

**UNITED STATES – DEFINITIVE SAFEGUARD MEASURES
ON IMPORTS OF WHEAT GLUTEN FROM THE
EUROPEAN COMMUNITIES**

Report of the Panel

The report of the Panel on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 31 July 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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

I. INTRODUCTION

1.1 On 17 March 1999, the European Community requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade ("GATT 1994"), Article 14 of the Agreement on Safeguards ("SA") and Article 19 of the Agreement on Agriculture with regard to the definitive safeguard measures imposed by the United States on imports of wheat gluten (WTO document WT/DS166/1).

1.2 On 1 April 1999, pursuant to paragraph 11 of Article 4 of the DSU, Australia notified its desire to be joined in the consultations under Article XXII:1 of GATT 1994 (WTO document WT/DS166/2).

1.3 The European Community and the United States held consultations on 3 May 1999 in Geneva, but failed to reach a mutually satisfactory solution.

1.4 On 3 June 1999, the European Community requested the establishment of a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU, Article 19 of the Agreement on Agriculture and Article 14 SA, with regard to the definitive safeguard measures imposed by the United States on imports of wheat gluten (WTO document WT/DS166/3).

1.5 At its meeting on 26 July 1999, the Dispute Settlement Body (the "DSB") established a Panel in accordance with the request made by the European Community in document WT/DS166/3.

1.6 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference were, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Community in document WT/DS166/3, the matter referred to the DSB by the European Community in document WT/DS166/3, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements". (WTO document WT/DS166/4)

1.7 On 11 October 1999, the parties to the dispute agreed on the following composition of the Panel:

Chairman: Mr. Wieslaw Karsz

Members: Ms. Usha Dwarka-Canabady
Mr. Alvaro Espinoza

1.8 Australia, Canada and New Zealand reserved their rights to participate in the panel proceedings as third parties.

1.9 The Panel met with the parties on 20-21 December 1999 and 1-2 February 2000. It met with the third parties on 21 December 1999.

1.10 Following the resignation on 11 April 2000 of Mr. Wieslaw Karsz as Chairman of the panel originally constituted to consider this matter, the parties agreed, on 20 April 2000, that Mr. Maamoun Abdel-Fattah would serve as Chairman of the Panel (WTO Document WT/DS166/6).

1.11 Accordingly, the composition of the Panel was as follows:

Chairman: Mr. Maamoun Abdel-Fattah

Members: Ms. Usha Dwarka-Canabady
Mr. Alvaro Espinoza

1.12 The Panel in its new composition held one additional meeting with the parties on 18 May 2000. At this meeting, each party was invited to make an oral statement summarizing its case on the basis of evidence already on the Panel record, including correspondence between the Panel and the parties.

1.13 The Panel issued its interim report to the parties on 19 June 2000. On 28 June 2000, the European Community and the United States each submitted written requests for review by the Panel of precise aspects of the interim report. On 5 July 2000, the parties submitted written comments on one another's requests for interim review. Section VII, *infra*, describes the interim review requests and comments received, and the changes made to the report in response to those comments.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition by the United States of a definitive safeguard measure, in the form of a quantitative restriction, on certain imports of wheat gluten (HS headings 1109.00.10 and 1109.00.90).

2.2 The United States imposed the measure following an investigation initiated by the United States International Trade Commission (the "USITC") on 1 October 1997 (USITC Investigation No. TA-201-67). The USITC initiated the investigation on the basis of a petition filed by the Wheat Gluten Industry Council of the United States, which consists of two of the four US producers of wheat gluten, Midwest Grain Products, Inc. ("Midwest") and Manildra Milling Corporation ("Manildra").

2.3 In a communication dated 17 October 1997, the United States notified the WTO Committee on Safeguards, pursuant to Article 12.1(a) SA, of the initiation of the safeguards investigation. The notification was circulated as a WTO document on 21 October 1997.¹

2.4 On 15 January 1998, the USITC determined that wheat gluten was being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic wheat gluten industry. The United States notified the WTO Committee on Safeguards pursuant to Article 12.1(b) SA of these findings in a communication dated 11 February 1998.²

2.5 The USITC forwarded its injury findings and remedy recommendations to the President of the United States on 18 March 1998. In a communication dated 24 March 1998, the United States notified to the WTO Committee on Safeguards, pursuant to Article 12.1(b) SA, a finding of serious injury caused by increased imports of wheat gluten.³ A copy of the USITC Report⁴, containing the USITC's analysis and a summary of the information collected during the investigation and excluding information identified as confidential information⁵, was provided with the United States notification.

¹ G/SG/N/6/USA/4, 21 October 1997.

² G/SG/N/8/USA/2, 12 February 1998.

³ G/SG/N/8/USA/2/Rev.1, 27 March 1998.

⁴ USITC Publication 3088, March 1998.

⁵ A note on page iv of the USITC Report states: "Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks."

2.6 On 3 April 1998, the United States Trade Representative (the "USTR") requested that the USITC provide additional information on the degree to which the domestic industry's adjustment plan would improve its competitiveness in the mid- and long-term. The additional information was requested to assist the inter-agency group that was considering what action to recommend that the United States President take. On 8 April 1998, the United States notified the WTO Committee on Safeguards, pursuant to Article 12.1(b) SA, of this request for additional information and informed the Committee that the United States President would make his determination not later than 31 May 1998.⁶

2.7 Under the "Proclamation 7103 of 30 May 1998 – To Facilitate Positive Adjustment to Competition From Imports of Wheat Gluten"⁷ and the "Memorandum of 30 May 1998 - Action Under Section 203 of the Trade Act of 1974 Concerning Wheat Gluten"⁸ by the United States President, the United States imposed definitive safeguard measures on imports of wheat gluten effective as of 1 June 1998. In a communication dated 4 June 1998, the United States notified the WTO Committee on Safeguards, pursuant to Article 12.1(c) and Article 9, footnote 2, SA, concerning the taking of a decision to apply a safeguard measure and the non-application of the safeguard measure to developing countries.⁹

2.8 The definitive safeguard measure consists of a quantitative restriction on certain imports of wheat gluten to the United States imposed for a period of three years plus 1 day, with annual increases in such quota limits of six per cent in the second year and the third year. The quantitative restriction is set at 57,521,000 kg for the first year, an amount which represents the total average imports in the crop years ending 30 June 1993 through 30 June 1995. Products from Canada¹⁰ and certain other countries were excluded from the application of the safeguard measure. Within the overall quantitative restriction, the quota is allocated based on average import shares in the period covered by the crop years ending 30 June 1993 through 30 June 1995. The shares of countries excluded from the quota are assigned on a *pro rata* basis to countries subject to the quota.

2.9 Wheat gluten is produced from wheat flour. About 80 per cent of wheat gluten consumed in the US serves as input to the milling and baking industry with year-to-year variations depending upon the quality and protein content of the wheat crop. Wheat gluten must be used in the production of high-fibre and multi-grain breads. Non-bakery uses, including the pet food industry, account for the remaining 15-20 per cent of consumption. The process of manufacturing wheat gluten always results in two products: one part of gluten and approximately five parts of starch. Effluents can be sent to a distillery – which may be part of the wheat gluten company itself – for utilization in the production of ethanol or food grade alcohol. It is also possible to use certain parts of the effluents as animal feed stock, and others as wheat feed.

⁶ G/SG/N/8/USA/2/Rev.1/Suppl.1, 9 April 1998.

⁷ Exhibit US-2. "Proclamation 7103 of May 30 1998 - To Facilitate Positive Adjustment to Competition from Imports of Wheat Gluten", Federal Register, Vol. 63, No. 106, Wednesday 3 June 1998, "Presidential Documents", pp. 30359-30361.

⁸ Exhibit US-3. "Memorandum of May 30 1998 - Action under Section 203 of the Trade Act of 1974 Concerning Wheat Gluten", Federal Register, Vol. 63, No. 106, Wednesday 3 June 1998, "Presidential Documents", pp. 30363-30364.

⁹ G/SG/N/10/USA/2 and G/SG/N/11/USA/2, 8 June 1998.

¹⁰ In the "Memorandum of 30 May 1998 - Action Under Section 203 of the Trade Act of 1974 Concerning Wheat Gluten", *supra* note 8, the United States President states: "I agree with the USITC's findings under section 311 (a) of the NAFTA Implementation Act, and therefore determine, pursuant to section 312(a) of the NAFTA Implementation Act, that imports of wheat gluten produced in Canada do not contribute importantly to the serious injury caused by imports and that imports of wheat gluten produced in Mexico do not account for a substantial share of total imports of such wheat gluten. Therefore pursuant to section 312(b) of the NAFTA Implementation Act, the quantitative limitation will not apply to imports of wheat gluten from Canada or Mexico."

2.10 There are four US producers of wheat gluten: Manildra¹¹, Midwest, Archer Daniels Midland ("ADM") and Heartland Wheat Growers ("Heartland"). The latter began production in June 1996. Heartland, Manildra and Midwest accounted for the substantial majority of domestic production of wheat gluten during the period of investigation. Each of the companies produces wheat gluten and wheat starch in a joint production process. Heartland, Manildra and Midwest all produce other by-products or derived products. Midwest, in particular, further processes wheat starch into alcohol.

III. PROCEDURES ADOPTED BY THE PANEL CONCERNING PRIVATE CONFIDENTIAL INFORMATION

3.1 In order to facilitate the Panel's obtention of information that had been deleted from the public version of the USITC Report of March 1998, the Panel adopted "Procedures Governing Private Confidential Information" as part of its working procedures on 1 February 2000. Pursuant to these procedures, only "approved persons" – i.e. a Panel member, a representative, or a Secretariat employee - whose selection or authorization has been notified to the Chairman of the Panel were permitted to view or hear information designated by a party as private confidential information in the course of the Panel proceedings. Such approved persons were under an obligation not to disclose that information, or allow it to be disclosed, to any other person other than another approved person, except in accordance with the Procedures. The Panel was under an obligation not to disclose private confidential information in its interim and final reports, but could make statements of conclusion drawn from such information. These Procedures are set forth in Attachment 4.

3.2 The Panel proposed a further procedure to the parties on 24 February 2000.¹² However, in light of communications received from the parties in respect of this proposed procedure, the Panel did not adopt this procedure.

IV. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. EUROPEAN COMMUNITY

4.1 In its submissions made before the Panel, the European Community requests the Panel to find that the United States, by imposing the definitive safeguard measures on wheat gluten, has breached Articles I and XIX of the GATT 1994 and Articles 2.1, 4, 5, 8 and 12 of the Agreement on Safeguards.¹³

B. UNITED STATES

4.2 The United States submits that its definitive safeguard measure on wheat gluten satisfies the United States' obligations under the Agreement on Safeguards and the GATT 1994.

V. ARGUMENTS OF THE PARTIES

5.1 The arguments of the parties are set out in their submissions to the Panel. The parties' submissions as well as their communications and comments in respect of the request by the Panel for certain information that had been identified as confidential information and deleted from the public

¹¹ Manildra is a wholly owned subsidiary of a United States company which is, in turn, wholly owned by an Australian company.

¹² See *infra*, para. 8.10, for a description of this proposed procedure.

¹³ See European Community first written submission, Attachment 1-1, para. 186; European Community second written submission, Attachment 1-4, para. 129. We note that in the request for the establishment of a Panel (WT/DS 166/3) the European Community also alleged a violation of Article 4.2 of the Agreement on Agriculture. The European Community did not submit any arguments in support of this claim. We address this claim *infra*, para. 8.221 .

version of the USITC Report are attached. The communications of the parties concerning newly proposed procedures governing private confidential information are attached as well (see Attachments 1 and 2).

VI. ARGUMENTS OF THE THIRD PARTIES

6.1 The arguments of the third parties, Australia, Canada and New Zealand, are set out in their submissions to the Panel (see Attachment 3).

VII. INTERIM REVIEW

7.1 On 28 June 2000, the European Community and the United States each submitted written requests for review by the Panel of precise aspects of the interim report issued on 19 June 2000. Neither party requested an additional meeting with the Panel. On 5 July 2000, the parties submitted written comments on one another's requests for interim review.

7.2 We have reviewed the comments presented by the European Community and the United States and have finalized our report, taking into account those comments by the parties which we considered justified, and also making certain technical and typographical refinements.

A. COMMENTS BY THE EUROPEAN COMMUNITY

7.3 In general, the European Community disagrees with the thrust of paragraphs 8.1 through 8.127 of the Panel's findings. According to the European Community, the Panel does not draw the necessary negative inferences from the refusal by the United States and its industry to disclose the information requested by the Panel¹⁴ in spite of the fact that procedures for protecting private confidential information had been adopted by the Panel after consulting the parties.¹⁵ The European Community asserts that the Panel report does not correctly appreciate that information was unjustifiably removed from the published version of the USITC Report, whilst it could have been provided in a manner which did not impinge upon business secrets of individual companies, and maintains its request that the Panel find that Article 4.2(c) SA is thereby violated. Moreover, the European Community does not find any basis in the covered agreements for the Panel's view that factors which are not explicitly mentioned in Article 4.2(a) SA only need to be investigated if they have been raised in a certain manner during the national proceedings. We have maintained these paragraphs in our findings, and have added certain clarifying language in paragraph 8.59 pursuant to the EC comment that the Panel does not draw the necessary conclusions in paragraphs 8.57-8.66 from the fact that the allocation *methodology* concerning profits and losses could - and therefore should - have been explained in detail in the USITC Report itself.

7.4 The European Community submits certain detailed comments and suggested textual modifications with respect to paragraphs 8.5, 8.6, 8.91, 8.131, 8.151, 8.175 and 8.176. In addition, according to the European Community, footnote 156 and paragraphs 8.160, 8.177 and 8.182 incorrectly reflected the imports excluded from the application of the measure. We have made certain modifications pursuant to these comments, including in footnote 156.

7.5 With respect to the Panel's exercise of judicial economy in paragraphs 8.184 and 8.220, the European Community requests that the Panel make at least factual findings with respect to the claims of the European Community under Article XIX ("unforeseen developments") and Article I of the GATT 1994 and Article 5 SA. Having determined that the measure at issue is inconsistent with Articles 2.1 and 4.2 SA, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the measure is also inconsistent with Article XIX of

¹⁴ See *infra*, section VIII.B.

¹⁵ See *supra*, section III.

the GATT 1994 ("unforeseen developments"), nor whether the form, level and allocation of the inconsistent measure are in breach of Article 5 SA or Article I of the GATT 1994. We have clarified our language to this effect in the cited paragraphs and have added footnote 201.

B. COMMENTS BY THE UNITED STATES

7.6 The United States suggests certain clarifications to the language in paragraph 8.69 concerning the evaluation of relevant factors in addition to those listed in Article 4.2(a) SA. The United States requests the insertion of certain clarifications of its argument in paragraph 8.134 concerning the USITC's findings relating to other possible causal factors. The United States also comments on the language used by the Panel in paragraph 8.209 concerning the requirement in Article 12.4 to notify the provisional measure before applying it. We have made certain modifications pursuant to these comments, including the insertion of additional language describing the United States argument in paragraph 8.134 and the insertion of footnotes 72 and 129-135.

7.7 The United States further asserts that the Panel should delete certain portions of paragraph 8.151. We have maintained these portions of this paragraph, and have made certain clarifications. With respect to the United States comment concerning the role of footnote 1 SA in the context of the imposition by free-trade area members of a safeguard measure, we have made certain additions to paragraph 8.181.

VIII. FINDINGS

A. STANDARD OF REVIEW

1. Arguments of the parties

8.1 The parties each made extensive submissions with respect to the standard of review that the Panel should apply. The parties agree that we should not engage in a *de novo* review of the USITC safeguard investigation and determination, and that Article 11 of the DSU articulates the appropriate general standard of review for WTO panels.

(a) European Community

8.2 The European Community, on the basis of Article 11 of the DSU and the panel reports in *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*¹⁶ ("*Korea-Dairy Safeguard*") and *Argentina-Safeguard Measures on Imports of Footwear*¹⁷ ("*Argentina-Footwear Safeguard*"), requests that the Panel make an objective assessment of whether: i) the domestic authority has considered all relevant facts as a whole, including specifically each factor listed in Article 4.2(a) SA; ii) the published report of the investigation contains adequate explanation of how the facts support the determination made; and iii) the determination made is consistent with the United States' obligations under the Agreement on Safeguards and the GATT 1994. According to the European Community, the role of the Panel is to determine whether the United States International Trade Commission ("USITC") fully and objectively considered the evidence before it, including any evidence that detracts from an affirmative determination of increased imports, serious injury or causation. The Panel should also verify the adequacy of the USITC's reasoning by reviewing whether the findings and conclusions made by the USITC are consistent with the evidence. The European Community asserts that the Panel cannot be content with a superficial glance at the issues, taking at face value the text of the USITC Report. Rather, the European

¹⁶ WT/DS98/R, paras. 7-26, 7.30-7.31, adopted as modified by the Appellate Body Report, WT/DS98/AB/R, 12 January 2000.

¹⁷ WT/DS121/R, para. 8.124, adopted as modified by the Appellate Body Report, WT/DS121/AB/R, 12 January 2000.

Community submits that the Panel must concentrate on the substance of the evidence that actually is in the Report or should have been in the Report since it was either considered during the investigation procedure, or should have been considered as pertinent evidence that was publicly available, or had been submitted to the USITC during the investigation procedure. The European Community submits to the Panel Exhibits EC-10, -12, -13 and -14, which are documents not submitted to the USITC during its investigation.

(b) United States

8.3 The United States submits that the Panel should apply the standard of review in Article 11 of the DSU, as articulated by the panel in *Argentina – Footwear Safeguard*.¹⁸ According to the United States, the European Community misrepresents the standard of review that the European Community purports to espouse by advancing arguments that it claims undermine the USITC conclusions. According to the United States, the European Community fails to demonstrate why the USITC's explanation of its decision was inadequate. Instead, the European Community attempts to persuade the Panel to engage in a *de novo* investigation of the underlying facts. The United States asserts that it is inappropriate for a panel to attempt to conduct its own assessment of the raw data reviewed by the competent authority during its investigation. In addition, with reference to Exhibits EC-10, 12, 13 and 14, the United States submits that the European Community should not be permitted to submit data to a WTO panel that it could have submitted to the competent authority during the investigation, but did not. In the United States view, this would invite strategic manipulation by parties of the process before the domestic investigating authority.

2. Evaluation by the Panel

8.4 Article 11 of the DSU articulates the appropriate standard of review for panels examining the consistency of a safeguard measure with the provisions of the Agreement on Safeguards.¹⁹ Pursuant to that Article, "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...".

8.5 Thus, we agree with the parties that a *de novo* review would be inappropriate. However, we also consider relevant the view of previous panels that for us to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU.²⁰ In determining whether the United States complied with its obligations under the Agreement on Safeguards and the GATT 1994, our review will consist of an objective assessment, pursuant to Article 11 of the DSU, of: whether the USITC considered all relevant facts, including an evaluation of "all relevant factors of an objective and quantifiable nature having a bearing on the situation of [the] industry" in Article 4.2(a) SA; whether the USITC demonstrated the existence of the causal link between increased imports and serious injury and did not attribute to imports injury caused by other factors; whether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record before the USITC support the determination made with respect to increased imports, serious injury and causation; and, consequently, of whether the determination made is consistent with the obligations of the United States under the Agreement on Safeguards and the GATT 1994. We note that previous WTO panels have adopted a similar approach.²¹

¹⁸ *Ibid*, para. 8.124.

¹⁹ We find support for our view in Appellate Body Report, *Argentina – Footwear*, *supra*, note 17, para. 120.

²⁰ Panel Report, *Korea – Dairy Safeguard*, *supra*, note 16, paras. 7.26, 7.30-7.31.

²¹ Panel Report, *Argentina – Footwear Safeguard*, *supra*, note 17, para. 8.124; Panel Report, *Korea – Dairy Safeguard*, *supra*, note 16, paras. 7.26, 7.30-7.31.

