WORLD TRADE ORGANIZATION

WT/DS121/AB/R
14 December 1999

(99-5419)

Original: English

ARGENTINA – SAFEGUARD MEASURES ON IMPORTS OF FOOTWEAR

AB-1999-7

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Argentina – Safeguard Measures on Imports of Footwear

Argentina, *Appellant/Appellee*
European Communities, *Appellant/Appellee*

Indonesia, *Third Participant*
United States, *Third Participant*

AB-1999-7

Present:

Bacchus, Presiding Member
Beeby, Member
Matsushita, Member

I. Introduction

1. Argentina and the European Communities appeal certain issues of law and legal interpretation in the Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities with respect to the application by Argentina of certain safeguard measures on imports of footwear.

2. On 14 February 1997, Argentina initiated a safeguard investigation and adopted Resolution 226/97, which imposed provisional measures in the form of minimum specific duties on imports of certain footwear.[2] On the same day, the Argentine Ministry of Economy and Public Works repealed the minimum specific duties on imports of footwear ("DIEMs") that had been maintained by Argentina since 31 December 1993.[3] The opening of the safeguard investigation and the implementation of a provisional safeguard measure were notified to the Committee on Safeguards by Argentina in a communication dated 21 February 1997[4] and, by further communication dated 5 March 1997, Argentina transmitted a copy of the provisional duty resolution to the Committee on Safeguards.[5]

[1]WT/DS121/R, 25 June 1999.

[2]Panel Report, para. 2.1. The Resolution became effective on 25 February 1997.

[3]*Ibid*., para. 8.2.

[4]G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, 25 February 1997.

[5]G/SG/N/6/ARG/1Suppl.1 and G/SG/N/7/ARG/1/Suppl.1, 18 March 1997.

3. On 25 July 1997, Argentina notified the Committee on Safeguards of the determination of serious injury made by its competent authorities, the Comisión Nacional de Comercio Exterior ("CNCE").[6] Attached to this notification was Act 338, the report of the CNCE on serious injury. Act 338 incorporates by reference the Technical Report, a summary by CNCE staff of the factual data gathered during the safeguard investigation.[7] On 1 September 1997, Argentina notified the Committee on Safeguards of its intention to impose a definitive safeguard measure.[8] On 12 September 1997, Argentina adopted Resolution 987/97, which imposed, effective 13 September 1997, a definitive safeguard measure in the form of minimum specific duties on certain imports of footwear. On 26 September 1997, Argentina transmitted a copy of this Resolution to the Committee on Safeguards[9], and Uruguay, as Pro Tempore President of the Mercado Común del Sur ("MERCOSUR")[10] notified the definitive safeguard measure imposed by that Resolution.[11] On 28 April 1998, Argentina published Resolution 512/98 modifying Resolution 987/97.[12] On 26 November 1998, Argentina published Resolution 1506/98, further modifying Resolution 987/97, and, on 7 December 1998, the Argentine Secretariat of Industry, Commerce and Mines published Resolution 837/98 implementing Resolution 1506/98.[13] The relevant factual aspects of this dispute are set out in further detail at paragraphs 2.1–2.6 and 8.1–8.20 of the Panel Report.

4. The Panel considered claims made by the European Communities that Argentina's safeguard measures are inconsistent with Articles 2, 4, 5, 6 and 12 of the *Agreement on Safeguards*, and with Article XIX:1(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 25 June 1999.

5. The Panel concluded that "the definitive safeguard measure on footwear based on Argentina's investigation and determination is inconsistent with Articles 2 and 4 of the Agreement on Safeguards" and, therefore, "that there is nullification or impairment of the benefits accruing to the European

[6]G/SG/N/8/ARG/1, 21 August 1997.

[7]Panel Report, paras. 5.250-5.251 and 8.127-8.128.

[8]G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, 15 September 1997; corrigendum 18 September 1997.

[9]G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, 10 October 1997.

[10]MERCOSUR was established on 26 March 1991, when Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción, which provides for the creation of a common market among its four State Parties.

[11]G/SG/N/10/ARG/1/Suppl.2, G/SG/N/11/ARG/1/Supp.2, G/SG/14/Suppl.1 and G/L/195/Suppl.1, 22 October 1997.

[12]Panel Report, para. 2.5.

[13]*Ibid*., para. 2.6.

Communities under the Agreement on Safeguards within the meaning of Article 3.8 of the DSU."[14] The Panel found "no basis to address the [European Communities'] claims under Article XIX of GATT separately and in isolation from those under the Safeguards Agreement."[15] The Panel rejected the claims of the European Communities under Article 12 of the *Agreement on Safeguards*[16] and, in light of its determination that the definitive safeguard measure is inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*, the Panel did not consider it necessary to make findings with respect to the claims of the European Communities under Articles 5 and 6 of that Agreement.[17]

6. On 15 September 1999, Argentina notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 27 September 1999, Argentina filed its appellant's submission.[18] On 30 September 1999, the European Communities filed its own appellant's submission.[19] On 11 October 1999, Argentina[20] and the European Communities[21] each filed an appellee's submission. On the same day, Indonesia and the United States each filed a third participant's submission.[22]

7. On 19 October 1999, the Appellate Body received a letter from the Government of Paraguay indicating its interest "in attending" the oral hearing in this appeal. On 25 October 1999, the Appellate Body received a second letter from Paraguay clarifying that it was not requesting an opportunity to "make oral arguments or presentations at the oral hearing" as set forth in Rule 27.3 of the *Working Procedures*. Rather, Paraguay maintained that, as a third party which had notified its interest to the Dispute Settlement Body under Article 10.2 of the DSU, it had the right to "participate passively" in the oral hearing before the Appellate Body in the present dispute. No participant or third participant objected to the participation of Paraguay on a "passive" basis. On 26 October 1999, the

[14]Panel Report, para. 9.1. The Panel's conclusions applied to "the definitive safeguard measure in its original legal form (i.e., Resolution 987/97) as well as in its subsequently modified form (i.e., Resolutions 512/98, 1506/98 and 837/98)." (Panel Report, para. 8.305) This finding has not been appealed and, therefore, stands.

[15]Panel Report, para. 8.69.

[16]*Ibid*., paras. 8.301 and 8.304.

[17]*Ibid*., paras. 8.289 and 8.292.

[18]Pursuant to Rule 21(1) of the *Working Procedures*.

[19]Pursuant to Rule 23(1) of the *Working Procedures*.

[20]Pursuant to Rule 23(3) of the *Working Procedures*.

[21]Pursuant to Rule 22 of the *Working Procedures.*

[22]Pursuant to Rule 24 of the *Working Procedures.*

Members of the Division hearing this appeal informed Paraguay, the participants and third participants that, having regard to the provisions of Articles 10.2 and 17.4 of the DSU as well as the provisions of Rules 24 and 27 of the *Working Procedures*, Paraguay would be allowed to attend the oral hearing as a "passive observer".

8. The oral hearing in the appeal was held on 29 October 1999. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants

A. *Claims of Error by Argentina – Appellant*

1. Terms of Reference

9. Argentina argues that the Panel violated Article 7.2 of the DSU and exceeded its jurisdiction because the Panel not only considered, but relied on[23], alleged violations of Article 3 of the *Agreement on Safeguards* even though the European Communities' request for the establishment of a panel and the Panel's terms of reference mentioned alleged violations of only Articles 2 and 4 of the *Agreement on Safeguards*.

10. Argentina notes that Articles 3 and 4 of the *Agreement on Safeguards* are separate provisions, each of which sets out distinct requirements. In Argentina's view, Members intended with these provisions to allow national authorities to separate the Article 3 "*findings and conclusions*" requirement from the Article 4 requirement of a "*detailed analysis*", as is done in practice in Argentina. In this case, the "findings and conclusions" to which Article 3 refers are contained exclusively in Act 338 (on which the Panel relied), but no claim of a violation of Article 3 was before the Panel.

11. Argentina emphasizes that due process concerns underlie the rule that a Panel's jurisdiction is limited by its terms of reference, as recognized in the Appellate Body Reports in *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut*")[24] and *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents*").[25] Argentina concludes that, by excluding Article 3 from its panel request, the European Communities essentially notified Argentina that it would not have to defend itself against Article 3 allegations. Argentina adds that

[23]In paras. 8.126, 8.127, 8.205, 8.207, 8.218 and 8.238 of the Panel Report.

[24]Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, p. 22.

[25]Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 92.

since Article 3 is central to the Panel's decision-making, the Panel's statements about Article 3 cannot be considered harmless error, "*purely gratuitous comment*" or not "*a legal finding or conclusion.*"[26]

2. Imposition of Safeguard Measures by a Member of a Customs Union

12. Argentina argues that the Panel erred in its legal reasoning and interpretation of the *Agreement on Safeguards* with respect to Argentina's right to exclude its partners in MERCOSUR from the application of safeguard measures. In Argentina's view, the Panel misinterpreted footnote 1 to Article 2.1 of the *Agreement on Safeguards*, and imposed an obligation to apply safeguard measures to customs union members when imports from all sources are taken into account for the injury determination, as well as a "parallelism requirement". Argentina maintains that neither of these supposed obligations has any basis in the *Agreement on Safeguards*.

13. Argentina contends that the footnote to Article 2.1 addresses comprehensively the conditions applicable to a safeguard investigation when a Member is part of a customs union. The fourth sentence of the footnote reflects the fact that Members could not agree on how to reconcile the requirements of Article XXIV:8 of the GATT 1994 with the most-favoured-nation requirement in Article 2.2 of the *Agreement on Safeguards*. Thus, in the last sentence of the footnote, Members specifically acknowledged that there was no resolution of this conflict in the *Agreement on Safeguards*. Argentina notes that the drafting history of footnote 1 shows that the Members deleted the very provisions that the Panel has attempted to "read in" to the existing text of the footnote.[27]

14. Argentina alleges as well that the Panel erred in law by imposing a "parallelism requirement" between the determination of injury and the application of the safeguard measure that is not found in the *Agreement on Safeguards*. Article 5, which sets out the requirements for the *application* of safeguard measures, makes no reference to any requirement of "parallelism", except to the extent that a measure may not exceed what is necessary to remedy the injury. Similarly, Article 9, which exempts developing countries from the *application* of safeguard measures in certain circumstances, does not impose a requirement that parallel modifications be made as part of the injury determination.

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[26]Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, para. 110.

[27]Argentina cites a text tabled on 31 October 1990 by the Chairman of the Negotiating Group on Safeguards (MTN.GNG/NG9/W/25/Rev.3), which included the following proposal for the last sentence of the footnote:

> It is understood that when a safeguard measure is applied by a customs union on behalf of a member state, [any injury attributable to competition from producers established in other member states in the customs union shall not be attributed to increased imports, in conformity with the provisions of sub-paragraph 7(b)] [such a measure shall be applied to imports from other member states of the customs union]. (emphasis added by Argentina)

In Argentina's view, the only "parallelism" on which the Members agreed is that only the market where injury is found can apply safeguard measures.

3. Claims Under Articles 2 and 4 of the *Agreement on Safeguards*

15. Argentina argues that, despite articulating a standard of review which essentially requires that a decision be "reasoned" and the decision-making process "explained", the Panel committed "significant legal error" by engaging in a "wholesale exercise of *de novo* review".[28] In its appellant's submission, Argentina referred to the standard of review applied by the panel in *United States – Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*United States – Salmon*")[29], as well as certain national rules of judicial review, for example, in the United States Court of Appeals for the Federal Circuit. Argentina clarified during the oral hearing that it accepts that the appropriate standard of review is found in Article 11 of the DSU, and that the Panel correctly identified this standard of review. Argentina's position is, rather, that having identified the proper standard of review, the Panel did not apply it correctly. Instead, Argentina contends, the Panel erred in conducting a "*de facto de novo*" review of the findings and conclusions of the Argentine investigating authority.

