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## **1 ARTICLE 4**

### **1.1 Text of Article 4**

#### **Article 4**

##### *Determination of Serious Injury or Threat Thereof*

1. For the purposes of this Agreement:
  - (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
  - (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and
  - (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.
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.

## 1.2 Article 4.1(a)

### 1.2.1 "serious injury" as "significant overall impairment" in the position of the domestic industry

1. The Appellate Body in *US – Lamb* described "serious injury" as a "very high standard of injury":

"The standard of 'serious injury' set forth in Article 4.1(a) is, on its face, very high. Indeed, in *United States – Wheat Gluten Safeguard*, we referred to this standard as 'exacting'. Further, in this respect, we note that the word 'injury' is qualified by the adjective 'serious', which, in our view, underscores the extent and degree of 'significant overall impairment' that the domestic industry must be suffering, or must be about to suffer, for the standard to be met.

...

[I]n making a determination on ... the existence of 'serious injury' ... panels must always be mindful of the very high standard of injury implied by these terms."<sup>1</sup>

2. Moreover, the Appellate Body juxtaposed the concept of "serious injury" in the Agreement on Safeguards and the concept of "material injury" contained in the Anti-Dumping Agreement and the SCM Agreement:

"We are fortified in our view that the standard of 'serious injury' in the *Agreement on Safeguards* is a very high one when we contrast this standard with the standard of 'material injury' envisaged under the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures* (the 'SCM Agreement') and the GATT 1994. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'.<sup>2</sup> Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures, since, as we have observed previously:

'[t]he 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.'<sup>3"4</sup>

### 1.2.2 "current" serious injury

3. The Panel in *US – Wheat Gluten* considered that, as the investigation of increased imports should focus on recent imports, serious injury should also be found to exist within the recent past. (the Appellate Body did not specifically address this finding):

"[A]ny determination of serious injury must pertain to the recent past. This flows from the wording of the text of Article XIX:1(a) of the GATT 1994 and Article 2.1 SA, which requires an examination as to whether a product 'is being imported' 'in such

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<sup>1</sup> Appellate Body Report, *US – Lamb*, paras. 124 and 126.

<sup>2</sup> (footnote original) We find support for our view that the standard of "serious injury" is higher than "material injury" in the French and Spanish texts of the relevant agreements, where the equivalent terms are, respectively, *dommage grave* and *dommage important*; and *daño grave* and *daño importante*.

<sup>4</sup> Appellate Body Report, *US – Lamb*, para. 124.

increased quantities ... and under such conditions as to cause or threaten serious injury...'. The use of the present tense of the verb in the phrase 'is being imported' in that provision indicates that it is necessary for the competent authorities to examine recent imports. It seems to us logical that if the increase in imports that the investigating authorities must examine must be recent, so also must be any basis for a determination by the authorities as to the situation of the domestic industry. Given that a safeguard measure will necessarily be based upon a determination of serious injury concerning a previous period, we consider it essential that current serious injury be found to exist, up to and including the very end of the period of investigation.<sup>5</sup><sup>6</sup>

### 1.3 Article 4.1(b)

#### 1.3.1 "serious injury that is clearly imminent"

The Panel in *US – Lamb* interpreted Article 4.1(b) as indicating that an industry's overall impairment needs to be ready to take place or be an impending event. The Appellate Body agreed, and stated that: "Returning now to the term 'threat of serious injury', we note that this term is concerned with 'serious injury' which has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty. We note, too, that Article 4.1(b) builds on the definition of 'serious injury' by providing that, in order to constitute a 'threat', the serious injury must be 'clearly imminent'. The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize. The use of this word implies that the anticipated 'serious injury' must be on the very verge of occurring. Moreover, we see the word 'clearly', which qualifies the word 'imminent', as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future."<sup>7</sup>

4. The Appellate Body also reiterated the strict standard of "serious injury" in the context of the "threat of serious injury":

"We recall that, in *Argentina – Footwear Safeguard*, we stated 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'.' The same is equally true for the definition of 'threat of serious injury' in Article 4.1(b) of that Agreement. Thus, in making a determination on either the existence of 'serious injury', or on a 'threat' thereof, panels must always be mindful of the very high standard of injury implied by these terms."<sup>8</sup>

5. The Panel in *EU – Safeguard Measures on Steel (Turkey)* noted that the Agreement on Safeguards does not preclude a finding of clearly imminent serious injury where there has been an improvement in the domestic injury during the period of investigation. Rather, such a finding is fact-specific and dependent on the nature of the improvement:

"We are of the view that the Agreement on Safeguards does not establish a categorical rule that precludes authorities from finding a threat of serious injury whenever the data show positive trends in the domestic industry's performance at a given point of the POI. Rather, Article 4.1(b) provides that 'threat of serious injury' shall be understood to mean serious injury that is clearly imminent'. In our view, such assessments are necessarily fact-specific and to be made on a case-by-case basis. If the evidence in a proceeding shows that a domestic industry's performance is on a durable upward trajectory, it may be difficult to establish that serious injury is 'clearly imminent'. However, if the evidence indicates that serious injury is 'clearly imminent' despite certain improvements in the domestic industry's performance, an authority may find a threat of serious injury. For instance, the evidence may show that the improvement is fleeting or illusory and that the

<sup>5</sup> (footnote original) Except, of course, in a case involving threat of serious injury, where the issue involves future injury.

<sup>6</sup> Panel Report, *US – Wheat Gluten*, para. 8.81.

<sup>7</sup> Appellate Body Report, *US – Lamb*, para. 125.

<sup>8</sup> Appellate Body Report, *US – Lamb*, para. 126.

domestic industry will continue to be at a competitive disadvantage *vis-à-vis* imports once the short-lived improvement recedes. Accordingly, the question of whether a determination of a threat of serious injury complies with the Agreement on Safeguards when the domestic industry's performance improves at some point during the POI will depend on the facts and the quality of the authority's explanation as to the nature and implications of those improvements."<sup>9</sup>

### 1.3.2 "based on facts and not merely on allegation, conjecture or remote possibility"

6. The Panel in *US - Lamb* noted that Agreement on Safeguards "contains no explicit guidance on any specific methodology that a competent national authority must employ when establishing threat of serious injury".<sup>10</sup> Highlighting that the imminent threat that is threatened must be serious, the Panel considered that:

"In line with this emphasis on the imminent nature of threat, ... such a determination has to be based on facts and not on allegation, conjecture, or remote possibility. 'Allegation' means 'an assertion, especially one made without proof'. 'Conjecture' connotes 'an opinion or conclusion based on insufficient evidence or on what is thought probable, guesswork, guess'. In turn, remote 'possibility' means 'contingency, likelihood, chance'.

From these elements of SG Article 4.1(b), i.e., the emphasis on clear imminence of significant overall impairment, the requirement to base a threat determination on objective facts, and the rejection of 'assertions', 'opinions' and 'conclusions' that are not based on sufficient factual evidence, it is possible to draw at least some inferences on how to conduct a threat analysis. These elements suggest (i) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past (i.e. the latter part of an investigation period) as a starting-point so as to avoid basing a determination on allegation, conjecture or remote possibility; (ii) that factual information from the recent past complemented by fact-based projections concerning developments in the industry's condition, and concerning imports, in the imminent future needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry's position is imminent in the near future; (iii) that the analysis needs to determine whether injury of a serious degree will actually occur in the near future unless safeguard action is taken."<sup>11</sup>

7. On appeal, the Appellate Body in *US - Lamb* stated that:

"Article 4.1(b) provides that any determination of a threat of serious injury 'shall be based on facts and not merely on allegation, conjecture or *remote possibility*.' (emphasis added) To us, the word 'clearly' relates also to the factual demonstration of the existence of the 'threat'. Thus, the phrase 'clearly imminent' indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury."<sup>12</sup>

8. The Panel in *US - Lamb* also considered that a focus on the recent data available pertaining to the end of an investigation period is logical in view of the future-oriented nature of a threat of serious injury analysis:

"In our view, due to the future-oriented nature of a threat analysis, it would seem logical that occurrences at the beginning of an investigation period are less relevant than those at the end of that period. While the SG Agreement does not specify the appropriate duration of the time-period to be considered in an investigation, the Panel and Appellate Body in *Argentina - Footwear* both considered this issue to some extent. Both concluded that (for an *actual* serious injury finding) the most recent data were clearly the most relevant. In particular, the Appellate Body stated that 'the

<sup>9</sup> Panel Report, *EU - Safeguard Measures on Steel (Turkey)*, para. 7.206.

<sup>10</sup> Panel Report, *US - Lamb*, para. 7.127.

<sup>11</sup> Panel Report, *US - Lamb*, paras. 7.128-7.129.

<sup>12</sup> Appellate Body Report, *US - Lamb*, para. 125.

relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past'.

Given that a threat of serious injury pertains to imminent significant overall impairment, i.e., an event to take place in the immediate future, the same principle should hold true a fortiori for threat determinations compared with present serious injury determinations."<sup>13</sup>

9. The Panel in *Argentina – Footwear (EC)* considered that a mere threat of increased imports is insufficient for the purposes of a determination of threat of serious injury:

"[I]f only a threat of increased imports is present, rather than actual increased imports, this is not sufficient. Article 2.1 requires an actual increase in imports as a basic prerequisite for a finding of either threat of serious injury or serious injury. A determination of the existence of a threat of serious *injury* due to a threat of increased *imports* would amount to a determination based on allegation or conjecture rather than one supported by facts as required by Article 4.1(b)."<sup>14</sup>

10. The Panel in *US – Lamb* also addressed the question of whether projections of future increases in imports equated a "threat of increased imports" with a "threat of serious injury":

"We agree in general with the complainants' argument that a threat of increased imports as such cannot be equated with threat of serious injury. However, in our view, this is not what the USITC has done in this case. Moreover, we also deem it possible that imports continuing on an elevated level for a longer period without further increasing at the end of the investigation period may, if unchecked, go on to cause serious injury (i.e., may threaten to cause serious injury). That is, if increased imports at a certain point in time cause less than serious injury, it is not necessarily true that a threat of serious injury can only be caused by a further increase, i.e., additional increased imports. In our view, in the particular circumstances of a case, a continuation of imports at an already recently increased level may suffice to cause such threat."<sup>15</sup>

### 1.3.3 Relationship between serious injury and threat of serious injury

11. The Panel in *Argentina – Footwear (EC)* observed that in the dispute before it, it was not necessary "to rule on the question of whether it is possible to make simultaneously findings of serious injury and threat of serious injury."<sup>16</sup>

12. In *Ukraine – Passenger Cars*, the Panel rejected Japan's claim that the Ukrainian authorities failed to explain whether they made a determination of serious injury or threat thereof, and found that the record showed that the authorities made a determination of threat of serious injury.<sup>17</sup> The Panel in *Ukraine – Passenger Cars* underlined the conceptual similarity between a determination of serious injury and a determination of threat of serious injury:

"As an initial matter, we note that Article 4.1(b) defines 'threat of serious injury' as 'serious injury' that is clearly imminent. It is thus apparent that, definitionally and conceptually speaking, the 'serious injury' to be established in a determination of a 'threat of serious injury' is not different from the 'serious injury' to be established in a determination of 'serious injury'. In other words, we perceive no difference between the two types of situations in terms of the level or extent of injury that must be shown – in either case it has to be 'serious' injury. The difference between the two situations relates to whether 'serious injury' has already materialized – 'yes' in the case of a finding of serious injury, 'not yet' in the case of a finding of threat of serious injury."<sup>18</sup>

<sup>13</sup> Panel Report, *US – Lamb*, paras. 7.192-7.193.

<sup>14</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.284.

<sup>15</sup> Panel Report, *US – Lamb*, para. 7.187.

<sup>16</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.285.

<sup>17</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.214-7.220.

<sup>18</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.224.

13. While taking into account the Appellate Body's finding in *US – Line Pipe* that the definitions of serious injury and threat of serious injury should be given independent meaning, the Panel in *Ukraine – Passenger Cars* nevertheless underlined that although Article 4.1(b) allows Members to impose safeguard measures to prevent imminent serious injury without waiting for serious injury to occur, this does not necessarily suggest that it is easier to demonstrate threat of serious injury:

"The Agreement on Safeguards reserves this right to Members so that they may take protective action to *prevent* imminent serious injury rather than wait for serious injury to materialize and then remedy it afterwards. It is in this sense of enabling such preventative action even though there is no actual serious injury that we understand the Appellate Body to have referred to the Agreement setting a lower threshold.

Significantly, however, neither the Agreement nor logic suggests that merely because the Agreement allows application of a safeguard measure even before serious injury has actually occurred, the relevant degree of injury should be easier to demonstrate in such cases. Indeed, this would have the perverse consequence of making it more difficult for a Member whose domestic industry is already suffering actual serious injury to apply a safeguard measure than it would be for the same Member in a case where the same domestic industry is facing a threat of serious injury, but not yet experiencing such injury. We also find relevant Article 4.1(b), which states that a 'determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility'. In our view, this requirement confirms that a threat of serious injury determination must be grounded in facts, just like a finding of serious injury."<sup>19</sup>

14. In coming to this conclusion on the requirements for a determination of threat of serious injury under the Agreement on Safeguards, the Panel in *Ukraine – Passenger Cars* found support in the "special care" requirement set forth in the analogous provisions of the Anti-Dumping Agreement and the SCM Agreement:

"Moreover, we note that Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement specifically indicate that 'special care' should be taken when deciding to apply anti-dumping or countervailing measures in threat of material injury cases. In our view, 'special care' is warranted because a determination of a threat of material injury requires no demonstration of actual, or present, material injury, and there always remains the possibility that the threatened injury would not actually materialize for reasons that were not foreseen at the time of the determination. The same possibility logically exists in the context of a determination of a threat of serious injury in a safeguard investigation. We recognize that neither Article 4.2(a) nor any other provision of the Safeguard Agreement contains the phrase 'special care'. Nonetheless, the similarities between the definitions and analysis of material injury and threat thereof in the Anti-Dumping Agreement and the SCM Agreement, and those of serious injury and threat thereof in the Agreement on Safeguards underscore and support our concern about Ukraine's view that it should be easier to establish a threat of serious injury than actual serious injury."<sup>20</sup>

15. The Panel in *India – Iron and Steel Products* briefly discussed the issue of simultaneous determinations of serious injury and threat of serious injury. The Panel emphasized the importance of conducting an independent evaluation of threat of serious injury, supported by evidence. Quoting the report in *Argentina – Footwear*, the Panel stated that:

"[A] finding of threat of serious injury 'whether instead of or in addition to a finding of present serious injury, must be explicitly examined in an investigation' and 'supported by specific evidence and adequate analysis'."<sup>21</sup>

<sup>19</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.227-7.228.

<sup>20</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.229.

<sup>21</sup> Panel Report, *India – Iron and Steel Products*, para. 7.223.