8.6 We do not see our review as a substitute for the investigation conducted by the USITC. Our role is limited to a review of the consistency of the United States measure with the Agreement on Safeguards and Articles I and XIX of the GATT 1994. Within the framework established by the Agreement on Safeguards, it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations of serious injury and causation. It is not our role to collect new data, nor to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not. We refer in this regard to Exhibits EC-10, -12, -13 and -14. However, we do not consider it necessary here to make a specific finding with respect to the admissibility of the United States government (Department of Agriculture) statistics pertaining to monthly pricing data which the European Community submitted as part of its Exhibits EC-10 and EC-12 in conjunction with its first written submission. These statistics were not part of the record before the USITC, but the European Community argued that, as they were United States government statistics, the USITC could and should have taken them into account. The submission by the United States of Exhibit US-10 provided quarterly pricing data that were in the USITC record but had previously been redacted from the public version of the USITC Report. As both parties subsequently referred to, and relied on, the quarterly pricing data in Exhibit US-10 in the course of these proceedings, we also referred to and relied on these data, which we deemed relevant and sufficient for reaching our determination. It was therefore not necessary for us to consider whether or not to refer to pricing data outside the USITC record in reaching our determination.²²

B. PANEL REQUEST FOR CERTAIN CONFIDENTIAL INFORMATION REDACTED FROM THE PUBLISHED USITC REPORT

8.7 The Panel considered that having access to certain information that had been redacted from the public version of the USITC Report would facilitate its objective assessment of the facts of the case. The Panel also considered that the adoption of certain procedures governing confidential information would facilitate its obtention of such information. Accordingly, on 24 January 2000 the Panel indicated to the parties that it proposed to adopt procedures governing the treatment of confidential information, and sent a draft of the proposed procedures to the parties for their comments. After giving the parties an opportunity to comment on the draft procedures and considering the communications received from the European Community and the United States in this regard, the Panel adopted the "Procedures Governing Private Confidential Information".²³ On 1 February 2000, the Panel transmitted to the parties the following communication, containing a request by the Panel to the United States for certain confidential information that had been redacted from the public version of the USITC Report:

"The Panel requests the United States to submit the following information furnished by the domestic industry (or derived from information furnished by the domestic industry) that was deleted from the public version of the ITC Report of March 1998:

-data on p. II-18, including table showing "individual industry costs on a per-pound basis";

-Table 10 on p. II-19;

-data on p. II-20, including table showing "individual industry costs as a percentage of the cost of goods sold" and information on cost allocation methodology (but not including Table 11);

²² The European Community submitted Exhibits EC-10 and EC-12 in conjunction with its first written submission (Attachment 1-1), and referred to the statistics in EC Exhibit-12 in its first oral statement (Attachment 1-2, paras. 15-16). However, in its second written submission, Attachment 1-4, paras. 34-35, the European Community referred to the USITC quarterly pricing data in Exhibit US-10.

²³ Attachment 4.

-Table 12 on p. II-21;

-Table 8 on p. II-16;

-Table C-1 (p. C-4); Table C-2 (p. C-6); and Table C-3 (p. C-8).

Having given the parties an opportunity to comment on its "Proposed Procedures Governing Business Confidential Information" and having considered the communications received from the European Communities and the United States in this regard, the Panel has adopted the attached "Procedures Governing Private Confidential Information". These Procedures supplement the working procedures already adopted by the Panel. In accordance with these Procedures, and in anticipation of the submission by the United States of the requested information, the Panel requests that the European Community notify the Chairman of the Panel and the United States of its representatives who are "approved persons".

The Panel is aware of the provisions of Article 3.2 of the Safeguards Agreement. The Panel believes that the procedures in effect in this case are adequate to protect the confidentiality of information submitted to it. The Panel notes the recent statement by the Appellate Body in *Canada – Measures Affecting the Export of Civilian Aircraft* (WT/DS70/AB/R, adopted 20 August 1999, para. 204) that "a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld."

8.8 The United States did not submit the requested information to the Panel. The response by the United States to this request for information, as well as the subsequent related communications of the parties are attached.²⁴

8.9 On 24 February 2000, the Panel proposed further procedures to the parties for viewing the requested information. The communications of the parties with respect to these proposed procedures are attached.²⁵

8.10 On 1 March 2000, the Panel communicated the following ruling to the parties with respect to the information requested by the Panel:

"In its communication to the Panel of 8 February 2000, the United States indicated that the various domestic producers would grant permission for release of all the information the Panel had requested if the Panel amended its Procedures Governing Private Confidential Information as follows:

"... the procedures should be amended to make clear that: 1) the Panel will review the CBI exclusively *in camera*; and 2) any Panel member, or WTO employee, who views or hears such information shall be under an obligation not to disclose the information, or allow it to be disclosed, to any person. For the reasons set out in the WGIC letter, the companies concerned are not prepared to grant permission for the CBI to be divulged to EC representatives."

²⁴ European Community -- Attachments 1-5,1-9 to 1-11; United States --Attachments 2-6, 2-9 to 2-11.

²⁵ European Community -- Attachments 1-12, 1-13; United States --Attachments 2-12, 2-13.

In its communication to the Panel of 11 February 2000, the European Community stated, *inter alia*:

"The course of action suggested by the United States ... would irreparably damage the fairness of this dispute settlement procedure, since the Panellists and the officials of the WTO Secretariat assisting the Panel would have access to *ex parte* communications, in flagrant breach of Article 18.1 of the DSU and of the Rules of Conduct on the appointment of Panellists."

Article 18.1 of the DSU states:

"There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body."

The Panel considered that, in light of Article 18.1 of the DSU and the position expressed by the European Community in this case, it should not view the requested information under the conditions outlined by the United States.

On 24 February 2000, the Panel proposed further procedures to the parties for viewing the requested information, as follows:

"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 Thursday 2 March 2000. 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*. These individuals would be under an obligation not to disclose the information, or to allow it to be disclosed, to any person. 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. 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."

In light of the communications received from the parties concerning these proposed procedures, the Panel has decided not to adopt the proposed procedures.

Accordingly, the Panel has decided to proceed with its examination on the basis of the record as it currently stands."

8.11 In our view, the protracted exchange of communications between the parties about the circumstances under which the Panel should view the requested information demonstrates the existence of a serious systemic issue as to the relationship between, on the one hand, the confidentiality obligations under Article 3.2 SA of a Member's investigating authorities with respect to confidential information obtained in the course of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a panel request for such confidential information under Article 13 DSU. The Panel's efforts to develop a consensual approach to the conditions under which the Panel might view the requested information were ultimately unsuccessful.

8.12 We remain of the view that having access to the requested information would have facilitated our objective assessment of the facts of this case, and of the matter before us. We recall the view expressed by a previous panel and the Appellate Body that the WTO dispute settlement system cannot function optimally if relevant information is withheld from a panel.²⁶ While the submission of the requested information would certainly have furnished a more extensive basis for our examination, we consider that the Panel record in this case -- including the USITC Report and the oral and written submissions of the parties and third parties -- provides sufficient basis for us to conduct the objective assessment of the matter required by Article 11 of the DSU.²⁷

C. EVALUATION OF CLAIMS

1. Claims under Articles 2.1 and 4 SA and Article XIX of the GATT 1994

(a) Redaction of Certain Confidential Information from the Published USITC Report

(i) *Arguments of the parties*

European Community

8.13 The European Community argues that the United States violated Articles 2.1 and 4 SA, as much of the data on which the USITC findings are based have been omitted from the public version of the USITC Report. According to the European Community, the USITC's findings based on secret data are unverifiable and unreviewable. The European Community argues that Article 4.2(c) SA presupposes that the detailed analysis and the demonstration of the relevance of factors are published, unless confidentiality is really an issue. The European Community does not contest that under certain specific circumstances, the protection of certain information regarding individual companies may be justified. However, in the EC view, confidentiality is not an issue in the context of whether or not data in summary form, such as aggregate data, is provided. According to the European Community, the USITC could have disclosed the relevant elements of confidential information while keeping it confidential, by providing aggregate data, or by describing the developments in performance of an individual company by using percentages or by showing trends in indexed form.

United States

8.14 According to the United States, the EC argument that a determination may be found inadequately explained under the Agreement on Safeguards due to failure to disclose confidential information flies in the face of the Agreement's plain terms: Article 3.2 SA prohibits domestic authorities from disclosing confidential information. Article 4.2(c) SA makes clear that the requirement to publish a "detailed analysis of the case under investigation" and "demonstration of the relevance of the factors examined" cannot entail the publication of information treated as confidential under Article 3.2 SA, as such publication shall be "in accordance with the provisions of

²⁶ In *Canada – Measures Affecting the Export of Civilian Aircraft*, the Appellate Body observed that the "continued viability of [the dispute settlement] system depends, in substantial measure, on the willingness of panels to take all steps open to them to induce the parties to the dispute to comply with their duty to provide information deemed necessary for dispute settlement" (WT/DS70/AB/R, adopted 20 August 1999, para. 204). See also Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, note 390, adopted with Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R, 12 January 2000.

²⁷ We note that the United States deemed that the published USITC Report "provides sufficient information for the Panel to conduct the analysis required by Article 11 of the DSU." See United States Response to Panel Question 3, Attachment 2-4, para. 7. For its part, the European Community asserted that "...it cannot be admissible for a party to contrive that a Panel is unable to carry out its tasks under Article 11 of the DSU simply by withholding self-proclaimed "confidential information"." See European Community Response to Panel Question 3, Attachment 1-3.

Article 3.” The United States submits that the use of percentages and indexes, as suggested by the European Community, would not be adequate to alleviate the disclosure problems in this case. According to the United States, when the universe of reporting companies is small, the USITC faces the same problem in reporting data in percentage and index form as it faces in reporting the actual aggregate data – i.e. the disclosure of confidential data.

(ii) *Evaluation by the Panel*

8.15 The issue before us relates to the nature of the obligations that Articles 2.1 and 4 SA, and specifically Article 4.2(c) SA, imposes upon Members concerning the contents of the published report of the safeguards investigation and their interaction with the obligations imposed upon Members by Article 3.2 SA in respect of the treatment of "confidential" information in a domestic safeguards investigation.

8.16 Several provisions of the Agreement are relevant to our consideration of this issue. Article 4.2(c) SA provides:

"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."

8.17 Article 3 SA is entitled "Investigation". Article 3.1 SA provides, in relevant part:

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

8.18 Article 3.2 SA deals specifically with the treatment of "confidential" information by the investigating authorities in the course of the investigation. It reads:

"Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct."

8.19 Thus, Article 4.2(c) SA, including by cross-reference Article 3 SA²⁸, requires written presentation of a detailed analysis of the case, including the findings and reasoned conclusions reached on all pertinent issues of fact and law and a demonstration of the relevance of the factors examined, while maintaining the confidentiality of certain information. Article 3.2 SA places an obligation upon domestic investigating authorities not to disclose -- including in their published report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and

²⁸ The European Community's request for establishment of the Panel, WT/DS166/3, which establishes the Panel's terms of reference under Article 7 DSU, does not contain a claim under Article 3 SA. Thus, we are not being asked to examine whether or not the United States fulfilled its obligations under Article 3 SA. Nevertheless, as the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, it is difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to Article 3. See, for example, Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, note 17, para. 74.

law and demonstrating the relevance of the factors examined -- information which is "by nature confidential or which is provided on a confidential basis" without permission of the party submitting it. Article 3.2 SA does not define the term "confidential" nor does it contain any examples of the type of information that might qualify as "by nature confidential" or "information that is submitted on a confidential basis".

8.20 Article 3.2 SA requires that information that is by nature confidential or which is submitted on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. In the absence of a detailed elaboration or definition of the types of information that must be treated as confidential, we consider that the investigating authorities enjoy a certain amount of discretion in determining whether or not information is to be treated as "confidential". While Article 3.2 does not specifically address the nature of any policies pertaining to the treatment of such "confidential" information which a Member's investigating authority may or must adopt, that provision does specify that such "information shall not be disclosed without permission of the party submitting it". The provision is specific and mandatory in this regard. This furnishes an assurance that the confidentiality of qualifying information will be preserved in the course of a domestic safeguards investigation, and encourages the fullest possible disclosure of relevant information by interested parties.

8.21 Given that the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, and given the specific and mandatory language of Article 3.2 dealing with the required treatment of information that is by nature confidential or is submitted on a confidential basis, the requirement in Article 4.2(c) to publish a "detailed analysis of the case under investigation" and "demonstration of the relevance of the factors examined" cannot entail the publication of "information which is by nature confidential or which is provided on a confidential basis" within the meaning of Article 3.2 SA.

8.22 The European Community asserts that aggregate data cannot be considered "confidential" in this sense and that, even if it is "confidential", it could be presented in percentages or indexed form so as to protect its confidentiality.²⁹ In response, the United States explains its confidentiality policy³⁰ and appends a copy of a memorandum relating to this policy.³¹ The USITC Report contains the following text: "Note – Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks".³²

8.23 While the United States has described the USITC's efforts to characterize as much confidential information as possible in its Report without compromising the confidential nature of that information, the USITC might ideally have been more creative in trying to provide the essence of the confidential information in its findings in the published USITC Report. We draw attention to

²⁹ We observe that the types of information redacted from the published version of the USITC Report are generally the types of information that might be treated as confidential, relating *inter alia* to profitability data, input costs, value of assets, capital expenditures and R&D expenses, importers inventories and producers' imports. We do not understand the European Community to argue that this *type* of information would never merit confidential treatment. Rather, we understand the EC to contest the redaction of such information in this case because of the EC's view that it was "aggregate data" which could have been provided in summary form.

³⁰ United States first written submission, Attachment 2-1, para. 156. The United States submits that its applicable domestic rules "assure that the publication of aggregate information does not disclose to competitors the confidential information of any firm. Under that policy, when confidential business data come from one or two firms, the published report does not disclose the data. Moreover, to assure that aggregations do not disclose a particular firm's information, aggregate summaries are not provided when the information comes from three or more firms, but one firm accounts for 75 per cent of the total or two firms account for 90 per cent."

³¹ Exhibit US-9.

³² USITC Report, p. iv.

the provision in Article 3.2 SA that parties providing confidential information in a domestic safeguard investigation "may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided..." The language of this provision is hortatory.³³ However, this is one vehicle envisaged by the Agreement on Safeguards that may provide a greater degree of transparency while respecting the confidentiality of qualifying information.

8.24 Nevertheless, given the small number of firms comprising the United States domestic industry (and the non-US producers and exporters) in this case; the fundamental importance of maintaining the confidentiality of sensitive business information in order to ensure the effectiveness of domestic safeguards investigations; the discretion implied in Article 3.2 SA for the investigating authorities to determine whether or not "cause" has been shown for information to be treated as "confidential"; and the specific and mandatory prohibition in that provision against disclosure by them of such information without permission of the party submitting it³⁴, we cannot find that the United States has violated its obligations under Articles 2.1 and 4 SA, nor specifically under Article 4.2(c), by not disclosing, in the published report of the USITC, information qualifying under the USITC policy as information "which is by nature confidential or which is provided on a confidential basis", including aggregate data.³⁵

8.25 While we acknowledge the possibility for a Member to misuse the confidentiality provisions in the Safeguards Agreement by withholding non-qualifying information, we presume good faith implementation by Members and we see no basis to conclude that, in this case, the USITC systematically extended confidential treatment to information that did not merit such treatment. We note that the United States supplied in its "corrigendum" (Exhibit US-10) certain information -- including quarterly pricing data in Table 18 of the USITC Report -- that had originally been identified by the USITC as requiring confidential treatment. The European Community considers that the submission by the United States of its "corrigendum" is an admission of violation of the obligation to publish certain information "promptly" under Article 4.2(c) SA.³⁶ We view this rather as a correction by the USITC of the application of its own confidentiality policy.³⁷

8.26 For these reasons, we find that the United States has not acted inconsistently with Articles 2.1 and 4 SA, nor specifically with Article 4.2(c) SA, in not disclosing certain confidential information in the published USITC Report.

(b) "increased quantities" of imports

(i) Arguments of the parties

European Community

³³ This contrasts with the mandatory nature of the language in Article 6.5 of the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-dumping Agreement) and Article 12.4 of the Agreement on Subsidies and Countervailing Measures.

³⁴ United States Response to Panel Question 3, Attachment 2-4.

³⁵ We are addressing here the EC claim under Articles 2.1 and 4, and specifically Article 4.2(c) SA, concerning the required contents of the published report. We are not ruling here on the impact of Article 3.2 SA on a Member's disclosure of confidential information to a WTO panel.

³⁶ See European Community Response to Panel Question 14, Attachment 1-3.

³⁷ We note in any event the United States permits interested governments access to confidential information under certain circumstances and subject to certain conditions (see United States Response to Panel Question 4, Attachment 2-4) and that although the European Community filed a notice of appearance early in the USITC investigation, the European Community did not avail itself of the opportunity to have access to the confidential information through an administrative protective order.

8.27 The European Community argues that, while Article 2.1 SA refers to imports "in such increased quantities, absolute or relative to domestic production...", the analysis in the USITC Report was limited to a comparison of absolute data, often selectively chosen, and focusing on end-to-end comparison of data.³⁸ We understand that this particular EC allegation pertains to the USITC finding of "increased imports" at p. I-10 of the USITC Report and is limited to Article XIX GATT 1994 and Article 2.1 SA.

United States

8.28 The United States submits that the USITC concluded that the criterion of "increased imports" was satisfied based on the absolute increase in imports from 128 million pounds in 1993 to 177 million pounds in 1997, as well as the relative increase compared to domestic production. The United States submits that the USITC also analyzed the trends in imports, noting that virtually all of the increase in imports occurred in the last two years of the period, during which imports increased from 128 million pounds in 1995 to 156 million pounds in 1996 to 177 million pounds in 1997. The United States further submits that during the investigation, EU producers conceded that imports had increased.

(ii) *Evaluation by the Panel*

8.29 Article XIX:1(a) GATT 1994 states, in pertinent part:

"If ... any product *is being imported* into the territory of that Member *in such increased quantities* and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products..." (emphasis added)

8.30 Article 2.1 SA states:

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. (emphasis added, footnote omitted)

8.31 It is clear to us that Article XIX:1(a) of the GATT 1994 and Article 2.1 SA contain the initial threshold requirement that there be an increase in imports. In the absence of an increase in imports, there would certainly be no need to perform any quantitative or qualitative analysis concerning the trends in imports and other factors relating to serious injury or causation under the Agreement on Safeguards. However, we note that Article XIX:1(a) of the GATT 1994 and Article 2.1 SA do not speak only of an "increase" in imports. Rather, they contain specific requirements with respect to the quantitative and qualitative nature of the "increase" in imports of the product concerned. Both Article XIX:1(a) of the GATT 1994 and Article 2.1 SA require that a product is being imported into the territory of the Member concerned *in such increased quantities* (absolute or relative to domestic production) as to cause or threaten serious injury. Thus, not just *any* increase in imports will suffice. Rather, we agree with the Appellate Body's finding in *Argentina-Footwear Safeguard* that the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury.³⁹

³⁸ See European Community first written submission, Attachment 1-1, para. 55.

³⁹ The Appellate Body in *Argentina-Footwear Safeguard* stated: "And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1 (a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough and significant enough,

8.32 Turning to examine the USITC determination of "increased imports", we note that the USITC determined that there was an absolute increase in imports, as well as an increase in imports relative to domestic production, during the period of investigation ("POI").⁴⁰ In support of that determination, the USITC Report referred to data⁴¹, which indicate that imports dropped from 128 million pounds in 1993 to 124 million pounds in 1994 and then rose to 128 million pounds in 1995, 156 million pounds in 1996 and 177 million pounds in 1997. The USITC observed that the volume of imports increased by 38 per cent over the POI⁴², and found that "virtually all" of the increase occurred in 1996 and 1997.⁴³ The USITC also referred to data pertaining to the ratio of imports to production that indicate a drop from 100.6 per cent in 1993 to 88.2 per cent in 1994 and then an increase to 89.7 per cent in 1995, 139 per cent in 1996 and 145.4 per cent in 1997.⁴⁴

8.33 While these data indicate a decrease in imports -- both absolute and relative to domestic production -- early in the POI, they subsequently indicate a sharp and substantial rise through to the end of the POI. We view this increase in imports reflected in the data before the USITC -- both absolute and relative to domestic production -- as recent, sudden, sharp and significant.

8.34 For these reasons, we find that the USITC Report provides an adequate, reasoned and reasonable explanation of how the facts support the determination made with respect to "increased imports" and that the USITC's determination that wheat gluten was being imported in "increased quantities" was not inconsistent with the threshold requirement of Article XIX:1(a) and Article 2.1 SA of imports in "increased quantities".

8.35 It remains for us to examine whether these imports were in such increased quantities *as to cause serious injury*. This finding must, therefore, be read in light of our findings below with respect to serious injury and causation.⁴⁵

(c) Serious Injury

(i) Arguments of the parties

European Community

8.36 The European Community argues that, under Article 4.2 SA, a Member must evaluate all factors having a bearing on the situation of the industry and must demonstrate that serious injury has taken place. With respect to the USITC's serious injury finding, the European Community alleges that: (i) the USITC failed to evaluate all relevant factors having a bearing on the situation of the industry under Article 4.2(a) SA; and (ii) the findings and conclusions of the USITC with regard to those factors which it did investigate were not supported by the evidence.

United States

8.37 The United States counters that the USITC's determination was based on the whole record, including an examination of all relevant factors in Article 4.2(a). The United States asserts that the European Community's factor-by-factor review of the evidence largely obscures the USITC's actual reasoning on injury and causation. According to the United States, the European Community takes

both quantitatively and qualitatively, to cause or threaten to cause 'serious injury.'" Appellate Body Report, *Argentina-Footwear Safeguard*, *supra*, note 17, para. 131.

⁴⁰ USITC Report, p. I-10. The period of investigation was 1993-1997.

⁴¹ USITC Report, pp. II-12.

⁴² USITC Report, p. II-9.

⁴³ USITC Report, p. I-10.

⁴⁴ USITC Report, p. II-15.

⁴⁵ See, in particular, *infra*, para. 8.98.

exception to the weight the USITC gave to each factor and the conclusions the USITC drew from the available evidence. However, the relative weight accorded each factor is within the discretion of the competent authorities, so long as they reach a reasoned conclusion. Moreover, the United States asserts, in its report the USITC noted that “virtually all”, but not *all*, factors pertaining to the serious injury analysis were negative.

(ii) *Evaluation by the Panel*

8.38 Article 4.2(a) SA reads:

"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."