16. In Argentina's view, the Panel's approach demonstrates confusion about the meaning of *de novo* review.[30] The Panel repeatedly substituted its judgment for that of the Argentine authorities and set out its own view of the correct analysis to be made and the conclusions to be drawn. The Panel's analysis went far beyond the approach used in the cases to which to the Panel referred.[31] The Panel read methodologies into the *Agreement on Safeguards* where that Agreement itself is silent, and it did so despite the fact that the Members have reached no agreement on such methodologies. Argentina also contests the Panel's characterization of the object and purpose of the *Agreement on Safeguards* as focused on limiting trade restrictions, and its reliance on this characterization in its reasoning and decision making. Argentina argues that the *Agreement on Safeguards* was in fact intended *both* to increase discipline and transparency in safeguards cases *and* to liberalize some of the rules relating to Article XIX in order to encourage Members to eliminate grey-area measures.

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[28]Argentina's appellant's submission, p. 25.

[29]Panel Report, ADP/87, adopted 27 April 1994, BISD 41S/229, para. 406.

[30]Argentina notes that "*de novo* review" has been defined as "trying the matter anew – as if it had not been heard before." *Black's Law Dictionary* (West Publishing Co., 5th ed., 1979) p. 392.

[31]Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*United States – Underwear*"), WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report WT/DS24/AB/R; Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses* ("*United States – Shirts and Blouses*"), WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report WT/DS33/AB/R.

17. With respect to the Panel's analysis of Argentina's determination that imports had increased, Argentina argues that the Panel collapsed the "increased imports" requirement with other requirements of Article 2, and wrongly treated it as a qualitative, rather than a quantitative requirement. In Argentina's view, the ordinary meaning of increased imports is that imports have become greater, and, contrary to the position of the European Communities, there is no factual or contextual support for any additional requirements in the *Agreement on Safeguards*.

18. Argentina emphasizes that the Panel took a very specific view of how the "increase" in imports must be calculated and compared. Even though the Panel recognized that the five-year base period selected was not inappropriate and that, on the basis of such review period, imports increased, the Panel nevertheless continued its inquiry and imposed a number of methodological hurdles which must be overcome before a finding of "increased imports" can be justified. The Panel misdefined the word "rate" in Article 4 to include "direction", and found that there could only be "increased imports" in this case if: (i) a change in the base year from 1991 to 1992 would still result in an increase; (ii) the analysis of end points and interim periods were mutually reinforcing; and (iii) it was found that the decrease in imports in 1994 and 1995 was temporary.

19. Argentina argues that, in its attempt to arrive at the "correct" result, the Panel ignored the following: (i) 1991 was an appropriate starting point to measure any increase because 1991 was the year in which market reforms were completed in Argentina; (ii) the "mutually reinforcing" requirement means that virtually any decrease in imports during a review period could prevent a finding of increased imports; and (iii) the Argentine decision in Act 338 specifically notes that the decline in imports was due to the specific duties that had been placed on footwear imports.

20. Argentina contends that, in effect, the Panel did not object to the *analysis* made by the Argentine authorities, but to their *conclusion* that imports increased absolutely. The Panel erred because the effect of its approach was to redetermine the weight to be assigned to each fact. Such an approach does not meet the requirement of Article 11 of the DSU that an objective assessment be provided. The Panel also violated Article 11 of the DSU by referring to the *preliminary*, rather than the *final* determination of the Argentine authorities, in support of its findings. In addition, the Panel violated Article 3.2 of the DSU by imposing obligations on Argentina that are not found in the *Agreement on Safeguards*.

21. Argentina submits also that the Panel erred in its analysis of Argentina's determination of "serious injury". In Argentina's view, Article 4.2(c) of the *Agreement on Safeguards* only requires a demonstration of the relevance of the factors examined, and not an examination of whether all factors are relevant. The Panel wrongly found that Argentina had not properly considered the factors of

capacity utilization and productivity, despite the fact that productivity is explicitly mentioned in Act 338 and the data to calculate capacity utilization was available to the Argentine authorities.

22. Argentina argues further that the Panel misinterpreted the evidence on "serious injury" and then found it to be legally deficient. The Panel improperly "required" Argentina to consider 1996 data as part of its injury determination, and erred in dismissing Argentina's argument that it could not have relied on 1996 data, as the record clearly shows that the data for 1996 was incomplete. Argentina submits that it was appropriate and reasonable to use a single review period for which all data was available as the basis for its consideration of all injury factors.

23. Despite certain statements made by the Panel, Argentina argues that the record is clear about the data used for each injury factor. Accordingly, the Panel erred in: (i) finding that Argentina violated the *Agreement on Safeguards* because the questionnaire results did not match such public industry-wide data; (ii) criticizing the Argentine authorities' treatment of interested party data which differed from questionnaire results; (iii) criticizing as inconsistent the data on overall firm profitability and its break-even point analysis; and (iv) finding that Argentina did not explain how a shift to higher-value production was a sign of injury.

24. Argentina argues that the Panel further erred in its findings with respect to causation. The Argentine authorities concluded that imports took market share from the domestic industry, and that this led to a fall in domestic production that caused financial and economic indicators to fall for the companies investigated. The Panel criticized this analysis and set out three of its own "standards". First, the Panel required that an upward trend in imports *coincide* with a *downward* trend in the injury factors. Argentina notes that Article 4.2(c) of the *Agreement on Safeguards* refers to "changes", not "downward trends", so there is no requirement that there be a *downward* trend in each year of the period of review. Moreover, the Panel's requirement of "coincidence" in time is not implied by the term "cause". Second, the Panel used the phrase "under such conditions" to develop a requirement that the "conditions of competition" between imported and domestic footwear in the Argentine footwear market demonstrate a "causal link" between increased imports and injury. Argentina asserts that there is no basis in the *Agreement on Safeguards* for this requirement. Third, the Panel required the Argentine authorities to establish that other relevant factors have been analyzed, and that injury caused by factors other than imports has not been attributed to imports. Argentina maintains that this requirement goes far beyond those actually contained in the *Agreement on Safeguards*, and fails to acknowledge the approach of the Argentine authorities, which ensured that general macroeconomic factors were not attributed to imports.

25. Finally, Argentina believes that the Panel violated Article 12.7 of the DSU, which requires that a panel report include the "basic rationale" behind any findings and recommendations that a panel makes. For example, Act 338 specifically notes that the decline in imports was due to the specific duties placed on footwear imports in 1993. Argentina contends that the Panel ignored this in its insistence that the *Agreement on Safeguards* requires an analysis of intervening trends and its criticism of Argentina for failing to take such trends into account. Argentina contends also that the Panel misinterpreted the evidence before it on "serious injury" and then found that evidence to be legally deficient. In Argentina's opinion, therefore, the Panel's conclusions "are not rational and do not follow logically from the evidence".[32]

B. *Arguments by the European Communities – Appellee*

1. Terms of Reference

26. The European Communities does not agree with Argentina that the Panel erred in considering or relying, in its reasoning, on Article 3 of the *Agreement on Safeguards* and, accordingly asks the Appellate Body to affirm the Panel's conclusions in that respect. The European Communities notes that the Panel has not found a violation of Article 3 of the *Agreement on Safeguards as such*. Instead the Panel legitimately referred to the requirements contained in Article 3.1 when considering the violation of Article 4.2(c) (which the European Communities did invoke), because Article 4.2(c) contains a cross-reference to Article 3. Moreover, the European Communities argues that, even in the absence of a specific cross-reference, panels and the Appellate Body may, in their reasoning, legitimately rely on a provision that was not mentioned in the request for the establishment of a panel. The European Communities notes also that it made no claim of a violation of Article 3.

2. Imposition of Safeguard Measures by a Member of a Customs Union

27. The European Communities agrees with the Panel that the *Agreement on Safeguards* contains a "parallelism" requirement. By taking into consideration imports from MERCOSUR countries for the purposes of making its injury determination, even though it never intended to impose measures on those imports, Argentina violated its obligations under the *Agreement on Safeguards* and Article XIX of the GATT 1994. During the oral hearing, the European Communities emphasized, however, that the Panel's interpretation of Article XXIV of the GATT 1994 and Article 2.2 of the *Agreement on Safeguards* was not necessary to support its conclusion that a parallelism requirement exists, that no claim relating to the legal status of MERCOSUR was made before the Panel, and that

[32]Argentina's appellant's submission, p. 61.

neither party to this dispute has appealed the Panel's apparent assumption that Article XXIV is applicable.

28. The European Communities points out that the text of Article 2.1 of the *Agreement on Safeguards* sets out the *requirements* which should be fulfilled before a Member may apply a *safeguard measure*. This provision therefore underscores the inherent link between the *requirements* and the *measure*. Article 5 of the *Agreement on Safeguards* reinforces such a link by providing that "[a] Member shall apply safeguard measures only *to the extent necessary* to prevent or remedy serious injury" and that "Members should choose measures *most suitable* for the achievement of these objectives." In the view of the European Communities, Article 9 of the *Agreement on Safeguards* does not support Argentina's position that there is no "parallelism requirement" in the *Agreement on Safeguards*. Article 9 contains an express exception to the concept of "parallelism", but no similar express exception is foreseen for members of customs unions.

29. The European Communities argues that Article XIX of the GATT 1994 also requires parallelism. A liberalization obligation must give rise to increased imports, which in turn must cause serious injury. Under Article XIX, the authorized remedy for that serious injury can only be the suspension of the relevant GATT or WTO liberalization obligation. Accordingly, obligations incurred by Argentina *within the framework of its customs union* cannot justify a safeguard measure, and imports subject to such obligations must be excluded from the analysis. The European Communities notes in this context that there is no WTO obligation on Argentina not to impose safeguard measures on its MERCOSUR partners, only an internal MERCOSUR commitment.

3. Claims Under Articles 2 and 4 of the *Agreement on Safeguards*

30. The European Communities maintains that the Panel correctly interpreted and applied the standard of review contained in Article 11 of the DSU, and did not engage in a *de novo* review.

31. The European Communities requests the Appellate Body to uphold the Panel's findings on "increased imports". The European Communities submits that the requirement of "increased imports" in Article 2.1 of the *Agreement on Safeguards* "should now be read in the light of the new package of rights and obligations,"[33] including Article XIX of the GATT 1994, and the *Agreement on Safeguards*, as well as on the basis of the object and purpose of these agreements. Given the content of the new "package", the determination of "increased imports" necessarily contains more than it did under the safeguard regime governed by Article XIX of the GATT 1947. The European Communities concludes that a strictly quantitative interpretation of the "increased imports" requirement (assuming

[33]European Communities' appellee's submission, para. 71.

arguendo that such an interpretation existed under Article XIX of the GATT 1947) can no longer be reconciled with the functioning of the safeguard mechanism under the WTO.