### 1.3.4 Relationship with other paragraphs of Article 4

#### 1.3.4.1 Article 4.1(c)

16. In *US – Lamb*, the Panel held that the definition of domestic industry by the United States authorities was inconsistent with Article 4.1(c) of the Agreement on Safeguards. The Panel then explained its decision not to exercise judicial economy, but rather to proceed to examine other claims, including those pertaining to Article 4.1(b):

"A finding that the industry definition used by the USITC is inconsistent with SG Article 4.1(c) would appear to compromise the investigation and determination overall. ... [T]he Appellate Body focuses on the need for panels to address all claims and/or measures necessary to secure a positive solution to a dispute and adds that providing only a partial resolution of the matter at issue would be false judicial economy. It is in the spirit of the Appellate Body's statements in *Australia – Salmon* that we continue with an analysis of other claims in the alternative, assuming *arguendo* either (1) that the USITC's industry definition were consistent with the Safeguards Agreement or (2) that, as the United States argues in the alternative, the USITC would have made a finding of threat of serious injury even if the industry definition had been limited to packers and breakers."<sup>22</sup>

#### 1.3.4.2 Article 4.2(a)

17. The Panel in *Ukraine – Passenger Cars* held that for a threat of serious injury determination the competent authorities are required to evaluate the injury factors listed in Article 4.2(a):

"Thus, in making a determination of a threat of serious injury, the competent authorities must evaluate all relevant injury factors. These include the same mandatory factors identified in Article 4.2(a) that the competent authorities must evaluate when making a determination of serious injury. In the specific case of an analysis of threat of serious injury, the competent authorities must evaluate all relevant factors with a view to determining whether as a whole, they support a finding that 'serious injury' is 'clearly imminent'. This notably requires a fact-based assessment of likely developments in the very near future with respect to all the relevant factors."<sup>23</sup>

### 1.4 Article 4.1(c)

#### 1.4.1 "domestic industry" – "producers as a whole ... of the like or directly competitive products"

18. In *US – Lamb* the Appellate Body concurred with the finding of the Panel that, in the context of an investigation in which the relevant like product was defined as lamb meat, the term "domestic industry" could not be interpreted as including growers and feeders of live lambs. The Appellate Body began by identifying the analytical approach towards defining "domestic industry":

"[A] safeguard measure is imposed on a specific '*product*', namely, the imported product. The measure may only be imposed if that specific product ('such *product*') is having the stated effects upon the 'domestic industry that *produces like or directly competitive products*'. (emphasis added) The conditions in Article 2.1, therefore, relate in several important respects to specific products. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists only when imports of a specific product have prejudicial effects on domestic producers of products that are 'like or directly competitive' with that imported product. In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of

<sup>22</sup> Panel Report, *US – Lamb*, para. 7.119.

<sup>23</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.234.

products that are *not* 'like or directly competitive products' in relation to the imported product.

Accordingly, the first step in determining the scope of the domestic industry is the identification of the products which are 'like or directly competitive' with the imported product. Only when those products have been identified is it possible then to identify the 'producers' of those products."<sup>24</sup>

19. After addressing the definition of "domestic industry" with respect to products, the Appellate Body in *US – Lamb* then proceeded to consider the issue of producers:

"As the Panel indicated, 'producers' are those who grow or manufacture an article; 'producers' are those who bring a thing into existence. This meaning of 'producers' is, however, qualified by the second element in the definition of 'domestic industry'. This element identifies the particular products that must be produced by the domestic 'producers' in order to qualify for inclusion in the 'domestic industry'. According to the clear and express wording of the text of Article 4.1(c), the term 'domestic industry' extends solely to the 'producers ... of the like or directly competitive products'. (emphasis added) The definition, therefore, focuses exclusively on the producers of a very specific group of products. Producers of products that are not 'like or directly competitive products' do not, according to the text of the treaty, form part of the domestic industry."<sup>25</sup>

20. In *US – Lamb*, the Appellate Body upheld the findings of the Panel and concluded that the definition of "domestic industry" by the United States' authorities was too broad:

"There is no dispute that in this case the 'like product' is 'lamb meat', which is the imported product with which the safeguard investigation was concerned. The USITC considered that the 'domestic industry' producing the 'like product', lamb meat, includes the growers and feeders of live lambs. The term 'directly competitive products' is not, however, at issue in this dispute as the USITC did not find that there were any such products in this case.

...

In this respect, we are not persuaded that the words 'as a whole' in Article 4.1(c), appearing in the phrase 'producers as a whole', offer support to the United States position. These words do not alter the requirement that the 'domestic industry' extends only to producers of 'like or directly competitive products'. The words 'as a whole' apply to 'producers' and, when read together with the terms 'collective output' and 'major proportion' which follow, clearly address the *number* and the *representative nature* of producers making up the domestic industry. The words 'as a whole' do not imply that producers of *other products*, which are *not* like or directly competitive with the imported product, can be included in the definition of domestic industry. Like the Panel, we see the words 'as a whole' as no more than 'a *quantitative* benchmark for the proportion of producers ... which a safeguards investigation has to cover.'"<sup>26</sup>

21. The Appellate Body in *US – Lamb* expressed scepticism that the degree of integration of production processes within an industry should have any bearing on the determination of the "domestic industry":

"Although we do not disagree with the Panel's analysis of the USITC Report, nor with the conclusions it drew from that analysis, we have reservations about the role of an examination of the degree of integration of production processes for the products at issue. As we have indicated, under the Agreement on Safeguards, the determination of the "domestic industry" is based on the 'producers ... of the like or directly competitive products'. The focus must, therefore, be on the identification of the

<sup>24</sup> Appellate Body Report, *US – Lamb*, paras. 86-87.

<sup>25</sup> Appellate Body Report, *US – Lamb*, para. 84.

<sup>26</sup> Appellate Body Report, *US – Lamb*, paras. 88 and 91.

products, and their 'like or directly competitive' relationship, and not on the processes by which those products are produced.<sup>27</sup><sup>28</sup>

22. The Panel in *Dominican Republic – Safeguard Measures* rejected the complainants' argument that an investigating authority is required to explain why two separate products were treated as the product under investigation in the same proceeding, and held that "the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under investigation."<sup>29</sup> With respect to the definition of domestic industry in investigations where multiple products are investigated, the Panel found that:

"The text of Article 4.1(c) of the Agreement on Safeguards establishes that the domestic industry has to be defined by reference to 'products' that are 'like or directly competitive' with respect to the imported product. There is nothing in the text of this provision that allows the domestic industry to be defined on the basis of a limited portion of these products. If a product is like or directly competitive with respect to the imported product, that product must be considered for the purposes of defining the domestic industry. Support for this interpretation can be gained by reading Article 4.1(c) of the Agreement on Safeguards within the context of Article 4.1(a). In particular, the determination of the domestic industry in terms of a portion of the 'like or directly competitive products' could fail to establish the existence of a determination of significant overall impairment of the domestic industry as required by Article 4.1(a) of the Agreement on Safeguards. In the present case, the directly competitive domestic product was defined on the basis of a *portion* of the 'like or directly competitive products'."<sup>30</sup>

23. The Panel in *Dominican Republic – Safeguard Measures* also rejected the argument that "it is consistent with Article 4.1(c) of the Agreement on Safeguards to exclude from the domestic industry producers that do not engage in significant production operations, as would be the case with *converters* that only cut and sew the tubular fabric which they purchase."<sup>31</sup> The Panel noted that:

"As the Appellate Body has pointed out, the term 'producers' used in Article 4.1(c) of the Agreement on Safeguards can be taken to mean those who 'manufacture an article', 'those who bring a thing into existence'. In this respect, the Panel does not see any reason why, in the circumstances of the present case, a company that cuts tubular fabric and sews it, and consequently causes a polypropylene bag actually to exist, should not be considered to be a producer under Article 4.1(c) of the Agreement on Safeguards."<sup>32</sup>

24. The Panel in *EU – Safeguard Measures on Steel (Turkey)* agreed with the panel in *Dominican Republic – Safeguard Measures*, and found that the Agreement on Safeguards does not discipline the investigating authority's choice of the product under investigation in itself, nor set out requirements such as restricting the product under investigation solely to those products that are like or directly competitive with each other:

"It is also worth noting what the provisions considered in this section do *not* discipline, namely the choice of the product under investigation, in itself. These provisions do not set out rules for selecting the product under investigation, and for example they do not prevent a Member from including a range of products in a single investigation. We thus agree with the panel in *Dominican Republic – Safeguard Measures* that while the Agreement on Safeguards requires the authority to define the product under investigation, it does not set out requirements such as restricting the product under investigation 'solely to those products that are like or directly competitive with each

<sup>27</sup> (footnote original) We can, however, envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products.

<sup>28</sup> Appellate Body Report, *US – Lamb*, para. 94.

<sup>29</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.181.

<sup>30</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.191.

<sup>31</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.194.

<sup>32</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.196.

other'. In that instance, the product under investigation comprised polypropylene bags (the end product) and polypropylene tubular fabric (the input product for polypropylene bags). The panel in that dispute explained that the authority could include 'two separate products' in the product under investigation, and was not under an 'obligation to provide an explanation of why two separate products were treated as the product under investigation in the same proceeding'. It therefore found that no inconsistency had been established on that basis."<sup>33</sup>

25. The Panel in *US – Safeguard Measure on Washers* agreed with the complainant, Korea, that the United States' investigating authority's application of the "product line approach"<sup>34</sup> to define the domestic industry was inconsistent with article 4.1(c) of the Agreement on Safeguards to the extent that this approach included in the definition of the domestic industry domestically produced inputs which were not like or directly competitive with the imported product under investigation.<sup>35</sup> In so finding, the Panel noted that:

"Article 4.1(c) states that the domestic industry shall be understood to mean 'producers as a whole' of such like or directly competitive products. However, unlike the United States, we do not consider that the term 'producers as a whole' permits investigating authorities to define the domestic industry on the basis of producers of intermediate products that are not 'like or directly competitive' with the PUC. The term 'producers as a whole' is followed by the phrase 'or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'. Read together with that subsequent phrase, we understand the term 'producers as a whole' to address the number and the representative nature of producers making up the domestic industry. That is, an investigating authority may define the domestic industry based on, either (a) producers as a whole of the like or directly competitive products, or (b) producers whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. Our views in this regard are consistent with previous DSB reports that also considered that the phrase 'as a whole' does not imply that producers of other products, which are not themselves like or directly competitive with the imported product, may be included in the definition of the domestic industry. Unless the input products are 'like or directly competitive' with the imported PUC, we find no textual basis under Article 4.1(c) to include the producers of such inputs within the scope of the domestic industry. This is because, as we have explained, according to Article 4.1(c), the only textual basis for defining the domestic industry is on the basis of producers of like or directly competitive products."<sup>36</sup>

26. In *US – Safeguard Measure on Washers*, the complainant, Korea, also argued that the United States' investigating authority acted inconsistently with Article 4.1(c) of the Agreement on Safeguards by including belt-driven washers in the scope of the domestic industry on the basis of their likeness to the product under consideration, while expressly excluding belt-driven washers from the definition of the product under consideration.<sup>37</sup> The Panel rejected Korea's argument and found that there was no requirement under Article 4.1(c) of the Agreement on Safeguards for a "match" between the product under consideration and the domestically produced good:

"We agree with Korea that the definition of the domestic industry affects subsequent stages of an investigating authority's determination (such as the serious injury and causation determinations). However, the Agreement on Safeguards provides a specific definition of the domestic industry in Article 4.1(c), and requires that the subsequent stages of the investigation be conducted based on a domestic industry defined in accordance with this provision. Neither Article 4.1(c) nor any other provision of the Agreement on Safeguards (including the provisions governing the subsequent conduct of the investigation, such as Articles 4.2(b) and 4.2(c)), impose any

<sup>33</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.34. See also Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.176-7.182.

<sup>34</sup> Panel Report, *US – Safeguard Measure on Washers*, paras. 7.71 and 7.73.

<sup>35</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.75.

<sup>36</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.75.

<sup>37</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.47.

additional requirements precluding what Korea describes as a 'mismatch' between the PUC and the domestically produced good. Article 4.1(c) requires that the domestic industry be defined on the basis of producers of goods that are 'like or directly competitive' with the PUC. To the extent the domestic industry is defined based on the producers of like or directly competitive products, there is no additional requirement under Article 4.1(c) for a 'match' between the PUC and the domestically produced good. Indeed, accepting Korea's position would mean that the investigating authority would have to exclude a producer of like or directly competitive goods from the scope of the domestic industry because the domestic product, while like or directly competitive, is essentially not the same as (or to use Korea's words, does not 'match') the goods included in the PUC. This is at odds with the text of Article 4.1(c). We consider that if Article 4.1(c) were intended to preclude investigating authorities from defining the domestic industry on the basis of goods that are like or directly competitive but not a 'match', the provision would have been drafted differently."<sup>38</sup>

27. In *US – Safeguard Measure on Washers*, the Panel rejected Korea's argument that the USITC failed to undertake an objective examination of the factor "profits and losses" in its injury analysis, because it did not evaluate the profitability of dryers which were in the same segment as the PUC, i.e., the laundry segment of the US Market.<sup>39</sup> The Panel did not agree that the USITC was required to consider the profitability of the laundry segment as a whole, i.e., including dryers, and explained that the proper focus of the examination of injury factors was on "like or directly competitive" products comprising the domestic industry:

"Article 4.1(c) defines the domestic industry on the basis of producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. This definition of the domestic industry applies for the purposes of the Agreement on Safeguards, including when the investigating authority determines whether the domestic industry, as defined under Article 4.1(c), has suffered serious injury. It follows that, in undertaking that analysis, investigating authorities are required to evaluate the injury factors having a bearing on the domestic industry by reviewing data relating specifically to those 'like or directly competitive products' that comprise the domestic industry.

...

Therefore, in determining whether the domestic industry, comprising producers of the like product at issue (i.e. LRWs), was suffering serious injury, the USITC was not required to analyse performance indicators (including profitability) for the dryer segment, which was not a like product within the meaning of Article 4.1(c) (or a 'directly competitive' product). That the producers forming part of the domestic industry also produced other products that were profitable is irrelevant to the situation of the domestic industry."<sup>40</sup>

#### 1.4.2 "those whose collective output ... constitutes a major proportion"

28. The Panel in *US – Wheat Gluten* addressed the link between the phrase "major proportion" and the question of data coverage:

"[T]he Agreement expressly envisages that, in certain circumstances, the 'domestic industry' may consist of those domestic producers 'whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'. This implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage. In this case, the fact that the USITC record included full period

<sup>38</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.51.

<sup>39</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.111.

<sup>40</sup> Panel Report, *US – Safeguard Measure on Washers*, paras. 7.114–7.115.

data for only two domestic producers was partially a result of the fact that Heartland became part of the domestic industry only in 1996. Furthermore, the profitability data provided by ADM did not pertain specifically to the domestic industry under investigation and was therefore excluded.

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

On the basis of the information contained, or referred to, in the sections of the USITC Report relating to profits and losses and the statement by the USITC that the three domestic producers that provided usable financial data on wheat gluten 'accounted for the substantial majority of domestic production of wheat gluten', we find that the United States did not act inconsistently with Article 4.2(a) in terms of the coverage of the 'profits and losses' data."<sup>41</sup>

29. In contrast to the Panel's findings in *US – Wheat Gluten*, the Panel in *US – Lamb* held that the data gathered by the investigating authorities in that dispute were not sufficiently representative of those producers whose collective output constitutes a major proportion of the products in question:

"[T]he crucial problem with the data used by the USITC relates to the representativeness of the questionnaire data where they were used (e.g., employment, financial indicators), and not with the use of USDA data where available. In particular the low data coverage for growers and feeders (approximately six per cent), the lack of financial data for interim 1997 and 1998 for grower/feeders, and the uneven data coverage for packers and breakers (especially in the financial data as outlined above) raises serious doubts as to whether the data represent a 'major proportion' of the domestic industry, in the sense of SG Article 4.1(c)."<sup>42</sup>

30. The Panel in *US – Lamb* also pointed out that an incorrect determination of what constitutes the "domestic industry" will likely vitiate also the representativeness of data related to such incorrectly determined domestic industry:

"This lack of representativeness is likely compounded by the fact that the USITC defined the domestic industry broadly as including growers and feeders, as the conclusions drawn from the data pertaining to only a small proportion of US growers and feeders are central to the USITC's overall finding of threat of serious injury."<sup>43</sup>

31. The Panel in *US – Lamb* made clear that a national authority is not under an obligation to collect information from all domestic producers so as to ensure the representativeness of the data used for its final determination. Nevertheless, the Panel invoked, among other things, the need for a "statistically valid sample":

"We agree with the United States that the Safeguards Agreement does not specify any particular methodology to ensure the representativeness of data collected in an investigation. But we also note that the USITC itself concedes that the questionnaire responses do not constitute a statistically valid sample of the producers which, in the USITC's view, form an essential part of the domestic industry. While, again accepting *arguendo* the USITC's industry definition,<sup>44</sup> we recognize that in practical terms it would have been impossible for the USITC to collect data from all of the more than 70,000 growers, we nevertheless believe that the USITC could have obtained data

<sup>41</sup> Panel Report, *US – Wheat Gluten*, paras. 8.54-8.56.