8.39 Article 4.2(a) SA requires that the competent authorities evaluate “all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular,…” the factors listed in that provision. We note that the language in this provision is mandatory ("shall..."). Furthermore, this list is preceded by the term "in particular...". On the basis of the text of the provision, we therefore concur with the shared view of the parties⁴⁶ that all of the factors listed in Article 4.2(a) must be evaluated.⁴⁷ Of course, an examination of any one of those factors in a given case may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Likewise, factors not enumerated in Article 4.2(a) that are "relevant" must be examined, although examination may lead the investigating authority to conclude that a particular factor is not probative in a particular case.

8.40 In examining the USITC's serious injury determination we examine, first, whether the USITC evaluated "all relevant factors of an objective and quantifiable nature having a bearing on the situation of [the] industry", in particular, the factors listed in Article 4.2(a) SA, as well as other such factors. Second, we examine whether the USITC Report provides an adequate, reasoned and reasonable explanation of how the facts as a whole support the USITC's serious injury determination, and consequently whether the determination made is consistent with the United States' obligations under the Agreement on Safeguards.

Did the USITC evaluate all relevant factors?

8.41 The USITC Report indicates that the USITC considered all the factors expressly enumerated in Article 4.2(a) SA⁴⁸, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms and the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and

⁴⁶ European Community Response to Panel Questions 6 and 7, Attachment 1-3; United States Response to Panel Question 7, Attachment 2-4, para. 24.

⁴⁷ We find support for our view in the Appellate Body Report in *Argentina – Footwear Safeguard*, *supra*, note 17. There, the Appellate Body stated: "We agree with the Panel's interpretation that Article 4.2(a) of the *Agreement on Safeguards* requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) ...". Appellate Body Report, *Argentina-Footwear*, *supra*, note 17, para. 136; Panel Report, *Argentina-Footwear*, *supra*, note 17, para. 8.123.

⁴⁸ USITC Report, pp. I-10, I-12 to I-14, II-16; pp. II-9-II-21, II-25.

losses and employment. The parties also do not dispute that the USITC considered wages⁴⁹, inventories⁵⁰ and price.⁵¹

Factors listed in Article 4.2(a)

8.42 The European Community alleges that the USITC has violated Article 4.2(a) SA in its collection and treatment of the data with respect to two of the factors explicitly listed in Article 4.2(a): (i) productivity; and (ii) profits and losses. We turn to examine the EC arguments concerning these factors.

(i) productivity

8.43 With respect to productivity, the European Community argues that the USITC's treatment of this factor is inconsistent with Article 4.2(a), as it embraces only "worker productivity" rather than overall industry productivity. The United States responds that the European Community does not suggest why an analysis of worker productivity does not satisfy the requirement of Article 4.2(a) to consider "productivity" and that, in any event, the USITC did not fail to take into account capital investment, especially capital projects adding production capacity and their effect on capacity utilization rates.

8.44 We note that the Agreement on Safeguards provides no precise definition of the term "productivity" that appears in Article 4.2(a) SA.⁵² The context of this term includes the rest of the text of Article 4.2(a) – and in particular, the phrase "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that *industry*" (emphasis added). We consider that this term, read in its context, may refer to the overall productivity of the *industry*.

8.45 It is apparent to us from the USITC Report that the USITC gathered and analyzed data on capital investment in the industry⁵³ as well as data pertaining to worker productivity. In these Panel proceedings, the United States asserts that "it is simple mathematics that if production declines (as it did in 1996-1997 from 1995 levels), while the amount of capital in the industry increases (as it did from the capital projects adding capacity), the productivity of capital will correspondingly decline."⁵⁴ We would have preferred a more integrated examination in the USITC Report of "productivity" that explicitly encompassed *overall* industry productivity -- particularly in light of the acknowledgement by the USITC that "production of wheat gluten is extremely capital intensive and requires very few production workers"⁵⁵. Nevertheless, we consider that the data and statements pertaining to worker productivity, in conjunction with those on capital investments, in the overall context of the USITC Report, indicate that the USITC considered industry productivity as required by Article 4.2(a).

8.46 For these reasons, we find that the United States did not act inconsistently with Article 4.2(a) SA in the treatment of "productivity" in the USITC Report.

⁴⁹ USITC Report, p. I-14; pp. II-16, II-17.

⁵⁰ USITC Report, p. I-13; pp. II-14, II-16.

⁵¹ USITC Report, pp. I-13, I-14; pp. II-27 to II-37.

⁵² In its response to Panel Question 6, Attachment 2-4, para. 23, the United States observed that the EU producers had not raised before the USITC any argument regarding the productivity of capital investment. In response to Panel Question 7, Attachment 2-4, para. 24, the United States states "...there is no doubt that a competent authority should undertake an inquiry as to these specifically enumerated factors [in Article 4.2 SA] regardless of whether they are raised by the parties." We consider "productivity", and the capital component thereof, to constitute a factor that is specifically enumerated in Article 4.2(a) SA.

⁵³ See p. II-21 and Table 12 of the USITC Report. Data in Table 12 are redacted from the USITC Report as confidential information.

⁵⁴ United States first written submission, Attachment 2-1, para. 97.

⁵⁵ USITC Report, pp. I-13, II-17.

(ii) profits and losses

8.47 With respect to profits and losses, the European Community alleges that the USITC does not provide an adequate explanation for the determination made, in violation of Article 4.2 SA. The European Community's allegations concerning the financial data obtained by the USITC pertain to the coverage of the data and to the unreviewable nature of the data.

8.48 The United States argues that the European Community does not claim that the USITC's findings may not support an injury determination, but faults the USITC's collection of information on this issue without alleging any basis for finding that the USITC's investigation or determination are in violation of the Agreement.

8.49 We turn to an examination of the specific allegations of the European Community concerning the financial data collected and analyzed by the USITC, as reflected in the USITC Report.

data coverage

8.50 Concerning the data coverage of the financial information, the European Community submits that data relating to the whole period of investigation were available for only two of the firms in the industry. The European Community notes that the USITC received usable financial data only from three of the four domestic producers of wheat gluten, and not from ADM.⁵⁶ The European Community submits that there was no explanation why ADM could not provide separate data on its United States operations, nor does the report detail any USITC efforts to obtain such separate data. The European Community further observes that one of the four firms entered the market in 1996, and new entrants in a market are almost always unprofitable in the first year of their operations.

8.51 The United States asserts that the USITC received usable financial data from three of the four domestic producers of wheat gluten. The fact that it did not obtain information from one producer for a period before it became a producer is not an inadequacy of the USITC investigation. In the view of the United States, the Agreement does not assume that an investigation will obtain perfect data coverage.

8.52 According to the USITC Report, the USITC "received usable financial data on wheat gluten operations from three of the four domestic producers of wheat gluten, Midland [*sic*], Manildra and Heartland. These three firms accounted for the substantial majority of domestic production of wheat gluten."⁵⁷ The fourth firm, ADM, provided data on its combined US and Canadian wheat gluten and wheat starch operations.⁵⁸

8.53 Article 4.1(c) SA states that,

⁵⁶ The United States asserts that the EC allegation that the United States violated Article 4.2(a) because of the nature of the financial records of ADM (in response to Panel Question 18 seeking clarification of a statement in the EC first written submission) is outside our terms of reference as it was not included in the EC panel request. See United States second oral statement, Attachment 2-7, para. 20. The EC panel request, WT/DS166/3, alleges that: "...the United States are in breach of the United States obligations under Articles 2.1 and 4 of the Agreement on Safeguards, since the United States disregarded in the investigation fundamental requirements under these provisions". We consider that the EC panel request, which calls into question the USITC investigation and the obligations under Articles 2.1 and 4 SA, is adequately broad to encompass this issue, particularly in light of the fact that "profits and losses" is a factor explicitly listed in Article 4.2(a) SA.

⁵⁷ USITC Report, p. I-13.

⁵⁸ USITC Report, p. I-13, note 56, citing USITC Report, p. II-17, note 45.

"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."

8.54 Therefore, the Agreement expressly envisages that, in certain circumstances, the "domestic industry" may consist of those domestic producers "whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". This implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage. In this case, the fact that the USITC record included full period data for only two domestic producers was partially a result of the fact that Heartland became part of the domestic industry only in 1996. Furthermore, the profitability data provided by ADM did not pertain specifically to the domestic industry under investigation and was therefore excluded.

8.55 Moreover, the USITC found that "[p]rofitability reflected the trends in average unit value prices, which initially rose and then fell."⁵⁹ The USITC had before it data pertaining to unit value from all producers, including ADM. The concurrence in trends between these two factors supports the view that the profitability data used by the USITC was representative of the domestic industry's situation.

8.56 On the basis of the information contained, or referred to, in the sections of the USITC Report relating to profits and losses and the statement by the USITC that the three domestic producers that provided usable financial data on wheat gluten "accounted for the substantial majority of domestic production of wheat gluten"⁶⁰, we find that the United States did not act inconsistently with Article 4.2(a) in terms of the coverage of the "profits and losses" data.

allocation methodologies

8.57 The European Community submits that the USITC finding that profitability had gone down was based on allocation of profits by United States domestic producers between the co-products of wheat gluten and wheat starch, and derived products. According to the European Community, because the wheat gluten/wheat starch industry relies by necessity on a single raw material input (wheat or wheat flour) and utilizes a single production line that results in wheat gluten, wheat starch and effluents suitable for producing e.g. alcohol, any allocation of profitability among the output products is arbitrary. In addition, data provided by United States producers to argue that the profitability of their wheat gluten sales had gone down are unverifiable. For the European Community, the USITC Report does not contain an adequate explanation of how the facts support the determination made with respect to "profits and losses".

8.58 The United States asserts that an authority's determination cannot be found in violation of the Agreement because it does not disclose information that is by nature confidential. The United States submits that the USITC specifically addressed the allocation issue in its report, and took care to ensure the accuracy and probative worth of the information provided to it. According to the United States, the USITC provided specific instructions to domestic producers with respect to the submission of financial data. The firms that did not maintain separate internal profit-and-loss and cost of production data for wheat gluten operations were directed to allocate costs between wheat gluten and wheat starch, to explain their allocation methodology and to provide worksheets with their calculations. Furthermore, the United States submits, the USITC took additional steps to verify

⁵⁹ USITC Report, p. I-13.

⁶⁰ USITC Report, p. I-13.

the accuracy and reasonableness of the data, including an on-site verification by a USITC auditor at Midwest, the largest producer.

8.59 The USITC Report indicates to us that the USITC gathered and analyzed data and information pertaining to the profits and losses of the domestic industry. The lion's share of this information, including not only the profitability data but also the allocation methodologies for the profitability data, is not included in the Report, as the USITC identified the information as confidential and thus redacted it. We recall our finding above that the United States did not act inconsistently with its obligations under the Safeguards Agreement by redacting confidential information from the published USITC Report.⁶¹ However, we do not consider that the non-disclosure of confidential information under Article 3.2 SA excuses a Member from providing an adequate, reasoned and reasonable explanation of how the facts support the determination made. We therefore turn to consider whether the USITC Report provides such an explanation. Concerning the cost allocation methodologies used by the relevant United States domestic producers, the USITC found:

"[e]ach of the companies [Midwest, Manildra and Heartland] produces wheat gluten and wheat starch in a joint production process. Each of the companies also produces by-products or related products, especially alcohol. We carefully considered the arguments made by the respondents with respect to the allocations made by domestic producers in providing financial data on their wheat gluten operations. Based on a careful review of the allocation methodologies used by domestic wheat gluten producers in responding to the Commission's questionnaire, we find those allocations to be appropriate."⁶²

8.60 The above passage demonstrates to us that the USITC considered the arguments made by the EU respondents in the course of the investigation concerning the allocations made by domestic producers in providing financial data on their wheat gluten operations. It also demonstrates that the USITC reviewed the allocation methodologies used and decided that those allocations were "appropriate".

8.61 The Panel asked the United States to clarify the nature of the "careful review" the USITC had performed and to clarify and elaborate upon the "allocation methodologies" referred to.⁶³ The United States responded that the majority of the responding firms maintained separate internal profit-and-loss and cost of production data for wheat gluten on a regular basis and furnished this data to the USITC. The responding firm that did not maintain separate data made allocations, and provided the USITC with an explanation of the basis for those allocations. The USITC reviewed the accounting methodologies used by all the producers and did an on-site verification of Midwest, the largest producer.⁶⁴ According to the United States, while virtually all of the information in the auditor's report, which formed part of the USITC record, is confidential information, the United States was able to submit before us that:

"To derive the wheat gluten financial data from the overall corporate financial data, the USITC auditor at the verification conducted a reconciliation which entailed a detailed evaluation of the firm's operations and the accounting system. The USITC auditor reconciled Midwest Grain's questionnaire data on wheat gluten for each period with the product income and loss statements which were derived from the audited financial statements. This was possible as Midwest Grain prepares separate income and loss statements on a monthly basis for each of its divisions, one of which is the wheat gluten division. The USITC auditor reviewed the financial statements for each division and any

⁶¹ *Supra*, para. 8.26.

⁶² USITC Report, p. I-13.

⁶³ Panel Question 26, Attachments 1-3 and 2-4.

⁶⁴ US response to Panel Question 26, Attachment 2-4.

allocations that might have been used, and tested their reasonableness with alternative allocation methods.

In addition, the USITC auditor confirmed that the allocation methods used by Midwest to measure the financial performance of each division, to the extent allocations were necessary, had been in use for a number of years and were not changed for purposes of the USITC wheat gluten investigation....."⁶⁵

8.62 In response to an additional question put by the Panel⁶⁶, the United States explained that "[t]he USITC's staff report reflects its resolution of issues that arose in its careful review of producers' cost allocations, a review that included extensive input from respondents and included scrutiny not discussed in the Report". The United States also indicated that the allocation methodologies had been the subject of questioning by the USITC to the domestic producers, on which the EU producers had an opportunity to comment in the course of the investigation.⁶⁷

8.63 We recognize the fundamental importance of assuring that data gathered in the course of a safeguards investigation is accurate and that any allocation of costs and revenues reflects, to the greatest extent possible, the realities of the domestic industry concerned. However, we note that the Agreement on Safeguards does not set out precise rules on the collection and analysis of data, nor does it require the use of any particular allocation methodology with respect to financial data gathered by the investigating authorities in the course of the investigation.

8.64 We note that the USITC paid attention to the allocation methodologies used by all domestic producers and in the questionnaire requested firms that did not maintain separate records for wheat gluten to make allocations and explain the methodology used.⁶⁸ We also note that the USITC conducted certain procedures, including internal analysis by its staff as well as an on-site verification by a USITC auditor, in order to verify the accuracy and the adequacy of the financial information provided. We believe that, in support of the USITC statement concerning the "careful review" and the finding that the methodologies were "appropriate", the USITC Report could have included a description of such procedures and a more detailed explanation as to how and why the USITC considered the allocations to be "appropriate", in addition to a characterization of the redacted confidential information.

8.65 Nevertheless, in light of the indications pertaining to the data actually collected and analyzed by the USITC⁶⁹, the findings contained in the USITC Report based upon this data and the clarifications given by the United States in these Panel proceedings pertaining to certain elements appearing on the face of the USITC Report, we consider that there is no reason to doubt the veracity of the USITC findings pertaining to the allocation methodologies, nor to call into question the thoroughness of the scrutiny given by the USITC in reviewing the allocation methodologies and in ensuring that the financial data used in the USITC serious injury analysis pertained to the domestic industry subject to the investigation.

8.66 For these reasons, we find that the USITC Report provides an adequate, reasoned and reasonable explanation with respect to "profits and losses" and that the United States did not act inconsistently with Article 4.2(a) of the Agreement on Safeguards in this regard.

Factors not listed in Article 4.2(a)

⁶⁵ US response to Panel Question 26, Attachment 2-4, paras. 74-75.

⁶⁶ Panel Question 2, Attachment 2-15.

⁶⁷ United States Response to Panel Question 2, Attachment 2-15, para. 5.

⁶⁸ Exhibit US-1.

⁶⁹ USITC Report, pp. II-18 to II-20.

Arguments by the parties

European Community

8.67 The European Community submits that the United States violated its obligations under Article 4.2 SA by not investigating appropriately "all relevant factors" in reaching its determination of serious injury. For the European Community, such "relevant factors" include: (i) new entries/expansion during the investigation period; (ii) developments as to co-products; and (iii) "imports as "positive business strategy" of certain US producers".⁷⁰ According to the European Community, all of these factors were raised by the EU producers respondents before the USITC.

United States

8.68 According to the United States, the European Community complains that the USITC failed to address factors that are not enumerated in the Agreement on Safeguards. In the view of the United States, while Article 4.2(c) SA requires the competent authorities to publish an analysis of the case that demonstrates the *relevance* of the factors examined, there is no obligation to explain why it found some factors irrelevant and thus did not rely on them.

Evaluation by the Panel

8.69 We have already stated that Article 4.2(a) SA requires a demonstration that the competent authorities evaluated "all relevant factors" enumerated in Article 4.2(a) as well as other relevant factors.⁷¹ We read this requirement in Article 4.2(a) SA as mandating that the investigating authorities evaluate those "factors" enumerated in Article 4.2(a) SA as well as any other relevant "factors" -- in the sense of factors that are *clearly* raised before them as relevant by the interested parties in the domestic investigation. Article 3.1 SA provides that a safeguards investigation shall include "public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties..." This embraces an opportunity for interested parties to bring to the attention of the investigating authorities factors which these interested parties consider to be relevant as having a bearing on the situation of the domestic industry.⁷² In addition, the requirement in Article 4.2(b) SA that "the determination in subparagraph (a) [of Article 4.2] *shall not be made*" (emphasis added) unless a causal link is established between increased imports and serious injury constitutes an explicit textual linkage between Articles 4.2(a) and (b) that acknowledges the intertwined nature of the serious injury and causation analysis. An investigating authority must evaluate all relevant factors, but the Agreement leaves a certain amount of discretion as to the manner in which the investigating authority may evaluate a given factor. With this in mind, we turn to an examination of the factors the European Community alleges that the USITC failed to take into account in its serious injury analysis.

(i) New entrants/expansion

8.70 We first address the EC argument concerning the alleged failure of the USITC to evaluate new entrants and expansion of domestic industry.⁷³

8.71 In the course of the USITC investigation, the EU producers submitted, in the context of their argument that the United States statutory test for serious injury was not met, that decisions to invest

⁷⁰ We address EC allegations concerning the USITC's approach to "productivity" in Article 4.2(a) *supra.*, paras. 8.43-8.46.

⁷¹ *Supra.*, para. 8.39.

⁷² Also see our related discussion *infra.*, para. 8.121.

⁷³ European Community first written submission, Attachment 1-1, paras. 74-75.

and expand capacity were a reflection of industry health that argued against a finding of serious injury.⁷⁴ This particular statement is not reflected in the summary of the arguments in the USITC Report relating to "serious injury", nor is it explicitly referred to in the findings in the USITC Report. However, in the context of a consideration of the decrease in the level of capacity utilization over the POI, the USITC Report states:

"Some of this decrease in capacity utilization is explained by the fact that domestic capacity to produce wheat gluten increased during the period of investigation in anticipation of significant increases in domestic consumption. Most of this increase in capacity was in place by June 1995, that is, before the surge in imports that occurred in crop years 1996 and 1997. Had there been no increase in imports from 1993 levels, the industry likely could have operated at 61 percent of capacity in 1997. Also, one plant in the industry, opened by ADM in 1994, closed in July 1995 as a result of low-priced imports."⁷⁵ (footnotes omitted)

8.72 Moreover, the USITC addresses "increased capacity" as a possible other causal factor in its causation analysis.⁷⁶

8.73 We consider that the USITC findings on serious injury could have expressly indicated that the USITC had considered the relevance of the increase in capacity in its finding of serious injury in the precise manner that the issue was raised before it by the EU producers. However, in light of the statement by the USITC that we have cited pertaining to capacity utilization and the fact that attention is paid to this factor in the USITC causation analysis, **we find that the USITC did not fail to consider this factor in its serious injury and causation analysis under Article 4.2 SA.**

(ii) Developments as to co-products

8.74 With respect to the EC allegation that the USITC failed to investigate the effect of co-products on profitability data⁷⁷, we observe that, in the course of the USITC investigation, EU producers submitted that the USITC should give no or little weight to the reported profitability data for wheat gluten and wheat starch, that allocation methods based on revenue can affect apparent profitability trends and that the allocation of wheat gluten costs based on sales revenue distorted the profitability data.⁷⁸ This argument is reflected in the summary of the parties arguments in the USITC Report.⁷⁹ We have discussed above⁸⁰ the treatment given by the USITC to the "profits and losses" factor in its serious injury analysis, and the reasons for our finding that the USITC's consideration and explanation of this factor was adequate for the purposes of Article 4.2(a) SA. We note, moreover, that the USITC addresses the issue of co-product markets in its causation analysis.⁸¹ In light of the statement by the USITC that we have cited above⁸² pertaining to the profitability data before the USITC and the fact that attention is paid to developments in co-product markets in the USITC causation analysis, **we find that the USITC did not fail to investigate developments in co-product markets -- including how the fact that co-products are necessarily produced in the course of wheat gluten production influences wheat starch/wheat gluten profitability -- in its serious injury and causation analysis under Article 4.2 SA.**

⁷⁴ Exhibit EC-16, p. 5.