32. In the view of the European Communities, the Panel did not, as Argentina claims, require that both the end point to end point analysis and the intervening periods *must be* mutually reinforcing. Rather, the Panel concluded that the Member taking a safeguard measure should determine whether or not imports increased by examining the issue from more than just one angle. If one analysis goes in a different direction from the other, then, as the Panel says, this "raises doubts" as to whether the conclusion that "imports increased" is justified, and a proper explanation is required. The European Communities also highlights the fact that the Panel has based its reasoning on the "increased imports" requirement on the import figures for *all* countries, that is, *including* MERCOSUR countries. The European Communities argues that Argentina's non-fulfilment of the requirement of "increased imports" is even more striking when third-country imports are separated out.

33. The European Communities submits that the Panel correctly analysed Argentina's serious injury determination as required by Article 11 of the DSU and was justified in concluding that this determination did not comply with the *Agreement on Safeguards*. In the view of the European Communities, the ordinary meaning of the requirement contained in Article 4.2(a) of the *Agreement on Safeguards* that "the competent authorities shall evaluate all relevant factors" is that such authorities are required to: (i) evaluate *at least* all of the factors mentioned in Article 4.2(a), and possibly more, if necessary; and (ii) on the basis of this examination demonstrate – and publish – the relevance of the factors considered. The European Communities submits that the Panel correctly concluded that Argentina failed to undertake these legally required steps with regard to capacity utilization and productivity.

34. The European Communities also requests the Appellate Body to uphold the Panel's analysis of Argentina's treatment of 1996 data. Article 4.2(a) of the *Agreement on Safeguards* requires "*all relevant factors*" to be considered, and the most *relevant* information is the most *recent*. The European Communities rejects Argentina's claim that, since it could consider 1996 data for some but not for all factors, it was reasonable to use a single review period for which all data are available. The *Agreement on Safeguards* does not oblige Members to base their determinations on a complete set of data for *all* factors for a *fixed* time-frame. By deliberately ignoring the 1996 information for those factors for which it *had* collected the information, Argentina made conclusions which were not reasonably supported by the facts.

35. The European Communities submits that the Panel correctly analysed Argentina's causation determination, as required by Article 11 of the DSU, and was justified in concluding that this

determination did not meet the requirements set out in Article 4 of the *Agreement on Safeguards.* In the view of the European Communities, the ordinary meaning of the term causation is "the act of causing or producing an effect".[34] One event (the increase in imports) must *produce* the other event (serious injury). If the two events take place simultaneously, then the probability that the events are linked is greater than if they happen many years apart. The longer the time between the two events, the more a compelling analysis is required of why causation is still present.

36. The European Communities considers that the Panel correctly interpreted the "under such conditions" requirement in Article 2.1 of the *Agreement on Safeguards* as indicating the need to analyse the conditions of competition between the imported product and the domestic like or directly competitive products as part of the causation analysis required by Article 4.2(a) and (b).[35] The European Communities disputes Argentina's claim that Article 4.2(b) of the *Agreement on Safeguards* does not require a separate analysis of possible "other" factors. In order to conclude that no "other" factor had caused the serious injury, the European Communities submits that it is necessary to examine whether there were such other factors present and to examine their impact on the domestic industry. In the view of the European Communities, by not providing such an analysis, in particular of the "tequila effect", Argentina violated Article 4.2(b) and (c) of the *Agreement on Safeguards*.

37. With respect to Argentina's claim of a violation of Article 12.7 of the DSU, the European Communities submits that, as the Appellate Body found in *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*")[36], the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case, as required by Article 12.7 of the DSU, and, therefore, there is no violation.

C. *Claims of Error by the European Communities – Appellant*

1. Relationship Between Article XIX of the GATT 1994 and the *Agreement on Safeguards*

38. The European Communities appeals and requests the Appellate Body to reverse the Panel's conclusion that safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new *Agreement on Safeguards* also thereby satisfy the requirements of Article XIX of the GATT 1994, as well as the Panel's consequent refusal to rule on the European Communities' Article XIX claim. The European Communities further requests the Appellate Body to

[34]European Communities' appellee's submission, para. 121.

[35]Panel Report, para. 8.250.

[36]Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, para. 168.

reverse the legal interpretations and findings made in support of this conclusion, notably the Panel's erroneous reference to the "*express omission* of the criterion of unforeseen developments" in the *Agreement on Safeguards*. The European Communities requests the Appellate Body to complete the Panel's reasoning and find, on the basis of the uncontested facts, that Argentina did not comply with the requirement contained in Article XIX:1(a) of the GATT 1994 to take safeguard measures only where the alleged increase in imports is "*as a result of unforeseen developments*".

39. The European Communities asserts that the requirement that increased imports result from "unforeseen developments" is a fundamental characteristic of safeguard measures, and lies at the beginning of the "logical continuum" of events justifying the invocation of the safeguard mechanism. This starts with a WTO Member incurring an obligation under the GATT 1994. After this obligation is implemented, an unforeseen development occurs, resulting in increased imports, which occur under conditions such that serious injury (or a threat thereof) is caused. In the view of the European Communities, if this chain of events has occurred, then a WTO Member may take a safeguard measure.

40. The European Communities is convinced that the WTO agreements are a "single undertaking" which constitutes an "integrated system". The requirement that increased imports must result from "unforeseen developments" and the other fundamental characteristics of safeguard measures were not expressly repeated in the *Agreement on Safeguards* because they did not need to be clarified, added to or modified.

41. The European Communities submits that there are four possible relationships between a provision of the GATT 1994 and an Agreement in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), namely: a *conflict* between provisions of the two texts; an *overlap* of provisions of the two texts[37]; *an express derogation* in an Agreement in Annex 1A of the *WTO Agreement* that allows for a violation of the GATT 1994; and provisions that are *complementary*. The European Communities argues that the fourth option, i.e, *complementary* provisions, describes the relationship between Article XIX:1(a) and Article 2.1 of the *Agreement on Safeguards*, and should have formed the basis for the Panel's reasoning. The Appellate Body has confirmed in *Brazil – Desiccated Coconut*[38] and *Guatemala – Antidumping Investigation Regarding Grey Portland Cement from Mexico (*"*Guatemala – Cement*")[39] that provisions of the

[37]See e.g., Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities – Bananas*"), WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, para. 203.

[38]*Supra*, footnote 24.

[39]Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998.

GATT 1994 and the relevant Agreement in Annex 1A of the *WTO Agreement* represent a package of rights and disciplines that must be considered in conjunction. Applying this to the present case, the European Communities argues that the *Agreement on Safeguards* does not supersede or replace the GATT 1994, and that it is possible to apply the conditions in the GATT 1994 and the *Agreement on Safeguards* together, because there is no formal *conflict* between them.

42. The European Communities argues that the ordinary meaning of the term "*as a result of unforeseen developments*" is "as a consequence of a sudden change in a course of action or events or in conditions that has not been foreseen".[40] The European Communities agrees that the opening phrase of Article XIX:1(a) of the GATT 1994 is relevant context for the "*as a result of unforeseen developments*" requirement, but comes to a conclusion opposite to that reached by the Panel. This phrase makes clear that there are two pre-conditions which need to be present before a safeguard action can be taken. Imports should increase *as a result of* unforeseen developments, and also *as a result of* the effect of tariff concessions or any other obligations under the GATT 1994.

43. The European Communities rejects the reasoning of the Panel on the object and purpose of the *Agreement on Safeguards*. In the view of the European Communities, the object and purpose of the *Agreement on Safeguards* is inherently linked with Article XIX of the GATT 1994, entitled "*Emergency Action* on Imports of Particular Products". (emphasis added) Therefore, safeguard measures are by definition a mechanism based on "emergencies": the very nature of a safeguard measure is to tackle an *urgent* situation which was *not expected*.

44. The European Communities is of the view also that the Panel mis-interpreted the 1951 *Hatters' Fur* case[41] by stating that it "made it easier" to meet the "*unforeseen developments*" condition, and that the Panel wrongly gave credit to the view of one legal scholar that this case "essentially read the unforeseen developments condition out of the text of Article XIX:1(a) of GATT 1947".[42] In fact, the *Hatters' Fur* Working Party confirmed the validity and relevance of the "*as a result of unforeseen developments*" requirement. The European Communities adds that further support for the continuing validity of the "*as a result of unforeseen developments*" requirement is found in recent texts of national legislation notified by WTO Members. Korea, Costa Rica, Norway, Panama and Japan have all incorporated the phrase in their national laws.

[40]European Communities' appellant's submission, para. 24.

[41]*Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX*, ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951.

[42]Panel Report, para. 8.65, footnote 470.

D. *Arguments by Argentina – Appellee*

1. Relationship Between Article XIX of the GATT 1994 and the *Agreement on Safeguards*

45. Argentina requests the Appellate Body to affirm the Panel's finding that "safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT"[43] and to decline to consider the claims of the European Communities under Article XIX separately. Argentina maintains that the "unforeseen developments" requirement in Article XIX has not been included in the *Agreement on Safeguards*, and that this significant omission can only be attributed to the intention of Members to eliminate that requirement *as a condition separate from and independent of the provisions of the Agreement on Safeguards*.

46. Argentina finds no legal text or other element that supports the reasoning of the European Communities that there is a "logical continuum of events" that conditions the application of a safeguard measure and that begins with the condition that "unforeseen developments" must occur. To Argentina, it is clear that the Uruguay Round undertook to recast the disciplines governing the application of safeguard measures by clarifying, developing and, where appropriate, modifying some aspects of those disciplines. If the entire content of Article XIX were perfectly consistent with the *Agreement on Safeguards*, there would have been no need to include in Article 11.1(a) the reference to "provisions of that Article applied in accordance with this Agreement".

47. In Argentina's view, the fact that certain Article XIX provisions are not expressly incorporated in the *Agreement on Safeguards* does not support the position of the European Communities. For example, the concept of "emergency action" is incorporated *by reference* in Article 11.1(a), with the clarification that any measure of this kind must be applied in conformity both with the *Agreement on Safeguards* and with Article XIX, and the provision that safeguard measures consist of the suspension of the relevant GATT obligation or the withdrawal or modification of the relevant concession appears in Article 8 of the *Agreement on Safeguards*. Similarly, the concept of "unforeseen developments" is now fully met once the conditions under Article 2 of the *Agreement on Safeguards* have been satisfied. Consequently, Argentina submits that it is clear that a situation in which a product is being imported "in such increased quantities" and "under such conditions" as to cause or threaten serious injury is now, by definition, an instance of "unforeseen developments" within the meaning of Article XIX and Article 2 of the *Agreement on Safeguards*.

[43]Panel Report, para. 8.69.

48. Argentina argues that none of the four possible interpretations put forward by the European Communities constitutes the proper analytical approach based on *Brazil - Desiccated Coconut*. The panel in *Brazil – Desiccated Coconut* specifically rejected the notion that the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") merely imposed *additional* substantive and procedural obligations[44] or that a measure imposed under that Agreement and under Article VI of the GATT 1994 would necessarily be consistent with Article VI in isolation.[45] Argentina interprets this case to mean that Article VI in and of itself can no longer have an independent, separate meaning, and that both agreements must be considered in conjunction.[46]

49. Argentina refers to the negotiating history of the *Agreement on Safeguards* in support of its position, noting that the June 1989 draft of that Agreement contained the concept of an "unforeseen increase … " in imports.[47] By mid-1990, though, all references to measures taken as a result of unforeseen or emergency situations had disappeared from the drafts of the *Agreement on Safeguards*.[48] Thus, in Argentina's view, the requirement that the increase in imports should result from unforeseen circumstances was expressly considered during the negotiation and intentionally left out of the text.