<sup>42</sup> Panel Report, *US – Lamb*, para. 7.218.

<sup>43</sup> Panel Report, *US – Lamb*, para. 7.219.

<sup>44</sup> (*footnote original*) Of course, only once the relevant domestic industry has been defined consistently with SG Article 4.1(c) is it logically possible to select producers representing a "major proportion" of the collective output of the like or directly product in question, or to develop a valid statistical sample that would ensure that the data collected are representative of a major proportion of the domestic industry.

from a larger percentage of the growers than it did or from a statistically valid sample, so as to ensure that the data collected were representative of growers as a whole. In any case, petitioners requesting the initiation of an investigation could not automatically be taken to represent a major proportion of the domestic industry.

In the light of the foregoing, we conclude that on the basis of the information made available by the United States in this dispute (and absent more detailed information on the exact coverage of the questionnaire responses), by industry segment and by injury factor, we are not persuaded that the data used as a basis for the USITC's determination in this case was sufficiently *representative* of 'those producers whose collective output ... constitutes a *major proportion* of the total domestic production of those products' within the meaning of SG Article 4.1(c)."<sup>45</sup>

### 1.4.3 Relationship between "like" and "directly competitive" products

32. In *US – Safeguard Measure on Washers*, Korea, the complainant, argued that "likeness is a subset of the concept of directly competitive products"<sup>46</sup> and thus, in the context of Article 4.1(c) of the Agreement on Safeguards, "the determination of whether products are 'like' is fundamentally 'a determination about the nature and extent of a competitive relationship between and among products'".<sup>47</sup> Korea contended that "whereas 'likeness' implies close to perfect substitutability ('a degree of competition that is higher than merely significant'), 'directly competitive or substitutable' products would be those that compete to a lesser degree."<sup>48</sup> The United States argued that the terms "like" and "directly competitive" were distinct and submitted that "the text of the Agreement on Safeguards makes clear that a domestic article 'like' an imported article subject to investigation need not be 'directly competitive' with the imported article."<sup>49</sup> The Panel explained that the meaning of the term "like" in Article 4.1(c) of the Agreement on Safeguards needs to be interpreted in the context of Article 4 as whole, and having regard to the purpose for which the investigating authority was required to define the domestic industry:

"Article 4 of the Agreement on Safeguards is titled '[d]etermination of serious injury or threat thereof', and sets out the negotiated rules governing such determination. In particular, Article 4.1(a) defines 'serious injury' as a significant overall impairment in the position of the domestic industry. Article 4.2(a), in turn, provides that in 'the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry' the investigating authorities shall evaluate relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry. Article 4.2(b) then requires demonstration of a causal link between increased imports and serious injury to the domestic industry. These provisions show that the domestic industry must be defined in a manner that would allow the investigating authority to subsequently determine whether there is a causal link between increased imports and serious injury to the domestic industry. Indeed, it is clear from the text of Article 4.1(c) ('in determining injury or threat thereof') that the domestic industry is defined for purposes of determining injury or threat to it from increased imports."<sup>50</sup>

33. The Panel in *US – Safeguard Measure on Washers* found that while it was not necessary to exhaustively determine the meaning of the term "like" under Article 4.1(c) of the Agreement on Safeguards, it was clear that when interpreted in the context of Article 4 as a whole, the term did not cover products which did not have any competitive relation with imported products. The Panel cautioned, however, that the term "like" under Article 4.1(c) does not necessarily require close to perfect substitutability between imported and domestic products:

"[W]e do not need to exhaustively define what 'like' under Article 4.1(c) could or could not mean, especially considering the drafters chose to not define the term in

<sup>45</sup> Panel Report, *US – Lamb*, paras. 7.220-7.221.

<sup>46</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.55.

<sup>47</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.55.

<sup>48</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.55.

<sup>49</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.56.

<sup>50</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.60.

the Agreement on Safeguards. Instead, we need to determine whether Article 4.1(c) precluded the USITC from finding that imported and domestic parts were like products, given its finding that the two did not compete. Interpreting Article 4.1(c) in the context of Article 4 as a whole suggests to us that products that are not in any type of competitive relation with each other could not cause serious injury or threat thereof to one other. In particular, we note that Article 4.1(c) opens with the phrase 'in determining injury or threat thereof', which, along with overall context provided by Article 4, specifically Articles 4.2(a) and 4.2(b), suggests that the domestic industry must be defined in a manner that allows the investigating authority to determine whether increased imports have caused or are threatening to cause serious injury to that industry. To the extent an investigating authority finds that two products are not in any competitive relation, we do not see how a domestic industry that is defined in a manner that excludes the possibility of subsequently determining that increased imports have caused or threatened to cause serious injury to that domestic industry (defined on the basis of producers of the like product, which here is covered parts) would be consistent with Article 4.1(c).

That being said, we recognize that competition in a market can manifest itself in various ways. Indeed, competition is not limited to situations where imported and domestic products are close to perfectly substitutable. Thus, to the extent Korea takes the view that 'like' under Article 4.1(c) requires close to perfect substitutability between imported and domestic products, we disagree. We see no textual basis for such a view. To the extent an imported product that is not perfectly substitutable with the domestically produced good has the capacity to cause serious injury to that good through some form of competitive impact, we do not see any basis to interpret 'like' in Article 4.1(c) to exclude such goods. Instead, an investigating authority is entitled as part of its causation determination to examine whether that imported product did cause injury to the domestic industry through that competitive effect. We do not consider that the drafters of the Agreement on Safeguards would have intended the domestic industry to be defined in a way that would preclude the investigating authority from making such a causation determination. However, while we recognize that competition can manifest itself in various ways, we do not consider that 'like' under Article 4.1(c), interpreted in the context of Article 4 as a whole and Article 2.1, covers products that have been found not to have any competitive relation with imported products."<sup>51</sup>

#### 1.4.4 Relationship with other provisions of the Agreement on Safeguards

34. With respect to the relationship with Article 4.1(b) of the Agreement on Safeguards, see paragraph 16 above.

### 1.5 Article 4.2(a)

#### 1.5.1 Standard of review

35. In *US – Lamb*, the Appellate Body articulated the standard of review for a national authority's determination of serious injury or threat thereof:

"[I]n examining a claim under Article 4.2 of the *Agreement on Safeguards*, a panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations."<sup>52</sup>

36. The Appellate Body also stated that:

<sup>51</sup> Panel Report, *US – Safeguard Measure on Washers*, paras. 7.64-7.65.

<sup>52</sup> Appellate Body Report, *US – Lamb*, para. 141.

"[A]lthough panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an 'objective assessment' of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate."<sup>53</sup>

37. The Appellate Body's application of its standard of review to a national authority's determination of serious injury or threat thereof is illustrated by its findings in *US – Lamb*. After criticising the US authority's determination of threat of serious injury, the Appellate Body stated:

"We wish to emphasize again that our remarks about the price data are not intended to suggest that the domestic industry was *not* threatened with serious injury. Rather, our conclusion is simply that the USITC has not adequately explained how the facts relating to prices support its determination, under Article 4.2(a), that the domestic industry *was* threatened with such injury."<sup>54</sup>

38. Although in *US – Lamb* the Appellate Body agreed with the Panel's articulation of the appropriate standard of review, it held that the Panel had not applied this standard correctly in that case. The Appellate Body took issue with the fact that the Panel had considered the evaluation of certain factors to be 'a sufficient basis' for the national authorities' determination, but did not engage in any substantive review of these factors. The Appellate Body found that the Panel had not applied the required standards of review because:

"[B]y failing to review the USITC's determination in light of these detailed substantive arguments, [it] failed to examine critically whether the USITC had, indeed, provided a reasoned and adequate explanation of how the facts supported its determination that there existed a 'threat of serious injury'."<sup>55</sup>

39. The Appellate Body in *US – Cotton Yarn*, in the context of examination of a transitional textile safeguard under Article 6 of the ATC, found that a panel "must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority", and summarized the standard of review for past safeguard disputes as follows:

"Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority."<sup>56</sup>

<sup>53</sup> Appellate Body Report, *US – Lamb*, para. 106.

<sup>54</sup> Appellate Body Report, *US – Lamb*, para. 160.

<sup>55</sup> Appellate Body Report, *US – Lamb*, para. 148.

<sup>56</sup> Appellate Body Report, *US – Cotton Yarn*, para. 74.

40. In *US – Tyres (China)*, the Appellate Body restated the standard of review under Article 11 of the DSU<sup>57</sup> and noted further concerning the Panel's decision in that case that:

"[T]he proper standard of review under Article 11 of the DSU required the Panel to establish whether the USITC provided a reasoned and adequate explanation for its *affirmative* finding of market disruption. The separate views of any dissenting commissioners are not part of the USITC's determination that market disruption exists. Accordingly, insofar as the Panel relied on the views of the dissenting USITC commissioners to support its finding that the USITC provided a reasoned and adequate explanation for its determination that subject imports were a significant cause of material injury under Paragraph 16.4, including the USITC's assessment of the conditions of competition in the US market, the Panel was in error."<sup>58</sup>

## 1.5.2 "all relevant factors"

### 1.5.2.1 General

41. In *Argentina – Footwear (EC)*, the Appellate Body discussed the relationship between the definition of "serious injury" in Article 4.1(a) and the requirement of an evaluation of "all relevant factors" in Article 4.2(a):

"[I]t 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'."<sup>59</sup>

42. The Panel in *Dominican Republic – Safeguard Measures* highlighted the heightened standard of serious injury in a situation where the competent authority examined a range of injury factors, some of which showed a positive trend while others showed a negative trend. The Panel noted that the competent authority "did not provide any explanation of the consideration that it gave to the [positive] factors in its serious injury determination"<sup>60</sup> and underlined the importance of providing an adequate and reasoned explanation on the existence of serious injury in investigations where certain injury factors display a positive trend:

"Considering that the injury evaluated within the context of the Agreement on Safeguards is *serious injury*, the Panel does not believe that the fact that four factors evaluated displayed a negative trend, as compared with the evidence that seven factors (including important elements indicative of the position of the domestic industry, such as production, sales, installed capacity and capacity utilization, and production's share of domestic consumption) performed positively, without the

<sup>57</sup> Appellate Body Report, *US – Tyres (China)*, paras. 123-124.

<sup>58</sup> Appellate Body Report, *US – Tyres (China)*, para. 211. For a summary of the principles governing standard of review under the Agreement on Safeguards, see Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.3-7.8.

<sup>59</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

<sup>60</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.309.

competent authority having provided a sufficient explanation, can result in an adequate and reasoned conclusion with respect to the existence of serious injury."<sup>61</sup>

43. The Panel in *US – Wheat Gluten* also addressed a situation where different factors are positive and negative. The Panel, in a finding upheld by the Appellate Body, considered that it is the overall position of the domestic industry which should be assessed, and that it is up to the competent authority to provide an adequate, reasoned and reasonable explanation for their determination:

"[A] determination as to the existence of such 'significant overall impairment' can be made only on the basis of an evaluation of the overall position of the domestic industry, in light of all the relevant factors having a bearing on the situation of that industry.

...

[W]e do not consider that a negative trend in every single factor examined is necessary in order for an industry to be in a position of significant overall impairment. Rather, it is the totality of the trends, and their interaction, which must be taken into account in a serious injury determination. Thus, such upturns in a number of factors would not necessarily preclude a determination of serious injury. It is for the investigating authorities to assess and weigh the evidence before them, and to give an adequate, reasoned and reasonable explanation of how the facts support the determination made."<sup>62</sup>

44. The Appellate Body in *US – Wheat Gluten*, held that "serious injury" should be determined on the basis of all relevant factors:

"The term 'serious injury' is defined as 'a significant *overall* impairment in the position of a domestic industry'. (emphasis added) The breadth of this term also suggests that all factors relevant to the overall situation of the industry should be included in the competent authorities' determination."<sup>63</sup>

45. In reviewing a determination of the existence of a threat of serious injury, the Panel in *US – Lamb* found that not each of the listed injury factors in Article 4.2 (a) need show a declining tendency. Rather, a determination of serious injury within the meaning of Article 4.1(b) requires an assessment of all injury factors "as a whole":

"[W]e do not exclude that in the particular circumstances of a case, e.g., prices remaining at a depressed level for a longer period may be sufficient for a determination on the whole that an industry is threatened with serious injury even if a given injury factor does not show a recent, sharp and sudden decline. Also, a threat finding does not require that, e.g., financial performance of each individual firm operating in the industry show a decline. A competent national authority may arrive at a threat determination even if the majority of firms within the relevant industry is not facing declining profitability, provided that an evaluation of the injury factors as a whole indicates threat of serious injury.

...

Article 4.1(b) and 4.2(a) do not require the competent national authority to show that each listed injury factor is declining, i.e., point in the direction of serious injury or threat thereof. The competent national authority is required to make its determination in the light of the developments of injury factors on the whole in order to determine

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<sup>61</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.313.

<sup>62</sup> Panel Report, *US – Wheat Gluten*, paras. 8.80 and 8.85.

<sup>63</sup> Appellate Body Report, *US – Wheat Gluten*, para. 74.

whether the relevant industry's condition is facing 'significant overall impairment' in the industry's condition is imminent."<sup>64</sup>

46. In *US – Safeguard Measure on Washers*, in reviewing the USITC's determination regarding serious injury to the domestic industry and evaluation of the relevant injury factors, the Panel observed that "[w]hile an investigating authority must evaluate all relevant factors having a bearing on the situation of the domestic industry, neither Article 4.2(a) nor any other provision of the Agreement on Safeguards requires that all the relevant factors need to show negative trends."<sup>65</sup> Accordingly, the Panel noted that "an authority may find that the domestic industry has been seriously injured where some, or even the majority of the factors do not, by themselves, trend negatively."<sup>66</sup> The Panel also noted that "[w]here some of the factors trend positively while others trend negatively, it is for the investigating authority to assess and weigh the evidence before it, and reasonably and adequately explain how the facts on record support its determination."<sup>67</sup>

47. In the context of reversing an interpretation by the Panel in *US – Wheat Gluten* regarding the requisite causal link between increased imports and serious injury, the Appellate Body held that a national authority should consider all the factors listed in Article 4.2(a), regardless of whether they relate to imports specifically or to the domestic industry more generally. The Appellate Body did not consider that Article 4.2(a) attached any special significance to any one of these factors in particular:

"The use of the word 'all' in the phrase 'all relevant factors' in Article 4.2(a) indicates that the effects of any factor may be relevant to the competent authorities' determination, irrespective of whether the particular factor relates to imports specifically or to the domestic industry more generally. This conclusion is borne out by the list of factors which Article 4.2(a) stipulates are, 'in particular', relevant to the determination. This list includes factors that relate *both to* imports specifically *and* to the overall situation of the domestic industry more generally. The language of the provision does not distinguish between, or attach special importance or preference to, any of the listed factors. In our view, therefore, Article 4.2(a) of the Agreement on Safeguards suggests that all these factors are to be *included* in the determination and that the contribution of each relevant factor is to be counted in the determination of serious injury according to its 'bearing' or effect on the situation of the domestic industry. Thus, we consider that Article 4.2(a) does not support the Panel's conclusion that some of the 'relevant factors' – those related exclusively to increased imports – should be counted towards an affirmative determination of serious injury, while others – those not related to increased imports – should be excluded from that determination."<sup>68</sup>

48. In *US – Wheat Gluten*, after finding that the phrase "all relevant factors" under Article 4.2(a) refers to factors relating both to imports and to the domestic industry, the Appellate Body further held that the determination of "causality" under Article 4.2(b) must give the phrase "all relevant factors" the same meaning as under Article 4.2(a). The Appellate Body noted that Article 4.2(a) imposes an obligation to evaluate (and by implication to include) the effect of all the relevant factors on the domestic industry and went on to state that this obligation under Article 4.2(a) would be violated if the very same effects, caused by those *same* factors, were – with the exception of increased imports – to be excluded from consideration under Article 4.2(b):

"We believe that Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards* must be given a mutually consistent interpretation, particularly in light of the explicit textual connection between these two provisions. According to the opening clause of Article 4.2(b) – 'The determination referred to in subparagraph (a) shall not be made unless...' – *both* provisions lay down rules governing a *single* determination, made under Article 4.2(a). In our view, it would contradict the requirement in Article 4.2(a) to evaluate – and, thereby, include in the determination – the 'bearing' or effect *all*

<sup>64</sup> Panel Report, *US – Lamb*, paras. 7.188 and 7.203.