⁷⁵ USITC Report, p. I-12, including information originally redacted from the published USITC Report as confidential information that was subsequently submitted in Exhibit US-10.

⁷⁶ USITC Report, p. I-17.

⁷⁷ European Community first written submission, Attachment 1-1, para. 76.

⁷⁸ Exhibit EC-18, pp. 34-36.

⁷⁹ USITC Report, p. I-12.

⁸⁰ *Supra*, paras. 8.59-8.66.

⁸¹ USITC Report, pp. I-16-I-17.

⁸² USITC Report, p. I-13, cited *supra*, para. 8.59.

(iii) Importation by domestic producers

8.75 We next consider the EC argument that the USITC failed to address the issue of importation by domestic producers in its serious injury analysis.⁸³

8.76 The EU respondents raised this issue in the course of the USITC investigation. However, it appears to have been raised predominantly in the context of "causation"⁸⁴, and the USITC addressed it in this context.⁸⁵ The fact that the USITC examined this factor in the context of its causation analysis, rather than in its serious injury analysis, does not constitute a violation of Article 4.2 SA. The nature and role of a "relevant factor having a bearing on the situation of the industry" may be either as indicative of serious injury or as a possible causal factor contributing to, or detracting from, serious injury, or both.

8.77 Therefore, we find that the USITC did not fail to consider this factor in its serious injury and causation analysis under Article 4.2 SA.

Is the USITC overall serious injury determination consistent with Article 4.2(a)?

Arguments of the parties

European Community

8.78 The European Community argues that the evidence before the USITC did not support a finding of serious injury. The European Community underlines that in order for the imposition of a safeguard measure to be justified under the Agreement on Safeguards, the domestic industry must be *currently* seriously injured. The European Community asserts that there were upturns in the trends of several factors at the end of the period of investigation which show that the situation in the industry was far from one of serious injury at the end of the period.

United States

8.79 The United States submits that the USITC's determination was based on the whole record, including an examination of all relevant factors in Article 4.2(a). According to the United States, the relative weight accorded each factor is within the discretion of the competent authorities, so long as they reach a reasoned conclusion. The United States argues that a finding of serious injury does not require a decline in every factor evaluated.

Evaluation by the Panel

8.80 Article 4.1(a) SA defines "serious injury" to mean "significant overall impairment in the position of a domestic industry". We are of the view that a determination as to the existence of such "significant overall impairment" can be made only on the basis of an evaluation of the overall

⁸³ European Community first written submission, Attachment 1-1, para. 77.

⁸⁴ In its response to Panel Questions 6 and 7, Attachment 1-3, the European Community indicated that the issue of importation had been raised before the USITC, and referred to Exhibit EC- 16 (pre-hearing brief of the AAC before the USITC), pp. 2 and 24 – 27 and Exhibit EC-18 (post-hearing brief of the AAC before the USITC), pp. 2, 3-5, 32. In the pre-hearing brief, Exhibit EC-16, the subsection in which the EU respondents' argument concerning importation by domestic producers appears ("Domestic producers import [...] because it is more economical than generating co-products where market demand for wheat starch is weak", Section III.D, p. 24) is entitled "Changes in co-product markets have a substantially larger impact on the U.S. industry than do imports of wheat gluten" (Section III, pp. 13 ff).

⁸⁵ USITC Report, p. I-17.

position of the domestic industry, in light of all the relevant factors having a bearing on the situation of that industry.⁸⁶

8.81 We also consider that any determination of serious injury must pertain to the *recent* past. This flows from the wording of the text of Article XIX:1(a) of the GATT 1994 and Article 2.1 SA, which requires an examination as to whether a product "is being imported" "in such increased quantities ... and under such conditions as to cause or threaten serious injury...". The use of the present tense of the verb in the phrase "is being imported" in that provision indicates that it is necessary for the competent authorities to examine recent imports.⁸⁷ It seems to us logical that if the increase in imports that the investigating authorities must examine must be recent, so also must be any basis for a determination by the authorities as to the situation of the domestic industry. Given that a safeguard measure will necessarily be based upon a determination of serious injury concerning a previous period, we consider it essential that *current* serious injury be found to exist, up to and including the very end of the period of investigation.⁸⁸

8.82 On this basis, we examine whether the USITC Report provides an adequate, reasoned and reasonable explanation of how the facts as a whole support the USITC's serious injury determination, and consequently whether the determination made is consistent with the United States' obligations under the Agreement on Safeguards.

8.83 The USITC concluded:

"In summary, by the end of the period examined, virtually all of the factors relevant to industry performance were negative. Industry capacity utilization has declined significantly, production and shipments have declined, end-of-period inventories have more than doubled; the industry has gone from being profitable to operating at a loss, average unit values have declined and were at their lowest level in 1997 at the same time that unit costs were rising, hourly wages have been relatively flat, worker productivity has declined due to the decline in capacity utilization and unit labour costs have almost doubled. While there has been minor improvement in several factors during the most recent year, these improvements are isolated and do not change our conclusion that the domestic industry is presently seriously injured. Thus, we find that the domestic wheat gluten industry is seriously injured."⁸⁹

8.84 In reaching its serious injury determination, it is apparent to us that the USITC took into account trends over the whole 5-year period of investigation, in addition to the specific trends in 1996 and 1997. The USITC found that several indicators rose from 1996 to 1997, including capacity utilization (slightly), production and sales. USITC weighed the factors before it and, in light of the entire record, found that such "minor" improvements were "isolated" and did not change its conclusion that the industry was, and remained, seriously injured in 1997. Before us, the European Community focuses on the 1996-1997 period to argue that the upturns in several injury factors from 1996 to 1997 demonstrates that there was no *current* serious injury to the domestic industry in 1997.

8.85 The information on which the USITC based its serious injury determination indicates that there were identifiable improvements in several factors in 1997: capacity utilization, production and sales were improving, wages were rising and inventories were being depleted, all signs of a positive

⁸⁶ We find support for this view in Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, note 17, paras. 138-139.

⁸⁷ See Appellate Body Report, *Argentina-Footwear Safeguard*, *supra*, note 17, para. 130.

⁸⁸ Except, of course, in a case involving threat of serious injury, where the issue involves future injury.

⁸⁹ USITC Report, p. I-14.

trend in the industry. We do not consider that a negative trend in every single factor examined is necessary in order for an industry to be in a position of significant overall impairment. Rather, it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination.⁹⁰ Thus, such upturns in a number of factors would not necessarily preclude a determination of serious injury. It is for the investigating authorities to assess and weigh the evidence before them, and to give an adequate, reasoned and reasonable explanation of how the facts support the determination made.

8.86 We consider that the information before the USITC, in its totality, would not preclude a finding by a domestic authority of *current* serious injury, in terms of a continuing “significant overall impairment” of the domestic industry, in 1997. Although certain factors were not declining, the overall picture could nonetheless still demonstrate “significant overall impairment” of the industry. The USITC found that “...by the end of the period examined, virtually all of the factors relevant to industry performance were negative.”⁹¹ Capacity utilization remained low in 1997 (44.5%), and its improvement from 1996 to 1997 was slight (2.5 percentage points). While trends in production, sales and inventories fluctuated over the course of the investigation period, the absolute levels were worse in 1997 than in 1993. Data before the USITC indicated that average unit values were declining and reached their lowest level of the POI in 1997 while unit costs were rising, and the industry was still operating at a loss⁹² in 1996 and 1997.

8.87 We believe that the USITC Report could perhaps have contained a more thorough explanation of why the decrease in inventories and the upturns in sales, production and capacity utilization towards the end of the period of investigation did not detract from the USITC’s determination of serious injury. In particular, the USITC could have provided an explanation as to why it found the upturns in the trends of various factors (sales, production, inventories, capacity utilization) from 1996 to 1997 to be “minor improvements” that were “isolated”. Nevertheless, in the light of the indications in the USITC Report pertaining to the information that was before the USITC at the time of the serious injury determination and the findings contained in the USITC Report pertaining to the overall trends in the factors examined over the POI, we consider that, in their totality, the USITC findings on serious injury contain an adequate, reasoned and reasonable explanation of how the facts as a whole support the determination of serious injury made by the USITC, including its determination that the domestic industry remained seriously injured in 1997. It is evident to us from the findings in the USITC Report that the USITC has assessed whether the overall picture painted by the totality of the factors examined demonstrated “significant overall impairment” of the industry as required by Articles 4.1(a) and 4.2 SA.

8.88 For these reasons, we find that the USITC's overall determination of serious injury was not inconsistent with Article 4.2(a) SA.

8.89 In sum, we have found that the USITC did not fail to evaluate all relevant factors having a bearing on the state of the industry in determining serious injury and that its overall serious injury determination was not inconsistent with Article 4.2(a) SA. However, Article 4.2(b) SA requires that a determination under Article 4.2(a) “*shall not be made*” unless the investigation demonstrates a causal link between increased imports and serious injury. We examine this issue below.

⁹⁰ The Appellate Body has observed that “... a certain factor may not be declining, but the overall picture may nevertheless demonstrate “significant overall impairment” of the industry...”. Appellate Body Report, *Argentina-Footwear Safeguard*, *supra*, note 17, para. 139.

⁹¹ USITC Report, p. I-14.

⁹² The USITC Report, p. I-13, states: “...gross profit and operating income increased between 1993 and 1994, and then fell sharply in 1995; further declines in 1996 and 1997 resulted in overall industry losses on wheat gluten operations in both of those years”.

(d) Causation

8.90 A demonstration of the existence of a causal link between increased imports and serious injury is a fundamental requirement for the imposition of a safeguard measure. Article XIX:1(a) of the GATT 1994 and Article 2.1 SA require that a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Article 4.2(a) and (b) SA read:

“2.(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 subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, *the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof*. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.”
(emphasis added)

8.91 We consider that an appropriate approach for a panel to take in assessing whether a Member has fulfilled the requirements of Article 4.2(a) and (b) SA with respect to causation consists of a consideration of: (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition between the imported and domestic product as analyzed demonstrate the existence of the causal link between the imports and any injury; and (iii) whether other relevant factors have been analyzed and whether it is established that injury caused by factors other than imports has not been attributed to imports. We observe that this three-step approach to causation was also followed by the panel in *Argentina-Footwear Safeguard* and that the Appellate Body saw “no error” in that panel’s approach⁹³ We note that, before us, the European Community espoused the latter panel’s approach and the United States did not specifically object to it.

(i) *whether upward trend in imports coincides with negative trends in injury factors*

Arguments of the parties

European Community

8.92 According to the European Community, the USITC failed to satisfy the element of coincidence of trends between serious injury and increased imports. In the view of the European Community, that the injury factors cited to support the finding of serious injury began declining before the increase in imports raises serious questions about the existence of a causal link. The European Community submits that the USITC provides no analysis or reasoning to demonstrate how the negative trends in injury factors could have been caused by the increase in imports which only began later. In the EC view, most factors indicative of injury either moved negatively before the increase in imports in 1996 and 1997, moved positively when imports were rising, or both. In particular, three factors -- capacity utilisation, domestic shipments and inventories -- worsened

⁹³ See Panel Report, *Argentina - Footwear Safeguard*, *supra*, note 17, para. 8.229; Appellate Body Report, *Argentina – Footwear Safeguard*, *supra*, note 17, para. 145.

before the reference period and actually improved during the period of the alleged "serious injury".⁹⁴ The European Community also alleges that the USITC emphasized the absolute increase in imports while downplaying the trends of imports relative to total United States demand and trends in the market share of imports.

⁹⁴ See European Community first written submission, Attachment 1-1, paras. 79-80; European Community second written submission, Attachment 1-4, paras. 80-83.

United States

8.93 The United States stresses the 38 per cent increase in imports in 1996-1997 from 1995 levels. Moreover, the United States submits, even though consumption in the United States market was rising, imports gained in market share during that two-year period (from 50.1 per cent in 1995 to 58.9 per cent in 1996 to 60.2 per cent in 1997). According to the United States, coming as it did after a period in which import market share fell slightly, such a rise was sudden and significant. The United States submits that the European Community does not explain why the USITC was required to give precedence to the import trends that the USITC allegedly downplayed.

8.94 Moreover, the United States asserts, the European Community ignores the fact that virtually all the factors relating to wheat gluten industry health declined in 1996 and 1997 in the face of the surge in imports. According to the United States, although the domestic industry was profitable from 1993 to 1995, it suffered growing operating losses in 1996 and 1997, when imports, particularly from the European Community, surged and consistently undersold the United States product. The United States argues that, as the USITC found, the industry's gross profit, operating income, and market share all declined in both 1996 and 1997. Likewise, both the domestic industry's production and shipments fell sharply when imports surged, and were at their lowest levels in 1996-1997. The United States submits that while there were slight upturns in sales and production in 1996 and 1997, both indicators remained in 1997 far below their pre-import surge levels.

Evaluation by the Panel

8.95 We consider that a coincidence in the movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation, while the absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why causation is still present.⁹⁵ The issue before us is whether the USITC Report indicates a coincidence between the movements in imports and the movements in injury factors and whether it contains an adequate, reasoned and reasonable explanation of how the facts support the USITC determination of causation of serious injury by increased imports.

8.96 With respect to the relationship between the movement in imports and the indicators of serious injury, the USITC found:

"This surge in relatively low-priced imports in 1996 and 1997 coincided with the decline in industry performance described above. There is a direct correlation between the dramatic increase in wheat gluten imports and the significant decline in domestic wheat gluten industry performance in 1996 and 1997. In the face of rising domestic demand and consumption, domestic production, shipments, capacity utilization, unit prices, industry financial performance, and worker productivity all declined during the period of greatest import penetration."⁹⁶

8.97 Looking at the *overall* trends in imports and the *overall* trends in serious injury factors pertaining to the *overall* situation of the industry over the period of investigation, we consider that there is a *general* coincidence between the trends in injury factors and the trends in imports which would support a finding by the investigating authority of a causal connection between increased imports and serious injury.

⁹⁵ We found guidance for our view in the Panel Report, *Argentina-Footwear Safeguard*, *supra*, note 17, paras. 8.237- 8.238; The Appellate Body saw "no error" in the Panel's interpretation of the causation requirements, or in the Panel's interpretation of Article 4.2(b) SA in that dispute, Appellate Body Report, *Argentina-Footwear Safeguard*, *supra*, note 17, paras. 144-146.

⁹⁶ USITC Report, p. I-16.

8.98 The USITC found that there was an absolute rise in imports of 38 per cent in 1996/1997 over 1995 levels (from 128 million pounds in 1995 to 156 million pounds in 1996 to 177 million pounds in 1997), and that there was an increase in the market share of imports from 50.1 per cent in 1995 to 58.9 per cent in 1996 to 60.2 per cent in 1997. We note the EC argument that the 1.3 percentage point rise in the market share taken by imports from 1996 to 1997 would not allow a finding of "increased imports" under Articles 2.1 and 4.2 SA. We disagree. In light of the trends over the course of the POI found by the USITC, including the finding that the share of the domestic wheat gluten market held by domestic wheat gluten producers fell to its lowest level of the POI in 1997⁹⁷, as well as the finding concerning the rate of the absolute increase in imports between 1996 and 1997⁹⁸, we consider that the rate of rise in imports in both absolute and relative terms would not preclude an investigating authority from characterizing this trend, both qualitatively and quantitatively, as sufficiently recent, sudden, sharp and significant to cause serious injury.⁹⁹

8.99 We also note that the information before the USITC indicates that many of the injury factors declined over the period of investigation, as imports were increasing. For example, sales, production, inventories and capacity utilization showed an overall negative trend during the POI. Furthermore, the USITC found that profitability decreased in 1996 and 1997 and the industry was operating at a loss at the end of the POI.¹⁰⁰

8.100 We observe that the information in the USITC Report indicates that when one looks at the trends of imports *vis-à-vis* the trends in certain *individual* injury factors in *isolation*, several of these injury factors were declining prior to the surge in imports found by the USITC in 1996-1997. In addition, in the face of continuing increased imports in 1996 and 1997, the USITC Report indicates that several injury factors actually improved. In particular, information in the USITC Report indicates that profitability rose in 1993 and 1994, fell sharply in 1995 (before the import surge), and continued to decline in 1996 and 1997. Capacity utilization declined from 1993 to 1995 (before the import surge found by the USITC in 1996 and 1997). Sales rose from 1993 to 1994, declined in 1995 (before the import surge) and 1996, but then increased from 1996 to 1997 (during the import surge). Inventories increased between 1993 and 1995, but then decreased in 1996 and 1997 (during the import surge). The ratio of inventories to shipments followed a similar trend. Hourly wages rose from 1993 to 1994, declined from 1994 (before the import surge) to 1996, and increased again in 1997 (during the import surge).

8.101 We consider that in light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of *individual* injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury.

8.102 For these reasons, we find that the USITC Report indicates a general coincidence of trends and that it contains an adequate, reasoned and reasonable explanation of how the facts support its findings with respect to this aspect of the causation analysis.

(ii) *"under such conditions" - conditions of competition*

⁹⁷ USITC Report, pp. I-16, II-25.

⁹⁸ USITC Report, pp. I-10, II-12.

⁹⁹ We refer to the language used by the Appellate Body in its Report, *Argentina-Footwear Safeguard*, *supra*, note 17, para. 131: "And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury"". Also see our finding *supra*, para. 8.34, with respect to "increased quantities" of imports.

¹⁰⁰ USITC Report, p. I-13.

Arguments by the parties

European Community

8.103 According to the European Community, Article XIX:1 of the GATT 1994 and Article 2 SA require that a product be imported "under such conditions" as to cause serious injury. The European Community also asserts that, pursuant to Article 4.2(b) SA, the USITC should have demonstrated, "on the basis of objective evidence", the existence of this aspect of the causal link between imports and injury. Furthermore, under Article 4.2(c), the USITC was required to publish "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". The European Community alleges that the United States has acted inconsistently with these obligations.

8.104 According to the European Community, the USITC appears to believe that the "conditions" under which imports took place which allegedly caused serious injury consisted of the prices of those imports. For the European Community, there was no evidence of consistent underselling of the type necessary to find that imports take place "under such conditions" as to cause injury. The European Community is of the view that there is no evidence of a causal link between imports and price. With respect to the USITC statement that prices were driven down during 1996 and 1997 by relatively low-priced imports, the European Community asserts that increased imports were not the cause of the decline in domestic unit sales values, and that evidence in the USITC Report indicates that prices went down sharply in 1995, before imports increased. Furthermore, the European Community submits, the USITC acknowledges that the price of wheat gluten is directly related to the protein level in wheat.

United States

8.105 The United States submits that the Agreement on Safeguards does not lend itself to giving price analysis the dispositive position that the EC would give it. "Price" is not an enumerated "relevant" factor in Article 4.2(a). The United States asserts that the European Community does not explain why the phrase "under such conditions" in Article 2.1 should be regarded as referring to price at all, much less why it should give to price a relevance greater than the enumerated factors listed in Article 4.2(a). At any rate, the United States asserts, the USITC fully considered the evidence on price in this case and found that it supported an affirmative injury finding. The United States does not deny that factors other than imports, such as the protein content of the domestic wheat crop, can affect domestic demand for, and the domestic price of, wheat gluten. However, according to the United States, the only explanation for the substantial price decline in 1996 and 1997 in the face of rising demand and consumption was the surge in imports.

Evaluation by the Panel

8.106 The issue before us requires a consideration of the nature of the obligation imposed by the phrase "under such conditions" in Article XIX:1(a) of the GATT 1994 and Article 2.1 SA. In particular, we must consider whether the term "under such conditions" requires a price analysis, and whether such price analysis must demonstrate evidence of consistent underselling by the imported product in the domestic market of the importing Member in order to make a finding of serious injury. We must then consider whether the causation analysis performed by the USITC is adequate to comply with the requirement imposed by the phrase "under such conditions" in Articles XIX:1(a) of the GATT 1994 and Article 2.1 SA and with Article 4.2 SA.

8.107 We first examine the nature of the obligation imposed by the phrase "under such conditions" in Article XIX:1(a) of the GATT 1994 and Article 2.1 SA.

8.108 We are of the view that the phrase "under such conditions" does not impose a separate analytical requirement in addition to the analysis of increased imports, serious injury and causation.¹⁰¹ Rather, this phrase refers to the *substance* of the causation analysis that must be performed under Article 4.2(a) and (b) SA. In our view, it must be demonstrated that the conditions under which increased imports are occurring are injurious, that is, that they are *such as to cause* serious injury. Such causation can be ascertained through an examination of the conditions of competition between the imported and domestic product in the importing country's market, and the importing country must therefore perform an adequate assessment of the impact of the increased imports at issue on the domestic industry under investigation. These conditions of competition (i.e. the precise nature of the interaction and relationship between the imported and domestic products) in the importing country's market will determine whether the conditions under which increased imports are occurring are such as to cause or threaten to cause serious injury.

8.109 As for the nature and content of the examination concerning the conditions of competition between the imported and domestic product, we observe that Articles 2 and 4.2 SA make no mention of "price". "Price" is not expressly listed in Article 4.2(a) SA as a "relevant factor" having a bearing on the situation of the domestic industry. However, this is not to say that "price" may not be a relevant factor in a given case. An imported product can compete with a domestic product in various ways in the market of the importing country. Clearly, the relative price of the imported product is one of these ways, but it is certainly not the only way, and it may be irrelevant or only marginally relevant in a given case.

