

WORLD TRADE ORGANIZATION

Dispute Settlement Reports

2003

Volume III

Pages 963-1265

THE WTO DISPUTE SETTLEMENT REPORTS

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**EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES
ON IMPORTS OF COTTON-TYPE BED LINEN FROM
INDIA RECOURSE TO ARTICLE 21.5 OF THE DSU
BY INDIA**

**Report of the Appellate Body
WT/DS141/AB/RW**

*Adopted by the Dispute Settlement Body
on 24 April 2003*

India, <i>Appellant</i> European Communities, <i>Appellee</i> Japan, <i>Third Participant</i> Korea, <i>Third Participant</i> United States, <i>Third Participant</i>		Present: Abi-Saab, Presiding Member Bacchus, Member Taniguchi, Member
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I. INTRODUCTION

1. India appeals certain issues of law and legal interpretations in the Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* (the "Panel Report").¹ The Panel was established to consider a complaint by India with respect to the consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") of the measures taken by the European Communities to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *EC – Bed Linen*.²

¹ WT/DS141/RW, 29 November 2002.

² The recommendations and rulings of the DSB resulted from the adoption, by the DSB, of the Appellate Body Report and the panel report, as modified by the Appellate Body Report, in *EC – Bed Linen*.

2. The original panel found that Council Regulation (EC) No 2398/97 of 28 November 1997³, imposing definitive anti-dumping duties on imports of cotton-type bed linen from India, is inconsistent with Articles 2.4.2, 3.4, and 15 of the *Anti-Dumping Agreement*.⁴ India and the European Communities appealed certain issues of law and legal interpretations developed by the original panel. The Appellate Body upheld the original panel's finding that "the practice of 'zeroing' when establishing 'the existence of margins of dumping', as applied by the European Communities in the anti-dumping investigation at issue" is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.⁵ In addition, the Appellate Body found that "the European Communities, in calculating amounts for administrative, selling and general costs and profits in the anti-dumping investigation at issue", had acted inconsistently with its obligations under Article 2.2.2(ii) of the *Anti-Dumping Agreement* and, therefore, reversed the findings of the original panel to the contrary in paragraphs 6.75 and 6.87 of the original panel report.⁶

3. On 12 March 2001, the DSB adopted the Appellate Body Report and the original panel report, as modified by the Appellate Body Report.⁷ The parties to the dispute mutually agreed that the European Communities should have until 14 August 2001 to implement the recommendations and rulings of the DSB.⁸ On 7 August 2001, the Council of the European Union adopted Council Regulation (EC) No 1644/2001, amending the original definitive anti-dumping measure on cotton-type bed linen from India.⁹ Subsequently, on 28 January 2002 and 22 April 2002, the Council of the European Union adopted Council Regulations (EC) No 160/2002 and No 696/2002, respectively.¹⁰ EC Regulation 160/2002 terminated the anti-dumping proceedings against cotton-type bed linen imports

³ Council Regulation (EC) No 2398/97, 28 November 1997, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 4 December 1997, L-series, No. 332 ("EC Regulation 2398/97").

⁴ Original Panel Report, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R.

⁵ Appellate Body Report, *EC – Bed Linen*, adopted 12 March 2001, para. 86(1).

⁶ *Ibid.*, para. 86(2).

⁷ WT/DS141/9, 22 March 2001.

⁸ WT/DS141/10, 1 May 2001.

⁹ Council Regulation (EC) No 1644/2001, 7 August 2001, amending Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, published in the Official Journal of the European Communities, 14 August 2001, L-series, No. 219 ("EC Regulation 1644/2001").

¹⁰ Council Regulation (EC) No 160/2002, 28 January 2002, amending Council Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, and terminating the proceeding with regard to imports originating in Pakistan, published in the Official Journal of the European Communities, 30 January 2002, L-series, No. 26 ("EC Regulation 160/2002").

Council Regulation (EC) No 696/2002, 22 April 2002, confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No 1644/2001, published in the Official Journal of the European Communities, 25 April 2002, L-series, No. 109 ("EC Regulation 696/2002").

from Pakistan and established that the anti-dumping measures against Egypt would expire on 28 February 2002, if a review were not requested by that date. This review was not requested, and the anti-dumping measures against Egypt expired. EC Regulation 696/2002 established that a reassessment of the injury and causal link based on imports from India alone had revealed that there was a causal link between the dumped imports from India and material injury to the European Communities industry. Additional factual aspects of this dispute are set out in greater detail in the Panel Report.¹¹

4. India was of the view that the European Communities had failed to comply with the recommendations and rulings of the DSB, and that EC Regulations 1644/2001, 160/2002, and 696/2002 were inconsistent with several provisions of the *Anti-Dumping Agreement* and Article 21.2 of the DSU. India, therefore, requested that the matter be referred to a panel pursuant to Article 21.5 of the DSU.¹² On 22 May 2002, in accordance with Article 21.5 of the DSU, the DSB referred the matter to the original panel. A member of the original panel was unable to participate in the proceedings and the parties therefore agreed on a new panelist on 25 June 2002.¹³ The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 29 November 2002.

5. Before making findings on India's claims, the Panel made the following rulings on four preliminary matters raised by the European Communities. The Panel:

- (i) ruled that EC Regulations 160/2002 and 696/2002 are not "measures taken to comply" with the recommendation of the DSB, within the meaning of Article 21.5 of the DSU.¹⁴ Thus, the Panel limited its examination to EC Regulation 1644/2001;
- (ii) declined to assess whether the measures "taken to comply" were adopted within the "reasonable period of time" agreed by the parties under Article 21.3 of the DSU¹⁵;
- (iii) found that India's "claim 6" was not properly before the Panel, to the extent that it concerned the consistency of the European Communities' measure with the obligation under Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" not be attributed to the dumped imports, because it was disposed of by the original panel and not appealed.¹⁶ The Panel, however, rejected the European Communities' request to exclude

¹¹ Panel Report, paras. 2.1-2.11.

¹² WT/DS141/13/Rev.1, 8 May 2002.

¹³ WT/DS141/14, 2 July 2002; WT/DS141/14/Corr.1, 10 July 2002.

¹⁴ Panel Report, para. 6.22.

¹⁵ *Ibid.*, para. 6.27.

¹⁶ *Ibid.*, para. 6.53.

- India's "claim 5" because the Panel found that India could not have presented that claim in the original dispute¹⁷; and
- (iv) rejected the European Communities' request that the Panel exclude India's claims relating to Article 4.1(i) of the *Anti-Dumping Agreement* and Article 21.3 of the DSU, given that India itself denied making such claims.¹⁸
6. The Panel then examined India's claims and found that:
- (i) India had failed to demonstrate that the European Communities' calculation of a weighted average for administrative, selling, and general costs on the basis of sales value violates Article 2.2.2(ii) of the *Anti-Dumping Agreement*¹⁹;
- (ii) even assuming EC Regulations 160/2002 and 696/2002 properly formed part of the Panel's evaluation, the European Communities had not violated paragraphs 1 and 3 of Article 3 or Article 5.7 of the *Anti-Dumping Agreement* in conducting a cumulative assessment of the effects of dumped imports from India and Pakistan (and Egypt), in subsequently re-examining whether imports from Pakistan were being dumped, and subsequently in reassessing the effects of the dumped imports from India alone²⁰;
- (iii) the European Communities had not acted inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* in considering "dumped imports"²¹;
- (iv) the analysis and conclusions of the European Communities with respect to injury are not inconsistent with paragraphs 1 and 4 of Article 3 of the *Anti-Dumping Agreement*²²;
- (v) the European Communities' finding of a causal link between the dumped imports and the injury is not inconsistent with Article 3.5 of the *Anti-Dumping Agreement*²³;
- (vi) the European Communities had not acted inconsistently with Article 15 of the *Anti-Dumping Agreement* by failing to explore possibilities of constructive remedies before applying anti-dumping duties²⁴; and
- (vii) the European Communities had not violated Article 21.2 of the DSU.²⁵

¹⁷ Panel Report, para. 6.57. India's "claim 5" related to the assessment of whether the European Communities' reconsideration of injury was consistent with Article 3.4.

¹⁸ Panel Report., para. 6.68.

¹⁹ Panel Report, para. 6.94.

²⁰ *Ibid.*, para. 6.116.

²¹ *Ibid.*, para. 6.144.

²² *Ibid.*, para. 6.217.

²³ *Ibid.*, para. 6.233.

²⁴ *Ibid.*, para. 6.260.

²⁵ *Ibid.*, para. 6.271.

7. Having excluded, as a preliminary matter, India's claim that the European Communities had failed to ensure that injuries caused by "other factors" was not attributed to the dumped imports pursuant to Article 3.5 of the *Anti-Dumping Agreement*, the Panel nevertheless made an alternative finding on this issue and determined that the European Communities had not acted inconsistently with Article 3.5 in this regard.²⁶

8. For these reasons, the Panel concluded that EC Regulation 1644/2001 is not inconsistent with the *Anti-Dumping Agreement* or the DSU.²⁷ Therefore, the Panel found that the European Communities had implemented the recommendation of the DSB to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.²⁸ In the light of these conclusions, the Panel did not make any recommendations under Article 19.1 of the DSU.²⁹

9. On 8 January 2003, India notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").³⁰ On 20 January 2003, India filed an appellant's submission.³¹ On 3 February 2003, the European Communities filed an appellee's submission.³² On the same day, Japan and the United States each filed a third participant's submission.³³ Korea notified its intention to appear at the oral hearing as a third participant.³⁴

10. The oral hearing in this appeal was held on 20 February 2003. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

11. We recall that the Panel found, as a preliminary matter, that only EC Regulation 1644/2001 was a measure "taken to comply" within the meaning of Article 21.5 of the DSU, and thus the Panel excluded EC Regulations 160/2002 and 696/2002 from the scope of its examination.³⁵ India has not appealed this finding. During the oral hearing, India and the European Communities agreed, moreover, that the measure at issue in this appeal is EC Regulation 1644/2001.³⁶ Therefore, we will confine our analysis in this appeal to EC Regulation 1644/2001.

²⁶ Panel Report, para. 6.246.

²⁷ *Ibid.*, para. 7.1.

²⁸ *Ibid.*, para. 7.2.

²⁹ *Ibid.*, para. 7.3.

³⁰ WT/DS141/16, 9 January 2003.

³¹ Pursuant to Rule 21(1) of the *Working Procedures*.

³² Pursuant to Rule 22(1) of the *Working Procedures*.

³³ Pursuant to Rule 24(1) of the *Working Procedures*.

³⁴ Pursuant to Rule 24(2) of the *Working Procedures*.

³⁵ Panel Report, para. 6.22.

³⁶ India's and the European Communities' responses to questioning at the oral hearing.

II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

A. *Claims of Error by India – Appellant*

1. *Article 21.5 of the DSU*

12. India asserts that the Panel erred in finding, as a preliminary matter, that India's claim, concerning the consistency of EC Regulation 1644/2001 with the obligation under Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" are not attributed to the dumped imports, was not properly before the Panel. India notes that the European Communities based its request for a preliminary ruling on two arguments: (i) that India should not be allowed to raise claims before the Article 21.5 Panel that it could have raised before the original panel; and (ii) that India was acting in bad faith. India submits that, although the Panel found that India's claim was raised during the original proceedings, and also that India was pursuing the matter in *good faith*, the Panel nevertheless granted the European Communities' request for a preliminary ruling.

13. According to India, instead of focusing on the facts of the case, the Panel based some of its conclusions on overarching considerations of the appropriate functioning of Article 21.5 panels and the dispute settlement system as a whole. For example, the Panel determined that defending Members in Article 21.5 proceedings would *always* be prejudiced by a finding in Article 21.5 proceedings of a violation made on the basis of a claim that could have been pursued in the original proceedings, but was not, because the defending member would not have a reasonable period of time for implementation. India submits that it had argued before the Panel that the European Communities would not, in this particular case, suffer any prejudice from lack of a reasonable period for implementation, since India's claim under Article 3.5 is not the only claim in these proceedings. However, according to India, the Panel "declined to address [India's] argument".³⁷

14. India contends that the Panel failed to take into account the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, where the European Communities raised a claim in the Article 21.5 proceedings that it had not raised in the original proceedings. The Article 21.5 panel and the Appellate Body, nevertheless, made findings with respect to that claim. In India's view, EC Regulation 1644/2001, like the measure before the Appellate Body in *US – FSC (Article 21.5 – EC)*, is a new and different measure from the measure subject to the original dispute.³⁸

15. India argues that the Panel erred in considering the situation in *US – Shrimp (Article 21.5 – Malaysia)* to be analogous to the situation in the present case. India asserts that in *US – Shrimp (Article 21.5 – Malaysia)*, the complainant sought to challenge exactly the same measure that had been found to be WTO-consistent in the original proceedings, whereas in the present case, the measure

³⁷ India's appellant's submission, para. 145.

³⁸ India's response to questioning at the oral hearing.

challenged by India is a *new* measure that is separate and distinct from the original measure. According to India, in *US – Shrimp (Article 21.5 – Malaysia)*, the "measure" consisted of several sub-measures, and the Appellate Body had found, in the original dispute, that one of these sub-measures, Section 609, was consistent with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").³⁹ Therefore, in those Article 21.5 proceedings, the Appellate Body declined to re-examine Section 609 because it had already found that it was consistent with the GATT 1994. In India's view, the issue in this appeal is different from that in *US – Shrimp (Article 21.5 – Malaysia)* because the "measure" cannot be divided into sub-measures. According to India, all the aspects of the original measure have been changed—there has been a redetermination of dumping and injury, as well as a re-examination of causation. India notes that the fact that the European Communities analyzed causation anew, makes that analysis part of the new implementation measure. In India's view, the European Communities should have similarly re-ensured that the injury caused by other factors was not attributed to the dumped imports.⁴⁰

16. India also submits that the Panel should have followed the Appellate Body's conclusion in *Canada – Aircraft (Article 21.5 – Brazil)*, that Article 21.5 panels are not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances related to the measure that was the subject of the original proceedings.⁴¹

2. Paragraphs 1 and 2 of Article 3 of the Anti-Dumping Agreement

17. India appeals the Panel's finding that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* when determining the volume of "dumped imports" for purposes of making a determination of injury. According to India, the European Communities mistakenly concluded that 86 percent of the total volume of imports of bed linen from India were dumped. India argues that the proportion of imports attributable to *sampled* producers found to be dumping (47 percent) constitutes the only *positive evidence* that could have been used to *objectively examine* and determine the volume of *total* imports from India that are dumped. India contends that if the basis for determining dumped imports is the calculation of dumping margins for sampled producers, and that calculation reveals no dumping for producers representing 53 percent of the imports attributable to sampled producers, one cannot objectively reach the conclusion that 86 percent of the total volume of imports are positively dumped.

18. Second, India argues that the Panel erred in finding that Article 3 does not provide any guidance on how to determine the volume of *dumped imports* for purposes of making a determination of injury. In India's view, Article 3.1

³⁹ India's response to questioning at the oral hearing.

⁴⁰ *Ibid.*

⁴¹ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

provides that an injury determination, including a determination of the volume of dumped imports, *shall* be based on *positive evidence* and involve an *objective examination*. Thus, according to India, Article 3.1 casts an *overarching obligation* on domestic authorities to make an objective examination of the volume of dumped imports based on positive evidence. India refers to the Appellate Body Report in *Thailand – H-Beams* as supporting this interpretation.⁴²

19. India asserts that the Panel mistakenly found that the European Communities had resorted to the *second* option provided for in the second sentence of Article 6.10 of the *Anti-Dumping Agreement*, namely that the European Communities individually examined producers accounting for the largest percentage of the volume of exports which could reasonably be investigated. This finding, according to India, is at odds with the conclusion reached by the original panel in this dispute, which correctly established that the European Communities had conducted its analysis of dumping based on *a statistically valid sample* of Indian producers and exporters within the meaning of the *first* option found in the second sentence of Article 6.10. Thus, India asserts that the Panel ignored its own factual determinations in the original proceedings. India notes that the evidence it presented to the Panel demonstrated that the European Communities sought to select a statistically valid sample. For example, India points to the Notice of initiation of the investigation which provides for the use of *sampling* techniques in this investigation. India refers also to an exchange of letters between the association of Indian exporters and the European Commission which, in India's view, demonstrates that the investigating authorities sought to select a sample representing Indian producers and exporters.⁴³ India concludes that the failure of the European Communities to objectively examine the positive evidence resulting from the sample of investigated Indian producers or exporters runs directly counter to the overarching obligation under Article 3.1 to base the determination of the volume of dumped imports on positive evidence and an objective examination.

20. Third, India argues that the Panel confused two distinct stages of the investigation—the stage of determining dumping and the stage of duty collection. India notes that, instead of seeking guidance in the text of Article 3, the Panel looked to Article 9.4 of the *Anti-Dumping Agreement*, which concerns duty collection. India contends that it cannot be inferred that the *Anti-Dumping Agreement* provides that all imports from producers or exporters that have not been individually examined may be considered dumped for purposes of analyzing injury, from the fact that Article 9.4 permits the collection of anti-dumping duties from non-examined producers *after* having completed a determination of *dumping, injury, and causality*. In other words, India asserts that the Panel was wrong in concluding, on the basis of the premise that a duty may be collected from non-examined producers, that all non-examined producers have dumped and caused injury. According to India, the Panel's reasoning

⁴² Appellate Body Report, *Thailand – H-Beams*, para. 106.

⁴³ India's appellant submission, paras. 56 and 59.

disregards the fact that the dumping and injury findings logically *precede* the collection of duties. In addition, India contends that Article 9.4 expressly restricts the scope of its application to the imposition of anti-dumping duties. Therefore, according to India, it would be contrary to previous Appellate Body rulings regarding effective treaty interpretation to read into Articles 2, 3, and 6 of the *Anti-Dumping Agreement* the method set forth in Article 9.4 for the calculation of anti-dumping duties. Moreover, India argues that extending the application of the method set forth in Article 9.4 to other provisions of the *Anti-Dumping Agreement* would upset the delicate balance of rights and obligations agreed to by the Uruguay Round negotiators. Accordingly, India asserts that this finding of the Panel is contrary not only to the *Anti-Dumping Agreement*, but also to Articles 3.2 and 19.2 of the DSU, which provide that findings and recommendations cannot add to or diminish the rights and obligations provided in the covered agreements.

21. Fourth, India argues that the Panel erred in concluding that India's proposed interpretation would lead to bizarre and unacceptable results for which there are no remedial mechanisms. The Panel determined that these results would be a consequence of the fact that only 47 percent of the total imports from India would be considered dumped for purposes of making a determination of injury, whereas pursuant to Article 9.4, anti-dumping duties would be applied to *all* imports from exporters or producers not individually examined. India notes that the Panel recognized the possibility of refunds and reviews as mechanisms for remedying the situation where a duty would be collected on imports from an unexamined producer that might not have been dumped. In India's view, the reference to Article 11.2 (review possibilities) and to Article 9.3 (refund possibilities) supports India's interpretation rather than that of the Panel.

22. Finally, India asserts that, if the sample of European Communities producers was accepted in this investigation to fully represent the European Communities producers, the sample of exporting producers likewise should have been considered to fully represent the Indian exporters.

3. *Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU*

23. India submits that the Panel did not properly discharge its duties under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU in concluding that the European Communities did have information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its injury determination.

24. India contends that the Panel misapplied the rules on the allocation of the burden of proof and, therefore, acted inconsistently with Article 11 of the DSU. India asserts that it had made a *prima facie* case before the Panel, showing that information on a number of economic factors had never been collected by the European Communities' investigating authorities. India argues that, as a consequence, the Panel should have required the European Communities to present evidence to rebut India's *prima facie* case. India submits that, by not

shifting the burden of proof to the European Communities, the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU.

25. India asserts, furthermore, that if the Appellate Body were to conclude that the Panel correctly applied the rules on the allocation of the burden of proof, the Appellate Body should then find that the Panel distorted the evidence by accepting, as constituting evidence of a fact, a mere assertion by the European Communities that data was collected. Accordingly, India maintains that the Panel acted inconsistently with Article 11 of the DSU, which requires panels to make an objective assessment of the matter, including an objective assessment of the facts of the case.

26. Referring to the Appellate Body Report in *US – Hot-Rolled Steel*, India argues that Article 17.6(i) of the *Anti-Dumping Agreement* requires panels to actively review or examine the facts.⁴⁴ India submits that despite the existence of this obligation, the Panel did not actively review the assertions of the European Communities that it had collected data on all relevant economic factors listed in Article 3.4, nor did the Panel use its investigative power under Article 13 of the DSU to inquire about the missing information on stocks and capacity utilization. In India's view, the fact-specific nature of this dispute *required* the Panel to use its right to seek information under Article 13 of the DSU in order to discharge its obligation, under Article 17.6(i), to actively review or examine the facts. India argues, furthermore, that Article 17.6(i) requires the Panel to do more than to merely state that it was clear to it that the European Communities had the data in its record. In India's view, by failing to actively review the facts, the Panel acted contrary to the obligation contained in Article 17.6(i) of the *Anti-Dumping Agreement*.

4. Article 3.5 of the Anti-Dumping Agreement

27. India submits that, if the Appellate Body were to conclude that the Panel erred in dismissing, as not being properly before it, India's claim challenging EC Regulation 1644/2001 as inconsistent with the obligation in Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" are not attributed to the dumped imports, then the Appellate Body should examine the Panel's finding, in the alternative, that the European Communities did not act inconsistently with that provision. First, India challenges the Panel's finding that India could not rely upon recital (50) of EC Regulation 1644/2001 as evidence of the fact that the European Communities was aware of other factors simultaneously causing injury to the European Communities industry. In India's view, the Panel was wrong to dismiss India's argument on the grounds that recital (50) of the redetermination is included in the section entitled "Conclusion on injury", and not in the section on "Causation". India contends that a factual finding does not cease to be a factual finding solely because it is contained in the preamble, conclusion, or other section of the same document.

⁴⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

28. Second, India contends that the conclusions of the Panel are based on a misrepresentation of the facts and an incorrect causation analysis. India argues that the Panel reviewed the findings of the European Communities on the basis of *ex post* justifications, instead of analyzing whether the European Communities (i) had properly examined the possible injurious effects of inflation and of the increase in the cost of raw cotton and (ii) had separated and distinguished the injury caused by those factors. Thus, India argues that the Panel erred in its analysis by relying upon explanations which are not discernible from EC Regulation 1644/2001 and the record of the investigation.

29. In addition, India argues that the Panel's misrepresentation of the facts of the case is a consequence of two other errors. First, India asserts that the Panel erred in reading into Article 3.5 an arbitrary distinction between "independent" and "dependent" factors causing injury, and in mistakenly assigning the authorship of this distinction to India. India submits that it never made such a distinction. In India's view, the effect of the Panel's distinction between independent and dependent causes of injury is to render redundant the requirement to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry. India explains that, if the Panel's theory were followed, investigating authorities would be able to argue (i) that the injurious effects of every other known factor could have been remedied through an increase in price and (ii) that this increase was not possible due to price suppression. As a result, India argues, the injury in its entirety would automatically be attributed to the dumped imports. According to India, this approach cannot be considered to be consistent with the aim of Article 3.5, which is to establish that injury to the domestic industry is indeed caused by the dumped imports.

30. Second, in India's view, the Panel also erred by disregarding the guidance provided by the Appellate Body in *US – Hot-Rolled Steel* on the interpretation of Article 3.5.⁴⁵ India submits that, in *US – Hot-Rolled Steel*, the Appellate Body made it clear that if an investigating authority has come to the conclusion that a known factor, other than the dumped imports, is causing injury to the domestic industry, that authority must ensure that the injurious effects of this other factor are not attributed to the dumped imports. India argues that, although the European Communities "tried" in recital (103) of Commission Regulation (EC) No 1069/97⁴⁶ to follow the Appellate Body's guidance, it failed to do so.⁴⁷

31. India argues, finally, that the Panel misunderstood India's argument with respect to inflation and again based its conclusions on a misrepresentation of facts. India disagrees with the Panel's finding that the European Communities did not identify the inability of bed linen prices to keep pace with inflation in prices of consumer goods as a cause of injury. India contends that, in recital (50) of EC Regulation 1644/2001, the European Communities does identify inflation in

⁴⁵ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 221-223.

⁴⁶ Commission Regulation (EC) No 1069/97, 12 June 1997, imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 13 June 1997, L-series, No. 156 ("EC Regulation 1069/97").

⁴⁷ India's appellant's submission, para. 178.

consumer prices as a cause of injury. India submits that, in spite of this, the European Communities failed to mention, let alone examine and distinguish, in its causation analysis the injurious effects of the inability of European Communities producers to keep pace with inflation. India notes that, although the Panel interpreted the inability of bed linen prices to increase commensurate with inflation as an *indicator* (instead of a cause) of injury, in India's view, the inability of bed linen prices to keep pace with inflation is a factor partly responsible for declining profitability of the European Communities industry.

B. Arguments of the European Communities – Appellee

1. Article 21.5 of the DSU

32. The European Communities submits that the Panel correctly dismissed India's claim that the European Communities violated Article 3.5 of the *Anti-Dumping Agreement* by failing to ensure that injuries caused by "other factors" not be attributed to the dumped imports, because that claim was not properly before the Panel. According to the European Communities, the determination on the "other factors" is an element of the original measure that was not modified and thus cannot be regarded as part of the implementation measure. Consequently, that determination cannot be challenged before an Article 21.5 panel.

33. The European Communities contends that Article 21.5 of the DSU is not intended to provide a "second service" to complainants which, by negligence or calculation, have omitted to raise or argue certain claims during the original proceedings.⁴⁸ In the European Communities' view, India's reading of Article 21.5 would diminish the procedural rights of defending parties, altering the balance of rights and obligations of Members that the DSU purports to maintain.

34. According to the European Communities, in *US – FSC*⁴⁹, *Mexico – Corn Syrup (Article 21.5 – US)*⁵⁰, and *US – Offset Act (Byrd Amendment)*⁵¹, the Appellate Body emphasized that procedural actions under the DSU must be taken in a timely fashion. The European Communities submits that, in a similar way, the right to make a claim must be exercised promptly. Consequently, Article 21.5 must be interpreted as excluding the possibility of raising a claim for the first time before an Article 21.5 panel when such claim could have been pursued before the original panel.

35. Furthermore, the European Communities contends that the decision of the original panel rejecting India's claim "has *res judicata* effects" between the parties.⁵² Therefore, in the view of the European Communities, India is precluded from reasserting the same claim before another panel. The European

⁴⁸ European Communities' appellee's submission, para. 140.

⁴⁹ Appellate Body Report, *US – FSC*, para. 166.

⁵⁰ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50.

⁵¹ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 314.

⁵² European Communities' appellee's submission, para. 150.

Communities asserts, in this regard, that the applicability of the principle of *res judicata* to disputes under the DSU was confirmed in *US – Shrimp (Article 21.5 – Malaysia)*, where the Appellate Body noted that Appellate Body Reports that are adopted by the DSB must be treated by the parties to a particular dispute as a final resolution to that dispute.⁵³ The same principle applies, according to the European Communities, to adopted panel reports.

36. The European Communities argues that India's allegation that the European Communities did not suffer prejudice is irrelevant and wrong. According to the European Communities, the defendant is not required to demonstrate prejudice. In addition, the European Communities submits that prejudice to the defending party arises whenever a claim that could have been pursued in the original proceedings is brought before an Article 21.5 panel, because, as a result, the defending party will be deprived of the possibility of correcting the alleged violation within a reasonable period of time, if indeed a violation is found.

37. The European Communities argues that whether or not India acted in good faith is also irrelevant for the interpretation of Article 21.5 of the DSU. The European Communities contends that, as explained by the Panel, a decision on this issue does not turn on the facts of any particular dispute. In the European Communities' view, even though India might not, in this specific case, have acted in bad faith, India's proposed interpretation of Article 21.5 would allow the kind of litigation techniques that are incompatible with the good faith requirement set out in Article 3.10 of the DSU.

38. According to the European Communities, the Panel's ruling is consistent with earlier decisions of the Appellate Body. The European Communities submits that, contrary to India's arguments, the facts of the present dispute are different from those in *Canada – Aircraft (Article 21.5 – Brazil)*, where Brazil raised claims against a new and different measure.⁵⁴ In the present case, in contrast, India's claim relates to an element that is not part of the new measure, because the findings on the "other factors" included in the original determination were not affected by the redetermination. Furthermore, the European Communities asserts that the present case differs from *US – FSC (Article 21.5 – EC)* because, in the latter case, the United States did not object to the claim raised by the European Communities under Article III:4 of the GATT 1994.⁵⁵ In that case, moreover, the claim brought by the European Communities under Article III:4 against the measure "taken to comply" was different from the claims that the European Communities could have brought under the same provision before the original panel, because the United States had repealed the measure at issue in the original dispute and replaced it with an entirely new measure. The European Communities argues that, in the current appeal, India is challenging findings that were not modified in the implementation measure and, therefore, cannot be considered as part of the measure "taken to comply".

⁵³ Appellate body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

⁵⁴ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 8-14.

⁵⁵ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 40-44.

2. *Paragraphs 1 and 2 of Article 3 of the Anti-Dumping Agreement*

39. The European Communities asserts that the Panel did not err in finding that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* when determining the volume of "dumped imports" for purposes of making a determination of injury.

40. The European Communities first notes that the Panel's observation that the European Communities' investigating authorities did not use a "statistically valid sample", within the meaning of the first option in the second sentence of Article 6.10 of the *Anti-Dumping Agreement*, is a factual finding beyond the scope of appellate review. The European Communities submits that the group of exporters selected for purposes of the dumping examination represents the largest percentage of the volume of exports which could reasonably be investigated, within the meaning of the second option in the second sentence of Article 6.10. Therefore, the Panel's factual observation that the European Communities did *not* resort to a "statistically valid sample" is correct. According to the European Communities, the selection of companies of different types was aimed at improving the representativeness of the selection, but it cannot be considered sufficient to produce a "statistically valid sample".

41. In addition, the European Communities explains that the fact that its investigating authorities, on a few occasions, referred to the group of examined exporters as a "sample", does not mean that the dumping examination was based on a "statistically valid sample" within the meaning of Article 6.10. The European Communities notes that if all "samples" were by definition "statistically valid", it would have been superfluous to add that precision into Article 6.10. According to the European Communities, the investigating authorities used the term "sample" because, in European Communities law and practice, the terms "sampling" and "sample" are used to designate indistinctly either of the two options envisaged in Article 6.10 of the *Anti-Dumping Agreement*. Similarly, the references made by the original panel and the Article 21.5 Panel to a "sample" merely reflect the European Communities' use of that term.

42. The European Communities states that, in any event, the Panel did not attach any legal consequences to the finding that the European Communities did not use a statistically valid sample. The Panel's conclusion that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 would be equally valid were the Appellate Body not to agree with this finding of fact. The European Communities contends that, even if the examined exporters selected by the investigating authorities constituted a "statistically valid sample", there would still be no basis to assume that the proportion of imports found to be dumped within the sample is positive evidence of the proportion of imports outside the sample which would have been found to be dumped had all the exporters been examined individually.

43. The European Communities asserts that "dumped imports" are those imports for which a positive determination of dumping, whether individual or

collective, has been made. The European Communities contends that, following this reasoning, its investigating authorities determined that all the imports from the unexamined exporters (cooperating and non-cooperating) were dumped. As India has not challenged the dumping determination in these proceedings, it is illogical and contradictory for India now to claim that some of those imports should be considered not dumped for purposes of making a determination of injury. According to the European Communities, the obligation to determine dumped imports objectively and on the basis of positive evidence is satisfied where the imports have been found to be dumped in accordance with the relevant provisions of the *Anti-Dumping Agreement* governing the determination of dumping.

44. The European Communities agrees with the Panel's conclusion that Article 3 of the *Anti-Dumping Agreement* contains no guidance with respect to the determination of the volume of dumped imports. In the European Communities' view, the general requirement to make an objective examination of injury based on "positive evidence", set forth in Article 3.1, cannot be read as imposing a new obligation with respect to the determination of dumping where none is provided in the relevant provisions of the *Anti-Dumping Agreement*.

45. In addition, the European Communities argues that India's proposed interpretation would lead to an absurd result—where the same imports could be simultaneously considered dumped and not dumped under different provisions of the *Anti-Dumping Agreement*—because Article 9.4 would allow the application of duties to imports which have been previously found not to be dumped for purposes of injury determinations under Article 3.

46. The European Communities contends, furthermore, that India's proposed interpretation assumes that no dumping margin needs to be assigned to unexamined exporters. However, in the European Communities' view, if the dumping margin of the unexamined exporters is not calculated, it is impossible to establish whether the country-wide dumping margin is above *de minimis*, as required by Article 5.8.

47. The European Communities states that, although the *Anti-Dumping Agreement* does not prescribe any specific rules for calculating the dumping margin of the unexamined exporters, it is implicit in Article 6.10 that, where the investigating authorities limit the investigation of dumping to some exporters, they may use the data collected for those examined exporters in order to calculate the dumping margin of the unexamined exporters. In addition, the European Communities refers to Article 9.3, which expressly states that there is a logical link between the level of the dumping margin and that of the dumping duty. Therefore, it contends that if Article 9.4 allows the investigating authorities to apply anti-dumping duties to *all* imports from the unexamined exporters, it is because *all* such imports can be considered dumped, including for purposes of paragraphs 1 and 2 of Article 3. In the light of this, the European Communities asserts that its investigating authorities were entitled to regard all imports from the unexamined exporters as dumped.

48. Finally, the European Communities argues that its investigating authorities were entitled to treat as "dumped" all imports from non-cooperating exporters, upon calculating the corresponding dumping margin for the non-cooperating exporters in accordance with the methodology set out in Article 6.8 and Annex II to the *Anti-Dumping Agreement*. In addition, the European Communities contends that, even if India's interpretation were correct, the proportion of dumped imports from the examined exporters within the sample could not be considered as representative of the proportion of dumped imports from the non-cooperating exporters, because the non-cooperating exporters were not included in the pool of exporters from which the sample was selected.

3. *Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU*

49. The European Communities argues that the Panel did not err in finding that the European Communities had information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*, including stocks and capacity utilization, and thus acted consistently with Article 3.4. According to the European Communities, the Panel correctly applied the rules regarding the allocation of the burden of proof, did not distort the evidence before it, nor did it fail to actively review the facts.

50. The European Communities submits that because India did not properly establish a *prima facie* case that no data was collected by the European Communities' investigating authorities, the Panel did not fail to apply the rules on the allocation of the burden of proof. Alternatively, the European Communities argues that, even if India had established a *prima facie* case, this *prima facie* case had been refuted by the European Communities. Furthermore, the European Communities emphasizes that the weighing of evidence is within the discretion of the Panel as the trier of facts. Consequently, the European Communities argues that the Panel was entitled to conclude that the European Communities had the relevant information in its possession, and acted consistently with Article 11 of the DSU.

51. In the European Communities' view, the Panel did not distort the evidence. The European Communities argues that the information contained in EC Regulation 1644/2001 is not "a mere assertion" as claimed by India. Rather, the regulation explains the basis of the European Communities' conclusion that stocks and capacity utilization did not have a bearing on the state of the domestic industry. The European Communities refers to the statement in the Appellate Body Report in *EC – Hormones* to the effect that a claim of distortion implies that a panel committed an egregious error that calls into question its good faith.⁵⁶ The European Communities then underscores that India has explicitly admitted that it is not alleging that the Panel in this case committed an egregious error or acted in bad faith.

⁵⁶ Appellate Body Report, *EC – Hormones*, para. 133.

52. The European Communities submits that the Panel did not fail to actively review the facts as required by Article 17.6(i) of the *Anti-Dumping Agreement*. According to the European Communities, India failed to demonstrate that the Panel's assessment of the evidence is inconsistent with Article 11 of the DSU; therefore, its identical claim under Article 17.6(i) is equally unfounded. In addition, the European Communities argues that the Panel's decision not to use its power of investigation under Article 13.2 of the DSU does not constitute a violation of Article 17.6(i), because a panel's right to seek information under Article 13.2 is discretionary. In the European Communities' view, the Appellate Body's ruling in *EC – Sardines* supports the conclusion that the Panel's decision not to seek information does not imply that the Panel failed to make an objective assessment of the facts.⁵⁷

4. Article 3.5 of the *Anti-Dumping Agreement*

53. The European Communities argues that the Panel did not err in finding that the European Communities did not act inconsistently with Article 3.5 of the *Anti-Dumping Agreement* by failing to ensure that injuries caused by "others factors" were not attributed to the dumped imports. In the European Communities' view, the Panel's finding that the increase in the cost of raw cotton and inflation were not causes of injury is a factual finding and thus beyond the scope of appellate review.

54. The European Communities submits that India's arguments misrepresent the findings of the investigating authorities. According to the European Communities, the passages of EC Regulation 1644/2001 referred to by India demonstrate that the investigating authorities did not consider the increase in the cost of raw cotton as a separate cause of injury.

55. The European Communities notes that "price suppression" is one of the possible "effects" of dumping set forth in Article 3.2 of the *Anti-Dumping Agreement*. Accordingly, price suppression cannot be, at the same time, one of the "other causes" of injury to be examined under Article 3.5. The European Communities asserts that the increase in the cost of raw cotton is not the cause of price suppression, but rather the fact that renders necessary the price increase. According to the European Communities, this is in accordance with Article 3.2, which provides that the "cause" of the "price suppression" is the fact that "prevents" the price increase, and not the fact that renders necessary such price increase. The European Communities contends, moreover, that India has not argued that any other factor that was not examined by the investigating authorities prevented the European Communities producers from increasing their prices to reflect the increase in the cost of raw cotton.

56. Furthermore, the European Communities argues that the injurious effects of the increase in the cost of raw cotton cannot be separated and distinguished from the effects of the dumped imports. In the European Communities' view, the existence of "price suppression" presupposes the existence of two elements: (i) a

⁵⁷ Appellate Body Report, *EC – Sardines*, para. 302.

factor that renders a price increase necessary; and (ii) a factor that "prevents" such price increase. If either of these elements is absent, there can be no "price suppression" within the meaning of Article 3.2 and, consequently, no injury. The European Communities contends that the injurious effects of the two constituent elements of price suppression cannot, therefore, be "separated and distinguished".

57. The European Communities argues that, contrary to India's allegation, the Panel's reasoning does not render redundant Article 3.5, because a price increase cannot be said to remedy the injury caused by the factors listed in that Article. As an example, the European Communities explains that a price increase would not remedy the injurious effects of a contraction of demand, but rather would aggravate them.

58. The European Communities submits that its investigating authorities did not find, as alleged by India, that the failure of bed linen prices to keep pace with inflation in the prices of consumer goods was a cause of injury. According to the European Communities, EC Regulation 1644/2001 mentioned the failure of bed linen prices to keep pace with inflation as a further indication of the existence of price suppression. In any event, the European Communities contends that the failure of bed linen prices to keep pace with inflation cannot be a *cause* of injury in the form of declining and inadequate profitability. The European Communities notes that the profitability of bed linen is a *function* of its cost of production and of its sales price. The inflation rate for other consumer goods does not affect either of these two variables. Therefore, the European Communities argues, the inflation rate cannot be the cause of the injury suffered by the European Communities industry. Rather, it is an indication or symptom of injury, as indicated by the Panel.

C. *Arguments of the Third Participants*

1. *Japan*

59. Japan submits arguments relating only to the determination of the volume of dumped imports for purposes of making a determination of injury under Article 3 of the *Anti-Dumping Agreement*. Japan submits that an analysis of the text, the context, and the object and purpose of Article 9.4 of the *Anti-Dumping Agreement* demonstrates that Article 9.4 does not apply to the determination of dumping, injury, and causation under Articles 2 and 3 of the *Anti-Dumping Agreement*. Japan contends that Article 9.4 provides rules applicable only to the stage where duties are collected, which follows the investigating authorities' affirmative determination of dumping, injury, and causation.

60. Japan argues that the use of the term "duty" or "duties" in Article 9.4 confirms the understanding that Article 9.4 applies only to the stage of imposition of anti-dumping duties. In addition, Japan contends that the use of the present perfect tense in Article 9.4 indicates that Article 9.4 becomes relevant only after the investigation phase has been completed and the investigating authorities have found dumping, injury, and causation. In Japan's view, the title

of Article 9, as well as the principles set forth in Article 9.1, clarify that Article 9 sets forth rules concerning imposition and collection of duties, and that it does not affect the determinations of dumping, injury, and causation.

61. Japan also contends that Article 9.4 contains a very narrowly-focused set of rules that apply only in exceptional cases where an examination of all responding parties is "impracticable," as set forth in the second sentence of Article 6.10.

62. Japan finds support in the Appellate Body Report in *US – Hot-Rolled Steel* for its argument that the European Communities' position would dilute the requirement established in Article 3.1 that a determination of injury be based on "positive evidence" and an "objective examination."⁵⁸ Japan submits that the European Communities' methodology is inconsistent with the requirement that the evidence "must be of an affirmative, objective and verifiable character, and that it must be credible."⁵⁹ In addition, Japan alleges that by using the data of the sampled producers in a biased and unfair manner, the European Communities failed to comply with the requirement that a determination of injury must involve an objective examination—that is, that the "'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness."⁶⁰

63. Japan contends, moreover, that its interpretation is supported by Article 17.6(i) of the *Anti-Dumping Agreement*. Japan argues that although Article 17.6(i) is directed to panels, the obligation of an unbiased and objective evaluation of facts applies equally to the investigating authorities, because panels review the investigating authorities' evaluation of facts in accordance with that standard.

2. *United States*

64. The United States agrees with the finding of the Panel that when a party's argument is rejected in a report adopted by the DSB, that party cannot raise new arguments on the same claim in a proceeding under Article 21.5 of the DSU. The United States disagrees with India's view that the mere inclusion of a finding in the legislative or administrative vehicle that implements a DSB recommendation makes it a measure taken to comply subject to Article 21.5 review. The text of that provision premises a panel's jurisdiction over a claim under Article 21.5 on whether that claim challenges measures that were taken to comply with DSB recommendations and rulings.

65. The United States submits that the Panel correctly concluded that investigating authorities may treat all imports from producers or exporters for which an affirmative dumping determination has been made as "dumped imports" for purposes of making a determination of injury. The United States submits that Article 2.1 of the *Anti-Dumping Agreement* defines dumped products "[f]or the purpose of [the Anti-Dumping] Agreement", on a country-

⁵⁸ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192-193.

⁵⁹ *Ibid.*, para. 192.

⁶⁰ *Ibid.*, para. 193.

wide basis, and that, therefore, the references to "dumped imports" in paragraphs 1 and 2 of Article 3 and throughout Article 3 refer to all imports of the product from the countries subject to the investigation.

66. In the United States' view, the *Anti-Dumping Agreement* requires investigating authorities to examine, on the one hand, the volume and price effects of the *dumped imports*, and, on the other hand, all relevant economic factors having a bearing on the state of the domestic industry. The United States argues that, through this examination of both the *dumped imports* and the injury factors, the investigating authorities examine the "consequent impact" of those *dumped imports* on the domestic industry, as set out in paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*.

67. The United States contends that Article 9.4 confirms this conclusion, as that provision does not provide for any separation of imports from each non-examined producer or exporter into two categories—dumped and not dumped. Rather, the United States contends that the provision provides for a calculated duty to apply to *all* of the imports from each non-examined producer.

68. The United States believes that the Panel correctly recognized that, under the *Anti-Dumping Agreement*, an investigating authority may appropriately draw a distinction between the economic factors and indicia that indicate whether an industry's overall condition is declining, and "other factors" that may be causing such decline. Only the latter are subject to the non-attribution provisions of Article 3.5 of the *Anti-Dumping Agreement*.

69. The United States agrees with the Panel's finding that the European Communities properly found that the industry's rising raw material costs and inflation were not "other factors" causing injury subject to the non-attribution provision of Article 3.5. Even if the Appellate Body were to conclude that these factors should have been considered "other factors", subject to the provisions of Article 3.5, the United States believes that the European Communities' analysis of the effect of the factors on the industry represents a reasoned and adequate discussion that does not attribute to imports the effects, if any, of these two factors. The United States believes that the European Communities' analysis of the effects of rising raw material costs and inflation would satisfy the European Communities' non-attribution obligation under Article 3.5, as that obligation has been interpreted by the Appellate Body.

III. ISSUES RAISED IN THIS APPEAL

70. The following issues are raised in this appeal:

- (a) (i) whether the Article 21.5 Panel⁶¹ erred in dismissing India's claim that the European Communities had acted inconsistently with Article 3.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*")—by failing to ensure that injuries caused

⁶¹ Hereinafter "the Panel".

- by "other factors" was not attributed to the dumped imports—because that claim was not properly before the Panel; and, if so
- (ii) whether the Panel erred in finding, in the alternative, that the European Communities had ensured that injuries caused by "other factors" was not attributed to the dumped imports and, therefore, had not acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement*;
- (b) whether the Panel erred in concluding that the European Communities had acted consistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* in calculating the volume of dumped imports, for purposes of determining injury; and
- (c) whether the Panel failed to discharge its duties properly under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), in finding that the European Communities had information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*, including stocks and capacity utilization.

IV. ARTICLE 21.5 OF THE DSU

A. Introduction

71. We turn first to the issue raised by India that the Panel erred in dismissing India's claim that the European Communities had acted inconsistently with the requirement of Article 3.5 of the *Anti-Dumping Agreement* by failing to ensure that injuries caused by "other factors" was not attributed to the dumped imports. We recall that India claimed before the *original panel* that the European Communities had acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement* by failing to determine to what extent injuries caused by "other factors" were responsible for the injury allegedly suffered by the domestic industry.⁶² The original panel ruled:

Finally, with respect to India's claim that the European Communities failed to properly consider "other factors" which might have been causing injury to the domestic industry, as required by Article 3.5 of the AD Agreement, we note that, with the exception of the argument concerning improper consideration of "dumped" imports, India has made no other arguments in

⁶² Original Panel Report, para. 6.123. India also claimed under Article 3.5 that the European Communities had failed to establish the existence of a causal link between dumped imports and injury suffered by the domestic industry. According to India, by cumulating *all* imports from the countries under investigation, the European Communities had included in its calculation of "dumped imports" what India considered to be *non-dumped* import transactions. (*Ibid.*, paras. 6.121-6.122) The original panel found *no* violation of Article 3.5 in relation to this particular claim. (*Ibid.*, para. 6.142) India did not appeal this finding in the original dispute.

support of this claim. Having rejected India's position in that regard, we consider that India has failed to present a *prima facie* case in this regard.⁶³

India did not appeal this panel finding in the original dispute. Thus, the panel report in the original dispute was adopted by the Dispute Settlement Body (the "DSB") without modification of this finding.

72. In order to comply with the recommendations and rulings of the DSB in the original dispute, the European Communities adopted Council Regulation (EC) No 1644/2001⁶⁴, reflecting the investigating authorities' revised determinations of dumping and injury. In the light of these revised determinations, the European Communities also re-examined whether a causal link existed between the dumped imports and injury suffered by the domestic industry.⁶⁵ The European Communities did *not*, however, revise the analysis of "other factors" made in the original determination.⁶⁶ Rather, in EC Regulation 1644/2001, the European Communities confirmed the findings of the original determination in this respect, except for a minor change.⁶⁷

73. Subsequently, before the *Article 21.5 Panel*, India claimed that the European Communities had violated Article 3.5, *inter alia*, because it had disregarded the obligation to not attribute to the dumped imports injuries caused by "other factors", and had failed to separate and distinguish injuries caused by those "other factors" from the injury caused by the dumped imports.⁶⁸ The European Communities responded with a request for a preliminary ruling, asking the Panel to dismiss India's claim under Article 3.5 insofar as it concerned aspects of the original determination which were the subject of a claim before the original panel, which was not pursued before that panel.⁶⁹ India asked the Panel to reject the European Communities' request for a preliminary ruling.⁷⁰

74. The Panel stated that:

... a claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be raised on the same facts and legal premises in an Article 21.5

⁶³ Original Panel Report, para. 6.144.

⁶⁴ Council Regulation (EC) No 1644/2001, 7 August 2001, amending Council Regulation (EC) No 2398/97, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India, and Pakistan and suspending its application with regard to imports originating in India, published in the Official Journal of the European Communities, 14 August 2001, L-series, No. 219 ("EC Regulation 1644/2001").

⁶⁵ *Ibid.*, recitals (52)-(53).

⁶⁶ *Ibid.*, recitals (59)-(64).

⁶⁷ The Panel noted that the European Communities expanded its findings in the redetermination with respect to the development of consumption of bed linen in order to take into account slightly different figures on domestic industry sales. The Panel stated that India's claim in the Article 21.5 proceedings did not rely on this minor change. (Panel Report, footnote 75 to para. 6.52)

⁶⁸ In addition, India claimed before the Article 21.5 Panel that the European Communities had acted inconsistently with Article 3.5 by failing to establish a causal link between dumped imports and the injury allegedly suffered by the domestic industry. (Panel Report, para. 6.218)

⁶⁹ *Ibid.*, para. 6.30.

⁷⁰ *Ibid.*, para. 6.34.

proceeding to determine the existence or consistency of measures taken to comply with the recommendation of the DSB in the original dispute.⁷¹

According to the Panel, neither Article 21.5 of the DSU nor any other provision entitles India to such a "second chance".⁷² The Panel concluded that:

... with respect to India's claim 6, insofar as it concerns the consistency of the EC's measure with the obligation in Article 3.5 to ensure that injuries caused by "other factors" not be attributed to the dumped imports, the EC's request for preliminary ruling has merit. We consider that this aspect of India's claim is not properly before us, having been disposed of by the Panel in the original Report and not appealed, and will not make any ruling on it.⁷³

75. In this appeal, India requests that we *reverse* the Panel's finding dismissing its claim under Article 3.5 relating to "other factors", and complete the legal analysis.⁷⁴ India argues that its claim under Article 3.5 forms part of the matter before the Article 21.5 Panel because India identified this claim in its request for the establishment of that Panel. In India's view, the Panel was not precluded from examining this claim, even though the original panel had dismissed it. Referring to our Report in *Canada – Aircraft (Article 21.5 – Brazil)*, India submits that the measure at issue in this implementation dispute is a *new* measure that is legally separate and distinct from the *original* measure.⁷⁵ India argues further that an implementation dispute is not confined to examining the measures taken to comply from the perspective of the claims, arguments, and factual circumstances related to the measure that was the subject of the *original* proceedings.⁷⁶ In support of this position, India asserts that, in the *US – FSC (Article 21.5 – EC)* implementation dispute, a claim under Article III of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") was accepted on appeal, even though the European Communities could have raised it during the original proceedings, but did not.⁷⁷

76. India also contends that the Panel erred in finding the situation in these implementation proceedings to be analogous to the situation in *US – Shrimp (Article 21.5 – Malaysia)*.⁷⁸ In India's view, the measure in *US – Shrimp*

⁷¹ Panel Report, para. 6.43. The Panel disagreed with India that the original panel's finding on India's claim under Article 3.5 concerning "other factors" was an exercise of *judicial economy*. In the Panel's view, it was a finding that India had failed to present a *prima facie* case of violation. (*Ibid.*, para. 6.44)

⁷² *Ibid.*, para. 6.43.

⁷³ *Ibid.*, para. 6.53. However, the Panel did rule on the merits of another aspect of India's claim under Article 3.5, namely the existence of a causal link between dumped imports and injury. The Panel found that the European Communities' finding of a causal link is not inconsistent with Article 3.5. (*Ibid.*, para. 6.233) India has not appealed this finding.

⁷⁴ India's appellant's submission, para. 154.

⁷⁵ *Ibid.*, paras. 151-152, referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 36 and 41.

⁷⁶ *Ibid.*, para. 136.

⁷⁷ *Ibid.*, para. 146.

⁷⁸ *Ibid.*, paras. 148 *ff.*, referring to Panel Report, paras. 6.50 and 6.52.

(*Article 21.5 – Malaysia*) was the *same* measure that had been found to be consistent with obligations of the World Trade Organization (the "WTO") in the original proceedings.⁷⁹ In this dispute, India notes that the European Communities re-examined causation in the redetermination as a consequence of revised dumping and injury findings. Therefore, in India's view, the causation analysis is a *new* component of the measure taken to comply that was not part of the measure before the original panel.⁸⁰

77. The European Communities responds that we should *uphold* the Panel's ruling dismissing India's claim under Article 3.5 relating to "other factors".⁸¹ The European Communities argues that it was under no obligation to correct, in the redetermination, its findings on "other factors", because the original panel had not ruled that these findings were inconsistent with Article 3.5.⁸² The European Communities concludes, therefore, that the aspects of the redetermination relating to "other factors" are not part of the measure "taken to comply" with the recommendations and rulings of the DSB in the original dispute.⁸³ According to the European Communities, claims challenging measures *other* than those taken to comply cannot form part of Article 21.5 proceedings. The European Communities agrees with the Panel's reliance on our findings in *US – Shrimp (Article 21.5 – Malaysia)*.⁸⁴ In the European Communities' view, the implementation disputes in *Canada – Aircraft (Article 21.5 – Brazil)* and in *US – FSC (Article 21.5 – EC)* can be distinguished from the present Article 21.5 proceedings because those disputes concerned *new* claims challenging *modified* aspects of the measure.⁸⁵ The European Communities emphasizes that the original panel's finding rejecting India's claim relating to "other factors" represents the final resolution of the dispute between the parties, because it forms part of a panel report adopted by the DSB. For this reason, the European Communities maintains that India is precluded from reasserting this claim in these Article 21.5 proceedings.

B. Analysis

78. In examining whether India's claim under Article 3.5 relating to "other factors" was properly before the Panel, we must first establish the appropriate *subject-matter* of Article 21.5 proceedings. Article 21.5 provides in relevant part:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided

⁷⁹ India's appellant's submission, para. 149, referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 89.

⁸⁰ India's statement at the oral hearing.

⁸¹ European Communities' appellee's submission, para. 121.

⁸² *Ibid.*, para. 142.

⁸³ European Communities' appellee's submission, para. 134.

⁸⁴ *Ibid.*, para. 149.

⁸⁵ *Ibid.*, paras. 136 and 160.

through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

As in *original* dispute settlement proceedings, the "matter" in Article 21.5 proceedings consists of two elements: the specific *measures* at issue and the legal basis of the complaint (that is, the *claims*).⁸⁶ If a *claim* challenges a *measure* which is not a "measure taken to comply", that *claim* cannot properly be raised in Article 21.5 proceedings. We agree with the Panel that it is, ultimately, for an Article 21.5 panel—and not for the complainant or the respondent—to determine which of the measures listed in the request for its establishment are "measures taken to comply".⁸⁷ Although the issue raised by India in this appeal relates primarily to the scope of *claims* that may be raised in Article 21.5 proceedings, this issue is intertwined with the question of which *measures* may be considered as "measures taken to comply" with the DSB rulings in an original dispute.

79. We addressed the function and scope of Article 21.5 proceedings for the first time in *Canada – Aircraft (Article 21.5 – Brazil)*. There, we found that Article 21.5 panels are not merely called upon to assess whether "measures taken to comply" implement specific "recommendations and rulings" adopted by the DSB in the original dispute.⁸⁸ We explained there that the mandate of Article 21.5 panels is to examine either the "existence" of "measures taken to comply" or, more frequently, the "*consistency with a covered agreement*" of implementing measures.⁸⁹ This implies that an Article 21.5 panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the *original* proceedings.⁹⁰ Moreover, the relevant facts bearing upon the "measure taken to comply" may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the "measure taken to comply" will not, necessarily, be the same as those relating to the measure in the original dispute.⁹¹ Indeed, a complainant in Article 21.5 proceedings may well raise *new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a "measure taken to comply" may be *inconsistent* with WTO obligations in ways different from the original measure.

⁸⁶ Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 76, interpreting Article 7 of the DSU.

⁸⁷ The Panel stated in para. 6.17 of the Panel Report:

To the extent a party may have challenged, in a request for establishment of an Article 21.5 panel, measures which were **not** "taken to comply" by the implementing Member, it is our view that a Panel may decline to address claims concerning such measures. (original boldface)

In paras. 6.13 ff of the Panel Report, the Panel refers, in support of this interpretation, to the panel reports in *Australia – Salmon (Article 21.5 – Canada)* (para. 7.10.22) and *Australia – Automotive Leather II (Article 21.5 – US)* (para. 6.4).

⁸⁸ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 40.

⁸⁹ *Ibid.*, paras. 40-41. The panels in *EC – Bananas III (Article 21.5 – Ecuador)* (paras. 6.8-6.9) and *Australia – Salmon (Article 21.5 – Canada)* (para. 7.10.9) reached essentially the same conclusion.

⁹⁰ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

⁹¹ *Ibid.*

In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to assess whether a "measure taken to comply" is *fully consistent* with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings.⁹²

80. This appeal, however, raises an issue different from the issue that was before us in *Canada – Aircraft (Article 21.5 – Brazil)*. Here, India did not raise a *new* claim before the Article 21.5 Panel; rather, India reasserted in the Article 21.5 proceedings the *same* claim that it had raised before the *original* panel in respect of a component of the implementation measure which was the same as in the original measure. This *same* claim was dismissed by the original panel, and India did not appeal that finding.

81. Despite this previous dismissal, and despite India's decision not to appeal it, India insists that it should be entitled to reassert its claim under Article 3.5 relating to "other factors" in these Article 21.5 proceedings. India argues that it should be entitled to do so because the "measure taken to comply" in this dispute is "separate and distinct" from the measure subject to the original dispute.⁹³ For support, India refers to our Report in *Canada – Aircraft (Article 21.5 – Brazil)*, where we stated that:

In principle, a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings.⁹⁴ (original italics; footnote omitted)

82. Relying on this, India contends that it is *not*, in fact, challenging the same measure that was before the original panel. India maintains that, although some aspects of the measure remain the same, the redetermination must be considered "as a whole new measure" because it is not capable of being divided into separate elements.⁹⁵

⁹² As we put it in *Canada – Aircraft (Article 21.5 – Brazil)*:

Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.

(Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41) We defined the function of Article 21.5 proceedings in the same vein in our Report in *US – Shrimp (Article 21.5 – Malaysia)* (para. 87).

⁹³ India's appellant's submission, para. 151.

⁹⁴ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. In *US – Shrimp (Article 21.5 – Malaysia)*, we recalled our rulings on this issue, explicitly referring to our Report in *Canada – Aircraft (Article 21.5 – Brazil)*. (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 86)

⁹⁵ India's response to questioning at the oral hearing.

83. In contrast, the European Communities contends that there are *limits* to the scope of the claims that may be raised in Article 21.5 proceedings, even where such claims challenge "measures taken to comply" as inconsistent with WTO obligations, in contrast to measures that gave rise to the *original* proceedings. The European Communities refers to our Report in *US – Shrimp (Article 21.5 – Malaysia)*, on which the Panel also relied⁹⁶, where we stated:

With respect to a claim that *has* been made when a matter is referred by the DSB for an Article 21.5 proceeding, Malaysia seems to suggest as well that a panel must re-examine, for WTO-consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* in that dispute, and that remain unchanged as part of the new measure.⁹⁷ (original italics)

We concluded in that appeal that:

... the [*US – Shrimp (Article 21.5 – Malaysia)*] Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in *United States – Shrimp* with respect to the consistency of Section 609, therefore, still stands.⁹⁸

84. In the light of these considerations, we turn to an examination of the measure taken to comply in this implementation dispute. In doing so, we look to the various aspects of the redetermination carried out by the European Communities in order to comply with the DSB rulings in the original dispute.

85. We agree with India that the investigating authorities of the European Communities were required to revise the original determination of dumping and injury in order to comply with the DSB recommendations and rulings. Towards this end, the European Communities recalculated the dumping margins *without* applying the practice of "zeroing" that had been found to be inconsistent with WTO obligations in the original dispute. According to the recalculation, two of the *individually* examined Indian producers were *not* dumping.⁹⁹ The investigating authorities deducted the imports attributable to those two producers from the *volume* of dumped imports, and, accordingly, the volume of dumped imports in the redetermination was *lower* than in the original determination. According to EC Regulation 1644/2001, the investigating authorities of the European Communities also "re-examined" whether a causal link between the

⁹⁶ Panel Report, para. 6.50.

⁹⁷ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 89.

⁹⁸ *Ibid.*, para. 96.

⁹⁹ In the original determination, the European Communities treated all imports from India as "dumped" because it found, in applying the practice of "zeroing", that all of the individually-examined producers were dumping. The original panel ruled that all import transactions attributable to a producer found to be dumping may be considered as "dumped" for purposes of making a determination of injury. (Original Panel Report, para. 6.137)

two *revised* elements—dumped imports and the injury to the domestic industry—still existed, and the Panel reviewed that re-examination.¹⁰⁰

86. The *amount* of dumped imports will, of course, have an impact on the assessment of the *effects* of the "dumped imports" for the purposes of determining *injury*. It is clear, therefore, that the revised findings on dumping and injury could have a bearing on whether a causal link exists between dumping and injury. But whilst a revised finding of *dumping* will, in all likelihood, have an impact on the "effect of *dumped* imports", we see no reason to conclude as well that this revised finding would have any impact on the "effects ... of known factors *other than* the dumped imports" in this dispute.¹⁰¹ Accordingly, we are of the view that the investigating authorities of the European Communities were not required to change the determination as it related to the "effects of other factors" in this particular dispute. Moreover, we do not see why that part of the redetermination that merely incorporates elements of the original determination on "other factors" would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute. Indeed, the investigating authorities of the European Communities were able to treat this element separately. Therefore, we do not agree with India that the redetermination can only be considered "as a whole new measure".¹⁰²

87. We conclude, therefore, that, in these Article 21.5 proceedings, India has raised the *same* claim under Article 3.5 relating to "other factors" as it did in the original proceedings. In doing so, India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations.

88. For these reasons, we agree with the Panel's statement distinguishing, in this respect, the *Canada – Aircraft (Article 21.5 – Brazil)* dispute from these Article 21.5 proceedings:

In that case, Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that **could not** have been raised in the original proceedings. The issue before us is whether India should be allowed to raise, in this Article 21.5 proceeding, claims with

¹⁰⁰ Panel Report, paras. 6.228 and 6.233.

¹⁰¹ We do not see how a change in the volume of "dumped imports" would affect the relationship between injury caused by "dumped imports" and injury caused by "other factors" in a situation where those "other factors" alone do *not* cause injury. However, a change in the volume of "dumped imports" could affect this relationship in a situation where "other factors" cause a certain amount of injury.

¹⁰² India's response to questioning at the oral hearing.

respect to Article 3.5 which it **could and did** raise before the original panel, but which it did not pursue, and which the Panel dismissed for failure to present a *prima facie* case of violation.¹⁰³ (original boldface)

We agree with the Panel that the *Canada – Aircraft (Article 21.5 – Brazil)* dispute involved a *new* claim challenging a *new* component of the measure taken to comply which was not part of the original measure. The situation in *Canada – Aircraft (Article 21.5 – Brazil)* was thus different from the situation in this appeal.

89. Nor does our finding in *US – FSC (Article 21.5 – EC)* support India's position in this appeal.¹⁰⁴ In that implementation dispute, the Article 21.5 panel ruled on a *new* claim under Article III of the GATT 1994 that the European Communities had not raised in the original proceedings. We upheld that ruling on appeal. In that dispute, the European Communities challenged a "foreign content limit" (which is similar to a local content requirement) imposed by the "FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI)"¹⁰⁵ on foreign trade property eligible for special tax treatment. That provision established a *different* "foreign content limit" from the one contained in the original "Foreign Sales Corporation (FSC) regime"¹⁰⁶, which the United States had *changed* in order to comply with the DSB recommendations and rulings in the original dispute. In other words, the *US – FSC (Article 21.5 – EC)* dispute involved a *new* claim challenging a *changed* component of the measure taken to comply, while this dispute, by contrast, concerns the *same* claim against an *unchanged* component of the implementation measure that was part of the original measure and that was not found to be inconsistent with WTO obligations.¹⁰⁷ Therefore, the situation in *US – FSC (Article 21.5 – EC)* was different from the situation in this appeal.

90. Having distinguished the situations in these two previous implementation disputes from the situation in this appeal, we turn next to the question of the effect of a ruling adopted by the DSB in an original dispute for the parties to Article 21.5 proceedings. The European Communities argues that a ruling adopted by the DSB provides a final resolution to the dispute between the parties as it relates to the particular claim and the specific aspect of the measure.¹⁰⁸ As we have noted, the *US – Shrimp (Article 21.5 – Malaysia)* dispute involved a claim against an aspect of the implementation measure that was the *same* as in

¹⁰³ Panel Report, para. 6.48.

¹⁰⁴ India's appellant's submission, para. 146.

¹⁰⁵ United States Public Law 106-519, 114 Stat. 2423 (2002).

¹⁰⁶ Sections 921-927 of the Internal Revenue Code and Related Measures Establishing Special Tax Treatment for Foreign Sales Corporations.

¹⁰⁷ We also agree with the Panel's statements, in paras. 6.46 and 6.49 of the Panel Report, that the claims raised in *EC – Bananas III (Article 21.5 – Ecuador)*, as well as those raised in *Australia – Salmon (Article 21.5 – Canada)*, concerned aspects of the "measures taken to comply" in those disputes which were *different* from the measures subject to the respective original disputes.

¹⁰⁸ European Communities' appellee's submission, paras. 150-151.

the *original* measure, and that we had found to be not *inconsistent* with WTO obligations in the original dispute. In that Article 21.5 dispute, we ruled:

We wish to recall that panel proceedings under Article 21.5 of the DSU are, as the title of Article 21 states, part of the process of the "*Surveillance of Implementation of Recommendations and Rulings*" of the DSB. This includes Appellate Body Reports. To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body "shall be" adopted by the DSB, by consensus, but also that such Reports "shall be ... unconditionally accepted by the parties to the dispute. ..." Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, "... unconditionally accepted by the parties to the dispute", and, therefore, *must be treated by the parties to a particular dispute as a final resolution to that dispute*. In this regard, we recall, too, that Article 3.3 of the DSU states that the "prompt settlement" of disputes "is essential to the effective functioning of the WTO".¹⁰⁹ (underlining added)

91. Thus, we concluded there that an adopted Appellate Body Report must be treated as a *final resolution* to a dispute between the parties to that dispute. We based this conclusion on Article 17.14 of the DSU, which deals with the effect of adopted Appellate Body Reports (as opposed to *panel* reports). Article 17.14 reads, in relevant part:

Adoption of Appellate Body Reports

An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. (footnote omitted)

92. The issue raised in this appeal is similar to the issue we resolved in *US – Shrimp (Article 21.5 – Malaysia)*. In this appeal, however, the original panel's finding on India's claim under Article 3.5 relating to "other factors" was *not appealed* in the original dispute. Accordingly, the finding of the original panel relating to that claim was adopted by the DSB as part of a *panel* report, and, therefore, Article 17.14, which deals with the adoption of *Appellate Body* Reports, does not dispose of the issue before us.

93. All the same, in our view, an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim. This conclusion is supported by Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and

¹⁰⁹ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

Article 22.1 of the DSU. Where a panel concludes that a measure is inconsistent with a covered agreement, that panel shall *recommend*, according to Article 19.1, that the Member concerned bring that measure into conformity with that agreement. A panel report, including the *recommendations* contained therein, shall be *adopted* by the DSB within the time period specified in Article 16.4—unless appealed. Members are to *comply* with recommendations and rulings *adopted* by the DSB promptly, or within a reasonable period of time, in accordance with paragraphs 1 and 3 of Article 21 of the DSU. A Member that does not comply with the recommendations and rulings adopted by the DSB within these time periods must face the consequences set out in Article 22.1, relating to compensation and suspension of concessions. Thus, a reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1, taken together, makes it abundantly clear that a panel finding which is not appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB—with respect to the particular claim and the specific component of the measure that is the subject of the claim. Indeed, the European Communities and India agreed at the oral hearing that both panel reports and Appellate Body Reports would have the same effect, in this respect, once adopted by the DSB.¹¹⁰

94. On this point, we recall that we resolved the question of the effect of findings adopted by the DSB as part of a *panel* report in the same vein in *Mexico – Corn Syrup (Article 21.5 – US)*. In that implementation dispute, we relied on Article 3.2 of the DSU, which emphasizes the need for security and predictability in the trading system, and on Article 3.3 of the DSU, which stresses the necessity for the prompt settlement of disputes. There, we treated certain findings of the original panel that had *not* been appealed in the original proceedings, and that had been adopted by the DSB, as a final resolution to the dispute between the parties in respect of the particular claim and the specific component of the measure that was the subject of the claim. We observed there that "Mexico seems to seek to have us revisit the original panel report"¹¹¹, and added that:

... the original panel report, regarding the *initial* measure (SECOFI's original determination), has been adopted and that these Article 21.5 proceedings concern a *subsequent* measure (SECOFI's redetermination). We also note that Mexico did not appeal the original panel's report, and that Articles 3.2 and 3.3 of the DSU reflect the importance to the multilateral trading system of security, predictability and the prompt settlement of disputes. We see no basis for us to examine the original panel's treatment of the alleged restraint agreement.¹¹² (original italics)

¹¹⁰ India's and the European Communities' responses to questioning at the oral hearing.

¹¹¹ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 78.

¹¹² *Ibid.*, para. 79.

95. We, therefore, agree with the Panel in this dispute that:

... the same principle [as that expressed in Article 17.14] applies to those aspects of the Panel's report that are not appealed and are thus not addressed by the Appellate Body. Thus, the portions of the original Report of the Panel that are not appealed, together with the Appellate Body report resolving the issues appealed, must, in our view, be considered as the final resolution of the dispute, and must be treated as such by the parties, and by us, in this proceeding.¹¹³ (footnote omitted)

96. We consider next whether the fact that the Panel dismissed India's claim because India had not established a *prima facie* case has any relevance for our decision on the effect of the adoption by the DSB of a finding of a panel report that was not appealed. We recall that, when we ruled in *US – Shrimp (Article 21.5 – Malaysia)* that a finding adopted by the DSB should be treated as a final resolution to a dispute, we relied on the fact that, in our original Report in *US – Shrimp*, we had found that the *unchanged* aspect of the measure, as such, was *consistent* with Article XX of the GATT 1994. Here, however, the original panel ruled that India had failed to present a *prima facie* case in respect of its claim under Article 3.5 relating to "other factors".¹¹⁴ In our view, the effect, for the parties, of findings adopted by the DSB as part of a panel report is the same, regardless of whether a panel found that the complainant failed to establish a *prima facie* case that the measure is inconsistent with WTO obligations, that the Panel found that the measure is fully consistent with WTO obligations, or that the Panel found that the measure is not consistent with WTO obligations. A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel. Once

¹¹³ Panel Report, para. 6.51. The Panel found support for its view in our finding in *Japan – Alcoholic Beverages II* that "[a]dopted panel reports are an important part of the GATT *acquis*. ... They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, *except with respect to resolving the particular dispute between the parties to that dispute*". (*Ibid.*, footnote 73 to para. 6.51, quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108) (emphasis added)

¹¹⁴ The Panel stated that:

Neither the Panel nor the Appellate Body in the original dispute had the opportunity to consider arguments with respect to India's claim in the original proceeding concerning the consistency of the EC's anti-dumping duty with Article 3.5 of the AD Agreement concerning consideration of "other factors" of injury, because India did not present arguments in support of its claim. The Panel **did**, however, rule on India's claim, finding that India had failed to present a *prima facie* case on this claim, and that aspect of the Panel's report was adopted without modification.

(Panel Report, para. 6.52) (original boldface)

adopted by the DSB, both findings amount to a final resolution to the issue between the parties with respect to the particular claim and the specific aspects of the measure that are the subject of the claim.¹¹⁵ Moreover, here, India decided not to appeal the panel finding at issue in the original proceedings, even though it could have done so, inasmuch as the issue was not of an exclusively factual nature. Hence, India itself seems to have accepted the finding as final.

97. Therefore, we agree with the Panel's conclusion that:

When considering the status of adopted panel reports, the Appellate Body has indicated that they are binding on the parties "with respect to that particular dispute". In our view, the Panel's ruling in the original dispute disposed of India's claim in this regard. Thus, we consider that India is precluded from reasserting in this proceeding and presenting arguments in support of a claim challenging the EC's consideration of "other factors" of injury.¹¹⁶ (footnotes omitted)

98. The Panel's ruling that India's claim under Article 3.5 relating to "other factors" was not properly before it is also consistent with the object and purpose of the DSU. Article 3.3 provides that the *prompt* settlement of disputes is "essential to the effective functioning of the WTO". Article 21.5 advances the purpose of achieving a prompt settlement of disputes by providing an expeditious procedure to establish whether a Member has fully complied with the recommendations and rulings of the DSB.¹¹⁷ For that purpose, an Article 21.5 panel is to complete its work within 90 days, whereas a panel in an original dispute is to complete its work within 9 months of its establishment, or within 6 months of its composition. It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted

¹¹⁵ We note that, at the oral hearing, the participants agreed that a finding adopted by the DSB, expressed in terms of WTO-consistency or the failure to present a *prima facie* case, has the same effect in terms of providing a final resolution to a dispute, in this respect, between the parties.

We also recall that the Panel noted, in para. 6.44 of the Panel Report, that the original panel's dismissal of India's claim under Article 3.5 relating to "other factors" was *not* an exercise of "judicial economy". The issue raised in this appeal is different from a situation where a panel, on *its* own initiative, exercises "judicial economy" by not ruling on the substance of a claim. In this respect, we recall our statement in *Australia – Salmon* that:

The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members."

(Appellate Body Report, *Australia – Salmon*, para. 223) (footnotes omitted)

We believe that in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding.

¹¹⁶ Panel Report, para. 6.52.

¹¹⁷ *Ibid.*, para. 6.45.

in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is *not* inconsistent with WTO obligations, and that report has been adopted by the DSB. At some point, disputes must be viewed as definitely *settled* by the WTO dispute settlement system.

99. In the light of the foregoing, we conclude that the original panel's finding on India's claim under Article 3.5 relating to "other factors" provides a "final resolution" to the dispute in this respect¹¹⁸ between the parties, because it was not appealed, and forms part of a panel report adopted by the DSB. Therefore, we *uphold* the Panel's finding, in paragraph 6.53 of the Panel Report, that India's claim under Article 3.5 of the *Anti-Dumping Agreement*, as far as it relates to the European Communities' consideration of "other factors", was not properly before the Panel.

100. As a result, we do not need to rule on the issue of whether the Panel erred, in its alternative finding, in paragraph 6.246 of the Panel Report, that the European Communities had ensured that injuries caused by "other factors" was not attributed to the dumped imports, and thus had not acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement*. We recall that, at the oral hearing, India confirmed that its appeal against the Panel's alternative finding is conditional on our reversing the Panel's finding that India's claim under Article 3.5 relating to "other factors" was not properly before the Panel, and that, therefore, we need not reach this issue if we were to rule as we, in fact, have ruled.¹¹⁹

V. PARAGRAPHS 1 AND 2 OF ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

A. Introduction

101. India appeals the Panel's finding that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*.¹²⁰ India contends that the European Communities did act inconsistently with those provisions, because the investigating authorities of the European Communities found, for purposes of determining injury, that *all* imports attributable to Indian producers or exporters for which *no individual* margin of dumping was calculated were *dumped*. India argues that this "determination by the EC neither rested on positive evidence, nor was objective, and, accordingly, was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*."¹²¹ According to India, the European Communities was required to determine the volume of dumped imports attributable to producers that *were not* examined individually on the basis of the *proportion* of imports found to be

¹¹⁸ By this we mean this particular claim and the specific component of the measure that was the subject of that claim.

¹¹⁹ India's response to questioning at the oral hearing.

¹²⁰ India's appellant's submission, para. 84; Panel Report, para. 6.144.

¹²¹ India's appellant's submission, para. 18.

dumped from producers that *were* examined individually.¹²² In other words, India argues that, where a certain proportion of the volume of the imports attributable to producers examined individually is found to be dumped, paragraphs 1 and 2 of Article 3 require the investigating authorities to determine the volume of dumped imports attributable to the producers that were *not* individually examined in the *same proportion*.

102. We begin by recalling the findings of the original panel and the Article 21.5 Panel insofar as they are relevant for resolving this issue. Before the *original panel*, India claimed that, by including import *transactions* for which there was no evidence of dumping in the volume of dumped imports when determining injury, the European Communities violated paragraphs 1 and 2 of Article 3. The European Communities contended that the volume of dumped imports, for purposes of Article 3, includes *all* imports originating in the investigated *country* found to be dumping. The original panel disagreed with India, and concluded that dumping is a determination made with reference to imports from a particular *producer* or *exporter*, and not with reference to individual *transactions*.¹²³ In the original panel's view, if a producer or exporter that is examined individually is found to be dumping, *all* import transactions attributable to that producer or exporter may be considered as dumped. The original panel found no violation of Article 3 in relation to the determination of the volume of dumped imports.¹²⁴ This latter finding of the original panel was *not* appealed.

103. In the *redetermination* that gave rise to this appeal, the investigating authorities of the European Communities recalculated dumping margins for the five Indian producers and exporters that had been examined *individually* in the original determination that led to the original measure. They did so without applying the practice of "zeroing", which had been found to be inconsistent with Article 2.4.2 in the original proceedings.¹²⁵ In this recalculation, the investigating authorities found that three of the five Indian producers examined individually were dumping, and two were *not*. It is undisputed between the parties that the two Indian producers found *not* to be dumping accounted for 53 percent of all imports attributable to the five producers which were examined individually. Based on this recalculation, the European Communities concluded that *all* imports attributable to *all other* Indian producers or exporters—which were *not* examined individually—*were dumped*. For purposes of determining injury, the investigating authorities *excluded* from the volume of dumped imports the imports from the two producers that were examined *individually* and found

¹²² India's appellant's submission, para. 31.

¹²³ Original Panel Report, para. 6.136.

¹²⁴ *Ibid.*, para. 6.142.

¹²⁵ The original panel found that the European Communities had acted inconsistently with Article 2.4.2 by establishing the margins of dumping based on a methodology which included zeroing negative price differences calculated for some models of bed linen. (*Ibid.*, para. 6.119) We upheld this finding on appeal. (Appellate Body Report, *EC – Bed Linen*, para. 66)

not to be dumping¹²⁶, but included all imports from Indian producers that had not been examined individually and for which, therefore, there was no direct evidence from the investigation.

104. Before the *Article 21.5 Panel*, India claimed that the European Communities violated paragraphs 1 and 2 of Article 3 by finding, in this redetermination, that *all* imports attributable to Indian producers or exporters that were *not* individually examined were *dumped*. In reply, the European Communities contended that nothing in the *Anti-Dumping Agreement* prohibits Members from including in the volume of dumped imports, the volume of all imports from producers which were examined individually and found to be dumping, as well as *all* imports from producers which were *not* examined individually.