50. Argentina highlights the fact that the European Communities eliminated the "unforeseen developments" requirements from its domestic legislation on safeguards.[49] Argentina considers this to be proof that the European Communities did not itself consider that the requirement existed in the context of the new rights and obligations defined and interpreted in the *Agreement on Safeguards*.

51. Argentina requests that if the Appellate Body does not accept the Panel's interpretation, then, in the alternative, the Appellate Body should find that there is a "conflict" between the *Agreement on Safeguards* and Article XIX, and confirm that the *Agreement on Safeguards* takes precedence over Article XIX in accordance with the General Interpretative Note to Annex 1A. Finally, in the event that the Appellate Body finds that there is a separate obligation to verify the existence of unforeseen developments, Argentina requests, in the further alternative, that the Appellate Body find that Argentina did verify such unforeseen developments in its investigation. Argentina stated in its

[44]Panel Report, WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report, WT/DS22/AB/R, para. 246.

[45]*Ibid*., para. 247.

[46]Appellate Body Report, *Brazil – Desiccated Coconut*, *supra*, footnote 24, p. 16

[47]MTN.GNG/NG9/W/25, 27 June 1989.

[48]MTN.GNG/NG9/W/25/Rev.2, 13 July 1990.

[49]EC Regulation 3285/94, OJ 1994 L349/53.

decision that "the pressure of imports was unforeseen on account of its rapid pace of increase at a time when the national economy was facing macroeconomic problems".[50]

E. *Arguments by the Third Participants*

1. Indonesia

52. Indonesia agrees with the European Communities that Argentina's safeguard measure was "fatally flawed" because it was not imposed in response to "unforeseen developments" as required by Article XIX of the GATT 1994. Indonesia also joins the European Communities in its request that the Appellate Body complete the Panel's analysis and hold that Argentina acted in violation of Article XIX. In Indonesia's view, the Panel's treatment of Article XIX and the *Agreement on Safeguards* is in direct conflict with the construction of the relationship between the GATT 1994 and the Annex 1A Agreements by previous panels and by the Appellate Body. Referring to the panel report in *European Communities – Bananas*[51], as well as to the Appellate Body reports in *Brazil – Desiccated Coconut*[52] and *Guatemala – Cement*[53], Indonesia submits that the Panel erred in law when it refused to apply Article XIX and the *Agreement on Safeguards* together, giving meaning to *all* terms in *both* agreements. Indonesia adds that, by reading the "unforeseen developments" requirement out of the WTO system altogether, the Panel removed an important protection against abuse of the safeguard mechanism.

53. Indonesia submits that Argentina's interpretation of footnote 1 to Article 2.1 of the *Agreement on Safeguards* is incorrect. Footnote 1 relates to the imposition of a safeguard measure by a customs union. Here, however, no action was taken *by a customs union*. Rather, Argentina independently investigated and imposed the safeguard measure on its own behalf. Footnote 1 says *nothing* about the obligations of, or any conditions affecting, a member of a customs union *acting individually*. For the same reason, even assuming *arguendo* that Argentina's interpretation of the negotiating history of footnote 1 is correct, it does not support Argentina's argument, because the language on which the parties allegedly could not reach agreement would not have applied to Argentina's actions in this case, i.e., to where a safeguard measure is applied *by a state acting independently*. Indonesia also questions whether Article XXIV is applicable to MERCOSUR, as the members of MERCOSUR did not notify the customs union under Article XXIV of either the GATT 1947 or the GATT 1994.

[50]Act 338, folio 5350.

[51]*Supra*, footnote 37, para. 7.160.

[52]See *Brazil – Desiccated Coconut*, *supra*, footnote 24, p. 14.

[53]*Supra*, footnote 39, para. 65.

54. Indonesia adds that even if footnote 1 were somehow applicable to Argentina's action by virtue of its MERCOSUR membership, that footnote would only permit a derogation from the obligations contained in *Article 2.1* of the *Agreement on Safeguards*. However, Argentina's independent imposition of a safeguard against only non-MERCOSUR countries violates *Article 2.2*, which obliges Members to apply safeguard measures in a nondiscriminatory fashion.

55. Indonesia maintains that the Panel's analysis of the "parallelism requirement" is best understood, not as an interpretation of the terms of the *Agreement on Safeguards* as such, but as an explanation of how – in practical terms – a Member can reconcile its WTO obligations under the *Agreement* with commitments that it may have made separately to members of its customs union. Argentina agreed with its fellow MERCOSUR members to refrain from applying safeguard measures against one another. That "extra-WTO" agreement, however, cannot exempt Argentina from its obligations *vis-à-vis* all other WTO Members under the *Agreement on Safeguards*.

56. Indonesia submits that the Panel properly refrained from conducting a *de novo* review of the determinations by Argentine authorities. In Indonesia's view, it was well within the scope of the Panel's authority to assess whether those determinations were reasonably supported by the results of the investigation. Moreover, Indonesia believes that, because Argentina failed to demonstrate "increased imports", failed to demonstrate "serious injury", and failed to demonstrate causation, the Panel correctly concluded that Argentina violated Articles 2 and 4 of the *Agreement on Safeguards*.

57. With respect to "increased imports", Indonesia characterizes Argentina's principal complaint as a belief that the Panel imposed new obligations on Members to use specific methodologies. In Indonesia's view, however, the Panel Report merely points out analytical flaws in Argentina's analysis; it is *not* fairly read as imposing specific requirements. Indonesia contends that Argentina ignored the "tense" of Article 2 of the *Agreement on Safeguards* – its focus on present and future rather than past events. In this respect, Indonesia points out that Argentina's failure to consult 1996 data did not itself constitute a violation of Article 2 and also that the Panel did not characterize it as such. The Panel simply found fault with Argentina's failure to weigh *all* the available data, particularly where the missing data would tend to contradict Argentina's finding of an "increase."

58. With respect to "serious injury", Indonesia underlines that Argentina failed to consider two factors that it was specifically required to evaluate under Article 4.2(a) – productivity and capacity utilization. Indonesia rejects Argentina's claim that it may pick and choose *a priori* the factors that it wishes to examine, and explain the relevance of those selected factors after the fact. Indonesia is also of the view that the Panel correctly held that Argentina relied on inadequate evidence even for those "serious injury" factors that it did choose to consider.

59. Indonesia submits that the Panel's conclusion that Argentina had not identified evidence or analysis on which it could reasonably base a determination of causation should also be upheld. Argentina failed to separate out the effects of other economic factors – such as the "tequila effect" – from the effects of footwear imports on the domestic industry. Indonesia agrees with the Panel that it is not enough simply to juxtapose the imports and the injury, and then to assert that there must be a link between them. If Argentina did not or cannot explain *how* the alleged increase in imports caused the alleged harm to its domestic manufacturers, then, Indonesia submits, the mere correspondence of these events in time will not support the imposition of a safeguard measure.

2. United States

60. The United States submits that the Panel correctly found that safeguard investigations conducted and safeguard measures imposed since the entry into force of the WTO agreements which meet the requirements of the *Agreement on Safeguards* also thereby satisfy the requirements of Article XIX of the GATT 1994. The United States requests the Appellate Body to uphold this ruling, as well as the Panel's consequent decision to decline to rule on the Article XIX claim by the European Communities.

61. The United States notes that while the *Agreement on Safeguards* defines "safeguard measures" as "those measures provided for in Article XIX", a number of the provisions of the Agreement, including Articles 2, 3, 4, 5, 7, 8.3, 9 and 10, either limit the rights provided in Article XIX or provide rights ruled out by Article XIX. In addition, the United States observes that the preamble of the Agreement refers to a "comprehensive agreement, applicable to all Members", and notes the need to re-establish control over safeguards measures and to eliminate grey-area measures. These objectives were achieved through an agreement that imposed new procedural requirements, enhanced transparency and consultation requirements, but loosened in some respects the strict requirements of Article XIX, while explicitly prohibiting grey-area measures. If it were possible for Members to pick and choose between the rights and obligations in the original package of Article XIX, and the rights and obligations in the *Agreement on Safeguards*, then the entire project represented by that Agreement would be revised *post hoc*, and the negotiated balance would be fundamentally upset.

62. The United States argues that the rebalancing of Article XIX was a fundamental premise of the negotiations on safeguards. Because of the problem of grey-area measures, the agreement had to be comprehensive and had to apply to all contracting parties. That rebalancing included the removal of the "unforeseen developments" condition for safeguard measures. Therefore, the text of Article XIX now cannot be read outside the context of the *Agreement on Safeguards*, and that

Agreement now completely occupies the field of regulation of safeguard measures in the WTO system. The United States concludes that the omission of "unforeseen developments" from the Agreement was intentional, and that this express omission must be given meaning.

63. The United States notes that legal scholars agree that under the *Agreement on Safeguards*, "unforeseen developments" are no longer a prerequisite for a safeguard action[54], and that state practice has also treated the question of "unforeseen developments" as "marginal, legally nonbinding or subsumed by other aspects of the safeguards process".[55] The United States underlines that the great majority of safeguards legislation notified to the WTO (including that of the European Communities) does not even refer to "unforeseen developments". With respect to the *Hatters' Fur* case of 1951[56], the United States considers that, while this case cannot contradict the substantive rebalancing that took place in the Uruguay Round, it does help to clarify the legal interpretation of "unforeseen developments" under the GATT 1947, the reasons why negotiators were willing to omit this concept from the Uruguay Round results, and how a determination which fully satisfies the requirements of Article 2.1 may also satisfy the "unforeseen developments" requirement.

64. With respect to the Panel's interpretation of footnote 1 to Article 2.1 of the *Agreement on Safeguards*, the United States refers to its view of the negotiating history of the footnote, as set out *in extenso* in paragraph 6.32 of the Panel Report and in footnote 396 to that paragraph. The United States emphasizes the reason why this footnote follows the word "Member": due to the unique status of the European Communities in the GATT, and to the fact that the European Communities did take safeguards measures, a special provision was needed to deal with the application of safeguards by the European Communities.

65. The United States also notes that Argentina and the Panel have wrongly referred to Article XXIV of the GATT 1994. In the view of the United States, MERCOSUR has never been notified under Article XXIV. The parties to MERCOSUR have chosen to notify it instead exclusively under the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries[57] (the "Enabling Clause"). The United States contends that, having made this legal choice, Argentina is now precluded from basing its arguments on the

[54]M.C.E.J. Bronckers, "Voluntary Export Restraints and the GATT 1994 Agreement on Safeguards," in J.H.J. Bourgeois, F. Berrod and E.Fournier (eds.), *The Uruguay Round Results: A European Lawyers' Perspective*" (European University Press, 1995), p. 275; M. Trebilcock and R. Howse, *The Regulation of International Trade* (2nd ed., 1999), p. 228.

[55]United States' third participant's submission, para. 22.

[56]*Supra*, footnote 41.

[57]L/4903, adopted 28 November 1979, BISD 26S/203.

assumption that MERCOSUR is an Article XXIV agreement, and that, therefore, the fourth sentence of footnote 1 to Article 2.1 of the *Agreement on Safeguards* is legally irrelevant in this case.

66. The United States submits that the Panel identified and applied the proper standard of review. A fair reading of the Panel Report demonstrates that the Panel did not, as Argentina alleges, engage in *de novo* review or construct alternate methodologies that it then concluded Argentina had failed to satisfy. Rather, the Panel properly examined whether Argentina had evaluated the relevant evidence, reached conclusions that were reasonably supported by the evidence, and adequately explained the reasoning set forth in its findings and conclusions. On this basis, and in keeping with the applicable standard of review, the Panel properly concluded that Argentina's actions were inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*.