<sup>65</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.102.

<sup>66</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.102.

<sup>67</sup> Panel Report, *US – Safeguard Measure on Washers*, para. 7.102.

<sup>68</sup> Appellate Body Report, *US – Wheat Gluten*, para. 72.

the relevant factors have on the domestic industry, if those *same* effects, caused by those *same* factors, were, with the exception of increased imports, to be excluded under Article 4.2(b), as the Panel suggested."<sup>69</sup>

### 1.5.2.2 Factors listed in Article 4.2(a)

#### 1.5.2.2.1 General

49. The Panel in *Korea – Dairy* found, with respect to the list of factors contained in Article 4.2(a), that the national investigating authority was under an obligation to evaluate *all* of these factors:

"This provision sets out the general principle regarding the economic factors which need to be considered in a serious injury investigation, and provides a list of factors that are a priori considered to be especially relevant and informative of the situation of the domestic industry. The use of the wording 'in particular' makes it clear to us that, among 'all relevant factors' that the investigating authorities 'shall evaluate', the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry."<sup>70</sup>

50. The Panel in *Argentina – Footwear (EC)* in a finding subsequently upheld by the Appellate Body, made a similar statement that, "in accordance with the text of the *Safeguards Agreement* and past practice, ... an evaluation of all factors listed in Article 4.2(a) is required."<sup>71</sup> The Appellate Body in *Argentina – Footwear (EC)* agreed "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."<sup>72</sup>

#### 1.5.2.2.2 "share of the domestic market taken by increased imports"

51. In *Ukraine – Passenger Cars*, the Panel noted that one of the mandatory injury factors that competent authorities must evaluate is the share of the domestic market taken by increased imports.<sup>73</sup> The Panel highlighted that:

"The text [of Article 4.2(a)] requires consideration of the market share of increased imports, not the percentage change in the domestic industry's market share. In any event, the fact that domestic market share was 35% lower in 2010 than in 2008 does not necessarily mean that imports picked up the market share that the domestic industry lost. Where, as in the present case, not all domestic producers (or production) are part of the domestic industry as defined by the competent authorities, it is possible that the domestic industry as defined lost market share to other domestic producers (or domestic production) not part of the domestic industry, in addition to losing market share to imports[.]"<sup>74</sup>

52. The Panel in *Ukraine – Passenger Cars* proceeded to reject Ukraine's argument that domestic producers had requested confidential treatment for information on their market shares. The Panel underlined that even if this were the case, such confidential treatment would not relieve Ukraine's investigating authorities from examining market shares, as one of the factors listed in Article 4.1(a):

"Ukraine states that its domestic industry requested confidential treatment of 'the domestic industry's production and sales in Ukraine, as well as other [sensitive] information concerning the domestic industry'. However, this statement about information relating to the domestic industry does not suggest to us that the share of

<sup>69</sup> Appellate Body Report, *US – Wheat Gluten*, para. 73.

<sup>70</sup> Panel Report, *Korea – Dairy*, para. 7.55.

<sup>71</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.123.

<sup>72</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.

<sup>73</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.249.

<sup>74</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.249.

the domestic market taken by increased imports was covered by the domestic industry's request. Ukraine further asserts that 'the specific market shares are confidential pursuant to Article 3.2 of the Agreement [on Safeguards] and Article 12 of the [Safeguards] Law'. In the absence of any explanation by Ukraine, we also fail to see how the import market share in this case could be considered to be 'by nature confidential' within the meaning of Article 3.2. And even if it could be considered confidential in some cases, the import market share is one of the injury factors that is identified in Article 4.2(a) and that must be evaluated by the competent authorities, whether on the basis of confidential or public information. That evaluation must then be published under Article 4.2(c), which may be constrained by the need to protect confidential information, but must nonetheless be complied with. In any event, we note that Ukraine itself submitted a private-sector publication from 2012 that contains market share data of individual producers of passenger cars for 2010 and 2011, including for imported brands, and even gives the production volumes in units of domestic producers.

Ukraine also argues that if its competent authorities had provided the absolute figures of any 'relevant factors having a bearing on the situation of [the domestic] industry', confidential data of the domestic industry would be 'vulnerable to a simple numerical analysis'. However, it is not apparent to us how the disclosure of the import market share in the present dispute could reveal the market share of the domestic industry, since the domestic market in the present dispute comprises (i) the domestic industry as defined in the Notice of Imposition (composed of three producers, namely ZAZ CJSC, Eurocar CJSC, and a subsidiary of Bogdan Motors), (ii) domestic producers or production not forming part of the domestic industry as defined in the Notice of Imposition, and (iii) imports. In such a situation, to derive the market share of the domestic industry that requested confidential treatment of its data, one would need to know both the import market share and the market share of the domestic producers (or domestic production) not forming part of the domestic industry as defined in the Notice of Imposition."<sup>75</sup>

#### 1.5.2.2.3 "rate and amount of the increase in imports"

53. The Panel in *Argentina – Footwear (EC)* read the requirement under Article 4.2(a) to evaluate the rate and amount of the increase in imports to mean a requirement to analyse the trends of imports over the period of investigation:

"[W]e recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated.<sup>76</sup> In our view this constitutes a requirement that the intervening *trends* of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change."<sup>77</sup>

54. The Appellate Body in *Argentina – Footwear (EC)* affirmed the Panel's interpretation of the words "rate and amount" in Article 4.2(a) by agreeing with the Panel that:

"[T]he specific provisions of Article 4.2(a) require that 'the *rate* and *amount* of the increase in imports ... in absolute and relative terms' ... must be evaluated. Thus, we

<sup>75</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.250-7.251.

<sup>76</sup> (*footnote original*) We recognize that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in "*such* increased quantities" (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.

<sup>77</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.159.

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)."<sup>78</sup>

55. In *Ukraine – Passenger Cars*, the Panel observed that one of the mandatory injury factors that competent authorities must evaluate is the rate and amount of the increase in imports of the product concerned in absolute and relative terms.<sup>79</sup> In the investigation underlying the Panel proceedings in *Ukraine – Passenger Cars*, the competent authorities provided no assessment of the amount of increase in imports on the grounds that, at the request of the domestic industry, that information had been treated as confidential. The Panel found that the authorities failed to properly evaluate the likely development of imports:

"In our view, the rate and amount of an increase in imports during the period of investigation may indicate a likelihood of increased importation into the domestic market in the very near future. We therefore consider that the rate and amount of an increase in imports are relevant also to an analysis of threat of serious injury. Thus, in a situation where imports have increased relative to domestic production during the period of investigation, there may be a basis for concluding that the trend will continue in the very near future. As we have noted, however, there is no such conclusion in the Notice. We express no opinion as to whether a conclusion that imports were likely to continue to increase relative to domestic production (or in absolute terms) could have been made in the present case. Even if such a conclusion could have been drawn, it is not sufficient for the competent authorities to have merely noted the percentage of the relative increase without explaining what inferences were drawn from it with regard to the likely development of imports in the imminent future. As the Appellate Body has pointed out, '[a] panel must not be left to wonder why a safeguard measure has been applied'.

Therefore, we find that the competent authorities have failed to properly evaluate and give a reasoned explanation of, the likely development of imports, either in absolute terms or relative to domestic production, and their likely effect on the situation of the domestic industry in the very near future."<sup>80</sup>

56. The Panel in *EU – Safeguard Measures on Steel (Turkey)* held that when a complainant alleges that the increase in imports is not sudden, significant, sharp or recent "enough", that complainant must also adduce evidence of the reference point or benchmark by which the increase in imports should be judged:

"Thus, the question of whether an increase is sudden, significant, sharp, and recent enough may be determined by evaluating whether the increase is sufficient to cause or threaten to cause serious injury to the domestic industry. This question may also conceivably be determined by reference to some other benchmark proposed by the complainant, such as whether the increase is merely reflective of a reversion to normal market conditions after a disruption."<sup>81</sup>

57. With respect to coincidence between trends in injury factors and import trends, see paragraphs 99-101 below.

#### 1.5.2.2.4 "productivity"

58. The Panel in *US – Wheat Gluten* held that the term "productivity" may refer to the overall productivity of an industry and encompasses productivity of both labour and capital:

"[T]he Agreement on Safeguards provides no precise definition of the term 'productivity' that appears in Article 4.2(a) SA. The context of this term includes the rest of the text of Article 4.2(a) – and in particular, the phrase 'all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry'

<sup>78</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

<sup>79</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.249.

<sup>80</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.254-7.255.

<sup>81</sup> Panel Report, *EU – Safeguard Measures on Steel (Turkey)*, para. 7.185.

... We consider that this term, read in its context, may refer to the overall productivity of the *industry*.

It is apparent to us from the USITC Report that the USITC gathered and analysed data on capital investment in the industry as well as data pertaining to worker productivity. In these Panel proceedings, the United States asserts that 'it is simple mathematics that if production declines (as it did in 1996-1997 from 1995 levels), while the amount of capital in the industry increases (as it did from the capital projects adding capacity), the productivity of capital will correspondingly decline.' We would have preferred a more integrated examination in the USITC Report of 'productivity' that explicitly encompassed *overall* industry productivity -- particularly in light of the acknowledgement by the USITC that 'production of wheat gluten is extremely capital intensive and requires very few production workers'. Nevertheless, we consider that the data and statements pertaining to worker productivity, in conjunction with those on capital investments, in the overall context of the USITC Report, indicate that the USITC considered industry productivity as required by Article 4.2(a)."<sup>82</sup>

### 1.5.2.3 Factors not listed in Article 4.2(a)

59. In *US – Wheat Gluten*, the Appellate Body disagreed with the interpretation by the Panel in that dispute that, with regard to factors not enumerated in Article 4.2(a), competent authorities are obliged only to evaluate factors "clearly raised" as relevant by interested parties in a domestic investigation.<sup>83</sup> Rather, the Appellate Body held that the investigating authorities must, where necessary, "undertake additional investigative steps ... in order to fulfil their obligation to evaluate all relevant factors":

"The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the *Agreement on Safeguards*. Moreover, Article 4.2(a) requires the competent authorities – and *not the interested parties* – to evaluate fully the relevance, if any, of "other factors". If the competent authorities consider that a particular 'other factor' may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. In such cases, where the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an 'other factor', they must investigate fully that 'other factor', so that they can fulfill their obligations of evaluation under Article 4.2(a). In that respect, we note that the competent authorities' 'investigation' under Article 3.1 is *not limited* to the investigative steps mentioned in that provision, but must simply '*include*' these steps. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors.

Thus, we disagree with the Panel's finding that the competent authorities need only examine 'other factors' which were '*clearly* raised before them as relevant by the interested parties in the domestic investigation.' (emphasis added) ... However, as is clear from the preceding paragraph of this Report, we also reject the European Communities' argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."<sup>84</sup>

60. In *Ukraine – Passenger Cars*, the Panel stated that the capacity of key exporting countries to generate exports, and whether other export markets could absorb additional exports from those countries, were relevant factors to be taken into account even if not explicitly identified in Article 4.2(a):

"In sum, the Notice determines that there was capacity in certain exporting countries (namely Japan and Russia) to export more, but fails to consider whether any

<sup>82</sup> Panel Report, *US – Wheat Gluten*, paras. 8.44-8.45.

<sup>83</sup> Panel Report, *US – Wheat Gluten*, paras. 8.69 and 8.121.

<sup>84</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 55-56.

increased exports were likely to enter Ukraine's market, for instance by addressing the availability of other export markets to absorb additional exports from these countries. With respect to other exporting countries, the Notice does not address, at all, whether they might have the capacity to export increased quantities to Ukraine, noting only that Ukraine's market was 'attractive' to Korean and Turkish producers – a conclusion that is open to question, as discussed above. The Notice therefore fails to properly assess the likelihood of a future increase in exports to Ukraine's market, and in fact reaches no conclusion in this respect.

In our view, the failure of the competent authorities to assess (i) whether the facts before them indicated a current, and/or projected, increase in capacity to export on the part of relevant exporting countries; and (ii) whether other export markets are available that could absorb additional exports from these countries, rather than or in addition to the Ukrainian market, leaves unclear how the information on export capacity in exporting countries was considered in the determination of threat of serious injury."<sup>85</sup>

#### 1.5.2.4 Consideration of trends

61. The Panel in *Argentina – Footwear (EC)* considered "the investigation's almost exclusive reliance on end-point-to-end-point comparisons in its analysis of the changes in the situation of the industry" to be inconsistent with the requirement of an evaluation of "all relevant factors". The Panel observed in this respect that:

"[I]f intervening trends are not systematically considered and factored into the analysis, the competent authorities are not fulfilling Article 4.2(a)'s requirement to analyse 'all relevant factors', and in addition, the situation of the domestic industry is not ascertained in full. For example, the situation of an industry whose production drops drastically in one year, but then recovers steadily thereafter, although to a level still somewhat below the starting level, arguably would be quite different from the situation of an industry whose production drops continuously over an extended period. An end-point-to-end-point analysis might be quite similar in the two cases, whereas consideration of the year-to-year changes and trends might lead to entirely opposite conclusions."<sup>86</sup>

62. The Panel in *Ukraine – Passenger Cars* faulted the competent authorities in the investigation at issue for not having evaluated and provided a reasoned explanation of the likely developments for injury factors that pertained directly to the situation of the domestic industry:

"We will now consider the competent authorities' evaluation of the factors that relate directly to the situation of the domestic industry, specifically, production volume, capacity utilization, domestic unit sales, operating profit, employment, and labour productivity. The analysis of these injury factors in the Notice consists of a simple end-point-to-end-point comparison of the data for 2008 and 2010, and the implication that the direction and extent of the change in these factors are evidence of a negative impact of imports on the domestic industry. The Notice notably provides no projections as to likely developments in these factors in the very near future. Thus, the Notice fails to evaluate and give a reasoned explanation of the likely developments in these factors and their likely effect on the situation of the domestic industry in the very near future."<sup>87</sup>

63. The Panel in *Ukraine – Passenger Cars* also faulted the competent authorities for not explaining why they made an affirmative determination of threat of serious injury despite the existence of several injury factors that showed a positive trend towards the end of the investigation period:

"However, there is no recognition or discussion of these improvements in the Notice. As we discussed above, the more recent data from the period of investigation are of

<sup>85</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.262-7.263.