105. The Panel found that the European Communities "did not act inconsistently with Articles 3.1 and 3.2 of the [Anti-Dumping] Agreement in its consideration of 'dumped imports' in this case".¹²⁷ The Panel's finding was premised essentially on the argument that paragraphs 1 and 2 of Article 3 "contain no guidance whatsoever regarding the determination of the volume of dumped imports".¹²⁸ In the Panel's view, the fact that "Article 9.4 allows anti-dumping duties to be **collected** on imports from producers for which an individual determination of dumping ... was not made ... necessarily entails that [imports attributed to] such producers are properly considered ... as 'dumped imports' for the purposes of Articles 3.1 and 3.2".¹²⁹ The Panel concluded "that the [Anti-Dumping] Agreement does **not** require an investigating authority to determine the volume of imports from producers outside the sample that is properly considered 'dumped imports' for purposes of injury analysis on the basis of the proportion of imports from sampled producers that is found to be dumped."¹³⁰

106. On appeal, India requests that we *reverse* this finding. In India's view, paragraphs 1 and 2 of Article 3 do not permit a determination of injury to be based on imports from producers for which there is "no evidence" of dumping.¹³¹ India notes that the evidence from the sample of *examined* producers indicated that only 47 percent of the imports attributed to those producers were dumped. Therefore, according to India, the European Communities' determination, on the basis of this evidence alone, that 86 percent of the *total* imports from India were dumped, and, therefore, that this was the percentage of the "volume of the dumped imports", under paragraphs 1 and 2 of

¹²⁶ Panel Report, para. 6.117. The European Communities made alternative calculations of the volume of dumped imports from India; one calculation included imports attributable to the producers that were found *not* to be dumping, while the other did not. Under both alternative calculations, the European Communities found that the domestic industry was suffering injury. (EC Regulation 1644/2001, recital (22))

¹²⁷ Panel Report, para. 6.144.

¹²⁸ *Ibid.*, para. 6.127.

¹²⁹ *Ibid.*, para. 6.137. (original boldface)

¹³⁰ *Ibid.*, para. 6.144. (original boldface)

¹³¹ India's appellant's submission, para. 44.

Article 3, did not result from an "objective examination" on the basis of "positive evidence", as required by the first paragraph of Article 3.¹³² In India's view, imports from producers for which an *individual* determination of dumping is *not* made must be presumed *not* to have been dumped in the *same proportion* as imports determined *not* to have been dumped from producers for which an *individual* determination of dumping *was* made.¹³³

107. The European Communities requests that we *uphold* the Panel's finding. The European Communities argues that it is entitled, for purposes of paragraphs 1 and 2 of Article 3, to treat as dumped *all* imports attributable to producers for which it did *not* make an affirmative determination of *no* dumping. According to the European Communities, this includes all imports attributable to producers that were examined *individually* and found to be dumping, as well as *all* imports attributable to producers that were *not* examined individually.¹³⁴ According to the European Communities, *all* imports attributable to producers that were *not* examined individually may be treated as *dumped*, for purposes of determining injury under Article 3, because Article 9.4 permits the imposition of the "all others" duty rate on imports attributable to *non-examined* producers.¹³⁵

B. Analysis

108. We recall at the outset that the *Anti-Dumping Agreement* permits importing Members to counteract dumping by imposing anti-dumping measures on imports from companies of exporting Members when an investigation demonstrates that all the requirements of that Agreement are fulfilled. It is useful also to recall the specific standard of review under the *Anti-Dumping Agreement* that the Panel was required to follow in this dispute. This standard of review is set out in Article 17.6 of the *Anti-Dumping Agreement*.¹³⁶ As to the facts, under Article 17.6(i), a panel "shall" determine whether the establishment of the facts

¹³² India's appellant's submission, para. 47. The figure of 86 percent was derived from deducting from the total amount of imports the volume of imports attributable to the two Indian companies that were examined individually and found, in the redetermination, *not* to be dumping.

¹³³ India emphasizes that the results from the producers that were examined *individually* are *representative* of *all* Indian producers exporting bed linen to the European Communities, because those examined producers constituted a "statistically valid sample" within the meaning of the second sentence of Article 6.10. We return to Article 6.10 later in this Report, *infra*, paras. 134 *ff.*

¹³⁴ The European Communities argues that the Indian exporters that were examined *individually* are *not* necessarily representative of the *non-examined* exporters. In other words, the five Indian exporters examined individually were not a statistically valid sample, as India has claimed. Rather, according to the European Communities, the five exporters accounted for the largest percentage of the *export volume* that could be reasonably investigated, within the meaning of the second sentence of Article 6.10.

¹³⁵ The "all others" duty rate refers to the duty applied to imports from producers or exporters for which an individual margin of dumping is not established. (See Appellate Body Report, *US – Hot-Rolled Steel*, para. 115)

¹³⁶ Appellate Body Report, *Thailand – H-Beams*, para. 114. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by Members. In our Report in *US – Hot-Rolled Steel*, we found that there is no "conflict" between Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*; rather, the two provisions complement each other. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 55)

by the investigating authorities was "proper" and whether the evaluation of those facts was "unbiased and objective". If the establishment of the facts was proper and the evaluation was unbiased and objective, then a panel "shall not" overturn that evaluation, even though it might have reached a different conclusion. As to the law, under Article 17.6(ii), first sentence, a panel "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law." Under Article 17.6(ii), second sentence, where a panel finds from such an interpretation that a relevant provision of the *Anti-Dumping Agreement* "admits of more than one permissible interpretation", the panel "shall find the [investigating] authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." We examine the issues raised in this appeal with this standard of review in mind.

109. We begin our analysis with an examination of Article 3 of the *Anti-Dumping Agreement*, which is entitled "Determination of Injury". Paragraphs 1 and 2 of Article 3 read as follows:

3.1 A determination of *injury* for purposes of Article VI of GATT 1994 shall be based on *positive evidence* and involve an *objective examination* of both (a) the *volume of the dumped imports* and the effect of the *dumped imports* on prices in the domestic market for like products, and (b) the consequent impact of *these imports* on domestic producers of such products. (emphasis added)

3.2 *With regard to the volume of the dumped imports*, the investigating authorities shall consider whether there has been a significant increase in *dumped imports*, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the *dumped imports* on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the *dumped imports* as compared with the price of a like product of the importing Member, or whether the effect of *such imports* is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance. (emphasis added)

These obligations are absolute. They provide for no exceptions, and they include no qualifications. They must be met by every investigating authority in every injury determination.

110. In *Thailand – H-Beams*, we emphasized the relevance of Article 3.1 as an "overarching provision" that informs the more detailed obligations in the succeeding paragraphs of Article 3:

Article 3 as a whole deals with obligations of Members with respect to the determination of injury. *Article 3.1 is an overarching provision* that sets forth a Member's fundamental, substantive obligation in this respect. *Article 3.1 informs the more detailed*

*obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2) ... The focus of Article 3 is thus on substantive obligations that a Member must fulfill in making an injury determination.*¹³⁷ (original italics; underlining added)

111. It is clear from the text of Article 3.1 that investigating authorities must ensure that a "determination of injury" is made on the basis of "positive evidence" and an "objective examination" of the volume and effect of imports that *are dumped*—and to the exclusion of the volume and effect of imports that *are not dumped*. It is clear from the text of Article 3.2 that investigating authorities must consider whether there has been a significant increase in *dumped* imports, and that they must examine the effect of *dumped* imports on prices resulting from price undercutting, price depression, or price suppression.

112. Article 3.5 continues in the same vein as the initial paragraphs of Article 3 by requiring a demonstration that dumped imports are causing injury to the domestic industry "through the *effects of dumping*", which, of course, depends upon there being imports from producers or exporters that *are dumped*. In addition, Article 3.5 lists "volume and prices of imports *not* sold at dumping prices" as an example of "known factors *other than the dumped imports*" that are injuring the domestic industry at the same time as the dumped imports. Article 3.5 requires that this injury *not* be attributed to the dumped imports. Thus, injury caused by "volume and prices of imports *not* sold at dumping prices" must be *separated and distinguished* from injury caused by the "dumped imports". None of these provisions of the *Anti-Dumping Agreement* can be construed to suggest that Members may include in the volume of *dumped* imports the imports from producers that are *not* found to be dumping.

113. Although paragraphs 1 and 2 of Article 3 do not set out a *specific* methodology that investigating authorities are required to follow when calculating the volume of "dumped imports", this does not mean that paragraphs 1 and 2 of Article 3 confer unfettered discretion on investigating authorities to pick and choose whatever methodology they see fit for determining the volume and effects of the dumped imports. Paragraphs 1 and 2 of Article 3 require investigating authorities to make a determination of injury on the basis of "positive evidence" and to ensure that the injury determination results from an "objective examination" of the volume of dumped imports, the effects of the dumped imports on prices, and, ultimately, the state of the domestic industry. Thus, whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of "positive evidence" and involves an "objective examination" of *dumped* imports—rather than imports that are found *not* to be dumped—it is not consistent with paragraphs 1 and 2 of Article 3.

114. In *US – Hot-Rolled Steel*, we defined "positive evidence" as follows:

¹³⁷ Appellate Body Report, Thailand – H-Beams, para. 106.

The term "positive evidence" relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an *affirmative, objective and verifiable* character, and that it must be *credible*.¹³⁸ (emphasis added)

In that same appeal, we also defined an "objective examination":

The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness.¹³⁹ (footnote omitted)

We summed up in that appeal the requirement to conduct an "objective examination" as follows:

In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.¹⁴⁰ (footnote omitted, emphasis added)

We observe that, in response to our questions at the oral hearing, both participants in this appeal confirmed that they agree with these interpretations of the terms "positive evidence" and an "objective examination", as set out in *US – Hot-Rolled Steel*.¹⁴¹

115. Moreover, at the oral hearing, none of the participants disagreed with the findings of the original panel and the Article 21.5 Panel relating to the treatment, for purposes of determining injury, of imports attributed to producers or

¹³⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

¹³⁹ *Ibid.*, para. 193.

¹⁴⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

¹⁴¹ These requirements of paras. 1 and 2 of Article 3, as well as the requirements of Article 17.6(i), that investigating authorities establish the facts of the matter *properly* and evaluate those facts in an *unbiased and objective* manner, are mutually supportive and reinforcing. In *US – Hot-Rolled Steel*, we explained in respect of Article 17.6(i) that:

... panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. (original italics)

(*Ibid.*, para. 56)

exporters that were *examined individually* in an investigation. Accordingly, if a producer or exporter is found to be dumping, all imports from that producer or exporter may be *included* in the volume of dumped imports, but, if a producer or exporter is found *not* to be dumping, all imports from that producer or exporter must be *excluded* from the volume of dumped imports.¹⁴²

116. The issue raised in this appeal, however, does not relate to imports from producers or exporters that *were examined individually* in an investigation. Rather, it relates to the appropriate treatment of imports from producers or exporters that *were not examined individually* in such an investigation. The appeal before us involves an investigation in which *individual* margins of dumping have *not* been determined for *each* Indian producer exporting to the European Communities. It is, of course, not necessary under the *Anti-Dumping Agreement* for investigating authorities to examine *each* producer and exporter. The second sentence of Article 6.10 authorizes investigating authorities, when determining margins of dumping, to *limit their examination* where the number of producers or exporters of the product under investigation is so large that the determination of an *individual* margin of dumping for *each* of them would be *impracticable*. This limited examination may be conducted in one of two alternative ways identified in Article 6.10: the authorities may limit their examination "either to a reasonable number of interested parties or products by using *samples* which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

117. Thus, there is a right to conduct a limited examination in the circumstances described in the second sentence of Article 6.10. Paragraphs 1 and 2 of Article 3 must, accordingly, be interpreted in a way that permits investigating authorities to satisfy the requirements of "positive evidence" and an "objective examination" without having to investigate each producer or exporter individually. This does not, however, in any way, absolve investigating authorities from the absolute requirements in paragraphs 1 and 2 of Article 3 that the volume of dumped imports be determined on the basis of "positive evidence" and an "objective examination".

118. We have noted that neither paragraph 1 nor paragraph 2 of Article 3—nor any other provision of the *Anti-Dumping Agreement*—sets forth a *specific* methodology that must be followed by investigating authorities when calculating the volume of dumped imports for purposes of determining injury. Still, whatever methodology investigating authorities choose for calculating the volume of "dumped imports", that calculation and, ultimately, the determination of injury under Article 3, clearly must be made on the basis of "positive evidence" and involve an "objective examination". These requirements are not ambiguous, and they do not "admit of more than one permissible interpretation" within the meaning of the second sentence of Article 17.6(ii). Therefore, as in *US – Hot-Rolled Steel*, our interpretation of these requirements is based on

¹⁴² Original Panel Report, paras. 6.138-6.140; Panel Report, paras. 6.121 and 6.131.

customary rules of interpretation of public international law, as required by the first sentence of Article 17.6(ii).¹⁴³ This leaves no room, in this appeal, for recourse to the second sentence of Article 17.6(ii) in interpreting paragraphs 1 and 2 of Article 3.

119. India argues that the European Communities failed to determine the volume of dumped imports attributable to *non*-examined producers on the basis of "positive evidence" and an "objective examination". Although the Indian producers that were *examined* individually and found to be dumping accounted for only 47 percent of imports attributable to all examined producers, the European Communities determined that *all* imports attributable to *non*-examined producers were dumped. India submits that an "objective examination" of the "positive evidence" from *examined* producers would lead to the conclusion that the same proportion, that is 47 percent, of imports attributable to *non*-examined producers were dumped. The European Communities contends that its conclusion, for purposes of determining injury, that *all* imports attributable to *non*-examined producers are dumped, is based on "positive evidence" and an "objective examination", as required by paragraphs 1 and 2 of Article 3, because it is justified by Article 9.4. Article 9.4 defines the maximum anti-dumping duty that may be applied to imports from producers for which an individual dumping margin has *not* been separately calculated—commonly referred to as the "all others" duty rate.¹⁴⁴ The European Communities argues that, inasmuch as Article 9.4 does *not* limit the *volume* of imports from *non*-examined producers to which the "all others" duty rate may be applied, the practice of the European Communities must be permissible because the *volume* of imports subject to anti-dumping duties under Article 9 must be the *same* as the *volume* considered to be dumped for purposes of determining injury under Article 3.¹⁴⁵

120. Regarding the requirement of "positive evidence", the European Communities maintains that it determined the volume of dumped imports on the basis of "positive evidence" under Article 3 because its investigating authorities calculated the "all others" duty rate under Article 9.4 on the basis of the weighted

¹⁴³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 130.

¹⁴⁴ Article 9.4 of the *Anti-Dumping Agreement* reads:

When the authorities *have limited* their examination in accordance with the second sentence of para. 10 of Article 6, any anti-dumping *duty applied to imports from exporters or producers not included in the examination* shall not exceed:

- (i) *the weighted average margin of dumping established with respect to the selected exporters or producers* or,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this para. any zero and *de minimis* margins and margins established under the circumstances referred to in para. 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6. (emphasis added)

¹⁴⁵ European Communities' statement at the oral hearing.

average of the dumping margins established for the three producers that were examined and found to be dumping. Regarding the requirement of an "objective examination", the European Communities points to the fact that Article 9.4 permits the imposition of the "all others" duty rate on *all* imports from all *non*-examined producers, and argues on this basis that the European Communities is entitled to include *all* imports from non-examined producers in the volume of *dumped* imports, when determining injury under Article 3.¹⁴⁶ In the view of the European Communities, this approach must necessarily constitute an "objective examination" for purposes of Article 3 because, if this approach were not "objective and unbiased"¹⁴⁷, the drafters of the *Anti-Dumping Agreement* would not have adopted it in Article 9.4. Accordingly, the European Communities concludes that the approach applied in this investigation satisfies the requirements of paragraphs 1 and 2 of Article 3 to base the determination of the volume of dumped imports and, ultimately, the determination of injury, on "positive evidence" and an "objective examination".

121. India rejects the European Communities' interpretation of the "volume of dumped imports" in Article 3 as including the volume of imports subject to the application of the "all others" duty rate under Article 9.4. India submits that the determination of the dumping "margin" is separate and distinct from the imposition and collection of anti-dumping "duties".¹⁴⁸ In India's view, Article 9.4 comes into play only *after* the investigating authorities have determined that all the conditions for the imposition of anti-dumping duties (namely, dumping, injury, and causation) have been fulfilled. According to India, Article 9.4 cannot be read to permit a derogation from the explicit requirements of paragraphs 1 and 2 of Article 3, namely that a determination of injury must be made on the basis of "positive evidence" and an "objective examination" of the volume and the effect of the dumped imports.

122. We turn now to an examination of Article 9, entitled "Imposition and Collection of Anti-Dumping Duties". Article 9.1 confers on Members the discretion to decide whether to impose an anti-dumping duty in cases where all the requirements for such imposition "*have been fulfilled*".¹⁴⁹ Where these requirements "*have been fulfilled*"¹⁵⁰, Article 9.4 defines the maximum anti-dumping duty that may be applied to exports from producers not individually

¹⁴⁶ Consistent with Article 9.4, the investigating authorities excluded from the calculation of that weighted average the negative or zero dumping margins established for the two examined producers that were found *not* to be dumping.

¹⁴⁷ European Communities' statement at the oral hearing.

¹⁴⁸ India's appellant's submission, para. 32. India also argues that the European Communities and the Panel confuse the imposition of dumping *duties* with the calculation of dumping *margins*. (See Panel Report, paras. 6.137-6.138)

¹⁴⁹ Article 9.1 of the *Anti-Dumping Agreement* reads in relevant part:

The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition *have been fulfilled*, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. (emphasis added)

¹⁵⁰ Article 9.1 also entitles Members to decide whether to impose an anti-dumping duty in the full amount of the margin of dumping, or a "lesser duty".

examined when the investigating authorities "*have limited*" their examination in accordance with either alternative provided in the second sentence of Article 6.10.¹⁵¹

123. Japan contended in its third party submission, and also in its statement at the oral hearing, that the use of the present perfect tense in paragraphs 1 and 4 of Article 9 ("have been fulfilled" and "have limited") is significant.¹⁵² In our view, too, the use by the drafters of the present perfect tense is significant; it indicates that the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made.¹⁵³ Members have the right to impose and collect anti-dumping duties only *after* the completion of an investigation in which it *has been established* that the requirements of dumping, injury, and causation "*have been fulfilled*". In other words, the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link. The determination, by the investigating authorities of a Member, that there is injury caused by a certain volume of dumping necessarily precedes and gives rise to the *consequential* right to impose and collect anti-dumping duties.¹⁵⁴

124. When examining the practice of "zeroing" in the original dispute, we noted that the requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties.¹⁵⁵ Similarly, in this implementation dispute, we are of the view that Article 9.4, which specifies what action may be taken only *after* certain prerequisites have been determined, is of little relevance for interpreting Article 3, which sets out those prerequisites. We do not see how Article 9.4, which authorizes the imposition of a certain maximum anti-dumping *duty* on

¹⁵¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 116.

¹⁵² Japan's third participant's submission, paras. 4 *ff.*

¹⁵³ According to Article 33.3 of the *Vienna Convention on the Law of Treaties*, where treaties have been authenticated in two or more languages, "[t]he terms of the treaty are presumed to have the same meaning in each authentic text." The Spanish terms ("se han cumplido" and "hayan limitado"), in paras. 1 and 4 of Articles 9, have the same temporal meaning as the English terms ("have been fulfilled" and "have limited"). The French terms ("sont remplies" and "auront limité") can also accommodate this temporal meaning.

¹⁵⁴ Korea too rejects the European Communities' interpretation that all imports from non-examined producers subject to the "all others" duty rate under Article 9.4 may be treated as dumped imports for purposes of Article 3. (Korea's statement at the oral hearing)

¹⁵⁵ In *EC – Bed Linen*, we noted that:

... Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

(Appellate Body Report, *EC – Bed Linen*, footnote 30 to para. 62)

imports from non-examined producers, is relevant for interpreting paragraphs 1 and 2 of Article 3, which deal with the determination of injury based on the *volume* of "dumped imports". Paragraphs 1 and 2 of Article 3 make no reference at all to Article 9.4, or to the specific methodology set out in Article 9.4 for calculating the "all others" duty rate, which comes into play only when imposing and collecting anti-dumping duties. Likewise, Article 9.4 does not mention the term "dumped imports" or the "volume" of such imports. In our view, the right to impose a certain maximum amount of anti-dumping *duties* on imports attributable to *non*-examined producers under Article 9.4 cannot be read as permitting a derogation from the express and unambiguous requirements of paragraphs 1 and 2 of Article 3 to determine the *volume* of dumped imports—including dumped import volumes attributable to *non*-examined producers—on the basis of "positive evidence" and an "objective examination". Thus, we see no basis for the European Communities' view that Article 9.4 establishes a methodology for calculating the volume of dumped imports from *non*-examined producers for purposes of determining injury on the basis of "positive evidence" and an "objective examination" under paragraphs 1 and 2 of Article 3.

125. Moreover, Article 9.4, which relates to the imposition of anti-dumping duties on imports from non-examined producers, has, by its own terms, a limited purpose as an *exception* to the rule in Article 9.3. Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."¹⁵⁶ When individual dumping margins are determined for *each* producer or exporter, the *volume* of imports attributable to producers that were examined individually and found to be dumping will match the *volume* of imports attributable to those producers for which anti-dumping duties are collected. However, as noted earlier, where the determination of individual dumping margins for each producer is *impracticable*, the second sentence of Article 6.10 permits investigating authorities—as an exception to the rule in the first sentence of Article 6.10¹⁵⁷—to *limit* their examination to some—and not all—producers. In such cases, as an *exception* to the rule in Article 9.3, Article 9.4 permits the imposition of a certain maximum amount of anti-dumping duties on imports attributable to producers that were *not* examined individually¹⁵⁸, irrespective of whether those producers would have been found to be dumping had they been examined individually. It is likely, therefore, that this "all others" duty rate will be imposed on imports attributable at least to some

¹⁵⁶ As a result, the amount of the anti-dumping duty collected from the individually-examined producer will *correspond* to the individually-calculated dumping margin. Pursuant to Article 9.1, the investigating authorities may decide, however, that it is sufficient to apply a duty of *less* than the dumping margin.

¹⁵⁷ The first sentence of Article 6.10 requires, "as a rule", that individual dumping margins be established for *each* producer or exporter.

¹⁵⁸ According to Article 9.4(i), this so-called "all others" duty rate for non-examined producers may be based on the *weighted average* of more than *de minimis* dumping margins of producers and exporters selected for individual examination pursuant to the second sentence of Article 6.10. Margins established under the circumstances referred to in Article 6.8 shall also be disregarded in calculating this weighted average. Article 9.4(ii) provides for a different calculation method for cases where the liability for payment of anti-dumping duties is calculated on the basis of a *prospective* normal value.

producers that, in reality, might *not* be dumping. Hence, the reliance by the European Communities on Article 9.4, in interpreting paragraphs 1 and 2 of Article 3, is misplaced.

126. In sum, Article 9.4 provides no guidance for determining the volume of dumped imports from producers that *were not* individually examined on the basis of "positive evidence" and an "objective examination" under Article 3. The exception in Article 9.4, which authorizes the imposition of anti-dumping *duties* on imports from producers for which *no* individual dumping margin has been calculated, *cannot be assumed* to extend to Article 3, and, in particular, in this dispute, to paragraphs 1 and 2 of Article 3. For the same reasons, we do not see why the volume of imports that has been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of anti-dumping duties* under Article 9.4, as contended by the European Communities and the Panel.¹⁵⁹

127. Having concluded that Article 9.4 does not provide justification for considering *all* imports from *non-examined* producers as *dumped* for purposes of Article 3, we turn now to consider whether the European Communities' determination of the volume of dumped imports and, ultimately, of injury, in this investigation, was in accordance with paragraphs 1 and 2 of Article 3. To do so, we must examine whether this determination was made on the basis of "positive evidence" and involved an "objective examination" of the volume of dumped imports and their effect on prices and on domestic producers.

128. As we have already noted, it is not in dispute between the participants that the evidence from the five *examined* Indian producers exporting to the European Communities shows that the producers accounting for 47 percent of all imports attributable to all examined producers were found to be dumping; nor is it in dispute that the evidence also shows that the producers accounting for 53 percent of those imports were found *not* to be dumping.¹⁶⁰ The European Communities confirmed at the oral hearing that the evidence from the five examined producers is the entirety of the evidence on which the determination by the European Communities of the volume of dumped imports (attributable to examined and non-examined producers) was based¹⁶¹; thus, the participants agree that there is no other evidence on the record of this investigation that could serve as "positive evidence" for determining the volume of dumped imports. Therefore, it is undisputed that the *only* available evidence for determining which import volumes can be attributed to *non-examined* producers that are dumping is the evidence obtained from the five examined producers.

129. We observe that, in other anti-dumping investigations, there may be different and additional types of evidence that properly could be considered as "positive evidence" and relied upon when determining, on the basis of an

¹⁵⁹ European Communities' statement at the oral hearing; Panel Report, para. 6.141.

¹⁶⁰ However, the European Communities believes that Article 9.4 entitles it in any event to treat all imports subject to the "all others" duty rate as "dumped imports" for purposes of Article 3.

¹⁶¹ European Communities' responses to questioning at the oral hearing.

"objective examination", the volume of dumped imports.¹⁶² That, however, is not the case before us.

130. In this dispute, we agree with the participants that the evidence on dumping margins established for the producers that were examined individually is "positive" in the sense that we defined it in *US – Hot-Rolled Steel*, namely that it is "affirmative, objective, verifiable, and credible".¹⁶³ We also agree with India that evidence on *dumping* margins of more than *de minimis* for examined producers is relevant as "positive evidence" in this investigation for determining which import volumes may be attributed to *non*-examined producers that are *dumping*.¹⁶⁴ In our view, both these qualities of evidence are probative of the existence of dumping in the circumstances of this investigation. Therefore, we conclude that the European Communities met the first requirement of paragraphs 1 and 2 of Article 3 by basing its determination on that "positive evidence".

131. Having established this, we must next assess whether the determination at issue of the volume of dumped imports attributable to non-examined producers was based on an "objective examination" of that positive evidence. India argues that, in the light of the facts of this dispute, an "objective examination" could *not* have led the European Communities to conclude that *all* imports attributable to *non*-examined producers were dumped; nor, India argues, could an "objective examination" have led to the conclusion in the redetermination that 86 percent of *total* imports from all examined *and non*-examined Indian producers were dumped.¹⁶⁵ The European Communities contends that import volumes subject to the "all others" duty rate under Article 9.4 may be considered as "dumped imports" under paragraphs 1 and 2 of Article 3. As explained earlier, the European Communities is of the view that the approach authorized under Article 9.4 meets the "objective examination" requirement of Article 3.1.

132. We disagree with the European Communities. We recall our statement in *US – Hot-Rolled Steel* that:

¹⁶² In response to questioning at the oral hearing, the United States referred, for example, to evidence such as witness testimony and different types of documentary evidence about critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports. In the circumstances of a specific investigation, such categories of evidence may qualify as affirmative, objective, and verifiable, and thus form part of the "positive evidence" that an investigating authority may properly take into account when determining, on the basis of an "objective examination", whether or not imports from non-examined producers are being dumped.

¹⁶³ India's and the European Communities' responses to questioning at the oral hearing; Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

¹⁶⁴ India's appellant's submission, para. 31.

¹⁶⁵ In their alternative calculation, the European Communities' investigating authorities *deducted* from the volume of dumped imports the imports attributable to the two Indian producers that were examined individually and found *not* to be dumping. (EC Regulation 1644/2001, recital (22)) According to India, the result of this deduction was that 86 percent of *total* imports from India by examined and non-examined producers and exporters were found to be dumped. The European Communities has not challenged this calculation by India. It believes, however, that the calculation is irrelevant, because Article 9.4 entitles it to subject all imports from non-examined producers to the "all others" duty rate and to treat the same import volumes as dumped for purposes of determining injury under Article 3.

... the investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an "objective examination". If an examination is to be "objective", the identification, investigation and evaluation of the relevant factors must be *even-handed*. Thus, investigating authorities are *not* entitled to conduct their investigation in such a way that it becomes *more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured*.¹⁶⁶ (emphasis added)

The approach taken by the European Communities in determining the volume of dumped imports was not based on an "objective examination". The examination was not "objective" because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers—as they are entitled to do under Article 6.10—all imports from *all non-examined* producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the "all others" duty rate on imports from *non-examined* producers, *regardless* of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to *non-examined* producers are simply *presumed*, in all circumstances, to be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it "more likely [that the investigating authorities] will determine that the domestic industry is injured"¹⁶⁷, and, therefore, it cannot be "objective". Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually. This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non-examined* producers, and, therefore, the larger the amount of imports *presumed* to be *dumped*. Given that the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.

133. For these reasons, we conclude that the European Communities' determination that *all* imports attributable to *non-examined* producers were dumped—even though the evidence from *examined* producers showed that producers accounting for 53 percent of imports attributed to examined producers were *not* dumping—did not lead to a result that was *unbiased, even-handed, and fair*.¹⁶⁸ Therefore, the European Communities did not satisfy the requirements of

¹⁶⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, paras. 193-194 and 196.

paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that is "*objective*".

134. India also challenges the Panel's finding relating to Article 6.10.¹⁶⁹ As we have indicated, in this investigation, the European Communities did not determine individual dumping margins for each Indian producer exporting bed linen to the European Communities, as permitted by Article 6.10. The Panel found that the European Communities chose the second alternative in Article 6.10, and limited its examination to producers and exporters representing the largest percentage of the volume of the exports from India that could reasonably be investigated.¹⁷⁰

135. On appeal, India asks us to find that the European Communities chose, instead, the first option in Article 6.10, and selected for *individual* examination a "statistically valid sample" *representative of all* Indian producers exporting to the European Communities.¹⁷¹ In India's view, the proportion of dumped imports attributable to *examined* producers is even more relevant for determining, on the basis of "positive evidence" and an "objective examination", the volume of dumped imports attributable to *non-examined* producers, when the examined producers are found to constitute a statistically valid sample representative of all Indian producers. The European Communities contends that the Panel's finding that the investigating authorities applied the *second* alternative in Article 6.10 is a factual finding beyond appellate review. In the alternative, the European Communities maintains that its investigating authorities relied upon the second alternative and examined the largest percentage of the volume of exports which could reasonably be investigated.

136. Article 6 is entitled "Evidence", and there is no indication in Article 6—or elsewhere in the *Anti-Dumping Agreement*—that Article 6 does not apply generally to matters relating to "evidence" throughout that Agreement. Therefore, it seems to us that the subparagraphs of Article 6 set out evidentiary rules that apply throughout the course of an anti-dumping investigation, and provide also for due process rights that are enjoyed by "interested parties" throughout such an investigation.

137. Turning to that part of Article 6 referred to by India, we note that Article 6.10 deals specifically with the determination of *margins* of dumping. Clearly, it does *not stipulate* that investigating authorities must follow a specific *methodology* when determining the *volume* of dumped imports under paragraphs

¹⁶⁹ Article 6.10 reads in relevant part:

The authorities shall, as a rule, determine an *individual* margin of dumping for *each* known exporter or producer concerned of the product under investigation. In cases where the *number* of exporters, producers, importers or types of products involved is *so large* as to make such a determination *impracticable*, the authorities may *limit their examination* either to a reasonable number of interested parties or products by using *samples* which are *statistically valid* on the basis of information available to the authorities at the time of the selection, or to the *largest percentage of the volume of the exports* from the country in question which can reasonably be investigated. (emphasis added)

¹⁷⁰ Panel Report, para. 6.135.

¹⁷¹ India's appellant's submission, paras. 27-29.

1 and 2 of Article 3. However, this does not mean that *evidence* emerging from the determination of margins of dumping for *individual* producers or exporters pursuant to Article 6.10 is irrelevant for the determination of the volume of dumped imports in paragraphs 1 and 2 of Article 3. To the contrary, such evidence may well form part of the "positive evidence" on which an "objective examination" of the volume of dumped imports for purposes of determining injury may be based. Indeed, in cases where the examination has been limited to a select number of producers under the authority of the second sentence of Article 6.10, it is difficult to conceive of a determination based on "positive evidence" and an "objective examination" that is made other than through some form of *extrapolation* of the evidence. This could be done, for example, by extrapolating from the import volumes attributed to *examined* producers found to be dumping to the import volumes attributed to *non-examined* producers. We recall that we considered that evidence on *dumping* margins of more than *de minimis* for *examined* producers is relevant as "positive evidence" in this investigation for determining which import volumes may be attributed to *non-examined* producers that are *dumping*.

138. India's suggestion that the investigating authorities should consider the *same* proportion of import volumes attributable to *non-examined* producers as *dumped*, as the proportion of import volumes attributed to *examined* producers that were found to be dumping, may be one way of adducing "positive evidence" from the record of an investigation and of conducting an "objective examination", especially if producers selected for individual examination constitute a statistically valid sample representative of all producers. Even if the producers selected for individual examination account, instead, for the *largest percentage of exports* that could reasonably be investigated, we do not exclude the possibility that the evidence from those *examined* producers could, nonetheless, qualify as part of the "positive evidence" that might serve as a basis for an "objective examination" of import volumes that can be attributed to the remaining *non-examined* producers. There may, indeed, be other ways of making these calculations that satisfy the requirements of paragraphs 1 and 2 of Article 3.

139. Although Article 6.10 is relevant from an evidentiary point of view, it is, nevertheless, as we explain below, not necessary here for us to decide whether the Indian producers and exporters selected for individual examination in this investigation constitute a "statistically valid sample" or "the largest percentage of the volume of exports" within the meaning of the second sentence of Article 6.10. In this respect, we recall the European Communities' argument that import volumes subject to the "all others" duty rate under Article 9.4 may be considered as dumped imports when determining injury under Article 3. As we have explained, Article 9.4 permits the imposition of the "all others" duty rate on imports from *non-examined* producers, regardless of whether those producers were excluded from individual examination on the basis of the first, or the second, alternative in Article 6.10. We have already concluded that imports attributable to *non-examined* producers that are subject to the "all others" duty rate under Article 9.4 cannot simply be presumed to be dumped for purposes of

determining injury under Article 3. Our conclusion was *not* premised on whether producers were excluded from individual examination on the basis of the first, or the second, alternative in Article 6.10. Therefore, our ruling that the European Communities failed to determine the volume of dumped imports with respect to non-examined producers on the basis of "positive evidence" and an "objective examination", as required by paragraphs 1 and 2 of Article 3, is not premised on which of the alternatives in Article 6.10 for limiting the examination was chosen by the European Communities in this investigation. For this reason, we decline to reverse, as requested by India, the finding of the Panel, in paragraph 6.135 of the Panel Report, that the European Communities chose here the second alternative under the second sentence of Article 6.10, because it is not necessary to make such a finding to resolve the issue in dispute here. Accordingly, it is not necessary for us to decide whether that finding was exclusively a factual one and is, therefore, beyond the scope of appellate review.

140. Finally, we turn to the arguments of the third participants in this dispute. Japan and Korea agree with India that the European Communities' determination of the volume of dumped imports in this investigation is not consistent with paragraphs 1 and 2 of Article 3. Our earlier discussion, in particular of Article 9, addresses in detail the arguments of Japan and Korea.¹⁷² In contrast to Japan and Korea, the United States maintains, for its part, that the European Communities' determination of the volume of "dumped imports" is consistent with paragraphs 1 and 2 of Article 3. According to the United States, in addition to Article 9, Articles 2.1 and 3.3 are also significant for interpreting the volume of "dumped imports" in paragraphs 1 and 2 of Article 3.

141. The United States asserts that "Article 2.1 ... defines *dumped* products '[f]or the purpose of [the AD] Agreement', on a *countrywide* basis."¹⁷³ In the view of the United States, "that phrase from the beginning to the end refers only to countries and products. It does not refer to producers."¹⁷⁴ Therefore, according to the United States, "the references to 'dumped imports' in Articles 3.1 and 3.2 and throughout Article 3 refer to all imports of the product from the countries subject to the investigation."¹⁷⁵ In other words, when determining injury, "the concept of whether or not there are dumped imports is country-specific."¹⁷⁶

142. We do not agree. Article 2.1 reads:

Determination of Dumping

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the

¹⁷² See *supra*, paras. 123 *ff.*

¹⁷³ United States' third participant's submission, para. 2. (original italics; underlining added)

¹⁷⁴ United States' response to questioning at the oral hearing.

¹⁷⁵ United States' third participant's submission, para. 2.

¹⁷⁶ United States' response to questioning at the oral hearing.

comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Nowhere in the text of Article 2.1 is there authority for treating all imports from *non*-examined producers as dumped for purposes of determining injury under Article 3. The subsequent paragraphs of Article 2 set out in detail how the export price, normal value and, thus, the margins of dumping, are to be established for specific producers or exporters. Nowhere in those paragraphs is there authority for treating imports from *non*-examined producers as dumped for purposes of determining injury under Article 3.

143. As we have explained, under Article 6.10, dumping margins are to be established for each producer and exporter or, if impracticable, for some of them. We have explained that Article 9 permits the imposition and collection of anti-dumping duties on imports from specific producers or exporters, or groups thereof. We also recall that the original panel confirmed that "dumping is a determination made with reference to a product from a particular producer [or] exporter, and not with reference to individual transactions".¹⁷⁷ We see no conflict between the provisions requiring producer-specific determinations and the need to calculate, for purposes of determining injury, the total volume of dumped imports from producers or exporters originating in a particular exporting country as a whole. This can be done, and has to be done, by adding up the volume of imports attributable to producers or exporters that are dumping, whether on the basis of an individual examination or on the basis of an extrapolation. Further, we see nothing in the text of Article 2.1 that permits a derogation from the express requirements in paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of "positive evidence" and an "objective examination".

144. The United States also argues that the interpretation that *all* imports attributable to *non*-examined producers may be considered as "dumped" is necessary to give meaning and effect to Article 3.3.¹⁷⁸ This provision concerns situations where an importing country conducts an anti-dumping investigation with respect to imports of a product from more than one exporting country.¹⁷⁹ Article 3.3 defines the circumstances where the investigating authorities may

¹⁷⁷ Original Panel Report, para. 6.136. Thus, we agree with the United States' argument that import transactions attributable to a particular producer or exporter need not be separated into two categories—dumped and non-dumped transactions. (United States' third participant's submission, para. 3)

¹⁷⁸ United States' third participant's submission, para. 17.

¹⁷⁹ Article 3.3 of the *Anti-Dumping Agreement* reads:

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in para. 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

cumulatively assess the volume and price effects of imports from *different* exporting countries. The United States argues that it would create an anomaly if, in multi-country investigations, authorities are entitled to assess the effects of *all* imports from the subject country, "as long as each countrywide margin was more than *de minimis*", while, under India's theory, in single-country investigations, authorities, finding no dumping for an individual company, "would be required to disregard some of the imports covered by the countrywide margin".¹⁸⁰

145. India's appeal does not extend to the requirements of Article 3.3. We do not see, however, how the cumulative assessment of the effects of imports from different exporting countries under Article 3.3 implies that all imports attributable to *non-examined* producers must be considered as dumped for purposes of determining injury. The investigation and the *cumulation* of dumped imports from different countries for purposes of determining injury can be carried out in conformity with the producer-specific provisions of the *Anti-Dumping Agreement*, even when several countries are involved.¹⁸¹ The provisions regarding the cumulative assessment of imports pursuant to Article 3.3 must be interpreted consistently with the provisions of the *Anti-Dumping Agreement* that deal with the determinations of dumping margins or the application of anti-dumping duties with respect to specific producers or groups thereof. Similarly, the right under Article 3.3 to conduct anti-dumping investigations with respect to imports from different exporting countries does not absolve investigating authorities from the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of "positive evidence" and an "objective examination".

146. For these reasons, we are of the view that the Panel has not properly interpreted paragraphs 1 and 2 of Article 3 in applying those provisions in this implementation dispute. Therefore, we conclude that, with respect to import volumes attributable to producers or exporters that were *not examined individually* in this investigation, the European Communities has failed to determine the "volume of dumped imports" on the basis of "positive evidence" and an "objective examination" as explicitly required by the text of paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*. However, we agree with the Panel "that the [Anti-Dumping] Agreement does **not** require an investigating authority to determine the volume of imports from producers outside the sample that is properly considered 'dumped imports' for purposes of injury analysis on the basis of the proportion of imports from sampled producers that is found to be dumped"¹⁸² according to the *specific methodology* suggested by India in this appeal. For these reasons, we *reverse* the Panel's finding, in paragraph 6.144 of the Panel Report, and find that the European Communities has acted

¹⁸⁰ United States' third participant's submission, para. 18.

¹⁸¹ Accordingly, as explained earlier, imports attributable to producers or exporters who were *individually examined* and for which, consistently with the *Anti-Dumping Agreement*, a *positive* dumping margin (more than *de minimis*) was found, may be *included* in the calculation of the volume of dumped imports; imports attributable to *individually-examined* producers or exporters for which *no* such dumping margin was found must be *excluded* from that calculation.

¹⁸² Panel Report, para. 6.144. (original boldface)

inconsistently with the requirements of paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*.

VI. ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU

A. Introduction

147. India claims on appeal that the Panel failed to comply with the requirements of Article 17.6 of the *Anti-Dumping Agreement* and of Article 11 of the DSU in concluding that the European Communities *did have* information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its determination of injury.¹⁸³ India alleges, in particular, that the European Communities did *not* have such information, because the European Communities failed to collect data on stocks and capacity utilization. India requests us to conclude that the Panel did not comply with the requirements of Article 17.6 of the *Anti-Dumping Agreement* and of Article 11 of the DSU, and, consequently, to *reverse* the Panel's finding that the European Communities acted consistently with paragraphs 1 and 4 of Article 3 of the *Anti-Dumping Agreement*.¹⁸⁴

148. Before examining India's arguments on appeal, we will recall briefly the findings of the original panel and of the Article 21.5 Panel on this issue, as far as they are relevant to the issue raised on appeal.

149. India claimed before the original panel that the European Communities did not examine all relevant economic factors having a bearing on the state of the industry and, therefore, failed to act consistently with its obligations under Article 3.4 of the *Anti-Dumping Agreement*.¹⁸⁵ The original panel stated that it appeared from the European Communities' regulation imposing provisional anti-dumping measures that data had not been collected for all relevant economic factors listed in Article 3.4, and that, "[w]hile some of the data collected ... may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination."¹⁸⁶ The original panel then found that:

... where factors set forth in Article 3.4 are not even referred to in the determination being reviewed, if there is nothing in the determination to indicate that the authorities considered them not

¹⁸³ India's appellant's submission, para. 130.

¹⁸⁴ *Ibid.*

¹⁸⁵ Original Panel Report, para. 6.145.

¹⁸⁶ *Ibid.*, para. 6.167. The Regulation which imposed provisional anti-dumping duties is Commission Regulation (EC) No 1069/97, 12 June 1997, imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 13 June 1997, L-series, No. 156 ("EC Regulation 1069/97"). Council Regulation (EC) No 2398/97, 28 November 1997, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 4 December 1997, L-series, No. 332 ("EC Regulation 2398/97"), refers, in part, to the findings contained in EC Regulation 1069/97.

to be relevant, the requirements of Article 3.4 were not satisfied.¹⁸⁷

150. The European Communities did not appeal this finding of the original panel. In the redetermination—EC Regulation 1644/2001—the European Communities addressed the relevant economic factors listed in Article 3.4, including stocks and capacity utilization, on the basis of information that it had collected during the original investigation. It is undisputed between the participants that the European Communities did not collect additional data for purposes of the redetermination.¹⁸⁸

151. Before the Article 21.5 Panel, India alleged that the European Communities had "never" collected data on stocks and capacity utilization, and also that the European Communities had not properly carried out an overall re-evaluation of those factors.¹⁸⁹ The Panel rejected both arguments. India has not appealed the Panel's finding with respect to the adequacy of the *evaluation*.

152. In rejecting India's claim that the European Communities had not collected information on all relevant economic factors listed in Article 3.4, the Panel found that:

It is thus apparent to us, on the face of the redetermination, that the EC did, in fact, have information on the Article 3.4 factors, which is specifically addressed. Thus, we find this no basis as a matter of fact for this aspect of India's claim.¹⁹⁰

153. In reaching this conclusion, the Panel first stated that India had misunderstood the "import" and "context" of the statement of the original panel that, in India's view, suggested that data had not been collected.¹⁹¹ The Panel then went on to clarify the meaning of that statement as follows:

Contrary to India's understanding, the original Panel did not **find**, as a matter of fact or law, that no information had been collected on certain of the Article 3.4 factors. Rather, as alluded to by the EC, the Panel was making an observation as to the lack of any basis, on the face of the provisional and definitive Regulations, for a conclusion that certain of the factors had actually been

¹⁸⁷ Original Panel Report, para. 6.168.

¹⁸⁸ Panel Report, para. 6.165.

¹⁸⁹ *Ibid.*, paras. 6.146-6.150.

¹⁹⁰ *Ibid.*, para. 6.169.

¹⁹¹ Panel Report, para. 6.164. The full para. containing the original panel's statement at issue is reproduced below. India relies on the sentence in italics:

It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data. While some of the data collected for the factors that are mentioned in the Provisional Regulation by the EC authorities may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination. Nor is the relevance or lack thereof, as assessed by the EC authorities, of the factors not mentioned under the heading "Situation of the Community industry" at all apparent from the determination.

(Original Panel Report, para. 6.167) (emphasis added)

considered by the EC authorities in making their determination. Indeed, the Panel specifically went on to note that, in the absence of any reference to the relevant information in the Regulations, it was not willing to assume that such data had been considered.¹⁹² (original boldface; footnote omitted)

154. The Panel concluded that it was clear that the European Communities had "in its record" information on stocks and capacity utilization—the two factors India had focused on—and that "unlike the original determination, the EC's consideration of these factors is clearly set out on the face of the redetermination."¹⁹³

155. India appeals from this finding of the Panel, arguing, first, that the Panel failed to meet its obligations under Article 11 of the DSU by incorrectly applying the rules on burden of proof that we set out in *US – Wool Shirts and Blouses*.¹⁹⁴ India argues that it had presented a *prima facie* case that data on a number of injury factors had never been collected and that, therefore, the Panel should have shifted the burden of proof to the European Communities to rebut that *prima facie* case.¹⁹⁵

156. In the alternative, India submits that the Panel distorted the evidence by accepting for a fact the "mere" assertion by the European Communities, in EC Regulation 1644/2001, that it had collected data on all relevant economic factors, including stocks and capacity utilization.¹⁹⁶ India argues that this constitutes a failure by the Panel to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU.¹⁹⁷

157. Regarding Article 17.6 of the *Anti-Dumping Agreement*, India argues that the Panel failed to "actively" review the facts, pursuant to subparagraph (i) of that provision, as we interpreted it in *US – Hot-Rolled Steel*.¹⁹⁸ India asserts that, by refusing India's request for the Panel to use its investigative powers under Article 13 of the DSU, and by concluding that the European Communities had the data in the record of the investigation without offering any real proof or reasoning to support such a conclusion, the Panel failed to comply with Article 17.6(i) of the *Anti-Dumping Agreement*.¹⁹⁹

¹⁹² Panel Report, para. 6.164.

¹⁹³ *Ibid.*, para. 6.167.

¹⁹⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, at 335.

¹⁹⁵ India alleges that it had established a *prima facie* case by: (i) pointing to the statement made by the original panel to the effect that the panel could not assume that data on certain injury factors was collected where it was not mentioned in the final determination; (ii) showing that the non-confidential replies to the questionnaires sent by the European Communities to its domestic producers did not contain such data; (iii) indicating that EC Regulation 1644/2001 does not contain *facts or data* concerning stocks and capacity utilization; and (iv) requesting that the European Communities provide this information during the Article 21.5 proceedings and by the European Communities' failure to do so. (India's appellant's submission, paras. 112-113)

¹⁹⁶ India's appellant's submission, para. 124.

¹⁹⁷ *Ibid.*

¹⁹⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

¹⁹⁹ India's appellant's submission, paras. 128-129.

158. In reply, the European Communities contends that the Panel properly discharged its duties under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* in concluding that the European Communities *did have* information before it on all the relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*, including stocks and capacity utilization, when making its injury determination. The European Communities asserts that the Panel correctly applied the rules on the burden of proof.²⁰⁰ The European Communities denies that EC Regulation 1644/2001 contains "mere" assertions and notes that, although India alleges that the Panel distorted the evidence, India concedes that the Panel has not committed an egregious error calling into question its good faith.²⁰¹ The European Communities also contends that the Panel could not have failed to comply with Article 17.6 of the *Anti-Dumping Agreement* by exercising its discretion pursuant to Article 13.2 of the DSU.²⁰²

B. Analysis

159. India does not challenge directly the Panel's finding on Article 3.4 of the *Anti-Dumping Agreement*. Rather, India argues on appeal that the Panel did not discharge its duties under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* in its examination of India's claim that the European Communities did not have information before it on stocks and capacity utilization when making its injury determination. India requests that, in the event that we agree with India regarding Article 17.6 and Article 11, we *reverse* the Panel's finding that the European Communities acted consistently with paragraphs 1 and 4 of Article 3 of the *Anti-Dumping Agreement*.

160. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by Members. The provision reads, in relevant part:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, *including an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. (emphasis added)

161. We recently explained that Article 11 of the DSU:

... requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record. Provided that panels'

²⁰⁰ European Communities' appellee's submission, para. 105.

²⁰¹ *Ibid.*, para. 108.

²⁰² European Communities' appellee's submission, para. 114.

actions remain within these parameters, however, we have said that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings", and, on appeal, we "will not interfere lightly with a panel's exercise of its discretion".²⁰³ (footnotes omitted)

162. Article 17.6 of the *Anti-Dumping Agreement*, for its part, "clarif[ies] the powers of review of a panel established under the *Anti-Dumping Agreement*."²⁰⁴ Subparagraph (i) of Article 17.6 "place[s] limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority."²⁰⁵ The provision reads, in relevant part:

in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

163. In *US – Hot-Rolled Steel*, we stated that "[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *panels* ... the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement*".²⁰⁶ We further explained that the text of Article 17.6(i) of the *Anti-Dumping Agreement*, as well as that of Article 11 of the DSU, "requires panels to 'assess' the facts and this ... clearly necessitates an active review or examination of the pertinent facts."²⁰⁷

164. Turning specifically to India's claim that the Panel did not discharge its duties under Article 11 of the DSU and under Article 17.6(i) of the *Anti-Dumping Agreement*, we are mindful that we have found previously that there is no "conflict" between Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*; rather, the two provisions complement each other.²⁰⁸ We

²⁰³ Appellate Body Report, *US – Carbon Steel*, para. 142.

²⁰⁴ Appellate Body Report, *Thailand – H-Beams*, para. 114.

²⁰⁵ *Ibid.*

²⁰⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 56. (original italics)

²⁰⁷ *Ibid.*, para. 55.

²⁰⁸ In our Report in *US – Hot-Rolled Steel*, we stated:

... Article 17.6(i) requires panels to make an "*assessment of the facts*". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment of the facts*". Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is "*objective*". However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the matter". *In this respect, we see no "conflict" between Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU.*

(Appellate Body Report, *US – Hot-Rolled Steel*, para. 55) (original italics; underlining added)
Both the European Communities and India agree with this interpretation of the relationship between

begin our analysis here with India's argument relating to Article 17.6(i), because this provision, which sets out the standard of review that panels must follow in reviewing the establishment of the facts by investigating authorities in anti-dumping investigations, is particularly relevant to the appeal before us.²⁰⁹

165. India asserts that the Panel failed to review the facts actively, as we required in *US – Hot-Rolled Steel*, because "[i]t neither used its powers under Article 13 [of the] DSU nor reviewed these facts otherwise."²¹⁰ Although India recognizes that a panel's power to seek information under Article 13 of the DSU is *discretionary*, India argues that the Panel was required to seek information from the European Communities as part of the Panel's obligation to "*actively review or examine the facts*" pursuant to Article 17.6 of the *Anti-Dumping Agreement*.²¹¹ Consequently, we understand India's claim to relate to the first part of the first sentence of Article 17.6(i), namely to the Panel's task of determining "whether the authorities' establishment of the facts was proper".²¹²

166. We have previously stated that a panel's right to seek information pursuant to Article 13 of the DSU is *discretionary* and not mandatory, as India itself recognizes.²¹³ Furthermore, in *EC – Sardines*, where a claim was brought under Article 11 of the DSU, we concluded that:

[a] contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the *due* exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU.²¹⁴ (emphasis added)

Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU. (India's and the European Communities' responses to questioning at the oral hearing)

²⁰⁹ Appellate Body Report, *US – Lead and Bismuth II*, para. 47.

²¹⁰ India's appellant's submission, para. 128.

²¹¹ *Ibid.*, para. 127. (original italics)

²¹² India's claim on appeal is limited to the Panel's finding that the European Communities did in fact collect and have information before it on stocks and capacity utilization before making its injury determination. India's appeal does not encompass the Panel's conclusion with respect to the European Communities' *evaluation* of these factors. (*Ibid.*, para. 130)

²¹³ Appellate Body Report, *EC – Sardines*, para. 302. Article 13 of the DSU reads:

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

²¹⁴ Appellate Body Report, *EC – Sardines*, para. 302.

167. Similarly, a panel's duty to "actively review the pertinent facts" in order to comply with Article 17.6(i) of the *Anti-Dumping Agreement* does not, in our view, imply that a panel *must* exercise its right to seek information under Article 13 of the DSU, which explicitly states that the exercise of that right is *discretionary*. Indeed, there is nothing in the texts of Article 17.6(i) of the *Anti-Dumping Agreement* or Article 13 of the DSU to suggest that a reading of these provisions, in combination, would render *mandatory* the exercise of a panel's *discretionary* power under Article 13 of the DSU. At the oral hearing, India sought to draw a distinction between the case before us and our ruling in *EC – Sardines* by arguing that, in the present case, the Panel's exercise of its discretion was not "due" because "there was no exercise at all".²¹⁵ We do not agree. In our view, it is for panels to decide whether it is necessary to request information from any relevant source pursuant to Article 13 of the DSU. The mere fact that the Panel did not consider it necessary to seek information does not, by itself, imply that the Panel's exercise of its discretion was not "due". We, therefore, reject India's allegation that the Panel failed to comply with the requirements of Article 17.6 of the *Anti-Dumping Agreement* by not seeking information from the European Communities pursuant to Article 13 of the DSU.

168. In addition to its argument relating to the Panel's right to seek information under Article 13 of the DSU, India argues that the Panel failed to "review[] these facts otherwise".²¹⁶ In support of this argument, India asserts that the "Panel merely stated that it was 'clear' to it that the EC had the data in its record", without offering any proof or reasoning other than what was stated in EC Regulation 1644/2001 itself.²¹⁷

169. We have said previously that panels must not, under Article 17.6(i) of the *Anti-Dumping Agreement*, "engage in a new and independent fact-finding exercise".²¹⁸ Furthermore, in our view, the discretion that panels enjoy as triers of facts under Article 11 of the DSU²¹⁹ is equally relevant to cases governed also by Article 17.6(i) of the *Anti-Dumping Agreement*. Thus, as under Article 11 of the DSU, we "will not interfere lightly with [a] panel's exercise of its discretion" under Article 17.6(i) of the *Anti-Dumping Agreement*.²²⁰

170. An appellant must persuade us, with sufficiently compelling reasons, that we should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts. As India points out, the Panel stated that it was apparent to the Panel from "the face of the redetermination" that the investigating

²¹⁵ India's response to questioning at the oral hearing.

²¹⁶ India's appellant's submission, para. 128.

²¹⁷ *Ibid.* (footnotes omitted)

²¹⁸ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 84. In the context of cases brought under the *Agreement on Safeguards*, we have also said that, in making an objective assessment of the facts pursuant to Article 11 of the DSU, panels may not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authorities. (Appellate Body Report, *US – Lamb*, para. 106; Appellate Body Report, *US – Cotton Yarn*, para. 74)

²¹⁹ For example, in *EC – Hormones*, we stated that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings." (Appellate Body Report, *EC – Hormones*, para. 135)

²²⁰ Appellate Body Report, *US – Wheat Gluten*, para. 151.

authority *did* have information on the relevant economic factors listed in Article 3.4.²²¹ The Panel, however, also noted that "it is clear that the EC had, in its *record*, information on stocks and utilisation of capacity".²²² In the light of this statement, we conclude that, contrary to India's contention, the Panel did not arrive at an affirmative conclusion that information on these two factors was before the investigating authorities based exclusively "on the face" of the redetermination.

171. We observe, in this regard, that the Panel also had before it explanations as to how the European Communities had collected information on stocks and capacity utilization. According to the European Communities, it had collected information on both factors through the questionnaire sent to the domestic industry and during the on-site verification visits.²²³ Moreover, the European Communities explained that it obtained additional information on stocks from audited accounts that were either annexed to the questionnaire replies, or verified during the on-site visits.²²⁴ The European Communities added that data on stocks could also be derived by comparing verified data on production and sales volume.²²⁵ As for capacity utilization, the European Communities stated that it had received information on production capacity from Eurocoton—the complainant in the anti-dumping investigation.²²⁶ In the light of these observations, we are not persuaded that we should interfere with the Panel's finding of fact on this matter. Therefore, we reject India's argument that the Panel "otherwise" failed to review the facts actively under Article 17.6(i) of the *Anti-Dumping Agreement*.

172. We turn next to the arguments submitted by India in support of its claim that the Panel failed to meet its obligation under Article 11 of the DSU to examine the facts of the case objectively. India's first argument is that the Panel misapplied the rules on the allocation of the burden of proof that we set out in *US – Wool Shirts and Blouses*.²²⁷

²²¹ Panel Report, para. 6.169.

²²² *Ibid.*, para. 6.167. (emphasis added)

²²³ Section VI.A of the questionnaire sent by the investigating authorities of the European Communities to its domestic industry reads:

Please *describe the effects of the imports* under consideration on your own business of producing the types of bed linen covered by the investigation, [e.g.] on market share, sales, prices, production, *capacity utilisation*, *stocks*, employment, profitability, ability to invest[,] etc. (emphasis added)

(European Communities' Anti-dumping Questionnaire, attached to India's oral statement to the Panel) See also, European Communities' response to Question 18 posed by the Panel during the Panel proceedings; Panel Report, Annex E-2, p. 37, para. 8.

²²⁴ European Communities' response to Question 18 posed by the Panel during the Panel proceedings; Panel Report, Annex E-2, p. 37, para. 8.

²²⁵ *Ibid.*, p. 38, para. 11.

²²⁶ European Communities' appellee's submission, para. 100, quoting excerpts from the European Communities' first written submission to the Panel.

²²⁷ In that case, we stated that:

... it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is

173. The Panel discussed the principles regarding burden of proof at the outset of the Panel Report. The Panel stated:

We recall that the general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim. In these Panel proceedings, we thus observe that it is for India, which has challenged the consistency of the EC measure, to bear the burden of demonstrating that the measure is not consistent with the relevant provisions of the AD Agreement. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. In this respect, therefore, it is also for the EC to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. In addition, we consider that both parties generally have a duty to cooperate in the proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.²²⁸ (footnotes omitted)

174. India is not alleging that, on this particular issue, the Panel should have allocated the burden of proof differently. Instead, India asserts that the Panel should have *shifted* the burden to the European Communities once India had established a *prima facie* case.²²⁹ There is nothing in the Panel's reasoning, however, to suggest that the Panel premised its ultimate conclusion on whether or not India had presented a *prima facie* case. From our perspective, the Panel assessed and weighed all the evidence before it—which was put forward by both India and the European Communities—and, having done so, ultimately, was persuaded that the European Communities did, in fact, have information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*.

175. We agree, therefore, with the European Communities' assertion that India's argument is, for all practical purposes, one related to the Panel's weighing and appreciation of the evidence.²³⁰ As the European Communities pointed out, we have previously stated that the "[d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts."²³¹

claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

(Appellate Body Report, *US – Wool Shirts and Blouses*, at 335) (footnote omitted)

²²⁸ Panel Report, para. 6.7.

²²⁹ India's response to questioning at the oral hearing.

²³⁰ European Communities' appellee's submission, para. 93.

²³¹ Appellate Body Report, *EC – Hormones*, para. 132.

176. We have, furthermore, explained that:

In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion.²³² (footnote omitted)

177. India has not persuaded us that the Panel in this case exceeded its discretion as the trier of facts. In our view, the Panel assessed and weighed the evidence submitted by both parties, and ultimately concluded that the European Communities had information on all relevant economic factors listed in Article 3.4. It is not "an error, let alone an egregious error"²³³, for the Panel to have declined to accord to the evidence the weight that India sought to have accorded to it. We, therefore, reject India's argument that, by failing to *shift* the burden of proof, the Panel did not properly discharge its duty to assess objectively the facts of the case as required by Article 11 of the DSU.

178. We reach now India's alternative argument on this issue, which is that, even if the Panel properly applied the rules on the burden of proof, the Panel failed to meet its obligations under Article 11 of the DSU because it "distorted the evidence [b]y accepting for a fact a mere assertion contained in the EC *Regulation 1644/2001*—while India had submitted *prima facie* evidence on the *absence* of data collection".²³⁴ India contends that, in doing so, "the Panel attached greater weight to the mere assertion" of the European Communities, while failing to explain why the Panel considered the assertion "sufficient to rebut the *prima facie* evidence of India that the EC had not collected such data."²³⁵

179. In *EC – Hormones*, we described how a panel could fail to make an objective assessment of the facts by "distorting" the evidence:

The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes,

²³² Appellate Body Report, *US – Wheat Gluten*, para. 151. We note, moreover, that in *Korea – Alcoholic Beverages*, we refused to "second-guess" the panel's appreciation of certain studies submitted into evidence or "review the relative weight" ascribed to the evidence. (Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161) In *Australia – Salmon*, we concluded that "[p]anels ... are not required to accord to factual evidence of the parties the same meaning and weight as do the parties." (Appellate Body Report, *Australia – Salmon*, para. 267)

²³³ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.

²³⁴ India's appellant's submission, para. 124. (original italics)

²³⁵ *Ibid.*

imply not simply an error of judgment in the appreciation of evidence but rather *an egregious error that calls into question the good faith of a panel*. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, *denied the party submitting the evidence fundamental fairness*, or what in many jurisdictions is known as due process of law or natural justice.²³⁶ (emphasis added; footnote omitted)

180. India expressly states that "it does not assert that the Panel committed an egregious error calling into question its good faith."²³⁷ At the oral hearing, India argued that, in disputes where we have found a violation of Article 11 of the DSU, "it has not always been the situation that the panel had made an egregious error calling into question its good faith".²³⁸ Indeed, we have found a violation of Article 11 of the DSU when panels have failed to ensure that a competent authority evaluated all relevant economic factors and that the authority's explanation of its determination is reasoned and adequate.²³⁹ In those instances, the error related to the evaluation conducted by the *competent authorities*. We also found that a panel exceeded its mandate under Article 11 by considering evidence that was not in existence at the time of a Member's determination imposing a safeguard measure on imports of textiles.²⁴⁰ In another case, we determined that the panel had not made an objective assessment of the *matter before it* because it examined a *claim* that had not been raised by the complainant.²⁴¹

181. In our view, none of these examples assists India with the claim it raises on appeal. India does not appeal the Panel's conclusion with respect to the *evaluation* by the investigating authorities of the European Communities of the relevant economic factors listed in Article 3.4.²⁴² India directs its arguments on appeal to the Panel's assessment of the *facts of the case*, and does not argue that the Panel failed otherwise to make an objective assessment of the *matter* before it. Specifically, India argues that the Panel did not make an objective assessment of the facts of the case because the Panel *distorted* the evidence by placing greater weight on the statements made by the European Communities than on those made by India.²⁴³ As we stated earlier, the weighing of the evidence is within the discretion of the Panel as the trier of facts, and there is no indication in

²³⁶ Appellate Body Report, *EC – Hormones*, para. 133.

²³⁷ India's appellant's submission, para. 87.

²³⁸ India's response to questioning at oral hearing.

²³⁹ Appellate Body Report, *US – Wheat Gluten*, paras. 161-162; Appellate Body Report, *US – Lamb*, para. 149.

²⁴⁰ Appellate Body Report, *US – Cotton Yarn*, para. 80.

²⁴¹ Appellate Body Report, *Chile – Price Band System*, para. 177.

²⁴² See *supra*, footnote 212 to para.165.

²⁴³ In response to questioning at the oral hearing, India explained that "[i]f there is a heavy balance on one side and nothing on the other side, and the panel nevertheless finds it is the other way around, then we feel [it] is a distortion of the evidence".

this case that the Panel exceeded the bounds of this discretion.²⁴⁴ We thus reject India's argument that the Panel distorted the evidence before it.

182. For all these reasons, we *find* that the Panel properly discharged its duties under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU. We, therefore, *uphold* the Panel's finding, in paragraph 6.169 of the Panel Report, that the European Communities had information before it on the relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its injury determination.

VII. FINDINGS AND CONCLUSIONS

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

- (a)
 - (i) *upholds* the Panel's finding, in paragraph 6.53 of the Panel Report, that India's claim under Article 3.5 of the *Anti-Dumping Agreement*—that the European Communities failed to ensure that injuries caused by other factors was not attributed to the dumped imports—was not properly before the Panel; and, consequently,
 - (ii) *declines* to rule on the issue of whether the Panel erred, in its alternative finding, in paragraph 6.246 of the Panel Report, that the European Communities acted consistently with Article 3.5 of the *Anti-Dumping Agreement*;
- (b)
 - (i) *reverses* the Panel's finding, in paragraph 6.144 of the Panel Report, that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*, and *finds* that the European Communities acted inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* in determining the volume of dumped imports for purposes of making a determination of injury; and
 - (ii) *declines* to rule on the Panel's finding, in paragraph 6.135 of the Panel Report, that the European Communities applied the second alternative in the second sentence of Article 6.10 for limiting its examination in this investigation; and
- (c) *finds* that the Panel properly discharged its duties under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU and, therefore, *upholds* the Panel's finding, in paragraph 6.169 of the Panel Report, that the European Communities had information before it on the relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its injury determination.

²⁴⁴ See *supra*, para. 177.

184. The Appellate Body recommends that the DSB request the European Communities to bring its measure, found in this Report to be inconsistent with its obligations under the *Anti-Dumping Agreement*, into conformity with that Agreement.

ANNEX 1

**WORLD TRADE
ORGANIZATION**

WT/DS141/16

9 January 2003

(03-0095)

Original: English

**EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON
IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA**

Recourse to Article 21.5 of the DSU by India

*Notification of an Appeal by India under paragraph 4 of
Article 16 of the Understanding on Rules and Procedures
Governing the Settlement of Disputes ("DSU")*

The following notification, dated 8 January 2003, sent by India to the Dispute Settlement Body ("DSB"), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, India hereby notifies its decision to appeal to the Appellate Body certain issues of law and legal interpretations covered in the Panel Report on *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India* (WT/DS141/RW, dated 29 November 2002).

The appeal relates to the following issues of law and legal interpretations developed by the Panel in its Report:

- (a) The Panel erred in law in concluding that the EC did not act inconsistently with Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and

- Trade 1994 ("Anti-Dumping Agreement") in paragraph 6.144 of the Panel Report and reasoning leading thereto;
- (b) The Panel erred in law in finding that the EC did have information before it on the injury factors under Article 3.4 of the Anti-Dumping Agreement in paragraph 6.169 of the Panel Report and reasoning leading thereto. In reaching this conclusion the Panel failed in its obligations under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU; and
 - (c)
 - (i) The Panel erred in law in finding that India's claim 6 under Article 3.5 of the Anti-Dumping Agreement was not properly before it in paragraph 6.53 of the Panel Report and reasoning leading thereto;
 - (ii) The Panel erred in law in finding that the EC's measure is not inconsistent with Article 3.5 of the Anti-Dumping agreement for failure to ensure that injuries caused by other factors are not attributed to dumped imports in paragraph 6.246 of the Panel Report and reasoning leading thereto.

Accordingly, India requests the Appellate Body to reverse the conclusions reached by the Panel in paragraphs 7.1-7.3 of the Report as it considers them to be error in law and based upon erroneous findings on issues of law and related legal interpretations.

**ARGENTINA – DEFINITIVE SAFEGUARD MEASURE ON
IMPORTS OF PRESERVED PEACHES**

Report of the Panel

WT/DS238/R

*Adopted by the Dispute Settlement Body
on 15 April 2003*

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I. INTRODUCTION

1.1 On 14 September 2001, Chile requested consultations with Argentina pursuant to Article XXIII:1 of the General Agreement on Trade and Tariffs of 1994 (the "GATT 1994"), Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") and Article 14 of the Agreement on Safeguards. This request was related to the definitive safeguard measure applied by Argentina on imports of peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, imported under MERCOSUR Common Nomenclature (MCN) tariff codes 2008.70.10 and 2008.70.90.¹

1.2 The consultations took place on 2 November 2001, but the parties failed to reach a mutually satisfactory solution. On 6 December 2001, Chile requested the Dispute Settlement Body (the "DSB") to establish a panel, in accordance with Articles 4 and 6 of the DSU in order to examine the definitive safeguard measure applied by Argentina on imports of preserved peaches.²

1.3 At its meeting on 18 January 2002, the DSB established a Panel in accordance with Article 6 of the DSU.³ At that meeting, the parties agreed that the Panel should have standard terms of reference. The terms of reference of the Panel were, therefore, the following:

1.4 "To examine, in the light of the relevant provisions of the covered agreements cited by Chile in document WT/DS238/2, the matter referred to the DSB by Chile in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."⁴

¹ See WT/DS238/1.

² See WT/DS238/2.

³ See WT/DSB/M/117.

⁴ See WT/DS238/3.

1.5 On 16 April 2002, the parties agreed to the following composition of the Panel:⁵

Chair: Ms. Elaine Feldman
Members: Mr. Jorge Castro Bernieri
Mr. Mateo Diego-Fernandez

1.6 The European Communities, Paraguay and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.7 The Panel met with the parties on 10 and 11 July 2002 and on 11 September 2002. The Panel met with the third parties on 11 July 2002.

1.8 The Panel submitted its interim report to the parties on 21 November 2002. The Panel submitted its final report to the parties on 16 December 2002.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of a definitive safeguard measure by Argentina on imports of peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, imported under MCN tariff codes 2008.70.10 and 2008.70.90.

1. Regulatory Framework

2.2 Argentina incorporated the Agreement on Safeguards into its domestic legislation by means of Law No. 24,425 of 7 December 1994.⁶ The Argentine regulatory framework for the conduct of safeguard investigations and the eventual imposition of safeguard measures is contained in Decree No. 1059/96 of 19 September 1996.⁷ Law No. 19,549⁸ (Law on Administrative Procedure of the Republic of Argentina), together with its Regulatory Decree No. 1759/72⁹, regulates the administrative proceeding in general and is of suppletory application when there are gaps in the specific legislation.¹⁰ Argentina has notified these laws, regulations and administrative procedures relating to safeguard measures to the WTO Committee on Safeguards.¹¹

2.3 Decree No. 1059/96 provides that a safeguard measure may be applied only after an investigation has been conducted by the competent authority, which is the Minister of the Economy.¹² On receipt of an application for the initiation of

⁵ *Ibid.*

⁶ Published in the Official Bulletin of Argentina (the "Official Bulletin") by the Ministry of External Relations and Culture, 5 January 1995.

⁷ Published in the Official Bulletin by the Ministry of the Economy, Public Works and Services, 24 September 1996.

⁸ Published in the Official Bulletin by the Ministry of Justice, 27 April 1972.

⁹ *Ibid.*

¹⁰ See Article 2 of Law No. 19,549. See footnote 8 of the present report.

¹¹ See G/SG/N/1/ARG/1, G/SG/N/1/ARG/2, G/SG/N/1/ARG/3 and G/SG/N/1/ARG/3/Suppl.1.

¹² See Articles 1 and 7 of Decree No. 1059/96. The Panel understands that the Ministry of the Economy was formerly known as the Ministry of the Economy, Public Works and Services.

a safeguards investigation, the Secretariat of Industry, Trade and Mining, which is within the Ministry of the Economy (the "ME"), refers the matter to the Undersecretariat of Foreign Trade¹³ and to the National Foreign Trade Commission (the "CNCE")¹⁴ who prepare a technical report prior to the final determination¹⁵ (the "technical report") on whether or not there exist increased imports of the product in question which have caused or threaten to cause serious injury.¹⁶ The CNCE is the authority responsible for the analysis, investigation and regulation in the determination of injury to domestic production.¹⁷ After examining their reports¹⁸, the Secretariat of Industry, Trade and Mining submits a report to the Minister of the Economy indicating whether or not a safeguard measure should be adopted.¹⁹ In the present case that report was Record No. 781.²⁰ The Minister then issues a resolution, which is published in the Official Bulletin, thereby providing public notice of the decision adopted as a result of the investigation. This resolution considers the different reports or determinations issued by the competent authorities in accordance with the prerogatives granted by the legislation in question, and introduces the administrative act containing a summary of the results of the injury investigation conducted and the reasons which led to the decision to adopt a safeguard measure, as well as the modalities of its adoption.²¹ In the present case that resolution is Resolution ME No. 348/2001 of 6 August 2001, published in the Official Bulletin of 7 August 2001.

2. *Safeguards Investigation*

2.4 On 27 November 2000, the Argentine Chamber of Industrial Fruit Production of Mendoza ("CAFIM") requested the predecessor of the Secretariat of Industry, Trade and Mining, within the ME, to initiate an investigation for the application of a safeguard measure on imports of peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, imported under MCN tariff codes 2008.70.10 and 2008.70.90 ("preserved peaches").²²

2.5 On 2 January 2001, by Record No. 711, the Board of Directors of the CNCE decided by majority of its members that the application contained sufficient evidence of threat of serious injury to the domestic industry caused by

¹³ The Undersecretariat of Foreign Trade is part of the SICyM within the ME.

¹⁴ The CNCE is a decentralized agency of the SICyM, established by Decree No. 766 of 12 May 1994.

¹⁵ "Informe Técnico previo a la Determinación Final".

¹⁶ See Article 10 of Decree No. 1059/96.

¹⁷ See Article 1 of Decree No. 766/94.

¹⁸ See Article 11 of Decree No. 1059/96.

¹⁹ See Article 17 of Decree No. 1059/96.

²⁰ Record No. 781 is included in Exhibit CHL-1.

²¹ See Argentina's response to questions Nos. 1 to 3 of the Panel.

²² See G/SG/N/8/ARG/4/Suppl. 1 and Annex to Record No. 781, page 1 in Exhibit CHL-1.

imports, thereby meeting the conditions laid down by the regulations in force to implement possible provisional safeguard measures.²³

2.6 On 5 January 2001, the predecessor of the Undersecretariat of Foreign Trade issued a technical opinion where it found that there was a causal relationship between the increase in imports and the threat of serious injury to the domestic industry and that the proposed adjustment plan was viable. It concluded that sufficient reasons existed in terms of timing, merit and advisability to justify the opening of an investigation and the adoption of a provisional safeguard measure.²⁴

2.7 Accordingly, Resolution ME No. 39 of 12 January 2001, published in the Official Bulletin on 18 January 2001²⁵, announced the opening of a safeguards investigation of imports into Argentina of peaches, preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, imported under MCN tariff codes 2008.70.10 and 2008.70.90, establishing provisional minimum specific duties amounting to US\$0.50 per kg. net for a period of 200 days.²⁶

2.8 On 15 January 2001, Argentina notified the WTO of the initiation of an investigation concerning the imposition of a safeguard measure and gave prior notice, under Article 12.4 of the Agreement on Safeguards, of the adoption of a provisional safeguard measure on preserved peaches.²⁷

2.9 On 20 March 2001, a public hearing was held so that the parties involved in the investigation could set forth their arguments.²⁸

2.10 The CNCE conducted the investigation taking into account information received from domestic producer companies in response to a CNCE questionnaire. The CNCE sent its questionnaire to all the companies registered as producers with CAFIM and received replies from six, of which five, representing 59 per cent of production in 2000, were verified, according to the Annex to Record 781. Those five surveyed companies²⁹ are La Colina, IAM, Cartellone, Benvenuto and Arcor.³⁰

2.11 On 2 July 2001, the Board of Directors of the CNCE³¹ met and, having concluded that the domestic industry was faced with a threat of serious injury

²³ See G/SG/N/8/ARG/4/Suppl. 1 and Annex to Record No. 781, page 1 in Exhibit CHL-1.

²⁴ See Resolution No. 348/2001, in Exhibit CHL-2.

²⁵ Published in the Official Bulletin of Argentina, 18 January 2001.

²⁶ See G/SG/N/8/ARG/4/Suppl. 1 and Annex to Record No. 781, page 1, in Exhibit CHL-1.

²⁷ See WT/DS/238/1.

²⁸ See G/SG/N/8/ARG/4/Suppl. 1 and Annex to Record No. 781, page 1, in Exhibit CHL-1.

²⁹ The surveyed companies ("relevamiento"), according to the Annex to Record No. 781, are the companies that replied to the questionnaire for domestic producers. A company called Nieto was removed from the survey upon verification because the information it provided could not be correlated with the supporting documentation. See Annex to Record No. 781, page 5.

³⁰ See Annex to Record No. 781, page 5 in Exhibit CHL-1.