67. With respect to "increased imports", the United States emphasizes that the Panel *did not* re-evaluate the facts or impose a specific methodology for collecting or evaluating the evidence. The Panel did not conclude that an end point analysis is *per se* inconsistent with the *Agreement on Safeguards*. Rather, the United States believes, the contrary evidence on interim periods was so significant that, in the absence of an explanation in Argentina's determination concerning how it had evaluated that contrary evidence, the Panel could not conclude that Argentina's determination that imports had increased constituted an objective evaluation of the record as a whole.

68. The United States argues also that the Panel properly found that Argentina's conclusions with respect to "serious injury" were not adequately supported by the evidence. The Panel's determination that, under Article 4.2(a), a Member must evaluate *all* relevant factors is consistent with past panel practice, including *United States – Underwear* and *United States – Shirts and Blouses*.[58] The United States also rejects as without merit Argentina's attacks on the Panel's determination that Argentina's findings and conclusions were not adequately explained and supported by the evidence.

69. On the question of causation, the United States notes that Argentina alleges *inter alia* that the Panel articulated a series of "new standards" that Argentina had to satisfy, rather than analyzing the adequacy of Argentina's actual decision. However, the United States asserts that the Panel's determination makes clear that what is at issue is Argentina's failure to provide sufficient evidence to justify its decision. The United States concludes that the Panel correctly found that Argentina's measure cannot be sustained where the underlying decision does not demonstrate that Argentina considered the relevant evidence and provided a reasoned explanation of its conclusions.

[58] *Supra*, footnote 31.

III. Issues Raised In This Appeal

70. This appeal raises the following issues:

(a) whether the Panel exceeded its terms of reference in its consideration of Article 3 of the *Agreement on Safeguards*;

(b) whether the Panel erred: in concluding that "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT"; in its consequent refusal to consider the EC's claims under Article XIX of the GATT 1994; and in its conclusion that the phrase "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994 was "*expressly omitted*" from the *Agreement on Safeguards* and, therefore, has no relevance for a safeguard measure imposed under the *Agreement on Safeguards*;

(c) whether the Panel erred in its interpretation and application of Article 2 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994 as these provisions relate to the application of the safeguard measure at issue in this case;

(d) whether the Panel: enunciated and applied the correct standard of review in this case; erred in its interpretation and application of the conditions for imposing a safeguard measure set forth in Articles 2 and 4 of the *Agreement on Safeguards*, in particular, increased imports, serious injury and causation; and set out a "basic rationale" for its findings as required by Article 12.7 of the DSU.

IV. Terms of Reference

71. Argentina argues, on appeal, that the Panel violated Article 7.2 of the DSU and exceeded its terms of reference, because the Panel not only considered, but also relied on, alleged violations of Article 3 of the *Agreement on Safeguards* even though the request for the establishment of a Panel submitted by the European Communities only alleged violations of Articles 2 and 4 of the *Agreement on Safeguards*. Argentina maintains, in particular, that the Panel's references to Article 3 contained in paragraphs 8.205, 8.207, 8.218 and 8.238 of the Panel Report[59] demonstrate that the Panel relied on

[59]At page 1 of its appellant's submission, Argentina also referred to the Panel's reasoning in paragraphs 8.126 and 8.127 of the Panel Report. During the oral hearing, however, Argentina limited its arguments to paragraphs 8.205, 8.207, 8.218 and 8.238 of the Panel Report.

obligations contained in Article 3 in reaching its conclusion that Argentina did not act in compliance with its obligations under Article 4.2(c) of the *Agreement on Safeguards*.

72. Article 4.2(c) of the *Agreement on Safeguards* provides as follows:

> 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. (emphasis added)

Article 3 provides, in relevant part:

> 1. … The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

73. We have examined the specific paragraphs in the Panel Report cited by Argentina, and we see no *finding* by the Panel that Argentina acted inconsistently with Article 3 of the *Agreement on Safeguards*. In one instance[60], the Panel referred to Article 3 parenthetically in support of its reasoning on Article 4.2(a) of the *Agreement on Safeguards*. Every other reference to Article 3 cited by Argentina was made by the Panel in conjunction with the Panel's reasoning and findings relating to Article 4.2(c) of the *Agreement on Safeguards*. None of these references constitutes a legal finding or conclusion by the Panel regarding Article 3 itself.

74. We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the *Agreement on Safeguards*. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) *without* taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an "objective assessment of the matter", as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims.

75. Consequently, we conclude that the Panel did not exceed its terms of reference by referring in its reasoning to the provisions of Article 3 of the *Agreement on Safeguards*. On the contrary, we find that the Panel was *obliged* by the terms of Article 4.2(c) to take the provisions of Article 3 into

[60]Panel Report, para. 8.238.

account. Thus, we do not believe that the Panel erred in its reasoning relating to the provisions of Article 3 of the *Agreement on Safeguards* in making its findings under Article 4.2(c) of that Agreement.

V. Article XIX of the GATT 1994 and "Unforeseen Developments"

76. The European Communities appeals the Panel's conclusion "that safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT."[61] The European Communities appeals as well the Panel's consequent refusal to rule on the European Communities' Article XIX claim, and asks the Appellate Body to reverse the legal interpretations and findings of the Panel made in support of this conclusion, notably the "fundamental error" made by the Panel when it referred to the "*express omission* of the criterion of unforeseen developments" in the *Agreement on Safeguards*.[62] The European Communities argues that the requirement of increased imports resulting from "unforeseen developments" is a fundamental characteristic of a safeguard measure because it lies at the beginning of a "logical continuum" of events justifying the invocation of a safeguard measure.[63] The European Communities requests the Appellate Body to find, on the basis of uncontested facts in the Panel Report, that Argentina did not comply with the requirement in Article XIX:1(a) of the GATT 1994 that safeguard measures may only be taken when the alleged increase in imports is "a result of unforeseen developments".[64]

77. In concluding that safeguard investigations and safeguard measures imposed after the entry into force of the *Agreement on Safeguards* which meet the requirements of that Agreement also thereby "*satisfy*" the requirements of Article XIX of the GATT 1994, the Panel made the following observations about the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*:

[61]Panel Report, para. 8.69.

[62]European Communities' appellant's submission, para. 5.

[63]*Ibid*., para. 17.

[64]*Ibid*., para. 138.

> … the application of safeguard measures in the meaning of Article XIX requires - since the entry into force of the Safeguards Agreement - conformity with the requirements and conditions of the latter agreement. Although all the provisions of Article XIX of GATT continue to legally co-exist with the Safeguards Agreement in the framework of the single undertaking of the Uruguay Round agreements, any implementation of safeguard measures in the meaning of Article XIX presupposes the application of and thus compliance with the provisions of the Safeguards Agreement.[65]
>
> …
>
> … While the Safeguards Agreement does not supersede or replace Article XIX, which continues to remain in force as part of the GATT, the original conditions contained in Article XIX have to be read in the light of the subsequently negotiated and much more specific provisions of the Safeguards Agreement. Those provisions of the Safeguards Agreement place the original rule of Article XIX within the entire package of the new WTO legal system and make it operational in practice.[66]
>
> …
>
> … Given the reasoning developed by the panel and the Appellate Body in the *Brazil - Desiccated Coconut* case, it is our view that Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction. Therefore, we conclude that Article XIX of GATT cannot be understood to represent the total rights and obligations of WTO Members, but that rather the Safeguards Agreement as applying the disciplines of Article XIX of GATT, reflects the latest statement of WTO Members concerning their rights and obligations concerning safeguards. Thus the Safeguards Agreement should be understood as *defining, clarifying, and in some cases modifying* the whole package of rights and obligations of Members with respect to safeguard measures as they currently exist. By the same token, and in the light of the principle of effective treaty interpretation, the *express omission* of the criterion of unforeseen developments in the new agreement (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must, in our view, have meaning.[67]
>
> …

[65]Panel Report, para. 8.55.

[66]*Ibid*., para. 8.56.

[67]*Ibid*., para. 8.58.

> … it is our conclusion that safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT. Therefore, we see no basis to address the EC's claims under Article XIX of GATT separately and in isolation from those under the Safeguards Agreement.[68]

78. In addressing this issue, we will examine, first, whether the Panel is correct in its conclusion about the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994, and, second, whether the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " in Article XIX:1(a) of the GATT 1994 continues to have any meaning and legal effect.

79. With respect to the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994, we begin with Article II of the *WTO Agreement*. Paragraph 2 of that Article stipulates:

> The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are *integral parts* of this Agreement, *binding on all Members*. (emphasis added)

Paragraph 4 of that Article provides:

> The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is *legally distinct* from the General Agreement on Tariffs and Trade, dated 30 October 1947 … (hereinafter referred to as "GATT 1947"). (emphasis added)

80. We note that the GATT 1994 is the first agreement that appears in Annex 1A to the *WTO Agreement*, and that it consists of: the provisions of the GATT 1947, as rectified, amended or modified by the terms of legal instruments that entered into force before the entry into force of the *WTO Agreement*; the provisions of certain legal instruments, such as protocols and certifications, decisions on waivers and other decisions of the CONTRACTING PARTIES to the GATT 1947, that entered into force under the GATT 1947 before the entry into force of the *WTO Agreement*; certain Uruguay Round Understandings relating to specific GATT articles; and the Marrakesh Protocol to the GATT 1994 containing Members' Schedules of Concessions.[69]

[68]Panel Report, para. 8.69.

[69]See paragraph 1 of the language incorporating the GATT 1994 into Annex 1A of the *WTO Agreement*.

81. Thus, the GATT 1994 is *not* the GATT 1947. It is "legally distinct" from the GATT 1947. The GATT 1994 and the *Agreement on Safeguards* are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are *both* "integral parts" of the same treaty, the *WTO Agreement*, that are "binding on all Members".[70] Therefore, the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. And, as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction."[71] Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.[72] And, an appropriate reading of this "inseparable package of rights and disciplines" must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements.

82. The drafters of the *WTO Agreement* addressed this issue specifically. The precise nature of the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the *WTO Agreement* is described in Articles 1 and 11.1(a) of the *Agreement on Safeguards* as follows:

> *Article 1*
>
> *General Provision*
>
> This Agreement establishes rules for the application of *safeguard measures* which shall be understood to mean *those measures provided for in Article XIX of GATT 1994*. (emphasis added)
>
> *Article 11*
>
> *Prohibition and Elimination of Certain Measures*
>
> 1. (a) A Member shall not take or seek any *emergency action* on imports of particular products *as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement*. (emphasis added)

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[70] *WTO Agreement*, Article II:2.

[71] Panel Report, para. 8.58.

[72] We have recently confirmed this principle in our Report in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, p. 23; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 12; Appellate Body Report, *India – Patents*, *supra*, footnote 25, para. 45.

83. We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish "rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of GATT 1994." (emphasis added) This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language "unless such action *conforms with the provisions of that Article applied in accordance with this Agreement*" (emphasis added) clearly is that any safeguard action must *conform with* the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Neither of these provisions states that any safeguard action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards*.[73]

84. Thus, we conclude that any safeguard measure[74] 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.

85. As a consequence, we must examine the claims of the European Communities under Article XIX of the GATT 1994, and, specifically, its claim on appeal that the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in Article XIX:1(a) of the GATT 1994 is a requirement that must be satisfied in order for a safeguard measure to be imposed.