8.110 Therefore, in the context of safeguards measures, the relevance of "price" will vary from case to case, in light of the particular circumstances and the nature of the particular product and domestic industry involved. Given that this is the nature of the "price" factor under the Agreement on Safeguards, we consider that the phrase "under such conditions" does not necessarily, in every case, require a price analysis. Moreover, if a price analysis is performed, we consider that it need not necessarily demonstrate consistent underselling by the imported product in the domestic market of the importing Member in order to make a finding of serious injury.

8.111 In the present case, the European Community focuses upon the "price" aspect of conditions of competition in its arguments concerning the alleged inconsistency of the USITC Report with the requirements imposed by the phrase "under such conditions" in Article XIX:1 of the GATT 1994 and Article 2.1 SA, and by the causation requirements of Article 4.2(a) and (b) SA. The USITC also placed emphasis on "relatively low-priced imports" in its causation analysis.¹⁰² We turn to an examination of the EC allegation that the USITC consideration of price is inadequate for the purposes of establishing a causal link between imports and serious injury under Article 4.2(a) and (b) SA.

8.112 The USITC Report indicates that the USITC examined "price" and found that it supported a finding of serious injury caused by imports. The USITC stated:

"The ratio of imports to consumption then increased sharply to 58.9 per cent in 1996 and 60.2 per cent in 1997. The record reflects that most of this increase consisted of imports from the EU. The record also shows that imports from the EU consistently undersold

¹⁰¹ Two previous panels have come to a similar conclusion about the nature of the obligation imposed by the phrase "under such conditions". Panel Report, *Argentina-Footwear Safeguard*, *supra*, note 17, paras. 8.249-8.252. The Appellate Body saw "no error" in the panel's approach to causation in that dispute, see Appellate Body Report, *Argentina-Footwear Safeguard*, *supra*, note 17, paras. 140-145. Panel Report, *Korea-Dairy Safeguard*, *supra*, note 16, paras. 7.51-7.52. That specific issue was not appealed in that dispute.

¹⁰² USITC Report, pp. I-17, I-18.

domestic wheat gluten. This surge in relatively low-priced imports in 1996 and 1997 coincided with a decline in industry performance."¹⁰³

8.113 The USITC Report contains data that support the USITC statement that EC imports undersold the US product in 1996 and 1997.¹⁰⁴ Such data can be found in Table 18 of the USITC Report, entitled "Vital wheat gluten produced in the United States and the European Union: weighted-average net delivered selling prices and quantities reported by U.S. producers and importers, and margins of under/(over)selling, by quarters, July 1992-June 1997".¹⁰⁵

8.114 The USITC also found:

"We note that raw material costs increased over the period examined, particularly in 1996 and 1997. Consumption also increased significantly during this period. Because demand for wheat gluten is relatively insensitive to changes in price, we would expect that wheat gluten producers would be able to pass on these cost increases to their customers. U.S. producers testified that, historically, higher raw material costs had been passed through to their customers. *In 1996 and 1997, however, unit selling values declined* notwithstanding increased demand and higher raw material costs. We find that this unusual development is explained by the dramatic increase in *relatively low-priced imports* during this period, which had the effect of *driving down wheat gluten prices*."¹⁰⁶ (emphasis added, footnotes omitted)

8.115 The quarterly pricing data in Table 18 of the USITC Report indicate that, during 1994¹⁰⁷, there was a sharp rise in the price of wheat gluten. The USITC explicitly acknowledged that this rise in price was caused, at least in part, by the low protein content in the wheat crop.¹⁰⁸ During 1995, prices fell. Prices then increased slightly in 1996 in comparison with the level of the last quarter of 1995.

8.116 While the USITC states that "unit selling values declined" in 1996 and 1997, the data in Table 18 indicate that quarterly wheat gluten prices actually increased in the first three quarters of 1996 from the level of prices in the last quarter of 1995. We recall that the USITC found that the surge in imports occurred in 1996 and 1997. Data in the USITC Report reflect that, on a quarterly basis, prices fell in 1995 (before the surge and at least in part due to the protein content of the wheat crop) and rose in 1996 (during the surge in "relatively low-priced imports").

8.117 Particularly when the USITC itself emphasizes and relies on a decline in unit selling values (in the face of increased demand and higher raw material costs) and on "relatively low-priced imports ... which had the effect of driving down wheat gluten prices" as part of its causation analysis, we believe that the USITC might have provided a more robust explanation in its findings of

¹⁰³ USITC Report, p. I- 16.

¹⁰⁴ We note there was an initial difference of views between the parties concerning the period referred to by the USITC when "imports from the EU consistently undersold domestic wheat gluten" (European Community first written submission, Attachment 1-1, paras. 82-83). The United States clarified before us that this reference in the USITC Report to such "consistent underselling" referred to the 1996-1997 period (United States first written submission, Attachment 2-1, paras. 121-123. We consider that this view is supported by the context of the relevant phrase as it appears in the USITC Report.

¹⁰⁵ USITC Report, p. II-33.

¹⁰⁶ USITC Report, pp. I-17 and I-18.

¹⁰⁷ This reference is to USITC reporting years, i.e. 12-month period ending in June of the relevant year.

¹⁰⁸ USITC Report, p. II-9, pp. I-22-I-23: "The increase in demand for wheat gluten in 1994 ... resulted at least in part from a weather-related deficiency in protein content in the wheat crops of the major producing countries, including the United States, during 1993." This is also reflected at note 84 on p. II-32 of the USITC Report.

how pricing data interrelated with the movement of trends in imports. We note that in Part II of the USITC Report, in its description of pricing information obtained in the investigation, the USITC characterizes in considerable detail the quarterly pricing trends during the POI.¹⁰⁹ Such detailed characterization is, however, not reflected in the USITC findings in Part I of the USITC Report, which focus on average annual unit selling values and merely state that "unit selling values declined". However, as the annual average trends in price as found by the USITC support the statement of the USITC¹¹⁰, we find that the USITC Report contains an adequate, reasoned and reasonable explanation of how the facts support the determination made on this point, and that the USITC Report contains a demonstration of the relevance of this factor.

8.118 For these reasons, we find that the United States did not act inconsistently in this context with the obligations imposed by the phrase "under such conditions" in Article XIX:1(a) of the GATT 1994 and Article 2.1 SA nor with its obligations under Article 4.2 SA.

(iii) other factors and attribution

Did the USITC investigate other relevant factors in the context of causation?

Arguments of the parties

8.119 The European Community argues that the USITC failed properly to investigate factors other than the increased imports as possible causes of injury, as required by Article 4.2(b) SA. According to the European Community, these factors include: (i) the effect of wheat protein premiums on the wheat protein price in the US market ; (ii) co-product markets ; (iii) increased capacity ; (iv) input prices ; and (v) imports by US producers.¹¹¹ According to the European Community, under Article 4.2(a), the competent authorities must, on their own initiative, identify which factors may be relevant and then, on their own initiative, obtain all information which is necessary to evaluate how that factor developed. In any event, the European Community submits that the EU producer respondents raised all of these factors, including wheat protein premiums, before the USITC as relevant for the whole period of investigation.

8.120 The United States argues that the USITC examined factors other than imports that may be a cause of serious injury to the domestic industry and included such findings in its report. The United States argues that the competent authority should be able to rely on the points raised by the parties, and does not need to investigate other possible causal factors on its own initiative. The United States submits that the EU respondent producers did not raise wheat protein premiums as a possible causal factor for the whole period of the investigation.

¹⁰⁹ USITC Report, pp. II-32 *ff.*

¹¹⁰ USITC Report, pp. II-31 and II-32.

¹¹¹ The European Community also raised the issue of inclusion of imports from Canada in the investigation and the exclusion of these imports from the application of the measure. We discuss this *infra.*, paras. 8.160 *ff.*

Evaluation by the Panel

8.121 As we have indicated¹¹², we read the requirement in Article 4.2(a) SA as mandating that the investigating authorities evaluate at least all those "factors" enumerated in Article 4.2(a) SA as well as any other relevant "factors" -- in the sense of factors that are *clearly* raised before them as relevant by the parties in the domestic investigation. While the investigating authorities certainly enjoy the discretion to investigate other "relevant factors of an objective and quantifiable nature having a bearing on the nature of the industry" beyond those that have been raised by the parties in the course of the investigation, the investigating authorities are not, in our view, obligated *on their own initiative* to seek out and evaluate factors other than those explicitly enumerated in Article 4.2(a) beyond those that are clearly raised before them by the interested parties in the course of the investigation.

8.122 From the summary of the arguments in the USITC Report, as well as certain EC Exhibits¹¹³ submitted to us that formed part of the record before the USITC, it is apparent that the EU respondents in the USITC proceedings clearly raised factors (ii) through (v) referred to above by the European Community, i.e. developments as to co-products¹¹⁴, a "new domestic producer, and less than full levels of capacity utilization by domestic producers"¹¹⁵, rising input costs¹¹⁶ and "large-scale importing by US producers"¹¹⁷ before the USITC. It is further apparent to us from a review of the USITC findings that the USITC considered these four possible causes of injury raised by the EU respondents before it and identified by the European Community in these Panel proceedings. The USITC causation findings expressly address co-product markets¹¹⁸; capacity utilization¹¹⁹; input prices¹²⁰ and the importation of wheat gluten by United States producers¹²¹.

8.123 We turn to the remaining factor identified by the European Community in this context before us -- the issue of wheat protein premiums.¹²² With respect to this factor, the European Community alleges that the USITC failed to collect data and failed to assess correctly any causal link between imports and alleged serious injury, in violation of Article 4.2(a) and (b) SA.

8.124 We therefore consider whether the issue of wheat protein premiums was raised by the EU respondents before the USITC as a relevant factor having a bearing on the situation of the industry that was possibly causing injury to the domestic industry throughout the POI. Before us, there is disagreement between the parties concerning the extent to which the issue of "protein premiums" was raised by the EU producers in the course of the USITC investigation. Both parties agree that the protein content in the wheat crop was a relevant factor in 1993-1994, that this was raised by the EU respondents before the USITC and that the USITC explicitly considered its relevance in the USITC Report. However, with respect to the post-1994 period, the United States submits before us that there was:

¹¹² *Supra*, paras. 8.39, 8.69.

¹¹³ Exhibits EC 16-18.

¹¹⁴ USITC summary of EU respondents' argument, USITC Report, p. I-15; USITC findings, USITC Report, p. I-16.

¹¹⁵ USITC summary of EU respondents' argument, USITC Report, p. I-16; USITC findings, p. I-17.

¹¹⁶ Exhibit EC-16, "Pre-hearing brief of 11 December 1997 lodged by AAC with ITC", p. 29; USITC findings, p. I-15.

¹¹⁷ USITC summary of EU respondents' argument, USITC Report, p. I-15; USITC findings, USITC Report, p. I-16.

¹¹⁸ USITC Report, pp. I-16 and I-17.

¹¹⁹ USITC Report, p. I-17.

¹²⁰ USITC Report, pp. I-17 and I-18.

¹²¹ USITC Report, p. I-17.

¹²² The "protein premium" is the price differential between low- and high-protein wheat.

" no evidence before the USITC of a drop in the protein content of the wheat crop in 1996 and 1997, or of any other change relating to the protein content of the wheat crop that would explain the increase in wheat gluten consumption in those two years. Nor did any of the parties in the USITC investigation make the argument the EC has advanced in this proceeding. While EU producers during the USITC proceeding cited the 1993/94 supply shortage, fluctuating prices of wheat, and the price premium of wheat over *corn* as factors affecting the domestic wheat gluten market, they did not allege a "wheat protein premium factor" or protein shortfall in the 1996 and 1997 wheat crops. If the protein factor of wheat during 1996 and 1997 was a serious factor affecting price and demand for wheat gluten, it is surprising that it was only discovered by the EC long after the conclusion of the USITC investigation."¹²³

8.125 Before us, in support of its assertion that the issue of the wheat protein premium was raised before the USITC as a relevant causal factor throughout the entire POI, the European Community indicates several places in the USITC record where EU producers mentioned this issue in the oral and written proceedings before the USITC¹²⁴, and points to a statement made by the petitioners in the course of the USITC investigation.¹²⁵ We have examined this evidence cited by the European Community before us. While this evidence demonstrates to us that the issue of the effect of protein premiums on price during 1993-1994 was certainly raised by the EU producer respondents as relevant before the USITC, we find that the European Community has not demonstrated to us as a matter of fact that the EU producer respondents clearly raised the broader issue of wheat protein premiums as a possible relevant causal factor pertaining to the post-1994 segment of the period of investigation which the European Community raises in these Panel proceedings.

8.126 We note that the USITC expressly acknowledged that the protein content of the wheat crop has an effect on the demand of wheat gluten¹²⁶, and we consider that the USITC might have included an explicit and distinct examination of the protein content of wheat as a "relevant factor having a bearing on the situation of the domestic industry" and reflected the results of that examination, including the relevance of that factor, in its Report. However, in light of our finding that the EU producer respondents did not clearly and persistently pursue this issue before the USITC as another possible cause of injury in the post-1994 period, we find that the fact that the USITC did not collect data on this factor and did not include an explicit and distinct examination of this factor in its Report over and above its considerations of price and demand (which would reflect developments in the protein content of the wheat crop), does not constitute a violation of Article 4.2(a) and (b) SA.

8.127 For these reasons, we do not find that the failure by the USITC to investigate the relevance of the protein premium issue in the post-1994 segment of the POI constitutes a violation of Article 4.2(a) and (b) SA.

8.128 It remains for us to examine the consistency with Article 4.2(b) SA of the USITC's examination of the factors that *were* clearly raised before it by the interested parties in the course of the investigation and *were* addressed by it.

¹²³ United States second oral statement, Attachment 2-7, para. 25.

¹²⁴ See European Community second written submission, Attachment 1-4, para. 54, referring to Exhibit EC-18, pp. 24 and 31; European Community Response to Additional Panel Question 1, Attachment 1-15.

¹²⁵ See European Community second written submission, Attachment 1-4, para. 55, referring to Exhibit EC-17, pp. 149-150.

¹²⁶ See, for example, USITC Report, p. II-5.

Did the USITC's examination ensure the non-attribution to imports of injury caused by other factors?

Arguments of the parties

European Community

8.129 The European Community alleges that the USITC failed to fulfill the obligation in Article 4.2(b) SA not to attribute to imports injury caused by other factors. According to the European Community, the United States should have provided an objective criterion to demonstrate that the injury attributable to imports, after having deducted the injury caused by other factors, reached the threshold of "serious". On the basis of the objective elements which they examined or should have examined, the USITC should never have reached the conclusion that such injury was "serious".

8.130 The European Community argues that the United States relies on a "preponderance" test when determining the causal link. In the EC view, the United States legislation mandating the United States authorities to examine whether or not increased imports are only a "substantial cause" and whether or not certain factors are "a more important cause of serious injury than increased imports" has no basis in WTO law. In case of concurring causes of injury, the United States law prevents the investigating authorities from verifying the only important issue, i.e. whether increased imports are *per se* the cause of "significant overall impairment of the position of the domestic industry". The European Community argues that Article 4.2(b) requires that a Member demonstrate that "increased imports" caused "serious injury *per se*, i.e. taken alone".¹²⁷ In the EC view, the investigating authorities cannot attribute the cause of serious injury to increased imports if the increased imports are a co-cause of such serious injury but do not reach *per se*, in isolation, the threshold of "serious injury". According to the European Community, the United States investigating authorities are limited by the United States law to investigating a different issue, i.e. whether there is a single cause "more important" than increased imports. This is incompatible with Article 4.2 SA.

8.131 The European Community alleges, in particular with respect to increased capacity, that the USITC violated Article 4.2(b) in that it should not have attributed to increased imports "any (easily quantifiable) injury caused by this factor".¹²⁸ The European Community urges that the United States should have excluded the injury caused by overcapacity from its determinations of serious injury and causation. In order to do this, it should have determined whether, if capacity had remained the same since 1993, there still would have been "a significant overall impairment of the domestic industry".

United States

8.132 The United States argues that the USITC specifically examined possible alternative causes of serious injury raised by interested parties in the course of the investigation, including: changes in co-product markets; domestic producers' importation of wheat gluten; competition among domestic producers; increased capacity and rising input costs. The USITC included findings on these possible alternative causes of serious injury in its report. According to the United States, in each case, the USITC found that the asserted cause did not have the effect on the industry suggested (*e.g.*, co-production, corn starch competition with wheat starch, importation by domestic producers, rising prices for inputs) or had only a demonstrably minor role in the serious injury suffered by the industry (increased capacity).¹²⁹ The United States submits that the European Community seeks to have the Panel re-find the facts as to each of these factors and assess the USITC's weighing of the factors.

¹²⁷ European Community Response to Panel Questions 8 and 9, Attachment 1-3.

¹²⁸ European Community second written submission, Attachment 1-4, para. 69.

¹²⁹ United States first written submission, Attachment 2-1, para. 125.

8.133 In the United States view, the causation standard relevant to WTO review of an injury determination is set forth in Article 4.2(b). The USITC determination clearly articulates its reasons for finding “the causal link” between the increased imports and serious injury. The United States argues that nothing in the Agreement on Safeguards requires the competent authority to articulate the causation standard at all; Article 4.2(b) requires merely that it be applied.

8.134 According to the United States, the USITC specifically addressed each of the other factors that importers and foreign producers suggested were causing injury, and found that no other factor that might be adversely affecting the wheat gluten industry was more important than the rapid increase in imports.¹³⁰ The United States submits that with respect to co-products, the USITC found that: there was no decline in wheat starch prices that either paralleled the sharp decline since 1994 of domestic wheat gluten prices or explained the sharp decline in the financial performance of domestic wheat gluten producers; and the relative stability of, and gradual increase in, domestic wheat starch prices suggested that competition between corn starch and wheat starch was not likely to have much, if any, effect on wheat gluten production.¹³¹ The United States further argues that the USITC found that imports by domestic producers were not responsible for the surge in imports that occurred in 1996 and 1997.¹³² According to the United States, the USITC also found that unit selling values declined in 1996 and 1997 despite increased demand and higher raw material costs and that this unusual development was explained by the dramatic increase in relatively low-priced imports during this period, which had the effect of driving down wheat gluten prices.¹³³ To the extent that one other factor -- namely, additions to U.S. capacity -- contributed to the decline in capacity utilization in that period, the USITC demonstrated why it was a less important factor than imports. Indeed, the United States asserts, the USITC specifically identified the relative contributions to injury of capacity utilization and imports.¹³⁴ The United States argues that the USITC specifically found that if the domestic industry filled the growth in demand in 1996 and 1997, instead of the increased imports doing so, the industry would have operated at 61 per cent of capacity instead of 44.5 per cent as it actually did. Under these conditions, domestic production in 1997 would have been well above, rather than below 1996 levels. Capacity utilization in 1997 would have exceeded 1995 levels. In short, according to the United States, “the fall in virtually all indicators of industry performance in 1996 and 1997 compared with prior periods, which the USITC found to constitute serious injury, would not have occurred.”¹³⁵ For the United States, the history and context of Article 4.2(b) demonstrate why the EC’s proposal that the USITC must somehow quantify and deduct from total injury the specific effects caused by other factors is not required.

8.135 The United States submits that the aspect of US law requiring a finding that imports must be a “substantial cause” of injury requires the USITC to make a finding related to causation that, while not required by Article 4.2, helps to ensure that its objectives are realized. The requirement to examine the relative weight of other factors ensures that the USITC both examines the causal link between increased imports and serious injury, as required by Article 4.2(b), and avoids attributing to imports the effects of other causes of injury that are more important. According to the United States, while they result in findings that provide more detail than required under Article 4.2(b), the relevant United States procedures are entirely consistent with its letter and spirit.

Evaluation by the Panel

8.136 We view the issue before us as whether, in conducting its investigation into whether increased imports were “a cause that is important and not less than any other cause” of any serious

¹³⁰ *Id.*, para. 127.

¹³¹ *Id.*, paras. 31-32, citing USITC Report, pp. I-16-17.

¹³² *Id.*, para. 33, citing USITC Report, p. I-17.

¹³³ *Id.*, para. 35, citing USITC Report, p. I-17.

¹³⁴ *Id.*, para. 127.

¹³⁵ *Id.*, para. 132.

injury to its domestic wheat gluten industry, the USITC satisfied the requirements in Article 4.2(b) SA to demonstrate the causal link between the increased imports and the serious injury, and not to attribute to imports injury caused by other factors.¹³⁶ We first consider the nature of the obligations imposed by Article 4.2(b) with respect to the causation analysis that the investigating authorities must conduct.

8.137 Article 4.2(b) SA deals specifically with the causal link between imports and serious injury. It requires that the safeguard investigation demonstrate, "on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof." It also stipulates that "[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." Thus, as part of the causation analysis, there must be a sufficient consideration of "other factors" operating in the market at the same time, so that any injury caused by such other factors can be properly identified and attributed.