³¹ The Panel notes that according to Article 5 of Decree No. 766/94, the CNCE Board of Directors consists of one Chairman and 4 Members. However, Record No. 781 shows that two directors, including the Chairperson, voted in favour of the safeguard measure and two directors voted against. Since, pursuant to Article 11 of Decree No. 766/94 the chairperson holds a casting vote, the CNCE thus voted in favour of the safeguard measure.

within the meaning of Article 4 of the Agreement on Safeguards and that this was happening in the context of unforeseen developments, found that the conditions justifying the application of a safeguard measure had been satisfied.³² Record No. 781 is the minutes of that meeting of the Board of Directors, and is part of investigation file No. 94/00, which includes technical report No. 08/01 as an integral part.³³

2.12 On 17 July 2001, Argentina notified the WTO Committee on Safeguards pursuant to Articles 12.1(b), 12.1(c) and Article 9, footnote 2, of the Agreement on Safeguards, on its making a finding of serious injury or threat thereof caused by increased imports, its taking a decision to impose a definitive safeguard measure and the non-application of the safeguard measure to South Africa, respectively.³⁴

2.13 In Resolution No. 348/2001, published in the Official Bulletin on 7 August 2001, the Minister of Economy stated that after having ascertained that there had been an increase in imports in circumstances such as to cause a threat of serious injury to domestic production and after the analysis by the Secretariat of Trade of that Ministry, he concluded that the legal conditions and other reasons existed in terms of timing, merit and advisability to justify the application of a safeguard measure. Accordingly, the Minister of Economy ordered the closing of the safeguard investigation and imposed a definitive safeguard measure consisting of minimum specific duties on imports of the product at issue for a period of three years starting from the entry into force of the provisional measure and amounting to US\$0.50 per kg/net during the first year, US\$0.45 during the second year and US\$0.40 during the third year.³⁵

3. *Customs Duties and Countervailing Measures*

2.14 At the time Argentina began to apply the provisional safeguard measure, it applied a customs tariff of 16.5 per cent on imports of preserved peaches, but a preferential tariff of 11.5 per cent for imports originating in Chile, in accordance with an Economic Complementarity Agreement No. 35. During the safeguard investigation and prior to the imposition of the definitive measure, the applied customs tariff increased to 30 per cent then settled at 28 per cent (19.6 per cent for Chile). In March 2002, Argentina restored the tariff to its original level of 16.5 per cent (11.5 per cent for Chile).³⁶

2.15 Argentina imposed countervailing duties on imports of peaches in syrup from the European Union in accordance with Resolution MEyOSP No. 06/96,

³² See Record No. 781, page 1 and 2 in Exhibit CHL-1.

³³ See Chile's first written submission, para. 3.7.

³⁴ See G/SG/N/8/ARG/4, G/SG/N/10/ARG/3, G/SG/N/11/ARG/3, G/SG/N/8/ARG/4/Suppl.1, G/SG/N/10/ARG/3/Suppl.1.

³⁵ See Resolution No. 348/2001 in Exhibit CHL-2 and G/SG/N/8/ARG/4.

³⁶ See Argentina's response to question No. 9 of the Panel ("*At the time of the investigation and the time of adoption of the safeguard measure, what was the tariff rate applied to imports of preserved peaches from Chile? At the same times, what were the tariff and countervailing duties applied to imports of preserved peaches from the various member States of the European Communities?*"), footnotes 52 and 53 to Chile's first written submission and paras. 59 to 60 of Chile's rebuttal.

which entered into force on 9 January 1996. The countervailing duty was imposed at a differential rate, according to the country of origin, on the f.o.b. import price for a period of five years (18.12 per cent for Italy, 12.55 per cent for Spain and 12.13 per cent for the other EU member States). At the beginning of 2002, Argentina reviewed the countervailing duties and decided to maintain them but at a single rate of 10.5 per cent for all EU member States.³⁷

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Chile requests the Panel:

- (a) to conclude and find that the safeguards investigation and the safeguard measure are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, 4.1(b), 4.2(a), 4.2(b), 5.1 and 12.2 of the Agreement on Safeguards;
- (b) to conclude and find that these breaches have caused nullification and impairment of the benefits accruing to Chile under those Agreements; and
- (c) to rule on all of the claims presented in order to ensure that Argentina does not continue to violate these Agreements as it has done.³⁸

3.2 Argentina requests the Panel:

- (a) to dismiss Chile's claims and to find that Argentina complied with the obligations imposed by Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, 4.1(b), 4.2(a), 4.2(b), 5.1 and 12.2 of the Agreement on Safeguards.³⁹

IV. ARGUMENTS OF THE PARTIES

4.1 This section includes a summary of the main arguments of the parties which are of relevance to the findings of the Panel.

A. Procedural Arguments

1. Working Procedures of the Panel

4.2 Paragraph 12 of the Working Procedures adopted by the Panel for the present proceedings reads as follows:

³⁷ See Argentina and Chile's response to question No. 10 of the Panel ("In 1996, Argentina applied countervailing measures to imports of preserved peaches from Greece. Are these measures still in place? If so, have they remained at the same level?").

³⁸ See final conclusion in Chile's first written submission, page 42. See also Chile's rebuttal, para. 71.

³⁹ See Argentina's first written submission, para. 160, Argentina's rebuttal, para. 41 and Argentina's second oral statement, page 17.

"Within two weeks following the first substantive meeting of the Panel with the parties, each of the parties shall provide the Panel with an integrated executive summary of the facts and arguments as presented to the Panel in their first written submissions, their oral presentations at the first substantive meeting and answers to questions. Within two weeks following the second substantive meeting of the Panel with the parties, each of the parties shall provide the Panel with an integrated executive summary of the facts and arguments as presented to the Panel in their rebuttals, their oral presentations at the second substantive meeting and answers to questions. Each summary should not exceed 25 pages. Third parties are requested to provide the Panel with an executive summary of the facts and arguments as presented to the Panel in their written submissions and oral presentations within 7 days following the special session set aside for third parties to present their views. The summary to be provided by each third party should not exceed 5 pages. The executive summaries will be used only for the purpose of assisting the Panel in drafting a concise factual and arguments section of the Panel report so as to facilitate a timely translation and circulation of the Panel report to the Members. They shall not serve in any way as a substitute for the submissions of the parties or third parties. The Panel may, in light of further developments, *including the extent of the questions from the Panel*, allow the parties and third parties to submit longer summaries."

4.3 On 10 May 2002, Argentina addressed a letter to the Panel indicating that the obligation to provide integrated executive summaries as required in the above paragraph of the Working Procedures amounted to an additional procedural burden since it limited the time available to the parties for the preparation and delivery of their allegations and, accordingly, diminished the due process guarantees, more so in the case of developing countries as provided in Article 12.10 of the DSU. Argentina therefore requested the Panel to set out the legal grounds for its decision to require executive summaries and the implications of the parties' obligation, in light of the special and differential treatment due to developing countries. Argentina also reserved its right not to provide the integrated executive summaries.

4.4 By a letter dated 16 May 2002, the Panel responded to Argentina, with a copy to Chile, indicating that its decision to adopt its working procedures after consultation with the parties was based on Article 12.1 of the DSU. Specifically, the Panel believed that executive summaries would be an invaluable tool in preparing high-quality factual and argument sections of its report and it had therefore chosen to seek them, as permitted by Article 12.2 of the DSU. It recalled that on many occasions the Appellate Body had instructed dispute settlement panels to adopt detailed working procedures for the sake of the efficiency and transparency of the panel process, and it was the Appellate Body which had initiated the practice of requesting executive summaries. The Panel

said that other panels now commonly require executive summaries in disputes, including those to which developing country Members are party.

4.5 In its reply, the Panel further indicated that it was indeed mindful of its duty under Article 12.10 of the DSU, in examining this complaint against a developing country Member, to accord sufficient time for Argentina to prepare and present its argumentation. The Panel believed that the time-limits in the timetable, which were longer than those in Appendix 3 of the DSU, accorded Argentina sufficient time to do this. At the organizational meeting, the Panel had given the parties an opportunity to suggest alternative approaches to executive summaries and, after consulting with them, it had decided exceptionally not to require a single executive summary but rather two consecutive summaries, one after each substantive meeting. The Panel did not believe that the preparation of executive summaries should create an unreasonable burden on parties and therefore did not believe that they reduced the guarantees of due process. The only time-period that could be affected was that for the preparation of written rebuttals, which was still within the limits set out in Appendix 3 of the DSU. It added that executive summaries should actually reduce work for both Panel and parties at the interim review stage as the parties were likely to be more satisfied with the descriptive part of the draft report if it had been drafted with the benefit of executive summaries.

4.6 Accordingly, the Panel urged the parties to comply with the working procedures as adopted. In any event, the Panel made clear that it would issue the descriptive part of its report based on the written submissions and written versions of oral statements and answers to questions submitted by the parties.

4.7 At the second substantive meeting, the Panel agreed to extend the deadline for submission of the second executive summary due to public holidays in Chile. Argentina and Chile both provided integrated executive summaries after both substantive meetings within the agreed deadlines.

B. Substantive Arguments

1. Unforeseen Developments: Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards

- (a) Whether there was a Prior Finding or Demonstration as a Matter of Fact of the Existence of "unforeseen developments"

4.8 **Chile** submits that neither Record No. 781 nor the technical report contains a finding or demonstrates, as a preliminary matter of fact, the existence of unforeseen developments as stipulated in Article XIX.1(a) of GATT 1994. Chile claims that this violates Article XIX.1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards.^{40 41}

⁴⁰ In support of this argument, Chile quotes the Appellate Body Report, *US – Lamb*, para. 72.

⁴¹ See Chile's first written submission, para. 4.1.

4.9 **Argentina** replies that both Record No. 781 and the technical report demonstrate and establish in a reasoned and adequate manner the existence of unforeseen developments.⁴² Argentina contends that its investigating authority did establish and demonstrate, as a matter of fact and law prior to the adoption of the safeguard measure, the existence of "unforeseen developments" in conformity with the obligation laid down in Article XIX:1(a) of the GATT 1994.⁴³

4.10 **Chile** argues that nowhere in the Annex to Record No. 781 is there any indication that the CNCE conducted a prior and specific analysis of whether or not there had been unforeseen developments and that it provided a reasoned and adequate explanation – i.e. that it explicitly established – how the facts analysed supported its determination of the existence of such developments.⁴⁴ Chile further contends that the technical report, like the Record and its Annex, contains no analysis relating to the previous condition of "unforeseen developments".⁴⁵

4.11 **Chile** claims that an analysis of the considerations that guided the directors who voted in favour of the application of the safeguard measure reveals that the regulatory framework used in the analysis of the evolution of imports is Article 4.2(a) of the Agreement on Safeguards, which states how the competent authorities should investigate whether increased imports have caused or are threatening to cause serious injury to the domestic industry, and that nowhere in the analysis is there so much as an indirect mention of Article XIX:1(a) of the GATT 1994 and its prerequisite of unforeseen developments.⁴⁶

4.12 **Argentina** replies that the Argentine investigating authority applied the WTO rules since they have been incorporated in Argentine domestic law through Law No. 24,425, regulated by Decree No. 1059/96. Argentina believes that Record No. 781 and the technical report reveal that the investigating authority applied the WTO rules in this case. Argentina stresses that the implementing authority stated from the very beginning of its analysis that the investigation would be conducted in accordance with the regulations laid down in the framework of Article XIX of GATT 1994.⁴⁷ In this connection, Argentina explains, the Record No. 781 states that "... having concluded that the domestic industry is facing a threat of serious injury within the meaning of Article 4 of the Agreement on Safeguards and that this is happening in the context of unforeseen developments, the CNCE finds that the conditions justifying the application of a safeguard measure under that Article have been met."⁴⁸

⁴² See Argentina's first written submission, para. 30.

⁴³ See Argentina's first written submission, para. 32.

⁴⁴ See Chile's first written submission, para. 4.7(b).

⁴⁵ See Chile's first written submission, para. 4.8.

⁴⁶ See Chile's first written submission, para. 4.7(a).

⁴⁷ See Argentina's first written submission, para. 34; Argentina's first oral statement, para. 4.

⁴⁸ Argentina refers to Annex to Record No. 781, page 11. See Argentina's first written submission, para. 35.

4.13 In response to question No. 4 of the Panel⁴⁹, **Argentina** explains that there is no difference between the word "context" of unforeseen developments which is used in both Record No. 781 and the technical report and the word "result" of unforeseen developments as provided in Article XIX:1(a) of the GATT 1994. Argentina indicates that, for the purposes of this case, the term "context" should be understood as being identical to the term "result".

4.14 **Chile** replies that Argentina's above response is an *ex post facto* clarification since it cannot find any such explanation or clarification in the Annex to Record No. 781. Moreover, Chile argues, the two words are different, and they have different meanings. In Chile's view, Argentina's explanation is an attempt to justify a clear inconsistency committed by the CNCE, and is not consistent with the meaning and scope that emerges from the actual Annex to Record No. 781. If the directors did not specify a particular definition for the word "context", we can only conclude that it was used in its ordinary and obvious meaning, which is not the consequence or effect of something (result), but a given situation, or a set of circumstances or conditions.⁵⁰

4.15 According to **Chile**, in order to comply with the obligations contained in Article XIX.1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards:

- (a) it is not enough for the Annex to Record No. 781 to state, under the heading "Legal Framework of the Commission's Report", that the imposition of a safeguard measure is regulated by the Agreement on Safeguards and that this Agreement establishes rules within the framework of Article XIX of the GATT 1994;
- (b) nor is it enough that in Record No. 781, the directors who voted in favour of imposing the measure concluded that the domestic industry was facing a threat of serious injury within the meaning of Article 4 of the Agreement on Safeguards and that this was happening in a context of unforeseen developments. This Record, which contains the final decision of the CNCE, i.e. its recommendation, must be a faithful reflection of the CNCE's prior analysis and evaluation on the basis of the facts investigated;
- (c) nor is it enough that the evolution of imports in terms of volume and price, or the conditions of competition, were considered in Record No. 781 and the Annex to the technical report, since these comments were clearly made by the CNCE in relation to the requirement of increased imports in absolute or relative terms and the determination of whether or not there was a threat of serious injury to the domestic industry.⁵¹

⁴⁹ Namely, "Why do Acta 781 and the Expediente (page 11) refer to the "context" of unforeseen developments, and not the "result" of unforeseen developments? Is there a difference?"

⁵⁰ Chile refers to the meaning of the word context (*contexto*) according to the Dictionary of the Real Academia Española de la Lengua.

⁵¹ See Chile's first oral statement, paras. 10(a), 10(b) and 10(c).

4.16 **Argentina** recalls the Panel's argument in *US – Lamb*⁵² to the effect that "[w]hile the Panel correctly stated that the demonstration of 'unforeseen developments' does not require the precise terminology of 'unforeseen developments' to be used, it is nevertheless necessary that the circumstances ... are in substance identified as such". Argentina understands that this was not rejected by the Appellate Body and, accordingly, the CNCE Report in the present case demonstrates as a matter of fact the existence of unforeseen developments for the application of a safeguard measure. In support of this view, Argentina refers to four excerpts of Record No. 781: in the Annex containing the joint vote of the CNCE directors who voted in favour of the safeguard measure, page 6 which refers to imports and pages 9 and 10 which refer to world production and a trend in prices; in the technical report, page 47 which refers to the European Union's output and exports and pages 73 and 74 which refer to world production, exports and stocks (Exhibits ARG II, III and IV).⁵³ Argentina stresses that both the increase in world production and exports and the increase in world stocks are referred to in the Annex to the Record and in the technical report. However, in response to question No. 6 of the Panel⁵⁴, Argentina indicates that the finding on unforeseen developments in the competent authorities' report can be found in three of these excerpts – the excerpt on pages 9 and 10 from the joint opinion of the CNCE directors who voted in favour of the safeguard measure, and the two excerpts on page 47 and on pages 73 and 74 from the technical report.⁵⁵

4.17 **Chile** says that Argentina's citation of pages 73 and 74 of the technical report illustrates its lack of objectivity in its attempt to demonstrate that it did comply with its obligations under Article XIX.1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards. Chile argues that the quotation from pages 73 and 74 is incomplete because Argentina fails to point out that the statement was made by a member of CAFIM (the applicant), named COPAL, which did not respond to the questionnaire and whose remarks do not appear to have been verified by the CNCE. Secondly, Chile adds, the quotation is also incomplete because Argentina fails to point out that COPAL does not refer to the evolution of imports from the European Union to Argentina, but only to the evolution of imports into other markets from the European Union, not Argentina.⁵⁶

4.18 In **Chile's** view, in order to comply with the obligations laid down in Article XIX.1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards, it is essential that the competent authorities analyse and examine

⁵² Argentina refers to the Appellate Body Report, *US – Lamb*, para. 61, which refers to the Panel Report, para. 7.31.

⁵³ See Argentina's first written submission, paras. 39 to 44.

⁵⁴ Namely, "Where is the finding on unforeseen developments in the competent authorities' report?".

⁵⁵ See Argentina's response to question No. 6 of the Panel. See also Argentina's first written submission, paras. 39 to 45.

⁵⁶ See Chile's first oral statement, para. 12.

beforehand, and hence independently and specifically⁵⁷, whether there were circumstances which, having developed in an unforeseen manner, resulted in imports in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry in question. Chile adds that the analysis must be adequate and sufficient in terms of demonstrating, not implicitly but explicitly, the existence of this prior condition in the file of the investigation.⁵⁸ In Chile's view, the comments of the directors that voted in favour of imposing the measure by no means constitute a prior, adequate, reasoned and independent evaluation of the "unforeseen development" requirement. Their analysis is biased, out of context, and in direct contradiction with the conclusion reached by the investigating authority.⁵⁹

4.19 Regarding page 47 of the technical report, **Chile** argues that: (i) it should have focused on Greece, as the main origin of imports, rather than the European Union; (ii) it took 1998 as a base year which was not a representative year; and (iii) Argentina should have taken account of what the investigating authority stated on pages 57 and 58 of the technical report which speak of a recovery of supply in 1999, a similar level of supply in 2000 and lower levels of production in 2000.⁶⁰

4.20 **Argentina** replies that the procedure followed by the investigating authority met the requirements of Article 3.1 of the Agreement on Safeguards and that, pursuant to Article 13 of Decree 1059/96, the administrative act providing for the initiation of the investigation came into force as from its publication in the Official Bulletin.⁶¹ Article 3 of Decree 1059/96 stipulates that all of the interested parties, including the representatives of the exporting countries, shall have access during the course of the investigation to all of the information contained in the file, except information that is confidential. Furthermore, once the investigation is completed, the competent implementing authority issues a resolution, published in the Official Bulletin, providing public notice of the decision adopted as a result of the investigation which in this case was Resolution ME No. 348/2001, published in the Official Bulletin, which outlines the results of the injury (threat of injury) investigation conducted as well as the reasons which led to the decision to adopt a safeguard measure and the modalities of its adoption. Argentina concludes that Chile had access to the investigation procedures, that it had the possibility of making such observations as it deemed necessary at the appropriate stage in the proceedings, and that

⁵⁷ In response to question No. 26 of the Panel ("*Can Chile explain why it believes that a finding on the existence of unforeseen developments must be "specific and independent" ("en forma específica e independiente")?*"), Chile explained that the specificity and independence of a finding on the existence of unforeseen developments is based on the requirement that the developments in question *be examined and identified as such* in the report of the competent authorities. According to Chile, this is the only way to establish that a Member has fulfilled its obligation to *demonstrate the existence* of this condition before a safeguard measure is applied. The above notwithstanding, the competent authorities must also explain how the investigated facts support their determination.

⁵⁸ See Chile's first oral statement, para. 10(c). See also Chile's rebuttal, para. 4.

⁵⁹ See Chile's first oral statement, para. 11.

⁶⁰ See Chile's rebuttal, paras. 11 to 13.

⁶¹ Argentina makes a reference to its response to question No. 1 of the Panel.

Argentina acted in conformity with Article 3.1 of the Agreement on Safeguards. Argentina notes that Chile did not make any observations during the proceedings.⁶²

(b) Whether the Facts on the Record Show that there were Unforeseen Developments

4.21 **Chile** also claims that the facts considered by the CNCE do not prove, by and of themselves, that there were unforeseen developments.⁶³

(i) What are Unforeseen Developments?

4.22 As regards the concept of unforeseen developments, **Chile** refers to the interpretation by the Appellate Body of the ordinary meaning of the expression "as a result of unforeseen developments" where it provided that the developments as a result of which a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must be unexpected.⁶⁴

4.23 **Argentina** submits that the Appellate Body in *Argentina – Footwear (EC)* found that the clause "as a result of unforeseen developments" must be interpreted to mean that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been unexpected. As regards the meaning of the terms "unexpected" or "unforeseen", the Appellate Body understands unforeseen to be synonymous with unexpected, i.e. it refers to developments that were not expected or foreseen at the time the obligation was incurred.⁶⁵

4.24 For **Chile**, different unforeseen developments must unquestionably be the cause of, or precede⁶⁶, imports in such increased quantities, absolute or relative, and under such conditions as to cause or threaten to cause serious injury to the

⁶² See Argentina's rebuttal, paras. 1 to 5.

⁶³ See Chile's first written submission, para. 4.10.

⁶⁴ See Chile's first written submission, para. 4.11.

⁶⁵ Appellate Body Report, *Argentina – Footwear (EC)*, para. 91.

⁶⁶ In response to question No. 27 of the Panel (namely, "Could Chile clarify its view that unforeseen developments must "be the cause or precede" ("ser la causa o el antecedente") an increase in imports, in the light of the finding by the Panel in *US – Lamb* which rejected a so-called two-stage causation test? (See *WT/DS177/R*, para. 7.16)"), Chile explained that the Panel's finding in *US – Lamb* on the so-called two-stage causation test does not in any way counter or contradict the assertion that unforeseen developments must be the "cause of, or precede", an increase in imports. As stated by the Panel in its Report, "unforeseen developments" are an element or a requirement distinct from increased imports *per se*. The Panel notes that "it may be sufficient for a showing of the existence of this 'factual circumstance' that 'unforeseen developments' have caused increased imports to enter 'under such conditions' and to such an extent as to cause serious injury or threat thereof". As emerges from the preceding reply, the Panel (a) starts from the premise that the competent authorities must demonstrate the existence of "unforeseen developments" before a safeguard measure is applied; (b) the developments in question must *be examined and identified as such* in the report of the competent authorities; and (c) as Chile asserts in its Rebuttal, these developments must be the cause of, or precede, imports in such increased quantities, absolute or relative, and under such conditions as to cause or threaten to cause serious injury.

domestic industry that produces like or directly competitive products. Nor can there be any question that the demonstration of unforeseen developments must appear in the actual report of the competent authorities. In Chile's view, this is clear from the first part of Article XIX:1(a) of GATT 1994 and Articles 2.1 and 3.1 of the Agreement on Safeguards, and has been established by the Appellate Body.^{67 68}

4.25 In response to questions Nos. 7 and 8 of the Panel⁶⁹, **Chile** explains that Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards establish a cause-effect relationship which requires, on the one hand, that one or more developments take place in an unforeseen manner, and on the other hand, that as a result of such unforeseen developments, a product be imported into the territory of another Member in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or to threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

(ii) Whether there were Unforeseen Developments

Whether the Increase in Imports was a Recovery

4.26 For **Chile**, it is clear that the CNCE considered that the "unforeseen developments" condition correspond to a sharp and unexpected increase in imports, which took place entirely in the most recent past.⁷⁰ Chile notes that in different parts of the technical report, the investigating authority points out that the historical levels of imports of preserved peaches in Argentina were seriously disrupted during the period 1997/1998 as a result of severe climatic conditions which affected the primary production of preserved peaches in Greece, the world's leading producer and exporter. In view of this disruption, the authority determines that imports experienced a recovery rather than an increase in the period 1999/2000.⁷¹ Chile contends that in spite of this finding, the CNCE, analysing only the trends for the most recent past (1999/2000), concludes that the increase in total imports was sharp and that the domestic industry faced a threat of injury in a context of unforeseen developments. Chile argues that after an isolated interruption of imports as a result of climatic conditions affecting the

⁶⁷ Chile refers to the Appellate Body Reports, *Korea – Dairy*, paras. 83-85; *Argentina – Footwear (EC)*, paras. 90-92; and *US – Lamb*, para. 72.

⁶⁸ See Chile's rebuttal, para. 5.

⁶⁹ Namely, "Does "unforeseen developments" mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the Argentine negotiators could and should have foreseen at the time when the concession was negotiated? When were those negotiations in this case?" (question No. 7); "At the time of the negotiations of the relevant tariff concession, what were the reasonable expectations of the Argentine negotiators with respect to the market for preserved peaches, including prices, production and stocks?" (question No. 8).

⁷⁰ See Chile's rebuttal, para. 10.

⁷¹ See Chile's first written submission, para. 4.12.

leading world producer and exporter, a recovery of those imports can, or should reasonably, be expected. Thus, in Chile's view, it is not objectively possible to find that there were unforeseen developments. Consequently, Chile concludes that the CNCE failed to examine this requirement objectively on the basis of the results of the investigation as reflected in the technical report.⁷²

4.27 **Argentina** replies that Chile's quotations from the technical report (pages 32 and 58) are biased. It explains that the reference in the CNCE technical report to the "recovery" of imports was not made in a contextual vacuum: the report also points (on the basis of USDA data) to a high level of leftover stocks in Europe. Argentina considers that if the Europeans have that capacity to generate stocks, it can be assumed that the effect of climatic conditions on harvests will be more moderate. Indeed, the Record also mentions this fact based on USDA information.⁷³ Argentina also points out that Chile is mistaken in stating that "after an isolated interruption of imports . . . a recovery of those imports can, or should reasonably, be expected" when, in this particular case, an unprecedented and unexpected situation had arisen in conjunction with a sharp increase of almost 300 per cent in the level of world stocks (see Exhibits ARG-III and ARG-IV).⁷⁴

4.28 **Chile** contends that Argentina⁷⁵ is trying to distort the scope and meaning of an objective fact recorded and analysed by the investigating authority in the technical report. According to Chile, the authority determined that the increases in imports of preserved peaches into Argentina in the period 1999/2000 (the last two years of the investigation period) reflected a recovery of those imports, whose historical levels had been seriously disrupted during the period 1997/1998 as a result of severe climatic conditions which affected the primary production of preserved peaches in Greece, the world's leading producer and exporter. In its view, the CNCE openly contradicts this fact, which was recorded in the technical report itself, when it concludes that an analysis of the most recent past (1999/2000) reveals a sharp increase in imports and that the threat of injury was occurring in a context of unforeseen developments.⁷⁶ Furthermore, Chile argues, Argentina's explanations are merely an *ex post facto* analysis which does not appear anywhere in the Annex to Record No. 781 or the technical report, and which cannot alter or remedy the fact that the CNCE failed to provide an adequate and reasoned demonstration prior to the imposition of the measure. Chile states that nowhere in the technical report or its Annex is there any record of the information which Argentina is now submitting to the Panel as Exhibits ARG-III and ARG-IV.⁷⁷ Chile further contends that the file of the investigation reveals that the measure imposed by Argentina was basically aimed at imports of preserved peaches from their two main origins: Greece and Chile. Thus, Chile argues, the foreseen and expected recovery of imports as recorded by the

⁷² See Chile's first written submission, para. 4.14.

⁷³ See Argentina's first written submission, para. 47.

⁷⁴ See Argentina's first written submission, para. 48.

⁷⁵ See para. 4.27 of the present report.

⁷⁶ See Chile's first oral statement, paras. 13 to 14.

⁷⁷ See Chile's first oral statement, para. 15(c). See also Chile's rebuttal, para. 4.

investigating authority is not linked to world stocks, but to the isolated and particular situation affecting Greece as the leading world producer and exporter of the product under investigation in 1997 and 1998.⁷⁸

4.29 **Argentina** replies that Chile is re-interpreting the conclusions of the investigating authority, arguing that the said authority had detected a recovery of imports only. Argentina also responds to Chile's claim that the information contained in Exhibits ARG-III and ARG-IV cannot be found in the technical report or in its annex. In fact, Argentina argues, the information contained in Exhibits ARG-II and ARG-IV can be found on pages 47, 48, 53, 59, 61, 64, 66, 68, 70 and 72 of the technical report.⁷⁹

4.30 **Argentina** further submits that the "recovery" of imports is also related to the imposition of countervailing duties on peaches from the European Union as of January 1996, a factor that should be taken into account with respect to the evolution of imports, and one which Chile fails to mention.⁸⁰

4.31 In reference to the above, **Chile** submits that Argentina provides no arguments or explanations regarding the implications of this relationship between the recovery of imports and the countervailing duties for the purpose of evaluating whether or not there were unforeseen developments. According to Chile, even if Argentina were to provide an explanation during what remains of the proceedings, it would be dealing with an *ex post facto* analysis which does not appear anywhere in the Annex to Record No. 781 or the technical report, and which cannot alter or remedy the fact that the CNCE failed to provide an adequate and reasoned demonstration prior to the imposition of the measure.^{81 82}

4.32 **Argentina** replies that, although the application of the countervailing duties may have succeeded in reducing the flow of imports from the European Union by eliminating the unfair competition element, they were unable to alleviate any of the circumstances constituting unforeseen developments. Indeed, Argentina adds, given the objective pursued in applying countervailing duties, it could not be otherwise.⁸³

Which were the unforeseen developments
in this case?

4.33 **Argentina** contends that the investigating authority's determination of "unforeseen developments" was in fact corroborated by the file; indeed, the authority made the determination by establishing three circumstances constituting unforeseen developments: (a) increased production as a result of the exceptional Greek harvest; (b) substantial increase in world stocks; and (c) a downward price trend.⁸⁴ In response to question No. 28 of the Panel⁸⁵, Argentina

⁷⁸ See Chile's first oral statement, para. 15(d).

⁷⁹ See Argentina's rebuttal, paras. 7 to 8.

⁸⁰ See Argentina's first written submission, para. 46.

⁸¹ Chile makes a reference to the Appellate Body Report, *US – Lamb*, para. 72.

⁸² See Chile's first oral statement, para. 15(a).

⁸³ See Argentina's rebuttal, paras. 14 to 15.

⁸⁴ See Argentina's rebuttal, para. 9.

indicated that the authorities demonstrated the existence of unforeseen developments on pages 6, 9 and 10 of their report.

4.34 In response to question No. 5 of the Panel⁸⁶, **Argentina** confirmed that it does not allege that increased imports themselves constitute an unforeseen development. However, it adds, if the "conditions under which the preserved peaches were being imported, or something else" refers to the low prices, the surplus harvest in Greece which exceeded the average for the entire decade, and the high concentrations of stocks, then yes, there were unforeseen developments.⁸⁷

(iii) When Should the Developments be Unforeseen?

4.35 **Chile** contends that the reference point to determine whether certain developments are unforeseen, is the concessions negotiated under the WTO, and in this specific case, during the Uruguay Round. However, it adds, a series of developments that were not foreseen during the negotiations can generate imports in such increased quantities as to cause or threaten to cause injury to the domestic industry, leading to the adoption of a safeguard measure. The unforeseen development must form part of the investigation on the application of a safeguard measure.⁸⁸

4.36 Also in response to questions Nos. 7 and 8 of the Panel⁸⁹, **Argentina** explains that the "unforeseen developments" in this case occurred after the relevant tariff concession had been negotiated. Argentina argues that at the time the concessions were granted, the negotiators could not have foreseen the developments that took place.

4.37 **Chile** replies that, regardless of Argentina's response, the analysis on when and by whom the developments were unforeseen cannot be found anywhere in the remarks of the CNCE directors that voted in favour of imposing the measure. Chile notes that the Uruguay Round took place between 1986 and 1994, and the WTO Agreement entered into force on 1 January 1995. Argentina incorporated, in its domestic legislation, the Final Act of the Uruguay Round and the Marrakesh Agreement on 5 January 1995. Chile claims that, despite the above, it cannot find, either in Argentina's response or in the "file of the investigation", any indication or record whatsoever of what Argentina's concession was on canned peaches when it was negotiated, when it was granted, or what the reasonable expectations of the Argentine negotiators were with

⁸⁵ Namely, "In Argentina's answer to question 5 posed by the Panel and in para. 9 of its written rebuttal, Argentina indicates what the competent authorities considered to be the unforeseen developments in this case. Where in their report did the competent authorities show that these developments were unforeseen?"

⁸⁶ Namely, "Does Argentina allege that increased imports themselves, the conditions under which the preserved peaches were being imported, or something else constituted unforeseen developments?"

⁸⁷ See Argentina's response to question No. 5 of the Panel.

⁸⁸ See Chile's response to questions Nos. 7 and 8 of the Panel.

⁸⁹ See footnote 69 of the present report.

respect to the preserved peaches market, including prices, production, inventories and exports at that moment or period, and above all, with respect to the "price" factor, since according to the "file of the investigation" this would appear to be the determining factor in the alleged increased imports and the alleged threat of serious injury to the domestic industry.⁹⁰

4.38 **Argentina** submits that the negotiators could not reasonably have been expected to foresee that abnormal circumstances, such as the record production of 1992/1993, would become the rule rather than the exception.⁹¹ In response to question No. 31 of the Panel⁹², Argentina clarified that the Argentine negotiators could not have foreseen that an exceptional case such as 1992/1993 might recur, and hence it was that they opted for the least trade-distortive alternative. Indeed, the tariff applied to the product in question was 35 per cent. Moreover, Argentina adds, the Agreement on Safeguards applies specifically to situations of injury under fair trading conditions which, owing to their exceptional nature, are difficult to predict.

4.39 **Chile** replies that the "record" world production of preserved peaches in 1992/1993 of which Argentina speaks in its reply is based on an assertion by the applicant, CAFIM, which, in turn, uses World Horticultural and U.S. Export Opportunities as a source. Nowhere in the technical report can Chile find any indication that the CNCE investigating authority verified that information or checked on its reliability for validation purposes. In Chile's view, if the CNCE itself only considered imports of preserved peaches from the European Union and Chile⁹³, Argentina's reply, in addition to referring to the reasonable expectations of its negotiators with respect to a world production indicator, should have addressed these expectations with respect to the two main origins, or should, at least, have discussed how one or more specific world production indicators implied unforeseen developments with respect, at least, to prices, production, inventories and exports in Chile and the European Union (chiefly Greece).⁹⁴

2. *Determination of an Increase in Imports. Article XIX.1(a) of GATT 1994 and Articles 2.1, 3.1 and 4.2(a) of the Agreement on Safeguards*

4.40 **Chile** claims that an examination of the file of the investigation reveals that Argentina did not demonstrate that during the period of investigation (1996/2000), preserved peaches were being *"imported in such increased*

⁹⁰ See Chile's rebuttal, paras. 17-18.

⁹¹ See Argentina's response to questions Nos. 7 and 8 of the Panel.

⁹² Namely, *"Given the fluctuations in world production of preserved peaches, as evidenced by record production in 1992/93, why did the Argentinean negotiators in the Uruguay Round not expect such fluctuations in the future?"*.

⁹³ Chile clarifies that the safeguard measure excludes imports of preserved peaches from MERCOSUR States Parties and South Africa.

⁹⁴ See Chile's rebuttal, paras. 19-20.

*quantities*⁹⁵, *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.⁹⁶ Chile also alleges that the CNCE failed to provide a reasoned and adequate explanation of its determination in the file of the investigation.⁹⁷

4.41 **Argentina**, on the contrary, submits that the increase in imports was both absolute and relative.⁹⁸ It contends that imports increased in both absolute and in relative terms inasmuch as they rose from 3,568 tons in 1998 to 7,271 tons in 1999 and then to 12,181 tons in 2000. According to Argentina, these volumes represented relative annual increases of 103.7 per cent and 68 per cent respectively⁹⁹ (Exhibits ARG-VII and ARG-VIII).¹⁰⁰ With regard to import volumes and as a percentage of domestic production, Argentina notes that a sharp increase of 10 per cent is observed between 1999 and 2000. Moreover, Argentina states that the growth rate of that indicator (imports as a percentage of production) was 90 per cent for 2000 compared with the previous year.¹⁰¹

(a) Whether there was an Increase in Imports in Absolute or Relative Terms

4.42 As regards a determination of an increase in imports in absolute terms, **Chile** contends that the growth of imports during the two last years of the import period investigated by the Argentine authorities (1996/2000) reflects a foreseen and expected recovery of historical levels, which had been disrupted by severe climatic conditions that affected the production and exports of the product under investigation, particularly in Greece. Moreover, Chile states that if total imports over the entire investigation period are considered, imports for the year 2000 reached approximately 12,120 tons, while in 1996, they reached approximately 14,401 tons. In other words, the volume imported in 2000 was 16 per cent lower than the volume imported in 1996.¹⁰² According to Chile, the facts recorded in the technical report and its annex do not support the CNCE's determination. Chile further alleges that neither Record No. 781 nor the technical report contain a substantiated, reasoned and adequate analysis explaining how, on the basis of what facts, and why Argentina arrived at this determination in the way that it did.¹⁰³

⁹⁵ In para. 4.29 of its first written submission, Chile indicates that, after having demonstrated that Argentina imposed a definitive safeguard measure without there having been increased imports, in absolute or relative terms, it is not necessary to address the issue of whether the CNCE also considered this alleged increase in terms of its quantity or magnitude - *in such increased quantities* - as the requirement must be understood in the light of the Article XIX of the GATT 1994 and the Agreement on Safeguards.

⁹⁶ See Chile's first written submission, para. 4.15.

⁹⁷ See Chile's first written submission, section heading IV.2.1, page 10.

⁹⁸ See Argentina's first written submission, para. 61.

⁹⁹ Argentina refers to the technical report, Table No. 2, sheet 1439 and Table No. 15.2, sheet 1477.

¹⁰⁰ See Argentina's first written submission, para. 61.

¹⁰¹ See Argentina's first written submission, para. 62.

¹⁰² See Chile's first written submission, para. 4.16.

¹⁰³ See Chile's first written submission, para. 4.17.

4.43 As regards a determination of an increase in imports in relative terms, **Chile** indicates that, as in the case of the lack of an absolute increase in imports, when one considers the most recent part of the investigation period from beginning to end in the context of the data and trends for the entire period, and analyses the structure of apparent consumption of preserved peaches during 1996, one arrives at the same conclusion: i.e. the growth in apparent consumption of imported preserved peaches recorded in 1999 and 2000 is merely a recovery by consumption of its historical levels, and cannot objectively be qualified as a relative increase, as the CNCE has done.¹⁰⁴ Chile observes that in its technical report, the investigating authority states that "during the first three years of the investigation period, sales of the domestic product accounted for approximately 90 per cent of apparent consumption, a share which fell to 85 per cent in 2000. Although in absolute terms, sales of the domestic product decreased in 1998, their share of 93 per cent of apparent consumption was the maximum recorded during the investigation period. During that year, imports from Chile fell, while imports from Greece remained at historically low levels." Chile argues that this behaviour of imports from the main origins was due to adverse climatic conditions mentioned above.¹⁰⁵

4.44 **Chile** alleges that the CNCE directors' analysis of increased imports in relative terms is based exclusively on data corresponding to what it deems to be the most recent past (1997/2000) and fails to evaluate this data in the context of the whole investigation period (1996/2000). It considers the evolution of imports during the investigation period (1996/2000) only with respect to the analysis of increased imports in absolute terms, but not with respect to the analysis of the increase in relative terms. The year 1996, which is omitted from the analysis, reflects a trend of crucial importance to the adequate and objective analysis of this indicator. Also, according to Chile, the file of the investigation contains no substantiated, reasoned and adequate analysis explaining why and on the basis of what facts the CNCE arrived at its determination of an increase in imports in relative terms in the way that it did.¹⁰⁶

4.45 **Argentina** contends that Chile's above statements reflect a misinterpretation of certain matters. Argentina considers that Chile proceeds from the false premise that the implementing authority acted improperly in considering an investigation period (1996/2000)¹⁰⁷ and finding that there was an increase in imports in a period that did not coincide exactly with that investigation period, but fell within that period. Argentina is of the view that this interpretation by Chile is not substantiated by any rules or regulations, either domestic or under the WTO, or by WTO precedent. In particular, the Agreement on Safeguards does not stipulate a period which must obligatorily be taken to

¹⁰⁴ See Chile's first written submission, para. 4.23. It cites statistics from a sectoral study, the subject of arguments summarized in the section below.

¹⁰⁵ See Chile's first written submission, para. 4.19.

¹⁰⁶ See Chile's first written submission, paras. 4.22(a), (b) and (c).

¹⁰⁷ In response to question No. 12 of the Panel ("*Statistics for various years appear in Record No. 781 and its Annex and the technical report. Could Argentina clarify what was the period of investigation?*") Argentina confirms that the gathering of import data covers the period 1996-2000.

determine whether there are increased imports, nor does Argentine legislation differ from the Agreement on Safeguards in this respect. Regarding Argentine legislation, Decree No. 1059/96 requires that applicants for the initiation of an investigation should supply data on imports relating to the five most recent complete years substantiating a significant increase, in absolute or relative terms, in the product at issue. However, Argentina argues, this obligation concerns the applicant for the initiation of an investigation only, and not the implementing authority. In order to support its views, Argentina refers to the Appellate Body Reports on *Argentina – Footwear (EC)*¹⁰⁸ and *US – Lamb*.^{109 110} Argentina maintains in addition that the investigating authority acted in accordance with WTO precedents, inasmuch as those precedents establish that it is the most recent period that must be taken into account for purposes of the application of a safeguard measure.¹¹¹

4.46 **Chile** points out that although the competent authorities should attach importance to data from the most recent period, they should not consider such data in isolation from the data pertaining to the entire period of investigation. Otherwise, Chile argues, it is impossible to understand objectively the real significance of short-term trends in the most recent data.^{112 113} Chile explains that, in the case of the CNCE's determination, the directors who voted in favour of imposing the measure made their finding of alleged increased imports in absolute or relative terms on the basis of data from the end of the period (1999/2000) and taking 1998 as a base year.¹¹⁴ According to Chile, there can be no question that if 1998 is taken as a base year, any determination of increased imports is bound to be lacking in objectivity and in fact highly questionable, since 1998 is not a year which is representative of the normal behaviour of the imports in question.¹¹⁵ The file of the investigation shows that imports of preserved peaches in Argentina are cyclical owing to their association with market fluctuations affecting the leading producer and exporter of the product under investigation, Greece. In 1997 and 1998, following unforeseen climatic circumstances, Greece suffered a substantial loss in its capacity to produce and export preserved peaches. This isolated situation involved a disruption of the historical share of Greek imports in the Argentine market, both in absolute and in relative terms (apparent consumption), as represented by the first year of the investigation period, 1996.¹¹⁶ According to Chile, this comes out clearly when the CNCE directors make their finding of an alleged increase in imports in absolute and

¹⁰⁸ Argentina refers to the Appellate Body Report, *Argentina – Footwear (EC)*, paras. 130 to 131.

¹⁰⁹ Argentina refers to the Appellate Body Report, *US – Lamb*, para. 137.

¹¹⁰ See Argentina's first written submission, paras. 54 to 59.

¹¹¹ See Argentina's first oral statement, para. 11.

¹¹² Chile refers to the Appellate Body Report, *US – Lamb*, paras. 137 and 138.

¹¹³ See Chile's rebuttal, para. 29.

¹¹⁴ In response to question No. 34 of the Panel ("Please refer to para. 12 of Argentina's second oral statement. Does Argentina share Chile's point of view that the base year for the determination of an increase in imports was 1998? Can Argentina confirm that increases were measured in 1999 over 1998, and 2000 over 1999?") Argentina confirmed that it used 1998 as a base year for the determination of an increase in imports.

¹¹⁵ See Chile's rebuttal, para. 30.

¹¹⁶ See Chile's first oral statement, paras. 18 to 19.

relative terms during 1999 and 2000. It is obvious to Chile that a comparison of imports during those years with the situation in 1998 will inevitably show strong increases towards the end of the period, when the process of recovery by imports of their historical levels began. If, on the other hand, the CNCE directors had examined the data from 1999 and 2000 without isolating it from the data of 1996, its conclusion, objectively, would have had to be the same as that reached by the investigating authority in the technical report, i.e. that the increase in imports during 1999 and 2000 reflected a recovery, in both absolute and relative terms, of their normal and historical levels that had been disrupted starting in 1997.^{117 118}

4.47 According to **Chile**, for the determination of increased imports to qualify as objective, unbiased and well founded rather than subjective, biased and unfounded, it is not enough for the authority concerned merely to announce that its investigation will cover a period of five years and then, upon making its determination, to consider the data from the most recent past (1999/2000) only, to compare it with data for a year that is not representative of the normal behaviour of those imports (1998) and to isolate it from data for a year that does represent normal behaviour (1996).¹¹⁹ Chile argues that Argentina did not manage to explain satisfactorily why its competent authorities excluded 1996 from the analysis and why 1998 would in fact be objectively representative of subsequent trends. What is more, Argentina never explained why the CNCE excluded, in the ITDF and its Annex, all information on apparent consumption for 1996.¹²⁰

4.48 **Argentina** contests Chile's interpretation that what was occurring was simply a recovery by Greek peach imports of their historical levels which were represented by 1996 and insists that what the industry was facing was not a hypothesis of recovery by imports of their historical levels, but "unforeseen developments".¹²¹ As regards 1996, Argentina contends that countervailing duties were applied to peaches from the EU since the month of January. Hence, the flow of imports from that origin must be considered to have been affected. As can be seen in page 10 of the Annex to Record No. 781 and contrary to what Chile claims, the investigating authority did take account of the impact of the countervailing duties.¹²² In response to question No. 33 of the Panel¹²³, Argentina clarified that Resolution MEyOSP No. 06/96 of 3 January 1996 introduced countervailing duties on imports of peaches from the European Union. This resolution entered into force on 9 January 1996 upon publication in

¹¹⁷ See technical report, pages 32, 57 and 58.

¹¹⁸ See Chile's rebuttal, para. 31.

¹¹⁹ See Chile's second oral statement, para. 16.

¹²⁰ See Chile's rebuttal, para. 32.

¹²¹ See Argentina's rebuttal, paras. 18 and 19.

¹²² See Argentina's rebuttal, para. 20.

¹²³ Namely, "Please refer to para. 20 of Argentina's written rebuttal. Could Argentina indicate the exact date in January 1996 on which the countervailing measure entered into force? Please confirm that the countervailing measure remained in place for the duration of the investigation period relevant to file CNCE No. 94/00. Could Argentina explain how the countervailing measure affected the flow of imports during that investigation period?"

the Official Bulletin. The countervailing duties continued to be applied during the investigation period relevant to file CNCE No. 94/00. The flow of imports was affected through the neutralization of the subsidy component of the imports from the European Union.

4.49 In response to question No. 15 of the Panel regarding the representativeness of the statistics for 1997 and 1998¹²⁴, **Argentina** indicates that in 1997 and 1998 total Argentine imports fell by 55 per cent and 45 per cent respectively, owing to severe climatic conditions that affected world production and, consequently, trade in the product in question. Argentina explains that an analysis of average f.o.b. prices shows that they increased in 1997, as did the prices of the main exporter: Greece. In 1998, Argentina adds, such prices continued to rise, though to a lesser extent on average, but in the case of the aforementioned country they fell by some 15 per cent to a level of US\$0.594/kg. Also in response to question No. 35 of the Panel¹²⁵, Argentina explained that the investigating authorities took all these data into account as indicated in Section V of the Annex to Record No. 781.

(b) Whether the 1994/1996 Sectoral Study was of Relevance

4.50 **Chile** submitted two tables showing the apparent consumption of preserved peaches in Argentina from 1994 to 1996 in tons and percentages, which it had calculated on the basis of a "Sectoral Study on Canned Peaches" of October 1998.¹²⁶ With reference to these two tables, Chile notes that the average historical level of sales of Argentine preserved peaches in the domestic market is approximately 73.3 per cent for the period 1994/1996; in other words, the average apparent consumption of imported preserved peaches for that period is 26.7 per cent. Further, Chile points out the contrasts with the apparent consumption of imported preserved peaches of 11 per cent for 1999, and 17 per cent for 2000, less than the average figure for 1994/1996, not to mention the figure for 1996 alone.¹²⁷

4.51 **Argentina** submits that the above data¹²⁸ are based on a CNCE sectoral study of apparent consumption measured in cans of peaches weighing less than 1 kilogram which do not correspond to the product under investigation in the present case, whereas the relevant paragraphs in the technical report use tons as a unit of measurement.¹²⁹ Thus, Argentina argues, the citation of that sectoral study is inaccurate. Argentina adds that this study has been available on the

¹²⁴ Namely, "Does Argentina believe that the statistics for 1997 and 1998 were representative of imports or were they influenced by any unusual factors? If the latter, how did the competent authorities take account of this in their determination?"

¹²⁵ Namely, "Argentina's answer to question 15 indicates unusual factors that influenced statistics for imports and prices in 1997 and 1998. How did the competent authorities take into account these factors in their determination of an increase in imports?"

¹²⁶ See Chile's first written submission, para. 4.24 and Exhibit CHL-6.

¹²⁷ See Chile's first written submission, paras. 4.25 and 4.26.

¹²⁸ See para. 4.50 of the present report.

¹²⁹ See Argentina's first written submission, para. 64.

CNCE web page and therefore available to the general public since before the initiation of the investigation. In response to question No. 11 of the Panel¹³⁰, Argentina clarified that the technical report does not take account of the data from the sectoral study because the product in the study does not correspond to the product at issue in the safeguard investigation, the quantities in the study are expressed in different units of measurement (cans, as opposed to tons), and refer to different periods of analysis, etc.

4.52 **Chile** replies¹³¹ that, regardless of whether the apparent consumption of preserved peaches is measured in units of 0.820 kg (cans of peaches) or in tons, the figures and results obtained in the comparison process remain every bit as representative and real. According to Chile, what counts is that the structure of apparent consumption of preserved peaches recorded in the sectoral study for 1994/1996, measured in percentages, is fully representative, genuine and objective. Moreover, Chile says, although the unit of measurement behind the information recorded in the technical report is sometimes expressed in tons, those tons are calculated on the basis of a unit of canned peaches of 0.820 kg.¹³² Chile also indicates that the argument that the sectoral study did not refer to the same product that was investigated in connection with the imposition of a safeguard measure is not true. Chile claims that the Study comes from the file of the CNCE Investigation No. 28/95 and concerns the imposition of countervailing duties on imports of canned peaches from the European Union and therefore it refers to exactly the same product. In fact, Chile adds, the annex to the technical report itself includes that file in its statistical charts.^{133 134}

4.53 **Argentina** insists that the sectoral study took as a reference the investigation conducted under File CNCE No. 28/95 in which the product investigated was "peaches in syrup", while in the safeguards investigation the product under analysis was "peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water".¹³⁵ Hence, for Argentina, the product analysed in the safeguard investigation clearly covered a broader universe than the product considered in File No. 28/95.¹³⁶

4.54 Also concerning apparent consumption, **Argentina** considers that the upward trend is beyond question and that the relative importance of imports follows a pattern similar to that of the imports/production ratio. According to Argentina, after imports had recovered in 1999 to the relative share that they had enjoyed prior to the year of the world production crisis, there was a significant growth in 2000 which went well beyond the recorded historical levels¹³⁷.

¹³⁰ Namely, "Was the study referred to by Chile in paras. 4.24-4.25 of its first written submission submitted by an interested party to the CNCE, or otherwise available to the investigation team in this case, during the safeguard proceedings?"

¹³¹ See para. 4.51 and footnote 130 of the present report.

¹³² Chile refers to page 21 and the Annex to the technical report, tables 10 and 11, as examples.

¹³³ Chile refers to the Annex to the technical report, charts 5.1 and 5.2.

¹³⁴ See Chile's rebuttal, para. 34.

¹³⁵ Argentina refers to MCN tariff codes 2008.70.10 – Peaches preserved in water containing added sweetening matter, including syrup; and 2008.70.90 – Other.

¹³⁶ See Argentina's second oral statement, para. 32.

¹³⁷ Argentina refers to the technical report, Table 2, sheet 1439 and Table 15.2, sheet 1477.

Argentina claims that this was the result of the unforeseen developments.¹³⁸ Argentina contends that the presence of low-price imports (due either to unfair competition during the period 1994/96 or to world market surpluses during the most recent years) has logically led to a greater share of imports in apparent consumption, which is significant.¹³⁹

4.55 Moreover, **Argentina** argues that the comparison of periods – such as 1994/96 with 1999/2000 – is clearly questionable, since they involve market and marketing structures that were completely different and a change in supply that was heavily influenced by the launching of the restructuring programme in the domestic production sector.¹⁴⁰ In response to question No. 21 of the Panel¹⁴¹, Argentina clarifies that the transformations in the market include changes in distribution channels with a concentration of demand and purchasing power, in the composition of importers and in consumer habits and related prices. As regards the restructuring process, Argentina submits that there were significant differences in the state of the industry following major technological improvements, an increase in the level of integration of the production process involving considerable investment, restructuring of manufacturing plants, and increased industrial concentration.

3. *Determination of Threat of Serious Injury. Article XIX:1(a) of GATT 1994 and Articles 2.1, 3.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards*

4.56 **Chile** submits that it has shown that there was no increase in imports, either in absolute or relative terms, and that there were no unforeseen developments either, so that it was impossible for the Argentine preserved peaches industry to have been in a situation where serious injury was clearly imminent. Indeed, Chile adds, if the increased imports (either in absolute or relative terms) must be the result of unforeseen developments, and if the threat of serious injury must have as its genuine and substantial cause an absolute or relative increase in imports, it is impossible, in fact and in law, for the Argentine industry to have faced a threat of serious injury under Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards. According to Chile, the inconsistencies described above show *per se* that Argentina's determination of threat of serious injury violates the covered WTO Agreements.¹⁴²

4.57 **Chile** notes that Articles 4.1(a) and (b) and Article 4.2(a) of the Agreement on Safeguards impose procedural and substantive obligations. On the one hand, Chile argues, the Member wishing to apply a safeguard measure must evaluate all relevant factors of an objective and quantifiable nature pertaining to the most recent past, but without isolating them from the data relating to trends

¹³⁸ See Argentina's first written submission, para. 63.

¹³⁹ See Argentina's first written submission, para. 65.

¹⁴⁰ See Argentina's first written submission, para. 66.

¹⁴¹ Namely, "... Could Argentina indicate which were the differences in the market structures and marketing conditions between these two periods?"

¹⁴² See Chile's first written submission, para. 4.34.

spanning the entire investigation period; and on the other hand, the Member must demonstrate that there has been a threat of serious injury, providing a reasoned and adequate explanation of how the factors analysed support such a finding.¹⁴³ As regards this second substantive obligation, Chile specifies that it requires the Member to conduct a substantive evaluation of the "bearing" – or of the "influence", "effect" or "impact" – of these relevant factors on the "situation of [the domestic] industry", i.e., to provide a reasoned and adequate explanation of the way in which the relevant factors corroborate or support their determination.^{144 145}

4.58 **Argentina** contests the above claims by Chile and submits that, what Chile fails to mention is that Argentina, acting in conformity with Article 4 of Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, established the threat of injury and the corresponding increased imports by conducting an evaluation which went beyond the mere recording of certain indicators, for example, isolated comparisons with respect to the impact of imports during two different periods of time. Argentina argues that, if criteria of this nature were sufficient to reach a conclusion, in a particular case, as to whether or not there was a threat of injury, the very definition of the concept would be deprived of any substance, since contextual evaluation in the broadest sense of the term would be devoid of any useful content.¹⁴⁶ Argentina favours a broader interpretation which it understands to be consistent with multilateral legislation and practice. Argentina is of the view that the criteria for determining threat of injury have much more to do with the patterns of variables within a context than with the mere establishment of their values. In other words, threat of injury must be seen more in terms of probable flows than of comparative statistics, as in the case of Chile's analysis.¹⁴⁷

- (a) Whether the CNCE Evaluated all of the Relevant Factors Listed in Article 4.2(a) of the Agreement on Safeguards Having a Bearing on the Situation of the Domestic Industry

4.59 **Chile** claims that, under Article 4.2(a) of the Agreement on Safeguards, the CNCE had to evaluate and investigate all of the relevant factors having a bearing on the situation of the Argentine preserved peaches industry, and at a minimum those explicitly mentioned in the said provision.¹⁴⁸ However, Chile argues, there is no evidence of any investigation or evaluation of productivity,

¹⁴³ See Chile's first written submission, para. 4.31. See also Chile's first oral statement, paras. 24 and 25.

¹⁴⁴ Chile refers to the Appellate Body Reports, *US – Lamb*, paras. 103 and 104; and *US – Wheat Gluten*, para. 71.

¹⁴⁵ See Chile's first oral statement, para. 37.

¹⁴⁶ See Argentina's second oral statement, paras. 46 and 47.

¹⁴⁷ See Argentina's second oral statement, para. 48.

¹⁴⁸ See Chile's first written submission, para. 4.60.

capacity utilization or level of employment.¹⁴⁹ The only clues are a few statistical tables annexed to the technical report in which much of the content is concealed, and a mere mention of the employment factor in the Annex to the Record. In any case, Chile adds, the information relating to these factors, partially recorded in the technical report, shows that the situation of the domestic industry by no means reflected a threat of injury.¹⁵⁰

4.60 **Argentina** denies Chile's claim that the investigating authority failed to evaluate, among the injury factors, the "degree of utilization of production capacity" and "employment". Argentina submits that Chile has failed to provide a single argument capable of substantiating such a claim. In fact, Argentina argues, the investigating authority did analyse the degree of utilization of production capacity, and its analysis supports the determination of threat of serious injury.¹⁵¹

4.61 In response to question No. 50 from the Panel¹⁵², **Chile** acknowledges that the technical report contains tables for capacity utilization and employment but indicates that none of them expressly refers to the "productivity" factor. In Chile's view, Argentina describes this factor as "*producto medio físico del empleo*", the meaning of which is unclear to Chile.¹⁵³ It further argues that, unlike the other statistical tables, there is no explanation whatsoever, in annex I to the technical report, of the data in Table No. 7 or of the data recorded as "*producto medio físico del empleo*". In any event, Chile adds, recording data in statistical tables – as the competent authorities have done – is one thing, but a proper and reasoned evaluation of the data or factors, in order to explain and demonstrate how such information supports a determination, is a different matter altogether.

(i) Productivity¹⁵⁴

4.62 **Argentina** submits that productivity is analysed in the Record and the technical report on the basis of an approximation determined by average physical output per employee. In this connection, it claims, an examination of the coefficient obtained by measuring own-production against the number of employees in the production sector (Table 7(e) of the technical report) reveals that in 2000, as an unquestionable result of the fall in production, the indicator fell to 32 points following an increase that reflected improved performance of the sector, ending up more than 10 per cent lower than in 1999. Argentina is of the

¹⁴⁹ See Chile's first written submission, para. 4.61 and rebuttal, para. 35(b). Note that the latter does not refer expressly to productivity.

¹⁵⁰ See Chile's first written submission, para. 4.62.

¹⁵¹ See Argentina's rebuttal, paras. 24 and 25.

¹⁵² Namely, "*Please refer to para. 4.62 of Chile's first written submission. Does Chile agree that there are statistical tables in the technical report for each of the three factors of productivity, capacity utilization and employment?*".

¹⁵³ In response to question No. 49 of the Panel ("*Regarding productivity, please clarify the meaning of 'producto medio físico del empleo' (which we have translated as 'labour productivity')*") Argentina indicates that "*producto medio físico del empleo*" is the "own production divided by the number of employees in the preserved peaches production sector.

¹⁵⁴ See footnote 149 to the present report.

view that this decrease in the mentioned ratio has an impact on the unit cost of the product, increasing the relative incidence of productive labour in the majority of the companies.¹⁵⁵

4.63 **Chile** points out that in the event that Argentina explains *ex post facto* that the expression "producto medio físico del empleo" refers to the "productivity" factor, the fall in productivity is not obvious for the following reasons: (a) Not all the partial data are recorded because of their confidential nature; (b) there is no record of the totals for the survey list for 1996; (c) the total for the survey list for 1999, including imports from the main origin and competitor, i.e. Greece (already clearly on its way to recovery), exceeds the total for 1998, when such imports had practically stopped because of unexpected adverse climatic factors; (d) the totals for 2000 and 1999, including the recovering Greek imports, exceed the totals for 1998 and 1997 when the imports had practically ceased; and (e) the statistical table also includes production subcontracted to plants belonging to third parties, but their total figures do not distinguish the incidence of such production from that of the plants' own production.¹⁵⁶

(ii) Capacity Utilization

4.64 **Argentina** observes that production capacity, as stated in Record No. 781, was "determined on the basis of values affecting the product in question exclusively ...". Argentina explains that, although at the national level, there was information pointing to constant production capacity during the period under analysis, at the level of the companies that supplied information in response to the CNCE questionnaires, and that were verified, production capacity grew owing to the closure or absorption of firms (technical report, page 42), with values corresponding to the methodology set forth in the questionnaires for producers.¹⁵⁷ It further explains that, for the companies as a whole (Table 6 of the technical report), utilization of installed capacity grew until 1999 from 71 per cent to 88 per cent, and then declined in 2000 to 73 per cent, partly as a result of the increase in installed capacity and partly, indeed above all, owing to the fall in production.¹⁵⁸ Argentina submits that, if there had been no increase in installed capacity in 2000, considering the actual output level, the utilization of 51,000 tons of 1999 capacity would have corresponded, in 2000, to a utilization of 76 per cent. This implies that only 3 per cent of the 15 per cent drop in utilization of installed capacity in 2000 is attributable to the increase in installed capacity, and the rest is the result of a fall in production due to the impact of imports, since there were no primary factors that could have contributed to that fall.¹⁵⁹

¹⁵⁵ See Argentina's first written submission, para. 91.

¹⁵⁶ See Chile's response to question No. 51 of the Panel ("*The opinion of the directors who voted in favour of the imposition of the safeguard measure refers to falls in "el producto medio físico del empleo". In view of this, please clarify Chile's claim that there is no reference to productivity at all in Record No. 781 or its Annex.*")

¹⁵⁷ See Argentina's first written submission, para. 92.

¹⁵⁸ See Argentina's first written submission, para. 93.

¹⁵⁹ See Argentina's first written submission, para. 94.

4.65 **Chile** replies that Argentina fails to provide any explanation of why or how it came to the conclusion that this factor supported the determination of threat of serious injury. Chile claims that Argentina merely states that the degree of utilization of production capacity is analysed in the Record and the technical report and, unlike the CNCE directors, it goes on to provide explanations of the figures partially recorded in the annex to the technical report.¹⁶⁰ However, Chile argues, nowhere does it emerge that this factor was examined.¹⁶¹ Furthermore, Chile submits, the information recorded in the technical report does not support the CNCE's determination of "threat of serious injury". According to that information, Chile argues, the degree of utilization of preserved peaches production capacity for the entire domestic industry experienced an increase as from 1997, reaching 83 per cent in 1999 and remaining at that level in 2000.¹⁶²

(iii) Employment

4.66 **Argentina** submits that, as indicated in section 2 of the Annex to Record No. 781 (Situation of the Domestic Industry), the level of employment fell, particularly towards the end of the period. Indeed, Argentina argues, as shown in Table 7a of the technical report, the number of employees employed in production for the companies taken as a whole decreased by 4 per cent in 2000.¹⁶³ In Argentina's view, the same pattern can be observed in the total production wage bill (Table 8 of the technical report), while the average salary per employee in the production sector declined continuously, at a varying rate, during each of the years.¹⁶⁴ According to Argentina, the correlative effort to ensure adequate cost and productivity levels helps to explain why the correlation between these factors is not more explicit. However, the analysis that was conducted of the variations relating to the other products produced by the companies shows different patterns, indicating that the decrease in the production of peaches had a real impact on this factor.¹⁶⁵

4.67 **Chile** stresses that the only instance in the file of the investigation in which this factor was examined is a very minor one. In Chile's view, the CNCE directors that voted in favour of imposing the measure merely pointed out that the "analysis of the other parameters shows a fall in the level of employment and labour productivity ... The trends in these factors directly reflect the changes in sales and production."¹⁶⁶ Chile further argues that the technical report¹⁶⁷ does not in fact provide employment figures for each company, but merely provides overall data for this factor. As can be seen, Chile adds, the CNCE, rather than evaluating and verifying this information, merely repeats what is stated in the

¹⁶⁰ Chile refers to paras. 92 to 94 in Argentina's first written submission, Annex to the technical report, Table No. 6.

¹⁶¹ See Chile's first oral statement, para. 27.

¹⁶² See Chile's first oral statement, para. 28.

¹⁶³ See Argentina's first written submission, para. 104.

¹⁶⁴ See Argentina's first written submission, para. 105.

¹⁶⁵ See Argentina's first written submission, para. 106.

¹⁶⁶ Chile refers to the Annex to Record No. 781, page 8.

¹⁶⁷ Chile refers to the Annex to the technical report, Table No. 7.

technical report. Chile further indicates that, similarly, the technical report indicates that the level of employment in the preserved peaches production sector hardly declined at all in 2000, and that the level in other production sectors decreased by no more than 7 per cent on average during that year.^{168 169}

- (b) Whether the CNCE Provided a Reasoned and Adequate Explanation of how the Evidence Gathered on the Evaluated Relevant Listed Injury Factors Justifies a Finding of "threat of serious injury"

4.68 **Chile** claims that the injury factors that the CNCE did consider: (i) do not indicate the existence of a threat of serious injury; (ii) were not evaluated in a reasoned and adequate manner by the directors because there is no explanation of the way in which these factors support their determination; (iii) were not examined in the context of data spanning the entire investigation period; and (iv) for the most part, are supported by incomplete information treated as confidential which the CNCE received from the companies on the survey list, information for which there is no record of verification and which it was in fact impossible for Chile to verify.¹⁷⁰

4.69 **Argentina** denies Chile's claims that the investigating authority acted incorrectly. In Argentina's view, the investigating authority, far from acting in any way that would justify Chile's claim, carried out a proper analysis of the information.¹⁷¹

4.70 **Argentina** contends that the CNCE did provide a reasoned and adequate explanation of how the evidence gathered on the evaluated relevant listed injury factors justified a finding of threat of serious injury. Argentina explains that the evolution of the relevant import-related variables is closely linked to the evolution of the international market. Argentina argues that, in the 1998/1999 and 1999/2000 seasons, world production grew by 16 per cent¹⁷², a highly significant growth rate if it is borne in mind that practically throughout the 1990s, world production of preserved peaches remained fairly stable in the vicinity of 1 million tons per year.¹⁷³ Argentina argues that what is significant in the analysis of international market trends is the availability of exportable surpluses, and this analysis reveals Greece's structural exporter status, which is clearly reflected in the relationship between production, exports and availability of stocks over the past decade.^{174 175} Exports represented 97.2 per cent of production for the period 1990/2000 with a value exceeding 100 per cent for certain years, proving that there were plenty of readily available stocks that could

¹⁶⁸ Chile refers to the Annex to the technical report, Table No. 7.

¹⁶⁹ See Chile's first oral statement, paras. 29 to 31.

¹⁷⁰ See Chile's rebuttal, para. 35(d).

¹⁷¹ See Argentina's rebuttal, para. 35.

¹⁷² Argentina refers to the technical report, page 73, sheet 1407.

¹⁷³ See Argentina's first written submission, para. 69.

¹⁷⁴ Argentina refers to the technical report, page 59, Table No. 7, sheet 1393.

¹⁷⁵ See Argentina's first written submission, para. 72.

easily be poured on to the international market.¹⁷⁶ In the case of Greece, these values can be explained by natural conditions for the production of peaches.¹⁷⁷ Greek peaches also share enormous price flexibility which is reflected in the great diversity of f.o.b. price quotations for Greek exports, depending on their destination.^{178 179} In Argentina's view, the logical corollary to this can be found in the behaviour of the domestic market for peaches during the 1999/2000 season when the fall in the volume of production was coupled with a significant decrease in the unit value of the product and, more importantly, in the per unit mark-up, since although costs decreased during the reference period, prices were subjected to an even greater downward pressure. This can be seen from the fact that the unit price/cost ratio fell sharply for all of the companies surveyed in the 1999/2000 season¹⁸⁰, confirming the imminence of a threat of serious injury within the meaning of Article 4.1(b) of the Agreement on Safeguards.¹⁸¹ In response to question No. 16 of the Panel¹⁸², Argentina confirmed that the above information can be found in the technical report (pages 54/59, 73/74, 81/82 and annex I – Methodological Notes and Statistical Tables). The competent authority considered that this information showed that there was a threat of serious injury.¹⁸³

4.71 **Argentina** further argues that the implementing authority did not analyse the relevant indicators out of context, but rather in the light of the changes that were taking place on the international market and the greater or lesser degree to which the Argentine economy was exposed to such developments.¹⁸⁴ For example, Argentina adds, the CNCE did not disregard the fact that 1998 was an atypical year in terms of production in the Northern Hemisphere owing to drought, and that, as a result, production levels in the following year were bound to be higher. Nor was the CNCE unaware of the fact that imports, measured in absolute or relative terms, and analysed in the context of the entire decade of the 90s, reached their highest volumes in 1993.¹⁸⁵

4.72 **Chile** does not agree with the above comments made by Argentina. In Chile's view, the non-confidential information recorded in the technical report does not justify these comments: they are based on information that is not recorded in the file of the investigation and they are based on data from the most recent past that was not analysed in the context of trends spanning the entire investigation period. Moreover, Chile draws the attention of the Panel to the fact

¹⁷⁶ See Argentina's first written submission, para. 73.

¹⁷⁷ See Argentina's first written submission, para. 76.

¹⁷⁸ Argentina refers to the technical report, page 82, sheet 1416.

¹⁷⁹ See Argentina's first written submission, para. 77.

¹⁸⁰ Argentina refers to the technical report, Tables 10.1, 10.2, 10.3, 10.4 and 10.5, sheets 1452/1456.

¹⁸¹ See Argentina's response to question No. 16.

¹⁸² Namely, "Was the information about the world market set out in Argentina's first written submission in paras. 68-78 considered by the competent authorities? If so, did it show that there was merely a threat of increased imports, or a threat of serious injury? Where does it appear in the report of the competent authorities?"

¹⁸³ See Argentina's first written submission, para. 79.

¹⁸⁴ See Argentina's second oral statement, paras. 41 to 43.

¹⁸⁵ See Argentina's second oral statement, paras. 44 and 45.

that Argentina has offered a number of arguments and lines of reasoning which cannot be found in the comments and determinations of the CNCE directors that voted in favour of imposing the challenged measure, hence representing *ex post facto* clarifications.¹⁸⁶

4.73 In **Chile's** view, any attempt by a Member to cure investigative or procedural deficiencies on the part of the competent authorities *ex post facto* by presenting possible explanations and reasons for their determinations that were not provided by the authorities themselves is contrary to the Agreement on Safeguards. The time and place for providing explanations and reasons for a determination are prior to the imposition of the measure, in the file of the investigation, and this must be done by the competent authorities. In the specific case of Argentina, Chile adds, the task of providing a reasoned and adequate evaluation falls to the CNCE directors.¹⁸⁷

(i) Rate and Amount of the Increase in Imports of the Product at Issue in Absolute and Relative Terms. Share of Domestic Market Taken by Increased Imports.

4.74 As regards the analysis of the imports in absolute terms, **Chile** is of the view that the CNCE directors that voted in favour of the measure, minimize the importance of the fact that the growth in imports during 1999 and 2000, seen in the context of the entire investigation period (1996/2000), reflects a recovery of historical levels that were severely disrupted in 1997 and 1998 rather than an increase in imports.¹⁸⁸ Chile claims that Argentina does not provide any argument to justify the CNCE's decision to consider data from the most recent past only, without analysing that data in the context of trends spanning the entire investigation period.¹⁸⁹ According to Chile, these facts were set forth in the technical report and its annex. Chile maintains that, if total imports for 1999 and 2000 had been analysed in relation to the entire investigation period, the conclusion would have been that imports actually decreased by approximately 75 per cent in 1998, 51 per cent in 1999 and 16 per cent in 2000 with respect to the average for 1996. Thus, in Chile's view, not even in the most recent past (1999 and 2000) did imports reach the historical averages that were interrupted in 1997. Chile concludes that it is impossible to maintain that there was threat of serious injury when imports in 1999 and 2000 were considerably lower than the historical average represented by 1996, and when the growth recorded towards the end of the period was a predictable trend which allowed the domestic industry to adjust beforehand to what was the normal behaviour of imports.¹⁹⁰

4.75 As regards the analysis of the imports in relative terms, **Chile** submits that when the CNCE analyses the rate and amount of the alleged relative increase in

¹⁸⁶ See Chile's first oral statement, para. 33.

¹⁸⁷ See Chile's first oral statement, para. 36.

¹⁸⁸ See Chile's first written submission, para. 4.35.

¹⁸⁹ See Chile's first oral statement, para. 34(a).

¹⁹⁰ See Chile's first written submission, para. 4.36.

imports (as with the absolute increase), it minimizes the importance of the fact that the growth in apparent consumption of imports in 1999 and 2000, seen in the context of the entire investigation period (1996/2000), reflects a recovery and not an increase.¹⁹¹ According to Chile, the disruption in imports also explains why the share of sales of the domestic product in apparent consumption reached a maximum of 93 per cent during the period of investigation. Consequently, Chile argues, it is not possible to maintain that there was threat of serious injury when apparent consumption of imports in 1999 and 2000 was significantly lower than the historical average represented by 1996. Chile is of the view that an industry which should historically share at least 25 per cent of apparent consumption cannot claim threat of serious injury when subsequently, during a period of recovery of imports, it shares only 17 per cent of apparent consumption.¹⁹²

4.76 **Argentina** considers that it has sufficiently dealt with Chile's claims regarding the rate and amount of imports when dealing with the increased imports.¹⁹³ In this regard, it insists that it has already pointed out that the most relevant data for the purposes of a determination is the data from the most recent past and that this is precisely what the investigating authority did in the case at issue.¹⁹⁴ It further argues that the leading world producer and exporter of peaches, Greece, recorded an increase in its exports to Argentina of 207 per cent in 1998, 309 per cent in 1999 and 110 per cent in 2000. Argentina indicates that this rate and amount of increase in imports was within the context described in Section 0 of overproduction and accumulation of stocks that could be poured onto the international market. To take this last factor alone, Argentina points out that in 1999 and 2000, available stocks in Greece were 152.1 per cent and 173.1 per cent higher, respectively, than the average recorded for the entire 1990s. Measured as a percentage of Argentine production, these stocks represented 183 per cent in 1999 and 225 per cent in 2000.¹⁹⁵ Argentina maintains that the increase in imports was less in terms of value and that this is due to the sharp fall in world prices, in particular in Greece, where in 2000, an increase in the volume of imports of 110 per cent corresponded to an increase in the value of imports of 76 per cent.¹⁹⁶

4.77 **Argentina** submits that the Argentine domestic market has developed over the last years thanks to various factors, such as a general growth in demand and changes in consumption patterns for a series of products. In this connection, Argentina explains, the massive presence in the domestic Argentine market of relatively low-priced products has caused part of the market to be taken by those products.¹⁹⁷ As far as preserved peaches are concerned, Argentina argues, apparent consumption followed an upward trend, disturbed only in 1998 by

¹⁹¹ See Chile's first written submission, para. 4.37.

¹⁹² See Chile's first written submission, para. 4.38.

¹⁹³ Argentina refers to paras. 52 to 67 of its first written submission. See Section 0 of the present report.

¹⁹⁴ See Argentina's rebuttal, paras. 29 and 30.

¹⁹⁵ See Argentina's first written submission, paras. 81 and 82.

¹⁹⁶ See Argentina's first written submission, para. 83.

¹⁹⁷ See Argentina's first written submission, para. 84.

adverse climatic conditions in the Northern Hemisphere and a domestic supply which, although the adjustment process was under way, proved insufficient.¹⁹⁸ Argentina contends that the prices of imported peaches on the market (even after the Greek price had been corrected by the countervailing duty) declined for the most part, particularly from the main countries of origin, recording levels up to 20 per cent below the domestic price.¹⁹⁹ In this context, Argentina submits, the share of imports in the domestic market measured through apparent consumption (see Exhibit ARG-VI) grew significantly in 2000 to the detriment of sales of the domestic product, affecting prices, production and utilization of installed capacity.²⁰⁰

(ii) Changes in the Level of Sales, in Volume and Value

4.78 **Chile** notes that, based on the information supplied by the portion of the domestic industry analysed by the CNCE, the volume of sales of preserved peaches totalled 24,386 tons in 1997, 26,422 tons in 1998, 37,264 tons in 1999 and 37,113 tons in 2000. Chile further notes that this represents a variation, according to the CNCE, of 8 per cent, 41 per cent, and –minus 0.4 per cent respectively. In terms of price (Argentine pesos), the CNCE's estimated variation is 5 per cent, 28 per cent and minus 14 per cent respectively.²⁰¹ Chile points out that in the file of the investigation, with the exception of the company ARCOR, the monthly sales data for that portion of the industry, in volume and in pesos, is not recorded for each company individually. Chile explains that the CNCE treats it as confidential information and that the sales data in pesos does not even include the totals for the survey list. Consequently, Chile submits that it has no way of verifying the estimated total annual sales in tons, and still less, the estimated sales in pesos.²⁰²

4.79 **Chile** notes that in evaluating this factor, the CNCE states that domestic market sales of the companies analysed taken as a whole decreased, in value, by 14 per cent in 2000 as compared to the previous year, and that domestic sales calculated for the purposes of the estimate of apparent consumption declined in 2000. It adds that this loss took place in a context of growth in apparent consumption starting in 1999. In Chile's view, this evaluation is clearly insufficient.²⁰³ Chile submits that the CNCE gives no reason why its estimated decline in the value of sales towards the end of the investigation period (14 per cent) should reflect a clearly imminent threat of serious injury in the near future. Moreover, Chile claims that Argentina fails to explain why it does not give any consideration to its estimate of sales in volume, which shows practically no decrease in 2000.²⁰⁴ Nor does it explain how this relationship between its

¹⁹⁸ See Argentina's first written submission, para. 85.

¹⁹⁹ See Argentina's first written submission, para. 86.

²⁰⁰ See Argentina's first written submission, para. 87.

²⁰¹ See Chile's first written submission, para. 4.39.

²⁰² See Chile's first written submission, para. 4.40.

²⁰³ See Chile's first written submission, para. 4.41.

²⁰⁴ See Chile's first written submission, para. 4.42.

estimate of the value of sales for 2000 and its estimate of apparent consumption for 1999 and 2000 justifies its determination of threat of serious injury.²⁰⁵

4.80 **Chile** notes that apparent consumption shows that domestic industry sales declined by only 1 per cent in 2000 as compared to 1999, and that their share in the market with respect to imports merely decreased from 89.41 per cent to 83.44 per cent in 2000. Thus, according to Chile, it is difficult to speak of "a fall in the share of sales" in 2000, when this "fall" represents a variation of minus 5 per cent and when sales decreased by 1 per cent.²⁰⁶ Moreover, Chile argues, the CNCE confines itself to the trends for the most recent period without analysing the share of sales in apparent consumption for the entire investigation period. In Chile's view, the CNCE should not have excluded the trends for 1996, since they are important to the behaviour of imports and apparent consumption. The greatest increase in sales in value and pesos and the greatest share of the domestic industry in apparent consumption were recorded in 1998, with the situation beginning to recover in 1999.²⁰⁷

4.81 **Argentina** argues that domestic market sales by Argentine companies which, after consecutive increases in 1998 and 1999 had decreased by only 0.4 per cent in tons, had in fact decreased by 14 per cent in terms of value. Moreover, Argentina adds, this decrease is reflected in the statistics of each one of the companies (Record No. 781, Annex, section 2, page 7 – Situation of the domestic industry – and Table 2.2 of the technical report).²⁰⁸ In Argentina's view, this decrease – more than proportional in value – reflects the fall in the price of the domestic product, provoked by the presence in the market of a considerable and growing volume of imports at decreasing prices. Argentina submits that the fall in price of the domestic product, adversely affected by imports, limited the losses in volume of sales to a minimum, but at the cost of lost profitability and a general negative impact on the industry.²⁰⁹

4.82 In reference to the above, **Chile** argues that Argentina failed to provide any justification, under the Agreement on Safeguards for: (i) the fact that Chile had no way of verifying the estimated total annual and monthly sales, in volume and value, of the companies on the survey list, because for reasons of confidentiality, practically none of the supporting information was included in the CNCE Report²¹⁰; (ii) the fact that the CNCE determined that there was a threat of serious injury in circumstances in which sales from the domestic industry declined by only 1 per cent in 2000, and their share in apparent consumption decreased by less than 6 per cent during the same year²¹¹; and (iii) the fact that the CNCE, without any explanation, disregarded the figures provided by CAFIM for sales in tons by the Argentine industry in 2000. Chile

²⁰⁵ See Chile's first written submission, para. 4.43.