86. The provisions of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, which together set out the conditions for applying a safeguard measure under the *WTO Agreement*, read as follows:

[73]We note that the provisions of Article 11.1(a) of the *Agreement on Safeguards* are significantly different from the provisions of Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, which state:

> Sanitary or phytosanitary measures *which conform to* the relevant provisions of this Agreement *shall be presumed to be in accordance with* the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b). (emphasis added)

[74]With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

GATT 1994

Article XIX

Emergency Action on Imports of Particular Products

> 1. (*a*) If, *as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions*, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)

Agreement on Safeguards

Article 2

Conditions

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

87. In comparing the language of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, we observe that although much of the language in the two provisions is very similar, and, in fact, identical, the initial clause in Article XIX:1(a) – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – does not appear in Article 2.1 of the *Agreement on Safeguards*. After making this same observation, the Panel concluded that the "unforeseen developments" clause was "expressly omitted" by the Uruguay Round negotiators. And, although the Panel conceded at one point in its reasoning that Article XIX and the *Agreement on Safeguards* "legally co-exist"[75] as part of the *WTO Agreement*, the Panel concluded from this supposedly "*express omission*" that the "omitted" phrase has no meaning.

88. We believe that, with this conclusion, the Panel failed to give meaning and legal effect to *all* the relevant terms of the *WTO Agreement*, contrary to the principle of effectiveness (*ut res magis*

[75]Panel Report, para. 8.55.

valeat quam pereat) in the interpretation of treaties.[76] The Panel states that the "*express omission* of the criterion of unforeseen developments" in Article XIX:1(a) from the *Agreement on Safeguards* "must, in our view, have meaning."[77] On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not.

89. Furthermore, it is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions.[78] We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures.

90. Having concluded that the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in Article XIX:1(a) of the GATT 1994 does have meaning, we are obliged by virtue of that conclusion to consider what that meaning *is*. Toward this end, we refer again to the language of Article XIX:1(a), in its entirety:

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[76]We note that in our Report *United States – Gasoline*, (*supra*, footnote 72, p. 23), we emphasized that:

> … One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

See also Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 72, p. 12; and Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, para. 133.

[77]Panel Report, para. 8.58.

[78]As set out in the General Interpretative Note to Annex 1A of the *WTO Agreement*.

> If, *as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported* into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)

91. To determine the meaning of the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in sub-paragraph (a) of Article XIX:1, we must examine these words in their ordinary meaning, in their context and in light of the object and purpose of Article XIX.[79] We look first to the ordinary meaning of these words. As to the meaning of "unforeseen developments", we note that the dictionary definition of "unforeseen", particularly as it relates to the word "developments", is synonymous with "unexpected".[80] "Unforeseeable", on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated".[81] Thus, it seems to us that the ordinary meaning of the phrase "as a result of unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected". With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ", we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.

92. When we examine this clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in its

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[79]As we have said in Appellate Body Report, *United States – Gasoline*, *supra*, footnote 72, p.17; Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 72, p. 11; Appellate Body Report, *India – Patents*, *supra*, footnote 25, para. 46; Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 47; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, adopted 22 June 1998, para. 84; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 114.

[80]See *Webster's Third New International Dictionary*, (Encyclopaedia Britannica Inc., 1966) Vol. 3, p. 2496; and *Black's Law Dictionary*, 6th ed., (West Publishing Company, 1990) p. 1530.

[81]*Ibid*.

immediate context in Article XIX:1(a), we see that it relates directly to the second clause in that paragraph – "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 …". The latter, or second, clause in Article XIX:1(a) contains the three *conditions* for the application of safeguard measures. These *conditions*, which are reiterated in Article 2.1 of the *Agreement on Safeguards*[82], are that: (1) a product is being imported "in such quantities and under such conditions"; (2) "as to cause"; (3) serious injury or the threat of serious injury to domestic producers. The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions … " – is a dependent clause which, in our view, is linked grammatically to the verb phrase "is being imported" in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.

93. Our reading is supported by the context of these provisions. As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: "*Emergency Action on Imports of Particular Products*". The words "emergency action" also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported "*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers". (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, "emergency actions." And, such "emergency actions" are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend the obligation in whole or in part or to withdraw or modify the concession". Thus, Article XIX is clearly, and in every way, an extraordinary remedy.

[82]We note that the title of Article 2 of the *Agreement on Safeguards* is: "*Conditions*".

94. This reading of these phrases is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to the product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products". In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a "fair" trade remedy. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.

95. Our reading of these prerequisites does precisely this, by making certain that *all* the relevant provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994 relating to safeguard measures are given their full meaning and their full legal effect. Our reading, too, is consistent with the desire expressed by the Uruguay Round negotiators in the Preamble to the *Agreement on Safeguards* "to clarify and *reinforce* the disciplines of GATT 1994, and *specifically those of its Article XIX* …, to re-establish *multilateral control* over safeguards and eliminate measures that escape such control …".[83] In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994, which are fundamental to the *WTO Agreement*. As such, safeguard measures may be applied only when *all* the provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994 are clearly demonstrated.

96. In addition, we note that our reading of the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in Article XIX:1(a) is also consistent with the one GATT 1947 case that involved Article XIX, the so-called "*Hatters' Fur*" case.[84] Members of the Working Party in that case, in 1951, stated:

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[83] *Agreement on Safeguards*, Preamble.

[84] *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX*, ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951.

> … "unforeseen developments" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[85]

97. In the light of all of this, we do not agree with the Panel that any safeguard investigations conducted or safeguard measures imposed after the entry into force of the *WTO Agreement* "which meet the requirements of the new Safeguards Agreement *satisfy* the requirements of Article XIX of GATT." (emphasis added) Therefore, we reverse the Panel's conclusion in paragraph 8.69 of the Panel Report that safeguard measures imposed after entry into force of the *WTO Agreement* which meet the requirements of the *Agreement on Safeguards* necessarily "satisfy" the requirements of Article XIX of the GATT 1994, as well as the Panel's finding that the Uruguay Round negotiators "expressly omitted" the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – from Article 2 of the *Agreement on Safeguards*.

98. As will be seen, in the final section of this Report, we uphold the conclusions of the Panel that Argentina's investigation in this case was inconsistent with the requirements of Articles 2 and 4 of the *Agreement on Safeguards*. As a consequence, there is *no legal basis* for the safeguard measures imposed by Argentina. For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ".

VI. Imposition of Safeguard Measures by a Member of a Customs Union

99. Argentina claims on appeal that the Panel misinterpreted footnote 1 to Article 2.1 of the *Agreement on Safeguards* and erred by "imposing an obligation" on a member of a customs union to apply any safeguard measure on other members of that customs union whenever imports from all sources are taken into account in a safeguards investigation.

100. The Panel described the issue before it as follows:

[85] *Supra*, footnote 84, para. 9. This interpretation was proposed by the representative of Czechoslovakia, and was accepted by the majority of the Working Party with the exception of the United States.

> … the essential question is whether Argentina was permitted under the Safeguards Agreement to take MERCOSUR imports into account in the analysis of injury factors and of a causal link between increased imports and the alleged (threat of) serious injury, and was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed.[86]

101. Article 2 of the *Agreement on Safeguards* provides as follows:

> *Conditions*
>
> 1. A Member[1] 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.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source.
>
> ---
>
> [1]A 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 prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

102. The Panel examined the ordinary meaning of footnote 1 to Article 2.1, and stated that "*in the case of measures imposed by a customs union* there are two options for imposing safeguard measures, i.e., (i) as a single unit or (ii) on behalf of a member State."[87] (emphasis added) The Panel assumed that it was dealing with a safeguard measure imposed by a customs union "on behalf of a member State" within the meaning of the first and third sentences of footnote 1, and concluded that the "footnote does not concern *to whom* but rather *by whom* a safeguard measure may be applied."[88] The Panel then proceeded to examine the context of Article 2.1 and the footnote thereto. The Panel declared this context to be Article 2.2, which provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source."[89] The Panel then stated that:

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[86]Panel Report, para. 8.75.

[87]*Ibid*., para. 8.78.

[88]*Ibid*., para. 8.83.

[89]*Ibid*., para. 8.84.

> The ordinary meaning of Article 2.2 would appear to imply that, as a result of a member-State-specific investigation, safeguard measures have to be imposed on a non-discriminatory basis against products from all sources of supply, regardless of whether they originate from within or from outside of the customs union.[90]

103. On the basis of this reasoning, the Panel stated its interpretation that:

> … the two options offered by the footnote to Article 2.1 read in conjunction with Article 2.2 imply a *parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures. Thus, in the light of the context of the footnote to Article 2.1, a member-state-specific investigation in which serious injury or threat thereof is found based on imports from all sources could only lead to the imposition of safeguard measures on a MFN-basis against all sources of intra-regional as well as extra-regional supply of a customs union.[91]

The Panel concluded, on the basis of its reasoning relating to Article 2, that "a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources cannot serve as a basis for imposing a safeguard measure on imports only from third-country sources of supply."[92]

104. The Panel then turned its attention to Article XXIV of the GATT 1994, in response to an argument by Argentina that Article XXIV of the GATT 1994 and certain MERCOSUR regulations prohibited Argentina from imposing safeguard measures on other MERCOSUR countries. After a lengthy analysis of Article XXIV:8 of the GATT 1994, the Panel stated:

> … we do not agree with the argument that in the case before us Argentina is prevented by Article XXIV:8 of GATT from applying safeguard measures to all sources of supply, i.e., third countries as well as other member States of MERCOSUR.[93]

105. Finally, the Panel concluded as follows:

[90]Panel Report, para. 8.84.

[91]*Ibid*., para. 8.87.

[92]*Ibid*., para. 8.91.

[93]*Ibid*., para. 8.101.

> … in the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, we conclude that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union.[94]

106. We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State".[95] On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentine authorities of the effects of imports from all sources on the Argentine domestic industry.

107. MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina.[96] When the safeguard measures at issue in this case were adopted by the government of Argentina, the transitional provisions in Chapter XII of the Regulation on the Application of Safeguard Measures to Imports from Non-Members of MERCOSUR (the "Regulation"), approved by Common Market Decision No. 17/96, were in effect among the State Parties of MERCOSUR.[97] According to these transitional provisions, the investigation procedure for the adoption of safeguard measures was to be conducted by the competent authorities of the State Party in question, applying relevant national legislation.[98]

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[94]Panel Report, para. 8.102.

[95]We also note that footnote 1 relates to the word "Member" in Article 2.1, which is commonly understood to mean a Member of the WTO.

[96]It is true that on 26 September 1997, Uruguay, as Pro Tempore President of MERCOSUR and on behalf of Argentina, notified the definitive safeguard measure imposed by Argentina. (G/SG/N/10/ARG/1/Suppl.2, G/SG/N/11/ARG/1/Supp.2, G/SG/14/Suppl.1 and G/L/195/Suppl.1, 22 October 1997). However, all relevant resolutions were adopted by Argentina alone, pursuant to Argentine national laws. We further note that that all other notifications relating to the measures at issue in this case were made by Argentina acting on its own behalf. In particular, on 26 September 1997 – the same day as Uruguay notified the measure on behalf of Argentina – Argentina itself transmitted a copy of Resolution 987/87 to the Committee on Safeguards (G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, 10 October 1997).

[97]Adopted by the Council of Ministers of MERCOSUR in December 1996. See Panel Report, para. 5.103.