8.138 As we have previously observed, Article 4.2(b) SA contains an explicit textual link to Article 4.2(a) SA. It stipulates that "[t]he determination made in subparagraph (a) *shall not be made unless* the investigation demonstrates the existence of the causal link between increased imports and serious injury. Article 4.2(a) and (b) require a Member: (i) to demonstrate the existence of the causal link between increased imports and *serious* injury; and (ii) not to attribute injury being caused by other factors to the domestic industry at the same time to increased imports. We consider that, read together, these two propositions require that a Member demonstrate that the increased imports, under the conditions extant in the marketplace, *in and of themselves*, cause *serious* injury. This is not to say that the imports must be the sole causal factor present in a situation of serious injury. There may be multiple factors present in a situation of serious injury to a domestic industry. However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of "serious" as defined in the Agreement.

8.139 In our view, where a number of factors, one of which is increased imports, are sufficient *collectively* to cause a "significant overall impairment of the position of the domestic industry", but increased imports alone are not causing injury that achieves the threshold of "serious" within the meaning of Article 4.1(a) of the Agreement¹³⁷, the conditions for imposing a safeguard measure are not satisfied. In such a situation, imports may be causing "injury", and there may even be a demonstration of the causal link between increased imports and "injury". However, where this injury does not achieve the threshold of "*serious* injury", as that term is defined in Article 4.1(a) SA, the conditions and circumstances permitting the imposition of a safeguard measure are not present.

¹³⁶ The United States asserts that the "EC makes some statements regarding U.S. law, but the EC did not challenge U.S. law thus such claims are not within the Panel's terms of reference" (United States first written submission, Attachment 2-1, footnote 119). In support, the United States cites the Appellate Body Report in *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 73 (the "measure" and the claims concerning that measure constitute the "matter referred to the DSB" which forms the basis for the panel's terms of reference). The United States argues: "The only matter with respect to Articles 2 and 4 of the Safeguard Agreement that has been referred to this Panel is whether the USITC's findings and conclusion comport with the cited articles." We understand that the measure before us is the definitive safeguard measure imposed by the United States, effective 1 June 1998, pursuant to the United States President's "Proclamation 7103 of May 30, 1998 - To Facilitate Positive Adjustment to Competition from Imports of Wheat Gluten", *supra*, note 7 and "Memorandum of May 30 1998 - Action Under Section 203 of the Trade Act of 1974 Concerning Wheat Gluten", *supra*, note 8. The measure before us is not Section 202 of the United States Trade Act. We must examine whether the United States met the requirements in the Agreement on Safeguards for the application of this measure. Accordingly, we must examine the findings and conclusions of the USITC as to the conditions for the imposition of the measure, and the analysis upon which those findings and conclusions are based.

¹³⁷ Article 4.1(a) SA states: "'serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry."

8.140 This should not be construed to mean that we view the Agreement on Safeguards as imposing upon the importing Member any particular method for assessing whether any factors other than imports are causing injury to its domestic market at the same time as imports, or how to go about ensuring that injury attributable to other factors is not attributed to imports. The United States remains free to choose a method for making this assessment and ensuring non-attribution.¹³⁸ However, while the United States is free to determine an appropriate method of assessing causation, the method it selects must ensure that the injury caused by increased imports, considered alone, is "serious" injury, that is "a significant overall impairment in the situation of the domestic industry". In order to achieve this, the investigating authorities must ensure that injury attributable to other factors is not attributed to imports. While the investigating authorities may not be required in their report explicitly to *articulate* a particular "causation standard" beyond that provided for in Article 4.2(b) SA, the approach that the investigating authorities actually *apply* must nevertheless yield a result that is consistent with the obligations contained in Article 4 SA, including the obligation not to attribute to imports any injury caused by other factors.

8.141 We note that the panel in *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* examined the issue of the treatment to be given to factors other than subsidized imports in the context of Article 6:4 of the Tokyo Round Subsidies Code. That panel considered¹³⁹:

"... that the primary focus of the requirement in Article 6:4 of a demonstration of a causal relationship between imports under investigation and material injury to a domestic industry was on the analysis of the factors set forth in Articles 6:2 and 6:3, i.e. the volume and price effects of the imports, and their consequent impact on the domestic industry. In this connection, the Panel recalled its conclusions regarding the findings made by the USITC with respect to these factors. Under Article 6:4 the USITC was required not to attribute injuries caused by other factors to the imports from Norway. In the view of the Panel this did not mean that, in addition to examining the effects of the imports under Articles 6:1, 6:2 and 6:3, 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. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 6:2 and 6:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports..."

8.142 We consider that significant differences exist between the text of the particular legal provisions that formed the basis for the analysis of the *United States - Salmon* panel and the legal context in which the issues before that panel arose (i.e. subsidization/dumping, as opposed to safeguards). Nevertheless, to the extent it is relevant to our examination in this dispute, we believe that the above passage from the *United States – Salmon* panel report provides guidance. We agree with the view of that panel to the extent that it would require the USITC to conduct a safeguards examination sufficient to ensure that, in its analysis of the injury factors contained or referred to in Article 4.2(a) SA, it did not find that serious injury was caused by increased imports of wheat gluten when injury to the domestic industry allegedly caused by increased imports was in fact caused by factors other than these increased imports. A Member is not necessarily required to quantify, on an individual basis, the precise extent of "injury" caused by each other possible factor. However, a

¹³⁸ A similar view was expressed by the panel in *Korea – Dairy Safeguard*, *supra*, note 16, para. 7.96.

¹³⁹ SCM/153, adopted by the SCM Committee on 28 April 1994, BISD 41S/576, para. 321. The panel in *United States – Antidumping Duties on Imports of Fresh and Chilled Salmon from Norway*, ADP/87, adopted by the ADP Committee on 27 April 1994, BISD 41S/229, para. 555 similarly examined the issue of the treatment to be given to factors other than dumped imports in the context of Article 3:4 of the Tokyo Round Anti-Dumping Code.

Member must conduct an examination that ensures that any injury caused by such other factors is not attributed to increased imports.¹⁴⁰

8.143 Thus, Article 4.2(a) and (b) SA require that increased imports *per se* are causing serious injury. Furthermore, the investigating authorities must conduct an examination that ensures that any injury caused by other factors is not attributed to increased imports. Where injury caused by one -- or multiple -- other factor(s) is attributed to those other factors, any remaining injury caused by increased imports may not reach the threshold of "serious injury", within the meaning of Article 4.1(a) SA.

8.144 On this basis, we examine whether the causation analysis applied by the USITC in this safeguard investigation complied with the "non-attribution" requirement of Article 4.2(b) SA.

8.145 In its investigation, the USITC examined whether increased imports were a "substantial cause" of serious injury, i.e. "a cause which is important and not less than any other cause." The USITC found as follows:

"We reviewed carefully the alternative causes of injury suggested by the parties and other possible causes, and have concluded that increased imports are both an important cause of serious injury and a cause that is greater than any other cause."¹⁴¹

8.146 The USITC Report indicates that the USITC weighed individually each of the other causal factors in question against imports in order to find whether any one of these factors, on its own, was "a more important cause of injury" or a "greater cause of serious injury" than increased imports. The USITC determined that none of these factors, on its own, was "a more important cause of serious injury" than increased imports.

8.147 With respect to co-products markets, the USITC found:

"We carefully reviewed EU respondents' arguments about the co-product markets. While there is evidence that wheat gluten production decisions are affected by market conditions in the wheat starch market, *we conclude that changes in the co-product markets were not a more important cause of serious injury than increased imports.*"¹⁴² (emphasis added, footnotes omitted)

8.148 With respect to rising input costs¹⁴³, the USITC stated:

¹⁴⁰ We recognize the practical difficulties that may arise in applying this principle. While we make a finding as to the general kind of examination that a Member is required to conduct, we make no pronouncement as to the precise steps that a Member must take in this regard.

¹⁴¹ USITC Report, p. I-16.

¹⁴² USITC Report, p. I-16.

¹⁴³ In light of our finding below, we do not believe it is necessary to examine that EC assertion that the USITC failed to fulfill the requirements of Article 4.2(b) SA by basing itself on oral assertions by "persons interested in the outcome of an investigation" (i.e. the presidents of two of the US producers, Midwest and Manildra) for the proposition that "[b]ecause demand for wheat gluten is relatively insensitive to changes in price, we would expect that wheat gluten producers would be able to pass on these cost increases to their customers. U.S. producers testified that, historically, higher raw material costs had been passed through to their consumers." According to the EC, the USITC could not rely on these oral assertions without verifying the correctness of such "interested" allegations through other sources. See first written submission of the EC, paras. 97-100; Oral Statement of the EC at the first meeting with the Panel, paras. 84-86; second written submission of the EC paras. 29-30, 45.

“Nor do we consider rising prices of wheat and wheat flour, which are the major inputs into wheat gluten/wheat starch production, to be a more important cause of injury than increased imports.”¹⁴⁴

8.149 With respect to the importation of wheat gluten by United States domestic producers, the USITC found:

*"We do not regard the ongoing importation of wheat gluten by domestic producers as being a more important cause of the serious injury, as argued by respondents."*¹⁴⁵ (emphasis added, footnotes omitted).

8.150 With respect to capacity utilization and increased capacity, the USITC found:

"We considered other possible causes of injury, including competition among domestic producers, increased capacity and rising raw materials (wheat and wheat flour) costs. The domestic wheat gluten market is very competitive. Producers have ample excess capacity to meet higher demand. Also, wheat gluten is a commodity product that sells primarily on the basis of price, and wheat gluten from different sources is highly interchangeable. One new domestic producer, Heartland, entered the market in 1996. In addition, the domestic industry added substantial new capacity early in the period of investigation. This increased capacity was added in anticipation of continued strong growth of domestic demand and consumption. Industry projections of continued growth in demand and consumption were largely correct, as apparent consumption increased nearly 18 percent between 1993 and 1997. As indicated above, but for the increase in imports, the industry would have operated at 61 percent capacity in 1997, which is much closer to the level at which the industry operated early in the investigative period when it operated reasonably profitably. We therefore conclude that *neither domestic competition nor increased domestic capacity was a more important cause of serious injury than increased imports.*"¹⁴⁶ (emphasis added)

8.151 As we have already observed, Article 4.2(b) SA prohibits the attribution to increased imports of injury caused by other factors. We take this to imply that a given factor is either a cause of injury, or it is not. If a given factor *is* a cause of injury (even a minor cause), then, under Article 4.2(b) SA, such injury "shall not be attributed to increased imports". We note the United States assertions that increased capacity had a role (characterized by the United States in these proceedings as a "demonstrably minor role")¹⁴⁷ in the serious injury suffered by the industry; that "to the extent that one other factor, namely additions to US capacity -- contributed to the decline in capacity utilization [in 1996 and 1997], the USITC demonstrated why it was a less important factor than imports"¹⁴⁸; and that the USITC specifically identified the relative contributions to injury of capacity utilization and imports.¹⁴⁹ To us, these assertions constitute an admission by the United States that at least one factor other than increased imports also contributed to the serious injury experienced by the domestic industry. However, we see no indication in the USITC Report that imports were not also held responsible for the injury caused by this factor. As a result of the USITC causation analysis that weighed each other factor individually against imports to determine whether such factor was "a more important cause of injury" and then excluded such other factor as a "cause of injury" when it did not, on its own, satisfy this standard, the USITC held that imports were effectively the sole remaining cause of injury, which the USITC presumed remained "serious".

¹⁴⁴ USITC Report, P. I-17.

¹⁴⁵ USITC Report, p. I-17.

¹⁴⁶ USITC Report, p. I-17.

¹⁴⁷ United States first written submission, Attachment 2-1, para. 125.

¹⁴⁸ United States first written submission, Attachment 2-1, para. 127.

¹⁴⁹ *Ibid.*

However, we see this approach as the converse of ensuring that it was the increased imports alone which were causing *serious* injury. A demonstration that a given causal factor did not make an equal or greater contribution to serious injury than imports does not demonstrate that such factor made no contribution *at all* to serious injury.

8.152 The USITC examination as to whether each other factor individually constituted "a greater cause of injury than imports" is not such as to ensure that "serious injury", within the meaning of Article 4.1(a) SA, would necessarily still exist after injury attributable to such other causes was not attributed to imports. In our view, under the USITC causation analysis applied in this case, it is not clear that the increased imports of the product concerned cause "*serious* injury" to the domestic industry. We consider that the USITC's causation analysis does not ensure that imports, in and of themselves, are sufficient to cause *serious* injury to the domestic industry once injury caused by other factors is not attributed to imports.

8.153 For these reasons, we find that the examination of the USITC into whether increased imports were "a cause that is important and not less than any other cause" of serious injury and the resulting conclusion of the USITC in the investigation that led to the imposition of the safeguard measure at issue that increased imports are "an important cause of serious injury and a cause that is greater than any other cause" are not consistent with Article 4.2(b) SA as they do not ensure the non-attribution to imports of injury caused by other factors.¹⁵⁰

(iv) *summary with respect to causation*

8.154 In sum, we have found that the USITC Report indicates a general coincidence of the upward trend in imports with the negative trends in the injury factors and that it contains an adequate, reasoned and reasonable explanation of how the facts support the USITC findings with respect to the first aspect of the causation analysis.¹⁵¹ With regard to the second aspect of the causation analysis relating to the conditions of competition between the imported product and the domestic product, we have found that the United States did not act inconsistently with the obligations imposed by the phrase "under such conditions" in Article XIX:1(a) of the GATT 1994 and Article 2.1 SA nor with its obligations under Article 4.2 SA. However, we have found that the USITC examination into whether increased imports were "a cause that is important and not less than any other cause" of serious injury and the resulting conclusion of the USITC that increased imports are "an important cause of serious injury and a cause that is greater than any other cause" are not consistent with Article 4.2(b) SA as they do not ensure the non-attribution to imports of injury caused by other factors.

(e) Exclusion of certain imports from the application of the measure on the basis of origin

(i) *Arguments of the parties*

European Community

8.155 In challenging the safeguard investigation and the measure imposed by the United States in this case, the European Community raises the issue of the inclusion of imports of wheat gluten from all sources in the investigation, but the exclusion of certain imports from the application of the

¹⁵⁰ We do not by our finding intend to express any view as to whether or not, had the United States conducted an examination that ensured that any injury caused by such other factors is not attributed to increased imports, it could have properly found that there was serious injury caused by increased imports. As the United States has itself argued, our task is to review the determination of an investigating authority, rather than to engage in a *de novo* review or to conduct our own assessment on the basis of the raw data that was before the investigating authority. See *supra*, para. 8.3.

¹⁵¹ See *supra*, para. 8.91 for the three parts of the Panel's approach to causation.

measure on the basis of origin (in particular, those of Canada, a NAFTA partner) in several contexts under Articles XIX:1 of the GATT 1994 and Articles 2.1 and 4 SA¹⁵² -- in particular, "increased imports", "serious injury" and "causation". The European Community also argued that the procedure followed by the USITC "does not correctly apply the fundamental MFN provision under Article 2.2 of the SA".¹⁵³

8.156 The European Community asserts that the United States found serious injury or threat thereof caused by imports from all sources, including imports from NAFTA countries including Canada, but then imposed its safeguard measure on wheat gluten only on non-NAFTA countries, thus excluding Canada. In the view of the European Community, this constitutes a breach of the principle of "parallelism" that was recognized in the *Argentina - Footwear Safeguard* case.¹⁵⁴ According to the European Community, nothing in Article 4.2 SA allows a Member to conduct a separate examination of serious injury based on the origin of the imported products concerned. The European Community asserts that Article 2.1 SA, and in particular its footnote 1, does not support the arguments made by the United States (and Canada) in this case. In the view of the European Community, the "generic reservation" contained in footnote 1 to Article 2.1 concerning the interpretation of the relationship between Articles XXIV and XIX of the GATT 1994 has no bearing on the interpretation of Article 4.2 SA.

United States

8.157 The United States contends that, in its investigation, the USITC found that the serious injury sustained by the domestic wheat gluten industry was attributable to a surge in imports from the EU in 1996 and 1997, accompanied by sustained underselling from EU producers.¹⁵⁵ In a second step, the USITC examined Canadian imports alone and determined that they were not a significant cause of serious injury. This separate causation analysis of NAFTA imports was conducted pursuant to US law, as required by Article 802 of the NAFTA. According to the United States, the USITC's finding make clear that, unlike in *Argentina - Footwear Safeguard*, the injury determination was not based on effects ascribable to Canadian imports.

8.158 The United States does not understand the Appellate Body to have established a broad requirement of "parallelism". Nevertheless, the United States asserts that the procedures contemplated by Article 802 of the NAFTA, and employed by the United States in this case, satisfies the purpose of the "parallelism" notion articulated in *Argentina-Footwear Safeguard*.

8.159 The United States argues that nothing in the Agreement on Safeguards proscribes an independent causation analysis for imports originating in the territory of another free trade area participant, or suggests that only a single causation analysis is appropriate. According to the United States, specific provisions on the application of safeguard measures by members of a customs union or free trade area are in footnote 1 of the Agreement on Safeguards. The United States asserts that the applicable provisions of the GATT 1994, namely Articles XIX and XXIV:8, determine Members' rights and obligations regarding the application of a safeguard measure in the context of an FTA. In particular, the footnote makes clear that the non-discrimination requirement of Article 2.2 SA is not pertinent in assessing the safeguards treatment accorded by a customs union or FTA member to goods originating in other participant countries. According to the United States, Article XXIV does not address the sequencing, or number, of causation analyses that may be undertaken as part of an Article XIX safeguards investigation.

¹⁵² See *infra*, paras. 8.184 and 8.220 with respect to the EC claims in this context under Article 5 SA and Article I of the GATT 1994.

¹⁵³ EC second written submission, Attachment 1-4, para. 123.

¹⁵⁴ EC second written submission, Attachment 1-4, para. 118 – 128. The European Community refers to Panel Report and Appellate Body Report, *Argentina - Footwear Safeguard*, *supra*, note 17.

¹⁵⁵ United States Response to Panel Question 29, 17 January 2000.

(ii) *Evaluation by the Panel*

8.160 We see the issue before us as whether, in this case, the United States, after including imports from all sources in its investigation of "increased imports" of wheat gluten into its territory and the consequent effects of such imports on its domestic wheat gluten industry, was justified in excluding imports from Canada from the application of the safeguard measure following a separate and subsequent inquiry concerning whether imports from Canada accounted for a "substantial share" of total imports and whether they "contributed importantly" to the serious injury caused by imports.¹⁵⁶

8.161 In the course of the present Panel proceedings, the United States confirmed that the USITC first conducted a "global" investigation concerning injury and causation that included imports of wheat gluten *from all sources*, regardless of their origin. Following an affirmative determination that wheat gluten was being imported *from all sources* into the United States in such quantities as to cause serious injury to the United States domestic wheat gluten industry¹⁵⁷, the USITC conducted a separate and subsequent examination of whether imports from Canada accounted for a substantial share of total imports, and whether imports from Canada contributed importantly to the serious injury caused by imports.¹⁵⁸

8.162 The USITC Report contains the following account of the USITC finding made with respect to imports from Canada (and Mexico) in the separate causation analysis conducted with respect to these imports:

¹⁵⁶ In its first written submission, the European Community challenged the exclusion from the application of the measure by the United States of imports from Canada "and certain other countries" (EC first written submission, Attachment 1-1, para. 103); the subsequent EC arguments focused on imports from Canada in this context (see e.g. EC first oral statement, Attachment 1-2, paras. 87 *ff.*; EC second written submission, Attachment 1-4, paras. 118 *ff.*). We note that imports from Mexico were also excluded from application of the measure pursuant to NAFTA and the US implementing legislation. According to the USITC Report, "there were no reported imports from Mexico during the period examined" (USITC Report, p. I-19). Imports from Israel and CBERA and ATPA countries were also excluded from the application of the measure. According to the USITC Report, there were also "no reported importations of wheat gluten from any of these countries during the period of investigation" (with the exception of one importation from Ecuador which may have been the result of a data entry error) (USITC Report, p. I-29). Thus, in addition to imports from those countries excluded from the application of the measure pursuant to Article 9.1 SA, imports from Canada, Mexico, Israel, CBERA and ATPA countries were also excluded from the measure. Of these latter countries, only Canada in fact had imports into the United States during the period examined by the USITC. Therefore, imports from Canada were in fact the only imports that were actually included in the USITC investigation but subsequently excluded from the application of the measure (again, apart from imports from those countries excluded from the application of the measure pursuant to Article 9.1 SA). For this reason, we focus our examination here on imports from Canada.

¹⁵⁷ In response to a question from the Panel, the United States confirmed that an affirmative determination under Section 202(b)(1)(A) of the United States Trade Act of 1974 is a determination "that a product is being imported into the United States in such quantities as to cause or threaten to cause serious injury to a US industry producing a like or directly competitive product". See United States Response to Panel Question 15, Attachment 2-8. The USITC Report states, at p. I-10: "Because section 202 is a global safeguard law, the Commission considers imports from all sources in determining whether imports have increased."