<sup>86</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.216.

<sup>87</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.265.

particular relevance to an analysis of a threat of serious injury. In these circumstances, the competent authorities should have provided some explanation in the published report as to why, despite positive developments in respect of several injury factors towards the end of the period of investigation, they concluded that it was likely that the situation of the domestic industry would deteriorate in the imminent future to a condition of serious injury."<sup>88</sup>

64. Similarly, the Panel in *India – Iron and Steel Products* required that such positive trends be accounted for in the competent authority's explanation:

"If a number of injury trends show a positive trend or an improvement in the situation of the domestic industry, the competent authority would need to provide a compelling explanation of why and how the domestic industry is injured despite such positive trends[.]"<sup>89</sup>

65. In *US – Safeguard Measure on Washers*, the Panel found that the USTIC failed to evaluate and provide a reasonable and adequate explanation for its finding on increased imports because its report did not show how the USITC evaluated the trends in imports over the period of investigation, and that the United States failed to present the unredacted version of the relevant document from the investigation file which in the United States' view would show otherwise. On this basis, the Panel found that the United States violated Articles 2.1 and 3.1 of the Agreement on Safeguards.<sup>90</sup>

#### 1.5.2.5 Consideration of "all relevant factors" in the case of a segmented domestic industry

66. The Panel in *Korea – Dairy* held that while it is permissible to analyse distinct market segments in order to make a finding of serious injury to the whole domestic industry, the investigating authorities must nevertheless comply with certain requirements in this respect:

"[T]he definition of the domestic industry in this case as comprising two different segments of the dairy products market has consequences for the evaluation of the situation of the industry. In assessing the serious injury to the whole domestic industry, we find that it is acceptable to analyse distinct market segments but, as stated above, all factors listed in Article 4.2 must be addressed. In considering each of the factors listed in Article 4.2, and any others found to be relevant by the authority, the investigating authority has two options: for each factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry. ... Our point here is that an analysis of only a segment of the domestic industry, without any explanation of its significance for the whole industry, will not satisfy the requirements of the Agreement on Safeguards."<sup>91</sup>

67. In *Argentina – Footwear (EC)*, the Panel addressed the argument that, since the investigation had been conducted on the basis of a division of the product under investigation into five product groups, the investigating authorities were required to prove serious injury in all segments in which safeguard measures were to be imposed:

"We disagree with the European Communities that Argentina was required to conduct its injury and causation analysis on a disaggregated basis. In our view, since in this case the definition of the like or directly competitive product is not challenged, it is this definition that controls the definition of the 'domestic industry' in the sense of Article 4.1(c) as well as the manner in which the data must be analysed in an investigation. While Argentina could have considered the data on a disaggregated basis (and in fact did so in some instances), in our view, it was not required to do so. Rather, given the undisputed definition of the like or directly competitive product as all

<sup>88</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.267.

<sup>89</sup> Panel Report, *India – Iron and Steel Products*, para. 7.209.

<sup>90</sup> Panel Report, *US – Safeguard Measure on Washers*, paras. 7.95-7.97.

<sup>91</sup> Panel Report, *Korea – Dairy*, para. 7.58.

footwear, Argentina was required at a minimum to consider each injury factor with respect to all footwear.<sup>92</sup> By the same token the European Communities, having accepted Argentina's aggregate like product definition, has no basis to insist on a disaggregated analysis in which injury and causation must be proven with respect to each individual product segment.<sup>93</sup> Thus, in our review of the injury finding, we will consider the analysis and conclusions pertaining to the footwear industry in its entirety."<sup>94</sup>

68. The Panel in *US – Lamb* found that an investigation of the injury factors with respect to particular industry segments is sufficient, provided an adequate explanation of certain issues is furnished:

"An initial issue before us is whether, accepting *arguendo* the USITC's industry definition, all factors need to be investigated in detail for *all* identified industry segments (i.e., growers, feeders, packers and breakers) or whether an investigation of certain injury factors with respect to *particular* segments only would be sufficient to meet the requirements of SG Article 4.2(a). In the light of the general standard of review, as it applies to contingent trade remedy cases, we consider the latter as sufficient if there is an adequate explanation in the report published by the USITC, of (i) why conclusive inferences from the data concerning *one* industry segment can be drawn for *another* industry segment, or (ii) why the factual constellation in particular industry segment in the given case does *not* permit data collection (i.e., *not* a 'factor of a *objective* and *quantifiable* nature'), or (iii) renders a certain injury factor not probative in the circumstances of a particular industry segment (i.e., *not* a factor '*having a bearing* on the situation of that industry' within the meaning of SG Article 4.2(a)."<sup>95</sup>

69. The Panel in *US – Lamb* then noted with respect to the investigation at issue:

"[W]here the USITC did not collect data concerning a particular injury factor with respect to all industry segments, the USITC report provides an adequate explanation for that. Either the USITC report explains how inferences can be drawn from the data collected with regard to *one* segment for *another* segment for which data were not collected, or it explains why, in the circumstances of the particular industry segment at issue, the collection of data of an objective and quantifiable nature was not possible, or it explains why a specific injury factor is not probative for that segment."<sup>96</sup>

### 1.5.3 "of an objective and quantifiable nature"

#### 1.5.3.1 General

70. In its determination of what would constitute "factors of an objective and quantifiable nature" within the meaning of Article 4.2(a), the Appellate Body in *US – Lamb* opined that the requirement of objectivity applies not only to factors but also to data:

"We note that no provision of the Agreement on Safeguards specifically addresses the question of the extent of data collection, and in particular, whether competent authorities must have before them data that is representative of the domestic industry. However ... competent authorities are obliged to 'evaluate' all relevant factors of an 'objective and quantifiable' nature ... We recognize that the clause 'of an

<sup>92</sup> (footnote original) Or, to the extent that Argentina relied on data for particular product segments as the basis for conclusions pertaining to the entire industry, it was required to explain how its analysis regarding those segments related to or was representative of the industry as a whole.

<sup>93</sup> (footnote original) We note that in any case, only if serious injury or a threat thereof exists with respect to the product market segments accounting for the bulk of the industry's output will injury be evident with respect to the industry as a whole. The European Communities appears to acknowledge this, in indicating that the share of a given product category of the total industry is relevant for the injury analysis of the entire industry.

<sup>94</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.137.

<sup>95</sup> Panel Report, *US – Lamb*, para. 7.141.

<sup>96</sup> Panel Report, *US – Lamb*, para. 7.177.

objective and quantifiable nature' refers expressly to 'factors', but not expressly to data. We are, however, convinced that factors can only be 'of an objective and quantifiable nature' if they allow a determination to be made, as required by Article 4.2(b) of the Agreement on Safeguards, on the basis of 'objective evidence'. Such evidence is, in principle, objective data. The words 'factors of an objective and quantifiable nature' imply, therefore, an evaluation of objective data which enables the measurement and quantification of these factors.

[T]he requirement for competent authorities to evaluate the 'bearing' that the relevant factors have on the 'domestic industry' and, subsequently, to make a determination concerning the overall 'situation of that industry', means that competent authorities must have a sufficient factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the 'domestic industry'. The need for such a sufficient factual basis, in turn, implies that the data examined, concerning the relevant factors, must be representative of the 'domestic industry'. Indeed, a determination made on the basis of insufficient data would not be a determination about the state of the 'domestic industry', as defined in the Agreement, but would, in reality, be a determination pertaining to producers of something less than 'a major proportion of the total domestic production' of the products at issue. Accordingly, we agree with the Panel that the data evaluated by the competent authorities must be sufficiently representative of the 'domestic industry' to allow determinations to be made about that industry."<sup>97</sup>

71. The Appellate Body in *US – Lamb* nevertheless stressed that data could fulfil the requirement of being representative even if they did not cover all domestic producers whose production constitutes a major proportion of the domestic industry:

"We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to all those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the 'domestic industry'. What is sufficient in any given case will depend on the particularities of the 'domestic industry' at issue."<sup>98</sup>

### 1.5.3.2 Nature and temporal focus of data in a threat analysis

72. In *US – Lamb*, the Appellate Body addressed "tension between a future-oriented 'threat' analysis" on the one hand, and the "need for a fact-based determination of serious injury" on the other:

"[W]e agree with the Panel that a threat determination is 'future-oriented'. However, Article 4.1(b) requires that a 'threat' determination be based on 'facts' and not on 'conjecture'. As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented 'threat' analysis, which, ultimately, calls for a degree of 'conjecture' about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is 'clearly imminent'. Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future."<sup>99</sup> <sup>100</sup>

73. With respect to the temporal focus of data used in a threat analysis, the Appellate Body in *US – Lamb* held:

<sup>97</sup> Appellate Body Report, *US – Lamb*, paras. 130-131.

<sup>98</sup> Appellate Body Report, *US – Lamb*, para. 132.

<sup>99</sup> (footnote original) We observe that the projections made must relate to the overall state of the domestic industry, and not simply to certain relevant factors.

<sup>100</sup> Appellate Body Report, *US – Lamb*, para. 136.

"[W]e note that the *Agreement on Safeguards* provides no particular methodology to be followed in making determinations of serious injury or threat thereof. However, whatever methodology is chosen, we believe that data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. ... [I]n principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry."<sup>101</sup>

74. The Appellate Body in *US – Lamb* nevertheless cautioned against the use of recent data in isolation from data pertaining to the entire period of investigation:

"However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. For instance, although the most recent data may indicate a decline in the domestic industry, that decline may well be a part of the normal cycle of the domestic industry rather than a precursor to clearly imminent serious injury. Likewise, a recent decline in economic performance could simply indicate that the domestic industry is returning to its normal situation after an unusually favourable period, rather than that the industry is on the verge of a precipitous decline into serious injury. Thus, we believe that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period<sup>102</sup>."<sup>103</sup>

### 1.5.3.3 Allocation methodology

75. In *US – Wheat Gluten*, the Panel stressed the importance of sound allocation methodologies, but acknowledged that the Agreement on Safeguards does not provide for one particular methodology in this context:

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

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

<sup>101</sup> Appellate Body Report, *US – Lamb*, para. 137.

<sup>102</sup> (footnote original) We note that, at footnote 130 of our Report in *Argentina – Footwear Safeguard* ..., we said that "the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past." In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period. The period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.

<sup>103</sup> Appellate Body Report, *US – Lamb*, para. 138.

description of such procedures and a more detailed explanation as to how and why the USITC considered the allocations to be 'appropriate', in addition to a characterization of the redacted confidential information."<sup>104</sup>

#### **1.5.4 Relationship with Article 4.2(b)**

76. With respect to the relationship with Article 4.2(b), see paragraphs 48 above and 133-134 below.

#### **1.5.5 Relationship with other WTO Agreements**

##### **1.5.5.1 Anti-Dumping Agreement**

77. The Panel in *Ukraine – Passenger Cars* found support in Article 3.8 of the Anti-Dumping Agreement for its findings regarding a determination of threat of serious injury under the Agreement on Safeguards. See paragraph 14 above.

78. The Panel in *Ukraine – Passenger Cars* cited Article 3.7 of the Anti-Dumping Agreement in connection with its finding regarding a determination of threat of serious injury under the Agreement on Safeguards. See paragraph 55 above.

##### **1.5.5.2 SCM Agreement**

79. The Panel in *Ukraine – Passenger Cars* found support in Article 15.8 of the SCM Agreement for its findings regarding a determination of threat of serious injury under the Agreement on Safeguards. See paragraph 14 above.

80. The Panel in *Ukraine – Passenger Cars* cited Article 15.7(ii) of the SCM Agreement in connection with its finding regarding a determination of threat of serious injury under the Agreement on Safeguards. See paragraph 55 above.

#### **1.6 Article 4.2(b)**

##### **1.6.1 "causal link"**

##### **1.6.1.1 General**

81. The Panel in *Korea – Dairy* set forth the basic approach for determining causation:

"In performing its causal link assessment, it is our view that the national authority needs to analyse and determine whether developments in the industry, considered by the national authority to demonstrate serious injury, have been caused by the increased imports. In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports.

To establish a causal link, Korea has to demonstrate that the injury to its domestic industry results from increased imports. In other words, Korea has to demonstrate that the imports of SMPP cause injury to the domestic industry producing milk powder and raw milk. In addition, having analysed the situation of the domestic industry, the Korean authority has the obligation not to attribute to the increased imports any injury caused by other factors."<sup>105</sup>

82. In *Argentina – Footwear (EC)*, the Panel set forth the following approach to the analysis of causation:

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<sup>104</sup> Panel Report, *US – Wheat Gluten*, paras. 8.63-8.64.

<sup>105</sup> Panel Report, *Korea – Dairy*, paras. 7.89-7.90.

"Applying our standard of review, 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."<sup>106</sup>

83. Although the Appellate Body in *Argentina – Footwear (EC)* considered that the Panel should have exercised judicial economy as regards the causation-related claims, it saw 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*:

"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."<sup>107</sup>

84. The Panel in *US – Wheat Gluten* confirmed and repeated this general causation standard<sup>108</sup> before also concluding that "Article 4.2(a) and (b) SA require that increased imports *per se* are causing serious injury".<sup>109</sup> While not demanding that increased imports be the only factor present in a situation of serious injury, the Panel held that the increased imports must be "sufficient, in and of themselves, to cause injury which achieves the threshold of 'serious' as defined in the Agreement."<sup>110</sup> The Panel further clarified that, "where a number of factors, one of which is increased imports, are sufficient *collectively* to cause a 'significant overall impairment of the position of the domestic industry', but increased imports alone are not causing injury that achieves the threshold of 'serious' within the meaning of Article 4.1(a) of the Agreement<sup>111</sup>, the conditions for imposing a safeguard measure are not satisfied."<sup>112</sup>

85. The Appellate Body in *US – Wheat Gluten* rejected the Panel's approach. The Appellate Body first expressed its understanding of the Panel's reasoning: concluded that the contribution by increased imports must be sufficiently clear so as to establish the existence of "the causal link" required, but rejected the Panel's conclusion that the serious injury must be caused by the increased imports alone:

"In essence, the Panel has read Article 4.2(b) of the *Agreement on Safeguards* as establishing that increased imports must make a particular contribution to causing the serious injury sustained by the domestic industry. The level of the contribution the Panel requires is that increased imports, looked at '*alone*', '*in and of themselves*', or '*per se*', must be capable of causing injury that is 'serious'. It seems to us that the Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a 'causal link' between increased imports and serious injury; second, the non-'attribution' language of the last sentence of Article 4.2(b) means that the effects caused by increased imports

<sup>106</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.229. See also Panel Report *India – Iron and Steel Products*, para 7.235.

<sup>107</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

<sup>108</sup> Panel Report, *US – Wheat Gluten*, para. 8.91.

<sup>109</sup> Panel Report, *US – Wheat Gluten*, para. 8.143.

<sup>110</sup> Panel Report, *US – Wheat Gluten*, para. 8.138.

<sup>111</sup> Panel Report, *US – Wheat Gluten*, para. 8.138.