[98]In response to questions during the oral hearing, Argentina confirmed that:

> … until 31 December 1998, the common safeguards regime of MERCOSUR provided for this modality of application of a measure which would permit a state member of the customs union to apply the measure uniquely and that it would be notified by MERCOSUR. That is why the measure was applied by Argentina within its regulatory framework.

108. Therefore, at the time the safeguard measures at issue in this case were imposed by the Government of Argentina, these measures were not applied by MERCOSUR "on behalf of" Argentina, but rather, they were applied by Argentina. It is Argentina that is a Member of the WTO for the purposes of Article 2 of the *Agreement on Safeguards*, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into *its* territory and the effects of those imports on *its* domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case. As a result, we find that the Panel erred in assuming that footnote 1 applied, and we, therefore, reverse the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards*.

109. Having found that footnote 1 to Article 2.1 is not applicable in this case, we also are not persuaded that an analysis of Article XXIV of the GATT 1994 was relevant to the specific issue that was before the Panel. This issue, as the Panel itself observed, is whether Argentina, after including imports from all sources in its investigation of "increased imports" of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, was justified in excluding other MERCOSUR member States from the application of the safeguard measures. In our Report in *Turkey – Restrictions on Imports of Textile and Clothing Products*, we stated that under certain conditions, "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions."[99] We indicated, however, that this defence is available only when it is demonstrated by the Member imposing the measure that "the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" and "that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."[100]

110. In this case, we note that Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of the GATT 1994. As Argentina did not argue that Article XXIV provided it with a defence against a finding of violation of a provision of the GATT 1994, and as the Panel did not consider whether the safeguard measures at issue were introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV, we believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Articles 2 and 4 of the *Agreement on Safeguards*. Accordingly, as we have found that the Panel's analysis of Article XXIV of

[99]Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999, para. 58.

[100]*Ibid*.

the GATT 1994 was not relevant in this case, we reverse the Panel's legal findings and conclusions relating to Article XXIV of the GATT 1994.[101]

111. 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."[102] 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.

112. 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.

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.

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[101]Panel Report, paras. 8.93-8.102.

[102]*Ibid*., para. 8.87.

113. 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.

114. For all the above reasons, we reverse the Panel's legal findings and conclusions relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994. We conclude that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States. However, as we have stated, we do not agree that the Panel was dealing, on the facts of this case, with a safeguard measure applied by a customs union *on behalf of* a member State. And we wish to underscore that, as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure.

VII. Claims under Articles 2 and 4 of the *Agreement on Safeguards*

115. Although Argentina acknowledges that the Panel correctly articulated the proper standard of review based on Article 11 of the DSU, Argentina alleges that the Panel erred in *applying* that standard of review, by conducting a "*de facto de novo* review"[103] of the findings and conclusions of the Argentine authorities. As a consequence, Argentina maintains that the Panel read certain methodologies into the *Agreement on Safeguards* where that Agreement itself is silent, and thereby added to the rights and obligations of Members under that Agreement in violation of Article 3.2 of the DSU.[104] The *Agreement on Safeguards*, in Argentina's view, allows Members discretion in the way it is implemented; however, the Panel, in its reasoning, created new requirements that are not contained in the *Agreement on Safeguards*. Argentina also claims that the Panel made several legal errors in its analysis of the requirements of Articles 2 and 4 of the *Agreement on Safeguards*, in particular, relating to the conditions of increased imports, serious injury and causation that must be satisfied before a safeguard measure may be applied.[105] Finally, Argentina submits that the Panel Report was not adequately reasoned because the Panel failed to reach reasonable conclusions based on the totality

[103]Argentina's appellant's submission, p. 26.

[104]*Ibid*., p. 43.

[105]*Ibid*., pp. 43-66.

of the evidence before the Argentine authorities, and that the Panel has therefore not fulfilled the requirement of Article 12.7 of the DSU that it provide a "basic rationale" for its ruling.[106]

A. *Standard of Review*

116. The Panel stated its approach to the standard of review as follows:

> In our view, we have no mandate to conduct a *de novo* review of the safeguard investigation conducted by the national authority. Rather, we must determine whether Argentina has abided by its multilateral obligations under the Agreement on Safeguards … in reaching its affirmative finding of injury and causation in the footwear investigation.[107]
>
> …
>
> … our review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement. We note that this was the standard of review applied by the Panel in *United States – Underwear*, with which we agree.[108]

117. Although the Panel ultimately stated the standard of review correctly, we are surprised that the Panel based its approach on several reports by previous panels reviewing domestic investigations in the context of two Tokyo Round Agreements: the *Agreement on Implementation of Article VI of GATT* and the *Agreement on Interpretation and Application of Article VI, XVI and XXIII of GATT*[109] as well as two previous WTO panels in *United States – Underwear* and *United States – Shirts and Blouses*.[110]

118. We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.[111] The only exception

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[106]Argentina's appellant's submission, pp. 42, 49 and 61.

[107]Panel Report, para. 8.117.

[108]*Ibid*., para. 8.124.

[109]Panel Report, *New Zealand – Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55; Panel Report, *United States – Salmon*, *supra*, footnote 29, para. 494.

[110]*Supra*, footnote 31.

[111]See e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 114-119; *Australia – Salmon*, *supra*, footnote 26, para. 2.67.

is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement.

119. In our report in *European Communities – Hormones*, we stated that:

> Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements. … [112]
>
> …
>
> So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts". [113]

120. Although that case dealt with the panel's assessment of the facts, and this case deals with the Panel's assessment of the matter, more generally, the same reasoning applies here. The *Agreement on Safeguards*, like the *Agreement on the Application of Sanitary and Phytosanitary Measures*, is silent as to the appropriate standard of review. Therefore, Article 11 of the DSU, and, in particular, its requirement that "… a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", sets forth the appropriate standard of review for examining the consistency of a safeguard measure with the provisions of the *Agreement on Safeguards*.

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

[112] Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 111, para. 116.

[113] *Ibid*., para. 117.

examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.

122. In addition to "an objective assessment of the facts ", we note, too, that part of the "objective assessment of the matter" required of a panel by Article 11 of the DSU is an assessment of "the applicability of and conformity with the relevant covered agreements". Consequently, we must also examine whether the Panel correctly interpreted and applied the substantive provisions of Articles 2 and 4 of the *Agreement on Safeguards*, in particular, those relating to the requirements of imports "in such increased quantities", "serious injury" to the domestic industry, and causation.

B. *Interpretation and Application of Articles 2 and 4 of the Agreement on Safeguards*

123. Articles 2.1 and 4.2 of the *Agreement on Safeguards* provide as follows:

> *Article 2*
>
> *Conditions*
>
> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted)
>
> *Article 4*
>
> *Determination of Serious Injury or Threat Thereof*
>
> 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.

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

124. We recall the Panel's ultimate conclusions on Articles 2.1 and 4.2:

> For the foregoing reasons, we conclude that Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a); that the investigation did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry within the meaning of Article 4.2(a); that the investigation did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article 2.1 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b); and that the published report concerning the investigation did not set forth a complete analysis of the case under investigation as well as a demonstration of the relevance of the factors examined within the meaning of Article 4.2(c).
>
> Therefore, we find that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the Safeguards Agreement. As such, we find that Argentina's investigation provides *no* legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure.[114]

1. Increased Imports

125. With respect to the requirement relating to "increased imports", the Panel stated as follows:

> The Agreement on Safeguards requires an increase in imports as a basic prerequisite for the application of a safeguard measure. The relevant provisions are in Articles 2.1 and 4.2(a).[115]
>
> …
>
> Thus, to determine whether imports have increased in "such quantities" for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production.[116]

[114]Panel Report, paras. 8.279 and 8.280.

[115]*Ibid*., para. 8.138.

[116]*Ibid*., para. 8.141.

126. In its evaluation of whether the investigation by the Argentine authorities demonstrated the required increase in imports under Articles 2.1 and 4.2(a), the Panel stated the following:

> … *the Agreement requires not just an increase (i.e., any increase) in imports, but an increase in "such…quantities" as to cause or threaten to cause serious injury*. The Agreement provides no numerical guidance as to how this is to be judged, nor in our view could it do so. But this does not mean that this requirement is meaningless. To the contrary, we believe that it means that the increase in imports must be judged in its full context, in particular with regard to its "rate and amount" as required by Article 4.2(a). Thus, considering the changes in import levels over the entire period of investigation, as discussed above, seems unavoidable when making a determination of whether there has been an increase in imports "in such quantities" in the sense of Article 2.1.[117] (emphasis added)

127. The Panel concluded that Argentina did not adequately consider the "intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used."[118] For these reasons, the Panel concluded that "Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a)".[119] The Panel, though, rejected an argument made by the European Communities "that only a 'sharply increasing' trend in imports at the end of the investigation period can satisfy this requirement."[120]

128. Argentina maintains that, in its interpretation and application of the requirement of "increased imports" in Articles 2.1 and 4.2 of the *Agreement on Safeguards*, the Panel "impose[d] a variety of methodological hurdles which must be overcome before a finding of 'increased imports' can be justified."[121] In particular, Argentina argues that the Panel misinterpreted the word "rate" in Article 4.2(a) to include "direction", and found that there could only be "increased imports" if: (i) a change in the base year from 1991 to 1992 would still result in an increase; (ii) the analysis of end points and interim periods is mutually reinforcing; and (iii) it is found that the decrease in imports in 1994 and 1995 was temporary.[122] Argentina also asserts that the Panel "collapsed" the "increased imports" requirement "with the other qualitative requirements of Article 2" and wrongly treated it as a "qualitative, rather than a separate quantitative requirement."[123] The ordinary meaning of "increased

[117]Panel Report, para. 8.161.

[118]*Ibid*., para. 8.276.

[119]*Ibid*., para. 8.279.

[120]*Ibid*., para. 8.165.

[121]Argentina's appellant's submission, p. 45.

[122]*Ibid*., p. 46.

[123]*Ibid*., p. 45.

imports", in Argentina's view, is that imports have become greater, and Argentina argues that there is no factual or contextual support for any additional requirements in the *Agreement on Safeguards*.[124]

129. We agree with the Panel that Articles 2.1 and 4.2(a) of the *Agreement on Safeguards* require a demonstration not merely of *any* increase in imports, but, instead, of imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury."[125] In addition, we agree with the Panel that the specific provisions of Article 4.2(a) require that "the *rate* and *amount* of the increase in imports … in absolute and relative terms" (emphasis added) must be evaluated.[126] Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a).[127] As a result, we agree with the Panel's conclusion that "Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used."[128]

130. All the same, while we do not find that the Panel erred in its application of the requirement in Article 2.1 of the *Agreement in Safeguards* that the "product *is being imported* … in such increased quantities", we do find the Panel's interpretation of that requirement somewhat lacking. We note that the Panel characterized this condition in Article 2.1 on several occasions in the Panel Report simply as "increased imports". However, the actual requirement, and we emphasize that this requirement is found in *both* Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, is that "such product *is being imported* … in such increased quantities"[129], "and under such conditions as to cause or threaten to cause serious injury to the domestic industry". (emphasis added) Although we agree with the Panel that the "increased quantities" of imports cannot be just *any* increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of

[124]Statement by Argentina at the oral hearing.

[125]Article 2.1 of the *Agreement on Safeguards*.

[126]Panel Report, paras. 8.140-8.141.

[127]*Ibid*., para. 8.276.

[128]*Ibid*.