²⁰⁶ See Chile's first written submission, para. 4.44.

²⁰⁷ See Chile's first written submission, para. 4.47.

²⁰⁸ See Argentina's first written submission, para. 88.

²⁰⁹ See Argentina's first written submission, para. 89.

²¹⁰ See Chile's first written submission, para. 4.40.

²¹¹ See Chile's first written submission, para. 4.44.

argues that pursuant to CAFIM's figures, these sales increased by 13 per cent in 2000 as compared to 1999.^{212 213}

4.83 **Argentina** replies that the classification of some of the information as confidential did not mean that the investigating authority could not draw proper conclusions from that information. In Argentina's view, the issue of the decline in sales has been duly explained. It argues that it reflects the fact that the fall in the price of the domestic product, adversely affected by imports, limited the losses in volume of sales to a minimum, at the cost of lost profitability and a general negative impact on the industry. Argentina further argues that the investigating authority did not act arbitrarily in analysing the sales figures, but examined all of the information at its disposal.²¹⁴

(iii) Production

4.84 In its first written submission, **Chile** argues that the technical report contains no analysis of this factor and that it merely provides, in an annex, a statistical table showing data on domestic production.²¹⁵ Chile explains that, for the CNCE, the information supplied by CAFIM shows a decrease of some 4.5 per cent in 1998, followed by stability in 1999 and 2000 at about 65,000 tons. However, the CNCE adds that the companies on the survey list, while they experienced growth in 1998 and 1999, in 2000 their production as a whole fell by 14 per cent.²¹⁶ Chile contends that the CNCE carried out another analysis, disregarding the data provided by CAFIM because it did not reflect trends that fitted in with its determination of threat of serious injury. According to Chile, without any kind of explanation to justify or support its new finding, the CNCE concluded that there was a decline in domestic production in 2000 which was consistent with the decline recorded in the companies analysed. It estimated the decrease at 12 per cent compared to 1999, with domestic production totalling 57,847 tons.²¹⁷ Chile submits that the CNCE does not consider 1996 and it confines itself to making estimates and using information from the technical report without providing a reasoned and adequate explanation of how that information supports its conclusions.²¹⁸ In any case, Chile argues, the estimate made by CAFIM, which is representative of the domestic industry, does not justify the finding of "threat of serious injury", nor indeed does the 12 per cent decrease estimated by the CNCE, since it takes place in the context of the recovery of imports. Furthermore, Chile contends, these CNCE estimates do not indicate any relationship between this recovery and the lower productivity. According to Chile, domestic production in 1998, when imports to Argentina

²¹² Chile refers to the Annex to the technical report, Tables 19.1 and 19.2.

²¹³ See Chile's first oral statement, para. 34(b).

²¹⁴ See Argentina's rebuttal, paras. 32 to 34.

²¹⁵ See Chile's first written submission, para. 4.49.

²¹⁶ See Chile's first written submission, para. 4.50.

²¹⁷ See Chile's first written submission, para. 4.51.

²¹⁸ See Chile's first written submission, para. 4.53.

reached their low point, was 4 per cent lower than in 1997 and 6.5 per cent lower than in 2000.²¹⁹

4.85 **Argentina** contests the above statement by Chile and submits that the indicators analysed and verified for the mentioned subgroup of companies show that production grew in 1998 and 1999 (20 per cent and 39 per cent respectively) and declined in 2000 (14 per cent). According to Argentina, it should be borne in mind that the adjustment process launched by the sector led to an increase in production which was reversed by massive imports in such conditions as to negatively influence that variable.^{220 221}

4.86 **Chile** claims that Argentina's above explanation fails to provide any justification under the Agreement on Safeguards for the fact that the CNCE, without providing any explanation of its determination, decided to disregard the domestic production figures provided by CAFIM, which show no decrease for 1999 and 2000; that on the contrary, it chose to adjust its estimate on the basis of the companies in the survey list, which did suffer a decline in 2000.^{222 223}

(iv) Profits and Losses

4.87 **Chile** submits that it is impossible to verify each and every one of the items of information provided by the Argentine producers. In Chile's view, the CNCE merely repeats what was stated by the producers on the basis of their general accounting statements and their specific sales accounts for the product under investigation. Chile claims that there is no knowledge of the methodologies used by producers in arriving at such conclusions, and the file of the investigation does not state that the CNCE investigated the data, let alone verified it to see whether it corresponded to the reality.²²⁴ According to Chile, what the file does reveal is that the Argentine industry made heavy investments in connection with a reconversion of the primary and secondary sectors, that the total average cost of peaches as a raw material decreased throughout the investigation period, and that it is common for part of that industry to entrust its production of preserved peaches to processing plants belonging to third parties. Chile submits that the CNCE fails to evaluate any of these circumstances which influence production costs and profits.²²⁵

4.88 **Chile** observes that the CNCE itself acknowledges that the accounting statements of the companies are limited from the analytical point of view in that these are multi-product companies. This is why, in Chile's view, it decided to obtain from the companies in question the accounts specifically relating to preserved peaches. However, Chile adds, it remains silent as to the impact of the profitability of sales of that product for each multi-product enterprise in terms of

²¹⁹ See Chile's first written submission, para. 4.54.

²²⁰ Argentina refers to Annex to Record No. 781, section 2, page 7 - Situation of the domestic industry - and Table 1 of the technical report.

²²¹ See Argentina's first written submission, para. 90.

²²² Chile refers to Annex to Record No.781, page 7.

²²³ See Chile's first oral statement, para. 34(c).

²²⁴ See Chile's first written submission, para. 4.55.

²²⁵ See Chile's first written submission, para. 4.56.

billing.²²⁶ Chile argues that, according to the actual information provided by the companies on the survey list, sales of preserved peaches represented between 1 per cent and 40 per cent; but it is impossible to verify the impact of these billings on their total sales, since the CNCE reveals this information for ARCOR only.²²⁷ Moreover, Chile submits, all of the companies on the survey list indicate a high debt ratio which has persisted since 1997. Chile claims that the CNCE has failed to investigate how this historical indebtedness might have been affecting the domestic industry's profitability.²²⁸

4.89 **Argentina** submits that, in analysing the evolution of the profitability and net worth of the enterprises in relation to the impact of imports on the domestic industry, it should be borne in mind that since these are multi-product enterprises, for an analysis to be more specific and directly relevant, as well as objective, it must be conducted on the basis of the accounts containing the results for the product in question.²²⁹ In Argentina's view, the fact that the CNCE was dealing with a multi-product industry and Chile's claim that there are no disaggregated profitability indicators for each product do not preclude the possibility of the CNCE having reached consistent conclusions on threat of injury to the preserved peaches industry.²³⁰ Argentina notes that there are disaggregated accounts for the production of peaches in terms of cost, price, employment and corresponding wages, as well as the evolution of sales (in volume and value) and the per unit mark up for the product measured as the unit price/cost ratio.²³¹ Argentina is of the view that circumstances dictated that the analysis of specific accounts for a major portion (more than 60 per cent) of the domestic industry was the most appropriate and relevant approach.²³²

4.90 Looking at the analysis of productivity of the product based on specific accounts, **Argentina** submits, the 11 per cent fall in the marginal contribution on sales after covering the variable costs, and a sales/breakeven point ratio²³³, which fell from 1.25 in 1999 to 0.67 in 2000, i.e. 33 per cent below the 1/1 limit, reveals a negative profitability at the end of the period, corresponding to the sharp growth in imports at decreasing prices and the consequent impact on domestic prices.²³⁴ At the same time, the price/cost ratio at the end of the period was close to or less than one, depending on the company, with considerable decreases recorded in 2000. Argentina argues that these results which, in accordance with the methodology used, corresponded exclusively to the product under analysis, must be seen in the context of multi-product enterprises in which the sale of preserved peaches does not exceed 40 per cent of total billing and whose balance pages, as indicated in the technical report, are affected by

²²⁶ See Chile's first written submission, para. 4.57.

²²⁷ *Ibid.*

²²⁸ See Chile's first written submission, para. 4.58.

²²⁹ See Argentina's first written submission, para. 95.

²³⁰ See Argentina's first written submission, para. 96.

²³¹ See Argentina's first written submission, para. 97.

²³² See Argentina's first written submission, para. 98.

²³³ Argentina refers to the technical report, Statistical Annex, specific accounts for preserved peaches, sheet 1475.

²³⁴ See Argentina's first written submission, para. 99.

company transfers and influenced by the operating results for other products as well as non-operating and non-recurring results.²³⁵

4.91 **Argentina** contends that, during the most recent period, when imports grew to unforeseen levels, most of the companies on the survey list representing the sector were experiencing decline: a 14 per cent fall in production, a 14 per cent decrease in the value of sales, and a 10 per cent fall in average physical output per employee (as an approximation of productivity), owing mainly to the 14 per cent decrease in production, which was higher than the decrease in employment. Thus, Argentina argues, the production capacity increased (following the restructuring mentioned earlier on) while capacity utilization decreased in 2000. In Argentina's view, this negative evolution of the degree of utilization of capacity was not attributable to the growth in capacity, but to the fall in production.²³⁶

4.92 **Argentina** further argues that, in addition to its above arguments regarding the special cost-benefit accounts for peaches, the analysis of employment indicators (average wage and total wage bill) reconfirms the relativity of the consolidated balance pages, given the multi-product industry status. According to Argentina, this can be seen in the negative ratio of the above-mentioned indicators and the evolution of wage indicators for the rest of the production of the companies on the survey list. These indicators are positive for 1999 and 2000, a fact that, in Argentina's view, could only reflect a difference in profitability *vis-à-vis* the production of peaches.²³⁷ Argentina concludes that it is obvious that the positive values (alleged by Chile) in the consolidated balance pages can only be explained by the results for the other products, and not by the billing for peaches, whose prices were seriously affected by the downwards pressure exerted by imports.²³⁸

4.93 **Chile** submits that Argentina fails to provide any argument to justify, in the light of the Agreement on Safeguards: (i) the fact that the CNCE does not explain or demonstrate the true incidence of billing for sales of preserved peaches by companies of the survey list on total sales or the profitability indices of these multi-product companies; and (ii) the fact that the CNCE provides no explanation of the methodologies used by the companies in presenting this information and of how it is possible to verify this information when the bulk of it is treated as confidential.²³⁹ Chile further responds to Argentina²⁴¹ that the whole point of a reasoned and adequate explanation supported by sufficient evidence is to avoid this kind of assumption or conjecture. Objectively, it says,

²³⁵ See Argentina's first written submission, para. 100.

²³⁶ See Argentina's first written submission, para. 101.

²³⁷ See Argentina's first written submission, para. 102.

²³⁸ See Argentina's first written submission, para. 103.

²³⁹ Chile refers to the Annex to the technical report, Tables 12, 13 and 14; Annex to Record No. 781, page 8; Chile's first written submission, paras. 4.57 and 4.58.

²⁴⁰ See Chile's first oral statement, para. 34(d).

²⁴¹ Chile refers to para. 103 of Argentina's first written submission where Argentina states that it is obvious that the positive values (alleged by Chile) in the consolidated balance sheets can only be explained by the results for the other products. See para. 4.92 of the present report.

the CNCE's determinations should be evident and well-founded for all Members, and not only for Argentina.²⁴²

(v) Other Considerations

4.94 **Argentina** contends that Chile undervalues certain variables which, in Argentina's view, are essential when it comes to evaluating threat of injury, namely:

- (a) Chile does not attach enough importance to the fact that the growth rate in imports was positive from 1998 onwards, and that imports grew at a faster rate than in 1996²⁴³;
- (b) Nor does Chile attach enough importance to the fact that 1998/2000 was a period of recession in Argentina which, until 1997, had experienced sustained growth, so that low-priced imports, in the context of substitution of consumption to which Argentina has already referred, had considerably more potential for injury due to the downward pressure they exerted;
- (c) Chile does not attach enough importance to the incontrovertible fact that the volume of stocks available in Greece to be poured on to the international market during the 1999/2000 period represented 1.83 and 2.25 times Argentina's production for those years respectively. In 2000, Argentine production fell by 12 per cent²⁴⁴;
- (d) Chile does not give due consideration to the fact that that stock could easily have been poured on to the Argentine market for macroeconomic reasons (1 to 1 parity as a result of the currency board) and the fact that it is a counter-seasonal market with growing apparent consumption. Argentina comments that the seasonality component was highlighted by the investigating authority on page 9 of the Annex to Record No. 781, and is also reflected in Table 15.2 of the technical report²⁴⁵;
- (e) Chile does not correctly analyse the historical volumes in Greece which, with its enormous production capacity and its high export coefficient, is unquestionably the country with the greatest potential to pour excedent production on to the world market, and focuses exclusively on the unfair competition component, which was duly remedied by applying countervailing duties. The investigating authority specifically refers to this circumstance on page 10 of the Annex to Record No. 781;
- (f) Chile underestimates the high potential for the said production volumes to be poured on to a market like the Argentine market. In

²⁴² See Chile's first oral statement, para. 35.

²⁴³ Argentina refers to Exhibit ARG-XVII.

²⁴⁴ Argentina refers to the technical report, page 59 and Table 1.

²⁴⁵ Argentina refers to Exhibit ARG-XVIII.

addition to Greece, the European market has other major suppliers (Spain, Italy and France), and the other large consumer market in the Northern Hemisphere, the United States, has historically been almost entirely self-sufficient;

- (g) Chile overlooks the fact that during the preceding years, the Argentine industry had been pursuing a significant investment and productive expansion plan, so that the downward pressure exerted by imports on prices, on top of the considerations set forth in subparagraph (b) above, aggravated the injury to the domestic industry that much more.

4.95 **Argentina** maintains that, taking the period 1995/1996, one could quite clearly see that the annual growth rate of imports decreased up until 1998. On the other hand, Argentina submits, during the period 1998/2000, the annual growth rate of imports rose steadily, reaching figures which, if we look at the entire decade, were only exceeded in 1993. Similarly, there was an upward trend in both apparent consumption and growth in international stocks in 1998/2000. Argentina stresses that the figure (in thousands of tons) for average annual stocks in Greece, the leading world exporter and producer was 47.6, while for 1995/1996, it was 43.25. Argentina explains that taking the mentioned average for the 1990s (47.6), available stocks in Greece for 1999 exceeded that figure by 152 per cent, and in 2000 by 173 per cent.^{246 247}

- (c) Whether the CNCE Considered all Relevant Injury Factors not Listed in Article 4.2(a) of the Agreement on Safeguards. Industry Readjustment

4.96 According to **Chile**, the producers that took part in the investigation showed that domestic production had expanded considerably over the past decade following heavy investments and business strategies involving the plantation of new, highly efficient varieties of peaches for preserves with good market prospects, vertical integration of production between the primary and secondary sectors, international scientific and technical counselling, protection against climatic risks and industrial concentration in plants offering economies of scale. This extensive readjustment led to a significant increase, *inter alia*, in productivity, production, sales and degree of utilization of production capacity. Chile indicates that all of this took place in the framework of trade liberalization, an indication of the confidence of the domestic industry in its ability to compete on export markets in the long term. Chile is of the view that, under these conditions, it is impossible that the CNCE should have found that this industry was facing a threat of serious injury.²⁴⁸

4.97 **Argentina** responds that the CNCE sent questionnaires to 100 per cent of the companies registered as producers in CAFIM, and received replies from a

²⁴⁶ Argentina refers to Exhibits ARG-IX and ARG-XVII.

²⁴⁷ See Argentina's second oral statement, para. 49.

²⁴⁸ See Chile's first written submission, para. 4.64.

large percentage of the domestic industry: six companies, of which five, duly verified, represented 68 per cent of production in 1999. These companies as a whole were referred to throughout the Record and the technical report as the "survey list" or the "companies surveyed", without distinction.²⁴⁹ Argentina maintains that the information supplied, together with the verifications, revealed that the sector was being restructured on the basis of new primary "productive units" which had led to a growth of 21 per cent in the production of preserved peaches up to 1999. This trend was reversed in 2000 under the pressure of imports in conditions which produced a significant decline in domestic production, making the industry more sensitive and marking out a clear and foreseeable path towards imminent injury.²⁵⁰

4.98 In response to question No. 17 of the Panel²⁵¹, **Chile** indicates that the legal basis of its claim regarding industry readjustment is the obligation imposed by Article 4.2(a) of the Agreement on Safeguards according to which the competent authorities must not only evaluate, at a minimum, the factors indicated therein, but must also evaluate any other factor that is relevant or pertinent to the situation of the domestic industry concerned, with a view to determining whether that industry is facing serious injury or a threat thereof. In response to question No. 42 of the Panel²⁵², Chile clarified that, in its view, an industry readjustment process can perfectly be measured and quantified on the basis of objective data on indicators of such a process, considered as an additional factor; these include production, investment, technological innovation, exportable surpluses, and so forth.

4.99 Also in response to question No. 42 of the Panel, **Argentina** indicates that it considers that although the industry readjustment may have the characteristics of an objective and possibly quantifiable fact, it is not one within the meaning of Article 4.2(a) which, moreover, does not list it among the objective and quantifiable facts for the purposes of the Article 4 determination.

- (d) Whether the CNCE Based its Finding of "threat of serious injury" Merely on Conjecture or Remote Possibility and Failed to Demonstrate Adequately that it was Clearly Imminent

4.100 **Chile** claims that the CNCE based its finding of "threat of serious injury" merely on conjecture or remote possibility and not on facts, and that it failed to demonstrate adequately that in the year 2000 there was a high probability or imminence that such injury would occur in the near future. The CNCE maintains that the factors it considered showed the high degree of sensitivity of the

²⁴⁹ See Argentina's first written submission, para. 79.

²⁵⁰ See Argentina's first written submission, para. 80.

²⁵¹ Namely, "What exactly is the legal basis of Chile's claim regarding industry readjustment in paras. 4.63-4.64 of its first written submission?"

²⁵² Namely, "Chile's answer to question 17 indicates that it claims that industry readjustment was another factor relevant or pertinent to the situation of the domestic industry. Could such a process be considered "of an objective and quantifiable nature" in the sense of Article 4.2(a) of the Agreement on Safeguards? Why, or why not? "

domestic industry to the change taking place in the market as a result of imports and that the behaviour of those imports towards the end of 2000, in terms of price and volume, had the capacity to cause serious injury. On that basis, it determined that there was a threat of serious injury, stating that in the international market there were no indicators that suggested that the volume and price of world production and exports, both present and future, should not be equal to or even greater than in 2000.²⁵³ Chile submits that all relevant factors of an objective and quantifiable nature, properly evaluated, do not indicate that the behaviour of imports towards the end of 2000 constituted a threat of serious injury.²⁵⁴

4.101 According to **Chile**, the CNCE unjustifiably predicts that serious injury will occur based on the simple assertion that there were no indicators in the international markets to prove that the volume and price of world production and exports would decrease either then or in the future. The CNCE does not provide any analysis to demonstrate the truth of its assertion or explain how and why, nor does it provide empirical evidence in support of its prediction. Its assertion rests on an assumption based on the lack of indicators in the international market. In other words, on the basis of a negative fact, it assumes a positive fact, that the volume and price of world production and exports in 2000 and in subsequent years could be the same or even higher. It bases its finding of threat of serious injury on a highly vague and ambiguous assumption, stating that the said assumption justifies the conclusion that such a threat exists because international market conditions such as they are will not be changing in future years. In other words, it bases one assumption on another assumption. Chile also argues that the CNCE should have focussed more specifically on production and exports from the two main origins: Greece and Chile.²⁵⁵

4.102 **Argentina** emphasizes that the determination of threat of serious injury, far from having been made on the basis of mere conjecture or remote possibility, was based on facts. Argentina observes that Chile itself appears to recognize that the analysis effected by Argentina supports a determination of the existence of the threat of serious injury. Argentina argues that according to Chile, the Argentine investigating authority was guilty of inconsistency in maintaining that the volume and price of world production and exports would not decrease in the future. It is obvious to Argentina that Chile agrees that the current situation is one of threat of injury. Otherwise, why would it lay stress on the future if it could demonstrate that the information considered by the investigating authority at the time of its determination was false. Argentina also submits that the Appellate Body in *US – Line Pipe* found that before serious injury occurs "there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury', serious injury does not generally occur suddenly...". Accordingly, the Appellate Body found that the threat of serious injury requires a lower threshold than serious injury and this distinction

²⁵³ See Chile's first written submission, para. 4.65.

²⁵⁴ See Chile's first written submission, para. 4.66.

²⁵⁵ See Chile's first written submission, para. 4.68.

serves to allow an importer Member to act sooner to take preventive action when increased imports posed a 'threat' of 'serious injury' to a domestic industry, but have not yet caused 'serious injury'.²⁵⁶

4. *Demonstration of the Existence of a Causal Link.*
Articles 2.1, 3.1 and 4.2(b) of the Agreement on Safeguards.

4.103 **Chile** submits that the CNCE failed to establish a genuine and substantial causal link between the alleged increased imports and the alleged threat of serious injury to the domestic industry as required by Articles 2 and 4.2(b) of the Agreement on Safeguards. According to Chile, Article 4.2(b) requires that the competent authorities demonstrate, "on the basis of objective evidence", the existence of a causal link.²⁵⁷ Chile further submits that these violations point to a breach of Article 3.1 of the Agreement on Safeguards, since the CNCE's report does not provide any reasoned and adequate explanation of the findings and conclusions reached on all pertinent issues of fact and law relating to the determination of causal link.²⁵⁸

4.104 **Chile** maintains that, for an analysis of causation to be consistent with Articles 2 and 4.2(b) of the Agreement on Safeguards, the methodology adopted by the investigating authorities must consist of a three-stage approach that complies with the so-called principle of non-attribution of injurious effects of other factors as has been described by the Appellate Body.²⁵⁹ ²⁶⁰ Chile contends that, in order to explain their determination of causal link, 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. In its view, this explanation must be clear and unambiguous, it must not merely imply or suggest an explanation and it must be a straightforward explanation in explicit terms.²⁶¹ ²⁶²

4.105 **Argentina** contests these claims and refers to Section V.4 of the Annex to Record No. 781 concerning the determination of threat of injury as a result of imports which concludes with the statement "[t]he import situation and the degree of variation and sensitivity of the indicators listed and described in Section V.2 prove the existence of a causal link between the investigated imports and the threat of serious injury."²⁶³

²⁵⁶ See Argentina's first oral statement, para. 53.

²⁵⁷ See Chile's first written submission, para. 4.72.

²⁵⁸ See Chile's first written submission, para. 4.100.

²⁵⁹ Chile refers to the Appellate Body Reports, *US – Wheat Gluten*, para. 69 and *US – Lamb*, para. 177.

²⁶⁰ See Chile's first written submission, para. 4.74.

²⁶¹ Chile refers to the Appellate Body Report, *US – Line Pipe*, paras. 216 and 217.

²⁶² See Chile's first written submission, para. 4.75. See also Chile's First Oral statement, para. 39.

²⁶³ See Argentina's first written submission, para. 108.

4.106 **Chile** replies that Argentina's defence merely repeats part of what was stated by the CNCE.²⁶⁴ In Chile's view, the CNCE's analysis does not meet the obligations laid down in Article 4.2(b) since the CNCE fails to:

- (a) ensure objectively that an alleged threat of injury is correctly attributed to an alleged increase in imports;
- (b) identify other possible factors that could explain the alleged threat of injury other than an alleged increase in imports;
- (c) separate the injurious effects of an alleged increase in imports from those caused simultaneously by other factors;
- (d) identify the nature and scope of the injurious effects of an alleged increase in imports as distinct from the injurious effects of other known factors;
- (e) explain satisfactorily the nature and scope of these injurious effects;
- (f) establish explicitly, through a reasoned and adequate explanation, that the alleged threat of injury caused by factors other than the alleged increase in imports is not attributed to increased imports; and
- (g) provide a clear and unequivocal explanation; merely implying or suggesting an explanation.²⁶⁵

4.107 **Chile** further contends that regardless of whether there is any foundation for Argentina's arguments, the fact is that these arguments are merely a set of *ex post facto* explanations which cannot be found among the remarks made by the CNCE directors at the time when they should have been analysing the causal link between the alleged increased imports and an alleged threat of serious injury.²⁶⁶
²⁶⁷

(a) Whether Argentina Followed any Rule with Respect to the Determination of the Causal Link

4.108 **Chile** claims that Argentina gave inadequate consideration to certain relevant factors while failing to analyse others. In Chile's view, most of the relevant factors, if not all, that the CNCE considered or failed to consider, do not point to any causal link between the alleged threat of serious injury and the alleged increase in imports.²⁶⁸ Chile is also of the view that, in supporting its determination, the CNCE does not distinguish or separate the effect of the factors that it did consider from the effect of others factors that it did not analyse and which may have had an influence on the loss of market share adduced by the industry. Thus, from a methodological point of view, the CNCE's examination of

²⁶⁴ See Chile's first oral statement, para. 42.

²⁶⁵ See Chile's first oral statement, para. 43. See also Chile's rebuttal, para. 42.

²⁶⁶ Chile refers to the arguments by Argentina in paras. 108 to 127 of its first written submission and paras. 54 to 74 of its first oral statement.

²⁶⁷ See Chile's rebuttal, para. 43.

²⁶⁸ See Chile's first written submission, para. 4.100.

causality did not enable it to establish whether there was a genuine and substantial causal link between the adduced loss of market share and the recovery of imports. In Chile's view, this constitutes a violation Article 4.2(b) of the Agreement on Safeguards.²⁶⁹ Chile claims that the CNCE attributes its determination of threat of serious injury, in absolute terms, to alleged increased imports. Chile maintains that although other factors were recorded in the investigation, they were excluded by the authority when it came to analysing them or determining their impact on the situation of the domestic industry. Chile contends that, not only does Argentina fail to include anywhere the objective criteria justifying this manner of proceeding, but it does not even recognize the existence of other factors that could have had an influence on the loss of market share.²⁷⁰

4.109 **Argentina** responds that Chile's assertions regarding its understanding of the causal link are erroneous. Argentina points out that the investigating authority acted correctly in considering the effect caused by imports separately from the effect caused by other factors. In this regard, Argentina submits that this point was established by the Appellate Body.²⁷¹ Argentina considers that Chile interprets the Agreement on Safeguards incorrectly when it contends that imports by themselves, separately from other factors, must reach the necessary threshold in order to qualify as a threat of serious injury. In Argentina's view, although the increased imports must contribute to causing the injury or the threat of injury, this does not mean that they are capable by themselves of causing injury or threat thereof. In other words, there is no implication that imports must be the only cause of serious injury or threat of serious injury. Argentina submits that the Appellate Body has already established that the way Chile interprets the obligations under the Agreement on Safeguards is inaccurate.^{272 273}

4.110 **Chile** contends that Argentina is misinterpreting Chile's arguments. Chile explains that it never said that the CNCE in fact identified, distinguished and separated the effects of alleged increased imports from the effects of other factors. Chile contends that it argued and proved exactly the opposite. It points out that it demonstrated that the CNCE directors, without going through the exercise of identifying, separating and evaluating the effects of other factors which coincided with the alleged increased imports, simply attributes all of the alleged threat of injury to those imports. Chile further submits that what it has said is that in order to attribute threat of injury properly, the competent authorities must demonstrate that an alleged increase in imports has alone reached the threshold for qualification as "serious". By this, it intended to make it clear that there must at least be a genuine and substantial cause-effect relationship between the alleged increased imports and a threat of serious injury,

²⁶⁹ See Chile's first written submission, para. 4.76.

²⁷⁰ See Chile's first written submission, paras. 4.77 to 4.78.

²⁷¹ Argentina refers to the Appellate Body Report, *US – Lamb*, para. 179.

²⁷² Argentina refers to the Appellate Body Reports, *US – Wheat Gluten*, para. 67; and *US – Line Pipe*, para. 209.

²⁷³ See Argentina's first oral statement, paras. 54 to 56.

regardless of any other factors which may at the same time be contributing to the existence of such a threat.^{274 275}

(b) Whether there were Other Objective and Quantifiable Factors that the CNCE did not Analyse

4.111 **Chile** claims that the file of the investigation records a series of relevant factors which may have had an influence on the loss of market share adduced by the Argentine industry that the CNCE did not consider or evaluate in making its finding of a causal link. In addition, there are other public and well-known economic factors which the CNCE could not objectively overlook.²⁷⁶ Chile contends that, although the majority of these factors are recorded in the file of the investigation, and although some of them were well known to the public, they are not even identified by the CNCE in its causal analysis. Chile submits that Argentina at no time provides any explanation of this fundamental omission – rather, it says, it simply tries to address the possible injury factors indicated by Chile, arguing that they are not alleged injury factors and consequently bear no causal relation to the said threat.²⁷⁷ Chile argues that, regardless of whether this explanation by Argentina is correct or not, it does not appear in, or form part of, the CNCE's causal analysis. In its view, the entire argument is an *ex post facto* explanation.²⁷⁸

4.112 **Argentina** replies that it conducted its threat of injury analysis in compliance with Article 4.2(a) and (b) of the Agreement on Safeguards.²⁷⁹ Argentina argues that in the course of the investigation, as Chile acknowledges, the investigating authority did establish the serious injury factors other than increased imports. In doing so, the investigating authority distinguished between the effects of these factors and the impact of imports, and also explained their nature and scope. Thus, Argentina contends, it is difficult to agree with Chile's assertions to the effect that the investigating authority did not act in conformity with Article 4.2(a) of the Agreement on Safeguards. In Argentina's view, if Chile recognizes that the effects of the factors other than imports are recorded in the file of the investigation, it cannot at the same time claim that the argument is belated.²⁸⁰

²⁷⁴ Chile refers to para. 4.77 of its first written submission and paras. 38 et seq. of its first oral statement. See para. 4.108 of the present report.

²⁷⁵ See Chile's rebuttal, paras. 37 to 42.

²⁷⁶ See Chile's first written submission, para. 4.79.

²⁷⁷ Chile refers to paras. 109 to 127 of Argentina's first written submission.

²⁷⁸ See Chile's first oral statement, para. 45

²⁷⁹ See Argentina's first written submission, para. 109.

²⁸⁰ See Argentina's rebuttal, para. 37.

(i) Whether CNCE Analysed Other Factors that Appear in the Technical Report

Imports from Greece

4.113 **Chile** submits that, assuming for a moment that the threat of injury alleged by CAFIM was real, and based strictly on the facts and considerations recorded in the CNCE report, there was no separate identification in that report of the alleged injurious effects of a factor which is qualified in the file itself as the substantial and authentic cause of the said threat, that factor being specific imports from Greece which, according to the report, are the main origin, and which, given that country's pricing structures and policies, enter the Argentine market under unfair trading conditions²⁸¹, with a clear capacity to displace the domestic industry and cause it serious injury.²⁸² Chile further submits that it is not its intention to make a value judgement or a pronouncement on whether or not exports of Greek peaches represent unfair trading practices. Chile indicates that it is making this argument in accordance with the objective merit of the record contained in the investigation file, which is what in principle and in the final analysis is important, to ascertaining whether Argentina acted consistently with its WTO obligations.

4.114 As **Chile** sees it, the requirement of threat of serious injury or serious injury under Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards applies to imports in general, without distinction as to origin, which enter the market of a specific Member under "fair" trading conditions.²⁸³ Chile contends that any reader, upon reading the "file of the investigation", would objectively conclude that on the merits of that file, the genuine and substantial cause of the alleged threat of injury determined by the CNCE and alleged by CAFIM was not imports in general occurring under fair competition. Rather, it claims, it was imports specifically from Greece (the main origin), and not Chile, that were able, owing to their volume, but above all to their price, to cause injury to the domestic industry, a situation that was

²⁸¹ In response to question No. 56 of the Panel ("*Please refer to para. 50 of Chile's written rebuttal. Does Chile allege that an investigating authority must establish that products are being imported in conditions of fair competition before it imposes a safeguard measure?*"), Chile explains that although the investigating authority is not required to establish in its report whether products from a specific origin are being imported in conditions of fair competition before it imposes a safeguard measure, it must evaluate the characteristics of the imports from such origin and the conditions in which they compete with the domestic product, as compared with the characteristics and conditions of competition of imports from other origins. An investigating authority can thus perfectly determine whether the genuine and substantial cause of an alleged threat of injury is imports from one origin in particular on the basis of the conditions in which they enter its market. If the causal link is demonstrated by the facts under investigation, it is not appropriate to impose a safeguard measure on imports in general, without discrimination as to their origin. Moreover, if imports from one origin in particular enter the country in conditions of unfair competition, the appropriate measure would be an anti-dumping or countervailing duty. If those imports were already subject to a countervailing duty but this failed to effectively offset the effects of the subsidy, it would be appropriate to increase that duty but not to impose a safeguard measure.

²⁸² See Chile's first oral statement, para. 46.

²⁸³ See Chile's first oral statement, para. 48.

aggravated by the seasonal differences in the production and harvest of the product under investigation between Argentina (Southern Hemisphere) and Greece (Northern Hemisphere).^{284 285} Chile points out that this was the case in spite of the imposition of countervailing duties in September 1996 on imports of preserved peaches from the European Union. Chile submits that the imposition of countervailing duties, in spite of the minimum specific import duty of US\$0.20 per kg imported, failed to place the imports from the main origin (Greece) in a fair-trade situation.²⁸⁶ In paragraph 47 of its Rebuttal, Chile cites 36 passages from the "file of the investigation"²⁸⁷, including passages from a) the opinions of the directors who voted in favor as well as against the measure, as included in the Annex to Record No. 781; and b) the conclusions of the investigation authority and the arguments of CAFIM and its associated companies, as included in the technical report. It also submits that a proper analysis of the statistical tables and charts in the annex to the technical report reveals that the cited passages are merely a faithful reflection of that data.²⁸⁸

4.115 **Argentina** contests Chile's argument to the effect that it is peaches of a distinct origin that are responsible for the situation of the industry and, in particular, its statement whereby the investigation itself attributes the situation to peaches from the European Union (more specifically, from Greece). Argentina indicates that in its reply to the questions of the Panel, it provided a detailed account of the situation with respect to the application of countervailing duties to peaches from the European Union. However, it adds, the analysis of this element carried out in the framework of the investigation essentially concerned matters relating to the capacity to generate stocks, the excess harvest in Greece owing to favourable climatic conditions and the price flexibility of peaches of that origin. In its view, it bears no relationship to the notion that in spite of the application of countervailing duties, peaches of European origin continued to be traded under unfair competition.²⁸⁹ It further argues that a passage cited by Chile in footnote 27 of its first oral statement confirms this.²⁹⁰ In response to question No. 55 of

²⁸⁴ See Chile's rebuttal, para. 45.

²⁸⁵ See also Chile's response to question No. 20.a) of the Panel ("*Why does Chile assert that, in the view of Argentina and CAFIM, a situation of unfair competition continued to exist despite the imposition of countervailing measures?*") and 20.b) ("*Does Chile believe that the imposition of countervailing measures on imports of certain products prevents the imposition of safeguard measures on imports of the same products? If so, on what basis?*") of the Panel.

²⁸⁶ See Chile's rebuttal, para. 46.

²⁸⁷ Chile cites passages from pages 6 to 14 of the Annex to Record No. 781 and from pages 32 to 91 of the technical report.

²⁸⁸ Chile refers to Table 15.3, to Charts 3, 4, 5.1 and 5.2, Tables 16.1 and 16.2, Charts 6, 7.1, 7.2, 8.1, 8.2, Tables 17 and 18 and Chart 9 of the technical report.

²⁸⁹ Argentina refers to Exhibits ARG-II, ARG-III, ARG-IV, ARG-IX and ARG-XI.

²⁹⁰ Argentina cites "*These changes at the international level have resulted in unforeseen and unexpected imports of the product under investigation from different origins, with a growth in imports from the EU, taking place under conditions such that although fair competition has been restored through the application of countervailing duties, the increase has been sharp over the past two years.*"

the Panel²⁹¹, **Argentina** indicated that the subsidy component of the imports from Greece was duly neutralized by the countervailing duties.

Cyclical Nature of Imports and Net Importer Status

4.116 **Chile** maintains that the international preserved peaches market is cyclical because it is so closely associated with agricultural fluctuations affecting producers, particularly Greece. At the same time the supply of preserved peaches from Greece has a strong influence on international prices, and hence on the volume of exports to its markets of destination. Climatic factors in Greece led to a sharp fall in Argentine imports in 1997/1998. If, according to Chile, over the past ten years Argentina has pursued a policy of opening up to the international preserved peaches market, it is logical that its industry should be sensitive to changes in that market, particularly the fluctuations and cycles of the leading world producer and exporter. In fact, Chile claims, the technical report shows that the domestic industry increased the volume of sales on the domestic market, having to reduce its exports, at least in 2000, to satisfy domestic demand.²⁹²

4.117 **Argentina** does not agree that the international preserved peaches market is cyclical "because it is so closely associated with agricultural fluctuations affecting producers" and refers to Tables 5 to 13 in the "International market" section of the technical report as showing that there was no evolution of the kind described by Chile. Nor does Argentina agree with the reference to Argentina's "position of net importer" because it takes no account of the structural changes that took place in the Argentine productive sector when Argentina began opening up its market.²⁹³

Change from the Status of Importer to a More Export-Oriented Position

4.118 **Chile** claims that, notwithstanding the low volume of exports in 2000 as a result of the need to satisfy domestic demand, the recent evolution of domestic production, as recorded in the technical report, reflects a change in the position of the domestic industry from net importer to exporter. Chile explains that, leaving aside 1998, during which imports were minimal, in 1999, when their recovery was already nearing completion, Argentina exported 6,878 tons and imported 6,601 tons. In Chile's view, this trend towards a more export-oriented

²⁹¹ Namely, "*Chile's answer to question 20(c) indicates that it believes that 'the cause of the alleged threat of serious injury appears to be imports from Greece in conditions of 'unfair' competition'. Could subsidization of production in Greece have contributed to the threat of serious injury to the Argentine industry? If not, why not? If so, where did the competent authorities take it into account in their assessment of the causal link between the increased imports and the threat of serious injury?'*".

²⁹² See Chile's first written submission, paras. 4.82 to 4.87.

²⁹³ See Argentina's first written submission, paras. 110 and 111. See also Argentina's first oral statement, paras. 57 and 58.

position could be having an influence on the loss of market share adduced by the domestic industry.²⁹⁴

Climatic Factors

4.119 As regards local climatic risks and integration of production, **Chile** contends that, according to the technical report, one element which has a direct impact on local output is the high climatic risk in the Mendoza area which affects the quantities, and hence the prices, of peaches available for the industry. The fact that the manufacturing industry has become closely integrated with the primary sector has meant that the manufacturing industry now has to assume the risks associated with the climate directly. This factor is of particular importance in determining the levels of competitiveness of the peach processing industry as well as its fixed costs, and could have a direct impact on the loss of market share adduced by CAFIM.²⁹⁵ As regards world climatic factors, Chile submits that, although between 1997 and 1998 there was a disruption in the historical levels of imports, the CNCE failed to take into consideration and evaluate the possible effect of this factor in its analysis. On the contrary, Chile claims, it makes its findings by comparing the situation of the domestic industry during 1999 and 2000 without considering the trends for those years in the context of a recovery of imports. As an example, Chile mentions that Greece's lower prices in 1999 and 2000 can be explained to a considerable extent by the fact that those years were preceded by two years of high prices due to the lack of supply of canned peaches and to the increase in exportable production.^{296 297}

4.120 **Argentina** submits that, as regards the climatic factors, both domestic and international, these were evaluated in the context of Record No. 781 and the corresponding report. Firstly, it argues, the surplus harvest in Greece in the 1999/2000 season was reflected in the volumes and stocks available to be poured onto the export markets on top of the average values for the decade, as shown in the section on the evolution of international trade in preserved peaches (pages 46 to 72 of the technical report) containing tables reflecting the breakdown by country of the evolution of world production as well as exportable volume and stocks, based on USDA information. According to Argentina, these values show (technical report, page 59, Table No. 7) that in the case of the leading world exporter and supplier (Greece), available stocks in 1999 and 2000 were 152.25 per cent and 173.27 per cent higher, respectively, than the average for the whole period 1990/2000. In its view, these stocks, in a context such as the Argentine one in which consumption of preserved peaches was growing during the period under analysis while import prices were falling steadily (technical report, Table No. 16, page 1484) to the point where imports were systematically marketed at prices lower than domestic prices – by up to 20 per cent in 1999 and

²⁹⁴ See Chile's first written submission, paras. 4.88 to 4.89.

²⁹⁵ See Chile's first written submission, paras. 4.90 to 4.92.

²⁹⁶ Chile refers to the analysis made by one of the directors who voted against the application of the measure, Annex to Record No. 781, page 14, para. 5.

²⁹⁷ See Chile's first written submission, paras. 4.93 to 4.94.

2000 – and with domestic production increasing until 1999, cannot in any way be considered part of the normal cycle of recovery of the sector - in fact, they constitute a threat of injury scenario.²⁹⁸

4.121 **Argentina** considers that Chile's argument is biased and partial, in that it takes no account of the difference in context between the 1995/96 period and the 1999/00²⁹⁹ whilst, at the same time, even Chile could not but acknowledge the importance of Greece in world trade in preserved peaches³⁰⁰, and hence Greece's capacity to influence the world cycle, particularly prices, with its enormous production capacity and above all, its export capacity.³⁰¹ In Argentina's view, this can be seen in the enormous diversity of f.o.b. price quotations for Greek peaches depending on the market of destination, the quotation for the Argentine market being, in 1999, among the lowest, a fact which explains the increase in exports during 2000.³⁰² Argentina submits that Chile's claim is without foundation given the fall in Argentine production in 2000 of 12 per cent in the context of growth in apparent consumption over the previous year.³⁰³ As regards company strategy in this sector during the 1990s, Argentina replies³⁰⁴ that there was an extensive adjustment that enabled these companies to reduce climatic risks while ensuring a more reliable supply of raw materials, through technical improvements and vertical integration with the primary sector. Argentina submits that Chile itself admits that Argentina improved its competitive capacity, as demonstrated beyond question by the evolution of production costs for peaches.^{305 306}

(ii) Whether there were Other Factors which the CNCE Should Have Analysed that do not Appear in the Technical Report

4.122 **Chile** claims that there are various factors which are not reflected in the technical report, such as the devaluation of the euro against the dollar and the Argentine economic situation which should have been analysed by the CNCE.

²⁹⁸ See Argentina's first written submission, paras. 112 to 115. See also Argentina's first oral statement, paras. 59 to 62.

²⁹⁹ See Argentina's first written submission, para. 116.

³⁰⁰ Argentina refers to para. 4.82 of Chile's first written submission. See para. 4.116 of the present report.

³⁰¹ See Argentina's first written submission, para. 117.

³⁰² See Argentina's first written submission, para. 118.

³⁰³ See Argentina's first written submission, para. 119. See also Argentina's first oral statement, paras. 63 to 66.

³⁰⁴ Argentina refers to para. 4.91 of Chile's first written submission. See para. 4.119 of the present report.

³⁰⁵ Argentina refers to Tables 10.1, 10.2, 10.3 and 10.4 of the annex to the technical report; sheets 1452 to 1455.

³⁰⁶ See Argentina's first written submission, paras. 120 to 121. See also Argentina's first oral statement, paras. 67 to 68.

Devaluation of the Euro Against the Dollar

4.123 **Chile** observes that, as soon as the euro was introduced in 1999, it began to devalue against the dollar (as did the drachma in Greece, which adopted the euro in January 2000). Chile indicates that, coupled with the dollarization of the Argentine peso until recently, this could reasonably be seen to have had an influence on the rate of recovery of imports of preserved peaches from the European Union, particularly Greece. To Chile, it follows that this factor could have been linked to the loss of market share adduced by the domestic industry.³⁰⁷

4.124 **Argentina** responds that, first of all, regardless of whether or not there was an analysis of this variable, it should be recalled that in normative terms, the evolution of the exchange rate, particularly if the resulting competitive improvement is sustained over time, does not preclude the legitimate right of a country to adopt the necessary measures to protect its industry which could otherwise be seriously impaired. In Argentina's view, although obvious, it bears recalling that a safeguard is a mechanism that is activated in conditions of fair competition in response to an objective situation of competitive difference where there is injury or threat of injury to the domestic industry. Argentina adds that the fact that the situation may be the result of a technological improvement, the accumulation of inventories, production shocks or whatever in no way changes the situation as regards the justification of the measure, provided all of the relevant factors have been properly evaluated. Secondly, Argentina argues, in macroeconomic terms, it is a well-known fact that the effects of a devaluation are never immediate, particularly in the case of primary products whose production is distinctly seasonal. In other words, when it comes to explaining the surplus harvest in Greece and the historical accumulation of stocks, Greek overproduction precedes the devaluation in causal terms. Moreover, Argentina insists, the values referred to by Chile are purely nominal, i.e. they do not reflect the effective exchange rate (net of the relevant inflation index and possible export taxes).³⁰⁸

Argentine Economic Situation

4.125 **Chile** claims that the CNCE completely avoided recording and examining the Argentine economic situation. Indeed, Chile argues, towards the end of 2000, Argentina's level of indebtedness, both private and State, was extremely high and there was a general default on payments and decline in the purchasing power of the various economic intermediaries, a situation that did not spare the domestic preserved peaches industry. In view of this situation of imminent economic crisis, Chile claims that it is difficult to understand why the CNCE completely avoided recording and examining this factor in its investigation for the purposes

³⁰⁷ See Chile's first written submission, para. 4.95.

³⁰⁸ See Argentina's first written submission, paras. 123 to 124. See also Argentina's first oral statement, paras. 69 to 71.

of analysing the possible reasons for the domestic industry's loss in market share.³⁰⁹

4.126 **Argentina** responds that imports at decreasing, and, relatively speaking, low prices, introduced a substitution effect at the consumption-related stage of the product's cycle. Argentina explains that the fall in imports in 1998 due to the influence of climatic factors, and the subsequent stage, involving a recovery followed by progress beyond historical values, took place in a context in which the production situation in the preserved peaches sector in Argentina was changing and consumption was affected by a high rate of price-induced substitution. On this basis, Argentina submits, it was found that the effect of the economic recession in Argentina was not a factor in the deterioration of the sector as Chile claims, but that the chain of negative effects for a sector whose production was undergoing adjustment was initiated and aggravated by the presence of a volume of low-price imports.³¹⁰

(c) Whether the Upward Trend in Imports Coincides with Negative Trends in Other Injury Factors

4.127 **Chile** considers that, as stated in the file of the investigation, most, if not all, of the threat of injury factors which the CNCE may or may not have invoked in support of its threat of injury finding, point to the exact opposite. According to Chile, those factors were either negative before the recovery of imports during 1999 and 2000, or evolved positively when the recovery took place, or suffered only a very small decline in 2000, or did several of the above at the same time.³¹¹

4.128 According to **Chile**, the annual production capacity of preserved peaches for companies in the survey list totalled 38,110 tons in 1997 and 44,430 tons in 1998. During the years that followed, in which the CNCE describes a sharp and unforeseen increase in imports, production capacity rose to 51,010, and 53,130 respectively. Chile further indicates that the degree of utilization of production capacity for the companies in the survey list was 71 per cent in 1997 and 73 per cent in 1998, while in the two following years it reached 88 per cent and 73 per cent respectively. It adds that the profitability (net result/total assets) of the companies in the survey list rose at the end of the period when imports began to recover, and fell when imports were interrupted. Examples of the former are La Colina: with an increase from 2 per cent in 1999 to 3 per cent in 2000, and IAM, which remained at 4 per cent from 1998 to 2000. An example of the latter is Cartellone, with a profitability of close to 0 per cent in 1997, falling to minus 2 per cent during the year in which the disruption reached its peak (1998), and remaining negative up to 2000. In the case of Benvenuto, profitability was at 9 per cent during 1997, falling to 6 per cent during the following year and remaining at 5 per cent during 1999 and 2000. As regards the apparent consumption of preserved peaches of Argentine origin for 1999 and 2000, when

³⁰⁹ See Chile's first written submission, para. 4.96.

³¹⁰ See Argentina's first written submission, paras. 126 to 127. See also Argentina's first oral statement, paras. 72 to 74.

³¹¹ See Chile's first written submission, para. 4.97.

the CNCE claims that there was a sharp and unforeseen increase in imports, they totalled 55,763 tons for 1999 and 55,020 tons for 2000. However, these are CNCE estimates made without any explanation of the methodology used. Chile adds that the figures provided by CAFIM were 55,763 tons for 1999 and 32,774 tons for 2000. Chile argues that, if we compare 1998 and 2000 on the basis of the CNCE estimate, we find that in 1998, when imports were at a minimum, and in 2000, when growth in apparent domestic consumption was 17,383 tons: imports (adjusted for inventories) increased by 7,308 tons, and sales of the domestic product increased by 10,075 tons. As regards the employment level in the peach production sector, Chile sustains that it increased by 18 per cent in 1999, decreasing slightly (by 4 per cent) in 2000.³¹² According to Chile, this shows that there is no causal link between the upward trend of imports during 1999 and 2000 (recovery) and the alleged threat of injury claimed by CAFIM and found by the CNCE.³¹³

5. *Permissible Extent of Application of the Measure. Article 5.1 of the Agreement on Safeguards*

4.129 **Chile** maintains that the concept of serious injury or threat of serious injury in Article 5.1 of the Agreement on Safeguards is the same as that which appears in Article 4. Chile claims that, with respect to Article 4.2(b) in particular, the safeguard measure that is imposed must necessarily be proportionate to the injury or threat of injury attributable to the increase in imports that the competent authorities have adequately determined on the basis of an objective examination of the causal link.³¹⁴ Chile submits that, bearing in mind that Argentina failed to comply with its obligations under Article 4.2(b) of the Agreement on Safeguards, the measure at issue can also be presumed to violate Article 5.1.³¹⁵ ³¹⁶ Chile further argues that, without prejudice to the above, the facts show that the measure, its level and the way it was formulated, went beyond and continues to go beyond the extent necessary to prevent the alleged threat of serious injury and facilitate adjustment. The specific duty imposed is so out of proportion that it is tantamount to an import prohibition. This is confirmed by the fact that since the application of the provisional safeguard measure, to date, Argentina has not imported any preserved peaches from Chile or indeed any other country.³¹⁷

4.130 **Argentina** submits that Chile is confining itself to dogmatic statements to the effect that the measure does not meet the requirements of Article 5.1 of the Agreement on Safeguards. Argentina submits that, contrary to what Chile maintains, it has shown that it complied with the requirements of Article 4 of the

³¹² See Chile's first written submission, para. 4.97.

³¹³ See Chile's first written submission, para. 4.99.

³¹⁴ See Chile's first written submission, para. 4.104.

³¹⁵ In response to question No. 23 of the Panel ("*Does Chile allege that the measure falls within Article 5.1, second sentence, of the Agreement on Safeguards, which applies to quantitative restrictions?*"), Chile confirmed that it alleges that the Argentine safeguard measure violates the first sentence of Article 5.1 of the Agreement on Safeguards.

³¹⁶ See Chile's first written submission, para. 4.105.

³¹⁷ See Chile's first written submission, paras. 4.106 to 4.108.

Agreement on Safeguards.³¹⁸ Argentina also refers to Chile's statement to the effect that Argentina has failed to comply with Article 5.1 of the Agreement on Safeguards because the measure, consisting of the application of specific duties, went beyond the extent necessary to prevent the threat of serious injury and to facilitate adjustment.³¹⁹ Argentina responds that Chile substantiates this statement by merely indicating the amount of the specific duties and their share of the percentage of customs duties applied to Chilean exports, and maintaining, without further explanation, that this amounted to an import prohibition. In this connection, Argentina points out that in accordance with Article 2.2 of the Agreement on Safeguards, a safeguard is applied to a product being imported irrespective of its source.³²⁰

4.131 **Chile** replies³²¹ that the concept of serious injury (including threat of serious injury) used in Article 4.2(b) of the Agreement on Safeguards is the same as the concept used in Article 5.1. Consequently, Chile argues, if the CNCE made no analysis enabling it properly to attribute the alleged threat of serious injury to an alleged increase in imports, it is impossible for that authority to have determined and known what was the extent necessary to prevent that threat and to facilitate adjustment. Chile stresses that the mere fact of having demonstrated that the CNCE did not comply with its obligations under Article 4.2(b) of the Agreement on Safeguards establishes a presumption or a prima facie case that the Argentine measure in turn violated Article 5.1 of the said Agreement.³²² In Chile's view, this prima facie case or presumption is not in any way rebutted by Argentina.³²³

4.132 **Argentina** considers that, as argued by the United States in its third party submission in this dispute, even if Argentina had acted inconsistently with Article 4.2(b) of the Agreement on Safeguards, that does not justify the presumption that the said inconsistency automatically entails non-compliance with Article 5.1 of the Agreement on Safeguards.³²⁴ In this connection, Argentina points out that, where such a presumption exists under the WTO Agreements, it is explicitly indicated.³²⁵ In response to question No. 22 of the Panel³²⁶, Argentina explained that the views of Chile and the European Communities are based on the Appellate Body Report in *US – Line Pipe*. In

³¹⁸ Argentina refers to para. 4.105 of Chile's first written submission. See para. 4.129 of the present report.

³¹⁹ Argentina refers to paras. 4.106 to 4.108 of Chile's first written submission. See para. 4.129 of the present report.

³²⁰ See Argentina's first written submission, paras. 128 to 132. See also Argentina's first oral statement, paras. 75 to 80.

³²¹ Chile refers to Argentina's arguments in paras. 128 to 132 of its first written submission. See para. 4.130 of the present report.

³²² Chile refers to the Appellate Body Report, *US – Line Pipe*, paras. 249, 252, 261 and 262.

³²³ See Chile's first oral statement, paras. 56 to 57.

³²⁴ Argentina refers to paras. 17 to 20 and texts quoted therein, of the United States' third party submission. See para. 5.27 of the present report.

³²⁵ See Argentina's first oral statement, para. 78.

³²⁶ Namely, " Could Argentina comment on the views of Chile, the United States and the European Communities as to whether a violation of Article 4.2(b) of the Agreement on Safeguards constitutes a prima facie case of a violation of Article 5.1 of the Agreement on Safeguards? ".

Argentina's view, the circumstances of that dispute do not match the circumstances of this case since the conclusions of the Appellate Body in that case are based on the circumstance that the United States had not acted in conformity with Article 4.2(b) of the Agreement on Safeguards, nor had it refuted that claim. Argentina submits that neither of these two elements of this precedent apply to this case, since Chile has not demonstrated that Argentina violated Article 4.2(b) of the Agreement on Safeguards and Argentina has refuted that claim.

4.133 **Chile** insists that the "serious injury" referred to in Article 4.2 and the "serious injury" referred to in the first sentence of Article 5.1 are the same. In its view, the principle of non-attribution established in Article 4.2(b) has two purposes: (i) it seeks to ensure that in situations in which there are various factors causing injury at the same time, the competent authorities do not infer the required "causal link" between alleged increased imports and an alleged threat of serious injury or actual serious injury on the basis of the injurious effects of factors other than the said increased imports; and (ii) it serves as a criterion for ensuring that only an appropriate share of the overall injury is attributed to alleged increased imports. According to Chile, it is precisely this second purpose that determines the circumstances in which it is acceptable to apply a safeguard measure under the first sentence of Article 5.1. Thus, Chile concludes, if the complainant demonstrates that the respondent violated Article 4.2(b) of the Agreement on Safeguards, it establishes a prima facie case of violation of the obligation imposed by the first sentence of Article 5.1.³²⁷

4.134 **Chile** observes that, in its reply to question No. 9 of the Panel³²⁸, Argentina points out that at the time of the investigation and the adoption of the safeguard measure, Chile was paying a tariff of 11.5 per cent because it had a preference of 30 per cent under Economic Complementarity Agreement No. 35. Chile contends that this reply is entirely wrong. It explains that on 18 January 2001, when Argentina applied the provisional safeguard measure consisting in a specific duty of US\$0.50 per kg. net imported, Chile did in fact pay a tariff of 11.5 per cent in view of its tariff preference. However, during the investigation that was under way and prior to the imposition of the definitive safeguard measure, the tariff increased from 16.5 per cent to 30 per cent, finally settling at 28 per cent. Thus, the tariff paid by Chile was 19.6 per cent considering the tariff preference. It was only in March 2002 that Argentina restored the tariff to its original level of 16.5 per cent (11.5 per cent for Chile).³²⁹ Thus, Chile concludes, the specific duties applied under the safeguard measure, combined with Chile's tariff situation as described above and the tariff situation of the member States of the European Communities, almost automatically spelled the total elimination of outside competition for preserved peaches in the Argentine market.

4.135 Also in its Rebuttal, **Chile** claims that it has not made any dogmatic statements to demonstrate that the safeguard measure went beyond the extent

³²⁷ See Chile's rebuttal, paras. 54 to 55.

³²⁸ See footnote 36 of the present report.

³²⁹ Chile refers to footnotes 52 and 53 to its first written submission.

necessary to prevent the alleged threat of serious injury and facilitate adjustment.³³⁰ Chile submits that it has explained and provided evidence of how the minimum specific import duty applied with the safeguard led to a situation where since its provisional imposition, the flow of exports of the product under investigation to Argentina from the main origins, Chile and Greece, has halted completely.³³¹ In any case, Chile argues, if Argentina is of the opinion that this statement is dogmatic and not true, it should provide the Panel with official information showing the contrary.³³²

4.136 **Argentina** stresses that the application of the safeguard measure complies with the requirement set forth in Article 5.1 of the Agreement on Safeguards in that it is applied only to the extent necessary to prevent or remedy the serious injury and facilitate adjustment. Indeed, Argentina explains, imports rose from 3,568 tons in 1998 to 7,271 tons in 1999, and then to 12,181 tons in 2000. In relative terms, these volumes represented annual increases of 103.7 per cent and 68 per cent respectively. Furthermore, it adds, if one analyses imports in volume as a percentage of domestic production, we note a sharp increase of 10 per cent between 1999 and 2000. Likewise, the growth rate for that indicator (imports as a percentage of production) reached 90 per cent for 2000 as compared to 1999. One must also take account of the price of the imported product in relation to the price of the domestic product (US\$1.081). If one bears this factor in mind, one can see that the application of the safeguard measure was appropriate (US\$0.50). If the amount of the specific duty under the safeguard measure had been less, the application of the measure would not have had any effect on imports. The price of Greek peaches, once the safeguard duty is deducted, is US\$0.654. In the light of these circumstances, Argentina claims that it is easy enough to understand the rationality of the measure, which provides for a liberalization period involving a percentage reduction of the measure. The reduction is of 10 per cent for the year following the base year and 20 per cent for the last year. Finally, Argentina notes that pursuant to Article 2.2 of the Agreement on Safeguards, a safeguard measure is applied irrespective of the origin of the product.³³³

6. *Investigation Report. Article 3.1 of the Agreement on Safeguards.*

4.137 **Chile** claims that it does not emerge from the file of the investigation "published"³³⁴ by the competent authorities (the Record No. 781 and the

³³⁰ Chile is refuting Argentina's statements to this end in para. 128 of its first written submission. See para. 4.130 of the present report.

³³¹ Chile refers to paras. 4.107 to 4.108 of its first written submission, and Exhibits CHL-9, CHL-10 and CHL-11. See para. 4.129 of the present report.

³³² See Chile's rebuttal, para. 58.

³³³ See Argentina's second oral statement, paras. 63 to 68.

³³⁴ In footnote 55 of its first written submission, Chile explained that, although it was able to view the file of the investigation (CNCE No. 94/00) containing Record No. 781 and its Annex as well as the technical report and its Annex, and was able to obtain photocopies thereof, Argentina did not publish a report setting forth its findings and reasoned conclusions - i.e. conclusions explained in a reasoned and adequate manner - reached on all pertinent issues of fact and law, and therefore violated

technical report) that the CNCE made adequate and sufficient findings on all the pertinent issues of fact and law which, pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards, must be investigated, analysed, established, found and verified, as provided in the final part of Article 3.1 of the Agreement. Consequently, in Chile's view, the safeguarded measure imposed by Argentina violates its obligations under that Article.³³⁵

4.138 **Argentina** replies that Chile appears to be confusing the obligation to publish a report setting forth the findings and reasoned conclusions reached on issues of fact and law with the substantive elements in Articles 2 and 4 of the Agreement on Safeguards which must be established in order to apply a measure. Argentina understands that the inconsistency of a measure with the substantive requirements of the Agreement on Safeguards cannot also be claimed under Article 3.1 of the Agreement on Safeguards *vis-à-vis* the substantive requirements imposed by the Agreement on Safeguards for the application of a measure. Argentina therefore considers that in accordance with its detailed analysis, the CNCE made adequate and sufficient findings on all pertinent issues of fact and law which, pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards, must be investigated, analysed, established, found and verified, as provided in the final part of Article 3.1 of the Agreement.³³⁶

4.139 **Argentina** explains that, for example, the CNCE began by addressing the issue of the like or directly competitive product.³³⁷ With equal care, it analysed the domestic industry³³⁸, the evolution of imports³³⁹ and the conditions under which the imports occurred.³⁴⁰ As regards the situation of the industry and serious injury, the CNCE reached its conclusion on threat of serious injury to the domestic industry on the basis of an evaluation of each and every one of the factors listed in Article 4.2(a) of the Agreement on Safeguards as well as all of the other relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry.³⁴¹ Similarly, the CNCE evaluated the causal link between the increased imports and the serious injury or threat of serious injury to the domestic industry.³⁴² Thus, Argentina submits, the report published by the

the obligation imposed by the last sentence of Article 3.1 of the Agreement on Safeguards. Notwithstanding, for the purposes of this claim, Chile takes that file to be the report "published" by the competent authorities.

³³⁵ See Chile's first written submission, para. 4.109.

³³⁶ See Argentina's first written submission, paras. 133 to 136. See also Argentina's first oral statement, paras. 81 to 84.

³³⁷ Argentina refers to the Annex to Record No. 781, pages 2, 3 and 4, and corresponding analysis in the technical report.

³³⁸ Argentina refers to the Annex to Record No. 781, pages 4 and 5, and corresponding analysis in the technical report.

³³⁹ Argentina refers to the Annex to Record No. 781, pages 6 and 7, and corresponding analysis in the technical report.

³⁴⁰ Argentina refers to the Annex to Record No. 781, pages 9 and 10, and corresponding analysis in the technical report.

³⁴¹ Argentina refers to the Annex to Record No. 781, pages 7 and 8, and corresponding analysis in the technical report.

³⁴² Argentina refers to the Annex to Record No. 781, pages 10 and 11, and corresponding analysis in the technical report.

competent authorities, i.e. Record No. 781 of the CNCE and the technical report, clearly reveals that the investigating authority examined all of the pertinent information, including the conclusions reached on increased imports under such conditions, the like product, the domestic industry, the analysis of factors, threat of serious injury, causal link and unforeseen developments.³⁴³

4.140 **Argentina** notes that Chile appears to disregard the verifications conducted during the proceedings of which, as an interested party in the investigation, it took cognizance at the appropriate procedural stage without the slightest comment. Indeed, Argentina argues, it is untrue that "the CNCE based its conclusions on information supplied by part of the domestic industry without investigating or verifying ... ". Argentina stresses that Chile's involvement in the procedure was in fact very limited. It further adds that both the Record and the technical report contain explanations of the methodologies used by the CNCE.³⁴⁴

4.141 In response to question No. 1 of the Panel³⁴⁵, **Chile** submits that for a Member to comply with the obligation imposed by the final part of Article 3.1 of the Agreement on Safeguards, it is not enough for the report merely to mention the determinations reached by the competent authority. In Chile's view, it must also explicitly establish, through a reasoned and adequate explanation, how the facts investigated support each one of those determinations. Otherwise, Chile argues, the Agreement on Safeguards would not require the findings to be accompanied by "reasoned conclusions". Moreover, a Member must set forth its findings and reasoned conclusions reached on all pertinent issues of fact and law which, according to Article XIX:1(a) and the Agreement on Safeguards, must be considered, evaluated and demonstrated before that Member has the right to apply a safeguard measure, and must explain why it did not evaluate the factors it failed to consider or analyse. Chile considers that, for the purposes of requesting a finding of inconsistency of the Argentine measure with Article 3.1 of the Agreement on Safeguards, it was enough to submit a claim based exclusively on that Article since it has a principal and general status with respect to Article 4.2(c).

4.142 As regards the documents constituting the "report" that the competent authorities must publish for the purposes of Article 3.1 of the Agreement on Safeguards, **Chile** contends that whatever the documents the said authorities decide to publish, the fact is that they must, one way or another, set forth all of the findings and "*reasoned conclusions*" reached on "*all pertinent issues*" of fact and law. Chile also responds that, on the basis of what appears in the Annex to Record No.781, which is the part in which the CNCE directors record their

³⁴³ See Argentina's first written submission, paras. 137 to 138. See also Argentina's first oral statement, paras. 85 to 86.

³⁴⁴ See Argentina's first written submission, paras. 140 to 141. See also Argentina's first oral statement, paras. 88 to 89.

³⁴⁵ Namely, "*Which documents constitute the report that the competent authorities must publish for the purposes of Article 3.1 of the Agreement on Safeguards, and the detailed analysis that they must publish for the purposes of Article 4.2(c) of the Agreement on Safeguards? Is there any relevant legislative provision?*".

analysis of the facts investigated and present their findings, it is clear that the investigating authority did not comply with the final part of Article 3.1 of the Agreement on Safeguards, since it does not set forth all of its findings and "*reasoned conclusions*" reached on "*all pertinent issues*" of fact and law. It further contends that, although theoretically, the investigating authority is only supposed to investigate and record facts, while a decision-making authority is supposed to evaluate those facts and make conclusions and findings, in the case at issue, the technical report contains a series of determinations which presuppose a prior analysis of the facts investigated. Chile indicates that it has undertaken to point out these determinations and to show that they are not supported or substantiated by any reasoned and adequate explanation.³⁴⁶

4.143 In response to questions Nos. 1 to 3 of the Panel³⁴⁷, **Argentina** explains that the publication requirement of Article 3 of the Agreement on Safeguards starts with the initiation of the investigation, when the initiation itself is made public through notification in the Official Bulletin of the Republic of Argentina of the corresponding administrative act of the competent implementing authority introduced by a resolution, in this particular case Resolution ME No. 39 of 12 January 2001, published in the Official Bulletin of 18 January 2001. Consequently, Argentina argues, regardless of the specific communications by the authorities to those that may be interested in the investigation, such as the producers, importers, exporters, etc., the actual publication in the Official Bulletin constitutes an act which is in itself considered to be of general public knowledge in accordance with explicit provisions under Argentine law. Thus, any natural or legal persons who consider that they have a legitimate interest in the investigation may invoke that interest and appear during the investigation with a view to defending such rights as they consider to be theirs. Similarly, Law No. 19,549 (Law on Administrative Procedure of the Republic of Argentina) which, together with Regulatory Decree No. 1059/96, regulates the treatment of applications for safeguard measures, stipulates that interested parties shall have access to all information contained in the file, except such information as may be treated as "confidential", and all parties shall also be supplied information by the implementing authority when the hearings provided for under the same legislation take place.³⁴⁸

4.144 **Argentina** explains that, once the investigation has been completed, also in strict compliance with Article 3, the competent implementing authority issues a resolution, which is published in the Official Bulletin, thereby providing public notice of the decision adopted as a result of the investigation. This resolution, which in the case at issue is Ministry of the Economy Resolution No. 348/2001

³⁴⁶ See Chile's response to question No. 1 of the Panel. See footnote 345 of the present report.

³⁴⁷ For question No. 1, see footnote 345 of the present report. Question No. 2, "*How was the investigation carried out by the competent authority? Which documents comprise the file of the competent authority?*" and question No. 3, "*Can factual information in the technical report and its Annexes, which does not appear in Acta 781 or the Annexed 15 page Expediente, constitute a finding or reasoned conclusion for the purposes of Article 3 of the Agreement on Safeguards? If so, how?*".

³⁴⁸ See Argentina's response to questions Nos. 1 to 3 of the Panel. See also Argentina's second oral statement, paras. 69 to 72.

of 6 August 2001, published in the Official Bulletin of 7 August, considering the different reports or determinations issued by the competent authorities in accordance with the prerogatives granted by the legislation in question, introduces the administrative act containing a summary of the results of the injury investigation conducted and the reasons which led to the decision to adopt a safeguard measure, as well as the modalities of its adoption.³⁴⁹

4.145 **Argentina** explains that Record No. 781, with its Annex, constitutes a single instrument, and is the injury determination of the implementing authority – the CNCE – which is based on the technical report. The technical report, as its name suggests, contains all of the objective data and information gathered during the investigation. The CNCE, when it adopts its decision, takes account both of the file of the investigation, made up, in this case, of 2,999 pages, and the technical report, and hence these two documents are integrated.³⁵⁰ Record No. 781 and its Annex, made up of five parts, constitute the CNCE's determination, added to which, there is the technical report with the scope described above, plus the 12 sets of documentation and three annexes making up the 2,999 pages covering the proceedings pertaining to the case.³⁵¹

4.146 **Chile** argues that if one examines what it has called the "file of the investigation", particularly Record No. 781 and its Annex, which contain the recommendations, conclusions and findings of the CNCE Board members, one finds that the said decision-making authority fails to establish explicitly, through reasoned and adequate explanations, how the facts investigated support each and every one of its determinations. Similarly, one finds that the said authority failed to set forth its findings and reasoned conclusions reached on all issues of fact and law which, according to Article XIX:1(a) and the SA, must be evaluated and demonstrated before the Member in question has the right to apply a safeguard measure.³⁵²

4.147 Furthermore, **Chile** argues that Argentina, both in its first written submission and its first oral submission, states that the report of the competent authorities to which the final part of Article 3.1 refers consists of Record No. 781 of the CNCE and the ITDF. Chile notes that notwithstanding these statements Argentina states in its rebuttal submission that the report of the competent authorities to which Article 3.1 of the Agreement on Safeguards refers is not the said file, but Ministry of the Economy Resolution No. 348/2001. For Chile, the Panel need only skim through Resolution No. 348/2001 to see that it violates the obligations laid down in the final part of Article 3.1 even more seriously than the "file of the investigation". According to Chile, the content of that Resolution is even more deficient than the content and tenor of the "file of the investigation", particularly Record No. 781 and its Annex. Chile argues that, with respect to those two documents, throughout these proceedings Chile has produced

³⁴⁹ See Argentina's response to questions Nos. 1 to 3 of the Panel. See also Argentina's second oral statement, para. 73.

³⁵⁰ See Argentina's second oral statement, para. 74.

³⁵¹ See Argentina's response to questions Nos. 1 to 3 of the Panel. See also Argentina's second oral statement, para. 75.

³⁵² See Chile's rebuttal, para. 65.

sufficient arguments and evidence, unrefuted by Argentina, to show a clear violation of Article 3.1 owing to: (i) the failure to explain, in a reasoned and adequate manner, how the facts investigated support each one of the determinations (explicit justification of the determinations); and (ii) failure to set forth the findings and reasoned conclusions reached on all issues of fact and law which, according to Article XIX:1(a) and the Agreement on Safeguards must be considered, evaluated and demonstrated before a Member has the right to apply a safeguard measure.³⁵³ In this regard, Chile insists that its claim has nothing to do with whether or not the Argentine competent authorities published a report in conformity with the obligations laid down in Article 3.1. For Chile, the basis for its claim is the fact that the content of the said report does not comply with the requirements of the final part of that Article.³⁵⁴

7. *Notification. Article 12.2 of the Agreement on Safeguards*

4.148 **Chile** submits that if one follows the precedent established in the Appellate Body report in *Korea – Dairy*, Argentina's notifications violate the second paragraph of Article 12 of the Agreement on Safeguards because they fail to provide evidence substantiating the finding of an alleged threat of serious injury caused by alleged increased imports, and they do not provide all of the pertinent information.³⁵⁵ In response to question No. 59 of the Panel³⁵⁶, Chile confirmed that Chile considers that the notification must refer to all factors listed, at a minimum, in Article 4.2(a) of the Agreement on Safeguards.

4.149 **Argentina** submits that its notifications to the Committee on Safeguards under Article 12.1(b) and 12.1(c) of the Agreement on Safeguards were made in conformity with Article 12.2 and Appellate Body precedent. It argues that the Argentine notification provided "all pertinent information" under Article 12.2, including evidence of threat of serious injury caused by increased imports as well as a precise description of the product involved, with an adequate definition of the like product and the domestic industry, and an analysis of the factors.³⁵⁷

4.150 **Chile** contends that, from its notifications to the Committee on Safeguards³⁵⁸, it would appear that Argentina merely provided an excerpt from

³⁵³ See Chile's second oral statement, paras. 6 to 9.

³⁵⁴ See Chile's second oral statement, para. 10.

³⁵⁵ See Chile's first written submission, para. 4.116.

³⁵⁶ Namely, "*In para. 4.114 of its first written submission, Chile claims that Argentina's notifications did not include three particular factors. Do the parties believe that the notification must refer to all factors listed in Article 4.2(a) of the Agreement on Safeguards? Does document G/SG/N/8/ARG/4, section 1, fifth bullet, refer to employment and productivity? Does it make any reference to capacity utilization?*".

³⁵⁷ See Argentina's first written submission, paras. 144 and 145. See also Argentina's first oral statement, para. 92.

³⁵⁸ In footnote 56 to its first written submission, Chile refers to Documents G/SG/N/8/ARG/4, G/SG/N/10/ARG/3, G/SG/N/11/ARG/3, G/SG/N/8/ARG/Corr.1, G/SG/N/10/ARG/2/Corr.1, G/SG/N/11/ARG/2/Corr.1, G/SG/N/8/ARG/4/Suppl.1, and G/SG/N/10/ARG/3/Suppl.1. In response to question No. 24 of the Panel ("*Can Chile confirm the document references for the notifications by Argentina to the WTO Safeguard Committee that it challenges?*"), Chile points out a mistake in the

the Annex to the Record containing the remarks of the CNCE directors that voted in favour of imposing the measure. The notifications also included Resolution No. 348/2001 of the Argentine Ministry of the Economy closing the investigation and imposing the safeguard. However, Chile argues, the notifications were not accompanied by any material evidence substantiating the cited remarks or the findings referred to in that Resolution; nor do these notifications contain all of the information pertinent to a determination of threat of injury. Chile specifies that the notifications do not make any reference to all of the relevant factors which, according to Article 4.2(b) of the Agreement on Safeguards must be evaluated, at a minimum, by the competent authorities. According to Chile, the only factors indicated in the notifications, but without any material evidence substantiating them, are "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" and "profits and losses".³⁵⁹

4.151 **Argentina** responds that in its notifications to the Committee on Safeguards, by "merely provid[ing] an excerpt from the Annex to the Record containing the remarks of the directors of the CNCE that voted in favour of imposing the measure" as claimed by Chile, it acted in conformity with Article 12.2.^{360 361} In Argentina's view if, when it comes to establishing the conformity of the process by which it is decided to apply a safeguard measure, it is not necessary for the required evaluation to be identical to the evaluation conducted by the national authority in assessing and applying Articles 2 and 4 of the Agreement, this threshold or congruity is even less applicable in cases of the kind covered by Article 12, in which a determination of injury or a threat thereof is not even involved. Argentina explains that the notification requirement in Article 12 is the first step in a process of transparency that can continue with a review by the Committee on Safeguards and eventual bilateral consultations with other Members that may have been affected.³⁶² Argentina submits that, in conformity with Article 12.2 of the Agreement on Safeguards, the Argentine notification includes, in addition to the evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, the expected duration and the timetable for progressive liberalization.³⁶³ In response to question No. 59 of the Panel³⁶⁴, Argentina indicates that it considers that the

listing of documents since the corrigendum identified as G/SG/N/8/ARG/Corr.1, G/SG/N/10/ARG/2/Corr.1, G/SG/N/11/ARG/2/Corr.1 in its first written submission does not refer to the measure challenged in this dispute.

³⁵⁹ See Chile's first written submission, paras. 4.111 to 4.114.

³⁶⁰ Argentina refers to the interpretation of this obligation in the Appellate Body Report, *Korea – Dairy*.

³⁶¹ See Argentina's first written submission, paras. 145 to 149. See also Argentina's first oral statement, paras. 93 to 97.

³⁶² See Argentina's first written submission, paras. 150 to 152. See also Argentina's first oral statement, paras. 98 to 100.

³⁶³ See Argentina's first written submission, para. 158. See also Argentina's first oral statement, para. 106.

³⁶⁴ See footnote 356 to the present report.

notification must refer to the injury factors set forth in Article 4.2(a) of the Agreement on Safeguards. However, Argentina adds, this minimum requirement does not imply that the evidence of threat of serious injury must include all of the details of the recommendation and the reasoning applied and set forth in the competent authority's report. According to Argentina, the Argentine notification includes precise data on employment, productivity and capacity utilization.

4.152 Regarding Chile's claims to the effect that the Argentine notifications did not contain all of the pertinent information and that the factors indicated in the notifications were not supported by any material evidence³⁶⁵, **Argentina** infers from all of the statements of the various panels and of the Appellate Body that it was only required to refer to the items expressly mentioned in Article 12, and in relation to the item concerning "evidence of injury or threat of injury", to confirm in its notification that in determining injury or threat of injury, the national authority had evaluated all of the factors mentioned in Article 4.2(a). In this connection, Argentina claims that it is possible to show that Argentina not only made the notifications as required, but even went beyond what was required by reporting on the appraisal of the factors other than increased imports referred to in Article 4.2(b). In Argentina's view, one needs only to refer to document G/SG/N/8/ARG/4, G/SG/N/10/ARG/3, G/SG/N/11/ARG/3 of 23 July 2001, which contains a specific section on "Evidence of serious injury or threat thereof caused by increased imports". In accordance with paragraph 4.113 of Chile's submission³⁶⁶, that section of the Argentine notification under Article 12.1(b) of the Agreement on Safeguards provides data concerning 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 levels of sales, and profits and losses. Likewise, and contrary to what Chile states in paragraph 4.114 of its submission³⁶⁷, the Argentine notification also includes precise data on productivity, capacity utilization and employment.³⁶⁸

4.153 At the same time, and contrary to what Chile claims³⁶⁹, **Argentina** contends that the following section, entitled "Information on whether there is an absolute increase in imports or an increase in imports relative to domestic production (see also Article 12.1 for the context)", presents in detail, with the support of precise data and figures, the analysis conducted by the competent Argentine authorities of the evolution of imports substantiating the finding of threat of serious injury, and provides all of the pertinent information to that end.³⁷⁰

³⁶⁵ Argentina refers to paras. 4.112 and 4.113 of Chile's first written submission. *See* para. 4.150 of the present report.