<sup>112</sup> Panel Report, *US – Wheat Gluten*, para. 8.139.

must be *distinguished from* the effects caused by other factors; third, the effects caused by other factors must, therefore, be *excluded* totally from the determination of serious injury so as to ensure that these effects are not 'attributed' to the increased imports; fourth, the effects caused by increased imports *alone*, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury."<sup>113</sup>

86. The Appellate Body further explained that:

"[T]he term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury. Although that contribution must be sufficiently clear as to establish the existence of 'the causal link' required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that '*other factors*' causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, *even though other factors are also contributing, 'at the same time', to the situation of the domestic industry.*

It is precisely because there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry that the last sentence of Article 4.2(b) states that competent authorities 'shall not ... attribute' to increased imports injury caused by other factors. The opening clause of that sentence indicates, to us, that this sentence provides rules that apply when 'increased imports' and certain 'other factors' are, together, 'causing injury' to the domestic industry 'at the same time'. The last clause of the sentence stipulates that, in that situation, the injury caused by other factors 'shall not be *attributed* to increased imports'. (emphasis added) Synonyms for the word 'attribute' include 'assign' or 'ascribe'. Under the last sentence of Article 4.2(b), we are concerned with the proper 'attribution', in this sense, of 'injury' caused to the domestic industry by 'factors other than increased imports'. Clearly, the process of attributing 'injury', envisaged by this sentence, can only be made following a separation of the 'injury' that must then be properly 'attributed'. What is important in this process is separating or distinguishing the *effects* caused by the different factors in bringing about the 'injury'."<sup>114</sup>

87. On this basis, the Appellate Body in *US – Wheat Gluten* concluded that competent authorities need only assess whether there is a "genuine and substantial relationship of cause and effect" between increased imports and serious injury:

"Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*."<sup>115</sup>

88. The Appellate Body in *US – Wheat Gluten* further reviewed the relationship between Article 2.1 and Article 4.2 of the *Agreement on Safeguards* in order to support its view that the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury. The Appellate Body highlighted

<sup>113</sup> Appellate Body Report, *US – Wheat Gluten*, para. 66.

<sup>114</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 67-68.

<sup>115</sup> Appellate Body Report, *US – Wheat Gluten*, para. 69.

that, "under Article 2.1, the causation analysis embraces two elements: the first relating to increased 'imports' specifically and the second to the 'conditions' under which imports are occurring".<sup>116</sup> The Appellate Body elaborated that:

"Each of these two elements is, in our view, elaborated further in Article 4.2(a). While Article 2.1 requires account to be taken of the 'increased quantities' of imports, both in 'absolute' terms and 'relative to domestic production', Article 4.2(a) states, correspondingly, that 'the rate and amount of the increase in imports of the product concerned in absolute and relative terms, [and] the share of the domestic market taken by increased imports' are relevant.

As for the second element under Article 2.1, we see it as a complement to the first. While the first element refers to increased imports specifically, the second relates more generally to the 'conditions' in the marketplace for the product concerned that may influence the domestic industry. Thus, the phrase 'under such conditions' refers generally to the prevailing 'conditions', in the marketplace for the product concerned, when the increase in imports occurs. Interpreted in this way, the phrase 'under such conditions' is a shorthand reference to the remaining factors listed in Article 4.2(a), which relate to the overall state of the domestic industry and the domestic market, as well as to other factors 'having a bearing on the situation of [the] industry'. The phrase 'under such conditions', therefore, supports the view that, under Articles 4.2(a) and 4.2(b) of the *Agreement on Safeguards*, the competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury.<sup>117</sup><sup>118</sup>

89. In *US – Lamb*, the Appellate Body reiterated that Article 4.2(b) requires a "demonstration" of the "existence" of a causal link, and it requires that this demonstration must be based on "objective data".<sup>119</sup> The Appellate Body also stated that:

"As we held in *United States – Wheat Gluten Safeguard*, the *Agreement on Safeguards* does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does that Agreement require that increased imports 'alone' be capable of causing, or threatening to cause, serious injury."<sup>120</sup>

90. In *US – Steel Safeguards*, the Panel discussed the standard for the assessment of a causal link, emphasizing that "it is not necessary for the competent authority to show that increased imports *alone* must be capable of causing serious injury" and that "pursuant to Articles 2 and 4 of the Agreement on Safeguards, a competent authority must determine whether 'overall', a genuine and substantial relationship of cause and effect exists between increased imports and serious injury suffered by the relevant domestic producers."<sup>121</sup> The Appellate Body exercised judicial economy over the Panel's conclusion with respect to the causation requirements of the US Steel Safeguard measures. However, since the United States was asking for further guidance on how to comply with its obligations under the Agreement on Safeguards, the Appellate Body summed up what it considered to be relevant jurisprudence. In this respect, the Appellate Body recalled its findings in *US – Wheat Gluten* that:

"[T]he term 'causal link' denotes ... a relationship of cause and effect' between 'increased imports' and 'serious injury'. The former—the purported cause—contributes to 'bringing about', 'producing' or 'inducing' the latter—the purported effect. The 'link' must connect, in a 'genuine and substantial' causal relationship, 'increased imports', and 'serious injury'.<sup>122</sup>

<sup>116</sup> Appellate Body Report, *US – Wheat Gluten*, para. 76.

<sup>117</sup> (footnote original) We do not, of course, exclude the possibility that "serious injury" could be caused by the effects of increased imports *alone*.

<sup>118</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 77-78.

<sup>119</sup> Appellate Body Report, *US – Lamb*, para. 130.

<sup>120</sup> Appellate Body Report, *US – Lamb*, para. 170.

<sup>121</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.290 and 10.293.

<sup>122</sup> Appellate Body Report, *US – Steel Safeguards*, para. 488.

91. In that context, the Appellate Body also summarized certain jurisprudence regarding non-attribution in the context of Article 3.5 of the Anti-Dumping Agreement:

"In *EC – Tube or Pipe Fittings*, we found that the non-attribution language of Article 3.5 of the *Anti-Dumping Agreement* does not require, *in each and every case*, an examination of the *collective* effects of other causal factors, in addition to an examination of the *individual* effects of those causal factors. We explained there that an assessment of the collective effects of other causal factors 'is *not always* necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors. 'We acknowledged, however, that 'there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports'. We explained further that 'an investigating authority is not required to examine the collective impact of other causal factors, *provided that*, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors'.

Lastly, it may be useful to refer to our finding in *EC – Tube or Pipe Fittings* in respect of the relevance of factors that 'had effectively been found not to exist'. In that case, the competent authority had found, contrary to the submissions of the exporters, that the difference in costs of production between the imported product and the domestic product was virtually non-existent and thus did not constitute a 'factor other than dumped imports' causing injury to the domestic industry under Article 3.5 of the *Anti-Dumping Agreement*. Consequently, we found that there was no reason for the investigating authority to undertake the analysis of whether the alleged 'other factor' had any effect on the domestic industry under Article 3.5 because the alleged 'other factor' 'had effectively been found *not* to exist'. In other words, we did not rule that minimal (or not significant) factors need not be considered by the competent authorities in conducting non-attribution analyses. Rather, we ruled that only factors that have been found to exist need be taken into account in the non-attribution analysis."<sup>123</sup>

92. In *US – Safeguard Measure on PV Products*, the Panel recapped the applicable legal requirements and the approach to be followed by the competent authority in its analysis of the causal link between increased imports and serious injury under Article 4.2(b) of the Agreement on Safeguards:

"The core conditions for applying a safeguard measure are set out in Article 2.1 of the Agreement on Safeguards, which in full provides:

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

Accordingly, a safeguard measure may only be imposed when a product (a) is being imported in such increased quantities, (b) and under such conditions, that (c) cause or threaten to cause serious injury to the domestic industry.

The requirements concerning serious injury are elaborated in Article 4 of the Agreement on Safeguards. Article 4.1(a) defines 'serious injury' as 'a significant overall impairment in the position of a domestic industry', while Article 4.1(c) clarifies that a 'domestic industry' is 'the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose

<sup>123</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 490-491.

collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'."124

93. The Panel in *US – Safeguard Measure on PV Products* recalled the basic tenets of a causation analysis as follows:

"Articles 4.2(a) and 4.2(b) specifically pertain to the causal link between increased imports and serious injury.

...

Pursuant to these provisions, the competent authorities of a Member must analyse whether increased imports are causing, or threatening to cause, serious injury to the domestic industry. They must also consider whether 'factors other than increased imports are causing injury to the domestic industry at the same time' as increased imports and ensure that the injury caused by those factors is not 'attributed to increased imports'.

Previous DSB reports have found that the Agreement on Safeguards does not establish any specific methodology as to how the existence of a causal link must be determined; as a consequence, the competent authorities of a Member have discretion in this regard. 125"126

94. The Panel also recalled different causation analysis methodologies which had been considered and endorsed in previous DSB reports:

"Moreover, when assessing whether the causation requirement in Article 4.2(b) of the Agreement on Safeguards has been fulfilled, previous DSB reports have considered, *inter alia*: (i) whether an upward trend in imports coincides with downward trends in relevant injury factors, and if not, whether an appropriate explanation was provided as to why nevertheless the data show causation; and (ii) whether the conditions of competition between the imported and domestic products as analysed demonstrate the existence of a causal link between the imports and serious injury.

Previous DSB reports have also found that, if the competent authorities decide to base their causation analysis on the coincidence between increased imports and downward injury factors, 'overall coincidence' is what matters and not whether coincidence or lack thereof can be shown in relation to a few selected factors. Thus, the mere presence of positive injury factors does not necessarily negate the existence of an 'overall coincidence'. Moreover, in the absence of an 'overall coincidence', the competent authorities may still be able to demonstrate the existence of a causal link if they can explain why a causal link nevertheless exists.

Lastly, previous DSB reports have found that, regardless of the methodology used, in order to demonstrate that increased imports are causing serious injury, the competent authorities must find a 'sufficiently clear' contribution by those imports. However, the increased imports do not need to be the sole cause of injury, and the causal link between increased imports and serious injury may exist even though other factors are also contributing at the same time to the situation of the domestic industry."127

95. After summarising the applicable principles, the Panel proceeded to consider China's claim that the USITC's causation analysis was inconsistent with Article 4.2(b), particularly with regard to the demonstration an "overall coincidence" between increased imports and serious injury:

"In our view, the mere presence of positive trends or lack of perfect correlation between increased imports and serious injury trends do not necessarily preclude the

<sup>124</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.69-7.71.

<sup>125</sup>

<sup>126</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.72-7.74.

<sup>127</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.75-7.77.

existence of an 'overall coincidence'. Moreover, contrary to China's view, we consider that our assessment of whether the USITC appropriately demonstrated an 'overall coincidence' requires that we account for the full context of the USITC's causation determination, and specifically the relative importance of particular injury factors to the overall causal link. We base this understanding on the fact that certain injury factors may be less relevant due to the prevailing conditions of competition in the market or the nature of serious injury found to exist, and therefore are less relevant to whether a coincidence between increased imports and serious injury exists overall.

...

As noted above, previous DSB reports have found that the Agreement on Safeguards does not establish any specific methodological requirements with respect to the causation analysis so long as the competent authorities of a Member provide a reasoned and adequate explanation demonstrating a causal link between increased imports and serious injury. This standard remains the same irrespective of whether an 'overall coincidence' has been demonstrated between increased imports and relevant serious injury factors. While it may be the case that, as a factual matter, it is more difficult to demonstrate a causal link when a significant number of injury factors are positive, we reject the notion that a more exacting legal standard would be applicable in those circumstances. Rather, the explanation demonstrating the causal link would need to properly account for any positive injury factors to be reasoned and adequate."<sup>128</sup>

96. In its analysis of the evidence of serious injury, the Panel explained that when a single product is under investigation, the investigating authority is only required to look at the domestic industry as a whole, and not individual market segments:

"Article 4.1(c) of the Agreement on Safeguards requires that serious injury be demonstrated in respect of the domestic industry *as a whole*, while Article 2.1 stipulates that safeguard measures may be applied with respect to a 'product' when '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'. Thus, when a singular 'product' is under investigation, the competent authorities are only required to conduct a single causation analysis; they are not required to conduct disaggregated analyses in which serious injury and causation must be demonstrated with respect to individual market segments. In this context, we do not consider that it is necessary to analyse or find competition in specific market sub segments, provided that the conditions of competition, overall, are properly accounted for in the analysis."<sup>129</sup>

97. The Panel also rejected China's argument that the competent authorities should limit their injury investigation to events in the "recent past":

"The Agreement on Safeguards does not discipline the temporal scope of the evidence that the competent authorities may consider, so long as the evidence is on the competent authorities' record and the procedural rights of interested parties are respected. Moreover, contrary to China's reference to the principle that the determinations of serious injury should focus on the 'recent past', we think that the principle to which China refers favours taking into account post POI developments. Indeed, those developments would reflect the most recent circumstances of the domestic industry, including any injurious effects of increased imports."<sup>130</sup>

98. In this context, the Panel proceeded to evaluate the injury report's findings concerning the relationship between increased imports and the negative injury indicators in the domestic industry, including lost market share, idling and closure of domestic production facilities, deterioration of the

<sup>128</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.83-7.84.

<sup>129</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.100.

<sup>130</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.158.

financial conditions impacting the domestic industry, and the employment, capacity and shipments of the industry, during the corresponding period of increasing imports.<sup>131</sup> In concluding, the Panel rejected China's argument that the USITC had failed to demonstrate an "overall coincidence" between the increased imports and serious injury:

"As explained above, the causal link required under the Agreement on Safeguards is between increased imports and the serious injury found to exist.

...

[W]e have found that China has failed to establish that the USITC erred in respect of its analysis of the relationship between increased imports and the negative and seemingly positive factors of serious injury that existed during the POI. Based on these findings, we reject China's argument that the USITC failed to demonstrate an 'overall coincidence' between increased imports and serious injury. Accordingly, we reject China's overall claim that the United States failed to evaluate whether increased imports were a cause of serious injury in accordance with Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards."<sup>132</sup>

### 1.6.1.2 Coincidence between import and injury factor trends

99. In the context of causation, the Panel in *Argentina – Footwear (EC)*, in a finding upheld by the Appellate Body, recalled that Article 4.2(a) requires national authorities to analyse trends in both injury factors and imports. Furthermore, with respect to a "coincidence" between an increase in imports and a decline in the relevant injury factors, the Panel noted that this should 'normally' occur if causation is present:

"In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the 'rate' (i.e., direction and speed) and 'amount' of the increase in imports and the share of the market taken by imports, as well as the 'changes' in the injury factors (sales, production, productivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that 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.

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."<sup>133</sup>

100. The Appellate Body in *Argentina – Footwear (EC)* agreed with the Panel and observed:

"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.' 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.' ... Furthermore, with respect to a 'coincidence' between an increase in imports and a

<sup>131</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.85.

<sup>132</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.186 and 7.189.

<sup>133</sup> Panel Report, *Argentina – Footwear (EC)*, paras. 8.237-8.238.

decline in the relevant injury factors, we note that the Panel simply said that this should 'normally' occur if causation is present."<sup>134</sup>

101. The Panel in *US – Wheat Gluten* concurred with the Appellate Body in *Argentina – Footwear (EC)*, and ruled that the "absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why a causal link is still present."<sup>135</sup> The Panel was of the view that "*overall coincidence*" is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors:

"[I]n light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of *individual* injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury."<sup>136</sup>

102. The Panel in *US – Steel Safeguards* discussed the relationship between "a coincidence analysis" and "a causation analysis":

"The Panel is of the view that since coincidence is 'central' to a causation analysis, a competent authority should 'normally' undertake a coincidence analysis when determining the existence of a causal link. We believe that in situations where the effects of injurious factors other than increased imports have not been attributed to increased imports, overall clear coincidence between movements in imports and movements in injury factors will provide a competent authority with an adequate basis upon which to conclude that a genuine and substantial relationship of cause and effect between increased imports and serious injury exists.

As mentioned, the Panel is also of the view that *overall* coincidence is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered. We refer in this regard to the panel's decision in *US – Wheat Gluten*, where it stated that:

"[I]n light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of *individual* injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury."<sup>137</sup>"<sup>138</sup>

103. The Panel in *US – Steel Safeguards* further addressed how a causal link must be established for the purposes of Article 4.2(b) in cases where there is an *absence of coincidence*:

"In our view, even when coincidence does not exist or an analysis of coincidence has not been undertaken, a competent authority may still be able to demonstrate the existence of a causal link if it can offer a compelling explanation that such causal link exists.