¹⁵⁸ The United States excluded imports from Canada from the application of the safeguard measure on the basis of Section 311(a) of the NAFTA Implementation Act, which, according to the USITC Report, p. I-18, provides that if the Commission makes an "affirmative injury determination" in an investigation under section 202 of the United States Trade Act, the Commission must also find whether: (i) imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and (ii) imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

"We make a negative finding with respect to both Mexico and Canada. There were no reported imports of wheat gluten from Mexico during the period examined. Thus, Mexico does not account for a substantial share of total imports. Having found that the first prong of the test is not met, we have made a negative finding with respect to Mexico. Canada, on the other hand, was the third largest supplier (after the EU and Australia) of wheat gluten imports during the most recent 3-year period, accounting for an average of 10.2 percent of imports. Therefore, we find that imports from Canada account for a substantial share of total imports. However, imports from Canada declined significantly during the period examined, while imports overall increased, and by 1997 Canada accounted for 8.9 percent of total imports. In addition, petitioner stated in its petition that imports from Canada are not contributing importantly to the serious injury caused by imports. We therefore find that imports from Canada are not contributing importantly to the serious injury caused by imports."¹⁵⁹ (footnotes omitted) and,

"Having made negative findings with respect to imports of wheat gluten from Canada and Mexico under section 311 of the NAFTA Implementation Act, we recommend that such imports be excluded from the quantitative restriction."¹⁶⁰

8.163 The President's "Memorandum of 30 May 1998 -Action Under Section 203 of the Trade Act of 1974 Concerning Wheat Gluten" states:

"I agree with the USITC's findings under section 311(a) of the NAFTA Implementation Act, and therefore determine, pursuant to section 312(a) of the NAFTA Implementation Act, that imports of wheat gluten produced in Canada do not contribute importantly to the serious injury caused by imports and that imports of wheat gluten produced in Mexico do not account for a substantial share of total imports of such wheat gluten. Therefore, pursuant to section 312(b) of the NAFTA Implementation Act, the quantitative limitation will not apply to imports of wheat gluten from Canada or Mexico."¹⁶¹

8.164 We understand, therefore, that the United States applied the safeguard measures at issue after conducting an *initial* global investigation of the product (wheat gluten) being imported into the territory of the United States *from all sources* and the effects of those imports on the United States' domestic industry. Thus, the overall affirmative determination of serious injury to the domestic industry caused by increased imports was made on the basis of imports *from all sources*.

8.165 We turn to examine the nature of the legal obligations imposed by the Agreement on Safeguards with respect to the scope of the imports subject to the investigation and the scope of the imports subject to the application of the measure.

8.166 Several provisions are relevant to our examination, in particular, Articles 2.1 and 4.2 SA. Article 2.1 SA provides as follows:

Conditions

1. A Member¹ 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

¹⁵⁹ USITC Report, p. I-19.

¹⁶⁰ USITC Report, p. I-21.

¹⁶¹ *Supra*, notes 8 and 10.

conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

¹A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

Article 4.2 SA states, in part:

"(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 subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports *of the product concerned* and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." (emphasis added)

8.167 In our view, the text of Articles 2.1 and 4.2 contains a requirement of symmetry between the scope of the imported products subject to the investigation and the scope of the imported products subject to the application of the measure. Article 2.1 SA refers to "a product". In order for a Member to apply a safeguard measure, this provision requires that "*such product*" (emphasis added) "is being imported into its territory in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." There exists a basic symmetry between the terms "a product" and "such product" in Article 2.1 SA. Both terms must refer to the *same* thing. That is, a safeguard measure must be applied to a *product*, and it is increased imports of *such product* into the territory of the importing Member that must have been determined to cause or threaten to cause serious injury. In our view, there is no basis in Article 2.1 SA for a distinction to be drawn on the basis of origin between the "product" subject to the investigation and the "product" subject to the application of the measure, and thus there is an implied symmetry with respect to the product that falls within the scope of a safeguard *investigation* and the product that falls within the scope of the *application* of the safeguard measure.

8.168 Similarly, Article 4.2(a) refers to "the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry....". Article 4.2(b) stipulates that this determination "shall not be made unless this investigation demonstrates ... the existence of the causal link between increased imports *of the product concerned* and serious injury or threat thereof". (emphasis added) These provisions indicate that it is increased imports of "the product concerned" that must form the basis for the determination of serious injury and causal link. In our view, there is no basis in Article 4.2 SA for a distinction to be drawn on the basis of the origin of a product when examining the element of causation in a safeguards investigation.

8.169 We find contextual support for our view in Article 2.2 SA, which mandates that:

"Safeguard measures shall be applied to a product being imported irrespective of its source."

8.170 We find further confirmation of our view that there is a requirement of symmetry between the imports subject to the scope of the investigation and the imports subject to the scope of the measure in the Appellate Body Report in *Argentina-Footwear Safeguard*. There, the Appellate Body stated the following:

"We now turn to examine whether the Panel was correct in its interpretation that there is an implied "*parallelism*" between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures."¹⁶² Article 2.1 provides that:

A Member may apply a safeguard measures ... only if that Member has determined ... that such product is being imported into its territory in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury to the domestic industry ...
(emphasis added)

Article 4.1(c) defines "domestic industry" as meaning "the producers as a whole of the like or directly competitive products operating *within the territory of a Member* ...". (emphasis added) Taken together, the provisions of Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* demonstrate that a Member of the WTO may only apply a safeguard measure after that Member has determined that a product is being imported *into its territory* in such increased quantities and under such conditions as to cause or threaten to cause serious injury to *its* domestic industry *within its territory*. According to Articles 2.1 and 4.1(c), therefore, all of the relevant aspects of a safeguard investigation must be conducted by the Member that ultimately applies the safeguard measure, on the basis of increased imports entering its territory and causing or threatening to cause serious injury to the domestic industry within its territory.

While Articles 2.1 and 4.1(c) set out the conditions for imposing a safeguard measure and the requirements for the scope of a safeguard *investigation*, these provisions do not resolve the matter of the scope of *application* of a safeguard measure. In that context, Article 2.2 of the *Agreement on Safeguards* provides:

Safeguard measures shall be applied to a product being imported irrespective of its source.

¹⁶²Panel Report, *Argentina – Footwear Safeguard*, *supra*, note 17, para. 8.87.

As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. 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 from other MERCOSUR member 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."¹⁶³

8.171 Having established that there is a requirement of symmetry under Articles 2.1 and 4.2 SA between the scope of the imports subject to a safeguards investigation and the scope of the imports subject to the application of the measure¹⁶⁴, we examine whether the approach of the USITC in its investigation achieved this symmetry.

8.172 The United States argues that "the procedures contemplated by NAFTA Article 802, and employed by the United States in the case of its wheat gluten safeguard, satisfies the purpose of the "parallelism" notion the *Footwear* panel articulated".¹⁶⁵ According to the United States, this purpose "is to ensure that when a Member attributes serious injury to 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."¹⁶⁶ The United States argues that "Article 802 and US implementing provisions provide for the exclusion of Mexican and Canadian imports from an eventual safeguard measure where they did not play a significant role in causing serious injury or threat of injury."¹⁶⁷

8.173 We do not agree with the United States that, in this case, the treatment of imports from Canada in the investigation and in the subsequent exclusion of those imports from the application of the measure comports with the symmetry that we have found to be required by Articles 2.1 and 4.2 SA.

8.174 We recall that the term "serious injury" is defined in Article 4.1(a) SA as "a significant overall impairment in the position of a domestic industry". In this case, the USITC made a global determination of "serious injury". This determination was one of serious injury caused by total imports of the product into its territory *from all sources*. After the USITC had determined serious injury to have been caused by increased imports of the product concerned *from all sources*, it *subsequently excluded* from the application of the measure imports from certain sources (in this case, particularly, Canada). It is our understanding that the USITC initially attributed injury to imports from all sources, including imports from Canada, in order to reach its overall finding of "serious injury" caused by imports, and then, on the basis of a *separate and subsequent* analysis concerning imports from Canada, excluded imports from Canada from the application of the measure.

¹⁶³ Appellate Body Report, *Argentina-Footwear Safeguard*, *supra*, note 17, paras. 111-113.

¹⁶⁴ The only explicit departure from this principle in the Agreement on Safeguards is in Article 9.1 SA, which provides that a safeguard measure "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 not more than 9 per cent of total imports of the product concerned."

¹⁶⁵ United States Response to Panel Question 30, Attachment 2-4, para. 108.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, para. 109.

8.175 The United States contends that, because of the USITC's separate and subsequent analysis of imports from Canada, "the USITC's overall causation finding did not depend on the inclusion of Canadian imports."¹⁶⁸ However, the fact that the USITC found that imports from Canada -- which it deemed to constitute a "substantial share" of total imports -- nevertheless did not "contribute importantly" to the serious injury caused by imports does not, in our view, demonstrate that imports were causing "*serious injury*", within the meaning of Article 4.1(a) SA, after the exclusion of imports from Canada (at the time, the third largest supplier of wheat gluten to the United States) and the consequent effects of these imports. Under these circumstances, there is no demonstration that the remaining imports of the product concerned would still be sufficient to cause "*serious injury*" to the domestic industry. Our view is not changed by the fact that imports from Canada declined in the years in question as they still accounted for 11.0 per cent and 8.9 per cent of total imports into the United States domestic market in 1996 and 1997, respectively.¹⁶⁹

8.176 The unsupportability of the United States' approach can be demonstrated by taking it to its logical extreme. An approach that excludes from the application of the measure imports of certain countries if they do not account for a "substantial share" of total imports and do not "contribute importantly" to the serious injury caused by imports might also result in a situation where, after multiple minor quantities of imports are excluded from the application of the measure, which *collectively* accounted for a major proportion of imports, it would no longer be clear that any injury remaining that was due to the remaining imports would still achieve the threshold of "serious" as that term is defined in Article 4.1(a) of the Agreement on Safeguards. For example, assume that the imports of 5 countries, each accounting for approximately 10% of total imports, were all deemed individually not to account for a "substantial share" of total imports" and not to "contribute importantly" to serious injury and on this basis were thus excluded. Collectively, such imports account for 50% of total imports. There is no demonstration that any injury caused by imports remaining after the exclusion of 50% of total imports would still reach the threshold of "*serious injury*".

8.177 We consider that in the circumstances of the present case, in applying safeguard measures on the basis of this investigation in this case, the United States was also required under Articles 2.1 and 4.2 SA to apply those measures to imports from all sources, including from Canada, another NAFTA member State. On this basis, we conclude that the United States, on the facts of this case, cannot justify the non-application of its safeguard measures to imports from Canada, another NAFTA member state, on the basis of an *initial* global safeguard investigation that found serious injury, within the meaning of Article 4.1 SA, *caused by* increased imports *from all sources*, including imports from Canada.

8.178 We turn now to the argument of the United States that "Article XXIV provides an exception to Article XIX of the GATT 1994"¹⁷⁰ and that "[a]n examination of Article XXIV demonstrates that the United States' treatment of Canada both with respect to the injury investigation and the remedy applied are consistent with Article XXIV".¹⁷¹ According to the United States, the last sentence of footnote 1 SA contains specific provisions on the application of safeguard measures by members of a customs union or free trade area. The United States asserts that the question of how a free trade area member may/must treat imports from its free trade area partners cannot be answered by reference to the Agreement on Safeguards, but rather by reference to GATT Articles XXIV and XIX. In particular, the United States continues, footnote 1 SA makes it clear that the non-

¹⁶⁸ United States Response to Panel Question 29, Attachment 2-4, para. 93.

¹⁶⁹ As the USITC found, such imports accounted for an average of 10.2 per cent of the subject imports over the "most recent 3-year period". USITC Report, p. I-19.

¹⁷⁰ United States Response to Panel Question 8, Attachment 2-8, para. 13.

¹⁷¹ *Ibid.*, para. 15.

discrimination requirement of Article 2.2 SA is not pertinent in assessing the safeguards treatment accorded by a customs union or FTA member to goods originating in other participant countries.¹⁷²

8.179 In addressing this argument, we note first that the obligations in Article XIX of the GATT 1994 and Agreement on Safeguards are *cumulative*.¹⁷³ Thus, "any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994."¹⁷⁴ (footnote omitted, emphasis added)

8.180 Furthermore, we understand that Article XXIV of the GATT 1994 may provide a defence to a claim of violation of a provision of the GATT 1994¹⁷⁵, and may also provide a defence to a claim of inconsistency with a provision of another covered agreement if it is somehow incorporated into that provision or agreement.¹⁷⁶

8.181 In the present case, while the United States has argued that Article XXIV of the GATT 1994 would provide it with a defence to a violation of Article XIX of the GATT 1994, it has confirmed in these proceedings its understanding that "Article XXIV provides neither an exception nor a derogation to the provisions of the Safeguards Agreement".¹⁷⁷ Therefore, the United States is not arguing that Article XXIV of the GATT 1994 would provide it with a defence to a violation of a provision of the Agreement on Safeguards. We therefore do not examine whether Article XXIV of the GATT 1994 may provide a defence to a violation of a provision of the Agreement on Safeguards. In any event, contrary to the argument of the United States¹⁷⁸, we do not read the last sentence in footnote 1 SA¹⁷⁹ as establishing that the question of how a free trade area member may/must treat imports from its free trade area partners cannot be answered by reference to the Agreement on Safeguards, but rather only by reference to GATT Articles XXIV and XIX. As we have already indicated, we believe that the symmetry that we have found to be required by Articles 2.1 and 4.2 of the Agreement on Safeguards between the scope of the imported products subject to the investigation and the scope of the imported products subject to the application of the measure is also relevant in this context. Our view is not changed by footnote 1 SA.

8.182 For these reasons, we find that, in this case, the United States has acted inconsistently with Articles 2.1 and 4.2 SA by excluding imports from Canada from the application of the safeguard measure (following a separate and subsequent inquiry concerning whether imports from Canada accounted for a "substantial share" of total imports and whether they "contributed importantly" to the "serious injury" caused by total imports) after including

¹⁷² US Response to Panel Question 30, Attachment 2-4, paras. 99-100.

¹⁷³ We find support for this view in Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, note 16, para. 77; Appellate Body Report, *Argentina-Footwear Safeguard*, *supra*, note 17, para. 84.

¹⁷⁴ *Ibid.*

¹⁷⁵ We find confirmation for this view in Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products ("Turkey-Textiles")*, WT/DS34/AB/R, adopted 19 November 1999, para. 58. There, the Appellate Body expresses the view that "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions".

¹⁷⁶ In its Report in *Turkey – Textiles*, the Appellate Body noted that "legal scholars have long considered Article XXIV to be an "exception" or a possible "defence" to claims of violation of GATT provisions" (*supra*, note 175, para. 45, note 13). However, the Appellate Body also observed that the chapeau of paragraph 5 of Article XXIV refers only to the provisions of the GATT 1994 (and not to the provisions of other WTO Agreements). Because the Appellate Body viewed Article 2.4 of the Agreement on Textiles and Clothing as incorporating Article XXIV of the GATT 1994 into that Agreement, it noted that Article XXIV "may be invoked as a defence to a claim of inconsistency with Article 2.4 of the ATC, provided that the conditions set forth in Article XXIV for the availability of this defence are met".

¹⁷⁷ United States Response to Panel Question 8, Attachment 2-8, para. 13.

¹⁷⁸ *Supra*, para. 8.178; US Response to Panel Question 30, Attachment 2-4, paras. 99-100.

¹⁷⁹ The last sentence of footnote 1 SA reads: "Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

imports from all sources in its investigation of "increased imports" of wheat gluten into its territory and the consequent effects of such imports on its domestic wheat gluten industry. We are of the view that, in this case, the United States was not justified in departing from the explicit provisions of Articles 2.1 and 4.2 SA by excluding from the application of its safeguard measure imports from Canada after having included such imports for the purposes of reaching its overall finding of serious injury caused by increased imports of the product concerned.

8.183 We do not believe that we have been asked to rule, and consequently make no ruling, on whether or not, as a general principle, a member of a free trade area can exclude imports from other members of that free trade area from the application of a safeguard measure.

8.184 In light of our findings on Articles 2.1 and 4.2 SA, and in light of our overall conclusion, we do not find it necessary to address, in this context, the EC's claims under Article 5 SA or Article I of the GATT 1994. That is, having determined that the measure at issue is inconsistent with Articles 2.1 and 4.2 SA, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the inconsistent measure is further in breach of Article 5 SA or Article I of the GATT 1994. We therefore make no pronouncement on the admissibility of the EC claim concerning Article I with respect to the United States treatment of imports from Canada, in light of the terms of the panel request¹⁸⁰ which alleges that "the measure was designed and applied in order to breach the most-favoured-nation principle under Article I of GATT 1994, particularly since Australia is favoured in terms of impact on trade", but makes no mention of Canada in this context.¹⁸¹

2. Claims under Articles 8 and 12 SA

(a) Type and timing of notifications

(i) Arguments of the parties

European Community

8.185 The European Community alleges that the United States did not make timely notifications of the steps associated with the imposition of its safeguard measure in accordance with Article 12 SA. In particular, the European Community asserts that the United States did not make timely notifications of:

- the initiation of the investigation under Article 12.1(a) (1 October 1997¹⁸²; notification 17 October 1997; WTO document dated 21 October 1997)¹⁸³;
- the determination of serious injury caused by increased imports under Article 12.1(b) (15 January 1998; notification 11 February 1998; WTO document dated 12 February 1998); and

¹⁸⁰ WT/DS166/3.

¹⁸¹ See European Community second oral statement, Attachment 1-6, para. 127.

¹⁸² We note that the notice of institution and scheduling of the USITC investigation which was attached to the notification under Article 12.1 (a) SA mentions 19 September 1997 as the effective date of institution. The date of 1 October 1997 is the date of publication of the initiation of the investigation in the Federal Register.

¹⁸³ The European Community cites the date of WTO circulation of the documents, rather than the date that appeared on the communication from the US to the WTO. We have conducted our examination on the basis of the date of notification to the WTO, rather than on date of circulation of WTO document.

- the decision to apply the measure under Article 12.1(c) (the United States President took the decision to apply the measure on 30 May 1998; the United States imposed its final measure effective 1 June 1998; the United States notified this under Article 12.1(c) in a document dated 4 June 1998; and the WTO document was dated 8 June 1998).

8.186 The European Community asserts that according to the plain text and meaning of Article 12 SA, these procedural steps, findings and decisions had to have been made at a date that would have allowed the Committee on Safeguards and, possibly, the Council for Trade in Goods, to request additional information and hold a meaningful discussion. The European Community argues that the United States notifications under Article 12.1(a) and (b) SA fail to comply with the requirement of immediate notification under Article 12.1 SA.

8.187 The European Community further argues that the United States failed to provide meaningful and timely notification of the proposed measure as required by Article 12 of the Agreement on Safeguards. According to the European Community, Article 12 SA establishes a sequence of events starting with the notification under Article 12.1(c) SA providing information to the Committee on Safeguards and the Council for Trade in Goods under Article 12.2 SA and consultations under Article 12.3 SA on the proposed measure. The European Community asserts that the United States did not comply with its obligation under Articles 12.1(c) and 12.2 SA to notify the *proposed* final measure to the Committee on Safeguards *before* implementing that final measure.

United States

8.188 The United States argues that, consistent with the requirements of Article 12 SA, it made timely notifications. The United States argues that the text of Article 12.1 SA makes it clear that notification can only be made *after* the finding or the decision concerned has been made. The United States submits that it notified the Committee on Safeguards of the initiation of the investigation under Article 12.1(a) only days after its publication in the Federal Register. With respect to its Article 12.1(b) notification of finding of serious injury, the United States argues that Article 12.1(b) SA clearly provides that a Member's obligation to notify only arises *after* it has made a serious injury determination. Similarly, the United States asserts that Article 12.1(c) SA requires notification once the decision to apply the measure is taken: in this case, the United States President took the decision to apply the measure on 30 May 1998 and the United States notified this decision on 4 June 1998. While the United States disputes the existence of an obligation to notify a proposed measure *before* any measure is taken, in the alternative, it asserts that the notification of 24 March 1998, made under Article 12.1(b) SA, nevertheless complies with this alleged requirement. The United States submits that the Agreement on Safeguards does not preclude the alteration of a proposed measure following an Article 12.1(b) notification.

(ii) *Evaluation by the Panel*

8.189 We will examine the provisions of Article 12 of the Agreement on Safeguards detailing the requirements concerning notifications to the Committee on Safeguards. In relevant part, Article 12 SA provides as follows:

"Article 12

Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:
 - (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

- (b) making a finding of serious injury or threat thereof caused by increased imports; and
- (c) taking a decision to apply or extend a safeguard measure.
2. In making the notifications 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. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.
3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.
4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.
5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8 and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned...."

8.190 We consider that Article 12 SA refers to two different points in time which determine the timeliness of the notification of any decision or finding by a Member. First, Article 12.1 SA refers to the actual decision or finding. The notification is to be made *immediately following* this decision or finding. Second, we consider that Articles 12.2 and 12.3 SA provide that the notifications of Article 12.1 are to be made *in any case before* the implementation of the measure in order to allow for prior consultations on the proposed measure. In sum, we find that the notifications of Article 12.1 are situated in time between the moment of making the decision or finding to be notified and the final application of the measure concerned.