³⁶⁶ *See* para. 4.150 of the present report.

³⁶⁷ *Ibid.*

³⁶⁸ *See* Argentina's first written submission, paras. 153 to 156. *See also* Argentina's first oral statement, paras. 101 to 104.

³⁶⁹ Argentina refers to para. 4.116 of its Chile's first written submission. *See* para. 4.148 of the present report.

³⁷⁰ *See* Argentina's first written submission, para. 157. *See also* Argentina's first oral statement, para. 105.

4.154 **Chile** replies that the best evidence that Argentina failed to comply with its obligations under Article 12.2 of the Agreement on Safeguards can be found in the merits of the actual notifications made to the Committee on Safeguards. In Chile's view, the inconsistency of the Argentine measure with that provision emerges from the Argentine defence itself. Chile observes where the Panel asks Argentina where the explicit references to each injury factor in the notifications are, Argentina merely states that they can be found in "Part I (Evidence of serious injury or threat thereof caused by increased imports) of document G/SG/N/8/ARG/4, G/SG/N/10/ARG/3 and G/SG/N/11/ARG/3 of 23 July 2001."³⁷¹ However, Chile argues, Argentina does not substantiate its statement in any way, nor does it identify the serious injury factors allegedly referred to in Part I. Chile further indicates that Argentina's response to Chile's argument that it should have provided, together with its notification or in its notification, evidence to substantiate a finding of serious injury or threat thereof, was that this was not an obligation. However, Chile adds, it is according to Argentina itself that "the Argentine notification provided ... evidence of threat of serious injury caused by increased imports ...".^{372 373}

V. ARGUMENTS OF THE THIRD PARTIES

5.1 From the third parties in these proceedings, i.e. the European Communities, Paraguay and the United States, only the European Communities and the United States filed their comments within the 20 June 2002 deadline and presented Oral Statements during the third party session.

A. *European Communities*

1. *Standard of Review and Record of Investigation*

5.2 The European Communities recalls that domestic authorities are under a duty to evaluate all facts before them or that should have been before them in accordance with the WTO safeguards regime.³⁷⁴ The European Communities submits that this broad obligation of the domestic authorities is paralleled by the review that panels are called upon to exercise with respect to safeguard measures.^{375 376} The European Communities considers that parties to a panel proceeding are neither bound by nor limited to the arguments (whether factual or legal) that they may have developed before the competent authorities during

³⁷¹ Chile refers to Argentina's response to question No. 25 of the Panel ("*Where are there explicit references to each injury factor in the notifications?*").

³⁷² Chile refers to paras. 92 and 101 of Argentina's first oral statement. See paras. 4.151 and 4.152 of the present report.

³⁷³ See Chile's rebuttal, paras. 67 to 70.

³⁷⁴ See European Communities' oral statement, para. 2 where it refers to the Panel Report, *Korea – Dairy*, paras. 7.30 to 7.31 and 7.54.

³⁷⁵ See European Communities' oral statement, para. 2 where it refers to the Appellate Body Report, *US – Lamb*, para. 114, referring to the Appellate Body Report, *US – Wheat Gluten*; and Appellate Body Report, *US – Cotton Yarn*, para. 73.

³⁷⁶ See European Communities' oral statement, para. 2.

domestic proceedings (nor *a fortiori* are such parties foreclosed from bringing arguments if they failed to do so before domestic authorities)³⁷⁷, the only limit being evidence that was not in existence at the time the domestic authorities made their decision.^{378 379} The European Communities explains that this logically flows from the fact that the respective focus and objectives of the domestic and the panel proceedings may be different and from the fact that the panels' mandate under Article 11 of the DSU is independent of that of domestic authorities. Accordingly, in the European Communities' view, the Panel is not limited in its review by the "record of investigation".³⁸⁰

2. Unforeseen Developments

5.3 In the European Communities' view, the safeguard mechanism is an "extraordinary remedy"³⁸¹ that should only be relied upon in *emergency* situations, as indicated by the title of Article XIX of the GATT 1994. It should only be invoked when all the strict requirements which are set out in WTO law have been fulfilled, in particular because the reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters.³⁸²

5.4 With regard to the meaning of the term "unforeseen developments", the European Communities recalls the established interpretation of Article XIX:1(a) of the GATT 1994 that "unforeseen developments" are "*circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994"³⁸³, and that "this demonstration must be made *before* the safeguard measure is applied" and "must also feature in the same report of the competent authorities" in which the conditions for the adoption of a measure are accounted for. The European Communities states that thus, the competent authorities' report must provide an explanation as to why certain changes in circumstances could be regarded as "unforeseen developments".³⁸⁴

5.5 In view of the above, the European Communities contends that the safeguard measure taken by Argentina does not include any "demonstration as a matter of fact" that certain circumstances constituted "unforeseen developments" at the time the competent authorities made their decisions. Furthermore, the

³⁷⁷ See European Communities' oral statement, para. 4 where it refers to the Appellate Body Report, *US – Lamb*, para. 113.

³⁷⁸ See European Communities' oral statement, para. 4 where it refers to the Appellate Body Report, *US – Cotton Yarn*, para. 77.

³⁷⁹ See European Communities' oral statement, para. 4.

³⁸⁰ See European Communities' oral statement, para. 6.

³⁸¹ See European Communities' third party submission, para. 4 where it refers to the Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.

³⁸² See European Communities' third party submission, para. 4.

³⁸³ See European Communities' third party submission, para. 5 where it refers to the Appellate Body Report, *US – Lamb*, para. 85; and *Argentina – Footwear (EC)*, para. 92, as confirmed in the Appellate Body Report, *US – Lamb*, para. 71.

³⁸⁴ See European Communities' third party submission, para. 5 where it refers to Appellate Body Report, *US – Lamb*, paras. 72 and 73.

European Communities submits that no element mentioned in Argentina's Resolution and technical report (or recalled in Argentina's first written submission) can indeed be termed as an "unforeseen development" within the meaning of Article XIX:1(a) of GATT 1994.³⁸⁵

5.6 As regards Argentina's reference³⁸⁶ to an increase in imports of particular magnitude in the most recent period investigated as an element relevant to fulfilling the "unforeseen development" precondition, the European Communities considers that while a surge in imports may "result" from "unforeseen developments", such increase cannot itself *be* an "unforeseen development" within the meaning of Article XIX:1(a) of the GATT 1994.³⁸⁷

5.7 The European Communities further points out that assuming *arguendo* that an increase in imports could be a relevant factor in deciding whether the "unforeseen developments" condition is met, it would certainly not be so in the present case.³⁸⁸ In this regard, the European Communities states that the Argentine authorities themselves acknowledge that prior to the import years considered, imports had decreased dramatically as a result of the climatic conditions in the countries accounting for the majority of the exports.³⁸⁹ The European Communities argues that the return to normal climate conditions and thus to normal production and international trade flows can only be a "*foreseen*" and "*expected*"³⁹⁰ development.³⁹¹ Lastly, the European Communities declares that more generally, as acknowledged by the Argentine authorities, agricultural imports are in fact characterized by a cyclical character, due to the inherent characteristics of agricultural production.³⁹²

5.8 As regards the other alleged unforeseen developments accounted for in the documents of the Argentine competent authorities, such as the production and market trends worldwide or in specific parts of the foreign markets³⁹³, the European Communities argues that there is no account of why these events were "unexpected" nor how they resulted in the imports increase specifically on the Argentine market during the reference period.³⁹⁴ The European Communities argues that the lack of such analysis and demonstration of "unforeseen developments" is already sufficient to establish that the safeguard measure under

³⁸⁵ See European Communities' third party submission, para. 6.

³⁸⁶ See Argentina's first written submission, paras. 38 to 39 and 43.

³⁸⁷ See European Communities' third party submission, para. 8.

³⁸⁸ See European Communities' third party submission, para. 9.

³⁸⁹ See European Communities' third party submission, para. 10 where it refers to the technical report, page 32, 58 and to Chile's first written submission, para. 4.13.

³⁹⁰ See European Communities' third party submission, para. 11 where it refers to the Appellate Body Report, *Korea – Dairy*, paras. 83 to 86; Appellate Body Report, *Argentina – Footwear (EC)*, paras. 91 and 92.

³⁹¹ See European Communities' third party submission, para. 11.

³⁹² See European Communities' third party submission, para. 12 where it refers to Record No. 781, page 13 in Exhibit CHL-1 of Chile's first written submission. The European Communities claims that this appears to be confirmed by Argentina's import statistics for 1992-2000 (Jan.-Nov.) produced by Chile (Exhibit CHL-4).

³⁹³ The European Communities refers to Argentina's first written submission, para. 39.

³⁹⁴ See, European Communities' third party submission, para. 13.

review is not consistent with Argentina's WTO obligations, and thus devoid of legal basis.³⁹⁵

3. *Increase in Imports*

5.9 In fulfilling the requirement relating to "increased imports" set out in Article 2.1 of the Agreement on Safeguards, the European Communities argues that three fundamental aspects must be addressed by the competent domestic authorities, and thus reviewed by panels. The first one is the reference period to be used for analysing import trends; the second is the assessment of whether the rate and amount of imports over the reference period were such as to fulfil Article 2.1 standards; and the third one, is the provision of an overall adequate explanation, in the safeguard measure or underlying report, of how the facts as a whole support a finding of "increased imports" within the meaning of Article 2.1.³⁹⁶ The European Communities considers that the Argentine authorities' investigation and conclusions are wanting in all three respects.

5.10 As to the reference period, the European Communities recalls that the "data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis".³⁹⁷ The European Communities submits that the period for observing increased imports must *be* the recent past³⁹⁸, so that imports must continue to increase or be very high in the latest period for a measure to be taken in accordance with Article 2.1, and that WTO practice has focused on the last one to three years (calendar years or 12-month periods) to be as close as possible, depending on data availability, to the date of application of the measure.³⁹⁹

5.11 Furthermore, the European Communities notes that the increase in imports must be assessed either in absolute or in relative terms, but in each case both through an end-point-to-end-point analysis and by examining the intervening trends between the end points of the reference period.⁴⁰⁰ The European Communities argues that the Argentine authorities even failed to set out clearly what period they actually used for their assessment of the import trends, nor were they consistent in referring to import data periods, as they should have been.^{401 402}

³⁹⁵ The European Communities refer to the Appellate Body Reports, *US – Lamb*, para. 72; *Argentina – Footwear (EC)*, para. 98; and *US – Wheat Gluten*, para. 181 ff.

³⁹⁶ See European Communities' oral statement, para. 10.

³⁹⁷ See European Communities' oral statement, para. 12 where it refers to the Appellate Body Report, *US – Lamb*, para. 137.

³⁹⁸ See European Communities' oral statement, para. 12 where it refers to the Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130.

³⁹⁹ See European Communities' oral statement, para. 12 where it refers to the Panel Reports, *Argentina – Footwear (EC)*, paras. 8.160 to 8.162; *US – Wheat Gluten*, paras. 8.32 to 8.33; and *US – Line Pipe*, para. 7.204.

⁴⁰⁰ See European Communities' oral statement, para. 13.

⁴⁰¹ For example, the EC refers to the statistics attached to the technical report that include import data on volume from 1996 to 2000 in some parts, or from 1995 to 2000 in other parts. See technical report, Exhibit CHL-1, graphic No. 15.1. and 15.2.

⁴⁰² The European Communities refers to the technical report, Exhibit CHL-1, graphic No. 3.

5.12 As to the legal standard set out in Article 2.1 of the Agreement on Safeguards, the European Communities recalls the emphasis of the Appellate Body that such provision refers to products "*being* imported ... in such increased quantities and under such conditions". The European Communities takes the view that the competent authorities must show that a recent, sudden, sharp and significant increase in imports, both quantitatively and qualitatively, continues until the very recent past.^{403 404}

5.13 The European Communities points out that the Argentine authorities themselves and the Argentine import statistical data confirm that the increase in imports observed in the period 1999/2000 did not bring import levels back to those in the period (1996) preceding the exceptional and disastrous climatic conditions in the main exporting country (1997).⁴⁰⁵ In this regard, the European Communities argues that it fails to see how this increase may be qualified as "significant", or "sharp", quantitatively and qualitatively, or anyway "so as to cause or threaten to cause serious injury to the domestic industry".⁴⁰⁶

5.14 The European Communities considers that the most recent data should not be considered in isolation from the data pertaining to the entire period of investigation, if that period was longer. It refers to the Appellate Body Report in *US – Lamb* where it was stated that "[i]f the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading".⁴⁰⁷ In view of the European Communities, this *caveat* was added expressly with a view to avoiding that a temporary downturn that may well be a part of the normal cycle of the domestic industry be misunderstood as a situation justifying safeguard action.⁴⁰⁸ The European Communities notes that it has to be read in the light of the Appellate Body's characterization of safeguard action as an "extraordinary remedy".⁴⁰⁹ In the view of the European Communities, it should by no means be read as a relaxation of the standards of the Agreement on Safeguards.⁴¹⁰

5.15 With respect to the adequate and reasoned explanation, notwithstanding the fact that there may have been a "recent" import increase, the European Communities asserts that nowhere do the Argentine authorities seem to explain why the fact that this increase simply restored historical import trends after an exceptionally low period still allows to conclude that the increase was "sharp",

⁴⁰³ See European Communities' oral statement, para. 17 where it refers to the Appellate Body Report, *Argentina – Footwear*, paras. 130-131.

⁴⁰⁴ See European Communities' oral statement, para. 17.

⁴⁰⁵ The European Communities refers to the technical report, Exhibit CHL-1, page 57 and Table 15.1.

⁴⁰⁶ See European Communities' oral statement, para. 19.

⁴⁰⁷ See European Communities' oral statement, para. 19 where it refers to the Appellate Body Report, *US – Lamb*, para. 137.

⁴⁰⁸ See European Communities' oral statement, para. 20 where it refers to the Appellate Body Report, *US – Lamb*, para. 138.

⁴⁰⁹ See European Communities' oral statement, para. 20 where it refers to the Appellate Body Report, *Argentina – Footwear (EC)*, para. 93; and to the Appellate Body Report, *Korea – Dairy*, para. 86.

⁴¹⁰ See European Communities' oral statement, para. 20.

"significant" or "so as to cause or threaten serious injury", despite the Appellate Body's finding that competent authorities should address the complexities of each case, and in particular respond to other plausible explanation of data.⁴¹¹

4. *Threat of Serious Injury*

5.16 The European Communities contends that the domestic authorities' independent duty to investigate casts doubts on the United States' suggestion that such authorities can simply consider "current facts", coupled with no indication on the record that such facts will change in the imminent future - as valuable *ex post* support for a finding of threat of serious injury.⁴¹² In its view, this would not be a demonstration "on the basis of objective evidence," as required by Article 4.2(b) of the Agreement on Safeguards, but an "allegation and conjecture" within the meaning of Article 4.1(b).⁴¹³

5.17 According to the European Communities, the Appellate Body has clarified that the domestic authorities have a duty to demonstrate, at the time they take a safeguard measure, and through a reasoned and adequate explanation (that is, in their report or equivalent), that the legal conditions for the adoption of such measure are met. Additionally, it argues, in *US – Lamb* the Appellate Body pointed out that the materialization of the threat of serious injury must be imminent and highly likely.⁴¹⁴ This imminence and likelihood must also be positively demonstrated by the domestic authorities. The European Communities argues that, in reviewing the competent authorities' findings, panels must be mindful of the definition of "threat of serious injury" in the Agreement on Safeguards and of the very high standard implied by the relevant terms.^{415 416}

5. *Permissible Extent of Application of the Measure*

5.18 With regard to Article 5.1 of the Agreement on Safeguards, the European Communities takes the view that, if a WTO Member fails to comply with the "non-attribution" obligation set out in Article 4.2(b) of the Agreement on Safeguards, there is a presumption that it has also failed to comply with its obligation under Article 5.1 not to apply a measure beyond the permissible extent. The European Communities recalls the finding of the Appellate Body in *US – Line Pipe*⁴¹⁷ where it concluded that, by establishing that the respondent had violated Article 4.2(b) of the Agreement on Safeguards, the claimant had

⁴¹¹ See European Communities' oral statement, para. 22 where it refers to the Appellate Body Report, *US – Lamb*, para. 106.

⁴¹² The European Communities refers to para. 16 of the United States' third party submission. See para. 5.26 of the present report.

⁴¹³ See European Communities' oral statement, para. 7.

⁴¹⁴ The European Communities refers to the Appellate Body Report, *US – Lamb*, para. 125.

⁴¹⁵ The European Communities refers to the Appellate Body Report, *US – Lamb*, para. 126.

⁴¹⁶ See European Communities' oral statement, para. 8.

⁴¹⁷ See European Communities' oral statement, para. 23 where it refers to the Appellate Body Report, *US – Line Pipe*, WT/DS202/AB/R, 15 February 2002, para. 261.

made a prima facie case that the application of the measure at issue was not limited to the extent permissible under Article 5.1.⁴¹⁸

B, United States

1. Unforeseen Developments

5.19 The United States submits that Article XIX of the GATT 1994 does not require a competent authority to demonstrate a "cause-effect" relationship between unforeseen developments and increased imports. Following what the Panel found in *US – Lamb*, the United States contends that there is no textual basis in Article XIX for a "two-step causation approach" that would require a Member to demonstrate that unforeseen developments caused an increase in imports that in turn caused serious injury or threat.⁴¹⁹⁴²⁰

5.20 The United States considers that rather, as the *US – Lamb* Panel stated, the term "unforeseen developments" in Article XIX is grammatically linked to both the terms, "in such increased quantities" and "under such conditions".⁴²¹ Therefore, in view of the United States, unforeseen developments can result in increased imports, or in a change in the "conditions" that apply to such imports, or both. Indeed, as the phrasing of Article XIX suggests, there may be an interplay between the conditions under which increased imports affect a domestic industry and the quantity of the increase that will cause serious injury.⁴²²

5.21 Thus, the United States concludes that Article XIX does not require a competent authority to demonstrate that unforeseen developments "caused" an increase in imports. Rather, the United States considers that it may be enough for the authority simply to demonstrate that unforeseen developments have resulted in increased imports entering "under such conditions" so as to cause serious injury or threat thereof.⁴²³

2. Increase in Imports

5.22 The United States submits that a contracting party should generally examine relevant data from its entire standard review period to provide objectivity in its analyses of import volume. The United States contends that the Agreement on Safeguards does not establish any particular methodology or analytic framework for evaluating increased imports. It takes the view that Article 2.1 merely states that a competent authority must determine "pursuant to" the other provisions of the Agreement on Safeguards that imports are taking

⁴¹⁸ See European Communities' oral statement, para. 23.

⁴¹⁹ See United States' oral statement, para. 4 where it refers to the Panel Report, *US – Lamb*, para. 7.16.

⁴²⁰ See United States' oral statement, para. 4.

⁴²¹ See United States' oral statement, para. 5 where it refers to the Panel Report, *US – Lamb*, para. 7.16.

⁴²² See United States' oral statement, para. 6.

⁴²³ See United States' oral statement, para. 7.

place "in such increased quantities, absolute or relative to domestic production . . . as to cause or threaten to cause serious injury to the domestic industry". The United States adds that Article 4.2(a), in turn, simply states that competent authorities shall evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms".⁴²⁴

5.23 However, the United States recalls the Appellate Body Report on *US – Lamb*, where it was stated that a competent authority "should not consider [the most recent] data in isolation from the data pertaining to the entire period of investigation", and 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".⁴²⁵ Thus, the United States concludes that these statements support the conclusion that a competent authority should generally examine *all* of the data that it has collected for the *entire* investigative period, provided that the data is reliable and useable and that there are no circumstances indicating that examination of a different time-period would be appropriate.⁴²⁶

5.24 The United States submits that the Panel should decline to consider extra-record evidence that was not before the competent authority. In challenging Argentina's analysis of increased imports, the United States notes that Chile cites tables containing data on apparent consumption of preserved peaches for the years 1994 to 1996 drawn from a study that CNCE prepared in 1998, apparently for a different investigation.⁴²⁷

5.25 The United States argues that if the study was not part of the record in the challenged investigation, the Panel should disregard it. The United States considers that a fundamental aspect of the standard of review of competent authorities' determinations in safeguard investigations is that the review of those determinations be based on the record that was before the competent authorities, and not on extra-record evidence. The United States recalls the Panel decision in *US – Wheat Gluten*, where it was concluded that "it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations of serious injury and causation." That Panel stressed that "[i]t is not our role to collect new data, or to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not."⁴²⁸ The United States also recalls the conclusion of the Panel in *US – Hot-Rolled Steel* concerning extra-record information based on its analysis of Article 11 of the DSU. The United States submits that if a panel considers new information that was not before the competent authority, it would

⁴²⁴ See United States' third party submission, para. 3.

⁴²⁵ See United States' third party submission, para. 4 where it refers to the Appellate Body Report, *US – Lamb*, para. 138.

⁴²⁶ See United States' third party submission, para. 4.

⁴²⁷ See United States' third party submission, para. 6.

⁴²⁸ See United States' third party submission, para. 7 where it refers to Panel Report on *US – Wheat Gluten*, para. 8.6.

be weighing these new facts against the evidence already on the record. The United States submits that the Appellate Body has found that panels are not entitled to conduct such *de novo* reviews.⁴²⁹

3. *Threat of Serious Injury*

5.26 The United States submits that current facts may support threat of serious injury determinations. The United States notes that Chile argues that the CNCE impermissibly based its finding of threat of serious injury on the fact that there were no indications that current international market conditions would change in the imminent future, and that the CNCE's threat analysis was based on conjecture or remote possibility and not on facts.⁴³⁰ The United States recalls the Appellate Body has analysed threat of serious injury as encompassing a lower threshold than serious injury and has found that there is often "a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury'," since "[s]erious injury does not generally occur suddenly."⁴³¹ The United States points out that the Appellate Body concluded that, in drafting the Agreement on Safeguards, Members defined threat of serious injury separately from serious injury so that an importing Member could act sooner to take preventive action when increased imports posed a threat of serious injury.^{432 433} The United States submits that nothing in the Agreement on Safeguards prohibits a competent authority from basing a threat of serious injury determination on current facts which, if continued, will result in serious injury, coupled with a finding that nothing in the record indicates that such facts will change in the imminent future.⁴³⁴

5.27 The United States is of the view that there is no basis for "presuming" a breach of Article 5.1. The United States disagrees with Chile's argument that a Member that establishes an inconsistency with Article 4.2(b) of the Agreement on Safeguards also establishes a presumption of inconsistency with Article 5.1 of the Agreement on Safeguards. In the view of the United States, there is no reference to such a presumption in Article 4.2(b) or Article 5.1, and there is no basis for reading one into the text.⁴³⁵ The United States points out that the Appellate Body has made it clear on numerous occasions that the rights and obligations of WTO Members are to be found in the actual text of the WTO Agreement, and not in layers of interpretation that are read into that text.^{436 437} In

⁴²⁹ See United States' third party submission, para. 7.

⁴³⁰ See United States' third party submission, para. 14.

⁴³¹ See United States' third party submission, para. 15 where it refers to the Appellate Body Report, *US – Line Pipe*, paras. 168 and 169.

⁴³² See United States' third party submission, para. 15 where it refers to the Appellate Body Report, *US – Line Pipe*, para. 169.

⁴³³ See United States' third party submission, para. 15.

⁴³⁴ See United States' third party submission, para. 16.

⁴³⁵ See United States' third party submission, para. 17.

⁴³⁶ See United States' third party submission, para. 18 where it refers to the Appellate Body Report, *India – Patents (US)*, para. 45 (stating that principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.").

the United States' view, the Appellate Body's guidance is particularly apt in this case, because other provisions of the WTO Agreements do contain provisions that establish presumptions.⁴³⁸ According to the United States, these excerpts demonstrate that when the WTO drafters intended to create presumptions in the agreements, they did so explicitly.⁴³⁹

5.28 The United States observes that Chile's challenge to the extent of application of the measure in its first written submission is limited to just two paragraphs. The United States notes that Chile asserts that the measure imposed an extra 70 percent on the customs duties applicable to Chilean imports, and then asserts that the duty amounted to an import prohibition.⁴⁴⁰

5.29 The United States questions whether Chile's arguments are sufficient to meet its initial burden of making a prima facie case. For example, the United States contends that merely noting that imports stopped after the safeguard measure was imposed does not necessarily prove that the safeguard measure was responsible.⁴⁴¹ In the view of the United States, Chile's arguments fail to address the central issue, which is whether a prohibitive tariff (assuming the tariff was prohibitive) went beyond what was necessary under the facts of this particular case. The United States further adds that depending on the facts underlying a particular safeguard action, it is possible that such an approach would be appropriate. The United States argues that Chile has not addressed this issue.⁴⁴²

5.30 With regard to increased imports and serious injury or threat, the United States refers to Chile's first written submission where it stated that there can be no threat of serious injury if there is no increase in imports.⁴⁴³ The United States considers that under Article 2.1 of the Agreement on Safeguards, a Member may apply a safeguard measure only if increased imports are causing or threatening to cause serious injury to a domestic industry. Thus, the United States concludes that there must be a causal link between increased imports on the one hand, and serious injury or threat on the other, before a Member would be justified in applying a safeguard measure; and that both conditions must be present.⁴⁴⁴

5.31 However, the United States argues it does not mean, that there must *be* increased imports for there to be serious injury or threat. As a factual matter, the United States finds it is possible for an industry to encounter serious injury or a threat of serious injury even in the absence of increased imports. It adds that the latter is not a necessary component of the former.⁴⁴⁵ Finally, the United States concludes that a Member would not, however, be justified in applying a safeguard measure in such a case.⁴⁴⁶

⁴³⁷ See United States' third party submission, para. 18.

⁴³⁸ See United States' third party submission, para. 19.

⁴³⁹ See United States' third party submission, para. 20.

⁴⁴⁰ See United States' third party submission, para. 21.

⁴⁴¹ See United States' third party submission, para. 22.

⁴⁴² See United States' third party submission, para. 23.

⁴⁴³ See United States' oral statement, para. 8.

⁴⁴⁴ See United States' oral statement, para. 9.

⁴⁴⁵ See United States' oral statement, para. 10.

⁴⁴⁶ See United States' oral statement, para. 11.

4. Causal Link

5.32 The United States takes the view that the Agreement on Safeguards does not mandate a three-stage approach to non-attribution. It notes that Chile argues that "[f]or an analysis of causal link to be consistent with Articles 2 and 4.2(b) of the [Agreement], the methodology adopted by the investigating authorities must consist of a three-stage approach that complies with the so-called principle of non-attribution of injurious effects of other factors."⁴⁴⁷ According to the United States, the Appellate Body stated that the three steps describe "a logical process for complying with the obligations relating to causation" in Article 4.2(b), not legal "tests" mandated by Agreement on Safeguards. The United States further notes that the Appellate Body stated that it was not imperative that each step "be the subject of a separate finding or a reasoned conclusion by the competent authorities."⁴⁴⁸ The United States recalls that the Appellate Body has also noted that the Agreement on Safeguards does not specify any particular method for separating the effects of increased imports and the effects of other causal factors.⁴⁴⁹

5.33 The United States contends that the Agreement on Safeguards does not require competent authorities to demonstrate that imports alone caused a degree of injury that is "serious". The United States notes that Chile argues that Argentina failed to demonstrate that the threat of injury from increased imports alone reached the threshold of "serious" injury. In the United States' opinion, Article 4.2(b) does not require a competent authority to demonstrate that imports, standing alone, caused serious injury.⁴⁵⁰

5.34 In this regard, the United States recalls *US – Wheat Gluten*, where the Appellate Body made clear that increased imports need not be the sole cause of the injury.⁴⁵¹ The United States explains that similarly, in *US – Lamb*, the Appellate Body stated that the Agreement on Safeguards "does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does the Agreement require that increased imports 'alone' be capable of causing, or threatening to cause, serious injury."⁴⁵² Finally, the United States notes that in *US – Line Pipe*, the Appellate Body explained that "to meet the causation requirement in Article 4.2(b), it is not necessary to show the increased imports alone – on their own – must be capable of causing serious injury".^{453 454}

⁴⁴⁷ See United States' third party submission, para. 8.

⁴⁴⁸ See United States' third party submission, para. 9.

⁴⁴⁹ Appellate Body Report, *US – Lamb*, paras. 178 and 181.

⁴⁵⁰ See United States' third party submission, para. 11.

⁴⁵¹ See United States' third party submission, para. 12 where it refers to the Appellate Body Report, *US – Wheat Gluten*, para. 67.

⁴⁵² See United States' third party submission, para. 12 where it refers to the Appellate Body Report, *US – Lamb*, para. 170.

⁴⁵³ See United States' third party submission, para. 12 where it refers to the Appellate Body Report, *US – Line Pipe*, para. 209.

⁴⁵⁴ See United States' third party submission, para. 12.

VI. INTERIM REVIEW

6.1 The Panel issued the draft descriptive (factual and argument) sections of its report to the parties on 24 October 2002 in accordance with Article 15.1 of the DSU. Both parties offered written comments on the draft descriptive sections on 7 November 2002. The Panel noted all these comments and amended the draft descriptive part where appropriate. The Panel issued its interim report to the parties on 21 November 2002 in accordance with Article 15.2 of the DSU. In a letter dated 28 November 2002, Argentina requested that the Panel review precise aspects of the interim report. Chile did not have any comments on the interim report. Neither of the parties requested an interim review meeting. On 5 December 2002, Chile provided written comments on Argentina's comments on the interim report, as permitted by the Panel's working procedures, in which it asked the Panel to reject all Argentina's comments and not to modify its findings. The Panel carefully reviewed the arguments made, and addresses them below, in accordance with Article 15.3 of the DSU.⁴⁵⁵

6.2 Argentina commented on paragraphs 7.44 to 7.82 of the interim report⁴⁵⁶ and requested that the Panel amend its finding regarding the increase in imports in paragraph 7.82. Argentina argued that the most significant analysis of the trend in imports should be the analysis covering the most recent period. It cited in support passages from Appellate Body reports which we quoted at paragraphs 7.51, 7.62 and 7.64 of our report. Chile replied that Argentina had not rebutted the Panel's findings in paragraphs 7.54, 7.55 and 7.64, and that the passage quoted at paragraph 7.62 of this report had to be read in conjunction with the passage quoted at paragraph 7.64. The Panel considers that it has dealt sufficiently with Argentina's argument in paragraphs 7.52 to 7.54. Moreover, the passage quoted in paragraph 7.64 itself explains that the most recent data should not be considered in isolation. The Panel has explained in paragraphs 7.65 to 7.67 why it believes that the competent authorities isolated the most recent data.

6.3 Argentina argued that the competent authorities could not have acted wrongly when they found an increase in absolute terms and acknowledged the earlier decrease in imports and sensitivity of the figures for the base year, as noted by the Panel in paragraphs 7.56, 7.58 and 7.61, given that the investigating authority was empowered to evaluate all this information within its sphere of competence. Chile replied that it was insufficient to acknowledge facts without explaining them adequately. The Panel considers that it explained in paragraph 7.61 why it was insufficient for the competent authorities merely to acknowledge these facts.

6.4 Argentina and Chile applied their respective comments above to the analysis of imports in relative terms. The Panel considers that, to the extent that some of the referenced paragraphs in the report apply to that analysis, the Panel's above discussion also applies to these comments. For all of the above reasons,

⁴⁵⁵ Section VI of this Report entitled "Interim Review" therefore forms part of the findings of the final panel report, in accordance with Article 15.3 of the DSU.

⁴⁵⁶ Para. numbers in the interim report were identical to those in this final report.

the Panel declines to amend the paragraphs on which Argentina commented or its finding in paragraph 7.82.

6.5 Argentina commented on paragraphs 7.97 to 7.99 on evaluation of capacity utilization and requested that the Panel amend its finding in paragraph 7.99. Argentina argued that the Panel established an artificial distinction between what is considered in an investigation and the concept of evaluation under Article 4.2(a). It argued that the investigation of installed capacity was sufficient to constitute an evaluation as a formal matter, even if it was not specifically mentioned in the joint opinion of the CNCE directors who voted in favour of the measure. It argued that the outcome of the investigation may have led the CNCE to give more or less weight to capacity utilization in its evaluation of the situation of the domestic industry and that, in making an adverse finding, the Panel was substituting itself for the CNCE. Furthermore, the technical report was available to the CNCE directors when they reached their decision regarding the situation of the industry. Chile replied that Article 4.2(a) requires that the competent authorities do more than conduct an investigation and record the results, but rather evaluate and analyze the results as well as provide a reasoned and adequate explanation as to how they support their determination. Chile said that there was no evaluation of capacity utilization at all by the CNCE directors nor any explicit establishment of this factor so as to support the determination of threat of serious injury. Chile argued that Argentina had indicated in its first written submission and its answer to a question posed by the Panel that the ones that should evaluate and analyse the information compiled in a technical report were not the investigating authorities but the CNCE Directors, that is to say, the ones making the various determinations.

6.6 The Panel observes that in paragraph 7.4 of its report it noted Argentina's own explanation of the technical report, which it had provided in response to questions 1 to 3 posed by the Panel. That explanation was that the "technical report contains all of the objective data and information gathered during the investigation". The Panel noted in paragraph 7.5 that the competent authorities' operative conclusion and the supporting reasoning appeared in the joint opinion. For this reason, in accordance with its approach set out in paragraph 7.6, the Panel looked first at the joint opinion for evaluation of all relevant factors, as supplemented by the data contained in the technical report. The Panel noted in paragraph 7.96 that the competent authorities have a duty under Article 4.2(a) to evaluate, at a minimum, each of the factors listed in that paragraph, and in paragraph 7.93 it recalled the appropriate standard of review. The Panel explained in paragraph 7.98 that it saw nothing on the record that showed that the competent authorities conducted an evaluation of this factor as a formal matter. The Panel agrees with Argentina, in principle, that the outcome of the investigation may have led the CNCE to give more or less weight to capacity utilization in its evaluation of the situation of the domestic industry. However, in this case, the CNCE directors made no comment on the rate of capacity utilization itself, not even to say that they considered it irrelevant. The technical team made no comment on its own account, but only reported what the applicant had said – which was not borne out by the 2000 figure estimated by the technical

team itself. As a result, the Panel cannot glean any idea as to what weight the competent authorities gave to the data which had been collected on capacity utilization nor, in fact, whether they turned their minds to it at all. If the Panel cannot be sure that the competent authorities even thought about the meaning of the data, it cannot find that there was an evaluation of this factor. If there was no evaluation, there is no need to continue and ask whether the competent authorities evaluated the bearing of capacity utilization on the situation of the domestic industry, nor whether the competent authorities provided a reasoned and adequate explanation as to how the facts relating to capacity utilization supported their determination of a threat of serious injury. Therefore, the Panel declines to amend its finding in paragraph 7.99. However, the Panel has added a footnote to paragraph 7.4 to show that the description of the contents of the technical report was provided by Argentina. The Panel does accept that its reference in paragraph 7.98, fourth sentence, to the investigation under Article 3.1 would be clearer if it were as specific as the parts of the investigation which it describes in the preceding three sentences, and it has therefore amended the fourth sentence of paragraph 7.98 accordingly. The Panel has also corrected the tense of the verb "refer" in paragraph 7.99 to be consistent with the rest of the section, and made a grammatical change in paragraph 7.101.

6.7 Argentina commented on paragraphs 7.102 to 7.117 and requested that the Panel amend its finding in paragraph 7.117 relating to a reasoned and adequate conclusion as to the existence of a threat of serious injury. Argentina argued that the nature of the competent authorities' explanation was not affected by any failure on their part to take into consideration the bad Greek harvest. It argued that, in making an adverse finding on this ground, the Panel had assumed the function of the investigating authority, since the latter was empowered to consider all the relevant data before it and to take a decision on the basis of an evaluation of the information, within its sphere of competence. Chile replied that neither it nor the Panel had disputed the powers of the CNCE but rather the question had been whether the CNCE had exercised its powers in a manner consistent with Article 4.2(a). Chile argued that the Panel had properly applied the appropriate standard of review, which it quoted at paragraph 7.103, and had not conducted a *de novo* examination of the evidence nor substituted its own conclusions for those of the CNCE.

6.8 The Panel stated the appropriate standard of review in paragraph 7.103 which prohibits it from substituting its own conclusions for those of the competent authorities but, at the same time, obliges it to examine critically the competent authorities' explanation, in depth, and in the light of the facts before it. The Panel explained throughout paragraphs 7.103 to 7.117 why it considered that the competent authorities' explanation was not reasoned or adequate. The Panel noted that an alternative explanation was plausible, but never adopted that explanation, as it specifically noted in paragraph 7.117. The Panel therefore declines to amend the paragraphs on which Argentina commented or its finding in paragraph 7.117.

6.9 Argentina commented on paragraphs 7.118 to 7.124 and requested that the Panel amend its finding in paragraph 7.124 concerning the requirement that a

threat of serious injury be "clearly imminent". Argentina concurred with the statement of the Appellate Body cited by the Panel in paragraph 7.120 regarding what should be understood by the words "clearly imminent" in defining a threat of serious injury. However, it recalled that, according to the same statement, a threat of serious injury necessarily implies that serious injury has not yet occurred, that it is an event which will materialize in the future and that its materialization "cannot, in fact, be assured with certainty". Argentina argued that the competent authorities satisfied this test based on the capacity of imports to cause serious injury, taking into account the specific characteristics of the threat. Argentina argued that the Panel did not properly take into account the competent authorities' findings regarding the capacity of the imports in the final stage of the period of analysis. Argentina argued that failure to take account of those circumstances would restrict the very notion of threat to such an extent that it would become almost impossible in practice to ascertain the existence of such a threat. Chile replied that Argentina's reliance on the Appellate Body statement was partial and omitted essential elements in the definition and concept of a threat of serious injury, which the Panel has quoted in paragraph 7.120.

6.10 The Panel agrees with Argentina that a threat of serious injury cannot be assured with certainty. However, it has quoted in paragraph 7.120 considerations relevant to the requisite degree of likelihood and imminence of serious injury, as a factual matter, in order for it to constitute a threat in accordance with Article 4.1(b). The Panel has explained in paragraphs 7.121 and 7.122 why it finds that the competent authorities did not show that serious injury was likely or imminent as required as a factual matter, and why it was insufficient to rely only on the behaviour of imports at the final stage of the period of analysis. The Panel has clarified the language in paragraph 7.122 slightly but, for the reasons given, declines to amend its finding in paragraph 7.124.

6.11 Argentina disagreed with the Panel's comment in paragraph 7.123 that a statement which Argentina had quoted was at odds with the definition of threat of serious injury in Article 4.1(b). Argentina argued that the statement which it had quoted did, in fact, refer to a threat of serious injury, and it pointed out that this view was supported by the heading of the section of the report from which the quote was taken, and a reference in a footnote. Chile replied that the Panel had not referred to the whole section of that report but only to one statement which did not refer to a threat of serious injury. The analysis in the rest of that section showed that the minimum requirement for a safeguard measure was the existence of a threat that complied with the definition in Article 4.1(b), which Argentina had failed to satisfy by not showing that serious injury to the domestic industry was clearly imminent.

6.12 The Panel accepts that the statement raised by Argentina which is quoted in paragraph 7.123 could refer to threat of serious injury, as defined, but only to the extent explained in the following sentence of the report from which Argentina quoted, i.e. only to the extent that the serious injury is clearly imminent. This does not alter the Panel's dismissal of its relevance to this case. If one were to argue that the statement meant that serious injury which had not yet occurred constituted a threat of serious injury even if it were not clearly

imminent, that would be at odds with the definition in Article 4.1(b). If one were to argue that it somehow purported to lower the standard established by the words "clearly imminent", this would be unsupported by the terms and context of that statement. The Panel has therefore amended the second and third sentences of paragraph 7.123 without modifying its dismissal of the argument, nor its finding in the following paragraph. The Panel has also made a grammatical change in paragraph 7.122.

VII. FINDINGS

A. *Preliminary Matters*

1. *Measure at Issue*

7.1 The measure at issue in these proceedings is Resolution No. 348/2001 of the Argentine Ministry of Economy, dated 6 August 2001, by which Argentina imposed a definitive safeguard measure on imports of peaches, preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, coming under MCN tariff codes 2008.70.10 and 2008.70.90 ("preserved peaches"), in the form of minimum specific duties for three years effective as of 19 January 2001 (the "preserved peaches measure").⁴⁵⁷ The minimum specific duty per kilogram net was set at US\$0.50 in the first year, US\$0.45 in the second year and is US\$0.40 in the third year. The preserved peaches measure applies to imports from all countries, including Members of the World Trade Organization (the "WTO"), other than MERCOSUR States Parties and South Africa.

2. *Relevant Documents*

7.2 The preserved peaches measure recites the conclusion of the National Foreign Trade Commission (the "CNCE") set out in Record No. 781 of 2 July 2001. That Record of two pages contains the minutes of a meeting of the Board of Directors of the CNCE which was convened to rule on an application for a safeguard measure on preserved peaches. It contains the conclusions of each of the directors on whether the conditions justifying the application of a safeguard measure had been met. It shows that two directors, including the Chairperson, concluded that they had been met, whilst the other two directors concluded that they had not. In the case of a tied vote, the Chairperson's vote is decisive and, accordingly, the conclusion of the Board of Directors was that the conditions justifying the application of a safeguard measure had been met. This was the conclusion forwarded to the Ministry of Economy, which is recited in the preserved peaches measure.

7.3 The Annex to Record No. 781 sets out the written opinions or votes of the CNCE directors. There is a joint opinion by the two directors who voted in favour of the measure (the "joint opinion") and a separate opinion by each of the

⁴⁵⁷ Reproduced in full in Exhibit CHL-2.

directors who voted against. The joint opinion explains the reasoning of the two directors who voted in favour and contains their conclusion, which became the conclusion of the Board of Directors.

7.4 The directors had prior access to the investigation file and to the technical report prepared by the technical team prior to the final determination (ITDF No. 08/01). The technical report of 95 pages plus three annexes including methodological notes and statistical tables (the "technical report"), is in turn attached to the Annex to Record No. 781. The technical report contains all of the objective data and information gathered during the investigation.⁴⁵⁸

7.5 In order to examine this matter, the Panel must consider the competent authorities' findings and reasoned conclusions on pertinent issues of fact and law, which must appear in a published report.⁴⁵⁹ Argentina argues that the report published in the Annex to Record No. 781 and the technical report contain the relevant findings and conclusions of fact and law.⁴⁶⁰ Chile does not agree that Argentina "published" a report in accordance with Article 3.1 of the Safeguards Agreement but, for the purposes of this case, it takes the file of the investigation to correspond to that published report.⁴⁶¹ It is clear from the record that the operative conclusion – that the requirements justifying the application of the preserved peaches measure had been met – and the supporting reasoning, appear in the joint opinion, which can be found in the Annex to Record No. 781. All directors, including those who wrote the joint opinion, had prior access to the technical report and the file of the investigation. Their opinions are based on the technical report.

7.6 Therefore, the Panel will assess the consistency of the preserved peaches measure and the preceding investigation with Article XIX of GATT 1994 and the Agreement on Safeguards on the basis, in the first instance, of the joint opinion in Annex to Record No. 781, as supplemented by the information in the technical report, to which we shall collectively refer as "the competent authorities' report".⁴⁶² We also note that the file of the investigation was available to the directors when they made their determination and can, in principle, be relevant to our assessment.⁴⁶³

3. *Standard of Review*

7.7 The Panel's function, as established by Article 11 of the DSU, dictates the appropriate standard of review by the Panel. Article 11 requires the Panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. The Panel's duty to make an objective

⁴⁵⁸ See Argentina's response to questions Nos. 1 to 3 of the Panel.

⁴⁵⁹ Article 3.1 of the Agreement on Safeguards.

⁴⁶⁰ See Argentina's first written submission, para. 139.

⁴⁶¹ See Chile's first written submission, footnote 55.

⁴⁶² The competent authorities' report is reproduced in Exhibit CHL-1.

⁴⁶³ See Argentina's first written submission, para. 138 and its first oral statement, para. 87 and Chile's response to question No. 1 of the Panel for the parties' views on the relevant documentation.

assessment of the facts prohibits it from engaging in a *de novo* review of the preserved peaches investigation but also from showing total deference to the findings of the Argentine authorities.

4. *Burden of Proof*

7.8 The Panel will follow consistent practice in relation to the burden of proof, according to which the party who asserts a fact, or the affirmative of a particular claim or defence, whether the complainant or the respondent, bears the burden of proof of that fact, or the affirmative of that claim or defence. If that party adduces evidence sufficient to raise a presumption that what is asserted is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.⁴⁶⁴

5. *Order of the Panel's Analysis*

7.9 Chile makes seven principal claims. It begins with the circumstance of unforeseen developments and continues with the three conditions that make up the legal basis of a safeguard measure, namely increase in imports, threat of serious injury and causation. It makes other claims under Articles 3, 5.1 and 12.2 of the Agreement on Safeguards as well. This is an appropriate order which both parties' submissions have basically followed. The Panel will therefore analyse the claims in this order.

B. *Claims*

1. *Unforeseen Developments*

7.10 Chile claims that the preserved peaches measure is inconsistent with Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards because the competent authorities did not make a prior finding nor demonstrate in their report, as a preliminary matter of fact, the existence of unforeseen developments.⁴⁶⁵ Argentina replies that the competent authorities' report did establish and demonstrate the existence of unforeseen developments, in accordance with these obligations.⁴⁶⁶

7.11 We will begin by considering Article XIX:1(a), which provides as follows:

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive

⁴⁶⁴ See Appellate Body Report in *US – Wool Shirts and Blouses*, p. 14; DSR 1997:I, at p. 337.

⁴⁶⁵ See Chile's first written submission, para. 4.1.

⁴⁶⁶ See Argentina's first written submission, paras. 30 and 31.

products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

7.12 This provision and the Agreement on Safeguards are to be applied cumulatively, in view of the fact that Article 1 of the Agreement on Safeguards states that the purpose of that agreement is to establish "rules for the application of safeguard measures which shall be understood to mean 'those measures provided for in Article XIX of GATT 1994'", and Article 11.1(a) prohibits certain action "unless such action conforms with the provisions of that Article applied in accordance with this Agreement". This interpretation is confirmed by various reports of panels and the Appellate Body.⁴⁶⁷ The parties to this dispute have proceeded on the basis of that interpretation. Therefore, in order to apply a safeguard measure, Members' competent authorities must, among other things, demonstrate as a matter of fact the existence of unforeseen developments.⁴⁶⁸

7.13 The Panel must assess whether Argentina's competent authorities "demonstrated as a matter of fact" the existence of unforeseen developments. The question arises as to when and where that demonstration must take place. Given that this is a prerequisite for the application of a safeguard measure, its existence cannot be demonstrated after the measure is applied. This was the approach of the Appellate Body in *US – Lamb*:

"[W]e note that the text of Article XIX provides no express guidance on this issue. However, as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied'⁴⁶⁹ consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed. (...) In our view, the logical connection between the 'conditions' identified in the second clause of Article XIX:1(a) and the 'circumstances' outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the 'logical connection' between these two clauses, and would also leave vague and uncertain how

⁴⁶⁷ Appellate Body Reports in *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71; and Panel Reports in *US – Line Pipe*, para. 7.295 and *Chile – Price Band System*, para. 7.134.

⁴⁶⁸ The parties' arguments as to whether the competent authorities' published report contained a finding and a reasoned and adequate explanation of how the facts investigated support the conclusion relate to the claim under Article 3.1 of the Agreement on Safeguards. Without expressing a view on whether Article XIX:1(a) itself requires a reasoned and adequate explanation of the existence of unforeseen developments, the Panel understands that the substance of many of those arguments relates to the demonstration required under Article XIX:1(a) of GATT 1994 as well, so that they should also be considered here.

⁴⁶⁹ Appellate Body Report in *Korea – Dairy*, para. 85; see also, Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

compliance with the first clause of Article XIX:1(a) would be fulfilled."⁴⁷⁰

7.14 We will therefore look for the demonstration of the existence of unforeseen developments in the competent authorities' report which the CNCE made before the application of the preserved peaches measure.

7.15 Chile alleges that there is no mention, even indirectly, of Article XIX:1(a) of GATT 1994 or its prior requirement of unforeseen developments in the competent authorities' report, including the technical report.⁴⁷¹ Argentina denies this claim, although it does not dispute that the report makes no express reference to "the result of unforeseen developments".

7.16 Both parties presented argument in their first written submissions which proceeded on the basis that the unforeseen developments in this case, if there had been any, comprised or included an increase in imports.⁴⁷² Chile argued that the competent authorities identified the unforeseen developments with the increase in imports.⁴⁷³

7.17 It is important to note that Article XIX:1(a) refers to "imports in such increased quantities and under such conditions" as to cause or threaten serious injury as a result of "unforeseen developments" and the effect of obligations. The link between these elements, according to which one has certain effects "as a result" of the other, means that they must be two distinct things. This is consistent with the approach of the Appellate Body in its reports in *Argentina – Footwear (EC)* and *Korea – Dairy* where it referred to a "logical connection" between these elements:

"In this sense, we believe that there is a logical connection between the circumstances described in the first clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...' – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure."⁴⁷⁴

7.18 The text of Article XIX:1(a) cannot support an interpretation that would equate increased quantities of imports with unforeseen developments.

7.19 Argentina argued that three factors constituted unforeseen developments: (a) increased production as a result of an exceptional Greek harvest; (b) substantial increase in world stocks; and (c) a downward price trend.⁴⁷⁵ Argentina argues that the competent authorities' report contains a finding and

⁴⁷⁰ See Appellate Body Report in *US – Lamb*, para. 72.

⁴⁷¹ See Chile's first written submission, para. 4.1.

⁴⁷² See, for example, Chile's first written submission, paras. 4.13, 4.16 and 4.85 and its first oral statement, paras. 10, 13 and 14, and Argentina's first written submission, para. 33.

⁴⁷³ See Chile's rebuttal, para. 7.

⁴⁷⁴ See Appellate Body Reports in *Argentina – Footwear (EC)*, para. 92 and *Korea – Dairy*, para. 85, quoted with approval in *US – Lamb*, para. 72.

⁴⁷⁵ See Argentina's rebuttal, para. 9.

demonstration of the existence of unforeseen developments in the following passages:⁴⁷⁶

- In the joint opinion, in the section headed "Conditions of competition":

" ... the significant increase in world production in 1998, 1999 and 2000 (more than 16 per cent) was concentrated in the northern hemisphere, and was essentially due to the sharp increase in production in the EU during the 1999-2000 season (50 per cent higher than in the previous year), which, in its turn, had a definitive effect on its share in world trade (16 per cent). Similarly, there was a declining trend in prices for products from producers located in both hemispheres, but the trend was more marked in the case of the northern hemisphere ... "⁴⁷⁷
- In Part V of the technical report, in a section on the international market for preserved peaches, under the heading "Industry and international trade in the main producer countries" and the subheading "The overall framework":

"...[s]ubstantial increases in the European harvest of peaches for industrial use, due to favourable climatic conditions, enabled the European Union's output of preserved peaches to reach a record of 678,000 tons in the marketing year 1999/2000, signifying an increase of nearly 50 per cent compared with the previous year ... ", and

" ... European exports of preserved peaches amounted to 428,500 tons in 1999/2000, representing a 16 per cent increase over the previous marketing year."⁴⁷⁸
- In Part VI of the technical report, devoted to arguments put forward in the file in relation to injury and the application of a safeguard measure, statements made by the Chamber of Industrial Fruit Production of Mendoza (CAFIM) in its application for a provisional safeguard measure:

" ... world production for 1999/2000 is estimated at a world record of 1,242,616 tons, a 14 per cent increase over the previous period and nearly 8,000 tons more than the previous record for the period 1992/1993. World exports are expected to set a record of 617,900 tons, 15 per cent up on the previous year and 34,353 tons higher than the 1995/1996 record. Closing inventories will stand at 191,843

⁴⁷⁶ See Argentina's response to questions Nos. 5 and 28 of the Panel and its rebuttal, paras. 10 to 12.

⁴⁷⁷ See Annex to Record No. 781, Section V.A.4 headed "Conditions of competition", penultimate para..

⁴⁷⁸ See the technical report, page 47.

tons, 51 per cent more than at the end of the previous period".⁴⁷⁹

7.20 The Panel observes that the only mention in these passages of the alleged development concerning an increase in world stocks⁴⁸⁰ is taken from Part VI of the technical report, which begins with the following disclaimer:

"This part of the report is based on the various lines of argument presented by each of the parties. Its contents do not therefore in any way constitute the opinion of the CNCE technical team."

7.21 Argentina indicated that the information and data revealed by the investigation was evaluated and taken into account by the investigating authority in its determination⁴⁸¹, but the Panel could not find any place in the joint opinion where the competent authorities showed how they evaluated or took account of the statement regarding world stocks. Therefore, this statement regarding world stocks in Part VI of the Technical Report cannot constitute by itself a demonstration by the competent authorities. The Panel finds that there is no demonstration that world stocks were an unforeseen development as required by Article XIX:1(a) of GATT 1994.

7.22 As regards the other alleged developments, namely an increase in world production and a declining trend in world prices, these both appear in the first passage, taken from the joint opinion, which contains the conclusions and reasoning of the CNCE directors who voted in favour of the preserved peaches measure. We understand that the references in that passage to increases in world and European production are based to some extent on the other three passages, taken from the technical report, but observe that there is no reference to a downward price trend in the other passages on which Argentina relies, although it may be based on other information in the technical report. The Panel will therefore consider whether the competent authorities demonstrated in their report as a matter of fact that these two developments constituted unforeseen developments in the sense required by Article XIX:1(a) of GATT 1994.

7.23 Following the approach of the Appellate Body in *US – Lamb*⁴⁸², we will first consider whether the competent authorities discussed or offered any explanation as to why the changes mentioned in these alleged developments could be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994. In the Panel's view, this requires, as a minimum, some discussion by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions in the second clause of Article XIX:1(a) occurred "as a result" of circumstances in the first clause.

7.24 The passage in the joint opinion and the supporting passages in Part V of the technical report on which Argentina relies, and which are quoted above, make no mention of either of these issues. Nevertheless, the Panel has noted that

⁴⁷⁹ See the technical report, Section VI, paras. 7 and 8 on pages 73 and 74.

⁴⁸⁰ See Argentina's response to Panel Question No. 5.

⁴⁸¹ See Argentina's rebuttal, para. 13.

⁴⁸² Appellate Body Report, para. 73.

the following paragraph of the joint opinion states that these developments had resulted ("*se han materializado*") in the entry of the investigated product from different origins in an unforeseen and unexpected way.⁴⁸³ It indicates that the entry of the imports, or the way in which they were being imported, was unforeseen, but there is no mention that the alleged developments themselves were unforeseen. We have already observed in paragraph 7.18 that an increase in imports and the unforeseen developments must be two distinct elements. A statement that the increase in imports, or the way in which they were being imported, was unforeseen, does not constitute a demonstration as a matter of fact of the existence of unforeseen *developments*. We do not agree with the statement by the Appellate Body in *Argentina – Footwear (EC)* that "the increased quantities of imports should have been 'unforeseen' or 'unexpected'."⁴⁸⁴ The text of Article XIX:1(a), together with the Appellate Body's own discussion of it and earlier conclusion regarding the logical connection between the circumstances in the first clause of Article XIX:1(a) – including unforeseen developments – and the conditions in the second clause – including an increase in imports – show that this is not a requirement for the imposition of a safeguard measure.

7.25 There is the issue of the point in time at which Article XIX:1(a) requires that developments should have been unforeseen. Chile stated that the developments should have been unforeseen by a Member at the time it incurred the relevant obligation.⁴⁸⁵ In response to questions posed by the Panel, both parties submitted basically that developments should have been unforeseen by the negotiators at the time at which they granted the relevant concession.⁴⁸⁶

7.26 We recall that the Appellate Body in both *Argentina – Footwear (EC)* and *Korea – Dairy* quoted the following statement in the *US – Fur Felt Hats* GATT Working Party report of 1951:

"... 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."⁴⁸⁷

7.27 In its report in *Korea – Dairy*, the Appellate Body made the following finding:

"In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'. And, such 'emergency actions' are to be

⁴⁸³ See Annex to Record No. 781, Section V.A.3 headed "Conditions of competition".

⁴⁸⁴ See Appellate Body Report in *Argentina – Footwear (EC)*, para. 131 referring to paras. 91 to 98 of the same report.

⁴⁸⁵ See Chile's first written submission, para. 4.11.

⁴⁸⁶ See Chile's and Argentina's respective responses to question No. 7 of the Panel.

⁴⁸⁷ See Appellate Body Reports in *Argentina – Footwear (EC)*, para. 96, and *Korea – Dairy*, para. 89, citing *US – Fur Felt Hats*, adopted 22 October 1951.

invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."⁴⁸⁸

7.28 We will apply this interpretation and determine whether the competent authorities assessed whether the developments which they identified were unforeseen as at the time the relevant obligation was negotiated. We emphasize that we are not now discussing the time at which the competent authorities must demonstrate the existence of unforeseen developments in order to adopt a safeguard measure.

7.29 In this case, the relevant obligations are Argentina's current tariff concessions on preserved peaches.⁴⁸⁹ The parties agree that those concessions were negotiated during the Uruguay Round⁴⁹⁰ but there is no mention of those negotiations in the competent authorities' report.⁴⁹¹ Neither the joint opinion nor the technical report discusses or offers any explanation why Argentina did not foresee the later developments in world production or world prices at the time of the Uruguay Round. It appears that the CNCE directors who voted in favour of the preserved peaches measure believed that the "way in which imports were entering" was "unforeseen and unexpected" from 1998, the earliest date mentioned in this section of the joint opinion, when the increases in world production and the decline in world prices began. Even if the CNCE directors had mentioned that the developments in world production and prices in 1999/2000 were unforeseen as at 1998, which they did not, this would have been four years later than the end of the Uruguay Round, which was the appropriate time as of which to assess whether developments were unforeseen in the sense of Article XIX:1(a) of GATT 1994.

7.30 The only evidence which the Panel has seen in the competent authorities' report that could be relevant to what Argentina foresaw during the Uruguay Round tends to show that these developments were not unforeseen. The supporting passage from Part VI of the technical report, on which Argentina relies, is a statement of an interested party about the volume of world production of preserved peaches in 1999/2000. It compares the volume with the volume of world production in 1992/1993 – which was a season during the Uruguay Round – and shows that the volume in 1999/2000 was less than one per cent higher.⁴⁹²

⁴⁸⁸ See Appellate Body Report in *Korea – Dairy*, para. 86.

⁴⁸⁹ Argentina's binding of 35 per cent on preserved peaches appears in the first note to Section I-A of its GATT Schedule of Concessions, dated 15 April 1994.

⁴⁹⁰ See Chile response to question No. 7 of the Panel; Argentina's second oral statement, paras. 15, 18 and 19; Argentina's response to questions Nos. 7 and 31 of the Panel and question No. 2 of Chile.

⁴⁹¹ There is only a mention of the bound tariff rate in the Annex to Record No. 781, Section V.A.1 headed "Evolution of imports". There is no mention of the market access expectations of the Argentine negotiators or the particular content surrounding the Uruguay Round, to which Argentina referred in paras. 15 to 19 of its second oral statement.

⁴⁹² See Argentina's response to question No. 6 of the Panel, citing information submitted by an interested party and contained in the technical report that estimated world production in 1999/2000 at a record 1,242,616 tons. According to Argentina, this represented a 14 per cent increase over the previous period and almost 8,000 tons more than the previous record in 1992/1993. From this we can

This would normally indicate that a level of production such as the one that occurred in 1999/2000 could and should have been foreseen by the Argentine negotiators at least before the end of the Uruguay Round. Argentina argued that its negotiators could not reasonably have been expected to foresee that abnormal circumstances, such as the record world production in 1992/1993, would become the rule rather than the exception.⁴⁹³ The competent authorities' report contains no finding or evidence that these abnormal circumstances did become the rule. The Panel asked Argentina why its negotiators in the Uruguay Round did not expect such fluctuations in the future. Argentina replied that the Agreement on Safeguards applies specifically to situations of injury under fair trading conditions which, owing to their exceptional nature, are difficult to predict.⁴⁹⁴ Whilst this may be true, given that in this case the alleged unforeseen developments are fluctuations in production, stocks and prices of a commodity, we would not expect that tariff negotiators could not and should not foresee them.

7.31 Argentina drew the Panel's attention to the incorporation in Argentine law of WTO rules and stressed that the competent authorities stated from the very beginning of their analysis that the investigation would be conducted in accordance with the regulations laid down in the framework of Article XIX of GATT 1994.⁴⁹⁵ The Panel notes that the former refers to the creation of legal obligations in Argentina's domestic legal order and the latter is a statement of principle. Neither amounts to a demonstration of the existence of unforeseen developments in the preserved peaches case.

7.32 The joint opinion does refer to "unforeseen developments" as such in its final conclusion, which is basically reproduced in Record No. 781 and Resolution No. 348/2001. It reads as follows:

"Having concluded that the domestic industry is facing a threat of serious injury within the meaning of Article 4 of the Agreement on Safeguards and that *this is occurring in a context of unforeseen developments*, Dr Lidia Elena M. de Di Vico and Dr Héctor F. Arese find that the requirements under that Agreement justifying the application of a safeguard measure have been met. [emphasis added]"

7.33 A mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact. The failure of the competent authorities to demonstrate that certain alleged developments were unforeseen in the foregoing section of their report is not cured by the concluding phrase.

7.34 The Panel has observed that this phrase refers to a "context" ("*contexto*") of unforeseen developments unlike Article XIX:1(a) of GATT 1994 which refers

calculate that the increase of the 1999/2000 estimate over 1992/1993 was approximately 0.64 per cent.

⁴⁹³ See Argentina's response to questions Nos. 7 and 8 of the Panel.

⁴⁹⁴ See Argentina's response to question No. 31 of the Panel.

⁴⁹⁵ See Argentina's first written submission, para. 34, Argentina's first oral statement, para. 4.

to their "result" ("*consecuencia*"). Argentina argues that the introductory reference to the Agreement on Safeguards and Article XIX of GATT 1994 on page 1 of the Annex to Record No. 781 shows that, when the directors wrote "context", they meant the same thing as "result".⁴⁹⁶ Chile does not agree, and argues that the use of the word "context" shows that the competent authorities' conclusion is inconsistent with Article XIX:1(a).⁴⁹⁷ We note that the words "context" and "result" have different meanings in the original Spanish (and in English and French), the key difference being that the word "result" denotes a causal relationship, which the word "context" does not. However, in view of our reasoning in the previous paragraphs, it is unnecessary to form a final view on this argument.

7.35 For all these reasons, the Panel finds that the competent authorities' report does not demonstrate as a matter of fact the existence of unforeseen developments as required by Article XIX:1(a) of GATT 1994.

7.36 Chile also claimed in its first written submission that the facts before the competent authorities showed that the alleged unforeseen developments were not unforeseen.⁴⁹⁸ The basis of that claim was that the increase in imports (not the unforeseen developments) was a recovery that was expected after the "interruption" in 1997 and 1998. In view of the Panel's finding⁴⁹⁹, and Chile's own later argument⁵⁰⁰, that increased quantities of imports cannot be equated with unforeseen developments, it is unnecessary for the Panel to consider this claim.

2. *Increase in Imports*

7.37 Chile claims that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the competent authorities did not demonstrate during the period of investigation (1996-2000) that preserved peaches were being imported 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.⁵⁰¹ It argues that the increases in imports in both absolute and relative terms correspond to a foreseen and expected recovery by those imports of their historical levels that were severely disrupted in 1997 and 1998 by an isolated and unexpected climatic situation which affected the production and export capacity of Greece, the leading world producer and exporter of preserved peaches.⁵⁰² Argentina denies the claim and submits that the increase was both absolute and relative.⁵⁰³ It further argues that

⁴⁹⁶ See Argentina's second oral statement, paras. 8 and 9.

⁴⁹⁷ See Chile's rebuttal, para. 10.

⁴⁹⁸ See Chile's first written submission, paras. 4.10 to 4.13.

⁴⁹⁹ See para. 7.18 above.

⁵⁰⁰ See Chile's rebuttal, para. 7.

⁵⁰¹ See Chile's first written submission, para. 4.15.

⁵⁰² See Chile's rebuttal, para. 23.

⁵⁰³ See Argentina's first written submission, para. 61

what the Argentine industry was facing was not a hypothetical recovery of imports to their historical levels but "unforeseen developments".⁵⁰⁴

(a) Periods of Analysis

7.38 The competent authorities' report does not identify an "investigation period" as such.⁵⁰⁵ When asked by the Panel to confirm the dates of the investigation period, Argentina replied that "The gathering of import data covers the period 1996-2000."⁵⁰⁶ The Panel asked Argentina to explain which were the criteria that the competent authorities used in order to select the period of time for their analysis of increased imports in absolute and relative terms. Argentina did not respond to this part of that question.⁵⁰⁷

7.39 The technical report and joint opinion show that data was collected and considered on volume of imports in *absolute* terms for *five* years from 1996 to 2000, and in some respects six years, from 1995. Data was collected and considered on volume of imports *relative* to domestic production for *four* years from 1997 to 2000. Argentina explained that, under its legislation, one of the requirements for applications to initiate investigations into safeguard measures is the submission of import data "for the last five full years to substantiate the significant increase in absolute or relative terms of the product being imported".⁵⁰⁸ Argentina emphasizes that this obligation binds applicants but not the competent authority.⁵⁰⁹

7.40 The technical report and joint opinion show that data was collected and considered for the domestic industry for four years from 1997 to 2000, although there is also mention of certain features of the industry during prior years.

7.41 We note that Argentina has used the term "period of analysis" in its rebuttal submission. For the purposes of our examination, we will use that term as well and simply note that the period for which the competent authorities analysed data was the five year period 1996-2000 in absolute terms, and 1997-2000 in relative terms.

(b) Competent Authorities' Determination

7.42 The relevant section of the joint opinion reads as follows:

"Evolution of imports

...

⁵⁰⁴ See Argentina's rebuttal, paras. 18 and 19.

⁵⁰⁵ See, for example, the absence of a reference to this period in the information summary on page (i) of the technical report. However, on two occasions the investigating authorities refer to the "period considered" and the "period investigated" as 1997-2000 in the section on the domestic market (see page 34 of the technical report).

⁵⁰⁶ See Argentina's response to question No. 12 of the Panel.

⁵⁰⁷ See Argentina's response to question No. 14 of the Panel.

⁵⁰⁸ See Decree No. 1059/96, Annex 1, para. (e) reproduced in full in Exhibit CHL-5, explained by Argentina in its first written submission, para. 58.

⁵⁰⁹ See Argentina's first written submission, para. 58.

In the period 1996/2000, Argentine imports of preserved peaches evolved in a way that needs to be analysed against a background of various factors, including climatic conditions, countervailing measures in force in Argentina, and the structural patterns of world production.⁵¹⁰ Thus, a comparison of the beginning and end of the period in question, without prejudice to the analysis of the years in between, shows that imports in tons in 2000 represented 85 per cent of the volume imported in 1996, but measured in dollars f.o.b. they only came to 64 per cent of the value for that year.

The year 1996 shows the greatest volume of imports with a figure of over 14,000 tons, equivalent to 10 million dollars f.o.b, which gives us a general average price for all origins of 0.699 dollars per kilogram. Greece was the leading exporter to Argentina during this period, representing 42 per cent of the total volume and approximately 36 per cent of the value, with an average price of 0.596 dollars f.o.b. per kilogram, within a range of 0.70 to 0.46 US\$/kg.

In 1997 and 1998 total Argentine imports⁵¹¹ fell by 55 per cent and 45 per cent respectively, owing to severe climatic conditions that affected world production and, consequently, trade in the product in question. An examination of average f.o.b. prices shows that they increased in 1997, as did the price of the main exporter, Greece. In 1998 these prices continued to rise on average, though to a lesser extent. In the case of Greece, however, they fell by some 15 per cent to a level of 0.594US\$/kg.

An analysis of the most recent period shows that in 1999, total imports grew sharply (by more than 100 per cent), a situation which recurred in 2000 with a growth of 68 per cent. Imports for 2000 exceeded 12,000 tons for an f.o.b. dollar value of approximately 6,400,000. In this last year imports from Greece, the leading exporter, came to 60 per cent of the total imports.

In 1999 the average price fell to 0.625 US\$/kg. and in 2000 to US\$0.525/kg. f.o.b. The determining factor of this fall was the prices of the main exporters, that is to say, the European Union and, more specifically, Greece, whose average f.o.b. price in 2000 was 0.412 US\$/kg.

The prices of the imports in the domestic market have generally remained below the domestic price, despite the existence of tariffs equivalent to Argentina's bound ceiling of 35 per cent and of countervailing duties for Greece.

⁵¹⁰ [Original footnote] Imports for the period 1996/2000 were also analysed in the light of Decree 1059/96.

⁵¹¹ [Original footnote] Not including MERCOSUR.

According to the figures supplied by CAFIM for the ratio of imports to domestic production for the most recent period, imports represented 11 per cent in 1999 and 19 per cent in 2000.

On the basis of the survey, the Commission concludes that imports satisfy the provisions of Article 2 of the Agreement on Safeguards, insofar as there was an increase in imports in the most recent period, both in absolute terms and in relation to domestic production, at prices which justify proceeding with the analysis provided for in Article 4 of the Agreement on Safeguards."⁵¹²

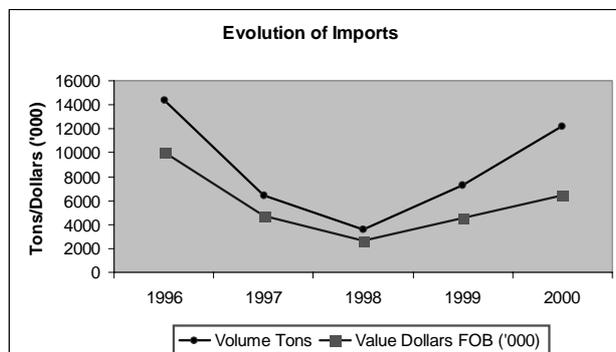
(c) Evaluation of the Determination

7.43 The Panel will consider this passage in the context of the rest of the joint opinion and the technical report, in its assessment of Chile's claims. We recall the standard of review of the factual aspects of a determination of an increase in imports as formulated by the Panel in *US – Line Pipe*, following the Panel in *US – Wheat Gluten*, which we will also apply:

"[W]hether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports."⁵¹³

(i) Increase in Imports in Absolute Terms

7.44 Chile claims that Argentina acted inconsistently with its obligations in respect of the finding of an increase in imports both in absolute terms *and* in relative terms. The Panel will first consider the finding regarding absolute quantities, and consider separately the finding regarding relative quantities. The data on imports in absolute terms referred to in the above passage is presented in the following graph.⁵¹⁴



⁵¹² See Annex to Record No. 781, Section V.A.1 headed "Evolution of imports".

⁵¹³ See Panel Report in *US – Line Pipe*, para. 7.194.

⁵¹⁴ This data is taken from Table 15 and accompanying graphics in the technical report. The graph includes the 1999 figure for imports in absolute terms in terms of value, which was not quoted by the directors.

7.45 The parties agree that the competent authorities used 1998 as the base year for the determination of an increase in imports.⁵¹⁵ This was the case both in terms of volume and value of imports. In making their finding, the directors took account of decreases in prices over the same period.

7.46 Accordingly, the issue for the Panel to decide is whether the competent authorities determined that there was an increase in imports in absolute terms as required by Article XIX:1(a) of GATT 1994 and Articles 2 and 4.2(a) of the Agreement on Safeguards based on the period 1998-2000.

7.47 Article XIX:1(a) GATT 1994 provides, relevantly, as follows:

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

7.48 Article 2.1 of the Agreement on Safeguards provides:

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

7.49 These two provisions contain the three basic conditions making up the legal basis for a safeguard measure. The first of these is an increase in imports. Article 2.1 provides that it may be in either absolute or relative terms. Article 4.2(a) of the Agreement on Safeguards explains how the investigation should be conducted to determine whether the conditions in Article 2.1 and the second clause of Article XIX:1(a) are satisfied. It provides, relevantly:

"... 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, ..."

7.50 We begin by agreeing with Argentina that none of these provisions establish a minimum period for the investigation, nor any so-called "base period" within the investigation period on which to base a determination of an increase in imports.⁵¹⁶

7.51 We recall that an increase in imports, in the sense required by Article 2.1 and Article XIX:1(a), was interpreted by the Appellate Body in *Argentina – Footwear (EC)* as follows:

"(...) In our view, the determination of whether the requirement of imports 'in such increased quantities' is met is not a merely

⁵¹⁵ See Chile's rebuttal, para. 13(b) and Argentina's response to question No. 34 of the Panel.

⁵¹⁶ See Argentina's first written submission, para. 57.

mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be '*such* increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'.⁵¹⁷

7.52 The Panel agrees with Argentina that it is not required to show that imports have increased over five years and we have seen no evidence of such a requirement under Argentine law either. However, the point is that there is no fixed period of five years or any other length of time over which figures can simply be subtracted to yield an increase in imports in the sense of Article 2.1 and Article XIX:1(a). Accordingly, neither the mathematical increase in imports of preserved peaches in the last two years, nor the mathematical decrease over the whole five year period of analysis, is determinative.

7.53 Argentina refers to the passage quoted above from *Argentina – Footwear (EC)* and argues that the increase in imports identified by the directors was recent.⁵¹⁸ The directors noted that they based their analysis on "the most recent period", i.e. the last two years of the period for which data was collected and considered. We agree that the last two years of the period of analysis was the most recent period. However, we concur with the Panel in *US – Line Pipe* that the word "recent" does not imply that the analysis must focus exclusively on conditions at the very end of the period of analysis.⁵¹⁹ The directors also qualified the increase in imports in the last two years of the period of analysis as "sharp".⁵²⁰ We do not disagree. We see no evidence that they considered whether the increase was sudden or significant.

7.54 We believe that a recent and sharp increase in imports is a necessary, but not a sufficient, condition to satisfy Article 2.1 and Article XIX:1(a). The increase is not merely the product of a quantitative analysis, it must also be qualitative. This was the approach of the Appellate Body in the passage quoted above from *Argentina – Footwear (EC)*, where it found that an increase in imports as required by Article 2.1 and Article XIX:1(a) must be recent, sudden, sharp and significant *enough*, both quantitatively and qualitatively. It is therefore

⁵¹⁷ See Appellate Body Report in *Argentina – Footwear (EC)*, para. 131.

⁵¹⁸ See Argentina's first written submission, paras. 57 to 59.

⁵¹⁹ See Panel Report in *US – Line Pipe*, para. 7.204.

⁵²⁰ See Annex to Record No. 781, Section V.A.1 headed "Evolution of imports". A dissenting director wrote that the increase was not "sharp": see Annex to Record No. 781, Section V.B.

not sufficient to find that an increase in imports is only recent, sudden, sharp and significant mathematically.

7.55 The qualitative analysis required was illustrated by the Appellate Body in *Argentina – Footwear (EC)* when it interpreted the requirement in Article 4.2(a) that the competent authorities evaluate the "rate and amount" of the increase in imports. They found that it meant that the competent authorities in that case should have considered the trends in imports over the period of investigation, rather than just comparing the end points, and to consider the sensitivity of their analysis to the particular end points of the investigation period used.⁵²¹

7.56 In the competent authorities' report in the present dispute, the CNCE directors who voted in favour of the measure considered the rate of the increase in imports in the last two years of the period of analysis. They cited increases of 100 per cent and 68 per cent in 1999 and 2000 respectively over the previous years. They also considered the amount of the increase in imports, in both volume and value.⁵²² They noted the trends in imports over the period of analysis, and also compared the end points. The data available in the technical report, which they did not quote, shows that the end points of the period of analysis 1996-2000 revealed a decrease in imports in absolute terms by volume of 2,217 tons or 15 per cent and a decrease by f.o.b. value of US\$3,661,306 or 36 per cent.

7.57 The directors recognized the sensitivity of 1998 as their choice of base year for their determination of an increase in imports. They expressly acknowledged that an unusual factor – the bad harvest in the major exporting country – affected that year, which was 1998. They acknowledged that over the whole period for which they considered data there was a decrease in imports, so that they were aware that their choice of the base year decisively affected their determination as to whether there was an increase in imports at all.

7.58 However, the Panel finds no record in the joint opinion that the directors related these considerations to their determination of an increase in imports. Indeed, the report indicates that once they had acknowledged the decrease from 1996 to 2000, the trend from 1996 to 1997 and the sensitivity of the figures for 1998, they disregarded these considerations in reaching their conclusion. By contrast, the investigating authority qualified the increase in imports as a "recovery", which shows how it took account of the trends. This explanation of the qualitative significance of the increase from 1998 to 2000 does not appear in the joint opinion, and hence is lacking from the reasoning of the competent authorities that led to the imposition of the preserved peaches measure.⁵²³

⁵²¹ See Appellate Body Report in *Argentina – Footwear (EC)*, para. 129.

⁵²² In fact, the amounts for 1999 were omitted, but they appear in the technical report, table 15.

⁵²³ After the determination of an increase in imports, the joint opinion does address some qualitative issues regarding world production, which it links to imports, in the paras. dealing with the alleged unforeseen developments. This only relates to the period 1998-2000 and does not add anything qualitative to the analysis of the increase of imports, which the directors had already qualified as recent and sharp. See Annex to Record No. 781, Section V.A.3 headed "Conditions of competition".