[129]Article 2.1 of the *Agreement on Safeguards* contains the additional words "absolute or relative to domestic production".

several years.[130] In our view, the phrase "is being imported" implies that the increase in imports must have been sudden and recent.

131. We recall here our reasoning and conclusions above on the meaning of the phrase "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994. We concluded there that the increased quantities of imports should have been "unforeseen" or "unexpected".[131] We also believe that the phrase "in *such* increased quantities" in Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 is meaningful to this determination. In our view, the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. 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".

2. Serious Injury

132. With respect to the requirement relating to "serious injury", Article 4.2(a) of the *Agreement on Safeguards* provides, in relevant part:

> 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 share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

133. The Panel stated that the requirements of Article 4.2(a) obliged it to:

[130]The Panel, in footnote 530 to para. 8.166 of the Panel Report, recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past.

[131]*Supra*, paras. 91-98.

> … consider, first, whether all injury factors listed in the Agreement were considered by Argentina, as the text of Article 4.2(a) of the Agreement ("all relevant factors … including … changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment") is unambiguous that at a minimum each of the factors listed, in addition to all other factors that are "relevant", must be considered.[132]

The Panel also concluded that, pursuant to the provisions of Article 4.2(c) and, by reference, Article 3 of the *Agreement on Safeguards*, it was required to examine whether Argentina's findings and conclusions on "serious injury" were supported by the evidence before the Argentine authorities.

134. The Panel read Article 4.2(a) literally to mean that all the listed factors: "changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment" – must be evaluated in every investigation. In addition, the Panel stated that all other relevant factors having a bearing on the situation of the industry must also be evaluated. As the Panel found that Argentina had not evaluated two of the listed factors, capacity utilization and productivity, the Panel concluded that Argentina's investigation was not consistent with the requirements of Article 4.2(a).[133]

135. Argentina submits that the Panel erred in its analysis of Argentina's determination of "serious injury". According to Argentina, Article 4.2(c) of the *Agreement on Safeguards* requires only a demonstration of the relevance of the factors examined, rather than an examination of all the listed factors as relevant.[134] In response to the Panel's finding that Argentina had not properly evaluated the factors of capacity utilization and productivity, Argentina replies by maintaining that the factor of productivity is explicitly mentioned in Act 338 and that data sufficient to calculate capacity utilization was available to the Argentine authorities.[135] Furthermore, Argentina argues that neither capacity utilization nor productivity was a principal or a significant issue in the investigation.[136] Argentina also takes issue with the Panel's view that the available data for 1996 should have been examined by Argentina in its investigation of "serious injury". Here, Argentina responds that the record clearly shows that the data for 1996 was incomplete, and Argentina submits that it was appropriate and reasonable to use a single review period for which all the data was available as a basis for its determination of "serious injury". In addition, Argentina argues that the Panel erred in several aspects of its examination of the evidence considered by the Argentine authorities.

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[132]Panel Report, para. 8.206.

[133]*Ibid*., para. 8.277.

[134]Argentina's appellant's submission, p. 60.

[135]*Ibid*., p. 59.

[136]*Ibid*., p. 60.

136. 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) as well as all other factors that are relevant to the situation of the industry concerned. Furthermore, we do not dispute the Panel's finding that Argentina did not evaluate all of the listed factors, in particular, capacity utilization and productivity. We consider the other points that Argentina has raised in this appeal, relating to the availability of data for 1996 and to the Panel's evaluation of the evidence considered by the Argentine authorities, to relate to matters of fact which are not within our mandate, under Article 17.6 of the DSU, to examine on appeal.

137. For these reasons, we uphold the Panel's conclusion that Argentina did not evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry" as required by Article 4.2(a) of the *Agreement on Safeguards*.

138. However, although it was not necessary for the Panel to go beyond where it did in this case, as the Panel found that Argentina had *not* evaluated all of the required listed factors, we do not believe that an evaluation of the listed factors in Article 4.2(a) is all that is required to justify a determination of "serious injury" under the *Agreement on Safeguards*. We note, in this respect, that there is a definition of "serious injury" in Article 4.1(a) of the *Agreement on Safeguards*, which reads as follows:

> "serious injury" shall be understood to mean a *significant overall impairment* in the position of a domestic industry. (emphasis added)

And we note that, in its legal analysis of "serious injury" under Article 4.2(a), the Panel made no use whatsoever of this definition.

139. In our view, it is only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is "a significant overall impairment" in the position of that industry. Although Article 4.2(a) technically requires that certain listed factors must be evaluated, and that all other relevant factors must be evaluated, that provision does not specify what such an evaluation must demonstrate. Obviously, any such evaluation will be different for different industries in different cases, depending on the facts of the particular case and the situation of the industry concerned. An evaluation of each listed factor will not necessarily have to show that each such factor is "declining". In one case, for example, there may be significant declines in sales, employment and productivity that will show "significant overall impairment" in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate "significant overall impairment" of the industry. Thus, in addition to a

technical examination of whether the competent authorities in a particular case have evaluated all the listed factors and any other relevant factors, we believe that it is essential for a panel to take the definition of "serious injury" in Article 4.1(a) of the *Agreement on Safeguards* into account in its review of any determination of "serious injury".

3. Causation

140. With respect to the requirement of causation, Article 4.2(b) of the *Agreement on Safeguards* provides that a determination of serious injury:

> … 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.

141. The Panel interpreted the requirements of Article 4.2(b) as follows:

> … we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[137]

142. On causation, the Panel stated:

> … the *trends* -- in both the injury factors and the imports -- matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.

[137]Panel Report, para. 8.229.

> In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[138]

143. Argentina argues on appeal that the Panel erred in establishing and applying three "standards" in its analysis of causation. First, Argentina maintains that the Panel required that an upward trend in imports must *coincide* with a *downward* trend in the injury factors. On this point, Argentina maintains that Article 4.2(c) of the *Agreement on Safeguards* refers to "changes" and not to "downward trends", so that there is no requirement that there be a "downward trend" in each year of the period of investigation. Moreover, Argentina maintains that the Panel's requirement of "coincidence" in time is not implied by the term "cause". Second, Argentina asserts that the Panel used the phrase "under such conditions" to develop a requirement that the "conditions of competition" between imported and domestic footwear in the Argentine market demonstrate a causal link between the increased imports and injury. Argentina asserts that there is no basis in the *Agreement on Safeguards* for this requirement. Third, Argentina maintains that the Panel required the Argentine authorities to establish that other relevant factors had been analyzed, and that injury caused by factors other than imports is not evidence of serious injury caused by imports. In Argentina's opinion, this requirement goes far beyond what is actually required in Article 4.2(b) of the *Agreement on Safeguards*.

144. We note that Article 4.2(a) requires the competent authorities to evaluate "the rate and amount of the increase in imports", "the share of the domestic market taken by increased imports", as well as the "changes" in the level of factors such as sales, production, productivity, capacity utilization, and others. We see no reason to disagree with the Panel's interpretation that the words "rate and amount" and "changes" in Article 4.2(a) mean that "the *trends* -- in both the injury factors and the imports -- matter as much as their absolute levels."[139] We also agree with the Panel that, in an analysis of causation, "it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination."[140] (emphasis added) Furthermore, with respect to a "coincidence" between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should "normally"

[138]Panel Report, paras. 8.237 and 8.238.

[139]*Ibid*., para. 8.237.

[140]*Ibid*.

occur if causation is present.[141] The Panel qualified this statement, however, in the following sentence:

> While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[142]

145. We are somewhat surprised that the Panel, having determined that there were no "increased imports", and having determined that there was no "serious injury", for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a "causal link" between "increased imports" that did not occur and "serious injury" that did not exist. Nevertheless, we see no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*. Rather, we believe that Argentina has mischaracterized the Panel's interpretation and reasoning. Furthermore, we agree with the Panel's conclusions that "the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price); and that 'other factors' identified by the CNCE in the investigation were not sufficiently evaluated, in particular, the tequila effect."[143]

146. For all these reasons, we uphold the Panel's conclusion that "Argentina's findings and conclusions regarding causation were not adequately explained and supported by the evidence."[144]

147. And, on the basis of all of the above reasoning, we uphold the Panel's findings and conclusions in paragraph 8.279 and paragraph 8.280 of the Panel Report, including the conclusions that "Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the Safeguards Agreement."[145] We also uphold the Panel's ultimate conclusion that "Argentina's investigation provides *no* legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure."[146]

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[141]Panel Report., para. 8.238.

[142]*Ibid*.

[143]*Ibid*., para. 8.278.

[144]*Ibid*.

[145]*Ibid*., para. 8.280.

[146]*Ibid*.

C. *Article 12.7 of the DSU*

148. Argentina also contends that the Panel violated Article 12.7 of the DSU by failing to provide "a basic rationale" for its findings and conclusions. Article 12.7 of the DSU reads, in relevant part:

> … the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the *basic rationale* behind any findings and recommendations that it makes. (emphasis added)

149. In our reports in *Korea – Alcoholic Beverages*[147] and *Chile – Taxes on Alcoholic Beverages*[148], we found that the panels in those cases had provided sufficient reasons for their findings and recommendations, and that, therefore, the requirements of Article 12.7 of the DSU were fulfilled. In this case, the Panel conducted *extensive* factual and legal analyses of the competing claims made by the parties, set out numerous factual findings based on detailed consideration of the evidence before the Argentine authorities as well as other evidence presented to the Panel, and provided extensive explanations of how and why it reached its factual and legal conclusions. Although Argentina may not agree with the rationale provided by the Panel, and we do not ourselves agree with all of its reasoning, we have no doubt that the Panel set out, in its Report, a "basic rationale" consistent with the requirements of Article 12.7 of the DSU.

150. For these reasons, we reject Argentina's appeal under Article 12.7 of the DSU. Indeed, we cannot help but note that, in this appeal, Argentina seems to be arguing that the Panel said and did both too much and too little.

VIII. Findings and Conclusions

151. For the reasons set out in this Report, the Appellate Body:

(a) concludes that the Panel did not exceed its terms of reference by referring in its reasoning to Article 3 of the *Agreement on Safeguards*;

(b) reverses the Panel's conclusion in paragraph 8.69 of the Panel Report that "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT", and also reverses the Panel's finding that the Uruguay Round negotiators "*expressly omitted*" the phrase "as a result of unforeseen developments" from Article 2 of the *Agreement on Safeguards*;

[147] *Supra*, footnote 36, para. 168.

[148] Appellate Body Report, circulated 13 December 1999, WT/DS87/AB/R, WT/DS110/AB/R, para. 78.

(c) declines to make a finding with respect to the European Communities' claim under Article XIX of the GATT 1994 since, in light of the findings in paragraph (f) below, there is, in any event, no legal basis for the safeguard measures imposed by Argentina;

(d) reverses the Panel's findings and conclusions relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994, and concludes that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States;

(e) concludes that the Panel correctly stated and applied the appropriate standard of review, as set forth in Article 11 of the DSU;

(f) upholds the Panel's findings and conclusions that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*, and that, accordingly, Argentina's investigation provides no legal basis for the application of the definitive safeguard measure at issue or any safeguard measure; and

(g) concludes that the Panel did not fail to set out the "basic rationale" behind its findings and recommendations as required by Article 12.7 of the DSU.

152. The Appellate Body *recommends* that the DSB request that Argentina bring its safeguard measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Safeguards*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 17th day of November 1999 by:

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James Bacchus
Presiding Member

_____ _____

Christopher Beeby
Member

Mitsuo Matsushita
Member