The Panel emphasizes that the Appellate Body in *Argentina – Footwear (EC)* upheld the panel's statement that 'coincidence by itself *cannot prove* causation' (emphasis added). The Panel considers that there are situations where a coincidence analysis may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link. Indeed, there may be situations where a competent authority, as part of its overall demonstration of the existence of a causal link, undertakes different analyses, with a view to proving that a

<sup>134</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

<sup>135</sup> Panel Report, *US – Wheat Gluten*, para. 8.95.

<sup>136</sup> Panel Report, *US – Wheat Gluten*, para. 8.101.

<sup>138</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.301-10.302.

genuine and substantial relationship of cause and effect exists between increased imports and serious injury."<sup>139</sup>

104. The Panel in *US – Steel Safeguards* further elaborated four scenarios regarding the coincidence analysis and how the competent authority should satisfy the causal requirement under Article 4.2 of the *Agreement on Safeguards*:

"In our view, there may be cases where: (i) a coincidence analysis has been undertaken and shows clear coincidence between movements in imports and movements in injury factors; (ii) as part of its overall demonstration of causal link, the competent authority has undertaken, *inter alia*, a coincidence analysis which, in and of itself, does not fully demonstrate the existence of a causal link and further analysis is undertaken; (iii) a coincidence analysis has been undertaken (with or without any other analysis) but it does not demonstrate any coincidence; and, finally, (iv) a coincidence analysis has not been undertaken but other analytical tools have been used with a view to proving a causal link.

We are of the view that in all cases, the competent authority must provide a reasoned and adequate explanation of its causal link findings. In the first case (i), assuming fulfilment of the non-attribution requirement, when clear coincidence exists, no further analysis is required of the competent authority and the Panel will confine its review to the coincidence analysis. In the second case (ii), the Panel will examine both the coincidence analysis and the other analysis undertaken by the competent authority with a view to assessing whether the competent authority has provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury.

In cases (iii) and (iv), the competent authority should explain the absence of coincidence or why a coincidence analysis was not undertaken and provide, in particular, a compelling explanation as to why a causal link exists notwithstanding the absence of coincidence. Ultimately, it is for the competent authority to decide upon the analytical tool it considers most appropriate to perform this compelling analysis in demonstrating the existence of a causal link."<sup>140</sup>

105. The Panel in *Ukraine – Passenger Cars* rejected Ukraine's argument that coincidence between increased imports and negative injury factors is sufficient to raise a presumption on the existence of a causal link:

"Regarding the coincidence in movements, we agree with the panel in *US – Steel Safeguards* that upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to be indicative of a causal link. However, this coincidence, by itself and without explanation, is not sufficient to establish a causal link between increased imports and serious injury or threat thereof. A worsening in the condition of a domestic industry may be wholly unconnected to increased imports and may instead be caused by one or more other developments, occurring at the same time as increased imports, such as declining consumption, inefficient production methodologies, increased costs, etc. Indeed, Article 4.2(b), second sentence, confirms that factors other than increased imports may be causing injury at the same time as increased imports. By requiring that injury caused by such factors not be attributed to increased imports, this provision seeks to ensure that safeguard measures are only applied in appropriate circumstances, that is, when increased imports are causing or threatening to cause serious injury. We therefore reject Ukraine's view that a coincidence between increased imports and the worsening in the injury factors is sufficient in itself to raise a presumption that a causal link exists between these two developments. For completeness, we also note that the

<sup>139</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.304-10.305.

<sup>140</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.306-10.308.

absence of coincidence does not necessarily rule out the existence of a causal link."<sup>141</sup>

106. The Panel in *Ukraine – Passenger Cars* further found that Ukraine's competent authorities "did not undertake a proper analysis of the relationship between movements in imports and movements in injury factors[]"<sup>142</sup>, *inter alia*, because they failed "to explain how imports could take market share from the domestic industry in a contracting market."<sup>143</sup>

107. The Panel in *US – Steel Safeguards* examined whether coincidence can be considered to exist in cases where there is a temporal lag between the influx of imports and the manifestation of the effects of such an influx on the domestic industry:

"The Panel considers that the argument by the United States of a lag between the increased imports and the manifestation of the effects of such increased imports on the domestic industry may have merit in certain cases. More particularly, in our view, there may be instances in which injury may be suffered by an industry at the same point in time as the influx of increased imports. However, the injury that is caused at that point in time may not become apparent until some later point in time. In other words, there may be a lag between the influx of imports and the manifestation of the injurious effects on the domestic industry of such an influx.

We find support for this view from the panel's decision in *Egypt – Steel Rebar*. There, the panel rejected Turkey's contention that there must be a strict temporal connection between the dumped imports and any injury being suffered by the industry, noting that this argument:

'[R]est[ed] on the quite artificial assumption that the market instantly absorbs, and reacts to, imports the moment they enter the territory of the importing company. Such an assumption implicitly rests on the existence of so-called 'perfect information' in the market (i.e., that all actors in the market are instantly aware of all market signals.)'"<sup>144</sup>

108. The Panel noted, however, that "in that case, the lag between the effects of imports on a market that the panel suggested was acceptable was, at most, a year in duration."<sup>145</sup> The Panel further elaborated that, in its view:

"[T]here are limits in temporal terms on the length of lags between increased imports and the manifestation of the effects that are acceptable for the purposes of a coincidence analysis under Article 4.2(b) of the Agreement on Safeguards. The limits that apply would, undoubtedly, vary from industry to industry and factor to factor. Generally speaking, the more rigid the market structure associated with a particular industry, the more likely a lag in effects would exist, at least in relation to some factors. Conversely, the more competitive the market structure, the less tenable it is that lagged effects could be expected. In addition, the Panel considers that while lags may be expected in relation to some factors (for example, employment), lags in the manifestation of effects are less likely to exist in relation to other injury factors such as production, inventories and capacity utilization, which, ordinarily, would react relatively quickly to changes taking place in the market, such as an influx of imports if increased imports are causing serious injury. If the competent authority does rely upon a lag as between the increased imports and the injury factors, we consider that such a lag must be fully explained by the competent authority on the basis of objective data."<sup>146</sup>

<sup>141</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.298.

<sup>142</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.306.

<sup>143</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.304.

<sup>144</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.310-10.311.

<sup>145</sup> Panel Reports, *US – Steel Safeguards*, para. 10.311.

<sup>146</sup> Panel Reports, *US – Steel Safeguards*, para. 10.312.

### 1.6.1.3 Conditions of competition between imported and domestic products

109. In examining whether in the case at issue conditions of competition had been analysed, the Panel in *Argentina – Footwear (EC)* observed that a juxtaposition of statistics on imports and injury factors did not constitute an analysis of the conditions of competition between the imports and the domestic product<sup>147</sup>; that, in the absence of price comparisons between imported and domestic products, there was no factual basis for the statements that imports were cheaper than domestic products<sup>148</sup>; and that there was no evidence that lower-priced imports had any injurious effects on the domestic industry.<sup>149</sup> In the latter regard, the Panel stated:

"[T]he report on the investigation contains no evidence to indicate that the effect of the prices of imported footwear on domestic producers' prices, production, etc., was specifically analysed, in spite of the fact that the causation finding was fundamentally based on price considerations. Rather, aggregate trends in broad statistical indicators were compared and conclusory statements made (e.g., that 'the decline in output was replaced by imports, essentially cheap imports'. This is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2."<sup>150</sup>

110. In a footnote to this paragraph, the Panel in *Argentina – Footwear (EC)* addressed the relationship between the determination of like or directly competitive products on the one hand and the causation analysis on the other:

"We note in this regard that there would seem to be a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition. Where as here a very broad product definition is used, within which there is considerable heterogeneity, the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market. With regard to the present case, we do not disagree that a quite detailed investigation of the industry was conducted, in which a great deal of statistical and other information was amassed. What in our view was missing was a detailed analysis, on the basis of objective evidence, of the imports and of how in concrete terms those imports caused the injury found to exist in 1995. In this regard, we note that Act 338 contains a section entitled 'Conditions of competition between the domestic products and imports'. This section does not contain such a detailed analysis, however, but rather summarizes questionnaire responses from domestic producers about their strategies for 'fending off foreign competition', and from importers and domestic producers concerning 'the sales mix' of domestic products and imports, including their overall views about quality and other issues concerning domestic and imported footwear, with the importers stressing the benefits of imports. This summary of subjective statements by questionnaire respondents does not constitute an analysis of the 'conditions of competition' by the authority on the basis of objective evidence."<sup>151</sup>

111. The Panel in *India – Iron and Steel Products* also addressed the issue of price comparison between heterogeneous products. In the investigation at issue, certain importers had alleged that the goods in question were not like and hence could not be compared based on average unit prices. The Panel found that the investigating authority had failed to properly examine price competition between imported and domestic products since it based its comparison on average unit prices:

"Although it is correct that the Agreement on Safeguards does not require a separate analysis of the prices of imports and domestic products, it also does not exclude such an analysis. In the present case, the Indian competent authority based its causation

<sup>147</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.254.

<sup>148</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.259.

<sup>149</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.261.

<sup>150</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.261.

<sup>151</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.261, fn 557.

analysis fundamentally on price considerations. In the context of a safeguard investigation, if a competent authority supports its injury determination by relying on price trends of imported and domestic products, it should ensure that the products on both sides are sufficiently similar and that any price difference can reflect the conditions of competition between imported and domestic products, rather than differences in the composition of the two baskets of products being compared."<sup>152</sup>

112. The Panel in *US – Steel Safeguards* was of the view that, while coincidence plays a central role in determining whether or not a causal link exists, other analytical tools may also come into play, in particular with reference to the conditions of competition as between imports and domestic products:

"As mentioned above, there may be cases, for instance, where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis. In such situations, reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists. Indeed, in our view, consideration of the conditions of competition of the market in which the relevant imported and domestic products are being sold may generally prove insightful in respect of the issue of the causal relationship between increased imports and serious injury.

There may also be cases where a competent authority considers that it is necessary to *support* its coincidence analysis with another analysis because, for example, coincidence cannot be established with a sufficient degree of certainty. In such situations, the competent authority may rely upon analysis of the conditions of competition to reinforce its causal link demonstration. In such situations, a panel will review the conditions of competition analysis performed by the competent authority with a view to assessing whether it provided a reasoned and adequate explanation that, overall, a genuine and substantial relationship of cause and effects exists between increased imports and serious injury."<sup>153</sup>

113. With respect to the factors that should be considered in a conditions of competition analysis for the purposes of Article 4.2(b), the Panel in *US – Steel Safeguards* pointed out that:

"The factors referred to in Article 4.2(a) are relevant in defining the conditions of competition for the purposes of the causation analysis under Article 4.2(b), in the Panel's view, volume of imports, imports' market share, changes in the level of sales and profit and losses are of particular interest. In addition, we note that the panel in *Argentina – Footwear (EC)* referred to physical characteristics, quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market as factors that could be taken into consideration in assessing the conditions of competition in a market for the purposes of a causation analysis."<sup>154</sup>

#### 1.6.1.4 Factors other than increased imports (non-attribution requirement)

114. The Panel in *Argentina – Footwear (EC)* emphasized the importance of a sufficient consideration of "other factors" in order to satisfy the requirements of Article 4.2(b):

"We recall that Article 4.2(b) requires that '[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.' Thus, as part of the causation analysis, a sufficient consideration of 'other factors' operating in the market at the same time

<sup>152</sup> Panel Report, *India – Iron and Steel Products*, para. 7.255. See also Panel Report, *Argentina – Footwear (EC)*, para. 8.278; Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

<sup>153</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.314-10.315.

<sup>154</sup> Panel Reports, *US – Steel Safeguards*, para. 10.319.

must be conducted, so that any injury caused by such other factors can be identified and properly attributed."<sup>155</sup>

115. The Panel in *Argentina – Footwear (EC)* found that, in the investigation at issue, factors other than imports had not been sufficiently evaluated, in particular the effect of a domestic recession.<sup>156</sup> The Appellate Body noted in general that it saw "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*" and agreed with the Panel's conclusion that the impact of the domestic recession had not been sufficiently evaluated.<sup>157</sup>

116. In *US – Wheat Gluten*, the Appellate Body considered that "all factors relevant to the overall situation of the industry should be included in the competent authorities' determination".<sup>158</sup> In this respect, the Appellate Body set out a three-stage process under Article 4.2(b):

"Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*.

The need to ensure a proper attribution of 'injury' under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors. However, the need to distinguish between the effects caused by increased imports and the effects caused by other factors does *not* necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury."<sup>159</sup>

117. While it reversed the Panel's legal interpretation of Article 4.2(b), the Appellate Body in *US – Wheat Gluten* found that in the investigation at issue, the competent authorities had acted inconsistently with Article 4.2(b) as a consequence of an inadequate examination of the role of increases in average capacity. The Appellate Body noted that, under Article 4.2(b), it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously causing injury. The Appellate Body stated that "[i]f the competent authorities do not conduct this examination, they cannot ensure that injury caused by other factors is not 'attributed' to increased imports."<sup>160</sup> The Appellate Body concluded that, in the case at hand, the competent authority, USITC, had "*not* demonstrated adequately, as required by Article 4.2(b), that any injury caused to the domestic industry by increases in average capacity ha[d] not been 'attributed' to increased imports and, in consequence, the USITC could not establish the existence of 'the causal link' Article 4.2(b) requires between increased imports and serious injury."<sup>161</sup>

118. In *US – Lamb*, the Appellate Body again stressed the importance of the separation of injurious effects caused by increased imports on the one hand and other factors on the other hand:

<sup>155</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.267.

<sup>156</sup> Panel Report, *Argentina – Footwear (EC)*, paras. 8.269 and 8.278.

<sup>157</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

<sup>158</sup> Appellate Body Report, *US – Wheat Gluten*, para. 74.

<sup>159</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 69-70.

<sup>160</sup> Appellate Body Report, *US – Wheat Gluten*, para. 91.

<sup>161</sup> Appellate Body Report, *US – Wheat Gluten*, para. 91.

"Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports 'shall not be attributed to increased imports.' In a situation where several factors are causing injury 'at the same time', a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.

As we said in our Report in *United States – Wheat Gluten Safeguard*, the non-attribution language in Article 4.2(b) indicates that, logically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of 'the causal link' between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors."<sup>162</sup>

119. The Appellate Body acknowledged in *US – Lamb* that these three steps need not be the subject of separate findings or conclusions by the competent authorities, and that the method and approach taken by Members is not specified in the Agreement on Safeguards:

"[T]hese three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal 'tests' mandated by the text of the Agreement on Safeguards, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities. Indeed, these steps leave unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b).

...

We emphasize that the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards. What the Agreement requires is simply that the obligations in Article 4.2 must be respected when a safeguard measure is applied."<sup>163</sup>

120. In *US – Lamb*, the Appellate Body found that the competent authority's causation analysis incorrectly considered whether increased imports were "an important cause, and a cause no less important than any other cause, of the threat of serious injury".<sup>164</sup> The Appellate Body considered this approach to be inconsistent with Article 4.2(b) because the competent authority, USITC, had not ascertained that the injury caused by other factors, whatever the magnitude of the injury, was not attributable to increased imports.<sup>165</sup> The Appellate Body specifically held that it was "impossible to determine whether the USITC properly separated the injurious effects of these other factors from the injurious effects of the increased imports. It is, therefore, also impossible to

<sup>162</sup> Appellate Body Report, *US – Lamb*, paras. 179-180.

<sup>163</sup> Appellate Body Report, *US – Lamb*, paras. 178 and 181.