7.59 The Panel asked Argentina whether it believed that the statistics for 1997 and 1998 were representative of imports or were influenced by any unusual factors and, if the latter, how the competent authorities took account of this in their determination. Argentina replied by providing statistics for 1997 and 1998 that appear in the joint opinion reproduced above.⁵²⁴ The Panel posed a follow up question to Argentina to ask how the competent authorities took account of these statistics in their determination of an increase in imports. Argentina replied that they did so in the sense that appears in Part V of the Annex to Record No. 781, which contains the respective opinions of the directors (reproduced in relevant part above).⁵²⁵

7.60 The Panel finds it highly significant that the volume of imports in absolute terms declined over the period of analysis – by a seventh in terms of volume and over a third in terms of price. It is highly significant that the volume of imports in absolute terms declined over the period 1996 to 1998 by more than the increase which the competent authorities identified from 1998 to 2000, and that this was due to an unusual factor which is acknowledged on the record. This decrease and the reason for it affected the significance of the later increase, so that it was qualitatively different from an increase of the same quantity under other circumstances. Its significance may have been that of a recovery and not an increase that was significant enough for the purposes of Article 2.1 and Article XIX:1(a).

7.61 We find that the competent authorities did at least acknowledge all the facts. Having done so, they then took no further account of any of them for the purposes of their determination other than those in the last two years of the period of analysis. They did not consider how this affected qualitatively the increase in the last two years of the period of analysis. Therefore, the Panel considers that their explanation was not adequately reasoned.

7.62 Argentina referred to a statement in the Appellate Body report in *US – Lamb* that:

"[D]ata 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. Thus, we agree with the Panel that, in 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."⁵²⁶

7.63 We agree with Argentina that these considerations regarding the period relevant to a threat of serious injury determination also apply to an increased

⁵²⁴ See Argentina's response to question No. 15 of the Panel.

⁵²⁵ See Argentina's response to question No. 35 of the Panel.

⁵²⁶ See Appellate Body Report in *US – Lamb*, para. 137. We note that the Panel in *Chile – Price Band System*, para. 7.153, fn. 714, also considered this statement relevant to the analysis of actual import trends.

imports determination, for the same reasons expressed by the Panel in *US – Line Pipe*:

"In a safeguard investigation, the period of investigation for examination of the increased imports tends to be the same as that for the examination of the serious injury to the domestic industry. This contrasts with the situation in an anti-dumping or countervailing duty investigation where the period for evaluating the existence of dumping or subsidization is usually shorter than the period of investigation for a finding of material injury. We are of the view that one of the reasons behind this difference is that, as found by the Appellate Body in *Argentina – Footwear Safeguard*, 'the determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination.'" The Appellate Body noted that when it comes to a determination of increased imports 'the competent authorities are required to consider the *trends* [emphasis in original] in imports over the period of investigation'. The evaluation of trends in imports, as with the evaluation of trends in the factors relevant for determination of serious injury to the domestic industry, can only be carried out over a period of time. Therefore, we conclude that the considerations that the Appellate Body has expressed with respect to the period relevant to an injury determination also apply to an increased imports determination." [original footnotes omitted]⁵²⁷

7.64 We do not believe that the statement to which Argentina refers in the Appellate Body report in *US – Lamb* is authority for the proposition that the most recent data alone is sufficient for a determination. The most recent past should not be considered separately from the overall trends during the period of analysis, as the succeeding paragraph of that report explains:

"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

⁵²⁷ See Panel Report in *US -Line Pipe*, para. 7.209.

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." [original footnote omitted]⁵²⁸

7.65 The Appellate Body acknowledged that by evaluating the most recent data in isolation, the resulting picture of the domestic industry may be quite misleading. We believe that the same is true of the resulting picture of an increase in imports. In the present case, we believe that the analysis of the 1998-2000 data should not be considered in isolation. However, the record shows that the directors acknowledged the decrease from 1996 to 2000, the trend from 1996 to 1997, and the sensitivity of the figures for 1998, but did not evaluate the increase from 1998 to 2000 in light of those facts.

7.66 Argentina argues that the investigating authority did not isolate the data for the last two years from the whole period of investigation because:

"... the investigating authority took an investigation period (1996/2000) and detected the increased imports in a period within the investigation period (1999/2000). In other words, the investigating authority, when evaluating the data corresponding to the most recent past, clearly did not isolate that data from the data corresponding to the entire investigation period."⁵²⁹

7.67 In the Panel's view, the first sentence does not rebut the argument that the competent authorities isolated the data for the end of the period for which they had data from the entire period. Indeed, detecting an increase in only part of the period is synonymous with isolating the data for that part from the data corresponding to the entire period. Merely commenting on the data for the first two years without relating it to the mathematical increase in the last two does not amount to a determination of a qualitative increase either.

7.68 Argentina also mentioned that in 1996 countervailing duties were applied to peaches from the European Union which affected the flow of imports from that origin.⁵³⁰ In the Panel's view, this cannot justify the competent authorities disregarding the imports in 1996 for three reasons. First, countervailing duties could be expected to reduce the level of imports, which would not explain why the 1996 figures were so much higher than the 1997 and 1998 figures. Second, the competent authorities had an explanation as to why the 1997 and 1998 figures were lower than 1996 – namely, because there had been a bad harvest in

⁵²⁸ See Appellate Body Report in *US – Lamb*, para. 138.

⁵²⁹ See Argentina's rebuttal, para. 22. The Panel observes that Argentina does not confirm that the period 1996 – 2000 was *the* investigation period in this case, but the Panel does not believe that this alters the situation. The period for which the competent authorities had import data in absolute terms available and which they considered was the five year period from 1996 to 2000. The competent authorities isolated the data for 1998 from the data for that entire five-year period.

⁵³⁰ See Argentina's rebuttal, para. 20.

Greece. Third, the countervailing measure was in place at the same rates for the entire period of analysis, excepting only the first nine days of 1996.⁵³¹ However, there is no reason on the record that justified the competent authorities disregarding the effects of the statistics for a whole year because of the effect of those nine days. The Panel also notes that Argentina does not argue that the countervailing measure was insufficient to offset the effect of the subsidies.⁵³²

7.69 For all of the above reasons, the Panel finds that the competent authorities' determination of an increase in imports in *absolute* terms is inconsistent with Article 4.2(a) of the Agreement on Safeguards, and that they failed to determine an increase in imports in absolute terms as required by Article 2.1.

(ii) Increase in Imports in Relative Terms

7.70 Our finding at paragraph 7.69 does not of itself prove that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards, as the first condition for the application of a safeguard measure is an increase in imports in absolute *or* relative terms. In order to succeed on this claim, Chile must also show that the competent authorities failed to show an increase in imports in relative terms.

7.71 The meaning of an increase in imports in relative terms is clear from Article 2.1 of the Agreement on Safeguards which refers to "increased quantities, (...) relative to domestic production." It is clear from the joint opinion that the data cited by the competent authorities refers to relative quantities in this sense, calculated by reference to volume.

7.72 The treatment of imports relative to domestic production is particularly sparse in the competent authorities' report.⁵³³ The only relevant statement in the joint opinion – apart from the conclusion that the increase satisfied Article 2 – reads as follows:

"According to the figures supplied by CAFIM for the ratio of imports to domestic production for the most recent period, imports represented 11 per cent in 1999 and 19 per cent in 2000."⁵³⁴

7.73 The technical report contains data on quantities of imports relative to domestic production, with sub-totals by hemisphere, for the years 1997 to 2000. There is no data on relative quantities for 1996. Argentina informed the Panel

⁵³¹ See Argentina's response to question No. 33 of the Panel.

⁵³² See Argentina's response to question No. 55 of the Panel.

⁵³³ Although the competent authorities cited relative rates of increase in imports of 100 per cent in 1999 and 68 per cent in 2000, those statistics refer to the absolute quantity for one year relative to the absolute quantity for the previous year, but not quantities relative to domestic production. Before the Panel, Argentina cited a statistic for the quantity relative to domestic production for one year relative to the quantity relative to domestic production for the previous year. That is not a quantity relative to domestic production either, nor does it appear in the competent authorities' report. We do not consider those statistics in relation to the determination of an increase in imports in relative terms for these reasons. See Argentina's first written submission, para. 61 and its rebuttal, para. 62.

⁵³⁴ See Annex to Record No. 781, Section V.A.1 headed "Evolution of imports".

that the gathering of import data covers the period 1996-2000⁵³⁵, but we take it that it meant the period for which applicants had to supply data, which was five years on quantities of imports in absolute *or* relative terms and, in this case, import data was collected for five years in absolute terms only.⁵³⁶ There are alternative figures for 2000: 18.57 per cent according to CAFIM and 21.05 per cent according to the CNCE, due to their different figures for domestic production in that year.⁵³⁷ This explains why the directors introduced the figures with the qualification "According to the figures supplied by CAFIM".

7.74 We recall that there is no statement as to what was the investigation period. For our purposes, we need only find that the period of analysis of import quantities in relative terms was the four-year period from 1997 to 2000.

7.75 The Panel asked Argentina over what periods of time the competent authorities found an increase in imports in absolute and relative terms. Argentina replied that the period is 1999-2000.⁵³⁸ In response to a follow-up question, Argentina indicated that the base year for the determination of an increase in imports was 1998.⁵³⁹ Chile has proceeded on the premise that the base year was 1998.⁵⁴⁰ It appears that these approaches focus on absolute quantities. Given that there is no reference in the joint opinion to figures for relative quantities for 1998, and no reference to figures for relative quantity for one year over another, the notion of "base year" refers, at best, to 1999, the figure for which can be subtracted from that for 2000.

7.76 There is no reasoning in the competent authorities' report as to why they determined that respective volumes of imports in relative terms of 11 per cent in 1999 and 19 per cent in 2000 constituted an increase in imports in relative terms in the sense of Article 2.1 and Article XIX:1(a). In fact, there is not an express determination of an increase in relative terms at all, although it can be deduced from the quantities for two years which are given (7.49 per cent, based on the figures supplied by CAFIM).⁵⁴¹ The only facts which the competent authorities appear to have considered are the statistics in table 20 of the technical report on imports relative to domestic production for four years, which show annual increases.

7.77 The only evidence on the record that shows how the facts supported the determination of an increase in imports in relative terms is the statement in the conclusion on evolution of imports that the increase, in both absolute and relative

⁵³⁵ See Argentina's response to question No. 12 of the Panel.

⁵³⁶ This appears to indicate that the applicants substantiated their application on the basis of an increase in absolute terms only.

⁵³⁷ See Table 20 in the technical report.

⁵³⁸ See Argentina's response to question No. 14 of the Panel.

⁵³⁹ See Argentina's response to question No. 34 of the Panel.

⁵⁴⁰ See Chile's first written submission, para. 4.36.

⁵⁴¹ Argentina asserted before the Panel that the increase was in the order of 10 per cent (*see* Argentina's second oral statement, para. 29). The difference in the figures quoted by the directors is 8 per cent (*see* Annex to Record No. 781, Section V.A.1 headed "Evolution of imports"). These figures were rounded up from those in the technical report which show a difference of 7.49 per cent (*see* Table 20 in the technical report). The percentage can be subtracted because, according to the figures supplied by CAFIM, domestic production volume was identical in 1999 and 2000.

terms, was "in the most recent period". We refer to our findings above at paragraphs 7.53 and 7.54 that this alone does not necessarily constitute an increase in the sense of Article 2.1 and Article XIX:1(a), nor can it on the facts of this case without some additional explanation. We see no evidence that the directors considered this sudden, sharp or significant. There is no qualitative analysis and almost no quantitative analysis.

7.78 In addition, our findings above in paragraphs 7.63 to 7.68 are applicable to the determination of an increase in imports in relative terms. The data for the most recent period, 1999 and 2000, was isolated from the rest of the data, and the resulting picture of the increase in imports was quite misleading.

7.79 For these reasons, the Panel finds that the competent authorities failed to determine an increase in imports in *relative* terms as required by Article 2.1 of the Agreement on Safeguards.

7.80 Chile urged the Panel to consider data on apparent consumption of preserved peaches for the period 1994-1996 drawn from a "Sectoral Study of Canned Peaches" prepared by the CNCE in 1998 for an earlier investigation into peaches in syrup from the European Union (the "subsidies investigation").⁵⁴² Chile alleges that the safeguard investigators referred to the file of the subsidies investigation because it is mentioned in some statistical charts in the safeguards technical report.⁵⁴³ Argentina does not deny that the file of the subsidies investigation may be quoted as a source in the file of the safeguard investigation and says that it was publicly available on the website of the CNCE before the safeguards investigation began. However, it denies that the safeguard investigation technical report takes account of the data from the sectoral study.⁵⁴⁴

7.81 We do not find that sectoral study relevant to our examination. It contains figures on apparent consumption and shows import quantities relative to domestic sales, not relative to domestic production. There are no figures for exports in 1996 which would allow a calculation of the quantity of imports relative to domestic production for that year. Argentina has argued that the product under consideration in the sectoral study is peaches in syrup which is not the same as preserved peaches⁵⁴⁵, despite the cross-reference in two statistical charts. It also argues that its statistics cannot be compared with the preserved peaches data because they are measured in units of cans, not tons, and that differences in apparent consumption and market and marketing structures between the period 1994-1996 and 1999-2000 make the study unreliable. Chile has not dispelled the doubts raised by these arguments.

⁵⁴² See Chile's first written submission, paras. 4.24 to 4.26. The Sectoral Study is reproduced in Exhibit CHL-6.

⁵⁴³ See Chile's rebuttal, para. 34.

⁵⁴⁴ See Argentina's response to question No. 11 of the Panel.

⁵⁴⁵ See Argentina's first written submission, paras. 64 to 66 and its response to question No. 11 of the Panel. Contrast the references to "peaches in syrup" with "canned peaches" in the Sectoral Study in Exhibit CHL-6 with the product description in the technical report in the preserved peaches safeguard investigation, pages 11 and 12.

7.82 In view of our findings at paragraphs 7.69 and 7.79, we find that Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards, because the competent authorities failed to make a determination of an increase in imports, in absolute or relative terms, as required.

3. *Threat of Serious Injury*

7.83 Chile claims that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2, 4.1(b) and 4.2(a) of the Agreement on Safeguards because, in making their determination of a threat of serious injury:

- (a) the competent authorities did not properly evaluate all of the factors having a bearing on the situation of the domestic industry;
- (b) the competent authorities evaluated factors in terms of the most recent past without considering them in the context of the entire period investigated. As part of this claim, Chile alleges other deficiencies in the competent authorities' methodology; and
- (c) the competent authorities' findings and conclusions with respect to the factors that they investigated neither proved nor justified the claim that serious injury was clearly imminent and they based their finding of "threat of serious injury" merely on conjecture or remote possibility.⁵⁴⁶

7.84 Argentina denies this claim and submits that the competent authorities conducted an analysis that was consistent with the provisions of Article XIX:1(a) and Article 4.2(a), (b) and (c) of the Agreement on Safeguards.⁵⁴⁷ The Panel notes that there is no claim made under Article 4.2(c).

7.85 The Panel will consider these claims in the order set out above, as consideration of the evaluation of the serious injury factors will assist in making findings on the competent authorities' final conclusion that a threat of serious injury existed.

(a) *Period of Analysis*

7.86 The competent authorities collected and considered data concerning the situation of the domestic industry for the four-year period 1997-2000. This was the period considered by the directors in the joint opinion. Import data was collected and considered for the five-year period 1996-2000, although the quantity of imports relative to domestic production was not calculated for 1996.

(b) *Competent Authorities' Determination*

7.87 The joint opinion contains a section headed "Situation of the domestic industry" which summarizes findings on a series of injury factors, discussed below. The conclusion of that section reads as follows:

⁵⁴⁶ See Chile's first written submission, para. 4.32.

⁵⁴⁷ See Argentina's second oral statement, paras. 36 and 46.

"On the basis of the considerations set forth above, of the Technical Report and of the evidence contained in the file, Dr Lidia Elena M. de Di Vico and Dr Héctor Arese conclude that the domestic preserved peaches industry shows indications of injury that grew worse during the last year considered (2000), but that they do not qualify as serious injury. Nevertheless, these indicators reflect a high degree of sensitivity to the change that is taking place in the market as a result of the imports."

7.88 The final phrase links the situation of the domestic industry and imports. The analysis of the evolution of imports in the joint opinion was reproduced in paragraph 7.42 above. The conclusion reached in the joint opinion on the existence of a threat of serious injury, which appears in the section headed "Causality", reads as follows:

"As concluded in the relevant section, there are signs of injury in the domestic industry which, while they do not yet qualify as serious injury within the meaning of Article 4.1(a) of the Agreement on Safeguards, show a high degree of sensitivity to the change taking place in the market as a result of imports. The behaviour of imports observed towards the end of 2000 shows that they have the capacity, in terms of price and volume, to cause serious injury.

"The lack of any indicators in the international market showing that the volume and price of world production and exports, both in the current year and in future years, would not equal or even exceed the levels for the year 2000, leads to the conclusion of threat of serious injury within the meaning of Article 4.1(b)."⁵⁴⁸

7.89 This passage shows that the directors identified imports as the threat to the domestic industry due to their price and volume, and the situation of the domestic industry. The period of time on which they based this determination was "towards the end of 2000". That description of the period of time is not sufficiently precise to know what it was, nor what were the changes in prices and quantities during that period.

7.90 The only injury factor which the directors expressly linked to imports in the section headed "Situation of the domestic industry" was the level of stocks. Otherwise, in their view, the relationship between the injury factors and imports was that the former showed signs of a high degree of sensitivity and the imports had the capacity to cause serious injury.

7.91 The other injury factors which were considered to demonstrate the high degree of sensitivity are reviewed in the joint opinion. Although the joint opinion states that its review of the situation of the domestic industry is an analysis of the situation of the industry during the period 1997-2000, most of the negative variations which it mentions consist of variations in 2000 as compared with 1999. This is the case of reported and estimated domestic production, value of

⁵⁴⁸ See Annex to Record No. 781, Section V.A.4 headed "Causality".

overall domestic market sales, domestic market share, employment, labour productivity, wage bill, exports, selling prices and cost/price ratios. It mentions falls in sales data from the accounting statements of surveyed companies without limiting them to a particular year.

7.92 Most of the factors analysed showed deterioration. Apparent consumption was growing and the volume of sales by the domestic industry was steady. The joint opinion mentioned the former in relation to falling domestic market share but did not mention the latter. It mentioned growth in production reported by the surveyed companies in 1998 and 1999. The statistics for domestic production supplied by CAFIM, which represented 100 per cent of the domestic industry, showed that production was steady in 2000, but the competent authorities gave an explanation why they chose to make their own estimates.⁵⁴⁹

(c) Evaluation of the Determination

7.93 Chile's first two claims concern the competent authorities' evaluation, under Article 4.2(a), in making a determination of a threat of serious injury under Article XIX:1(a) of GATT 1994 and Article 2.1 of the Safeguards Agreement. We will apply the standard of review to two aspects of the evaluation in accordance with the following statement of the Appellate Body in *US – Lamb*:

"... in 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."⁵⁵⁰

7.94 We understand Chile's first two claims to correspond to these two aspects of the competent authorities' determination. We will begin with our review of the formal aspect first and review whether the competent authorities evaluated, as a formal matter, *all relevant factors*.

(i) All relevant Factors

7.95 Chile claims that the CNCE did not evaluate and investigate all the relevant factors having a bearing on the situation of the domestic industry in particular and at a minimum those explicitly mentioned in Article 4.2(a) of the Agreement on Safeguards. It argues that the competent authorities omitted three of the factors listed in Article 4.2(a), namely productivity, capacity utilization and employment.⁵⁵¹ It made a separate claim regarding an alleged unlisted factor:

⁵⁴⁹ The competent authorities could not explain why the domestic production figure for 2000 was identical to 1999 when the production of the companies surveyed had decreased, so the technical team made two estimations for 2000 using two alternative methods. See the methodological notes in the technical report, Annex I, pages 2 and 3.

⁵⁵⁰ See the Appellate Body Report in *US – Lamb*, para. 141.

⁵⁵¹ See Chile's first written submission, paras. 4.61 and 4.64.

relating to the domestic industry's "expansive readjustment".⁵⁵² Argentina cites parts of the competent authorities' report that purport to show these factors were investigated and evaluated.⁵⁵³

7.96 Article 4.2(a) 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.⁵⁵⁴ We will therefore assess first whether the competent authorities' determination, as a formal matter, evaluated the three listed relevant factors which Chile claims were omitted.

Capacity Utilization

7.97 Table 6 of the technical report contains data for capacity utilization, which shows that among those companies surveyed this factor improved in 1999 and declined in 2000 to its 1998 level of 73 per cent. It also shows that the technical team calculated an industry-wide figure based on the figures supplied by CAFIM which showed that this factor improved in 1999 and remained steady in 2000. A statement by CAFIM to this effect is noted in the body of the technical report.⁵⁵⁵ All of this shows merely that data on capacity utilization was collected and tabulated. However, in terms of what the competent authorities *evaluated*, in accordance with Article 4.2(a), the joint opinion does not mention "capacity utilization" as such. It does refer to the methodology for calculation of production and installed capacity but does not mention any statistic or result for installed capacity.

7.98 Argentina argued that the competent authorities considered both the fall in production and the increase in capacity.⁵⁵⁶ However, it did not direct us to any place on the record that shows that they conducted any *evaluation* of capacity utilization nor, for that matter, installed capacity. The only indirect reference to capacity utilization which the Panel could see in the joint opinion is a statement that the directors reached the conclusion that the industry showed a high degree of sensitivity (which was a prelude to the determination of a threat of serious injury) based on the consideration of injury factors in the joint opinion (which did not include capacity utilization), the technical report (which did include capacity utilization) and the evidence contained in the file. A catch-all phrase of this kind does not demonstrate an evaluation of a factor.

7.99 The most that the Panel can say is that the CNCE directors who voted in favour of the measure may have read the table of statistics which showed that capacity utilization either declined to 1998 levels or remained steady but there is nothing on the record that shows that they evaluated the factor. It is not even

⁵⁵² See Chile's first written submission, para. 4.63 and response to question No. 17 of the Panel.

⁵⁵³ See Argentina's first written submission, paras. 91 to 94 and 104 to 106.

⁵⁵⁴ See the Appellate Body Report in *Argentina – Footwear (EC)*, para. 136.

⁵⁵⁵ See the technical report, page 42 for the statement by CAFIM. See page 87 for a statement by the European Commission which appears in Part VI and therefore "does not in any way constitute the opinion of the CNCE technical team" (page 73).

⁵⁵⁶ See Argentina's first written submission, paras. 93 and 94, its rebuttal, para. 27 and its response to question No. 48 of the Panel.

clear which figure they might have referred to for 2000, or whether they might have referred to both. Therefore, the Panel finds that the competent authorities did not, as a formal matter, evaluate this factor as required by Article 4.2(a).

Productivity

7.100 Table 7e of the technical report contains statistics on "*producto medio físico del empleo*".⁵⁵⁷ When asked to clarify, Argentina explained that this term was a measure of "own production divided by the number of employees in the preserved peaches production sector".⁵⁵⁸ The body of the technical report does not discuss this term. However, unlike capacity utilization, the joint opinion mentions this factor and notes falls, i.e. a deterioration, which it relates to falls in sales and production. This indicates some evaluation, even if it represents the bare minimum. Without prejudice to the question whether labour productivity was a sufficient measure of productivity in the preserved peaches industry, the Panel finds that productivity was evaluated, as a formal matter, as required by Article 4.2(a).

Employment

7.101 Tables 7a and 8 of the technical report contain data on the level of employment and the total production wage bill. The body of the technical report refers to the level of employment in primary production.⁵⁵⁹ The joint opinion, in the same sentence in which it notes falls in labour productivity, mentions employment, noting falls in 2000 which it relates to falls in sales and production. The Panel therefore finds that employment was evaluated, as a formal matter, as required by Article 4.2(a).

(ii) Reasoned and Adequate Explanation

7.102 Turning to Chile's claim concerning the substantive aspects of the competent authorities' findings and conclusions of a threat of serious injury, the Panel must review whether the competent authorities provided a reasoned and adequate explanation of how the facts supported their determination that a threat of serious injury existed. The temporal focus of the competent authorities' evaluation of the data, and the alternative explanation that the rate and amount of the increase in imports reflected a recovery to historical levels, are among the various methodological issues which Chile has raised.⁵⁶⁰

7.103 We recall certain statements of the Appellate Body in *US – Lamb* concerning the appropriate standard of review. We have already quoted those statements concerning the value of the most recent data in making a determination of the existence of a threat of serious injury, but also the danger of

⁵⁵⁷ We provisionally translated this term as "labour productivity". We asked Argentina to explain this term and drew attention to the translation. It did not object to our translation.

⁵⁵⁸ See Argentina's response to question No. 49 of the Panel. Chile was non-committal on the meaning of this term: see Chile's response to question No. 51 of the Panel.

⁵⁵⁹ See the technical report, page 25.

⁵⁶⁰ See Chile's first written submission, paras. 4.35-4.58.

evaluating the most recent data in isolation and the need to evaluate the short-term trends in the light of the longer term trends.⁵⁶¹ We also bear in mind another statement in that report concerning the standard of review of a determination of a threat of serious injury:

"We wish to emphasize that, although 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."⁵⁶²

7.104 The Panel will consider the temporal focus of the competent authorities' evaluation of the data in making their determination of a threat of serious injury, and whether their explanation was adequate in the light of any plausible alternative explanation of the facts.

7.105 The determination of a threat of serious injury in this case rests on two findings: one regarding the capacity of imports to cause injury and the other regarding the "sensitivity" of the domestic market. Argentina argues that the determination was based on the overall weighing of all of the factors having a bearing on the industry as set forth in the technical report and as illustrated in a chart.⁵⁶³ However, the joint opinion makes it clear that the directors relied, with respect to imports, on the last part of 2000 and, with respect to the situation of the domestic industry, mainly on the variation from 1999 to 2000. The joint opinion makes no mention of the rest of the period of analysis which, in the case of import data, was 1996-2000 and, in the case of the situation of the domestic industry, was 1997-2000.

7.106 Although the directors did not explain why they chose to rely on data from the very end of the period of analysis, it is clear that in a case of a

⁵⁶¹ See Appellate Body Report in *US – Lamb*, paras. 137 and 138, quoted in this Report at paras. 7.62 and 7.64 above.

⁵⁶² See Appellate Body Report in *US – Lamb*, para. 106.

⁵⁶³ See Argentina's rebuttal, para. 104, referring to charts in the technical report at pages 26, 27, 47 and 49.

determination of a *threat* of serious injury, such as this, the data relating to the most recent past provided them with an essential basis for a projection of future conditions.⁵⁶⁴ However, once again we recall the balancing consideration that if the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading.⁵⁶⁵

7.107 In the preserved peaches investigation, the data for the most recent period was quite different from that for the rest of the period of analysis. Of the nine injury factors cited, in almost all cases the figure for 2000 showed a modest deterioration compared to the improvement during the previous years. The most significant decrease was in the production figure reported by the surveyed companies which showed a 14 per cent decline in the last year of the analysis, but this came after increases of 20 per cent and 39 per cent in the previous years of the period of analysis.⁵⁶⁶ The production figure generated by the competent authorities showed a 12 per cent decline in the last year of the period of analysis after a decrease of 4 per cent and an increase of 21 per cent. Most of the injury factors considered in reaching the conclusion that the domestic industry displayed a high degree of sensitivity showed that the condition of that industry in 2000 was better than in 1998, which itself was an improvement on 1997. These factors appeared to be returning to their pre-1998 levels after an unusually favourable period.

7.108 The impact of the longer term trends in the data could have been decisive on the competent authorities' conclusion that the industry displayed a high degree of sensitivity, which was an essential part of the determination of a threat of serious injury, as formulated in the joint opinion. This importance of the longer term trends is illustrated by the fact that the only directors who explained the impact of the favourable longer term trends reached the conclusion that the preserved peaches measure was not justified.

7.109 The joint opinion offers no explanation of the impact of the improvements throughout the period of analysis on their determination of a threat of serious injury. It offers no explanation of the choice of 1999, or late 2000, as a benchmark for evaluation of these factors. Instead, it assumes that those years were an appropriate benchmark for its evaluation of the situation of the domestic industry. In view of these trends over the period of analysis, these explanations are essential to provide a reasoned and adequate explanation of the conclusion that the domestic industry showed a high degree of sensitivity, which was an essential step in the way the joint opinion made its determination of a threat of serious injury.

7.110 There was no improvement in 2000 over 1998 in the volume and value of imports, selling prices for the domestic industry and sales value data of the surveyed companies. However, the increase in imports in 2000 over 1998 was

⁵⁶⁴ See Appellate Body Report in *US – Lamb*, para. 137, raised by Argentina in relation to the determination of an increase in imports and quoted above.

⁵⁶⁵ See Appellate Body Report in *US – Lamb*, para. 138, quoted above.

⁵⁶⁶ See Table 1 of the technical report. CAFIM indicated that production was identical in 1999 and 2000.

less than the decrease in 1998 over 1996, so that the volume of imports in absolute terms actually declined over the entire period of analysis (1996-2000) by a seventh in terms of volume and over a third in terms of value. The average prices of imports showed modest increases to 1998 and then a steep decline to 2000 which was inversely proportional to the volume of imports. These factors formed the basis of the finding that imports had the capacity to threaten serious injury. The average selling prices for the domestic industry showed a slight decline to 1998 and then followed the same trend of a steeper decline to 2000. Sales value data of the surveyed companies showed an improvement to 1998 or 1999 and then a steep decline to 2000.

7.111 The directors viewed the most recent data for the volume and price of imports, in fact, the period "toward the end of 2000" at the very end of the period of analysis. They did not relate it to data for the rest of the period of analysis but isolated it. The joint opinion offers no explanation of the impact of the decrease in imports over the entire period of analysis. We have already dealt with Argentina's arguments that they did not isolate the recent import data from the rest of the period of analysis at paragraphs 7.66 to 7.68. We do not accept them in relation to the threat of serious injury determination for the same reasons.

7.112 An alternative plausible explanation of the variations in import prices and volumes, and the average selling prices for the domestic industry, was open on the facts. This was that the volume of imports represented a return to pre-1998 levels, after the effects of an unusual climatic factor. The increase in imports at the end of the period of analysis continued a trend which began in 1998 but, when viewed in the light of all the data analysed from 1996, was open to this alternative explanation. The deceleration in the increase in imports in the last year of the period of analysis also supported this alternative explanation. Even if the import data for 1996 was excluded, the directors acknowledged that the low volume of imports in 1997 was due to a bad harvest in Greece. The data showed that the relative quantity of imports from Greece in 1997 represented almost zero and that it had recovered more or less in line with the total increase in imports since then.

7.113 The Panel sees nothing in the joint opinion that addresses this alternative plausible explanation. During the investigation, it was suggested that the increase in imports was merely a recovery.⁵⁶⁷ The technical team observed that imports "recovered" in 1999 and 2000, and described the increase in supply of peaches in Greece in 1999 and the increase in exports from Greece in 1998 and 1999 as a "recovery".⁵⁶⁸ They also described a "recovery" in production in Chile in 1999 followed by a decline. The directors who voted in favour of the preserved peaches measure did not address it.

7.114 Viewed as a recovery after the bad Greek harvest, the behaviour of imports and domestic prices was consistent with the pattern of the other injury factors which appeared to be returning to their pre-1998 levels after an unusually

⁵⁶⁷ See the submission of the Chilean representation to the investigation, reflected in the technical report, page 84.

⁵⁶⁸ See the technical report, pages 32, 58, 59 and 71.

favourable period. The plausibility of this alternative explanation is illustrated by the fact it was accepted by the other CNCE directors.⁵⁶⁹ We cite their opinion only to show that the explanation was plausible, not that it was correct.

7.115 Argentina argued before the Panel that the increase was not a recovery, but it has not directed our attention to any passage in the competent authorities' report that addressed such an explanation and gave a reason for rejecting it.⁵⁷⁰ Argentina drew attention to the fact that the growth rate in imports from 1998 onwards "grew at a faster rate than in 1996" but it has not shown where this contrast was drawn by the competent authorities nor explained how that would exclude the possibility that the later increase was nonetheless a recovery.⁵⁷¹ Argentina argued that the volume of stocks in Greece, and the ease with which they could have been poured onto the Argentine market, were essential variables in the evaluation of the threat of serious injury.⁵⁷² However, an explanation was required as to why these levels of stocks were not part of a recovery, and none was given. Argentina argued that it was the overall weighing of all of the factors having a bearing on the industry that ultimately supported the determination of threat of serious and imminent injury⁵⁷³ but it has not directed our attention to any passage in the competent authorities' report that addressed the possibility that the injury factors analysed in relation to the situation of the domestic industry were simply returning to their pre-1998 levels.

7.116 The directors who voted in favour of the preserved peaches measure viewed the data for the most recent period in isolation and did not acknowledge the alternative plausible explanation. The considerable increase in imports in 2000 and deterioration in certain injury factors – viewed in isolation – led them to a potentially very different conclusion from an evaluation in the light of all data before the competent authorities. They explained their finding on the basis of the most recent period and did not offer any explanation of that data in light of the longer term data which was before them. They did not seek to deal with the alternative plausible explanation, even though it was disclosed in the technical report.

7.117 The Panel is not substituting its own opinion for that of the competent authorities. In fact, the Panel has not formed its own opinion on either the situation of the domestic industry or the capacity of imports to cause serious injury in 2001. Rather, the Panel finds that for the reasons given above, the explanation of the determination of a threat of serious injury was not reasoned or adequate as required by Article 4.2(a).

⁵⁶⁹ See the separate opinions of Dra. Diana Tussie and Lic. Elías A. Baracat, in the Annex to Record No. 781, Sections V.B and V.C, respectively.

⁵⁷⁰ See Argentina's first written submission, para. 115.

⁵⁷¹ See Argentina's second oral statement, para. 49.

⁵⁷² See Argentina's first written submission, para. 82.

⁵⁷³ See Argentina's first written submission, para. 107.

(iii) Clearly Imminent

7.118 Chile also argues that the purported determination of threat of serious injury did not satisfy the definition of a "threat of serious injury" in Article 4.1(b).⁵⁷⁴ That definition reads as follows:

"'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."

7.119 This definition refers to "serious injury" which is defined in Article 4.1(a) as follows:

"'serious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry."

7.120 Chile claims that the finding of a threat of serious injury did not demonstrate that the threat was "clearly imminent". That phrase has been interpreted by the Appellate Body as follows:

"(...) 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. We also note 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."⁵⁷⁵

7.121 In the present case, the directors' conclusion was that that the industry showed a "high degree of sensitivity" in circumstances which did not constitute serious injury. Sensitivity of any degree does not show that serious injury is about to occur – it depends on the likelihood and imminence of the threat. In this case, the threat was described as the "capacity" of imports to cause serious injury.⁵⁷⁶

7.122 The "capacity" of imports is a reference to the *possibility* of causing serious injury, not a threat. The directors purported to identify the threat in the following paragraph of their conclusion, but they did not indicate any degree of likelihood that serious injury would occur, let alone a high degree of likelihood. There was a statement that the increase in imports in the most recent period was

⁵⁷⁴ See Chile's first written submission, para. 4.32 and its rebuttal, para. 35(d).

⁵⁷⁵ See Appellate Body Report in *US – Lamb*, para. 125.

⁵⁷⁶ See Annex to Record No. 781, Section V.4 headed "Causality".

"sharp" but the conclusion was not drawn that this indicated that the imports that would cause serious injury were about to occur. There was just an acknowledgement of the possibility. There was no attempt to make a projection of what was about to occur, nor a fact-based assessment of the likelihood of the imports increasing. In the light of the flawed temporal focus of the analysis of the data, the use of the most recent data did not necessarily indicate the future state of imports. In the light of the alternative explanation that the imports were recovering to their historical levels, the most recent increase did not necessarily indicate that they would continue to increase either at all or at the same rate.

7.123 Argentina reminded us of another statement by the Appellate Body in *US – Line Pipe* that "serious injury does not generally occur suddenly".⁵⁷⁷ However, this does not affect the definition of threat of serious injury in Article 4.1(b) which requires that the serious injury be "clearly imminent". Indeed, this requirement was recalled by the Appellate Body in the passage from which Argentina quoted.

7.124 Consequently, we find that this determination does not purport to find that there is a high degree of likelihood that the threat would materialize in the very near future. Therefore, we find that the determination does not contain a finding that serious injury is clearly imminent as required by Article 4.1(b).

(iv) Remote Possibility

7.125 Chile argues that the determination of threat of serious injury was not based on facts but merely on "conjecture or remote possibility", which is inconsistent with the definition in Article 4.1(b).⁵⁷⁸ The relevant conclusion (in the section headed "Causality") in the joint opinion is reproduced at paragraph 7.88 above.

7.126 Chile describes this assertion as a "prediction" based not on supporting analysis or empirical evidence but rather on an assumption based, in turn, on a lack of indicators.⁵⁷⁹ Argentina asserts that it was the overall weighing of all of the factors having a bearing on the industry as set forth in the technical report that ultimately supported the determination of threat of serious and imminent injury.⁵⁸⁰

7.127 In their conclusion, the directors acknowledge that in 2000 the domestic industry was not suffering serious injury. In the second paragraph, they admit the possibility that, in the future, world production and exports might equal or be even greater than in 2000. For this reason, they purported to determine the existence of a threat of serious injury.

7.128 Article 4.1(b) requires a determination of threat of serious injury to be based on facts. The directors based their determination on the possibility that the

⁵⁷⁷ See Argentina's First Oral Statement, para. 53, citing the Appellate Body Report in *US – Line Pipe*, para. 168.

⁵⁷⁸ See Chile's first written submission, paras. 4.32 and 4.69 and its rebuttal, para. 35(d).

⁵⁷⁹ See Chile's first written submission, para. 4.68; its rebuttal, para. 35(d).

⁵⁸⁰ See Argentina's first written submission, para. 107.

volume and prices of future world production and exports would be at the same or higher levels than in 2000. They state that it is based on "the lack of any indicators" that this would *not* occur.

7.129 Article 4.1(b) prohibits a determination of threat of serious injury based on remote possibility. The directors partly based their determination on a possibility that volumes and prices would be at the same levels as in 2000, which they acknowledged did not present a threat of serious injury. On its own terms, this is not a determination of a threat of serious injury. The directors do not mention any change that they expected in the coming year which would alter the effect of production and exports, so that they must have thought that, at the same levels, they would not present a threat of serious injury. They could not determine a threat of serious injury on the basis of that possibility, even if it did materialize. We note that this was only part of the basis of their determination.

7.130 The directors partly based their determination on the possibility that the volume and prices of future world production and exports would be worse for the domestic industry than in 2000. They recognized that this possibility might not occur at all, since they entertained the possibility that volume and prices might be at the same levels as in 2000, which they had already determined did not present a threat of serious injury.

7.131 In order to succeed on this claim, Chile needs to show that the possibility on which the directors based their claim was "remote" or that it was not based on facts at all. The record shows that it was based on a possibility of the injury caused by future imports, but there is insufficient evidence to conclude that that possibility was remote. The evidence shows that the determination of the threat was at least partly based on the existing quantities and prices of imports, and the evaluation of the injury factors – even if this was inconsistent with Article 4.2(a). There was no real projection from that evidence – which could, for example, have been based on the trends in the data – but that does not indicate a finding not based on facts. For these reasons, we do not find that the determination of threat of serious injury was based not on facts but merely on "remote possibility".

7.132 In view of the above findings, we do not need to consider Chile's claims regarding other alleged deficiencies in the methodology used by the competent authorities in their evaluation of various injury factors, nor its claim regarding the domestic industry's "expansive readjustment" as another factor required to be evaluated under Article 4.2(a).

7.133 In view of our findings at paragraphs 7.99, 7.117 and 7.124, the Panel finds that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards because the competent authorities, in making their determination of the existence of a threat of serious injury:

- (a) did not evaluate, as a formal matter, all of the relevant factors having a bearing on the situation of the domestic industry, in particular, capacity utilization;

- (b) did not provide a reasoned and adequate explanation of how the facts supported their determination; and
- (c) did not find that serious injury was clearly imminent.

7.134 The Panel does not find that the competent authorities' determination of threat of serious injury was based not on facts but on remote possibility.

4. *Causal Link*

7.135 Chile claims that Argentina acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the Agreement on Safeguards in making its determination of a causal link between the increased imports and the threat of serious injury. Given that the Panel has found that the competent authorities did not demonstrate the existence of an increase in imports nor a threat of serious injury, there is no need for the Panel to make an assessment of the determination of the existence of a causal link. In view of those findings, it would be impossible for us to continue and find that the competent authorities demonstrated a causal link between increased imports that did not occur and a threat of serious injury that did not exist.⁵⁸¹ However, the Panel can expeditiously produce a record of the competent authorities' evaluation of the causal link, which is consistent with its role as the sole trier of fact in this proceeding under the DSU. That record is set out below.

7.136 The section headed "Causality" in the joint opinion, in its entirety, reads as follows:

"Paragraph 4.2(b) of the WTO Agreement on Safeguards stipulates that the serious injury determination for the purposes of applying a safeguard measure shall not be made "unless [the] investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof". It also states that the injury caused by factors other than increased imports shall not be attributed to increased imports.

As concluded in the relevant section, there are signs of injury in the domestic industry which, while it does not yet qualify as serious injury within the meaning of Article 4.1(a) of the Agreement on Safeguards, show a high degree of sensitivity to the change taking place in the market as a result of imports. The behaviour of imports observed towards the end of 2000 shows that they have the capacity, in terms of price and volume, to cause serious injury.

The lack of any indicators in the international market showing that the volume and prices of world production and exports, both in the current year and in future years, would not equal or even exceed the levels for the year 2000, leads to the conclusion of threat of serious injury within the meaning of Article 4.1(b).

⁵⁸¹ This was the approach favoured by the Appellate Body in *Argentina – Footwear (EC)*, para. 145.

The import situation and the degree of variation and sensitivity of the indicators listed and described in Section V.2 prove the existence of a causal link between the investigated imports and the threat of serious injury."⁵⁸²

7.137 The joint opinion does not contain any other references to the causal link condition. The body of the technical report contains no discussion of the causal link, except statements in Part VI which are statements of interested parties during the safeguard investigation. One is a statement by the applicant, CAFIM, that:

"... if imports, irrespective of their origin, continue in the conditions which prevailed prior to the application of the safeguard clause with provisional duties, in particular in relation to the prices of imports from the northern hemisphere, they will cause injury which will prove impossible to remedy and lead to the virtual destruction of domestic production of peaches for processing, as well as of the processing industry itself. It is for this reason that we are requesting the application of definitive safeguard measures ... since we feel that the grounds established in the Agreement on Safeguards have all been fully satisfied."⁵⁸³

7.138 Two domestic producers also made statements which could be interpreted as listing a variety of factors causing injury.⁵⁸⁴ The other relevant statements in Part VI of the technical report were made by the European Commission. It said that:

"... with regard to the causal link between increased imports and the threat of serious injury, Argentina has not provided any evidence of a link between the possible injury and the said imports"; and

"... the key sectoral indicators, such as the level of domestic producer profits, increase in production levels, use of installed capacity, exports, average labour productivity indicators and actual and planned investment volumes, discount any form of actual injury or threat of future injury caused by the entry into the country of imported products."⁵⁸⁵

7.139 Neither party has directed the Panel's attention to any additional passages in the competent authorities' report which could show how they made their determination of a causal link.

5. *Judicial Economy*

7.140 Article 11 of the DSU provides that the Panel's function is to assist the DSB in discharging its responsibilities under the DSU and the covered

⁵⁸² See Annex to Record No. 781, Section V.A.4 headed "Causality".

⁵⁸³ See the technical report, Part VI.1, page 91.

⁵⁸⁴ See the technical report, pages 77 and 78.

⁵⁸⁵ See the technical report, pages 88 and 93.

agreements. It does not require us to examine all the legal claims made by Chile. Our findings should assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. We are mindful of the approach of the Appellate Body in *US – Wool Shirts and Blouses* that we need only address those claims which we consider necessary for the resolution of the matter between the parties.⁵⁸⁶ At the same time, we are mindful of the balancing consideration expressed by the same body in *Australia – Salmon* that a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members.⁵⁸⁷

7.141 In view of our findings at paragraphs 7.35, 7.82 and 7.133 that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards, we can conclude that the preserved peaches measure lacks a legal basis under the relevant covered agreements. Further findings on Chile's other claims cannot alter that conclusion and would not further assist the DSB in making sufficiently precise recommendations to allow for prompt compliance by Argentina with those recommendations. Accordingly, the Panel chooses to exercise judicial economy and declines to rule on the claims made under Articles 2.1 and 4.2(b) of the Agreement on Safeguards regarding the causal link, and under Articles 3, 5.1 and 12.2 of the Agreement on Safeguards, regarding the published report, the permissible extent of application of the measure, and notification, respectively.

7.142 Chile requests the Panel to rule on all of the claims presented "in order to ensure that Argentina does not continue to violate these agreements as it has done".⁵⁸⁸ Chile did not offer any explanation as to why ruling on *all* claims would achieve this objective. Furthermore, we must presume that all Members will comply with their obligations under the covered agreements in good faith, and we have seen no evidence that Argentina will continue to violate the agreements at issue in this dispute. The Panel therefore declines to agree to Chile's request.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In the light of our findings, we conclude that the Argentine preserved peaches measure was imposed inconsistently with certain provisions of the Agreement on Safeguards and GATT 1994. In particular:

- (a) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 by failing to demonstrate the existence of unforeseen developments as required;

⁵⁸⁶ See Appellate Body Report in *US – Wool Shirts and Blouses*, page 19; DSR 1997:I, at p. 340.

⁵⁸⁷ See Appellate Body Report in *Australia – Salmon*, para. 223.

⁵⁸⁸ See Chile's first written submission, final para. and its rebuttal, para. 72.

- (b) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards by failing to make a determination of an increase in imports, in absolute or relative terms, as required;
- (c) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards because the competent authorities, in their determination of the existence of a threat of serious injury:
 - (i) did not evaluate all of the relevant factors having a bearing on the situation of the domestic industry;
 - (ii) did not provide a reasoned and adequate explanation of how the facts supported their determination; and
 - (iii) did not find that serious injury was clearly imminent.

8.2 The Panel does not find that Argentina acted inconsistently with its obligations under Articles 2.1 and 4.1(b) of the Agreement on Safeguards by basing a finding of the existence of a threat of serious injury on an allegation, conjecture or remote possibility.

8.3 In light of these conclusions, we decline to rule on Chile's claims that:

- (a) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 because the facts before the competent authorities showed that the alleged unforeseen developments were not unforeseen;
- (b) Argentina acted inconsistently with its obligations under Article 3 of the Agreement on Safeguards by failing to include in its published report adequate and sufficient findings on all pertinent issues of fact and law;
- (c) Argentina acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards in its analysis of a possible causal link between the alleged increased imports and the alleged threat of serious injury;
- (d) the level and formulation of the definitive preserved peaches measure are inconsistent with Article 5.1 of the Agreement on Safeguards because they exceed the extent necessary to prevent or remedy the alleged threat of serious injury and to facilitate adjustment; and
- (e) Argentina acted inconsistently with Article 12.2 of the Agreement on Safeguards because its notification to the Committee on Safeguards of its finding of alleged threat of serious injury as a result of alleged increased imports failed to include evidence substantiating that finding.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement by a Member of its obligations assumed under a covered agreement, such action is considered prima facie to constitute a case of nullification or impairment of

benefits under that agreement. We have seen no evidence in these proceedings that would rebut Chile's prima facie case against Argentina. Accordingly, we conclude that to the extent that Argentina has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described in paragraph 8.1, it has nullified or impaired the benefits accruing to Chile under those two agreements.

8.5 We therefore recommend that the Dispute Settlement Body request Argentina to bring its preserved peaches measure into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

IX. ANNEX

A. Abbreviations Used for Dispute Settlement Cases Referred to in the Report

SHORT TITLE	FULL TITLE
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575.
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515.
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, 3 May 2002, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207AB/R.
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9.
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49.
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3.
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001.

SHORT TITLE	FULL TITLE
US – Fur Felt Hats	Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, <i>GATT/CP/106, adopted 22 October 1951.</i>
US – Hot-Rolled Steel	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R.
US – Lamb	Panel Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R.
US – Lamb	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.
US – Line Pipe	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R.
US – Line Pipe	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002.
US – Wheat Gluten	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R.
US – Wheat Gluten	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001.
US – Wool Shirts and Blouses	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

**UNITED STATES – CONTINUED DUMPING AND
SUBSIDY OFFSET ACT OF 2000**

**Arbitration under Article 21.3(c) of the Understanding
on Rules and Procedures Governing the
Settlement of Disputes**

WT/DS217/14,
WT/DS234/22

Award Circulated 13 June 2003

Parties:

*Australia, Brazil, Canada, Chile, the European
Communities, India, Indonesia, Japan, Korea,
Mexico, Thailand and the United States*

Arbitrator:

Yasuhei Taniguchi

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TABLE OF ARBITRATIONS CITED IN THIS AWARD

Short Title	Full Title and Citation of Arbitration
<i>Argentina – Hides and Leather</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001.
<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, 267.

Short Title	Full Title and Citation of Arbitration
<i>Canada – Patent Term</i>	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001.
<i>Canada – Pharmaceutical Patents</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000.
<i>Chile – Price Band System</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS207/13, 17 March 2003.
<i>EC – Bananas III</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS27/15, 7 January 1998, DSR 1998:I, 3.
<i>EC – Hormones</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833.
<i>Japan – Alcoholic Beverages II</i>	Award of the Arbitrator, <i>Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3.
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937.
<i>US – 1916 Act</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001.

Short Title	Full Title and Citation of Arbitration
<i>US – Hot-Rolled Steel</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS184/13, 19 February 2002.
<i>US – Section 110(5) Copyright Act</i>	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001.

I. INTRODUCTION

1. On 27 January 2003, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report¹ and the Panel Report², as modified by the Appellate Body Report, in *United States – Continued Dumping and Subsidy Offset Act of 2000 ("US – Offset Act (Byrd Amendment)")*.³ At the DSB meeting of 27 January 2003, the United States stated that it intended to implement the recommendations and rulings of the DSB in a manner that respected the United States' WTO obligations.⁴ The United States confirmed those intentions at the DSB meeting of 19 February 2003.⁵ At the DSB meeting of 26 February 2003, the United States stated that it would require a "reasonable period of time", pursuant to the terms of Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), to implement the recommendations and rulings of the DSB in this dispute.⁶

2. On 14 March 2003, Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico, and Thailand (the "Complaining Parties") informed the DSB that consultations with the United States had not resulted in agreement on the reasonable period of time for implementation of the recommendations and rulings of the DSB. The Complaining Parties therefore requested that such period be determined by binding arbitration, in accordance with Article 21.3(c) of the DSU.⁷

¹ Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003.

² Panel Report, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by the Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R.

³ WT/DS217/11, WT/DS234/19, 3 February 2003.

⁴ WT/DSB/M/142, 6 March 2003, para. 60.

⁵ WT/DSB/M/143, 20 March 2003, para. 44.

⁶ WT/DSB/M/144, 21 March 2003, para. 11.

⁷ WT/DS217/12, WT/DS234/20, 19 March 2003.

3. The United States and the Complaining Parties were unable to agree on the appointment of an arbitrator within a period of ten days following referral of the matter to arbitration. Therefore, the Complaining Parties, on 24 March 2003, requested that the arbitrator be appointed by the Director-General, pursuant to footnote 12 to Article 21.3(c). Following consultations with the United States and the Complaining Parties, the Director-General appointed me as arbitrator on 2 April 2003. The parties to the arbitration were informed of my acceptance of the appointment on 3 April 2003.

4. The United States and the Complaining Parties subsequently agreed to extend the deadline for completion of the arbitration. In their letters dated 16 April 2003, both the United States and the Complaining Parties, respectively, confirmed that, notwithstanding the 90-day time period stipulated in Article 21.3(c) of the DSU for the conduct of the arbitration to determine the reasonable period of time, the arbitration award to be issued no later than 13 June 2003 shall be deemed to be an award issued under Article 21.3(c) of the DSU.⁸

5. Written submissions were received from the United States and the Complaining Parties on 23 April 2003.⁹ Further to my request, dated 30 April 2003, the United States provided, on 2 May 2003, additional written information to me and served a copy of the information on the Complaining Parties. The oral hearing was held on 6 and 7 May 2003.

II. ARGUMENTS OF THE PARTIES

A. *United States*

6. The United States requests that I determine the reasonable period of time for implementation of the recommendations and rulings of the DSB to be 15 months from the date of adoption by the DSB of the Panel and the Appellate Body Reports in this dispute, such that the period would expire on 27 April 2004.

7. The United States asserts that the requested period of 15 months is consistent with previous arbitration awards under Article 21.3(c) of the DSU involving implementation by means of legislative measures. Specifically, the United States refers to the arbitration awards in *Japan – Alcoholic Beverages II*, *EC – Bananas III*, and *EC – Hormones*, in which the reasonable period of time for implementation was determined to be, respectively, 15 months, 15 months and 1 week, and 15 months from the date of adoption by the DSB of the panel and the Appellate Body reports.

8. The United States considers that the "particular circumstances" relevant to the arbitrator's determination of the reasonable period of time, pursuant to Article 21.3(c), are: the legal form of implementation (legislative versus administrative

⁸ The United States, in its letter, stated furthermore that this confirmation was "without prejudice to the U.S. position on what rights each complaining party has in its dispute, given the fact that only Canada requested adoption of the Panel and Appellate Body reports".

⁹ The Complaining Parties filed a single joint submission.

measures); the technical complexity of the implementing measures; and, finally, the period of time in which the implementing Member can achieve the proposed legal form of implementation in accordance with its system of government.

9. First, with respect to the legal form of implementation, the United States claims that implementation of the recommendations and rulings of the DSB in this dispute will require legislative, as opposed to administrative, action, because the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA") is "mandatory legislation".¹⁰

10. Second, with respect to the technical complexity of the implementing measure, the United States notes that, shortly after the adoption of the Panel and Appellate Body Reports, the United States Executive branch proposed to the United States Congress that the CDSOA be repealed. Nevertheless, the United States submits that a "simple repeal of the measure" is not the only option for the United States to implement the recommendations and rulings of the DSB in this dispute.¹¹ The United States is of the view that the Appellate Body "expressly disavowed the notion that *any* expenditure of collected antidumping or countervailing duties would constitute a WTO violation".¹² Accordingly, the United States submits that, although a repeal of the CDSOA is one way for the United States to bring itself into compliance with the recommendations and rulings of the DSB¹³, another possible option is to revise the CDSOA such that distributions of collected anti-dumping and countervailing duties are made in a WTO-consistent manner.

11. The United States explains that consultations between the Executive branch and the United States Congress revealed that Congress intends to examine the repeal of the CDSOA as well as "all options" for implementing the recommendations and rulings of the DSB, including other methods of distribution of collected anti-dumping and countervailing duties to groups of recipients.¹⁴ According to the United States, implementation of any of these options would require legislative action.

12. Third, with respect to its legislative process, the United States points out that the enactment of legislation in the United States Congress is a "complex and lengthy process", over which the Executive branch of the United States Government has "no control".¹⁵ The first step in the legislative process is for a bill to be introduced in the House of Representatives (the "House") or the Senate. This may be done by a member of Congress or by the Executive branch. In the latter case, the Executive branch will act through the Speaker of the House or the President of the Senate, after which draft legislation will be introduced, in either the original or a revised version, by the chairman or a ranking member of the

¹⁰ United States' submission, para. 7.

¹¹ *Ibid.*, para. 8.

¹² *Ibid.* (original emphasis)

¹³ United States' response to questioning at the oral hearing.

¹⁴ United States' submission, para. 14.

¹⁵ *Ibid.*, para. 20.

relevant committee. Alternatively, the Executive branch may request that an individual member or members of Congress introduce proposed legislation.

13. After introduction, as a general rule, a bill is referred to a standing committee or committees having jurisdiction over the subject matter of that bill. In the House, a bill may be referred to a number of committees simultaneously; in contrast, in the Senate, a bill is more commonly referred first to the committee with primary subject matter jurisdiction, after which it may be sequentially referred to other committees. The relevant committee will then typically refer the bill to a subcommittee for consideration.

14. In the House, the subcommittee normally schedules public hearings to obtain the views of proponents and opponents of a bill, including government agencies, experts, interested organizations, and individuals. No specified time frame for committee consideration exists. Upon completion of the hearings, the subcommittee will usually meet to make changes and amendments to the bill ("mark-up" the bill) prior to deciding whether to recommend the bill to the full committee. The subcommittee may subsequently either vote to recommend the bill to the full committee or, alternatively, suggest that a bill be postponed indefinitely.

15. After receiving the subcommittee's report (recommendation), the full committee may conduct further study and hearings. There will again be a "mark-up" process. The full committee then votes whether to report the bill to the full House, either as originally introduced or as revised. If the full committee votes to report a bill to the House, a committee report is written by the committee's staff. An approved bill is "reported back" to the House.

16. The subsequent step is the consideration of the bill on the House floor. The scheduling of this step is determined, as a general rule, by the Speaker of the House and the leader of the political party with the majority of seats in the House. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be proposed. During the debate process, the bill is read in detail, and members of the House may propose further amendments. After voting on amendments, the House immediately votes on the bill itself, with any adopted amendments. The bill can also be returned to the committee that reported it for further consideration.

17. If passed, the bill must be referred to the Senate.¹⁶ The United States explains that, although the Senate has similar procedures for consideration of legislation by relevant committees, there are significant differences in the way the Senate considers proposed legislation. The Senate functions in a less rule-driven manner than the House, in that the Senate does not have a Rules Committee and scheduling as well as floor consideration are generally decided by consensus. In addition, unlike in the House, where debate is strictly controlled, debate is rarely restricted in the Senate.

¹⁶ Under the United States' legislative system, it is possible to introduce proposed legislation on the same matter in both the House of Representatives and the Senate.

18. As most bills are not passed by the Senate exactly as referred by the House, a possible next step in the United States' legislative process is a so-called conference committee, in which differences between the House and the Senate versions of the bill are to be reconciled. Members of the conference committee are appointed by each chamber and given specific instructions, which may be revised every 21 days. If the conference committee cannot reach agreement, the bill "dies".¹⁷ If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes; this conference report must be approved by both chambers, in identical form, or, again, the revised legislation expires.

19. After the bill proposed by the conference committee is approved by both chambers, it is sent to the President for approval, which is the last step in the legislative process. Only after Presidential approval does a proposed piece of legislation become law.

20. According to the United States, except for Presidential approval, none of the steps in the legislative process is required by law, but they are required in practice. Furthermore, there are no prescribed time-lines for any of the steps described.¹⁸ The United States also submits that, as the United States Congress is independent of the Executive branch and operates under its own procedures and timetables, it is not feasible or even meaningful for the United States to estimate the time periods to be taken for each of these steps.¹⁹ The United States adds that, in any event, its request for 15 months as the reasonable period of time for implementation in the present case is not based on estimates as to the time that may be required under each component step of the legislative process, but rather on an overall assessment of the time required based on previous experience with the legislative process, the complexity of the measure, as well as the number of steps which will be taken.²⁰

21. The United States explains that another central factor in the legislative process is the Congressional schedule. A Congress lasts two years and meets in two sessions of one year each, each session beginning in January. The date of adjournment will vary; in an election year, Congress may adjourn in October; in a non-election year, it will typically adjourn in November or December. Furthermore, according to the United States, Congress is often only present and in session three days per week for three weeks per month, and goes into recess for the month of August. As for the Congressional recess, the United States has also identified a shorter recess period in late April 2004.

22. According to the United States, the earliest date a bill can be introduced is the month of January. If a bill is introduced in the first session of Congress but is not passed by the end of that session, it will be carried over to the second session, such that the process does not have to start again from the beginning;

¹⁷ United States' submission, para. 29.

¹⁸ United States' response to questioning at the oral hearing.

¹⁹ *Ibid.*

²⁰ *Ibid.*

however, legislation not passed by the end of the second session of a Congress "dies".²¹

23. The United States points out that the 108th Congress is currently in its first session, which will allow it to "save" work done during the year 2003 and complete it in 2004.²² Taking into account the "complexity of the legislative task in question"²³, the fact that Congressional committees will be considering the issue at hand for the first time, the need for sufficient time to design implementing legislation, as well as the fact that other matters will be under consideration during the remainder of the current Congressional session, the United States is of the view that legislation implementing the recommendations and rulings of the DSB in the present dispute will need to be carried over into the second session of the current Congress, that is, into 2004. Moreover, the United States is of the view that, even if the end of a Congressional session "spurs legislative activity", the "opportunity to pass legislation may be greater" before a Congressional recess.²⁴ As a result, the United States believes that the reasonable period of time for implementation should appropriately conclude at the time of the recess referred to as the Spring District Work Period in late April 2004.

24. Turning to the arguments of the Complaining Parties, the United States rejects the Complaining Parties' submission that the arbitration awards in *US – 1916 Act* and *US – Section 110(5) Copyright Act* support their request for six months as a reasonable period of time for implementation. The United States notes that, in these arbitration awards, the reasonable period of time was determined to be 10 and 12 months, respectively.²⁵

25. The United States also rejects the argument of the Complaining Parties that the proposed repeal of the CDSOA in the President's Budget proposal to Congress for Fiscal Year 2004 implies that the United States Executive branch believes that the repeal of the CDSOA can reasonably be concluded by the end of the current Fiscal Year, that is, by 30 September 2003. In the United States' view, the inclusion of the repeal of the CDSOA in the proposed Budget says nothing about the timing of the implementing legislation; a repeal of the CDSOA is not linked to, and can occur later than, the adoption of the Budget proposal by 30 September 2003.²⁶

26. Finally, the United States also rejects the Complaining Parties' submission that the prejudice caused to foreign exporters to the United States by another disbursement of collected anti-dumping or countervailing duties to United States' producers is a particular circumstance relevant to the determination of the reasonable period of time for implementation. The United States is of the view that any ongoing harm caused by the CDSOA must not impact on the

²¹ United States' submission, para. 32.

²² *Ibid.*, para. 34.

²³ *Ibid.*, para. 35.

²⁴ *Ibid.*

²⁵ United States' statement at the oral hearing.

²⁶ *Ibid.*

determination of what constitutes the shortest period possible for implementation within the United States' legal system.²⁷

B. Complaining Parties

27. The Complaining Parties request that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB to be six months from the date of adoption by the DSB of the Panel and the Appellate Body Reports in this dispute, such that the period would expire on 27 July 2003.²⁸

28. The Complaining Parties recall that, according to Article 21.1 of the DSU, "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." The Complaining Parties also submit that a Member is entitled to a reasonable period of time for implementation only where immediate withdrawal of the measure is "impracticable". Moreover, the Complaining Parties recall that arbitrators appointed to determine the reasonable period of time under Article 21.3(c) have stated that the reasonable period of time "should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB".²⁹ Finally, the Complaining Parties recall the statement of the arbitrator in *Canada – Pharmaceutical Patents* that the implementing Member bears the burden of proof in showing that the duration of any proposed period for implementation constitutes a reasonable period of time.³⁰

29. The Complaining Parties recall that the Panel suggested that the United States should repeal the CDSOA. They "support the Panel's view" that the "only effective way" to comply with the recommendations and rulings of the DSB is to repeal the CDSOA.³¹ In this context, the Complaining Parties also point out that the President of the United States has proposed that the CDSOA be repealed as part of the Budget for Fiscal Year 2004. Ten of the Complaining Parties³² also state that deliberations in the United States Congress as to alternative uses and methods of distribution of the collected anti-dumping and countervailing duties should not be considered as part of the implementation of the recommendations and rulings of the DSB in this dispute.

30. In the Complaining Parties' view, past arbitrations reveal that the "particular circumstances" that may influence the determination of the reasonable period of time for implementation in any particular case are the

²⁷ United States' response to questioning at the oral hearing.

²⁸ Complaining Parties' submission, para. 50.

²⁹ Complaining Parties' submission, para. 24, referring to Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; and Award of the Arbitrator, *US – 1916 Act*, para. 32.

³⁰ Complaining Parties' submission, para. 25, referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47.

³¹ Complaining Parties' submission, para. 18.

³² Statements of Australia; Brazil; Canada; Chile; the European Communities, India, Indonesia, and Thailand jointly; Japan; and Mexico, respectively, at the oral hearing.

following: the legal form of implementation (legislative or administrative action); the complexity of that new legislation or administrative action; whether the procedural steps toward implementation, including their respective duration, are legally binding or discretionary; and, finally, the integration of the WTO-inconsistent measure into the domestic system, that is, the length of time this measure has been in existence and the extent to which it depends on other legislation. The Complaining Parties recall that factors such as domestic "contentiousness" of implementing measures, as well as hardship of an economic and social nature, are not relevant for the determination of the reasonable period of time.

31. The Complaining Parties highlight five sets of particular circumstances in the present case which, in their view, make it "reasonably practicable" for the United States to implement the recommendations and rulings of the DSB within six months from the date of adoption of the Panel and Appellate Body Reports.³³

32. First, the Complaining Parties state that the United States' legislative process is flexible and permits "expeditious implementation".³⁴ The Complaining Parties point out that there are no constitutionally fixed timeframes for any stage of the legislative process and no rules "limiting the speed at which a legislative action to comply with WTO obligations may be undertaken."³⁵ This absence of established timeframes, according to the Complaining Parties, indicates that legislation may be passed expeditiously, "if the will exists"³⁶; by way of example, the Complaining Parties point out that the CDSOA was enacted in only 25 days. The flexibility of the United States' legislative process was also recognized by arbitrators in *US – 1916 Act* and *US – Section 110(5) Copyright Act*. The Complaining Parties submit that, "us[ing] in good faith all the flexibility available within [the United States] normal legislative procedures", a reasonable period of time of six months is "more than sufficient" to implement the recommendations and rulings of the DSB.³⁷

33. Second, the Complaining Parties claim that the repeal of the CDSOA—which they claim is the "only effective way to comply with the DSB rulings and recommendations"—is not a "complicated process", but rather requires merely a "simple statement".³⁸ The Complaining Parties believe that this circumstance distinguishes the present case from the arbitration in *Chile – Price Band System*, in which the arbitrator noted that the measure in dispute in that case was "longstanding" and "fundamentally integrated into the policies of Chile".³⁹ In the Complaining Parties' view, the CDSOA, unlike the Chilean measure in *Chile – Price Band System*, is independent of other legislation, was an "add-on" to the existing anti-dumping and countervailing duty system, has no "complicated or

³³ Complaining Parties' submission, para. 1.

³⁴ *Ibid.*, para. 3.

³⁵ *Ibid.*, para. 31.

³⁶ *Ibid.*, para. 33.

³⁷ *Ibid.*, para. 36.

³⁸ *Ibid.*, paras. 18 and 37.

³⁹ *Ibid.*, para. 38, referring to Award of the Arbitrator, *Chile – Price Band System*, para. 48.

complex system built around it" and has existed for a relatively short period of time.⁴⁰

34. Third, the Complaining Parties believe that previous arbitral awards under Article 21.3(c) of the DSU concerning the adoption of United States legislation evidence that six months is a reasonable period of time. The Complaining Parties recall that in *US – 1916 Act* and *US – Section 110(5) Copyright Act*, the arbitrator granted the United States 10 and 12 months, respectively; the Complaining Parties explain that, in those cases, the new Congressional session was not to begin for a number of months and that a shorter period "would not have provided sufficient time" for implementation following the beginning of the then current Congressional session in early January.⁴¹ In the Complaining Parties' view, this difficulty does not arise in the present case, since the Panel and Appellate Body Reports in the present dispute were adopted only a few weeks after the opening of the current Congressional session.

35. As a fourth relevant particular circumstance in this case, the Complaining Parties highlight that the President of the United States has proposed that the CDSOA be repealed as part of the Budget for Fiscal Year 2004, beginning on 1 October 2003. This proposal, in the view of the Complaining Parties, implies a recognition on the part of the United States Executive branch that it is possible to repeal the CDSOA within the current Fiscal Year, that is, by 30 September 2003.

36. As a final particular circumstance in this case, the Complaining Parties allege that a reasonable period of time for implementation extending beyond 30 September 2003 would "irreparably harm the rights" of the Complaining Parties because disbursements under the CDSOA for United States' Fiscal Year 2003 will be made no later than sixty days after the end of the Fiscal Year, that is, no later than 60 days after 30 September 2003.⁴² Failure by the United States to bring itself into compliance with the recommendations and rulings of the DSB before 30 September 2003 would therefore "result in another illegal distribution of funds and additional irreparable harm".⁴³ The Complaining Parties point out that disbursements for the year 2001 totalled more than USD 231 million and, for the year 2002, currently total more than USD 329 million.

III. REASONABLE PERIOD OF TIME

37. Pursuant to Article 21.3(c) of the DSU and the agreement of the parties, it is my task as Arbitrator in this case to determine the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in *US – Offset Act (Byrd Amendment)*.

38. Article 21.3(c) of the DSU provides that when the "reasonable period of time" is to be determined through arbitration:

⁴⁰ Complaining Parties' submission, para. 39.

⁴¹ Complaining Parties' submission, para. 42.

⁴² *Ibid.*, para. 47.

⁴³ *Ibid.*, para. 49.

... a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

39. The meaning of Article 21.3(c) is elucidated by its context. Article 21.1 sets forth that "prompt compliance" with recommendations and rulings of the DSB is "essential in order to ensure effective resolution of disputes to the benefit of all Members." Furthermore, Article 3.3 of the DSU recognizes that the "prompt settlement of situations ... is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

40. Article 21.3, furthermore, makes clear that "prompt compliance", in principle, implies "immediate[]" compliance. Thus, a "reasonable period of time" for implementation is not available unconditionally to an implementing Member. Rather, an implementing Member is entitled to a reasonable period of time for implementation only where, pursuant to Article 21.3, "it is impracticable to comply immediately with the recommendations and rulings" of the DSB.

41. The 15-month period set forth in Article 21.3(c) is a "guideline", expressed as a maximum period, and does not represent an average, or usual, period. Rather, as previous arbitrators have recognized, it is ultimately the relevant "particular circumstances" that influence what is a "reasonable period of time" for implementation.⁴⁴

42. The final sentence of Article 21.3(c), moreover, makes clear that the "reasonable period of time" cannot be determined in the abstract, but rather has to be established on the basis of the particular circumstances of each case. I therefore agree, in principle, with the Arbitrator in *US – Hot-Rolled Steel*, who found that the term "reasonable" should be interpreted as including "the notions of flexibility and balance", in a manner which allows for account to be taken of the particular circumstances of each case.⁴⁵ At the same time, it is also clear to me that the term "reasonable period of time" must always be read together with the term "prompt compliance" contained in Article 21.1, as well as in the light of the systemic interest of all WTO Members in such "prompt compliance". I therefore agree with the view, expressed by previous arbitrators, that the reasonable period of time, to be determined under Article 21.3(c), should be "the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."⁴⁶

⁴⁴ Award of the Arbitrator, *Canada – Patent Term*, para. 36; Award of the Arbitrator, *Chile – Price Band System*, para. 34.

⁴⁵ Award of the Arbitrator, *US – Hot Rolled Steel*, para. 25, quoting with approval the Appellate Body in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 85.

⁴⁶ Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *US – 1916 Act*, para. 32.

43. I recall that the "shortest period possible within the legal system of the Member" generally refers, in the case of implementation by legislative means, to normal legislative procedures. Therefore, I concur with the view of previous arbitrators that, when implementing recommendations and rulings of the DSB, a Member is not required to have recourse to extraordinary legislative procedures in every case.⁴⁷

44. Moreover, I also agree with statements by previous arbitrators that it is for the implementing Member to establish that the duration of the implementation period it proposes constitutes the "shortest period possible" within its legal system to implement the recommendations and rulings of the DSB.⁴⁸ Where the implementing Member fails to establish that the period of time requested by it is indeed the shortest period possible within its legal system, the arbitrator must determine the "shortest period possible" for implementation, which will be shorter than proposed by the implementing Member, on the basis of the evidence presented by all parties in their submissions, and taking into account the 15-month guideline provided by Article 21.3(c).

45. With these principles in mind, I now turn to the case before me and to the question of what constitutes the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in *US – Offset Act (Byrd Amendment)*. I note that the parties appear to agree that "immediate[]" compliance by the United States is "impracticable".

46. At the outset, I note that there is agreement among the parties that, in the present case, implementation of the recommendations and rulings of the DSB requires the enactment of legislation by the United States. There is, however, no agreement between the parties as to what constitutes, in the present case, the appropriate *specific* means of implementation.

47. The United States submits that the United States Congress intends to examine "all options" for implementation, that is, a repeal of the CDSOA as well as possible alternative methods for distributing collected anti-dumping and countervailing duties.⁴⁹ The Complaining Parties, in contrast, argue that the "only effective way" for the United States to comply with the recommendations and rulings of the DSB is to repeal the CDSOA.⁵⁰ At the oral hearing, the Complaining Parties conceded that there may be, in fact, many potentially WTO-consistent ways in which the United States may decide to spend the collected anti-dumping and countervailing duties. However, ten of the Complaining Parties⁵¹ also stated, at the oral hearing, that deliberations in the United States Congress as to alternative methods of distribution of the collected anti-dumping and countervailing duties are distinct from, and should not be considered as part

⁴⁷ Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 32.

⁴⁸ Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *US – 1916 Act*, para. 32.

⁴⁹ United States' submission, para. 14.

⁵⁰ Complaining Parties' submission, para. 18.

⁵¹ Statements at the oral hearing of Australia; Brazil; Canada; Chile; the European Communities, India, Indonesia, and Thailand jointly; Japan; and Mexico.

of, the implementation of the recommendations and rulings of the DSB in this dispute.⁵²

48. I recall that my mandate, under Article 21.3(c), is confined to the determination of the reasonable period of time for implementation of the recommendations and rulings of the DSB. I am particularly aware that it is *not* part of my mandate to determine or even to suggest the manner in which the United States is to implement the recommendations and rulings of the DSB.⁵³ As the Arbitrator in *EC – Hormones* stated:

An implementing Member ... has a measure of discretion in choosing the *means* of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.⁵⁴ (original emphasis)

49. I recall that both the Panel and the Appellate Body in *US – Offset Act (Byrd Amendment)* recommended "that the Dispute Settlement Body request the United States to bring the CDSOA into conformity" with its WTO obligations.⁵⁵ In this regard, I agree with the Arbitrator in *Argentina – Hides and Leather*, who stated:

[T]he non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by *withdrawing* such measure completely, or by *modifying* it by excising or correcting the offending portion of the measure involved.⁵⁶ (original emphasis)

50. Thus, in my view, the United States may choose either to *withdraw* or *modify* the CDSOA so as to bring it into conformity with its obligations under the covered agreements. I therefore do not see any basis for the claim of the Complaining Parties that deliberations as to different, WTO-consistent methods for distributing collected anti-dumping or countervailing duties should *not* be considered as part of the implementation process.

51. The Complaining Parties put forward two further arguments in support of their claim that the "only effective way" for the United States to comply with the recommendations and rulings of the DSB is to repeal the CDSOA. First, they point to the fact that the Panel in *US – Offset Act (Byrd Amendment)* made a

⁵² At the oral hearing, the Complaining Parties argued that the United States Congress could repeal the CDSOA within a short period of time and then continue to debate alternative uses of the collected duties. The Complaining Parties submitted that the recommendations and rulings of the DSB make clear how the United States may *not* spend the collected duties; thus, according to the Complaining Parties, the "answer" to the recommendations and rulings of the DSB is the removal of the offset payments as set forth in the CDSOA. The fact that the same funds as used under the CDSOA may be used for alternative financing purposes does not, in the view of the Complaining Parties, mean that a decision on these alternative financing purposes is a part of the implementation process.

⁵³ Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Chile – Price Band System*, para. 32.

⁵⁴ Award of the Arbitrator, *EC – Hormones*, para. 38; Award of the Arbitrator, *Australia – Salmon*, para. 35; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 40.

⁵⁵ Panel Report, para. 8.5; Appellate Body Report, para. 319.

⁵⁶ Award of the Arbitrator, *Argentina – Hides and Leather*, para. 40.

suggestion, pursuant to Article 19.1 of the DSU, that the United States repeal the CDSOA. Second, they urge me to give consideration to the fact that the United States Executive branch itself, in its Budget proposal for Fiscal Year 2004, has proposed to the United States Congress that the CDSOA be repealed.

52. With respect to the suggestion of the Panel that the United States repeal the CDSOA, I note, first, that the Panel, in making its suggestion, also recognized that "there could potentially be a number of ways in which the United States could bring the CDSOA into conformity".⁵⁷ Moreover, although the suggestion by the Panel, as part of a panel report adopted by the DSB, could serve as a useful contribution to the decision-making process in the implementing Member, I do not believe that the existence of such a suggestion ultimately affects the well-established principle that "choosing the means of implementation is, and should be, the prerogative of the implementing Member".⁵⁸

53. With respect to the proposal by the United States Executive branch to the United States Congress, I do not believe that it would be appropriate for an arbitrator acting under Article 21.3(c) to attach any particular weight to any individual proposal. As I and other arbitrators have said, it is not for the arbitrator acting under Article 21.3(c) to impose any particular means for implementing the recommendations and rulings of the DSB. The means of implementation is left to the discretion of the implementing Member, which is bound to implement the recommendations and rulings of the DSB within "the shortest period possible within the legal system of the Member." Thus, my task is not to look at *how* implementation will be carried out, but to determine *when* it is to be done. For this reason, individual proposals under consideration by the implementing Member cannot be determinative in my inquiry.⁵⁹

54. For the above reasons, I do not accept the Complaining Parties' argument that my decision must be based on the fact that the "only effective way" for the United States to comply with the recommendations and rulings of the DSB is to repeal the CDSOA.

55. Having considered the issue of the means of implementation, I now turn to the central issue of this arbitration, namely the determination of the reasonable period of time for the United States to implement the recommendations and rulings of the DSB. The United States proposes that I determine the reasonable period of time to be 15 months from adoption of the Panel and Appellate Body Reports. In contrast, the Complaining Parties request that I determine the reasonable period of time to be six months from the date of adoption of the Panel

⁵⁷ Panel Report, para. 8.6.

⁵⁸ Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 40; Award of the Arbitrator, *Chile – Price Band System*, para. 32.

⁵⁹ It is certainly true, as stated by the Arbitrator in *Chile – Price Band System*, that "the more information that is known about the details of the implementing measure, the greater the guidance to an arbitrator in selecting a reasonable period of time." (Award of the Arbitrator, *Chile – Price Band System*, para. 37) In this arbitration, I am unable to take any guidance from the nature of the implementing measure because the United States has not specified what form the implementing measure will take.

and Appellate Body Reports. Recalling my view that it is for the implementing Member to establish that the time period it proposes is the shortest period possible within its legal system for implementation⁶⁰, I turn first to the arguments put forward by the United States in support of its request for an implementation period of 15 months.