Compliance with Article 12.1 SA: the requirement of immediacy

8.191 For the sake of clarity, we recall that the United States made the following notifications to the Committee on Safeguards regarding its wheat gluten investigation:

notification under Article 12.1(a) SA

- On 1 October 1997, the United States decided to initiate a safeguards investigation regarding imports of wheat gluten. In a communication dated 17 October 1997 (i.e. 16 days later), the

United States notified the Committee on Safeguards, under Article 12.1(a), of its decision to initiate an investigation.¹⁸⁴

notifications under Article 12.1(b) SA

- On 15 January 1998, the USITC found that there was evidence of serious injury caused by increased imports and the United States notified the Committee on Safeguards pursuant to Article 12.1(b) SA of these findings in a communication dated 11 February 1998 (i.e. 26 days later).¹⁸⁵
- On 18 March 1998, the USITC forwarded its Report containing its injury findings and remedy recommendations to the President of the United States. In a communication dated 24 March 1998 (i.e. 6 days later), the United States notified to the Committee on Safeguards, pursuant to Article 12.1 (b) SA, a finding of serious injury caused by increased imports of wheat gluten.¹⁸⁶ A copy of this USITC Report, also containing the USITC's analysis and a summary of the information collected during the investigation and excluding information identified as confidential information, was provided with the United States notification.
- On 3 April 1998 the USTR requested that the USITC provide additional information on the degree to which the domestic industry's adjustment plan would improve its competitiveness in the mid and long-term. The additional information was requested to assist the inter-agency group that was considering what action to recommend that the President take. On 8 April 1998, the United States notified the Committee on Safeguards pursuant to Article 12.1 (b) SA of this request for additional information and informed the Committee that 31 May 1998 was the ultimate date for the President to determine what safeguard action would be taken.¹⁸⁷

notification under Article 12.1(c) SA

- On 30 May 1998, the United States President decided to apply a safeguard measure and on 1 June 1998, the United States imposed quantitative restrictions in the form of a quota on imports of wheat gluten for a period of just over three years. On 4 June 1998 (i.e. 5 days after the decision was taken), the United States notified the Committee on Safeguards pursuant to Article 12.1(c) SA of the decision to apply a safeguard measure.¹⁸⁸

8.192 We recall that Article 12.1 SA contains an explicit temporal guideline that applies to the three types of notifications explicitly enumerated in that Article. It states that "a Member shall *immediately* notify the Committee ... upon": (a) "initiating" a safeguard investigation; (b) "making a finding of serious injury or threat thereof caused by increased imports"; and (c) "taking a decision to apply or extend a safeguard measure."

8.193 The panel in *Korea – Dairy Safeguard* found that the term "immediately" implies a certain urgency and is a function of the content of the notification itself:

"Article 12.1 provides that "A Member shall immediately notify the Committee on Safeguard upon ..." (emphasis added). The ordinary meaning of the term "immediately"¹⁸⁹ introduces a certain notion of urgency.... We note finally that no

¹⁸⁴ G/SG/N/6/USA/4.

¹⁸⁵ G/SG/N/8/USA/2.

¹⁸⁶ G/SG/N/8/USA/2/Rev.1.

¹⁸⁷ G/SG/N/8/USA/2/Rev.1/Suppl.1.

¹⁸⁸ G/SG/N/10/USA/2 and G/SG/N/11/USA/2.

¹⁸⁹ Original footnote: "The New Webster Encyclopaedic Dictionary defines immediately as "without delay, straightaway"; the New Shorter Oxford Dictionary defines it as "without delay, at once, instantly".

specific number of days is mentioned in Article 12. For us this implies that there is a need under the agreement to balance the requirement for some minimum level of information in a notification against the requirement for “immediate” notification. The more detail that is required, the less “instantly” Members will be able to notify. In this context we are also aware that Members whose official language is not a WTO working language, may encounter further delay in preparing their notifications.”¹⁹⁰

8.194 We consider that the text of Article 12.1 SA is clear and requires no further interpretation. The ordinary meaning of the requirement for a Member to notify immediately its decisions or findings prohibits a Member from unduly delaying the notification of the decisions or findings mentioned in Article 12.1 (a) through (c) SA. Observance of this requirement is all the more important considering the nature of a safeguards investigation. A safeguard measure is imposed on imports of a product irrespective of its source and potentially affects all Members. All Members are therefore entitled to be kept informed, without delay, of the various steps of the investigation.

8.195 We will now consider the United States notifications under Article 12.1 SA which the European Community alleges were not made immediately after the decision or the finding was made. These are the notification under Article 12.1(a) SA of the initiation of the investigation and the notification under Article 12.1(b) SA of the finding of serious injury caused by increased imports.

8.196 According to the date mentioned on the United States notification under Article 12.1(a) SA of the initiation of the investigation, the United States initiated a safeguards investigation on imports of wheat gluten into the United States on 1 October 1997. The United States notified the initiation of this safeguards investigation on 17 October 1997, i.e. 16 days later. The information contained in the notification is minimal. A copy of the notice of institution and scheduling of the investigation by the USITC is annexed.

8.197 We therefore find that the delay of 16 days between the initiation of the investigation and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1 (a) SA.¹⁹¹

8.198 On 15 January 1998, the USITC found that wheat gluten was being imported in such increased quantities as to be a substantial cause of serious injury to the domestic wheat gluten industry. The United States notified this finding of serious injury caused by increased imports under Article 12.1 (b) SA to the Committee on Safeguards only 11 February 1998, i.e. 26 days later. This one-page notification refers to the USITC Report, which was to be published on 18 March 1998.

8.199 We therefore find that the delay of 26 days between the finding of serious injury and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1 (b) SA.

Requirement to make notification under Article 12.1(c) SA before implementation of the measure.

8.200 As we established above, a Member is required to notify the decision to apply a measure immediately after the decision is made. However, we consider that Article 12.1(c) SA as informed

¹⁹⁰ Panel Report, *Korea – Dairy Safeguard*, *supra*, note 16, para. 7.128

¹⁹¹ As noted above, note 182, the notice of institution and scheduling of the investigation which was attached to the notification under Article 12.1 (a) SA mentions 19 September 1997 as the effective date of institution. If one were to take this date as the date of initiation, the delay between the initiation of the investigation and the notification thereof of 27 days would be even less “immediate”.

by Articles 12.2 and 12.3 SA requires that the notification of the decision to apply a measure is to be made in any case before the measure is implemented.

8.201 Article 12.2 SA provides that a Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information. The information required shall include a precise description of the product involved and of the proposed measure, the proposed date of introduction, its expected duration and the timetable for a progressive liberalization of the measure. Article 12.3 SA requires a Member proposing to apply or extend a safeguard measure to provide adequate opportunity for prior consultations.

8.202 Articles 12.2 SA and 12.3 SA thus stipulate that the notifications under Article 12.1(b) and (c) which are to be made immediately following the decision or the finding shall contain information concerning the *proposed measure* and shall be made at such time as to provide adequate opportunity for *prior* consultations. The language of Article 12.2 SA and Article 12.3 SA therefore confirms the importance of notifying a *proposed* measure before it is applied in order to allow adequate opportunity for prior consultations, that is, consultations before the measure is effectively applied. With reference to the notifications under Articles 12.1(b) and Article 12.1(c) SA concerning respectively the finding of serious injury caused by increased imports and the decision to apply a measure, Article 12.2 SA refers, *inter alia*, to "the Member *proposing* to apply or extend a safeguard measure", "a precise description of ... the *proposed* measure", and the "*proposed* date of introduction" of the measure (emphasis added). Article 12.3 refers to "the Member *proposing* to apply or extend the measure" and requires that the Member "shall provide adequate opportunity for *prior* consultations..." (emphasis added).

8.203 The reports of the panel and the Appellate Body in *Korea – Dairy Safeguard* provide relevant guidance. The panel in *Korea-Dairy* concluded that Articles 12.2 and 12.3 SA implicitly require that any *proposed* measure be notified *before* the consultations referred to in Article 12.3 SA in order to allow for meaningful and informed consultations. In this respect, the panel stated¹⁹²:

"Thus, Article 12.1, 12.2 and 12.3 taken together makes it clear that before a definitive safeguard measure may be applied, the Member proposing to apply it must notify all the pertinent information regarding the proposed measure and the factual basis (the injury finding) for applying it, and must provide an opportunity for consultations with Members whose trade will be affected by the proposed measure. In other words, details of the measure proposed must be notified before it is applied, so that affected Members may consult about it before it takes effect."

8.204 We recall that the Appellate Body agreed with the panel in *Korea – Dairy Safeguard* that¹⁹³:

"... 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 decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation".

8.205 The text of Article 12.2 SA speaks of *proposed* measures in the context of both Article 12.1(b) and (c) notifications. That is, a measure that is notified under Article 12.1(c) SA would still be a "proposed" measure. Article 12.2 SA requires that information be given in an Article 12.1(c)

¹⁹² Panel Report, *Korea – Dairy Safeguard*, *supra*, note 16, para. 7.120.

¹⁹³ Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, note 16, para. 111.

notification on the "proposed" date of introduction and the "expected" duration and timetable for progressive liberalization. The purpose of notifying a proposed measure *after* taking a decision to apply it and *before* it is applied is in order to "provide all pertinent information" in order to furnish a basis for the consultations referred to in Article 12.3 SA.¹⁹⁴

8.206 Article 12.1(c) SA, read in conjunction with Article 12.2 and 12.3, refers to a final proposed measure, i.e. the measure that the WTO Member concerned intends to adopt and not one that the Member has already implemented. Otherwise, the requirements of transparency and information would not be fully served. It should be recalled that the objective of the prior consultations as set out in Article 12.3 SA is to review the information provided in the notifications, exchange views on the measure and reach an understanding on ways to achieve the objectives of Article 8.1 SA. The latter provision requires a Member *proposing to apply* a safeguard measure to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under the GATT 1994. The Agreement on Safeguards thus requires a Member when proposing to apply a safeguard measure to provide an adequate opportunity to consult with affected Members prior to the application of the measure *inter alia* to discuss ways to maintain an equivalent level of concessions and perhaps agree on adequate means of trade compensation. The requirement to endeavour to maintain a substantially equivalent level of concessions between the Member proposing to apply a measure and exporting Members affected by such a measure is intrinsically linked with the fact that "taking a safeguard action results in restrictions on imports arising from 'fair' trade".¹⁹⁵ The obligation to provide adequate opportunity for *prior* consultations is therefore essential to the proper application of the safeguard mechanism.

8.207 We recall that the United States applied the safeguard measure at issue on 1 June 1998. However, it notified its decision of 30 May 1998 to apply a measure under Article 12.1(c) SA only on 4 June 1998, i.e. three days after the measure was effectively imposed. We note in passing that the delay of 5 days between the decision to apply a safeguard measure and the notification thereof might well satisfy the requirement of immediate notification of Article 12.1 SA. **However, we find that the United States notification of this decision after the measure had been implemented, violated the United States obligation under Article 12 SA to make timely notification under Article 12.1 (c) SA of its decision to apply a measure.**

8.208 We will briefly address two other arguments of the United States in support of its position that the Agreement on Safeguards does not require a Member to notify its proposed measure before it is applied. First, the United States points to the notification provision concerning provisional safeguard measures. The United States argues that if such an obligation of prior notification were to exist with regard to final measures, the Agreement would have explicitly stated so as is the case in Article 12.4 SA concerning provisional safeguard measures. Second, the United States asserts that the obligation to notify the proposed measure would run counter to the purpose of encouraging positive consultations with interested Members since no Member would be inclined to change the measure as a result of consultations with other Member since any change would lead to a new round of notifications of the new proposed measure. This, the United States asserts, cannot have been the intention of the drafters.

8.209 Article 12.4 SA requires Members to notify any provisional safeguard measure before it is taken and provides that consultations be initiated immediately after the measure is taken. According to Article 6 SA, a Member may only take provisional safeguard measures pursuant to a preliminary

¹⁹⁴ It is thus irrelevant to our examination of the timeliness of the United States notification under Article 12.1 (c) SA that the United States notified the USITC's remedy recommendation to the Committee on Safeguards on 24 March 1998. The language of Article 12.2 and 12.3 SA makes it clear that the measure notified under Article 12.1 (c) SA is still a proposed measure and that its notification has to be made before the implementation of the measure in order to allow for an adequate opportunity for consultations.

¹⁹⁵ Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, note 16, para. 87.

determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. Article 12.4 SA thus requires a Member to notify the decision to apply a provisional safeguard measure after a preliminary determination of increased imports causing or threatening to cause serious injury is made but before taking the measure. We consider therefore that Article 12.4 SA in fact strengthens the general rule that a Member is to notify its decision to apply a safeguard measure before it is applied, even if it is only a provisional safeguard measure. What is different from the notification requirements concerning final measures is the obligation to initiate consultations only *after* the (provisional) measure is taken. It seems logical to us that it may well have been the absence of a requirement for prior consultations regarding provisional safeguard measures that led to the explicit requirement of Article 12.4 SA to notify the provisional measure before applying it.

8.210 Finally, we do not believe that, as the United States is arguing, the obligation to notify the proposed measure would give rise to a long chain of new notifications in case the measure is amended as a consequence of the consultations. We refer to Article 12.5 SA which provides *inter alia* that the results of any consultations shall be notified immediately to the Council for Trade in Goods through the Committee on Safeguards. This would imply that in case consultations lead to a modification of the measure, the modification is to be notified under Article 12.5 SA. Members are entitled to assume that in the absence of any notification under Article 12.5 SA, the safeguard measure applied is the measure proposed and notified under Article 12.1 (c) SA.

Summary

8.211 In sum, we have found that the United States violated the requirement concerning timely notification of Article 12 SA. Both its notifications of the initiation of the investigation and of the finding of serious injury caused by increased imports of 17 October 1997 and 11 February 1998 respectively were not made immediately after the decision or the finding as required by Article 12.1 SA. Moreover, and more importantly, we have found that the United States did not provide a timely notification under Article 12.1(c) SA of its proposed final measure since the United States notified its decision to apply a measure three days after the measure had been implemented.

(b) Adequacy of consultations

(i) Arguments of the parties

European Community

8.212 The European Community acknowledges that consultations took place between the parties on 24 April 1998 and 22 May 1998. The European Community emphasizes that such consultations only dealt with information provided by the United States in its Article 12.1(b) notifications and therefore cannot be considered prior consultations on the final proposed measure, i.e. the measure in its final form, in terms of form, level and duration.

8.213 The European Community further submits that the United States did not make a genuine endeavour to maintain a substantially equivalent level of concessions and never offered a meaningful opportunity for consultation and negotiation, thereby violating Articles 8.1 and 12.3 SA. The European Community argues that the obligation to engage in meaningful consultations prior to altering the balance of negotiated concessions, even temporarily, is fundamental to the functioning of the WTO system. According to the European Community, the United States failed to demonstrate that it has actively and concretely offered adequate compensation and that compensation was rejected (or at least not accepted) by the Member concerned.

United States

8.214 The United States asserts that it held consultations with the European Community on 24 April 1998 and 22 May 1998 in accordance with Article 12.3 SA. The United States argues that the European Community acknowledged that consultations concerning the wheat gluten investigation took place under Article 12.3 SA in two letters dated 8 May 1998¹⁹⁶ and 21 May 1998¹⁹⁷ respectively. Finally, the United States considers that the Panel should reject the European Community's claim that a Member is required to provide concessions before it can take a safeguard action.

¹⁹⁶ Exhibit US-11.

¹⁹⁷ Exhibit US-12.

(ii) *Evaluation by the Panel*

8.215 Article 8.1 provides as follows:

Article 8

Level of Concessions and Other Obligations

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 GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade."

8.216 The principal issue confronting the Panel is whether Articles 12.3 SA and 8.1 SA require that the consultations referred to in these provisions must include consultations on the *final* proposed measure. Clearly, consideration of this issue is intimately intertwined with the Panel's view of the requirements of Article 12 SA concerning the type and timing of notifications.¹⁹⁸ As we established above, consultations on the proposed measure under Article 12.3 SA would necessarily take place *after* a Member has notified the "proposed" measure but *before* that measure is actually applied.

8.217 In this case, the United States applied its safeguard measure effective 1 June 1998, 2 days after the United States President had decided upon the safeguard measure to be applied and had "taken the decision" to apply that measure on 30 May 1998. While the parties have confirmed that consultations did take place on the basis of the United States notifications under Article 12.1(b) concerning the USITC's finding of serious injury and the USITC's recommendations on remedy, no consultations were held on the final proposed measure as approved by the United States President on 30 May 1998. Therefore, the Panel considers that, while consultations may have been held on the basis of the notifications made by the United States under Article 12.1(b) SA, the United States did not provide "an adequate opportunity for prior consultations" on this final proposed measure, within the meaning of Article 12.3 SA. This necessarily implies that the United States did not fulfil its obligations under Article 8.1 SA to endeavour to maintain a substantially equivalent level of concessions and other obligations, in accordance with the provisions of paragraph 3 of Article 12.

8.218 The fact that consultations took place between the United States and the European Community on 24 April 1998 and 22 May 1998 does not affect this finding. It should be recalled that Article 12.1(b) SA, read together with Articles 12.2 and 12.3 SA, envisages that consultations may also be held on the basis of Article 12.1(b) notifications concerning a finding of serious injury. Members are encouraged to consult with each other before a final decision on whether to apply a measure is taken. Such consultations could fulfil part of the aims of Article 12.3, i.e. to review the information contained in the notifications and possibly exchange views on the measure. However, one of the important objectives of the consultations under Article 12.3 SA is to reach an understanding on ways to achieve the objective of Article 8.1 concerning compensation. We consider that it is only after a decision to apply a measure is taken and information is given on the final proposed measure, that informed and meaningful consultations can be held under Article 12.3 and 8.1 SA. Another interpretation would mean that WTO Members would be consulting on a hypothetical measure that might not come into effect.

¹⁹⁸ See discussion *supra*, paras. 8.189-8.211.

8.219 We found above¹⁹⁹ that the United States did not provide a timely notification under Article 12.1 (c) SA of its proposed final measure since the United States notified its decision to apply a measure three days after the measure had been implemented. **For the same reason, we find that the United States violated the obligation of Article 12.3 SA to provide adequate opportunity for prior consultations on the measure. Hence, we find that the United States also violated its obligation under Article 8.1 SA to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with Article 12.3 SA.**

3. Claims under Article XIX of the GATT 1994 ("unforeseen developments"); Article 5 SA and Article I of the GATT 1994

8.220 The European Community also makes claims under Article XIX:1(a) ("unforeseen developments"), Article 5 SA and Article I of the GATT 1994. We note that a "panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".²⁰⁰ As we have found that the United States definitive wheat gluten safeguard measure based on the United States investigation and determination to be inconsistent with Articles 2.1 and 4.2 of the Agreement on Safeguards, we do not consider it necessary to examine these claims of the European Community under Article 5 SA and Articles I and XIX of the GATT 1994. That is, having determined that the measure at issue is inconsistent with Articles 2.1 and 4.2 SA, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the measure at issue is also inconsistent with Article XIX of the GATT 1994 ("unforeseen developments") nor whether the form, level and allocation of the inconsistent measure are in breach of Article 5 SA or Article I of the GATT 1994.²⁰¹

4. Claim under Article 4.2 of the Agreement on Agriculture

8.221 The European Community included a claim under Article 4.2 of the Agreement on Agriculture in its panel request. However, the European Community did not develop this claim in any of its written or oral submissions to the Panel. We thus consider that this claim has been abandoned.

¹⁹⁹ See *supra*, para. 8.207.

²⁰⁰ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 19.

²⁰¹ We find support for our approach in Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 112-117. In this Report, the Appellate Body cites its previous Reports in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 18 and *Australia - Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 223, and confirms that, "[i]n discharging its functions under Articles 7 and 11 of the DSU, a panel is not ... required to examine all legal claims made before it. A panel may exercise judicial economy."

IX. CONCLUSIONS AND RECOMMENDATION

9.1 In light of the findings made in section VIII above, we conclude that the United States has not acted inconsistently with Articles 2.1 and 4 of the Agreement on Safeguards or with Article XIX:1(a) of the GATT 1994 in:

- (i) redacting certain confidential information from the published USITC Report; or
- (ii) determining the existence of imports in "increased quantities" and serious injury.

9.2 In light of the findings made in section VIII above, we conclude that the definitive safeguard measure imposed by the United States on certain imports of wheat gluten based on the United States investigation and determination is inconsistent with Articles 2.1 and 4 of the Agreement on Safeguards in that:

- (i) the causation analysis applied by the USITC did not ensure that injury caused by other factors was not attributed to imports; and
- (ii) imports from Canada (a NAFTA partner) were excluded from the application of the measure after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports (following a separate inquiry concerning whether imports from Canada accounted for a "substantial share" of total imports and whether they "contributed importantly" to the "serious injury" caused by total imports).

9.3 In light of the findings made in section VIII above, we also conclude that the United States failed to notify immediately the initiation of the investigation under Article 12.1(a) and the finding of serious injury under Article 12.1(b) SA. We further conclude that, in notifying its decision to take the measure after the measure was implemented, the United States did not make timely notification under Article 12.1(c). For the same reason, the United States violated the obligation of Article 12.3 SA to provide adequate opportunity for prior consultations on the measure. Hence, the United States also violated its obligation under Article 8.1 SA to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with Article 12.3 SA.

9.4 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that the United States has nullified or impaired benefits accruing to the European Community under the Agreement on Safeguards within the meaning of Article 3.8 of the DSU.

9.5 The Panel *recommends* that the Dispute Settlement Body request the United States to bring its measure into conformity with the Agreement on Safeguards.