<sup>164</sup> Appellate Body Report, *US – Lamb*, para. 182.

<sup>165</sup> Appellate Body Report, *US – Lamb*, para. 185.

determine whether injury caused by these other factors has been attributed to increased imports as it had not assessed the injurious effects of these other factors."<sup>166</sup>

121. In *US – Line Pipe*, the Appellate Body reaffirmed its findings in *US – Wheat Gluten* and *US – Lamb*, and stated competent authorities must separate and distinguish the injurious effects of the increased imports from the injurious effects of other factors, and establish explicitly, with a reasoned and adequate explanation, that injury caused by factors other than the increased imports was not attributed to increased imports.<sup>167</sup> The Appellate Body stated that:

"[I]n *US – Wheat Gluten*, we stated in the context of parallelism that the competent authorities must 'establish explicitly' that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.' We explained further in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a 'reasoned and adequate explanation' of how the facts support their determination'. We are of the view that, by analogy, the requirements elaborated in *US – Wheat Gluten* and in *US – Lamb*, also apply to the exercise contemplated in Article 4.2(b), last sentence, since in all those cases, the competent authorities are under a procedural obligation to provide an explanation as regards a determination.

Thus, to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."<sup>168</sup>

122. The Appellate Body in *US – Line Pipe* also found that, although the text of the Agreement on Safeguards on causation is not identical to that of the Anti-Dumping Agreement, there are considerable similarities between the two regarding non-attribution. The Appellate Body considered that its statements in *US – Hot-Rolled Steel* regarding Article 3.5 of the Anti-Dumping Agreement provide guidance in the interpretation of the similar language of the last sentence of Article 4.2(b):

"Article 3.5 of the *Anti-Dumping Agreement* requires an identification of 'the nature and extent of the injurious effects of the other known factors'<sup>169</sup> as well as 'a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.'

These statements in *US – Hot-Rolled Steel* provide guidance for us here. As we noted in that appeal: '[a]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language.' We then went on to say that 'adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*.' We are of the view that this reasoning applies both ways. Our statements in *US – Hot-Rolled Steel* on Article 3.5 of the *Anti-Dumping Agreement* likewise provide guidance in interpreting the similar language in Article 4.2(b) of the *Agreement on Safeguards*."<sup>170</sup>

123. Regarding the sequence of assessment of the various elements in the non-attribution analysis, the Panel in *US – Steel Safeguards* was of the view that the Agreement on Safeguards does not prescribe any order. Recalling the Appellate Body's comments in *US – Lamb* that these steps are not legal tests mandated by the text of the Agreement on Safeguards, and that it was

<sup>166</sup> Appellate Body Report, *US – Lamb*, para. 186.

<sup>167</sup> Appellate Body Report, *US – Line Pipe*, para. 217.

<sup>168</sup> Appellate Body Report, *US – Line Pipe*, paras. 216-217.

<sup>170</sup> Appellate Body Report, *US – Line Pipe*, paras. 213-214.

not imperative that each step be the subject of a separate finding or reasoned conclusion, the Panel stated that:

"Accordingly, the Panel does not consider that the non-attribution exercise need necessarily precede a consideration of coincidence between the increased imports and the injury factors and the conditions of competition or *vice versa*. The Panel is of the view that the wording of Articles 2.1 and 4.2 does not require that non-attribution be undertaken in advance of or following any other analysis that may be undertaken with a view to establishing the existence of a causal link. Provided that the various elements entailed in a causation analysis are considered and analysed in coming to a conclusion on the existence or otherwise of a 'causal link', this should suffice. This much is clear from the Appellate Body's comments in *US – Wheat Gluten* and *US – Lamb*:

'[L]ogically, the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor. As we also indicated, the final determination about the existence of 'the causal link' between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors.'"<sup>171</sup>

124. The Panel in *Ukraine – Passenger Cars* stressed that competent authorities are only required to conduct a non-attribution analysis when factors other than increased imports are causing injury to the domestic industry at the same time. The Panel also pointed out that, in cases where there are no such factors, that too should be clearly indicated in the competent authorities' reports:

"We further observe that pursuant to Article 4.2(b), second sentence, the competent authorities need to conduct a non-attribution analysis 'when' factors other than increased imports are causing injury to the domestic industry at the same time. Thus if the competent authorities determine that other factors are not causing injury at the same as increased imports, there is no need to conduct a non-attribution analysis...When the competent authorities determine that there are no other factors causing injury at the same time as increased imports, or that factors argued to be causing injury are not, in fact, doing so, this, too, must be stated explicitly in the published report, accompanied by a clear, explicit, and adequate explanation. Otherwise, it would be impossible to determine whether the imposing Member has properly considered whether factors other than imports are causing injury to the domestic industry, and if so, whether that Member has ensured that such injury is not attributed to the increased imports."<sup>172</sup>

125. The Panel in *Ukraine – Passenger Cars* pointed out that a non-attribution analysis in investigations based on a threat of serious injury should be "forward looking":

"Regardless of the method used by the competent authorities when performing a non-attribution analysis, cases involving a threat of serious injury to the domestic industry should, in our view, include a forward-looking assessment of whether other factors currently causing injury to the domestic industry will continue to do so in the very near future."<sup>173</sup>

126. In *US – Safeguard Measure on PV Products*, in the context of assessing whether the respondent's non-attribution report on "other" factors injuring the domestic industry was consistent with Article 4.2, the Panel stated that "the Agreement on Safeguards does not obligate the

<sup>171</sup> Panel Reports, *US – Steel Safeguards*, para. 10.344.

<sup>172</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.334. See also Panel Report, *US – Safeguard Measure on Washers*, para. 7.187.

<sup>173</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.319.

competent authorities of a Member to explicitly address in their report every assertion made by interested parties during the investigation."<sup>174</sup>

127. In *US – Safeguard Measure on PV Products*, the Panel reiterated the legal requirements concerning the non-attribution analysis for "other" factors which are claimed to be causing injury to the domestic industry under article 4.2(b) of the Agreement on Safeguards as follows:

"Article 4.2(b), second sentence, of the Agreement on Safeguards reads as follows:

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.

As such, the second sentence of Article 4.2(b) envisages that the competent authorities of a Member are required to conduct a non-attribution analysis when factors other than increased imports are found to be causing injury to the domestic industry simultaneously with increased imports. Conversely, if the competent authorities determine that the 'other' factors are *not* causing injury at the same time as increased imports, there is no requirement to conduct a non-attribution analysis. However, because such a determination is subject to review, it should be supported by an explanation that is reasoned and adequate."<sup>175</sup>

128. In this context, the Panel explained that the standard of review that applied to the competent authority's analysis was whether it had provided reasoned and adequate explanations in its non-attribution report of the "other" factors allegedly injuring the domestic industry:

"Therefore, with respect to China's claim under Article 4.2(b), second sentence, the relevant question is whether China has established that the USITC failed to provide reasoned and adequate explanations demonstrating that alleged missteps by the domestic industry did not cause injury to the domestic industry.

In this context, the simple fact that the USITC did not explicitly address certain evidence or afford more probative weight to certain evidence does not mean that it acted inconsistently with these principles, as any such omissions would not dispositively establish that the USITC's findings and conclusions were unreasoned or inadequate. This is particularly the case because, when conducting safeguard investigations, the competent authorities are expected to accumulate an extensive record comprising arguments, data, and evidence from different sources, including from parties with conflicting interests in the outcome of the investigation. Accordingly, to demonstrate that the USITC's treatment of certain evidence was improper, China must explain why the treatment of such evidence, when viewed in the context of the overall evidentiary record, demonstrates that the USITC's findings and conclusions were unreasoned or inadequate."<sup>176</sup>

#### 1.6.1.5 Quantification of causation

129. The Panel in *US – Steel Safeguards* addressed the question of whether quantification and use of econometric models is required in order to satisfy the legal standard for causation (as well as for the appropriate remedy):

"We note, first, that the text of the Agreement on Safeguards does not require quantification. However, in the Panel's view both the Agreement on Safeguards and relevant jurisprudence anticipate that quantification *may* occur. In addition, the Panel considers that quantification may be particularly desirable in cases involving complicated factual situations where qualitative analyses may not suffice to more fully understand the dynamics of the relevant market.

<sup>174</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 7.236.

<sup>175</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.193-7.194.

<sup>176</sup> Panel Report, *US – Safeguard Measure on PV Products*, paras. 7.201-7.202.

In support, we note that Article 4.2(a) of the Agreement on Safeguards refers to 'factors of [a] quantifiable nature.' As explained in paragraph 10.318 above, we consider that Articles 4.2(a) and 4.2(b) must be read together and in a mutually consistent fashion. Therefore, the factors referred to in Article 4.2(a) must be taken into consideration in undertaking the non-attribution exercise (in addition to any other factors that may be relevant). In addition, the requirement in Article 4.2(a) that evaluated factors be of a 'quantifiable nature' implies that at least some of the factors assessed in the non-attribution exercise will be quantifiable and, in those circumstances, should be quantified."<sup>177</sup>

130. The Panel in *US – Steel Safeguards* further considered that quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution explicitly, on the basis of a reasoned and adequate explanation:

"The Panel considers that quantification could help in identifying the share of the overall injury caused by increased imports, as distinct from the injury caused by other factors, which would in turn yield a 'benchmark' for ensuring that the safeguard measure is imposed only to the extent necessary to prevent or remedy serious injury and allow for adjustments.

In addition, the Panel considers that quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution 'explicitly' on the basis of a reasoned and adequate explanation. In this regard, the Panel recalls that, as stated on several occasions by the Appellate Body, WTO Members are expected to interpret and apply their WTO obligations in good faith. Moreover, in light of the obligations imposed on competent authorities to consider all plausible alternative explanations submitted by the interested parties, we believe that a competent authority may find itself in situations where quantification and some form of economic analysis are necessary to rebut allegedly plausible alternative explanations that have been put forward. While the wording of the provisions of the Agreement on Safeguards does not require quantification in the causal link analysis *per se*, the circumstances of a specific dispute may call for quantification."<sup>178</sup>

131. The Panel in *US – Steel Safeguards* determined that quantification may not necessarily be determinative:

"Having said that quantification may be desirable, useful and sometimes necessary depending on the circumstances of a case, the Panel recognizes that quantification may be difficult and is less than perfect. Therefore, the Panel is of the view that the results of such quantification may not necessarily be determinative. We consider that an overall qualitative assessment that takes into account all relevant information, must always be performed. Nevertheless, in the Panel's view, even the most simplistic of quantitative analyses may yield useful insights into the overall dynamics of a particular industry and, in particular, into the nature and extent of injury being caused by factors other than increased imports to a domestic industry."<sup>179</sup>

### 1.6.2 Relationship with other provisions of the Safeguards Agreement

132. The Panel in *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of GATT 1994 and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards, exercised judicial economy with respect to claims raised under Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the Agreement on Safeguards.<sup>180</sup>

133. The Panel in *Korea – Dairy*, after finding that the determination of the existence of serious injury at issue in that dispute was inconsistent with Article 4.2, noted that, as a consequence, it was not necessary for the Panel to reach any findings as to whether Korea had demonstrated that increased imports were causing serious injury to the domestic industry. However, referring to the

<sup>177</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.336-10.337.

<sup>178</sup> Panel Reports, *US – Steel Safeguards*, paras. 10.339-10.340.

<sup>179</sup> Panel Reports, *US – Steel Safeguards*, para. 10.341.

<sup>180</sup> Panel Report, *US – Lamb*, para. 7.280.

Appellate Body findings in *Australia – Salmon*, the Panel opted for offering "some general comments relevant to an analysis of a causal link between increased imports and injury, in the context of the Korean investigation".<sup>181</sup>

134. In *Argentina – Footwear (EC)*, the Appellate Body expressed its surprise 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."<sup>182</sup> The Appellate Body found difficulty in understanding a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist."<sup>183</sup>

### 1.6.3 Relationship with other WTO Agreements

#### 1.6.3.1 Anti-Dumping Agreement

135. The Appellate Body in *US – Line Pipe* ruled that its statements in *US – Hot-Rolled Steel* regarding Article 3.5 of the Anti-Dumping Agreement provide guidance in the interpretation of the similar language of the last sentence of Article 4.2(b). See paragraph 122 above.

### 1.7 Article 4.2(c)

#### 1.7.1 General

136. The Panel in *Ukraine – Passenger Cars* in considering the meaning of "promptness" under Article 4.2(c), stated that "the assessment of whether a report has been published promptly must ... be made on a case-specific basis, taking account of the circumstances of the dispute."<sup>184</sup> The Panel then found that Ukraine violated the obligation under Article 4.2(c) to publish a report "promptly" because in the investigation at issue Ukraine's competent authorities had published their report 11 months after their determination of threat of serious injury:

"[W]e consider that the competent authorities' report, or analysis and demonstration, must be promptly published once the competent authorities have made the determination referred to in Article 4.2(a), that is to say once they have made a determination of serious injury or threat thereof caused by increased imports. We thus consider that whether a Member 'promptly' published its report, or analysis and demonstration, has to be examined by reference to when the aforementioned determination was made.

...

Turning to the facts of this dispute, we recall that Japan's claim concerns the Notice of 14 March 2013, and that we agree that the Notice is the type of report, or analysis and demonstration, that Ukraine was required to publish 'promptly'. The Notice was published in the official gazette on 14 March 2013. However, as confirmed by Ukraine, the investigation in this case was concluded on 28 April 2012. Moreover, as we explain below, the competent authorities made a determination of threat of serious injury caused by increased imports on 28 April 2012. The date of introduction, and also the proposed form and level (increased rates of duty) and expected duration of the safeguard measure, were only established on 14 March 2013. As we have explained, in our view these subsequent actions did not warrant a delay in publication of the competent authorities' report. Furthermore, as noted below at paragraph 7.453, Ukraine argues that after making its finding on 28 April 2012, it held consultations with various exporting countries. However, Ukraine has not argued, and we do not consider, that such consultations affected the competent authorities' ability to publish their report quickly and without delay after having made the determination referred to in Article 4.2(a). In the light of this, we consider that since the competent authorities published their report in this case almost 11 months after the determination of 28

<sup>181</sup> Panel Report, *Korea – Dairy*, paras. 7.87. The Panel's "general comments" can be found in paras. 7.89-7.96.

<sup>182</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

<sup>183</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

<sup>184</sup> Panel Report, *Ukraine – Passenger Cars*, para. 7.446.

April 2012, they failed to publish their report, or analysis and demonstration, 'promptly'.<sup>185</sup>

### **1.7.2 Relationship with other provisions of the Safeguards Agreement**

137. In *Argentina – Footwear (EC)*, the Appellate Body rejected an argument that, in referring to Article 3, in the context of its reasoning on Article 4.2(a) and 4.2(c), the Panel had exceeded its terms of reference:

"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, 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.

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.

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 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."<sup>186</sup>

138. The Panel in *US – Wheat Gluten* considered the relationship between Article 4.2(c) and the confidentiality requirements of Article 3.2.

"Given that the very terms of Article 4.2(c) expressly incorporate the provisions of Article 3, and given the specific and mandatory language of Article 3.2 dealing with the required treatment of information that is by nature confidential or is submitted on a confidential basis, the requirement in Article 4.2(c) to publish a 'detailed analysis of the case under investigation' and 'demonstration of the relevance of the factors examined' cannot entail the publication of 'information which is by nature confidential or which is provided on a confidential basis' within the meaning of Article 3.2 SA."<sup>187</sup>

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<sup>185</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.445 and 7.447.

<sup>186</sup> Appellate Body Report, *Argentina – Footwear (EC)*, paras. 73-75.

<sup>187</sup> Panel Report, *US – Wheat Gluten*, para. 8.21.