56. The United States submits that the particular circumstances relevant to my determination of the reasonable period of time for implementation in this case are as follows: *first*, the United States highlights the need for implementation by legislative, as opposed to administrative, means. *Second*, the United States points to the technical complexity of the required legislation; specifically, the United States submits that "there would appear to be numerous WTO-consistent ways in which collected duties might be spent" and that choosing among the various existing options will involve the "complex question" of distinguishing between permissible and impermissible expenditures.⁶¹ *Third*, the United States evokes the functioning of its legislative process and submits that the requested period of 15 months is reasonable "in light of the U.S. legal system and prior experience"⁶²; in this regard, the United States adds that the reasonable period of time should extend beyond the end of the current Congressional session to the April 2004 Congressional recess, because "the opportunity to pass legislation may be greater prior to a Congressional recess".⁶³

57. With respect to the need for implementation by legislative means, I concur with the Arbitrator in *Canada – Pharmaceutical Patents* that this is a relevant circumstance for my determination of the reasonable period of time.⁶⁴ As a general rule, absent evidence to the contrary, implementation by legislative measures will, more often than not, require a longer period of time than implementation by means of administrative measures. I note that the Complaining Parties do not dispute the need for implementation by legislative means in this dispute.

58. With respect to the technical complexity of the required legislation, the United States invokes, as sources of such complexity, the existence of numerous options to implement the recommendations and rulings of the DSB, as well as the fact that choosing among the various existing options will involve the "complex question" of distinguishing between permissible and impermissible expenditures.⁶⁵

59. I do not consider the existence of numerous options to implement the recommendations and rulings of the DSB, as invoked by the United States, to be relevant to my determination of the "reasonable period of time" for

⁶⁰ See *supra*, para. 44.

⁶¹ United States' submission, para. 9.

⁶² United States' submission, heading II.B.1.

⁶³ United States' submission, para. 35.

⁶⁴ Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 49.

⁶⁵ United States' submission, para. 9.

implementation of the recommendations and rulings of the DSB.⁶⁶ The weighing and balancing of the respective merits of various legislative alternatives is one of the key functions and aspects of any legislative process. The mere fact that implementation of the recommendations and rulings of the DSB necessitates the choice between several, or even a large number of, alternative options is generally not, in my view, in and of itself, a particular circumstance that would inform my determination of the shortest period possible to implement the recommendations and rulings of the DSB in this case.

60. Similarly, the need to distinguish, in the light of Panel and the Appellate Body findings in this dispute, between WTO-consistent and WTO-inconsistent implementation options would appear to be the typical content, and concomitant aspect, of every legislative process aiming at implementing recommendations and rulings of the DSB. I do agree with previous arbitrators that, in principle, the complex nature of implementing measures can be a relevant factor for the determination of the reasonable period of time.⁶⁷ Nevertheless, I do not believe that the need to take into account international treaty obligations in the process of drafting implementing legislation, in and of itself, gives rise to the kind of complexity that would warrant additional time for implementation. *Each and every* piece of legislation enacted with a view to implementing recommendations and rulings of the DSB must be designed and drafted in the light of the implementing Member's rights and obligations under the covered agreements. If the need to distinguish between WTO-consistent and WTO-inconsistent implementation options were to qualify, *per se*, as "complexity", and, therefore, were to give rise to "particular circumstances" relevant for the determination of the reasonable period of time, then *every* implementation measure under consideration in proceedings pursuant to Article 21.3(c) would have to be considered complex. In other words, "complexity" would not be a "particular circumstance"; rather, it would be a standard aspect of every implementation.

61. I do not mean to suggest that I am of the view that the dispute between the United States and the eleven Complaining Parties in *US – Offset Act (Byrd Amendment)* does not involve important questions under WTO law. Moreover, I am fully aware of the high level of economic and political interest in this particular dispute, as evidenced by the significant number of WTO Members involved in all stages of this dispute, including in these arbitration proceedings. Nevertheless, "complexity" of implementing legislation as a particular

⁶⁶ I recall that the Arbitrator in *US – Section 110(5) Copyright Act* stated that, although it is an "important issue" whether a Member decides to "simply repeal" a measure or whether "some other approach will be utilized", he failed to see how this issue would

... add any *additional time* to the legislative process, as the *content* of the legislation effecting implementation is precisely the issue that Congress will decide through its normal procedures. (original emphasis)

(Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 42)

⁶⁷ Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 50. I also agree with the example for "complexity" given by the Arbitrator in those proceedings, namely where "implementation is accomplished through extensive new regulations affecting many sectors of activity".

circumstance, within the meaning of Article 21.3(c), is a *legal* criterion, to be examined without regard for political contentiousness or other non-legal factors that may surround a measure at issue. I am precluded, by my mandate under Article 21.3(c), from giving consideration to these non-legal factors.

62. In the light of the above considerations, I therefore do not accept the United States' argument that implementation of the recommendations and rulings of the DSB in this dispute gives rise to complexity that would qualify as a particular circumstance within the meaning of Article 21.3(c).

63. As the third particular circumstance, the United States invokes "the period of time in which the implementing Member can achieve the proposed legal form of implementation in accordance with its system of government."⁶⁸ In doing so, the United States has provided me with a detailed description of its multiple-step legislative process. The United States confirmed that virtually none of these steps is required by law⁶⁹, and that the time periods required for the majority of these steps are equally not legally determined.⁷⁰ In other words, as recognized by previous arbitrators, the United States' legislative process appears to be characterized by a considerable degree of flexibility.⁷¹

64. I am aware that the component steps of the United States' legislative process, as pointed out by the United States, are numerous and potentially time-consuming. However, I note that legislative bills have been passed by the United States Congress within short periods of time; for instance, the CDSOA itself appears to have been passed in a period of only 25 days.⁷² Moreover, the United States has described itself as a "strong advocate[] of prompt compliance".⁷³ Finally, I also agree with the arbitrators in *US – Section 110(5) Copyright Act* and in *US – 1916 Act*, respectively, who noted that, where the United States is obliged to enact a piece of legislation in order to bring itself into compliance with its obligations under an international treaty, the United States Congress may be expected to take advantage of the flexibility available within the legislative procedures to implement such legislation as speedily as possible.⁷⁴

⁶⁸ United States' submission, para. 6.

⁶⁹ The United States explains that the final step of the legislative process, that is, Presidential approval, is mandatory in the sense that the President must either sign an act or, failing that, the act would become law even in absence of his or her signature. (United States' response to questioning at the oral hearing) Moreover, in my view, voting on a bill, in the House and in the Senate, may also be described as a mandatory step in the legislative process.

⁷⁰ The United States, however, states that, although none of the steps in the legislative process is required by law, these steps are required in practice. (United States' response to questioning at the oral hearing)

⁷¹ Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 38; Award of the Arbitrator, *US – 1916 Act*, para. 39.

⁷² The United States submits that the United States Congress had deliberated various legislative projects similar to the CDSOA for a period of 12 years prior to the enactment of the CDSOA. According to the United States, it is therefore misleading to state that the CDSOA took only 25 days to enact. (United States' response to my written question, dated 30 April 2003)

⁷³ United States' statement at the oral hearing.

⁷⁴ Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 39; Award of the Arbitrator, *US – 1916 Act*, para. 39.

65. In order to improve my understanding of how the United States had calculated the requested 15 month period for implementation, I requested the United States, prior to the oral hearing, as well as at the oral hearing itself, to specify the time periods required for each of the individual component steps under its legislative process.⁷⁵ The United States responded to my request on 2 May 2003, explaining how the CDSOA was enacted and providing me with a copy of the schedule for the current Congress; however, in that response, the United States did not provide information on the specific time periods required for each of the component steps under its legislative process. At the oral hearing, the United States, in response to my renewed request, provided oral estimates of the required time periods for certain of the component steps under its legislative process; later, however, the United States explained that these estimates "were based on nothing more than speculation on [its] part", and declined to reduce these estimates to written form because it did not "believe it is appropriate to commit [this] speculation to writing". The United States further explained that, in any event, it was not basing its request for 15 months for the total process upon an accumulation of time estimates for the individual component steps; rather, the United States argued that the basis for its request of 15 months is a general estimate, based on factors such as the legal form and the complexity of implementing legislation, other matters that will be pending before the United States Congress at the same time, the United States' understanding of the legislative process, as well as the estimate that a period extending beyond the end of the current Congressional session will be needed in order to complete all the required work.⁷⁶

66. I recognize that estimating the duration of the various steps involved in a domestic legislative process is not an exact science. It would be unrealistic to expect an implementing Member to provide, as the basis for its request for a reasonable period of time, a definitive day-by-day schedule of the prospective implementing legislative process. Some of the steps in a legislative process, such as pre-legislative consultations, by their very nature, may prove particularly difficult to estimate.⁷⁷ At the same time, however, I fail to see how it would be possible to arrive at a reasoned, and non-speculative, estimate of the total duration of a process without referring, at a minimum, to rough estimates of the time periods required for at least the key component steps of this process. Logically, the total time required for any process must be the sum of the time

⁷⁵ The United States has identified, in its submission, the following steps under its legislative process: Transmission of legislative proposal to Congress (where Executive branch intends to initiate legislation); introduction of a bill into the House and/or the Senate by a Member of Congress; referral of bill to committee and committee action; referral of bill to sub-committee and sub-committee action; committee study, hearings, and mark-up; committee vote and report to full House and/or Senate; consideration and vote on legislation by full House and Senate; House/Senate conference committee (where there are differences between the House and Senate versions of the bill); consideration and approval of reconciliation bill; Presidential approval. (United States' submission, paras. 21-29)

⁷⁶ United States' response to questioning at the oral hearing. The schedule of the current United States Congress, submitted by the United States in response to my request, indicates 3 October 2003 as the prospective date of adjournment for the current Congressional session.

⁷⁷ See also Award of the Arbitrator, *Chile – Price Band System*, para. 45.

periods required for each of the component steps of this process. If the request for a total time period of 15 months, as argued by the United States, is based on "logical" and "rigorous"⁷⁸ factors, such as the complexity of implementing legislation, or the general experience under the United States' legislative system, then I believe that such factors would necessarily provide the same relevant, and non-speculative, guidance with respect to at least some of the component steps of the legislative process. Put differently, I do not agree that an estimate of the total duration of the legislative process can be qualified as "logical" and "rigorous" if such an estimate is not based, at least to some extent, on an accumulation of the timeframes for the component steps. Moreover, if any possible estimates of the time periods required under the various component steps of the legislative process would be, as the United States stated at the oral hearing, mere "speculation", then it appears difficult to see how the total time period of 15 months, requested by the United States, would equally constitute anything other than "speculation".

67. As an additional relevant factor, the United States submits that the reasonable period of time should extend beyond the end of the current Congressional session to the April 2004 Congressional recess, because "the opportunity to pass legislation may be greater prior to a Congressional recess" than at the end of the Congressional session.⁷⁹ The United States believes that this "greater opportunity" to pass legislation is a particular circumstance, within Article 21.3(c), which should inform my determination of the reasonable period of time for implementation.⁸⁰

68. I note that the calendar of the United States Congress is, generally speaking, not laid down in the United States Constitution or in a United States statute. I understand that the only exception in this regard is the requirement, contained in the United States Constitution, that Congress meet "at least once in every year" and that it convene on 3 January, unless another date is chosen.⁸¹ Furthermore, I recall that the Arbitrator in *Canada – Patent Term* stated:

Fixing the "reasonable period of time" to coincide with a date which is not determined by constitution or by statute, but which can easily be modified, would give the actual calendar of the House of Commons [of Canada] a legal value and significance that it simply does not have.⁸²

69. I concur with this statement. The fact that at any given point in the Congressional schedule there would be a "greater opportunity" to pass legislation than at another point in time, is not a particular circumstance relevant for my determination of the reasonable period of time for implementation in this case. The obligation to implement promptly and, if impracticable to do so immediately, then within a reasonable period of time, the recommendations and

⁷⁸ United States' response to questioning at the oral hearing.

⁷⁹ United States' submission, para. 35.

⁸⁰ United States' response to questioning at the oral hearing.

⁸¹ United States' submission, para. 30.

⁸² Award of the Arbitrator, *Canada – Patent Term*, para. 66.

rulings of the DSB is an international treaty obligation of the United States; the specific content and meaning of this international legal obligation cannot be affected by non-legal considerations related to the United States Congressional schedule.

70. This is not to say that the schedule of the United States Congress (or any other legislative body of any implementing Member) can never be a relevant particular circumstance; for instance, previous arbitrators have given consideration, in their determination of the reasonable period of time for implementation, to circumstances where a draft bill could not be introduced into Congress for a number of months because a new Congress had not yet convened at the time when the arbitration was initiated.⁸³ However, these circumstances do not arise in the present proceedings. The United States has *not* argued that it would not be possible to pass the implementing legislation at another point in time, for instance at the end of the Congressional session when the majority of bills are enacted⁸⁴, or at any other time during the Congressional session.

71. I recall my view that it is for the United States to establish that the time period it proposes is the shortest period of time within its legal system to implement the recommendations and rulings of the DSB. In light of the above, I am of the view that the United States has failed to establish that 15 months is the shortest time possible within the United States' legal system to implement the recommendations and rulings of the DSB.

72. I turn now to the arguments submitted by the Complaining Parties in support of their request that I determine the reasonable period of time in these proceedings to be six months from adoption of the Panel and Appellate Body Reports. The Complaining Parties emphasize that: the repeal of the CDSOA is "not a complicated matter" and has been suggested in the United States Budget proposal⁸⁵; the United States' legislative process is flexible and allows expeditious implementation; the request for a period of six months is in line with previous arbitration rulings concerning the adoption of legislative acts by the United States; and, finally, the reasonable period of time must expire before the next distribution of collected duties, because such distribution will cause further harm to the Complaining Parties and to the entire WTO system.

73. With respect to the Complaining Parties' arguments concerning the repeal of the CDSOA as a means of implementation, I wish to recall my findings that it is for the United States to decide on the means of implementation of the recommendations and rulings of the DSB.⁸⁶

74. As regards the United States' legislative process, I recall my finding that the United States Congress indeed has flexibility to act expeditiously, if it so chooses.⁸⁷ It is true that neither the component steps of the United States'

⁸³ Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 45; Award of the Arbitrator, *US – 1916 Act*, para. 44.

⁸⁴ United States' submission, para. 32.

⁸⁵ Complaining Parties' submission, para. 30.

⁸⁶ See *supra*, paras. 50, 52 and 53.

⁸⁷ See *supra*, paras. 63-64.

legislative process nor their duration are legally required or determined and that, as a result, the United States Congress can be expected to use all available flexibility to expedite the implementation of the recommendations and rulings of the DSB. Nevertheless, it is also important to recall that an implementing Member, in principle, is to use its "normal" legislative procedure and should not be required to utilize "extraordinary legislative procedures" in every case. In the light of this principle, I confirm that I do not, in this case, propose the United States to utilize extraordinary legislative procedures. I also accept the United States' explanation that the legislative steps are generally required as a matter of practice and can be time-consuming, and that the entire legislative process is controlled exclusively by the United States Congress.

75. The Complaining Parties furthermore urge me to consider, as a relevant particular circumstance, that the President of the United States has proposed a repeal of the CDSOA as part of the Budget for 2004. The Complaining Parties argue that this proposal implies a recognition on the part of the United States Executive branch that it is possible to repeal the CDSOA within the current Fiscal Year, which will end on 30 September 2003.⁸⁸

76. The United States does not contest that the President of the United States has proposed, as part of the Budget for 2004, a repeal of the CDSOA. However, the United States submits that there is no legal link between, on the one hand, the Budget and the prospective latest date of the passing of the Budget resolution⁸⁹, and, on the other hand, Congressional action concerning the CDSOA; as a consequence, the Budget resolution and proposals concerning the CDSOA will each follow a separate and distinct legislative process in Congress.⁹⁰ According to the United States, the Budget proposal is merely the "vehicle" by which the President of the United States made clear his wish to the United States Congress that the CDSOA be repealed.⁹¹

77. I understand that the President's suggestion to Congress to repeal the CDSOA did not include any draft legislative text to be introduced by a Member of Congress.⁹² I also accept the United States' explanation that the Budget proposal and the proposal to repeal the CDSOA are not legally linked. Finally, the United States has stated that the proposed repeal of the CDSOA is *not* intended to be included in the so-called appropriations bills, which accompany the Budget and of which some are adopted by 1 October and some are adopted after 1 October of any given year. In the light of these explanations by the United States, I am unable to accept the Complaining Parties' argument that the inclusion of the proposal for repeal of the CDSOA in the Budget proposal to the

⁸⁸ Complaining Parties' submission, para. 46.

⁸⁹ 30 September 2003.

⁹⁰ United States' statement at the oral hearing.

⁹¹ *Ibid.*

⁹² United States' statement at the oral hearing. I recall that under the United States' legal system, unlike in the legal systems of certain other WTO Members, the Executive branch has no authority to introduce legislation into Congress; rather, any legislative proposals originating with the Executive branch must be introduced, in either the original or modified version, by a Member of Congress. The remaining steps of the legislative process are also entirely in the hands of the United States Congress.

United States Congress necessarily "implies a recognition" by the United States Executive branch that a repeal of the CDSOA is possible by the end of the current Fiscal Year.⁹³

78. As another alleged particular circumstance, the Complaining Parties urge me to consider the economic harm that may be inflicted on their economic operators by another disbursement of collected anti-dumping and countervailing duties to United States' producers. The Complaining Parties submit that the reasonable period of time for implementation should expire before 30 September 2003 because:

[f]ailure by the United States to bring itself into compliance with the rulings of the DSB before 30 September 2003 would ... result in another illegal distribution of funds and additional irreparable harm to that already imposed on foreign exporters to the United States.⁹⁴

79. In my view, economic harm suffered by foreign exporters does not, and cannot, by definition, impact on what is the "shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB".⁹⁵ The particular circumstances, within the meaning of Article 21.3(c), can only be of such nature as will influence the evolution and unfolding of the implementation process itself. Factors external to the legislative process itself are of no relevance for the determination of the reasonable period of time for implementation.

80. I do not wish to imply that economic harm, caused by the WTO-inconsistent measure, to economic agents of the Complaining Parties, or any other WTO Members, is irrelevant in the context of the implementation of the recommendations and rulings of the DSB. Many WTO-inconsistent measures will cause some form of economic harm to exporters of WTO Members.⁹⁶ However, the need, and urgency, to remove WTO-inconsistent measures, and to remove the harm to economic agents caused by such measures, is, in my view, already reflected in the principle of "prompt compliance" under Article 21.1. The same concern, in my view, underlies the well-established principle, under Article 21.3(c), that the reasonable period of time for implementation be the shortest time possible within the legal system of the Member. Thus, it would be supererogatory, and incongruous, to accord renewed consideration to the issue of

⁹³ In any event, *even if* I were to find that there *is* an implicit recognition by the United States Executive branch that a repeal *can* be accomplished by the end of September 2003, it is still important to recall, once again, that the United States, as the implementing party, remains free to choose the appropriate means of implementation of the recommendations and rulings of the DSB. The United States may therefore choose whether it will repeal or modify the CDSOA. In this regard, I note that the Complaining Parties have *not* argued that the United States Executive branch has also implicitly recognized that a *modification* of the CDSOA, as opposed to a *repeal*, is possible by the end of the September 2003.

⁹⁴ Complaining Parties' submission, para. 49.

⁹⁵ See also Award of the Arbitrator, *Canada – Patent Term*, para. 48.

⁹⁶ *Ibid.*

economic harm when determining the shortest period possible for implementation within the legal system of the implementing Member.

81. As urged by some Complaining Parties⁹⁷, I am, furthermore, mindful of my obligation, pursuant to Article 21.2, to pay "[p]articular attention ... to matters affecting the interests of developing country Members". I note that, by its wording, Article 21.2 does not distinguish between situations where the developing country Member concerned is an implementing or a complaining party. However, I also note that the Complaining Parties have not explained *specifically* how developing country Members' interests should affect my determination of the reasonable period of time for implementation. It is useful to recall, once again, that the term "reasonable period of time" has been consistently interpreted to signify the "shortest period possible within the legal system of the Member". Therefore, I have some difficulty in seeing how the fact that several Complaining Parties are developing country Members should have an effect on the determination of the shortest period possible within the legal system of the United States to implement the recommendations and rulings of the DSB in this case.

82. In the light of the above considerations, and weighing all the relevant factors, I do not find the Complaining Parties' proposal of six months to be a sufficient period within which the United States should implement the recommendations and rulings of the DSB in this case. At the same time, I recall my finding that the United States has equally not established that 15 months represents the "shortest period possible" within its legal system to implement the recommendations and rulings of the DSB.⁹⁸

IV. THE AWARD

83. For the reasons set out above, I determine that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this case is 11 months from the date of adoption of the Panel and Appellate Body Reports by the DSB, namely, 27 January 2003. The "reasonable period of time" will therefore expire on 27 December 2003.

⁹⁷ Brazil's, Chile's and Mexico's statements at the oral hearing.

⁹⁸ See *supra*, para. 71.

**CANADA – EXPORT CREDITS AND LOAN GUARANTEES
FOR REGIONAL AIRCRAFT**

**Recourse to Arbitration by Canada under Article 22.6 of the
DSU and Article 4.11 of the SCM Agreement**

Decision by the Arbitrator
WT/DS222/ARB

Circulated 17 February 2003

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<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515.
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R and Corr.1, DSR 1998:III, 1033.
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003.
<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189.
<i>Brazil – Aircraft (Article 22.6 – Brazil)</i>	Decision by the Arbitrators, <i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS46/ARB, 28 August 2000.
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377.
<i>Canada – Aircraft (Article 21.5 – Canada)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/RW, adopted 4 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/RW.
<i>Canada – Aircraft Credits and Guarantees</i>	Panel Report, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft</i> , WT/DS222/R and Corr.1, adopted 19 February 2002.

SHORT TITLE	FULL TITLE
<i>EC – Bananas III (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725.
<i>EC – Hormones (Canada)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS48/ARB, 12 July 1999, DSR 1999:III, 1105.
<i>EC – Hormones (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1135.
<i>Norway – Trondheim Toll Ring</i>	Panel Report, <i>Panel on Norwegian Procurement of Toll Collect Equipment for the City of Trondheim</i> , adopted 13 May 1992, BISD 40S/319.
<i>US – FSC</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS108/ARB, 30 August 2002.
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.

I. INTRODUCTION

A. Initial Proceedings

1.1 On 19 February 2002, the Dispute Settlement Body (DSB) adopted the report of the Panel in this dispute.¹ The DSB recommended, in particular, that Canada withdraw the subsidies found to be incompatible with its obligations

¹ Report of the Panel on *Canada – Aircraft Credits and Guarantees*, hereafter the "Panel" and the "Panel Report".

under Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) within 90 days.² The 90-day period expired on 20 May 2002.

1.2 On 24 May 2002, Brazil stated that Canada had not followed the recommendation of the DSB within the time-period specified by the Panel and, pursuant to Article 4.10 of the SCM Agreement and Article 22.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Brazil requested the DSB to authorize it to take appropriate countermeasures in the amount of US\$3.36 billion.³

1.3 In its communication, Brazil specified, *inter alia*, that it intended to implement this authorization to take appropriate countermeasures in the form of some or all of the following:

- (a) suspension of the application of the obligation under paragraph 6(a) of Article VI of GATT 1994 to determine that the effect of subsidization under EDC Canada Account and EDC Corporate Account programmes is to cause or threaten material injury to an established domestic industry, or is to retard materially the establishment of a domestic industry;
- (b) suspension of the application of obligations under the Agreement on Import Licensing Procedures relative to licensing requirements on imports from Canada; and
- (c) suspension of tariff concessions and related obligations under the GATT 1994 concerning a list of products to be drawn from the list attached to its request.

B. Request for Arbitration and Selection of the Arbitrator

1.4 On 21 June, Canada submitted a communication to the DSB objecting to the recourse by Brazil to Article 22.2 of the DSU and Article 4.10 of the SCM Agreement. Canada stated that the countermeasures proposed by Brazil were not appropriate.

1.5 Furthermore, Canada considered that, with respect to the part of Brazil's request regarding an alleged failure of Canada to withdraw subsidies in respect of certain aircraft options in a transaction considered by the Panel:

- (a) the situation described in Article 22.2 of the DSU had not occurred since there was no subsidy for Canada to withdraw;
- (b) hence, a necessary precondition for the operation of Article 22.6 of the DSU had not been satisfied; and
- (c) the DSB had no authority to consider the authorization requested by Brazil.

² As recommended in the Panel Report on *Canada – Aircraft Credits and Guarantees*, para. 8.4.

³ WT/DS222/7.

Canada requested that the item be removed from the agenda of the DSB. Alternatively, Canada requested that the matter be referred to arbitration under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement.⁴

1.6 At the meeting of the DSB on 24 June 2002, it was agreed that the matter raised by Canada in document WT/DS222/8 be referred to arbitration, in accordance with Article 22.6 of the DSU and Article 4.11 of the SCM Agreement.⁵

1.7 The Arbitration was carried out by the original Panel, namely:

Chairman: Prof. William J. Davey
Members: Ms Usha Dwarka-Canabady
Prof. Seung Wha Chang.

1.8 The Arbitrator held an organization meeting with the parties on 17 July 2002, during which the parties expressed their views on the draft timetable and working procedures prepared by the Arbitrator. Having regard to additional comments subsequently submitted by the parties, the Arbitrator adopted its timetable and working procedures on 25 July 2002.⁶ According to the timetable, Brazil submitted a statement of its methodology to establish appropriate countermeasures on 3 September 2002. Canada submitted comments on 10 September. Both parties filed initial written submissions on 20 September and rebuttal submissions on 8 October. The Arbitrator held a substantive meeting with the parties on 24 October 2002 and submitted written questions to the parties on 25 October. The parties replied in writing on 1 November 2002 and were given until 7 November to comment on each other's replies. Thereafter, both parties requested the Arbitrator not to issue its report between 6 December and 19 December 2002. A confidential version of the report of the Arbitrator was issued to the parties on 23 December 2002. Parties were requested to identify, by 6 January 2003, those portions of the report which, in their view, should remain confidential. After having received comments from the parties, the Arbitrator circulated the non-confidential version of the report to Members on 17 February 2003.

II. PRELIMINARY ISSUES

A. *Mandate of the Arbitrator*

2.1 Canada has initiated these proceedings pursuant to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement. Article 22.6 of the DSU provides in relevant part:

"When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or

⁴ WT/DS222/8.

⁵ WT/DS222/9.

⁶ The Arbitrator's Working Procedures are found in Appendix 3 of the DSU and Annex 2 to this report.

other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, (...) the matter shall be referred to arbitration. (...)"

2.2 However, with regard to countermeasures taken in response to violations of Article 3.1 of the SCM Agreement on prohibited subsidies, Article 4.11 of that Agreement provides the following mandate for Arbitrators:

"In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ('DSU'), the Arbitrator shall determine whether the countermeasures are appropriate."

2.3 Canada argues that the level of suspension of concessions requested by Brazil is inconsistent with Article 4.10 of the SCM Agreement in that the countermeasures proposed are not "appropriate" within the meaning of that provision.

2.4 We note that Canada has raised no issue regarding the *type* of countermeasure proposed in this case. Our mandate under Article 4.11 of the SCM Agreement in relation to the violation of Article 3 of that Agreement is therefore only to determine whether the *level* of countermeasures proposed is appropriate.

B. Burden of Proof

2.5 Both parties agree that Canada, as the applicant in this case, bears the burden of proving its assertions that the requested level of suspension of concessions is not an appropriate countermeasure within the meaning of Article 4.10 of the SCM Agreement.⁷

2.6 We recall that the general principles applicable to burden of proof, as stated by the Appellate Body, require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.⁸ We find these principles to be also of relevance to arbitration proceedings under Article 4.11 of the SCM Agreement.⁹ In this procedure, we thus agree that it is for Canada, which has challenged the consistency of Brazil's proposed level of countermeasures under Articles 4.10 of the SCM Agreement, to bear the burden of proving that the proposed amount is not consistent with that provision. It is therefore up to Canada to submit evidence sufficient to establish a *prima facie* case or "presumption" that the countermeasures that Brazil proposes taking

⁷ Brazil first submission, paras. 22-24; Canada rebuttal submission, paras. 12-15.

⁸ Report of the Appellate Body, *US – Wool Shirts and Blouses* DSR 1997:I, 323, at 337.

⁹ For previous application of these rules in arbitration proceedings under Article 22.6 of the DSU, see Decision by the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 8 ff. For an application in the context of Article 4.11 of the SCM Agreement, see Decision by the Arbitrators, *Brazil – Aircraft, (Article 22.6 – Brazil)*, paras. 2.8 ff; Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 2.8-2.11.

are not "appropriate". Once Canada has done so, it is for Brazil to submit evidence sufficient to rebut that "presumption". Should the evidence remain in equipoise on a particular claim, the Arbitrator would conclude that the claim has not been established.

2.7 We note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.¹⁰ In this respect, therefore, it is also for Brazil to provide evidence for the facts which it asserts.

2.8 Finally, both parties have claimed that, in respect of certain issues, the other party is in sole possession of the information necessary to establish the appropriateness of the proposed level of suspension of concessions or other obligations. In this regard, we recall that both parties generally have a duty to cooperate in these arbitral proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.¹¹ This is why, even though Canada bears the original burden of proof, we also requested Brazil to submit a "methodology paper" describing how it arrived at the level of countermeasures it proposes.¹² Later, we asked it to come forward with evidence supporting various factual assertions made in its "methodology paper".

C. Treatment of Evidence Submitted by Brazil in its Closing Statement at the Hearing

2.9 Canada claims that Brazil submitted new arguments and new evidence in its concluding remarks at the end of our substantive meeting with the parties, held on 24 October 2002.¹³ The evidence at issue consisted of two press articles contained in Exhibits BRA-76 and 77. Canada argues that Brazil's submission of those exhibits was in breach of due process and contrary to the provisions of paragraph (d) of the Arbitrator's Working Procedures¹⁴, because Brazil gave no reasons why it could not have submitted its evidence in a timely manner. On that ground, Canada requests the Arbitrator to exclude the above-mentioned exhibits.

2.10 Brazil replies that its closing statement was simply a summation of Brazil's case, with some general policy points appended. Regarding Exhibits BRA-76 and 77, Brazil contends that they are properly on the record, being part of Brazil's response to question No. 2 of the Arbitrator to both parties.

2.11 We recall that paragraph (d) of our Working Procedures provides that:

"(d) the parties shall submit all factual evidence to the Arbitrators no later than the first written submissions to the Arbitrators, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure

¹⁰ Report of the Appellate Body, *US – Wool Shirts and Blouses*, p. 335.

¹¹ Report of the Appellate Body, *Canada – Aircraft*, para. 190.

¹² This approach is similar to those followed in all other arbitrations under Article 22.6 of the DSU and under Article 4.11 of the SCM Agreement.

¹³ "Canada's Comments on the New Arguments and Evidence in Brazil's Closing Statement", 1 November 2002, paras. 1-3.

¹⁴ Annex 2 to this report.

will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate;"

2.12 The purpose of paragraph (d), which is also found, *mutatis mutandis*, in most panel and Article 21.5 DSU compliance panel working procedures, is to ensure that parties are given sufficient opportunities to comment on any piece of evidence submitted in the course of the proceedings. Paragraph (d) clearly states the circumstances in which evidence may be submitted after the first written submission. First, additional evidence may be submitted for the purpose of rebuttals or answers to questions. Second, the Arbitrator may allow new evidence to be submitted at a later time, upon a showing of good cause. In all events, paragraph (d) requires that the other party shall be accorded a period of time for comment, as appropriate.

2.13 We recall that in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*¹⁵, the Panel was confronted with a situation of evidence submitted late in the proceedings.¹⁶ The Panel considered that due process required that it accept the evidence submitted by the United States on the understanding that Argentina would have a period of time to provide further comments on the additional pieces of evidence. The Appellate Body upheld the Panel's reasoning, confirming that the Panel enjoyed a certain amount of discretion in its dealing with evidence and stating that Argentina had not requested more time to comment.¹⁷

2.14 In this case, Canada requests that the Arbitrator reject the evidence, since Brazil showed no good cause for submitting late a piece of information that had been available to it for some time.¹⁸ Brazil responds that Exhibits BRA-76 and 77 were submitted as part of its reply to question No. 2 of the Arbitrator to both parties. However, nowhere do we find any reference to these exhibits in Brazil's reply of 1 November 2002. Assuming the evidence was for purposes of rebuttal, we see no particular reason why it could not have been submitted together with Brazil's oral statement at our meeting rather than with its closing statement. By delaying the presentation of this evidence until its closing statement, Brazil's position as respondent gave it a procedural advantage since it spoke last, and it was not foreseen in the Working Procedures that Canada could reply at that point. This makes such a late submission of evidence even less acceptable. Intentionally submitting evidence at a time where the other party is normally no longer in a position to comment – as in this case – not only adversely affects the interests of that party, it also affects due process in general and can generate delays in the work of panels and Arbitrators, thus making it more difficult for them to meet the deadlines contained in the WTO Agreement. Hence, we felt it more appropriate to exclude such evidence rather than to allow Canada to

¹⁵ Panel Report, *Argentina – Textiles and Apparel*, para. 6.55.

¹⁶ In that case, evidence had been submitted by the United States a few days before the second hearing of the panel.

¹⁷ Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 80-81.

¹⁸ Exhibits BRA-76 and 77 are respectively dated 10 July 2001 and 19 October 2002.

respond, the more so as Canada had expressly requested the Arbitrator to reject such evidence. As a result, we decided not to take into account the evidence submitted by Brazil in Exhibits BRA-76 and 77.

D. Admissibility of New Arguments

2.15 Since we reject the evidence contained in Exhibits BRA-76 and 77, we see no reason to consider the arguments of Canada addressing those exhibits.

2.16 This leaves us with the treatment of Canada's additional submission to the extent it addresses Brazil's concluding remarks at the meeting, separately from Exhibits BRA-76 and 77. This submission should not be treated as a reply to new evidence, but as a new submission of arguments which is not foreseen in the Working Procedures. A strict interpretation of our Working Procedures should lead us to disregard Canada's additional submission. However, we note that Brazil developed a rather new line of argumentation in its concluding remarks. It was in the interest of due process and of the information of the Arbitrator to hear what Canada had to say about it, if it wished to do so. We also note that, even if Canada decided to reply to Brazil's arguments, Brazil's right – as respondent – to speak last was preserved by the opportunity given to parties to comment on each other's replies to the questions of the Arbitrator. We saw no reason to formally intervene in that process as long as due process was ultimately respected. We also do not believe that our passivity in this respect could lead to an endless exchange of arguments since the comments on the replies to the questions were the last opportunity for parties to express their views, as provided by the Arbitrator at its hearing with the parties.

2.17 For these reasons we decide to accept Canada's comments on Brazil's concluding statement and Brazil's remarks on those comments.

E. Confidentiality

2.18 Both parties insisted in the course of the proceedings on the confidentiality of certain documents provided to the Arbitrator.¹⁹ We were mindful of the serious problems that could be caused by the disclosure of certain commercial or financial information. Like the *Brazil – Aircraft* Arbitrator, we were also aware of the fact that the full cooperation of Members and private persons in the WTO dispute settlement mechanism, which is essential for an objective assessment of the facts, often depends on the appropriate protection of confidential information.

2.19 This is the reason why we decided to prepare two versions of this report. The first version, including the details of our calculations and all the information relied upon, was issued exclusively to the parties on a confidential basis. We also requested the parties to identify the commercially sensitive information which

¹⁹ At our request, the parties consented that we could have access to the file of the Arbitrator in *Brazil – Aircraft*, provided we respected the confidentiality of the information contained therein. We made that request in light of the parties' extensive references to the record of that arbitration.

they considered should be removed from the text of a non-confidential version to be circulated to Members.²⁰ While some data is not included in this version, it is nevertheless sufficiently detailed for all Members to understand the reasoning of the Arbitrator and the methodology applied in determining whether the countermeasures proposed by Brazil are appropriate. By doing so, the Arbitrator is of the view that it has respected its obligations under the DSU while appropriately protecting the confidentiality of certain information, which had been so requested by the parties.

III. DETERMINATION OF THE "APPROPRIATE COUNTERMEASURES"

A. Main arguments of the Parties

3.1 Brazil argues that, given the circumstances of this case, the appropriate level of countermeasures should be set in light of the sales that Brazil (i.e., Embraer) lost to Bombardier in connection with the transactions for which the Panel found that Canada had provided prohibited export subsidies. In order to calculate that amount, Brazil first adds together the value of all the contracts that were won by Bombardier as a result of the subsidies granted by the Canadian Government, i.e. the contracts with Comair, Air Nostrum and Air Wisconsin. Brazil calculates an estimated value of each aircraft under those contracts on the basis of the total value of the Air Wisconsin contract mentioned in a press release by Bombardier on 16 April 2001. Brazil adds to this amount the harm caused to Embraer in the form of lost business opportunities directly related to the transactions that the Panel established were inconsistent with the SCM Agreement, i.e., supply of parts and services to Air Nostrum, Air Wisconsin and Comair, and sales to other Delta Airlines subsidiaries lost due to fleet "commonality" factors.²¹ Brazil considers that the total represents a possible level of "appropriate" countermeasures. However, Brazil considers this amount unnecessarily high, given the magnitude of trade between the two countries. Therefore, Brazil limits the level of its proposed countermeasures to US\$3.36 billion, which is its estimate of the value of the contracts for aircraft not delivered as of the date that the subsidy should have been withdrawn, i.e., 20 May 2002.

3.2 Canada considers that this case is similar to the arbitration in *Brazil – Aircraft*. Accordingly, Canada accepts that it would be appropriate to authorize Brazil to take countermeasures based, as in that arbitration, on the amount of the

²⁰ Canada submitted proposals for redaction on 6 January 2003. On 13 January 2003, Brazil objected to a number of redactions proposed by Canada. In a response dated 22 January 2003, Canada agreed that the redactions objected to by Brazil were not necessary. Thus, the text of the version circulated to Members is identical to the text of the confidential version issued to the parties, with the exception of the information which the Arbitrator, having regard to the comments of the parties, considered to be confidential. This information is replaced by "xxx".

²¹ Brazil adds that it did not include in its calculations lost tax revenue due to lost sales and other material losses, such as those resulting from direct and indirect unemployment and losses of parts and services suppliers, among others (Brazil's methodology paper, third page).

subsidy. This amount would correspond to the difference between the present value of the payments due under the subsidized financing on the aircraft delivered or to be delivered after the compliance date, and the value of the payments that would have been due if those aircraft were financed at market rate.²² Canada argues that the use of the sales value rather than the amount of the subsidy would result in inappropriate countermeasures, claiming that there is no reason to depart from the approach used by the other Article 4.11 Arbitrators. Moreover, according to Canada, Brazil has not demonstrated that the sales value equates to the "harm" allegedly arising from the Air Wisconsin transaction. Canada argues that Brazil simply assumes that, were it not for Canada's subsidy, Embraer would have won the entirety of the sales and options won by Bombardier with Air Wisconsin.²³ Canada considers that a more proper approach would be to use a counterfactual scenario in which Canada would have withdrawn the subsidy as of 20 May 2002. Canada considers that, leaving aside financing conditions, there was a margin of preference for Bombardier, which must be added on top of the cost for Air Wisconsin of switching its remaining orders to Embraer. Canada believes that the overall cost of the switch would have been higher than any potential financial benefits. Moreover, any realistic counterfactual scenario must include consideration of the compelling interest of the supplier to respond by assuming some of the terms of the contract. On that basis, Canada is of the view that the only reasonable conclusion is that the airline would not switch suppliers. Thus, the level of harm in such a counterfactual would be zero.

B. Approach of the Arbitrator

3.3 We recall that Article 4.10 of the SCM Agreement provides as follows:

"In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate countermeasures, unless the DSB decides by consensus to reject the request."

*(footnote original)*⁹ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

3.4 In addition, Article 4.11 of the SCM Agreement defines our mandate as follows:

"In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ('DSU'), the Arbitrator shall determine whether the countermeasures are appropriate."¹⁰

²² Canada's comments on Brazil's methodology paper, paras. 3-4.

²³ Canada rebuttal submission, paras. 42-48.

(*footnote original*)¹⁰ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

3.5 These two provisions complement each other: The expression "appropriate countermeasures" defines what measures can be authorized in case of non-compliance, and our mandate requires us to review whether, in proposing certain measures to take in application of that provision, the prevailing Member has respected the parameters of what is permissible under Article 4.10 of the SCM Agreement. In doing this, we must aim at determining whether, in this particular case, the countermeasures proposed by Brazil are "appropriate".

C. *The Notion of "Appropriate Countermeasures" Under Article 4.10 of the SCM Agreement*

3.6 Our first task is to consider the meaning of Article 4.10 to the extent necessary for this arbitration. In relation to this, we note that the parties have made frequent references to the other two arbitrations carried out so far under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement: *Brazil – Aircraft* and *US – FSC*. We note that in both cases (and, in particular, the *US – FSC* case) the Arbitrators had to examine the provisions of Article 4.10 and, in particular, the term "appropriate countermeasures". We recall that both Arbitrators applied for that purpose the general principles of interpretation as embodied essentially in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (1969).²⁴

3.7 We note that the Arbitrator in *US – FSC* first considered the meaning of the term "countermeasures":

"5.4 Dictionary definitions of 'countermeasure' suggest that a countermeasure is essentially defined by reference to the wrongful action to which it is intended to respond. The New Oxford Dictionary defines 'countermeasure' as 'an action taken to counteract a danger, threat, etc'.²⁵ The meaning of 'counteract' is to 'hinder or defeat by contrary action; neutralize the action or effect of'²⁶. Likewise, the term 'counter' used as a prefix is defined *inter alia* as: 'opposing, retaliatory'²⁷. The ordinary meaning of the term thus suggests that a countermeasure bears a relationship with the action to be counteracted, or with its effects (cf. 'hinder or defeat by contrary action; neutralize the action or effect of'²⁸)."

Considering these definitions in the context of Article 4 of the SCM Agreement, the Arbitrator in *US - FSC* found that the ordinary meaning of the term

²⁴ See Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.42 *et seq.*, Decision by the Arbitrator *US – FSC (Article 22.6)*, para. 4.7, in relation to the application of Article 3.2 of the DSU and the Vienna Convention on the Law of Treaties to arbitrations under the DSU.

²⁵ (*footnote original*) *The New Shorter Oxford English Dictionary* (1993).

²⁶ (*footnote original*) *Ibid.*

²⁷ (*footnote original*) *Webster's New Encyclopaedic Dictionary* (1994).

²⁸ (*footnote original*) *The New Shorter Oxford English Dictionary* (1993).

"countermeasures" includes actions directed either at countering the measure at issue (effectively neutralising the export subsidy), or at countering its effects on the affected party, or both.²⁹

3.8 Then, examining the meaning of the term "appropriate", the Arbitrator in *US – FSC* noted:

"5.9 The ordinary dictionary meaning of the term 'appropriate' refers to something which is 'especially suitable or fitting'.³⁰ 'Suitable', in turn, can be defined as 'fitted for or appropriate to a purpose, occasion...'³¹ or 'adapted to a use or purpose'.³² 'Fitting' can be defined as 'of a kind appropriate to the situation'.³³"

On the basis of these considerations, it concluded:

"Based on the plain meaning of the word, this means that countermeasures should be adapted to the particular case at hand. The term is consistent with an intent not to prejudge what the circumstances might be in the specific context of dispute settlement in a given case. To that extent, there is an element of flexibility, in the sense that there is thereby an eschewal of any rigid *a priori* quantitative formula. But it is also clear that there is, nevertheless, an objective relationship which must be absolutely respected: the countermeasures must be suitable or fitting by way of response to the case at hand."³⁴

3.9 Moving to analyse the meaning of "appropriate" in light of the terms of the attached footnote 9, the *US – FSC* Arbitrator concluded that the flexibility ensured by the use of the term "appropriate" was bound by a requirement to avoid disproportion between the proposed countermeasures and either the actual violating measure itself, the effects thereof on the affected Member, or both.³⁵ The footnote and the fact that the subsidy has to be withdrawn also make clear that the text of Article 4.10 cannot be construed to confine the appropriateness test to the element of countering the injurious effects on a party. In the view of the *US – FSC* Arbitrator:

"the entitlement to countermeasures is to be assessed in light of the legal status of the wrongful act and the manner in which the breach of that obligation has upset the balance of rights and obligations as between Members. It is from that perspective that the judgment as to whether countermeasures are disproportionate is to be made."³⁶

²⁹ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.6.

³⁰ (footnote original) *Webster's New Encyclopaedic Dictionary* (1994).

³¹ (footnote original) *The New Shorter Oxford English Dictionary* (1993).

³² (footnote original) *Webster's New Encyclopaedic Dictionary* (1994).

³³ *Ibid.*

³⁴ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.12.

³⁵ *Ibid.*, para. 5.19.

³⁶ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.24.

In particular, the Arbitrator recalled that the relative proportion which should exist between the wrongful act and the countermeasures implies that there be "no manifest imbalance or incongruity".³⁷

3.10 Considering the SCM Agreement as part of the context of Article 4.10, the Arbitrator in *US – FSC* noticed that the concept of "trade effect", "adverse effect" or "trade impact" was absent from Article 4, whereas such a concept is clearly found in the context of remedies under Article 7 of the SCM Agreement.³⁸ It concluded that the different terminology reflects the distinct legal nature and treatment of various types of subsidies.³⁹ The Arbitrator also noted the difference between Article 22.4 of the DSU and 4.10 of the SCM Agreement, remarking that Article 4.10 did not contain the explicit quantitative benchmark found in Article 22.4, which provides that the "level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment."⁴⁰

3.11 Finally, considering the object and purpose of the SCM Agreement and of the WTO Agreement, the *US – FSC* Arbitrator expressed the view that the objective of the SCM Agreement in relation to Article 4.10 was to secure compliance with the DSB recommendation to withdraw the subsidy without delay.⁴¹

3.12 The Arbitrator in *US – FSC* concluded:

"5.61 Thus, as we interpret Article 4.10 of the *SCM Agreement*, a Member is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question. This cannot be reduced to a requirement that constrains countermeasures to trade effects, for the reasons we have set out above.

5.62 At the same time, Article 4.10 of the *SCM Agreement* does not amount to a blank cheque. There is nothing in the text or in its context which suggests an entitlement to manifestly punitive measures. On the contrary, footnote 9 specifically guards us against such an unbounded interpretation by clarifying that the expression 'appropriate' cannot be understood to allow 'disproportionate' countermeasures. (...) Countermeasures under Article 4.10 of the *SCM Agreement* are not even, strictly speaking, obliged to be proportionate but not to be 'disproportionate'. Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the 'appropriateness' of such countermeasures – in light

³⁷ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.24, para. 5.18.

³⁸ *Ibid.*, paras. 5.32-5.33.

³⁹ *Ibid.*, paras. 5.36-5.37.

⁴⁰ *Ibid.*, paras. 5.47-5.48.

⁴¹ *Ibid.*, paras. 5.52-5.53.

of the gravity of the breach – , a margin of appreciation is to be granted, due to the severity of that breach."

3.13 Having regard to the reasoning of the Arbitrator in *US – FSC*, we consider that the terms of Article 4.10, taken in their context and in the light of the object and purpose of the SCM Agreement and of the WTO Agreement, do not exclude recourse *a priori* to either of the methodologies suggested by the parties in this case. Of particular importance, in our opinion, is the element recalled by the Arbitrator in *US – FSC* that "the countermeasures must be suitable or fitting by way of response to the case at hand."⁴²

3.14 In light of the foregoing, in this case we must determine whether the proposed countermeasures are appropriate under Article 4.10 of the SCM Agreement. In doing so, we must ensure that they are not disproportionate.

D. Assessment of the Level of Countermeasures Proposed by Brazil

1. Introduction

3.15 As noted above, Brazil has requested authorization from the DSB to impose countermeasures in an amount of US\$3.36 billion, which is its estimate of the value of the contracts for aircraft not delivered as of the date that the subsidies at issue should have been withdrawn, i.e., 20 May 2002. In fact, that amount includes all aircraft under the Air Wisconsin contract, since Brazil has no information as to the actual deliveries under that contract.

3.16 While Canada concedes that countermeasures based on the amount of the subsidy it granted, subject to certain adjustments, would be appropriate in this case, it argues that Brazil's proposed level of countermeasures is inappropriate. In the first instance, Canada argues that this dispute is very similar to the dispute in *Brazil – Aircraft*⁴³ and that, compared to that case, the level of the proposed Brazilian countermeasures is disproportionate. Second, Canada argues that a proper analysis of Brazil's proposal, to the extent it is based on lost sales or competitive harm, would lead to the conclusion that no countermeasures are appropriate.

3.17 As noted above⁴⁴, since Canada has challenged the appropriateness of Brazil's proposed countermeasures, it bears the burden of proof in the first instance. Therefore, we start with Canada's argument that proper analysis of Brazil's lost sales/competitive harm methodology establishes that no countermeasures are appropriate.

⁴² Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.12.

⁴³ See para. 3.2, above.

⁴⁴ See para. 2.6, above.

2. *Brazil's Lost Sales/Competitive Harm Methodology*

(a) Arguments of the Parties

3.18 Canada argues that Brazil "has simply assumed in its argument that, were it not for Canada's subsidy, Embraer necessarily would take the entirety of the Air Wisconsin sales and options won by Bombardier."⁴⁵ Canada suggests that the appropriate approach is to examine the counterfactual situation in which Canada would have withdrawn the subsidy on undelivered aircraft as of 20 May 2002, as recommended by the DSB. Canada argues that Air Wisconsin would not have shifted its orders to Embraer because it has a "revealed margin of preference" for Bombardier aircraft, as demonstrated by the fact it chose Bombardier in the first place when faced with "equivalent and competing below-market offers."⁴⁶ That preference would have to be added to the costs that Air Wisconsin would incur in switching suppliers in mid-contract. Even if those considerations were not sufficient for Air Wisconsin to remain with Bombardier, Canada argues that Bombardier would have powerful incentives to try to retain Air Wisconsin's business.

3.19 In response, Brazil argues that Canada's counterfactual is irrelevant because in a prohibited export subsidy case, serious prejudice and adverse effects are presumed.⁴⁷ Moreover, Brazil argues that Canada's position that Air Wisconsin had a preference of some sort for Bombardier is inconsistent with Canada's decision to grant a Canada Account subsidy to enable Bombardier to win the contract in the first place.⁴⁸ In that regard, Brazil recalls that Canada Account is reserved for transactions involving the national interest, and it also quotes Canadian officials to the effect that the subsidy was necessary to enable Bombardier to win the contract.

(b) Analysis of the Arbitrator

3.20 At the outset, we note that, in principle, countermeasures based on trade effects or competitive harm may be consistent with Article 4.10. However, regardless of whether adverse effects are presumed to exist in a prohibited export subsidy case, as argued by Brazil, the question remains as to whether Brazil's methodology results in a level of countermeasures that is appropriate. Since Brazil bases its proposed countermeasures on trade effects or competitive harm, we must in the first instance determine the nature of the trade effects or competitive harm.

3.21 In past cases where a lost sales or a trade effect methodology was proposed, such as in the *EC – Bananas* and *EC – Hormones* cases, the "level of suspension of concessions" (the equivalent in Article 22 of the DSU of "countermeasures" in Article 4.10 of the SCM Agreement) to be authorized was set by the Arbitrators through a determination of the level of nullification or

⁴⁵ Canada rebuttal submission, para. 42.

⁴⁶ Canada rebuttal submission, para. 44.

⁴⁷ Brazil's responses to questions to the parties, para. 47.

⁴⁸ Brazil's responses to questions to the parties, para. 50.

impairment as of the date that the reasonable period of time for implementation of DSB recommendations expired.⁴⁹ The level of nullification or impairment was assessed in light of the relevant measures or markets as of the expiration of the reasonable period of time. Thus, in the *EC – Bananas* cases, the Arbitrators considered the level of the nullification or impairment arising from the revised EC measure⁵⁰, while in the *EC – Hormones* cases, the Arbitrators considered the market for beef products existing on the implementation date, which had shrunk as a result of various health concerns as compared to the market existing at the outset of the case.⁵¹ In all of these cases, the Arbitrators used a counterfactual approach, comparing the existing situation with that which would have occurred had implementation taken place as of the expiration of the reasonable period of time.

3.22 Following this traditional approach, the key issue in this case is whether the withdrawal of future subsidies by Canada as of 20 May 2002 – i.e. the expiration date of the reasonable period of time in this case – would have resulted in a change in Air Wisconsin's future purchases. In considering Canada's arguments that there would be no change, we examine first its contention that Air Wisconsin had a revealed margin of preference for Bombardier. While such a preference may have existed, Canada has not meaningfully quantified it and we doubt its significance given the fact, noted by Brazil, that Canada felt compelled to grant the subsidies at issue in order to ensure the contract for Bombardier. However, more importantly, Canada argues that Bombardier would have incentives to try to keep the Air Wisconsin contract, even at some cost.⁵² Brazil does not respond to this argument.⁵³

3.23 On balance, we conclude that Canada has satisfied its burden of demonstrating that the assumptions underlying Brazil's methodology are not valid. After considering the evidence and arguments of the two parties, we are persuaded that withdrawal of the subsidy would not have resulted in Embraer

⁴⁹ Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.9; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 37; *EC – Hormones (US) (Article 22.6 – EC)*, para. 38.

⁵⁰ Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 4.8 – 4.9; *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 168.

⁵¹ Decision by the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)* para. 37; *EC – Hormones (US) (Article 22.6 – EC)*, para. 38.

⁵² It is not clear that the costs to retain the contract would be all that great. Canada also contends that given Air Wisconsin's existing relationship with Bombardier as of 20 May 2002, Air Wisconsin would not have switched suppliers at that point. In this regard, we note that 12 of the 51 firm orders had been delivered as of 20 May 2002. Brazil does not directly respond to this contention. Indeed, Brazil has elsewhere argued in a different context in this very proceeding that once an airline buys one type of aircraft, it and related companies are likely to stay with that type of aircraft "because of the well known reality in the airline industry that having 'commonality' of aircraft in a company's fleet *greatly* reduces maintenance and repair costs." Brazil first submission, para. 46 (original underlining).

⁵³ In this regard, we note that Canada recalls that Brazil had itself made a similar argument in *Brazil – Aircraft*, where it contended, in considering the reaction of Embraer to a withdrawal of subsidies that "Embraer has a strong business interest in maintaining the goodwill and trust of its customers by ensuring that it fulfils the customers' orders." (Canada rebuttal submission, para. 45, quoting Brazil's written submission in *Brazil – Aircraft*, at para. 56).

obtaining the remainder of the Air Wisconsin contract. Thus, we find that application of Brazil's lost sales/competitive harm methodology does not justify the level of countermeasures (US\$3.36 billion) proposed by Brazil. Hence, we find the level of countermeasures proposed by Brazil not to be appropriate in terms of Article 4 of the SCM Agreement.

3.24 This conclusion is buttressed by our belief that it would be inappropriate to base the level of countermeasures on lost sales suffered by Embraer as a result of losing the Air Wisconsin contract in a situation where we have previously found that Embraer's original offer to Air Wisconsin was not a market-based offer itself.⁵⁴

3.25 However, we still have some concerns that the approach we follow here – focusing on what would have happened if compliance had occurred compared to the non-compliance situation – may in some cases result in a lack of effectiveness of countermeasures in achieving compliance. Such cases could include those involving violations of the Agreement on Government Procurement or the SCM Agreement in circumstances *not involving*, as this case did, non-market offers by both parties. Indeed, the inadequacy of GATT-style remedies was discussed in some detail in respect of government procurement in the case on *Norway – Trondheim Toll Ring*.⁵⁵ We see no reason to address this issue in this case. This issue is, however, one that should be dealt with in a case where it is relevant. Here, we believe that the approach we have followed has led to the correct result for this particular case.

3.26 In our view, the foregoing analysis indicates that Brazil's proposed countermeasures based on its trade effects/competitive harm methodology are not appropriate. We note, however, that the parties presented extensive arguments on the question of whether the *level* of those countermeasures was "appropriate", particularly in light of the countermeasures authorized in the *Brazil – Aircraft* case. We turn now to examine that issue.

3. *The Appropriateness of the Level of Brazil's Proposed Countermeasures*

(a) Arguments of Canada

3.27 Canada considers that Brazil's methodology is inconsistent with the methodologies used in the two previous arbitrations regarding export subsidies, which were based on the amount of the subsidy.⁵⁶ The amount proposed by Brazil lacks any proportionality and is therefore not appropriate. In this regard, Canada notes that both this case and the *Brazil – Aircraft* case involve the same parties, the same legal provisions, regional aircraft and export subsidies that

⁵⁴ Panel Report, paras. 7.147-7.150.

⁵⁵ Panel Report adopted on 13 May 1992, BISD 40S/319. We also note that, in *Australia – Automotive Leather II (Article 21.5 – US)*, the Panel took the view that, in the particular circumstances of that case, the withdrawal of a prohibited subsidy implied its reimbursement (see, *inter alia*, paras. 6.46-6.49).

⁵⁶ Canada first submission, paras. 8-9.

reduce the cost of financing those aircraft. The two salient differences highlighted by Canada are that far more aircraft were involved in *Brazil – Aircraft* (1,118) and in that case Brazil offered its subsidies simply to gain an illegal commercial advantage over competing aircraft from other countries while in this case, Canada granted subsidies only to offset what the Panel found to be a below-market offer from Embraer. Despite this, Canada notes that the level of countermeasures proposed by Brazil, on a per-aircraft basis, is 43 times the level authorized in *Brazil – Aircraft*.⁵⁷

3.28 Canada also claims that countermeasures, as recognized by the Arbitrator in *US – FSC*, should be adapted to the particular case at hand. The concept of "appropriateness" implies a consideration of the specific circumstances which, in this case, suggest a less egregious violation by Canada, justifying a lower appropriate level of countermeasures. Canada only came to the aid of its own aircraft industry in reply to an imminent threat that Brazil was going to subsidize certain sales. As acknowledged by the Arbitrator in *US – FSC*, countermeasures should reflect the gravity of the breach and the nature of the upset in the balance of rights and obligations in question. In that context, Canada considers that it would be appropriate to reduce the countermeasures to half the amount of the subsidy.⁵⁸

3.29 Canada contests Brazil's argument that Canada intentionally violated its obligations and that this merits especially severe countermeasures. When Canada offered its financing in the Air Wisconsin transaction, it did so in the belief that matching was permitted under the Item (k) "safe haven" of the illustrative List contained in Annex I to the SCM Agreement. Regarding Brazil's claim of targeting, Canada claims that "matching" necessarily involves targeting a specific transaction of another country. Canada acted on credible evidence that Brazil was offering illegal PROEX subsidies, as acknowledged in the Panel report.⁵⁹ Brazil bases its request for "punitive" countermeasures on Canada's decision to honour its contract with Air Wisconsin, whereas Brazil in *Brazil – Aircraft* not only chose to honour its existing contracts, but also made commitments after the compliance deadline on a much larger scale. Given the disparity of the breaches and in the particular circumstances of this case, it would be manifestly unjust to grant Brazil's request for countermeasures at a level vastly higher than that granted in respect of Brazil's own non-compliance in *Brazil – Aircraft*. On the contrary, countermeasures proportionally lower than those awarded to Canada in *Brazil – Aircraft* would be entirely appropriate.⁶⁰

(b) Arguments of Brazil

3.30 In considering whether its proposed countermeasures are appropriate, Brazil recalls that both the *Brazil – Aircraft* and *US – FSC* arbitrations allow the Member authorized to retaliate to choose to base the level of countermeasures on

⁵⁷ Canada first submission, para. 7.

⁵⁸ Canada first submission, paras. 12-18.

⁵⁹ Canada rebuttal submission, paras. 20-27.

⁶⁰ Canada rebuttal submission, paras. 28-30.

either the level of the subsidy or the effect of the subsidy.⁶¹ For Brazil, it is not relevant that Canada and the EC chose to base their proposed countermeasures on the level of the subsidy in those two cases. Brazil also argues that the *Brazil – Aircraft* arbitration is not controlling as a matter of law, and that the two cases are not similar.⁶²

3.31 As to the appropriate level for countermeasures, Brazil notes that in *Brazil – Aircraft*, the Arbitrator determined that a countermeasure was appropriate, *inter alia*, if it effectively induced compliance. Brazil's countermeasures are intended to effectively induce Canada to withdraw the prohibited export subsidy. If the level is too low, Brazil Argues, Canada will have no incentive to withdraw the prohibited subsidy.⁶³ Brazil also recalls that in the *US – FSC* arbitration, the Arbitrator declared that the countermeasure could be directed either at neutralizing the export subsidy or at countering its effect on the affected party. The Arbitrator also said that it would be inappropriate to limit countermeasures to the face value of an export subsidy since in some instances the adverse effect could be manifestly greater.⁶⁴ According to Brazil, both the *Brazil – Aircraft* and *US – FSC* arbitrations allow the Member authorized to retaliate to choose to base the level of countermeasures on either the level of the subsidy or the effect of the subsidy.⁶⁵

3.32 Brazil adds that the *US – FSC* Arbitrator also stated that the maintenance of the unlawful export subsidy itself had the effect of upsetting the balance of rights and obligations irrespective of the actual trade effects. Thus, an arbitration must account for both the "gravity of the wrongful act" and the objective of securing withdrawal of a prohibited subsidy.⁶⁶ A margin of appreciation should be granted due to the "severity of the breach." In this case, Canada knew and admitted that the subsidies it granted were illegal. Moreover, Canada targeted Brazil. This constitutes a severe breach. In addition, Canada has done nothing to implement the DSB recommendations and rulings and does not intend to comply with them. Canada cannot argue that Brazil's violation in *Brazil – Aircraft* was more serious. PROEX is a general export credit programme. Its application to aircraft was to remedy or offset the unfair advantage that Canada has in export financing, whereas Canada gave direct financing on very generous terms.⁶⁷ This justifies countermeasures based on the level of competitive harm suffered by Embraer in losing the Air Wisconsin contract as manifestly appropriate.⁶⁸ Brazil notes that in *Brazil – Aircraft*, Canada considered that countermeasures could be appropriately based on the level of competitive harm.

3.33 Brazil adds that the Arbitrator in *US – FSC* found that an "appropriate level of countermeasures" must be adapted to the particular case, i.e. suitable and

⁶¹ Brazil rebuttal submission, para. 3.

⁶² *Ibid.*

⁶³ Brazil rebuttal submission, paras. 16-17.

⁶⁴ Brazil first submission, paras. 29-33.

⁶⁵ Brazil rebuttal submission, para. 3.

⁶⁶ Brazil rebuttal submission, para. 6.

⁶⁷ Brazil rebuttal submission, paras. 22-27.

⁶⁸ Brazil first submission, paras. 35-36; Brazil rebuttal submission, para. 7.

fitting by way of response and concluded that a proposed level of countermeasures is not "disproportionate" unless it is "manifestly excessive".⁶⁹ Brazil argues that it could have proposed a significantly higher level of countermeasures which would not have been disproportionate since it was calculated on the basis of the direct harmful effects on Brazil and Embraer of the Canadian illegal measure.⁷⁰ For example, Brazil could have added to the value of the Air Wisconsin's contract those of the Air Nostrum and Comair contracts, as well as the opportunities to supply parts and services during the useful life of the aircraft sold to these companies. However, Brazil chose to request a much lower level of countermeasures, one that is strictly proportional to the value of just one of the contracts won by Bombardier with prohibited subsidies. The level of countermeasures requested by Brazil is therefore clearly not disproportionate and bears a direct relationship with the trade effect of the measure.⁷¹

(c) Analysis of the Arbitrator

(i) Introductory Remarks

3.34 Canada's basic argument is that Brazil's proposed countermeasures are inappropriate because they are disproportionate compared to the two prior export subsidy cases where countermeasures were authorized. In particular, it draws a comparison between the level authorized in *Brazil – Aircraft* and that proposed here, where the countermeasures on a per-aircraft basis would be 43 times the level authorized there. Since Canada views its breach in this case as having been less serious than Brazil's breach in *Brazil – Aircraft*, it sees the proposed countermeasures as particularly disproportionate.

3.35 Brazil argues that a high level of countermeasures is appropriate in this case because of the need for the countermeasures to induce compliance and because of the gravity of Canada's breach.

3.36 At the outset, it seems clear to us that the fact that the amount of the subsidy was used as a basis for setting the level of countermeasures in *Brazil – Aircraft* and *US – FSC* does not preclude Brazil from using a different basis for its proposed countermeasures. The amount of the subsidy was accepted as the basis for the level of countermeasures in those cases by the prevailing party. However, that is not the case here. Brazil cannot be bound by strategic decisions made by other parties in other cases as to the level of countermeasures they wished to have authorized. Nor is the fact that Brazil accepted the amount of the subsidy approach in *Brazil – Aircraft* legally relevant. Obviously, in that case at that time, it was in Brazil's interest to prefer that approach to the alternative proposed by Canada, which would have resulted in a higher level of countermeasures. That is not to say, however, that Brazil has *carte blanche* in proposing countermeasures. They must be appropriate; they must not be disproportionate.

⁶⁹ Brazil first submission, paras. 37-38.

⁷⁰ Brazil rebuttal submission, para. 14.

⁷¹ Brazil first submission, paras. 50-52.

(ii) Appropriateness of the Proposed Countermeasures

3.37 Regarding this question, we express our agreement with the Arbitrator's findings in *US – FSC* that "countermeasures should be adapted to the particular case at hand."⁷² Accordingly, we are authorized to consider the relevant factors constituting the totality of the circumstances at hand in order to determine whether Brazil's proposed countermeasures – at a level of US\$3.36 billion – are appropriate in this particular case.

3.38 In the arguments of the parties, we have discerned five factors that may be relevant in evaluating the appropriateness of the proposed level of Brazilian countermeasures: (i) the level of the proposed countermeasures in light of those authorized in *Brazil – Aircraft*; (ii) the level of the proposed countermeasures in light of the value of imports of goods from Canada into Brazil; (iii) the level of the proposed countermeasures in light of the gravity of the breach; (iv) the level of proposed countermeasures in light of the need to induce Canada to comply with its WTO obligations; and (v) the relevance of whether the countermeasures are not manifestly excessive. In this section, we will examine first whether five such factors are relevant here. If relevant, then we will consider each factor for our assessment of the appropriateness of proposed countermeasures.

a. The Countermeasures Considered on a per-Aircraft Basis

3.39 First, as noted by Canada, the level of countermeasures proposed by Brazil, on a per-aircraft basis, is 43 times that authorized in *Brazil – Aircraft*; this despite the fact that the level of subsidy per aircraft is not so dissimilar. The per-aircraft subsidy in this case, as we calculate it below, is approximately 2.5 times the per-aircraft subsidy calculated in *Brazil – Aircraft*.⁷³ Even if adjusted for the different subsidy levels, the difference in the per-aircraft level of countermeasures is a striking difference – on the order of twenty to one.

3.40 While we have concluded that Brazil is not legally bound to propose the same methodology in this case that Canada accepted in *Brazil – Aircraft*, we believe that a comparison of the result produced by the Brazilian methodology with the result in *Brazil – Aircraft* may be relevant in deciding whether the result of the application of the Brazilian methodology is appropriate. After all, this dispute involves largely the same market and products, the same parties and similar violations of the SCM Agreement, i.e. the use of prohibited export subsidies.

3.41 On an initial view, a strong argument can be made that the large difference in levels of countermeasures on a per-aircraft basis compels the conclusion that Brazil's proposed level of countermeasures is not appropriate in

⁷² Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.12.

⁷³ An average amount of subsidy per aircraft in *Brazil – Aircraft* can be calculated by dividing the total subsidies of US\$1.4 billion by the 1118 aircraft involved. See *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.76 and 3.93. We would note that the Embraer aircraft at issue were in part smaller and less expensive than the Bombardier aircraft involved in the Air Wisconsin transaction.

this case. Can it be said that Brazil's proposed countermeasures are "fitting by way of response to the case at hand"⁷⁴ if Canada is subjected to much more onerous countermeasures on a per-subsidy/per-aircraft basis than Brazil was in a similar case between these same two parties? Ultimately, however, we find it difficult to conclude on this factor alone that the proposed countermeasures are not appropriate. After all, Canada specifically chose to accept the lower of two levels of countermeasures that it proposed in *Brazil – Aircraft*. The alternative level proposed, but not preferred, by Canada was based on trade effects and was significantly larger (Can\$ 4.7 billion). Nonetheless, the large difference in levels of countermeasures on a per-aircraft basis suggests that Brazil's proposed level of countermeasures may not be appropriate.

b. The Countermeasures Considered in Light of the Value of Imports of Goods from Canada into Brazil

3.42 A second measure of appropriateness is to consider the proposed countermeasures in light of the overall level of trade in goods between the two parties.⁷⁵ This seems particularly relevant since the point of the countermeasures is to restrict trade and Brazil has made a request to suspend concessions relating to imports of goods from Canada.⁷⁶ In that regard, Canada estimates its exports of goods to Brazil in 2001 amounted to US\$591 million.⁷⁷ Brazil estimates the amount at US\$927 million.⁷⁸ Thus, the level of the proposed countermeasures would be from three to six times Brazil's annual imports from Canada. This disparity between the level of the proposed countermeasures and the total value of Brazil's imports of goods from Canada is so large that, in our view, it is not "fitting by way of response to the case at hand."⁷⁹ We understand that an assessment of proportionality under Article 4.10 of the SCM Agreement normally requires the Arbitrator to examine whether some congruence exists between the countermeasures and the original violating measures.⁸⁰ It is also true, however, that the plain meaning of "appropriate" in Article 4.10 suggests that "countermeasures should be adapted to the particular case at hand."⁸¹ While we do not wish to minimize in any way the seriousness of the original violation by the measure at issue, our consideration of this particular fact that authorizing countermeasures would, if applied, halt such a significant proportion of trade in

⁷⁴ See Decision by the Arbitrator *US – FSC (Article 22.6 – US)*, para. 5.12

⁷⁵ Brazil implicitly suggests that countermeasures may not be appropriate in light of the value of trade between the parties, when it states that its initial calculation of the countermeasures at US\$10.2 billion "is unnecessarily high, given the magnitude of trade between the two countries." (Brazil's methodology paper, "step 3").

⁷⁶ See WT/DS222/7, point (3), p. 2. We note that Brazil's requests also includes suspension of other obligations (see para. 1.3, above).

⁷⁷ Canada's answer to question 1 addressed to both parties.

⁷⁸ The difference may be explained by the fact that some goods are transhipped through the United States (see Brazil's answer to question No. 1 of the Arbitrator to both parties, para. 3).

⁷⁹ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.12.

⁸⁰ See, also, para. 3.49, below

⁸¹ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.12.

goods between the two parties for several years leads us to find that the level of Brazil's proposed countermeasures may not be appropriate to the circumstances at hand.⁸²

c. The Countermeasures Considered in
Light of the Gravity of the Breach

3.43 Brazil invokes the gravity of the breach in this case as an aggravating factor justifying the use of a methodology that produces a high level of countermeasures. Canada, on the contrary, claims that its breach is less serious than Brazil's violation in *Brazil – Aircraft*.

3.44 We recall that the Arbitrator in *US – FSC* considered that in assessing the "appropriateness" of countermeasures, a margin of appreciation is to be granted in light of the gravity of the breach at issue.⁸³ However, we believe that the Arbitrator in *US – FSC* used the term "the gravity of the breach" in the context of discussing the prohibited nature of export subsidies in general.⁸⁴ Comparatively, it appears to us that what the parties are referring to in this case under the term "gravity of the breach" concerns the *characteristics* of the specific prohibited subsidy at issue, i.e. whether it relates to one transaction or is a recurrent programme, whether it is based on "self defence" in response to other subsidies or whether it targets a particular market or competitor.

3.45 Our reading of the *US – FSC* report, however, does not mean that we are precluded from taking into account the characteristics of this particular subsidy pointed out by Brazil, since such characteristics may constitute relevant elements of original violating measures against which the proportionality of countermeasures should be measured. Our examination of such characteristics of this subsidy, in our view, does not justify a particularly high level of countermeasures. The gravity of granting a prohibited subsidy is assessed in

⁸² We are mindful that our consideration of the total value of imports of goods from Canada into Brazil in order to assess appropriateness may be interpreted as creating an imbalance between WTO Members. Members with limited imports would be prevented from imposing a large amount of countermeasures, whereas Members with significant imports would be entitled to a larger amount of countermeasures. We do not believe that our decision creates that imbalance or exacerbates inequalities in a system based on countermeasures in the form of suspensions of concessions or other obligations under the WTO Agreement. Rather, our decision simply reflects the imbalance between Members that inherently results from the reliance on countermeasures in the form of market access restrictions, which disfavour Members with a lower value of imports. In this regard, we note that there is no restriction on the *types* of countermeasures under Article 4.10 of the SCM Agreement. In this particular case, however, what Brazil requested for as countermeasures is suspension of tariff concessions and other WTO obligations which are related only to market access restrictions. Finally, we wish to stress that, although the value of bilateral trade is one of the important factors for the Arbitrator's determination under 4.10 of the SCM Agreement under certain circumstances in a particular case such as ours, it may not be deemed to be a universally applicable decisive factor of which consideration alone, under any circumstances, always compels the Arbitrator to conclude that the proposed countermeasures are not appropriate.

⁸³ See *US – FSC (Article 22.6 – US)*, para. 5.62.

⁸⁴ *Ibid.*, paras. 6.7-6.9. The *FSC* Arbitrator noted the systemic and widely available nature of the *FSC/ETI* scheme, but in the context of confirming how the balance of rights and obligations had been upset in that particular case involving a prohibited export subsidy programme and for the purpose of establishing the right of the EC to counter the subsidy by a measure equivalent in amount.

absolute terms against the rule or principle that was breached. However, the gravity of a *particular* prohibited subsidy based on its characteristics may only be assessed in a relative manner, through a comparison with the characteristics of other subsidies. The only reliable comparator available in this field is Brazil's programme of subsidization for regional aircraft addressed in the *Brazil – Aircraft* proceedings. We first note that the measure at issue in *Brazil – Aircraft* was a programme of subsidization which was not limited in time, whereas the measure at issue in this case relates to a finite amount of subsidy. Second, the amount of subsidy expended by Brazil or for which commitments existed at the time the Article 22.6 arbitration took place in *Brazil – Aircraft* was much higher than in the present case. Third, even if we were to assess the gravity of the subsidy at issue on the basis of its "competitive harm", we have no reason to believe that any of the factors to be considered in assessing such harm would be significantly different in the two cases, with the consequence that there is no reason to assume that the harm caused by Canada's subsidy should be proportionally higher than the harm caused by Brazil's subsidy, as reviewed by the *Brazil – Aircraft* Arbitrator. The fact that Canada targeted Embraer offers is also of limited significance. Since Brazil and Canada are the main competitors in the regional aircraft sector, any offer from one *ipso facto* targets the other.

3.46 In conclusion, even if the characteristics of a particular subsidy might sometimes justify the application of a particularly high level of countermeasures, we see no reason to consider that the characteristics of Canada's subsidy in this case do so. Thus, this factor is not helpful in assessing the appropriateness of the proposed level of Brazilian countermeasures in this case.

d. The Countermeasures Considered in Light of the Need to Induce Compliance

3.47 One of the recognized purposes of countermeasures is to induce the defaulting party to comply with DSB recommendations. In this case, Brazil argues that the application of its methodology is necessary in order to set a level of countermeasures that will be sufficiently high to induce compliance. We note that inducing compliance was a concern expressly mentioned by the Arbitrators in *Brazil – Aircraft*⁸⁵ and in *US – FSC*.⁸⁶ For example, the report in *US – FSC* stated:

"5.57 In our view (...) when assessing the scope of what may be deemed "appropriate" countermeasures, we should keep in mind the fact that the subsidy at issue has to be withdrawn and that a countermeasure should contribute to the ultimate objective of withdrawal of the prohibited subsidy without delay."

⁸⁵ Decision by the Arbitrator, *Brazil – Aircraft* (Article 22.6 – Brazil), paras. 3.44, 3.54, 3.57 and 3.58.

⁸⁶ Decision by the Arbitrator, *US – FSC* (Article 22.6 – US), paras. 5.51-5.60. We recall that both in *Brazil – Aircraft* and in *US – FSC* the Arbitrators chose to use the full amount of the subsidy, without any adjustment.

3.48 We agree that the need to induce compliance is a factor that should be considered in evaluating the appropriateness of the level of proposed countermeasures. In terms of this case and in light of our analysis thus far, the issue is whether the need to induce compliance by Canada should cause us to find that the level of countermeasures proposed by Brazil is appropriate, notwithstanding our finding above that the proposed level of countermeasures is not appropriate in terms of Article 4.10 of the SCM Agreement. We are not convinced that we should change our finding because of the uncertainty as to the level of countermeasures that would result in compliance. That uncertainty exists because, in addition to the level of the countermeasures, the nature of the countermeasures and the sectors subject to countermeasures have a role in determining likely compliance. In addition, other factors internal to the Member subject to the countermeasures may have an impact. While the logic underpinning countermeasures is that higher countermeasures are more likely to induce compliance than lower countermeasures, the requirement that countermeasures be "appropriate" precludes reliance on that logic alone. Thus, we conclude that the need to induce compliance does not justify changing our finding that the level of countermeasures proposed by Brazil is not appropriate in light of our finding in paragraph 3.23 and the other relevant factors examined above.⁸⁷

e. Are the Proposed Countermeasures Manifestly Excessive?

3.49 Brazil argues, relying on the *US – FSC* report⁸⁸, that any level of countermeasures that is not "manifestly excessive" should be considered appropriate. We understand this to be more of a general argument about what appropriateness or disproportionality means in Article 4.10 of the SCM Agreement. First, we doubt that the Arbitrator in *US – FSC* considered that the term "disproportionate" in footnote 9 to Article 4.10 was meant to equate to "manifestly excessive", as claimed by Brazil. We consider that the language on which Brazil relies should be read in the broader context of the discussion of the *US – FSC* Arbitrator regarding the relationship between the words "appropriate" and "disproportionate", which we have set out in Section III.C above. As noted by the Arbitrator in *US – FSC*,

"(...) there is a requirement to avoid a response that is disproportionate to the initial offence – to maintain a *congruent relationship in countering the measure at issue so that the reaction is not excessive in light of the situation to which there is a response*. But this does not require exact equivalence – the relationship to be respected is precisely that of "proportion" rather than "equivalence."⁸⁹

⁸⁷ In our view, this conclusion does not preclude a consideration of adjusting the level of countermeasures produced by a different methodology in different circumstances.

⁸⁸ Decision by the Arbitrator, *US – FSC*, (*Article 22.6 – US*), para. 5.24, footnote 51.

⁸⁹ Decision by the Arbitrator, *US – FSC*, (*Article 22.6 – US*), para. 5.18, emphasis added.

In other words, some congruence must remain between the countermeasure and the measure to which it responds. Therefore, we consider that we need not examine whether the level of Brazil's proposed countermeasures is "manifestly excessive" or not.

4. Conclusion

3.50 Accordingly, in light of our discussion in the foregoing paragraphs, we find that Canada has established that the countermeasures proposed by Brazil are not appropriate in terms of Article 4 of the SCM Agreement. First, the methodology proposed by Brazil is based on assumptions that are not sustainable. Second, the result of the methodology is a level of countermeasures that is not appropriate.

3.51 As noted at the outset, however, Canada admits that in light of its non-compliance with DSB recommendations Brazil is entitled to impose countermeasures. Canada argues that an appropriate starting point for calculating the level of such countermeasures is the amount of the subsidy that will be granted on aircraft not yet delivered as of 20 May 2002, when Canada should have withdrawn the subsidy. Given Canada's concession and the fact that the two prior arbitrations under Article 4.10 of the SCM Agreement have used the amount of the subsidy as the basis for approving proposed countermeasures, we find it proper as a starting-point to calculate the level of countermeasures in this case based on the amount of the subsidy methodology, subject to adjustments if necessary to ensure that the level of countermeasures is appropriate. In this regard, we note that prior Arbitrators that have rejected proposed levels of countermeasures (or suspensions of concessions) have always proceeded to set levels consistent with the relevant agreements.⁹⁰

E. Calculation of the Amount of "appropriate countermeasures"

1. Determination of the Amount of the Subsidy

3.52 For the reasons mentioned above, we find it proper as a starting-point to use a methodology based on the amount of the subsidy for the calculation of the "appropriate countermeasures" in this case. We recall that Canada, in its first written submission, suggested that the subsidy be calculated "as the discounted present value of the difference in payment streams under the subsidized

⁹⁰ Except in *United States – FSC*, Arbitrators have always rejected the level proposed by the Member requesting the right to suspend concessions or other obligations and set a new level, based on their own assessment (see *EC – Bananas III (United States) (Article 22.6 – EC)*: US\$520 million requested, US\$191.4 million authorized; *EC – Hormones (United States) (Article 22.6 – EC)*: US\$202 million requested, US\$116.8 million authorized; *EC – Hormones (Canada) (Article 22.6 – EC)*: Can\$75 million requested, Can\$11.3 million authorized; *EC – Bananas III (Ecuador) (Article 22.6 – EC)*: US\$450 million requested, US\$201.6 million authorized; *Brazil – Aircraft*: Can\$ 700 million requested, Can\$344.2 million authorized).

financing compared to an estimated market financing, where the present value is calculated as of the date of delivery of the individual aircraft."⁹¹

3.53 Brazil contests the calculation methodology proposed by Canada, claiming that the amount of subsidy actually corresponds to the entire value of the loan – the financing provided by EDC Canada Account – not merely a portion of it.⁹² Contrary to the situation in *Brazil – Aircraft*, where the "financial contribution", within the meaning of Article 1.1(a)(1) of the SCM Agreement, was the direct PROEX interest-equalization payment, not the loan, Brazil believes that the financial contribution in this case is the loan itself given by the Government of Canada.⁹³ Moreover, Brazil contends that, contrary to what is claimed by Canada, the amount of the subsidy should not be based on the benefit to the recipient, but rather on the definition of what constitutes a subsidy, contained in Article 1 of the SCM Agreement.

3.54 We note that the Panel in this case found that: "the EDC Canada Account financing to Air Wisconsin constitutes a prohibited export subsidy contrary to Article 3.1(a) of the SCM Agreement".⁹⁴ We note, however, that the findings requested from a panel are different from those requested from an Arbitrator under Article 22.7 of the DSU and Article 4.11 of the SCM Agreement. A panel is requested to establish the existence of a violation leading to a presumption of nullification or impairment. An Arbitrator is essentially requested to determine whether the proposed level of countermeasures is appropriate.

3.55 In any event, we recall that the Panel in this case determined the existence of a subsidy on the basis of the definition in Article 1 of the SCM Agreement. That Article provides that "a subsidy shall be deemed to exist" where, *inter alia*, there is a financial contribution by a government *and* a benefit is thereby conferred. These requirements are cumulative, i.e., they must both be satisfied in order for a subsidy to exist. In the present case, the Panel identified a financial contribution in the form of a direct transfer of funds.⁹⁵ The Panel further concluded that a benefit was conferred, and a subsidy therefore existed, because that financial contribution (in this case, a loan) was not provided on market terms.

3.56 Our task in this arbitration is not of course to re-consider the determination of the Panel regarding the *existence* of a subsidy, but to consider the *amount* of the subsidy in our determination of whether the level of countermeasures proposed is appropriate. The Appellate Body, in *Canada – Aircraft*⁹⁶, has made clear that the *existence* of a benefit, within the meaning of Article 1.1(b)

⁹¹ Canada first submission, para. 19.

⁹² Brazil rebuttal submission, paras. 41-51; Brazil's replies to the questions of the Arbitrator, para. 67. Brazil's comments on Canada's replies to the questions of the Arbitrator, paras. 26-29

⁹³ Brazil rebuttal submission, para. 43.

⁹⁴ Panel Report, para.8.1(e)

⁹⁵ Panel Report, para. 7.142.

⁹⁶ See Appellate Body Report in *Canada – Aircraft*, para. 157.

"(...) implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."

However, Article 1 does not give us any specific guidelines as to how we should *calculate* the *amount* of the subsidy in the case of a loan.

3.57 In its submissions, Canada refers to Article 14 of the SCM Agreement, which provides guidelines for the calculation of the amount of a subsidy for the purpose of imposing countervailing duties, to support its view that, in the case of a loan, the amount of subsidy on which countermeasures should be based should correspond to the difference between the interest rate applied to the financing and the commercial interest rate which Air Wisconsin could have secured for the transactions at issue.

3.58 We recall that Article 14(b) of the SCM Agreement provides that:

"For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(...)

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;"

3.59 We note that the field of application of Article 14 seems to be limited to the application of countervailing measures. However, we also note that the introductory paragraph of Article 14 refers to methods "to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1". We therefore conclude that while Article 14(b) relates specifically to proceedings under Part V of the SCM Agreement, the guidelines contained therein are relevant context in considering how to calculate the amount of the subsidy in the case where

countermeasures have to be assessed under Article 4.11 of the SCM Agreement, as recalled by the Appellate Body in *Canada – Aircraft*.⁹⁷

"(...) Article 14 sets forth guidelines for calculating the amount of a subsidy in terms of 'the benefit to the recipient'. Although the opening words of Article 14 state that the guidelines it establishes apply '[f]or the purposes of Part V' of the *SCM Agreement*, which relates to 'countervailing measures', our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b). The guidelines set forth in Article 14 apply to the calculation of the 'benefit to the recipient' conferred pursuant to paragraph 1 of Article 1'. (emphasis added) This explicit textual reference to Article 1.1 in Article 14 indicates to us that "benefit" is used in the same sense in Article 14 as it is in Article 1.1. Therefore, the reference to 'benefit to the recipient' in Article 14 also implies that the word 'benefit', as used in Article 1.1, is concerned with the 'benefit to the recipient' and not with the 'cost to government', as Canada contends."

3.60 In the light of the above, we conclude that, in this case, it is appropriate to calculate the amount of the subsidy on the basis of the benefit conferred by the loan. We also agree with Canada that, in such a case, the amount of the subsidy should correspond to the difference between the amount Air Wisconsin pays on the loan from EDC and the amount Air Wisconsin would pay on a comparable commercial loan which that company could actually obtain on the market.

3.61 This conclusion is not inconsistent with the approach to calculating the amount of subsidy taken in *Brazil - Aircraft*. In that case, the Arbitrators used as the basis for its calculation of the amount of the subsidy the net amount of the grant received by the airlines purchasing the subsidized aircraft, having previously deducted the commission of the intervening bank. In the case of a grant, the net financial contribution received, and the amount of the benefit conferred within the meaning of Article 1, are the same. That is not of course true in the case of a loan, where the subsidy component may be far less than the face value of the loan.

3.62 Brazil argues that, in a sector where foreign trade is highly competitive, "just a few basis points" below the market could be enough to win a contract. In such a case, if one were to apply the methodology suggested by Canada, the "prohibited portion" of the export financing operation would be very small and the level of countermeasures would be very small too, compared with the value of the transaction or the total amount of the financing provided.

3.63 We agree with Brazil that, in a market as competitive as the market for regional jets, even a limited difference in interest rates, if it allows a manufacturer to win a contract, could have a disproportionate impact compared with the amount of subsidy granted, calculated on the basis of the benefit conferred. On the one hand, we do not consider that this is a sufficient reason for

⁹⁷ Appellate Body Report, *Canada – Aircraft*, para. 155.

us to depart from what we understand to be the approach mandated by Article 1 and Article 14 of the SCM Agreement for a case involving, as this one does, a subsidized loan.⁹⁸ On the other hand, we recall that the terms "appropriate" in Article 4.10 of the SCM Agreement allows us some flexibility in order to address situations of this type and to that end we consider below the appropriateness of various adjustments to the level of countermeasures that we calculate on the basis of the amount-of-the-subsidy methodology.

3.64 For these reasons, we decide to calculate the amount of the subsidy as the discounted present value of the difference in payment streams under the subsidized financing compared to an estimated market financing.

2. *Calculation of the Amount of Subsidy per Aircraft*

(a) *Introductory Remarks*

3.65 In this section, we address the calculation of the amount of subsidy per aircraft. However, this amount is only the basis on which the countermeasures should be determined. Adjustments to take into account the specific circumstances of this case are addressed in the following section.

(b) *Model of Aircraft and Number of Subsidized Aircraft not Delivered as of 20 May 2002*

(i) *Model of Aircraft*

3.66 The press release issued by Bombardier on 16 April 2001 after the signature of the Air Wisconsin contract⁹⁹ refers to the sale of CRJ-200 aircraft. We were not informed of any modifications at the delivery stage in this respect. We will therefore assume that the Air Wisconsin contract related to the sale of only one model of aircraft.

(ii) *Number of Subsidized Aircraft not Delivered as of 20 May 2002*

3.67 Canada argues that, under the methodology based on the amount of the subsidy, the value of the subsidy per aircraft has to be multiplied by the number of aircraft that have been, or will be, delivered after the compliance date. Canada claims that all transactions with Air Nostrum and Comair had been completed by 20 May 2002. As far as Air Wisconsin is concerned, Canada relies on the Bombardier press release of 16 April 2001 to state that the sales consisted of 51 firm orders and 24 conditional orders, plus 75 options for which Canada claims that no financing would be extended if they were exercised.¹⁰⁰ Out of the 51 firm orders, 12 were delivered before the compliance date, leaving 39 firm orders still

⁹⁸ We are aware of the content of Annex IV of the SCM Agreement on the calculation of the total *ad valorem* subsidization under Article 6.1(a). However, Article 6.1(a) is no longer applicable.

⁹⁹ Exhibit CDA-3.

¹⁰⁰ Canada first submission, para. 27.

to be delivered.¹⁰¹ As far as conditional orders are concerned, Canada claims that, under the current circumstances, approximately 20 out of 24 of those conditional orders would become firm. Regarding options, Canada claims that, even if they are exercised, no subsidy will be granted in relation to those transactions.

3.68 Brazil originally contested the number of firm orders still to be delivered after 20 May 2002, claiming that it was for Canada to demonstrate that deliveries had taken place before that date.¹⁰² Brazil maintains that the current trend in the airline sector towards more intensive use of regional aircraft implies that all the conditional orders will be confirmed and that, contrary to what Canada alleges, the current difficulties to obtain commercial market financing will lead EDC to finance the options to guarantee the sales of Bombardier.¹⁰³ Brazil also argues that, in such a context, the rate of conversion of options should be 100 per cent.¹⁰⁴

3.69 We first note that Canada claims and Brazil does not contest that the proper time to assess the granting of the subsidy is the delivery. Therefore, in order to determine whether a subsidy was still to be granted on 20 May 2002, it is sufficient to check the delivery date. We received confirmation from Canada of the number of aircraft delivered and concluded that uncompleted transactions by 20 May 2002 concerned only the contract with Air Wisconsin.

3.70 We now address the question of the options and conditional orders. We note that Canada repeatedly stated, before the DSB¹⁰⁵ and during these proceedings, that the Panel had made no findings regarding subsidization of the financing of option and that options were not subject to any financing by Canada Account. We are aware of Brazil's argument that the difficulties encountered in obtaining financing for the aircraft subject to options may tempt Canada at some future time to offer subsidies so that the options will be exercised. We also noted the argument that the contraction of the number of passengers after 11 September 2001 may lead to a development of sales of regional jets as substitutes for larger aircraft. We note, however, that unlike in *Brazil – Aircraft*, there are no findings of the Panel in this case relating to the financing of options. Brazil's arguments are simply speculation. In the absence of something more concrete, we see no reason to consider the currently unsubsidised options in our assessment of the appropriate level of countermeasures.

3.71 Regarding the conditional orders, we recall that if they are confirmed, the subsidy will be paid. We note, however, that we have no certainty as to the number of conditional orders that will be confirmed. From the information

¹⁰¹ *Ibid.*

¹⁰² During the Arbitrator's meeting with the parties, Canada submitted evidence in the form of certificates of receipt of aircraft, bills of sales filed with the US Federal Aviation Administration and a letter of EDC of 23 October 2002, in support of its statement regarding the number of transactions completed (Exhibits CDA-14; CDA-15 and CDA-16).

¹⁰³ Brazil's comments on Canada's replies to the questions of the Arbitrator, para. 20.

¹⁰⁴ Brazil's comments on Canada's replies to the questions of the Arbitrator, para. 24 and 30.

¹⁰⁵ DSB meeting held on 24 June 2002, WT/DSB/M/128, pp. 11-12.

and that this amount should be discounted by xx per cent to reach the actual price at which the aircraft were sold to Air Wisconsin. In support of its position, Canada supplied: (a) a letter from Bombardier confirming that the disclosed value of the transaction is based on the list price¹⁰⁸; and (b) a letter from the analyst firm BK Associates, Inc.,¹⁰⁹ stating, *inter alia*, that "it [was] entirely reasonable, and even, likely, that Air Wisconsin would negotiate and obtain a discount of xx per cent off the list price for an order of 75 aircraft".¹¹⁰ At our request, Canada also submitted credentials for this firm.¹¹¹

3.75 Brazil contends that the amount referred to in the Bombardier press release of 16 April 2001 is the actual amount of the transaction, and that any discount is: (a) less than xx per cent; and (b) included in the amount made public. Brazil also argues that the letters produced by Canada, since they were prepared after the initiation of these proceedings and for the purpose of this case, should not be given the same probative value as a press release produced before the case was initiated.

3.76 We note that both parties start, for the determination of the price of the subsidized aircraft, with the figures given by Bombardier in its press release of 16 April 2001. The main issue is consequently whether any discount should be applied to this amount. As far as the information given by BK Associates is concerned, we have no reason to doubt the independence of this firm. However, this letter is only a reasonable assessment of what the practice of the industry would be in similar circumstances. It is not a description of what Bombardier actually did in the Air Wisconsin contract. We note that the letter of xxx xx xx xxxxxxx from Bombardier merely states that the "contract value" may not correspond to the actual price of the aircraft. However, it does not specify by how much this value should be adjusted to correspond to the actual unit price. As a result, while it confirms that the contract value may not correspond to the actual price paid for the aircraft, it is of limited use to determine by how much the contract value should be adjusted. We agree that Bombardier most probably did not disclose the actual price of the aircraft in its press release of 16 April 2001. However, we have no precise basis on which to adjust the price mentioned in the press release. Canada and Bombardier know by how much the list price of the CRJ-200 was discounted in this contract. However, even though they request the Arbitrator to adjust the price of the aircraft concerned, they are unwilling to provide us with the actual information.¹¹² Under those circumstances, and bearing in mind that it is Canada, the party with the actual information, that is requesting an adjustment of the aircraft price, we decide not to make any such

¹⁰⁸ Letter of xxxxxx xx xxxxxxx, Executive Vice-President, Bombardier, to Matthew Kronby, Deputy Director, Trade Law Bureau, Ministry of Foreign Affairs and International Trade of Canada, dated 31 October 2002 (Exhibit CDA-17).

¹⁰⁹ Hereafter "BK Associates".

¹¹⁰ Letter of xxxx xx xxxxx of 19 September 2002 (Exhibit CDA-4).

¹¹¹ Exhibits CDA-18, 19, 20.

¹¹² During our hearing, Canada offered to disclose the actual price of the aircraft in the Air Wisconsin transaction, but only to the Arbitrator. Brazil strongly objected. We rejected Canada's offer as incompatible with the principle of due process which should govern our proceedings.

adjustment to the price calculated on the basis of the press release of 16 April 2001.

(d) Applicable Market Financing Rate

3.77 The parties did not discuss Canada's suggested use of the xxxx¹¹³ xxxxxxxxxxxx xx xxx xxxx xx xxx xxxxxxx xx xxxxx xx xxx xxx xxxxxxxxxxx xxxxxxx xxxxxxxxxxxxxx xx xxx xxxxxxxxxxx xxxxx They focussed their arguments on the estimated market financing rate to be applied in the comparison. In its calculation, Canada uses an estimated market financing rate on the date of the letter of offer, or xxxx per cent, based on what Canada considers a comparable discount rate used to value the stream of payments.¹¹⁴ In the absence of externally rated actively traded Air Wisconsin's debt, Canada used a market benchmark that corresponded as closely as possible to the credit risk of Air Wisconsin as of the date of the letter of offer.¹¹⁵ That market benchmark was a May 2001 pricing for the xxxx xx xxxxxxx EETC.

3.78 Brazil argues that the use by Canada of the May 2001 pricing for the xxxx xx xxxxxxx EETCs is a questionable choice. The carrier and the equipment types are quite different. Even if one were to accept Canada's use of EETCs spreads, which Brazil considers questionable, the May 2001 spreads on CRJ EETC debt should be used instead.¹¹⁶

3.79 With regard to the specific question of the applicable financing rate, we tend to agree with Brazil that some of the elements in the xx xxxxxxx rate used by Canada may not seem to be comparable with the situation of Air Wisconsin. However, we note that Canada provided a detailed explanation of its calculation of the "proxy" commercial rate, acknowledging the difficulties encountered. We believe that, by doing so, Canada made a prima facie case that the rate of xxxx per cent that it identified was a reasonable proxy. While we acknowledge that Brazil argues in general that basing countermeasures on the amount of subsidy is inappropriate in this case, we recall that we expressly requested Brazil to comment on the estimated market rate calculated by Canada, as well as on any other elements of Canada's proposed calculation, in our questions to the parties. Brazil raised some questions concerning the parameters applied by Canada but did not convincingly challenge Canada's calculations. Further, Brazil did not provide any alternative calculation.

3.80 We therefore believe that Canada made a prima facie case that the interest rate it has calculated could be a reasonable "proxy" commercial rate. We gave ample opportunity to Brazil to rebut Canada's arguments and evidence. Brazil chose to follow an approach which did not include a detailed rebuttal of Canada's calculation. In particular, we are of the view that Brazil did not submit either any sufficient argument or any evidence to support the use of another rate, whereas Canada replied to Brazil's arguments regarding the use of a commercial rate

¹¹³ xxxxxxxxxxx xxxxxxx xxxxxxxxxxx xxxxx

¹¹⁴ Canada first written submission, para. 25 and footnote 21.

¹¹⁵ Canada comments on question No. 4 to Brazil, paras. 1-4.

¹¹⁶ Brazil reply of 1 November 2002 to question No. 4 of the Arbitrator to Brazil, para. 64.

based on CRJ EETC debt in a manner which we consider sufficiently credible. As a result, we consider that, in the absence of convincing elements that would justify the use of another rate, we should apply the proxy commercial rate of xxxx per cent suggested by Canada.

(e) Amount Financed and Duration of the Financing

3.81 Canada, in its calculation, states that the Canada Account financing offer of 10 May 2001 to Air Wisconsin applied to a loan-to-value ratio of xx per cent of the value of the aircraft over a period of xxxx years.¹¹⁷

3.82 Brazil argues that most lenders in the market provide financing only according to 80 per cent and 15-year terms. Brazil considers that Canada's use of a xx per cent/xxxx-year term is inappropriate.¹¹⁸

3.83 We note that the xx per cent/xxxx-year conditions are referred in paragraphs 7.137 and 7.155 of the Panel Report. We agree with Brazil that these conditions might not be the most usual, but we see no particular reason to reject them and use the 80 per cent/15-year term suggested by Brazil instead. We recall that, in *Brazil – Aircraft*, the equalization payment was applied over a period of 15 years, as suggested by Brazil, but to 85 per cent of the value of the aircraft. We also note that other rates were identified in the Panel Report.¹¹⁹

3.84 We therefore decide to apply the financing to xx per cent of the value of the aircraft over a period of xxxx years.

(f) Methodology Applied by the Arbitrator

3.85 On the basis of the above, we have decided to calculate the appropriate level of countermeasures on the following basis:

- (a) We start with the identification of the average sale price of the model of aircraft for which sales to Air Wisconsin are still subsidized after 20 May 2002, using the figure contained in Bombardier's press release of 16 April 2001.
- (b) The next stage consists of the calculation of the net present value of the subsidy per aircraft model using the sale price for the model concerned (CRJ-200), an EDC financing rate of xxxx per cent¹²⁰ for a financing corresponding to xx per cent of the price over a period of xxxx years, and an estimated commercial financing rate of xxxx per cent. Financing is calculated for the two rates applied over the same period. The difference in amount between the two is

¹¹⁷ Canada first submission, para. 20.

¹¹⁸ Brazil reply to question No. 4 of the Arbitrator, para. 64.

¹¹⁹ Panel Report, para. 7.235.

¹²⁰ As recalled in para. 3.77 above, Canada suggested that we use the xxxx applicable on 10 May 2001, which is the date of the letter of offer for the Air Wisconsin contract (Exhibit CDA-5). Canada mentioned that the actual interest rate charged would be fixed at xxxx on the date of delivery of the individual aircraft. Since not all aircraft had been delivered as of the time of this arbitration, we decided to apply xxx xxxx xxxx on the date of the letter of offer. This is consistent with the use of an estimated market financing rate determined on the date of the letter of offer.

the net present value of the subsidy for each aircraft at the date of the financing of the transaction.

- (c) Finally, we multiply the total number of aircraft still to be delivered to Air Wisconsin after 20 May 2002 (including all conditional orders but not options) by the net present value of the subsidy per model.

(g) Calculation

(i) Net Present Value of the Subsidy per Aircraft

3.86 The table in Annex 1 to this report contains the calculation of the amount of subsidy per aircraft.

3.87 As mentioned above, we used as price of the aircraft the amount resulting from the press release issued by Bombardier on 16 April 2001. The press release estimates the value of the 75 firm and conditional orders at approximately US\$1.68 billion, or US\$22.4 million per aircraft. For the reasons mentioned above, we did not apply any discount to that amount. Under those circumstances, the total financing per aircraft represents US\$xxxxxxxxxxx. The difference between the present value of the sum of the actual payments @ xxxx per cent (US\$xxxxxxxxxxx) and the present value of the sum of payments discounted at the estimated market financing rate of xxxx per cent that we agreed to use (US\$xxxxxxxxxxx) gives the net present value of the subsidy per aircraft, i.e.: US\$3,277,735.

(ii) Allocation over the Total Number of Subsidized Sales Delivered after 20 May 2002

3.88 On the basis of the elements described above, we considered that 39 firm orders had not been delivered by 20 May 2002. The total of all conditional orders was 24. We therefore multiply the result in (i) above by 63 aircraft.

(iii) Net Present Value of the Total Amount of the Subsidy

3.89 The net present value of the subsidy per aircraft (US\$3,277,735) multiplied by the number of undelivered firm order and conditional orders as of 20 May 2002 (63 aircraft CRJ-200) equals US\$206,497,305.

3.90 The net present value of the total amount of the subsidy is: US\$206,497,305

3. *Adjustments to the Amount of the Subsidy to Identify an Appropriate Level of Countermeasure*

(a) Preliminary Remarks

3.91 We recall that Brazil proposed a level of countermeasures based on the competitive harm caused by Canada's subsidy but failed to sufficiently support its claim. We accepted Canada's methodology based on the amount of the subsidy as a proper starting point. The fact that we found it more appropriate to base our determination of the level of the countermeasures at issue on the amount of the subsidy does not mean that we have to limit the level of countermeasures to that amount. Canada recognizes that we have discretion to adjust the amount produced by its methodology and has presented arguments in favour of a downward adjustment in the level of countermeasures. Likewise, Brazil implicitly accepts this discretion in arguing that the amount of the subsidy methodology results in a level of countermeasures that is too low.

3.92 Here we recall again our agreement with the Arbitrator's findings in *US – FSC* that "countermeasures should be adapted to the particular case at hand."¹²¹ Accordingly, we are authorized to consider relevant factors constituting the totality of the circumstances at hand in order to determine whether a specific level of countermeasures is appropriate in this particular case. Therefore, we address hereafter the arguments of the parties which, in our opinion, relate to factors that may justify an adjustment of the level of countermeasures to take into account the specificities of this case. We will begin with Canada's argument that the "appropriate countermeasures" should be lower than the amount of the subsidy. Then, we will proceed to address the issues raised in Brazil's arguments. We consider those issues to be the following: (i) the consequences to be attached to Canada's refusal to withdraw the subsidy at issue in relation to the principle according to which countermeasures are supposed to contribute to induce compliance; (ii) the risk of other "hit and run" actions by Canada if the level of countermeasures does not constitute a sufficient deterrent; and (iii) the impact that even a small difference of interest rate can have on the market for regional aircraft.

(b) Canada's Argument that the "appropriate countermeasures" should be Lower than the Amount of the Subsidy

3.93 Canada recalls that the *US – FSC* Arbitrator found that countermeasures should be adapted to the case at hand. The circumstances of this case make Canada's violation a less egregious breach than that of Brazil in *Brazil – Aircraft*. First, Canada was responding to a below-market offer of Embraer¹²²; it acted not to upset the balance of rights and obligations, but to preserve them in the face of an imminent threat that Brazil itself would upset them. Second, Canada believes that it could still at the time consider in good faith that matching Embraer's offers

¹²¹ Decision by the Arbitrator, *US – FSC*, (Article 22.6 – *US*), para. 5.12, see para. 3.37, above.

¹²² Canada first submission, paras. 15 to 18. Canada rebuttal submission, paras. 20-27.

through a subsidy was permitted under Item (k) of the Illustrative List in Annex I to the SCM Agreement. Canada acknowledges that the Article 21.5 DSU Panel in *Canada – Aircraft* noted its belief that "matching" was not an "interest rate provision".¹²³ However, Canada considers that the part of the panel reasoning dealing with this issue was *obiter dictum*, made in the absence of an actual disputed transaction.¹²⁴

3.94 Brazil, relying on the reasoning of the Arbitrator in *United States - FSC*, insists on the gravity of the wrongful act, stating that it was premeditated and admittedly targeted at Embraer.¹²⁵ Brazil also contests Canada's claim that it could believe in good faith that its subsidy would be covered by Item (k) of the Illustrative List in Annex I to the SCM Agreement. Brazil considers that the Article 21.5 DSU panel on *Canada – Aircraft* had held that the "matching" provisions of the OECD Export Credit Arrangement did not bring an export credit practice into conformity with the interest rate provisions of the OECD Arrangement. Canada's "matching" could not be justified under Item (k).¹²⁶

3.95 We recall again that the Arbitrator in *US – FSC* considered that "[the Member concerned] is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question."¹²⁷ A thorough reading of the *US – FSC* arbitration report, however, leads to our understanding that the gravity of the violation considered in *US – FSC* was pointed primarily to the fact that at issue was an export subsidy, which is *per se* prohibited.¹²⁸

3.96 This does not mean that the characteristics of this particular subsidy, namely, an alleged action of "self defence" should not be examined at all by the Arbitrator in this case. Since Canada argues that such a characteristic of the subsidy in this case should be considered as a relevant factor justifying a downward adjustment of the level of countermeasures, we move to consider whether such argument is valid. In other words, does the fact that Canada replied through subsidisation to offset what it claims was an illegal Brazilian offer constitute an acceptable excuse which justifies a downward adjustment in the level of countermeasures calculated above, as requested by Canada?

3.97 The subsidy addressed in this arbitration, even if we were to admit that it was a response to a credible threat of subsidisation from Brazil, remains by nature an export subsidy, prohibited *per se*, as recalled by the Arbitrator in *United States - FSC*. The fact that Canada sought to "maintain [the] appropriate balance [of rights and obligations in question]"¹²⁹ by matching Brazil's offer goes against the very purpose of Articles 3 and 4 of the SCM Agreement, which is to ensure that export subsidies are not maintained.

¹²³ Panel Report in *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.126.

¹²⁴ Canada rebuttal submission, para. 23.

¹²⁵ See Brazil rebuttal submission, paras. 7 and 23-27.

¹²⁶ Brazil first submission, para. 10.

¹²⁷ Decision by the Arbitrator, *US – FSC, (Article 22.6 – US)*, paras. 5.41, 5.61, 5.62, 6.6, and 6.25.

¹²⁸ See, also, para. 3.44 above.

¹²⁹ Canada first submission, para. 6.

3.98 In our opinion, accepting the Canadian suggestion to cut the level of countermeasures by half because it is a response to Brazil's subsidisation would also be contrary to Article 23 of the DSU. Canada should not take the law into its own hands. Nowhere does the SCM Agreement or the WTO Agreement condone in any way resorting to this type of countermeasure without prior recourse to the DSU, even if Brazil was at the origin of the subsidy competition.¹³⁰

3.99 With reference to Canada's claim that it could believe in good faith that its attempt to "match" Brazil's offer would be permitted under the Item (k) "safe haven" of the Illustrative List of Export Subsidies, we first note that Canada was obviously aware of the reasoning contained in the Panel Report in *Canada – Aircraft (Article 21.5 – Brazil)* which, even if Canada is correct that it was only *dicta*, rejected that view.¹³¹ That report, dated 9 May 2000, was adopted by the DSB on 4 August 2000. The Item (k) issue was not appealed by Canada. In that context, it may be debatable whether Canada could believe in good faith, when the Air Wisconsin subsidy was granted in 2001, that the subsidy could be justified under Item (k). Moreover, even assuming Canada had such a good faith belief in 2001, we are still of the view that this cannot be a justification for a downward adjustment. In WTO dispute settlement cases, it is probably true that most defending parties argue in good faith that they believed the measures at issue were in conformity with the relevant provisions of the WTO Agreement. Once such measures are found to be in breach of WTO obligations, those parties should not be entitled to special treatment in terms of remedies against such a breach because the violation was made in good faith. Should the Arbitrator consider this alleged good faith of the defending party for the purpose of a downward adjustment, almost all of the cases under Article 4.10 of the SCM Agreement might need such an adjustment, which would surely not be acceptable.

3.100 We therefore conclude that no adjustment of the amount of the subsidy is necessary in relation to this argument of Canada.

(c) Brazil's Arguments that the "appropriate countermeasures" should be Higher than the Amount of the Subsidy

3.101 Since Brazil did not accept the Canadian amount-of-the-subsidy methodology, it did not specifically argue that the result produced by the methodology should be adjusted upwards. However, in the context of justifying its own methodology and a high level of countermeasures, Brazil presented arguments that are relevant to the issue of whether the level of countermeasures produced by the Canadian methodology should be adjusted upwards. We have already dealt with Brazil's argument concerning the gravity of the Canadian violation. In this section we deal with: (i) Canada's refusal to withdraw the

¹³⁰ In this case, the Canadian subsidisation is not presented as a reply to previous subsidization by Brazil, but as a concurrent action intended to prevent Brazil from gaining a contract thanks to its own financing programme.

¹³¹ Panel Report in *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.126.

subsidy and "inducing compliance"; (ii) Brazil's alleged risk of other "hit and run" measures by Canada if the level of countermeasures is not sufficiently high to deter such measures in the future; and (iii) the potential disproportionate impact of even a small amount of the subsidy on a very competitive market.

(i) Canada's Refusal to Withdraw the Subsidy and "inducing compliance"

3.102 Brazil argues that countermeasures are designed to induce compliance. We have already expressed our agreement with that position.¹³² Accordingly, we turn to the question of whether the "inducing compliance" function of countermeasures justifies an upward adjustment of the amount set in paragraph 3.90 above.¹³³

3.103 First, we note that mere non-compliance with the recommendations and rulings of the DSB and the fact that Canada has not yet complied are not "aggravating factors" justifying a higher level of countermeasures. Under Article 22.1 of the DSU and Article 4.10 of the SCM Agreement, non-compliance is the very event justifying the adoption of countermeasures.

3.104 However, this does not mean that non-compliance may not become an aggravating factor in determining an appropriate level of countermeasures given the facts of a specific case. Indeed, we recall that, pursuant to the general principle of international law *pacta sunt servanda*, as embodied in Article 26 of the Vienna Convention on the Law of Treaties (1969), States are not only presumed to perform their treaty obligations in good faith, they are expected and obliged to do so. We also note that Article 27 of the same Vienna Convention specifies that obligations under internal law cannot excuse States from complying with their international obligations. We are mindful that the Vienna Convention is not intended to prevail over special provisions contained in other treaties applicable between the parties. However, we do not read anything in the DSU or in the SCM Agreement which would create a right not to comply with DSB recommendations and rulings.

3.105 On the contrary, while stating that neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity, Article 22.1 of the DSU is particularly clear as to the temporary nature of suspensions of concessions or other obligations, pending compliance. In this respect, the *EC – Bananas* Arbitrators, referring to this provision, expressed the view that suspension of concessions or other obligations was intended to induce compliance because it was temporary.¹³⁴ Moreover, we recall our agreement with the Arbitrator in *US – FSC* that the objective of the SCM Agreement in relation

¹³² See para. 3.48, above.

¹³³ While we found that the goal of inducing compliance could not justify the US\$3.36 billion level of countermeasures proposed by Brazil in light of our finding that such a level was inappropriate for other reasons, that finding does not preclude a consideration of whether a much lower level of countermeasures ought to be adjusted upwards in order to promote compliance.

¹³⁴ Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

to Article 4.10 is to secure compliance with the DSB recommendation to withdraw the subsidy. In particular, Article 4.7 of the SCM Agreement requires the withdrawal of prohibited subsidies without delay.

3.106 In the present case, we asked Canada to clarify whether it actually did not intend to comply with the DSB recommendations. Canada confirmed that it would honour its contractual commitments to grant the financing found to be an illegal subsidy on the aircraft undelivered as of the compliance date.¹³⁵ We take this statement to mean that Canada does not now intend to withdraw the subsidy at issue, as is required pursuant to Article 4.7 of the SCM Agreement. In this connection, we note again paragraph 5.57 of the *US – FSC* report, which stated that:

"In our view (...) when assessing the scope of what may be deemed "appropriate" countermeasures, we should keep in mind the fact that the subsidy at issue has to be withdrawn and that a countermeasure should contribute to the ultimate objective of withdrawal of the prohibited subsidy without delay."

3.107 In other words, we consider that countermeasures are there to contribute to the end of a breach. We also believe that the "appropriate" level of countermeasures should reflect the specific purpose of countermeasures. Keeping this in mind, we are of the view that Canada's statement that, for the moment, it does not intend to withdraw the subsidy at issue suggests that in order to induce compliance in this case a higher level of countermeasures than that based on the Canadian methodology would be necessary and appropriate.¹³⁶

(ii) The Risk of Other "hit and run" Measures
(the deterrence argument)

3.108 Brazil states that it wants the Arbitrator to award a "significant level of countermeasures" so as to deter Canada from applying its subsidy regime to future sales of regional jets.¹³⁷ As Brazil puts it, "the lower the anticipated level of countermeasures, the higher the chances of 'hit and run' actions."¹³⁸

3.109 The measure with respect to which the countermeasures are supposed to induce compliance is clearly the measure found inconsistent by the Panel. As can

¹³⁵ Canada reply to question No. 6 of the Arbitrator, para. 1.

¹³⁶ Canada argues that, in *Brazil – Aircraft (Article 22.6 – Brazil)* too, the Arbitrators noted the statement of Brazil that it did not intend to comply with the recommendations and rulings of the DSB with respect to the contracts that had been already concluded. Canada refers to para. 56 of Brazil's written submission in *Brazil – Aircraft (Article 22.6 – Brazil)*. However, the Arbitrators did not draw any particular conclusion from that statement. In the present case, however, we believe that there is no legal reason for us to be prevented from giving some weight to the position of Canada in terms of determining the appropriate level of countermeasures.

¹³⁷ We note that Brazil uses this systemic argument to justify a recourse to a methodology based on lost sales or harm to Embraer and Brazil. The fact that we rejected the application of Brazil's proposed methodology does not mean, however, that we should disregard its argument in determining an "appropriate" amount of countermeasure. We should therefore address the question whether deterrence of future similar violations should be one of the elements to take into account.

¹³⁸ Brazil closing statement at the hearing of the Arbitrator with the parties.

be seen from Article 22.2 DSU and Article 4.10 of the SCM Agreement, it is the non-compliance with the recommendations and rulings of the DSB that triggers the right to adopt countermeasures and the recommendations and ruling relate exclusively to the measure found to be illegal.

3.110 In the present case, the measures found to be illegal were the granting of subsidies to a number of transactions. The Panel Report clearly ruled that the EDC Corporate Account and Canada Account programmes "as such" did not constitute prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement. The DSB recommendations and rulings clearly cannot be interpreted as extending the right to take countermeasures to the maintaining of those programmes "as such".

3.111 Likewise, the findings of the Panel do not extend beyond the particular instance where the application of those programmes was found to be illegal. It is likely that an identical application of those programmes would, in identical circumstances, lead to an identical ruling. However, as long as this is not a matter that was before the Panel and it did not lead to recommendations of the DSB, we are not, as Arbitrator under Article 22.6 of the DSU and Article 4.10 of the SCM Agreement, allowed to address it.

3.112 We do not see other legal reasons why deterrence of future application of EDC Canada account and Corporate Account to finance sales of Canadian regional jets should be part of the factors to be taken into account in determining the appropriate level of countermeasures for this particular case. We note that the Panel applied the "classical" distinction between mandatory and discretionary legislation¹³⁹ and found that those programmes did not mandate subsidization of exports.¹⁴⁰ At this point in time, from the point of view of WTO law and practice, the mere possibility of another breach resulting from the existence of the programmes contained in a discretionary legislation seems difficult to incorporate in our assessment of "appropriate countermeasures". Indeed, this would be equivalent to disregarding the legal consequences of the distinction between mandatory and discretionary laws.

3.113 We need not decide that, if there were a pattern over time of illegal subsidisation and non-compliance, such facts could not or should not be taken into account. In our view that situation is not the case before us, and therefore no adjustment is appropriate in this particular case.

(iii) The Potential Disproportionate Impact of the Subsidy on the Market

3.114 As part of its arguments on the gravity of Canada's breach, Brazil addresses a specific issue. Brazil argues that, in a sector where international trade is highly competitive, "just a few basis points" in interest rate below the market rate could be enough to win a contract.

¹³⁹ Panel Report, paras. 7.56-7.68.

¹⁴⁰ *Ibid.*, paras. 7.84-7.85 (EDC, by virtue of being an ECA); paras. 7.96-7.97 (EDC Canada Account); paras. 7.112-7.113 (EDC Corporate Account); 7.126-7.127 (*Investissement Québec*).

3.115 We agree in principle with Brazil that, in a market as competitive as the market for regional jets, even a limited difference in interest rates, if it allows a manufacturer to win a contract, may have a disproportionate impact, calculated on the basis of the trade impact, compared with the amount of subsidy granted.

3.116 We note that, in some such cases, countermeasures equal to the amount of the subsidy might be viewed as insufficient to induce compliance. Nonetheless, we have already concluded that an adjustment is appropriate in light of the need to induce compliance. Thus, in our view, Brazil's concern here has already been taken care of in assessing the appropriate level of countermeasures and, hence, justifies no further adjustments.

3.117 In any event, we note that the situation before us is different from that referred to by Brazil. The countermeasures in this case are not based on a subsidy equal to "a few basis points" of interest rate. In this case, the difference on which the countermeasures are based is that between the interest rate which we have accepted as the applicable rate for the Air Wisconsin contract (xxxx per cent), and the interest rate which we have accepted as representative of the market for this type of transaction (xxxx per cent), that is more than "a few basis points".

3.118 Under these specific circumstances, we conclude that no adjustment is necessary in this case in this respect.

(d) Conclusion on Adjustments

3.119 In the light of the above, we consider it appropriate to adjust the result of our calculations based on the amount of subsidy to take into account the fact that Canada, until now, has stated that it does not intend to withdraw the subsidy at issue and the need to reach a level of countermeasures which can reasonably contribute to induce compliance.

3.120 We acknowledge that such adjustments cannot be precisely calibrated. Canada's request for a 50 per cent reduction of the level of countermeasures based on its claims that it was in good faith and that its breach was not grave is evidence of the difficulty to assess precisely the monetary value of such adjustments.

3.121 Recalling Canada's current position to maintain the subsidy at issue and having regard to the role of countermeasures in inducing compliance, we have decided to adjust the level of countermeasures calculated on the basis of the total amount of the subsidy by an amount which we deem reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations. We consequently adjust the level of countermeasures by an amount corresponding to 20 per cent of the amount of the subsidy as calculated in Section III.E above, i.e.:

$$\text{US\$}206,497,305 \times 20\% (\text{US\$}41,299,461) = \text{US\$}247,796,766.$$

3.122 As we have noted in paragraph 3.120, adjustments such as the one we are making cannot be precisely calibrated. There is no scientifically based formula that we could use to calculate this adjustment. In that sense, the adjustment might

be viewed as a symbolic one. Even so, we are convinced that it is a justified adjustment in light of the circumstances of this case and, in particular, the need to induce compliance with WTO obligations. Without such an adjustment, we would not be satisfied that an appropriate level of countermeasures had been established in this case.

IV. AWARD OF THE ARBITRATOR

4.1 For the reasons set out above, the Arbitrator determines that, in the matter *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, the suspension by Brazil:

- (a) of the application of the obligation under paragraph 6(a) of Article VI of GATT 1994 to determine that the effect of subsidization under EDC Canada Account and EDC Corporate Account programmes is to cause or threaten material injury to an established domestic industry, or is to retard materially the establishment of a domestic industry;
- (b) of the application of obligations under the Agreement on Import Licensing Procedures relative to licensing requirements on imports from Canada; and
- (c) of tariff concessions and related obligations under the GATT 1994 concerning a list of products to be drawn from the list attached to its request;

covering trade in a total amount of US\$247,797,000 would constitute appropriate countermeasures within the meaning of Article 4.10 of the SCM Agreement.

4.2 In this respect, the Arbitrator urges Brazil to make sure that, if it decides to proceed with the suspension of certain of its obligations *vis-à-vis* Canada referred to in document WT/DS222/7, this will be done in such a way that the maximum level of countermeasures referred to in the preceding paragraph will be respected.

4.3 Finally, the Arbitrator would like to emphasize that Article 22.8 of the DSU provides that:

"The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. (...)"

4.4 The Arbitrator understands that the parties have been holding consultations. The Arbitrator is of the opinion that, given the particular circumstances of this case, a mutually satisfactory agreement between the parties addressing the issues dealt with in this case *in their broader context* would be the most appropriate solution.

ANNEX 2

CANADA – EXPORT CREDIT AND LOAN GUARANTEES FOR REGIONAL AIRCRAFT (WT/DS222) Recourse by Canada to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement

Working Procedures

The Arbitrators will follow the normal working procedures of the DSU where relevant and as adapted to the circumstances of the present proceedings, in accordance with the timetable they have adopted. In this regard,--

- (a) the Arbitrators will meet in closed session;
- (b) the deliberations of the Arbitrators and the documents submitted to them shall be kept confidential. However, this is without prejudice to the parties' disclosure of statements of their own positions to the public, in accordance with Article 18.2 of the DSU;
- (c) at any substantive meeting with the parties, the Arbitrators will ask Canada to present orally its views first, followed by Brazil;
- (d) the parties shall submit all factual evidence to the Arbitrators no later than the first written submissions to the Arbitrators, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate;
- (e) the parties shall provide an electronic copy (on a computer format compatible with the Secretariat's programmes) together with the printed version (7 copies) of their submissions, including the methodology paper and comments thereon, on the due date. All these copies must be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (Office 3154. Electronic copies may be sent by e-mail to Mr. Ferranco at DSregistry@wto.org). Parties shall provide 7 copies and an electronic version of their oral statements during or immediately after any meeting;
- (f) except as otherwise indicated in the timetable, submissions should be provided at the latest by 5.00 p.m. on the due date so that there is a possibility to send them to the Arbitrators on that date. As is customary, *distribution of submissions shall be made to the other party by the party themselves*;

- (g) if necessary, and at any time during the proceedings, the Arbitrators will put questions to the parties to clarify any point that is unclear;
- (h) any material submitted shall be concise, as brief as possible and limited to questions of relevance in this particular procedure;
- (i) parties shall provide a list of the participants of their delegation prior to, or at the beginning of, any meeting with the Arbitrators.
- (j) to facilitate the maintenance of the record of the arbitration, and to maximize the clarity of submissions and other documents, in particular the references to exhibits submitted by parties, parties shall sequentially number their exhibits throughout the course of the arbitration.

**CHILE – PRICE BAND SYSTEM AND SAFEGUARD
MEASURES RELATING TO CERTAIN AGRICULTURAL
PRODUCTS**

**Arbitration under Article 21.3(c) of the Understanding on
Rules and Procedures Governing the Settlement of Disputes
WT/DS207/13**

Award Circulated 17 March 2003

Parties:		Arbitrator:
<i>Argentina</i>		John Lockhart
<i>Chile</i>		

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TABLE OF ARBITRATIONS CITED IN THIS AWARD

Short Title	Full Title and Citation of Arbitration
<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, 267.
<i>Argentina – Hides and Leather</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001.
<i>Canada – Autos</i>	Award of the Arbitrator, <i>Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS139/12, WT/DS142/12, 4 October 2000.
<i>Canada – Patent Term</i>	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001.
<i>Canada – Pharmaceutical Patents</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000.
<i>Chile – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Chile – Taxes on Alcoholic Beverages –</i>

Short Title	Full Title and Citation of Arbitration
	<i>Arbitration under Article 21.3(c) of the DSU</i> , WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2589.
<i>EC – Bananas III</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS27/15, 7 January 1998, DSR 1998:I, 3.
<i>Indonesia – Autos</i>	Award of the Arbitrator, <i>Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029.
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937.
<i>US – Hot-Rolled Steel</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS184/13, 19 February 2002.
<i>US – Section 110(5) Copyright Act</i>	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001.
<i>US – 1916 Act</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001.

I. INTRODUCTION

1. On 23 October 2002, the Dispute Settlement Body ("DSB") adopted the Appellate Body report¹ and the panel report², as modified by the Appellate Body report, in *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*").³ At the DSB meeting of 11 November 2002, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Chile informed the DSB of its ongoing consultations with Argentina to find a mutually agreeable solution and that it would require a "reasonable period of time", pursuant to the terms of Article 21.3, to implement the recommendations and rulings of the DSB in this dispute.⁴

2. On 6 December 2002, Chile notified the DSB that consultations with Argentina had not resulted in agreement on the reasonable period of time for implementation, and therefore, Chile requested that such period be determined by binding arbitration, in accordance with Article 21.3(c) of the DSU.⁵ By joint letter dated 16 December 2002, Chile and Argentina requested that I serve as arbitrator.⁶ They also indicated in that letter that they had agreed to extend the

¹ Appellate Body Report, WT/DS207/AB/R, adopted 23 October 2002.

² Panel Report, WT/DS207/R, 3 May 2002, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R.

³ WT/DS207/8.

⁴ WT/DSB/M/136.

⁵ WT/DS207/9.

⁶ WT/DS207/11.

deadline for the completion of the arbitration until 90 days after the date of appointment of the Arbitrator.⁷ They agreed further that, notwithstanding this extension of the 90-day period of time stipulated in Article 21.3(c) of the DSU, the arbitration award would be deemed to be an award under Article 21.3(c) of the DSU.⁸ My acceptance of the designation as Arbitrator was conveyed to the parties by letter dated 17 December 2002.⁹

3. Written submissions were received from Chile and Argentina on 27 January 2003, and an oral hearing was held on 17 February 2003. Chile and Argentina each submitted additional documentation during the oral hearing. Neither raised any objection to the submission of such documentation by the other party. The parties were permitted to file written comments on each other's submissions by Thursday, 20 February. Both parties submitted comments, but raised no objection to my consideration of the new documentation. That documentation has accordingly been included in the record of this arbitration.

II. ARGUMENTS OF THE PARTIES

A. Chile

4. Chile requests that I determine the "reasonable period of time" to be 18 months from the date of the DSB's adoption of the panel and the Appellate Body reports in this dispute, so that the period would expire on 23 April 2004.¹⁰

5. According to Chile, implementation of the recommendations and rulings of the DSB will entail passage of a new law to modify appropriately the price band system ("PBS") found to be WTO-inconsistent by the panel and the Appellate Body in this case.¹¹ Chile states that, as a tariff measure, the PBS has the status of a tax under Chilean law.¹² The imposition or modification of a tax is subject to substantive and procedural limitations prescribed by the Constitution of Chile, which provides that all taxes (including the imposition and modification thereof) shall be regulated by a law passed by the National Congress.¹³ This legislative prerogative may not be delegated to the President, thereby precluding the possibility that the PBS could be amended solely by Executive action.¹⁴

1. Implementation Process in Chile

6. Chile identifies a "pre-legislative" phase through which any proposed legislation must first proceed. This phase is not governed or mandated by law in

⁷ WT/DS207/11.

⁸ WT/DS207/11.

⁹ WT/DS207/12.

¹⁰ Chile's submission, para. 61.

¹¹ *Ibid.*, para. 18.

¹² *Ibid.*, para. 19.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 20.

Chile.¹⁵ In practice, extensive consultations take place at this stage "between the authorities and the representatives of institutions and agencies, both public and private, particularly the various organizations or associations representing the interests that will be affected by the new legislation."¹⁶ For a measure modifying the PBS, discussion will involve the Interministerial Committee on International Economic Relations, a committee comprised of various government agencies whose portfolios relate to finance, agriculture, and/or foreign affairs.¹⁷ Consultations at this stage include development of "technical, political, social and legal studies" on the issue to be the subject of legislation, as well as analysis and preparation of the text of a new measure.¹⁸

7. Chile says that the pre-legislative phase concerning the implementation required in this dispute has special difficulties, and emphasizes that the PBS has served as a "cornerstone" of Chile's agricultural policy for almost 20 years.¹⁹ According to Chile, the PBS is intended to respond to price fluctuations stemming from market interventions by agricultural exporting countries. Chile maintains that the consequent reliance of the Chilean agricultural sector on the PBS renders the pre-legislative phase very critical, as evidenced by (i) the concern expressed by leading public officials and private sector interests at the prospect of any modification of the PBS, and (ii) "in general the irritation caused by the conclusions of the [panel and Appellate Body] reports" in this case.²⁰

8. Given these considerations, Chile notes that "all of the Ministries and government departments involved have undertaken to ensure that the sectors in question are aware that Chile is required to make a number of adjustments to the PBS as a result of its international commitments."²¹ To this end, the Ministry of Agriculture has held ongoing discussions with agricultural trade associations on the consequences of the panel and Appellate Body reports in this dispute for the current PBS.²² Furthermore, according to Chile, until the end of 2002, Chile and Argentina were engaged in consultations with a view to arriving at a mutually satisfactory solution, not only as regards the reasonable period of time for implementation of the reports, but also with respect to the changes to the PBS that would be required by such implementation.²³ Also during this time, the Interministerial Committee has begun discussions on the requirements for implementation and the nature of amendments that may be needed to the PBS.²⁴ Chile states that this pre-legislative phase of consultations concerning the measure required to amend the PBS has not yet been completed.²⁵

¹⁵ Chile's submission, para. 23.

¹⁶ *Ibid.*, para. 24.

¹⁷ *Ibid.*, para. 27.

¹⁸ *Ibid.*, paras. 24 and 26.

¹⁹ *Ibid.*, para. 7.

²⁰ *Ibid.*, para. 25.

²¹ *Ibid.*, para. 26.

²² Chile's response to questioning at the oral hearing.

²³ Chile's submission, para. 26.

²⁴ Chile's response to questioning at the oral hearing.

²⁵ *Ibid.*

9. Regarding the legislative phase, Chile explains that all tax measures must be passed by the National Congress, but the President alone possesses the authority to "initiate" tax legislation.²⁶ The draft law is then sent to one house of the National Congress, the Chamber of Deputies.²⁷ "[A]nalysis of [the bill's] general aspects and main ideas" is undertaken by the Commission on Finance of the Chamber of Deputies.²⁸ The Commission's conclusions are transmitted to the full Chamber.²⁹ The Chamber then engages in a "general discussion" of the proposed law to "decide whether to approve or reject the idea of legislating" on the particular subject.³⁰

10. After the bill is approved by the Chamber of Deputies in general discussion, it is sent to various legislative commissions that have jurisdiction over the bill.³¹ In the case of a measure modifying the PBS, the following commissions will examine the specific content of the proposed law: Commission on Finance; Economic Commission; Commission on Agriculture; and Foreign Relations Commission.³² After commission review, the Chamber as a whole studies the law in greater detail during its "specific discussion".³³ When the Chamber approves the bill, it is sent to the second house of the legislature, the Senate, where the bill undergoes an identical process of review.³⁴

11. Once approved by both houses of the National Congress, the bill is sent to the President for approval.³⁵ Upon "endorsement" of the bill³⁶, the President issues a decree of promulgation and submits the bill for constitutional review by the Comptroller-General.³⁷ After the bill has been declared constitutionally sound by the Comptroller-General³⁸, the President has the bill published as law in the Official Journal.³⁹ Publication of the law is the final step required in the legislative process.

²⁶ Chile's submission, paras. 19 and 30.

²⁷ *Ibid.*, para. 31.

²⁸ *Ibid.*, para. 34.

²⁹ *Ibid.*, para. 35.

³⁰ *Ibid.*

³¹ *Ibid.*, para. 36.

³² *Ibid.*, para. 33.

³³ *Ibid.*, para. 36. During the specific discussion, the Chamber may introduce amendments or return the bill to the commissions for further study. (Chile's submission, para. 36)

³⁴ Chile's submission, para. 36. If the Senate approves an amended version of the bill, both versions are discussed by a joint Chamber-Senate Commission and then a compromise version is voted upon by each house. (Chile's response to questioning at the oral hearing)

³⁵ Chile's submission, para. 38. If the President does not approve the bill, he or she returns it to the National Congress, with relevant comments, within thirty days. The National Congress may then approve the comments or, by special majority, reject some or all of them. It may also reject the bill in its entirety. If approved, the bill is returned to the President for promulgation. (Chile's submission, para. 38)

³⁶ Endorsement may be explicit or implicit, as when the President does not return a bill within 30 days of its transmission. (Chile's submission, para. 39)

³⁷ Chile's submission, paras. 40 and 42.

³⁸ Chile also notes that constitutional review by the Constitutional Court may be requested at any previous legislative stage, but that such "request does not suspend the processing of the draft [law]." (Chile's submission, para. 46)

³⁹ Chile's submission, paras. 43-44.

12. Chile states that the average period of time for passage of "regulatory" ⁴⁰ legislation is approximately 24 months⁴¹, and the corresponding time for tax legislation is about 19 months.⁴² The "urgency" procedures⁴³ have no bearing on the "reasonable period of time" for implementation because under Chilean law use of these procedures is left to the discretion of the President and, in any event, either house may reject the urgency request.⁴⁴ More importantly, as recognized by the Arbitrators in *Chile – Alcoholic Beverages*, and *Korea – Alcoholic Beverages*, implementing Members are not required to employ procedures outside the normal legislative processes when implementing the recommendations and rulings of the DSB.⁴⁵

2. *Chile's Proposal for a Reasonable Period of Time*

13. Chile argues that the "reasonable period of time" for implementation provided for in Article 21.3(c) of the DSU should be read in the light of Article 22, which deals with the consequences of a Member's failure to comply with the recommendations and rulings of the DSB within the reasonable period of time determined pursuant to Article 21.3.⁴⁶ In particular, when determining the "reasonable period of time", Chile contends that an arbitrator should allow time for the implementing Member to take those actions necessary for the "full and efficient implementation" of recommendations and rulings of the DSB, which is the preferred course of action prescribed by Article 22.⁴⁷

14. Chile also asserts that Article 21.3(c) does not establish 15 months as a *maximum* period of time within which an arbitrator should fix the "reasonable period of time" for implementation.⁴⁸ Rather, establishing the reasonableness of the time for implementation requires the arbitrator to consider the specific circumstances of each case.⁴⁹ Chile finds the following circumstances in this case to warrant a "reasonable period of time" beyond 15 months: (i) the significance of the PBS as a "cornerstone" of Chile's agricultural policy for almost 20 years and the consequent serious impact of a modification of the PBS⁵⁰; (ii) the intensity of the political opposition, both within the legislature and in the private

⁴⁰ "Regulatory" laws are laws which directly or indirectly regulate public institutions, including their establishment, their operations and functioning, their rights and obligations to citizens, and certain other matters. (Chile's response to questioning at the oral hearing)

⁴¹ Chile's submission, para. 48.

⁴² Chile's response to questioning at the oral hearing.

⁴³ Argentina argues that Chile should be expected to employ the constitutionally-authorized "urgency modalities", whereby the President may seek expedited review of draft legislation. By designating a bill as "urgent", "very urgent", or "for immediate discussion", when submitting the bill to the National Congress, the President may request that the time period for the particular step of the legislative process be limited to 30 days, 10 days, or 3 days, respectively. (Argentina's submission, para. 36)

⁴⁴ Chile's response to questioning at the oral hearing.

⁴⁵ Chile's statement at the oral hearing.

⁴⁶ Chile's submission, para. 54.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, para. 52.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, para. 51.

sector, to reform of the PBS⁵¹; and (iii) the fact that implementation requires passage of a new law (as opposed to an administrative measure), and the "process" involved in that passage, namely, the pre-legislative discussions and the stages of legislation outlined by Chile in its submission.⁵²

15. Chile points out that it does not raise simply the "contentiousness" of the PBS modification or the possible need for structural adjustment in the agricultural sector as relevant matters for consideration in fixing the "reasonable period of time", as Chile acknowledges that matters of that kind have been discounted by previous arbitrators. Rather, Chile regards the impact of any PBS modification on the sectors concerned to be relevant to my determination in terms of evaluating the complexities inherent in the pre-legislative and legislative phases, which impact upon the assessment of the reasonable period of time for implementation.⁵³

16. Chile emphasizes Article 21.2 of the DSU, which provides that "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." In the light of the importance of agriculture to the Chilean economy, and the longstanding role of the PBS in Chilean agricultural and trade policy, Chile argues that I should take account of its specific interests as a developing country Member when determining a "reasonable period of time" for implementation.⁵⁴

17. Chile rejects the contention of Argentina that implementation in this case will be achieved only by the repeal of the PBS. Although it has not yet determined precisely what form its new law will take to implement the rulings in this dispute, Chile asserts that determining the "best" or even "only" means of implementation is beyond my competence as an arbitrator under Article 21.3(c) of the DSU. Chile maintains that, as previous arbitrators have observed, the means of implementation lie exclusively in the discretion of the implementing Member, and my sole task, according to Chile, is to evaluate what period of time would be "reasonable" for the means of implementation identified by the Member.⁵⁵

18. Furthermore, Chile finds Argentina's comparison to the short periods of time required for passage of Laws 19.772 (amending the WTO bound sugar tariff) and 19.716 (implementing *Chile – Alcoholic Beverages*) to be erroneous. Law 19.772 *increased*, rather than lowered, the protection for the sugar industry, and it was also preceded by several bilateral negotiations with trading partners, both factors thereby facilitating the pre-legislative phase.⁵⁶ With regard to Law 19.716, Chile had been in negotiations with the European Communities for 10 months when the measure was introduced into the National Congress, and the

⁵¹ Chile's submission, para. 51.

⁵² *Ibid.*, para. 53.

⁵³ Chile's statement at the oral hearing.

⁵⁴ Chile's submission, paras. 55–59.

⁵⁵ Chile's statement at the oral hearing.

⁵⁶ *Ibid.*

President made use of the urgency procedure.⁵⁷ Therefore, Chile argues that the experience in the passage of these two laws is not relevant to my determination of a "reasonable period of time" for implementation in this case.

B. Argentina

19. Argentina requests that I determine nine months and six days to be a "reasonable period of time" under Article 21.3(c) of the DSU for implementation of the recommendations and rulings of the DSB in this case.

20. Argentina observes that, under Article 21.1 of the DSU, compliance with the recommendations and rulings of the DSB must be "prompt".⁵⁸ As stated by the Arbitrator in *Chile – Alcoholic Beverages*, "reading Articles 21.1 and 21.3 together, 'prompt' compliance is, in principle, 'immediate' compliance".⁵⁹ In the light of this fundamental requirement of prompt, or immediate, compliance, Argentina argues that the "reasonable period of time" provided for implementation in Article 21.3 constitutes an "exception" to the general principle of prompt compliance, in the sense of immediate compliance.

21. Accordingly, Argentina agrees with Chile that the 15-month period of time identified in Article 21.3(c) is a "guideline only of an indicative nature" and that the focus of an arbitrator should be on the particular circumstances of the case.⁶⁰ Recalling that previous arbitrators have found that implementation should occur in the shortest period of time possible within the legal system of a Member⁶¹, Argentina submits that Chile bears the burden of establishing that the period of time proposed by Chile, which goes beyond the "shortest possible period" in its system, is justified according to the circumstances of the case.⁶²

22. Argentina argues that "the only appropriate way to implement the DSB recommendations consists of the elimination of the PBS, inasmuch as the PBS imposes [duties on] the products covered by the dispute ... that do not constitute ordinary customs duties."⁶³ In the light of the reasoning of the Appellate Body in this dispute, according to Argentina, the only measure that Chile may implement to afford protection to the producers of the agricultural products at issue is to apply ordinary customs duties, as permitted by the *Agreement on Agriculture*.⁶⁴

23. Argentina submits that, Chile has failed to adequately define the methods of implementation it intends to follow in this case. Although Chile has stated that a tax law will be required, the absence of further specificity as to the scope or text of the intended measure cannot support the 18 months requested by Chile,

⁵⁷ Chile's response to questioning at the oral hearing. Chile added that without the "reasonable period of time" coming to an end, it would not have been necessary to use the urgency procedure.

⁵⁸ Argentina's submission, para. 21.

⁵⁹ Argentina's submission, para. 23 (quoting Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 38).

⁶⁰ *Ibid.*, para. 27.

⁶¹ *Ibid.*, paras. 28–29.

⁶² *Ibid.*, paras. 29–30; Argentina's statement at the oral hearing.

⁶³ Argentina's submission, para. 18.

⁶⁴ *Ibid.*, paras. 19(a)–(e).

particularly since the implementation of the recommendations and rulings of the DSB can be achieved only through the relatively "simple" act of repeal of the PBS.⁶⁵ Argentina argues that this absence of further clarification from Chile as to the means of implementation should result in a shorter, not longer, "reasonable period of time" for implementation.⁶⁶

24. Argentina acknowledges that, under the Chilean Constitution and the Constitutional Organic Law of the National Congress, the passage of legislation requires Presidential initiation and discussion in the National Congress, followed by Presidential endorsement and promulgation before publication.⁶⁷ According to Argentina, Chilean law provides that this legislative process may "extend up to five months".⁶⁸ With regard to the "pre-legislative" phase described by Chile, however, Argentina argues that no such phase is mandated by Chilean law, and therefore, it should not be taken into account in my determination of the "reasonable period of time" for implementation.⁶⁹ Should I find the pre-legislative phase to be relevant, Argentina requests that I accord little weight to this step in the legislative process.

25. Argentina also notes that Article 52 of the Chilean Constitution establishes "urgency modalities" whereby the President may seek expedited review of draft legislation.⁷⁰ Under this urgency procedure, the President may designate a bill as "urgent", "very urgent", or "for immediate discussion", when submitting the bill to the National Congress.⁷¹ Such designation limits the period of time for the particular step of the legislative process to 30 days, 10 days, or 3 days, respectively.⁷² Argentina submits that, in complying with its international obligations, Chile should reasonably be expected to employ the urgency procedure, which factor should be considered in my determination of the "reasonable period of time" for implementation.⁷³

26. Notwithstanding the nomenclature of "urgency" attached to this procedure, Argentina suggests that this practice is indeed a "normal and usual" part of Chile's legislative process.⁷⁴ Referring to 23 laws that it states were passed in 2002 under the urgency procedure, Argentina argues that this option is exercised by the President with sufficient regularity, when seeking to expedite legislation, to justify its employment by Chile in the present matter.⁷⁵ Argentina argues that I should therefore take the availability of the urgency procedure into account when fixing the "reasonable period of time" for implementation of the recommendations and rulings of the DSB.

⁶⁵ Argentina's statement at the oral hearing.

⁶⁶ *Ibid.*

⁶⁷ Argentina's submission, para. 35.

⁶⁸ *Ibid.*

⁶⁹ Argentina's statement at the oral hearing.

⁷⁰ Argentina's submission, para. 36.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*, Argentina's statement at the oral hearing.

⁷⁴ Argentina's statement at the oral hearing.

⁷⁵ *Ibid.*

27. That legislation may be passed far more expeditiously than suggested by Chile is evident, according to Argentina, when examining the passage of Chilean Law 19.772, which, *inter alia*, amended Chile's WTO bound tariff rate for certain sugars.⁷⁶ Only 69 days passed between the submission of the bill to the National Congress and its publication in the Chilean Official Journal.⁷⁷ As a tariff measure, that law was subject to the same legislative procedures as would be followed by any draft law modifying the PBS, and therefore, in Argentina's submission, serves as a useful comparison to evaluate how long a "reasonable period of time" should be for implementation in this case.

28. Argentina similarly points to Chile's rapid implementation of the legislation modifying the tax law found to be WTO-inconsistent in *Chile – Alcoholic Beverages*. That new law was passed within approximately one month of presentation before the National Congress, due to the President's resort to the urgency procedure provided for by the Chilean Constitution.⁷⁸

29. Rejecting the relevance of the longstanding importance of the PBS to the agricultural sector in Chile, Argentina argues that previous arbitrators have specifically rejected similar claims of difficulties stemming from political opposition to implementation. To permit such a rationale for assessing the "reasonable period of time", in Argentina's submission, would indefinitely postpone implementation, contrary to the DSU's requirement of prompt compliance.⁷⁹

30. With regard to Chile's claim for consideration as a developing country Member, Argentina says it is "surprised" that such a claim has been made, because both parties agreed during the Appellate Body hearing that their respective developing country status had no relevance in this dispute.⁸⁰ Nevertheless, Argentina states that the plain text of Article 21.2 makes no distinction between complainants and respondents when providing that particular attention should be paid to matters affecting the interests of developing countries. In this regard, Argentina submits that its own status as a developing country warrants particular attention in this determination, as Argentina's rights have been nullified and impaired by the continued operation of the PBS.⁸¹ In any event, says Argentina, no specific economic difficulties face Chile as a developing country in this case, in contrast to the financial situation of Indonesia found to be relevant under Article 21.2 in *Indonesia – Autos*.⁸²

31. Finally, Argentina states that Chile has been aware of its international obligation to comply with the recommendations and rulings of the DSB at least since the adoption of the panel and Appellate Body reports on 23 October 2002. More than four months have passed since then and, Argentina argues, Chile has not undertaken sufficient steps towards implementation during that time.

⁷⁶ Argentina's submission, para. 38 and Annex ARG-3.

⁷⁷ *Ibid.*, para. 35 and Annex ARG-3.

⁷⁸ Argentina's statement at the oral hearing.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Argentina's statement at the oral hearing.

Accordingly, Argentina submits that this lack of progress, particularly with regard to the pre-legislative consultations, should be taken into account in my determination, as stated by the Arbitrator in *US – Section 110(5) Copyright Act*.⁸³

III. REASONABLE PERIOD OF TIME

32. My task in this arbitration is to determine the "reasonable period of time" (the term used in Article 21.3 of the DSU) for the implementation of the recommendations and rulings of the DSB in *Chile – Price Band System*. In doing so, I recognize that I am not asked to determine or even suggest the manner in which a Member should implement its international obligations. My function is to fix a "reasonable period of time" appropriate to the means proposed by the implementing Member.⁸⁴ I therefore agree with the statement by the Arbitrator in *Korea – Alcoholic Beverages*, that "[c]hoosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements."⁸⁵

33. Article 21.1 of the DSU, which provides relevant context for understanding the remaining paragraphs of Article 21, states that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." Recognizing that "prompt compliance" may not always be "immediate" compliance, however, the chapeau of Article 21.3 provides, "If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so." The allowance of a "reasonable period of time" for implementation, therefore, is premised on it being impracticable for the Member to comply "immediately".⁸⁶

34. Article 21.3(c) provides for an arbitrator a "guideline" of a maximum of 15 months from the date of adoption of the panel and Appellate Body reports when establishing a "reasonable period of time" for implementation. Notwithstanding this "guideline", I must ultimately be informed, as Article 21.3(c) instructs, by the "particular circumstances" of a given case, which may counsel in favour of shorter or longer periods.⁸⁷ As previous arbitrators have observed, the controlling principle is that the "reasonable period of time" should be "the shortest period possible within the legal system of the Member to

⁸³ Argentina's statement at the oral hearing.

⁸⁴ Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 43.

⁸⁵ Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45.

⁸⁶ Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 45; Award of the Arbitrator, *Australia – Salmon*, para. 30; Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 25. I note that both parties in this arbitration argue that new legislation is necessary for implementation of the recommendations and rulings of the DSB, and therefore, appear to agree that "immediate" compliance by Chile is impracticable. The impracticability of Chile's immediate compliance has not been raised as an issue for decision in this arbitration.

⁸⁷ Award of the Arbitrator, *Canada – Patent Term*, para. 36; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 36.

implement the relevant recommendations and rulings of the DSB⁸⁸, in the light of the "particular circumstances" of the dispute.

35. The following issues arise in this arbitration:

- (a) whether there is only one possible course of action which Chile, as the implementing Member, can follow in order to comply with the recommendations and rulings of the DSB, namely, eliminating the PBS in respect of the products in dispute;
- (b) whether pre-legislative consultations, being engaged in by Chile, but not mandated by the law of Chile, are relevant considerations and, if so, in what respects and to what extent;
- (c) whether the action taken by Chile to implement those recommendations and rulings or its delay in taking such action, since the adoption of the panel and Appellate Body reports, should be taken into account in fixing the reasonable period of time;
- (d) whether domestic political and industry opposition in Chile to the modification of the PBS is relevant, and if so, to what extent;
- (e) what relevance and weight should be attached to procedures within Chile's legal system for expediting legislation, the passage of which is necessary to comply with the recommendations and rulings of the DSB; and
- (f) of what significance in this arbitration are the interests of developing countries, which here includes both Chile and Argentina.

36. Argentina argues that "the only appropriate way to implement the DSB recommendations consists of the elimination of the PBS, inasmuch as the PBS imposes [duties on] the products covered by the dispute ... that do not constitute ordinary customs duties."⁸⁹ The straightforward nature of this action, in Argentina's submission, contradicts Chile's claim for a significant period of time to draft a replacement law after discussion with and input from other agencies and interest groups. Whether elimination of the PBS, in so far as it impacts upon the relevant products, is the "only appropriate" means of implementation (as opposed to a modification of the PBS) is not an issue for decision in this arbitration.⁹⁰ As discussed above, the focus of my inquiry and determination relates to the period of *time* needed to implement the recommendations and rulings of the DSB, not to the *manner* in which Chile intends to implement them.⁹¹ I therefore do not accept Argentina's argument.

⁸⁸ See for example, Award of the Arbitrator, *US – 1916 Act*, para. 32 (citing, *inter alia*, *Canada – Pharmaceutical Patents*, para. 47).

⁸⁹ Argentina's submission, para. 18.

⁹⁰ The Arbitrator in *Canada – Pharmaceutical Patents* rejected a similar challenge by the European Communities, which had claimed that Canada was required to repeal a provision of its Patent Act instead of implementing new regulations in order to comply with the recommendations and rulings of the DSB. Award of the Arbitrator, paras. 37–40.

⁹¹ See *supra*, para. 32 of this Award.

37. The fact that an Article 21.3(c) arbitration focuses on the period of time for implementation, however, does not render the substance of the implementation, that is, the precise means or manner of implementation, immaterial from the perspective of the arbitrator. In fact, the more information that is known about the details of the implementing measure, the greater the guidance to an arbitrator in selecting a reasonable period of time, and the more likely that such period of time will fairly balance the legitimate needs of the implementing Member against those of the complaining Member. Nevertheless, the arbitrator should still avoid deciding what a Member must do for proper implementation.⁹² I accept Chile's stated intention to pass new legislation modifying the PBS so as to render it consistent with Chile's WTO obligations. How it does this is a matter for Chile.

38. Chile identifies a "pre-legislative" phase followed by an extensive lawmaking procedure through which any law implementing the DSB's recommendations and rulings must pass.⁹³ The multi-step process of legislating, which involves the participation of several legislative committees with at least two rounds of review ("general" and "specific", as labelled by Chile) by not only those committees, but also by each house of Congress itself, highlights the complexity of the *process* Chile will undergo during implementation. I find the intricacy of the lawmaking process relevant to my determination⁹⁴, and I agree with the observation of previous arbitrators that implementation through legislation is likely to require a longer time for implementation than administrative rulemaking or other exclusively Executive action.⁹⁵

39. That said, however, I am also conscious of the fact that most steps in Chile's lawmaking procedure, while required by law, are not subject to statutory or constitutional time limits. Therefore, there appears to be a certain amount of "flexibility"⁹⁶ within the normal legislative process, particularly in terms of steps such as the "general discussions" and Presidential endorsement, that Chile may fairly be expected to utilize in good faith so that it may promptly develop a new law repealing or modifying the PBS and otherwise ensure that it conforms with its WTO obligations.

40. According to Chile, in the time since the adoption of the panel and Appellate Body reports on 23 October 2002, it has begun to implement the recommendations and rulings of the DSB. When questioned at the oral hearing, Chile identified the following as actions it has undertaken in furtherance of implementation: (i) consultations with Argentina, in addition to other trading partners, on a reasonable implementation period and on possible actions required for implementation; (ii) discussions between the Chilean Ministry of Agriculture

⁹² Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 30.

⁹³ See *supra*, paras. 37–43 of this Award.

⁹⁴ Award of the Arbitrator, *EC – Bananas III*, para. 19; Award of the Arbitrator, *US – 1916 Act*, paras. 38–39.

⁹⁵ See for example, Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 34; Award of the Arbitrator, *Australia – Salmon*, para. 38; Award of the Arbitrator, *Canada – Patent Term*, para. 41.

⁹⁶ Award of the Arbitrator, *Canada – Patent Term*, para. 64; Award of the Arbitrator, *US – 1916 Act*, para. 39; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, paras. 38–39.

and agricultural trade associations; (iii) deliberations within the Interministerial Committee on changes to the PBS that may be necessitated by virtue of the panel and Appellate Body reports.

41. These actions that have been undertaken by Chile in the last several months constitute part of the "pre-legislative" phase of Chile's lawmaking process. Chile argues that this phase is an integral component of its implementation of the recommendations and rulings of the DSB. Argentina submits that, because this phase is not mandated by Chilean law, Chile should be expected to use its "flexibility" to pass over or minimize the time required for this phase. Accordingly, Argentina suggests that time requested by Chile for the pre-legislative phase should not be relevant to my determination of a "reasonable period of time" for implementation.

42. The absence of a requirement under Chile's laws to engage in pre-legislative consultations is not sufficient, in my view, to dismiss the relevance of such consultations for purposes of this Article 21.3(c) arbitration. As other arbitrators have noted⁹⁷, and as Chile has emphasized, the consultation phase is important for laying the foundation upon which a proposed law passes through the legislative process. Although not mandated by law, consultations within government agencies as well as with the affected sectors of society are typically a concomitant of lawmaking in contemporary polities, and such consultations should be taken into account when fixing a "reasonable period of time" for implementation.

43. Even if the "pre-legislative" phase is treated as relevant, Argentina additionally requests that I interpret Chile's actions thus far as a lack of progress in implementation by Chile, as more than four months have passed since the DSB's adoption of the panel and Appellate Body reports in this dispute and little positive progress appears to have been made. A Member's obligation to implement the recommendations and rulings of the DSB is triggered by the DSB's adoption of the relevant panel and/or Appellate Body reports. Although Article 21.3 acknowledges circumstances where *immediate* implementation is "impracticable", in my view the implementation process should not be prolonged through a Member's inaction (or insufficient action) in the first months following adoption. In other words, whether or not a Member is able to *complete* implementation promptly, it must at the very least promptly *commence* and continue concrete steps towards implementation. Otherwise, inaction or dilatory conduct by the implementing Member would exacerbate the nullification or impairment of the rights of other Members caused by the inconsistent measure. It is for this reason that arbitral awards under Article 21.3(c) calculate "reasonable period[s] of time" as from the date of adoption of panel and/or Appellate Body reports.

44. Therefore, in the light of the importance of prompt compliance in WTO dispute settlement, I concur with the Arbitrator in *US – Section 110(5) Copyright Act*:

⁹⁷ Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 43; Award of the Arbitrator, *US – Hot-Rolled Steel*, para. 38.

... an implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB. Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period after adoption of a panel and/or Appellate Body report and prior to any arbitration proceeding. If it is perceived by an arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect "prompt compliance", it is to be expected that the arbitrator will take this into account in determining the "reasonable period of time".⁹⁸

45. Based on Chile's description of the steps it has taken towards implementation, it is unclear to me what results have been achieved by the various consultations thus far. Almost five months have passed between adoption of the panel and Appellate Body reports and issuance of this award. Chile states that the pre-legislative phase is "by no means over".⁹⁹ As discussed above, I realize the value of thorough pre-legislative activities, particularly so as to ensure passage of final legislation and thereby achieve "full implementation".¹⁰⁰ I also recognize that consultations, discussions and deliberations, by their very nature, are indeterminate and cannot be subject to arbitrary time limits, particularly because the extensiveness of these activities may change with each measure in issue. Nevertheless, for purposes of calculating a "reasonable period of time" under Article 21.3(c), such activities should not be assumed to be without reasonable limits.¹⁰¹ I do not suggest that Chile's pre-legislative activities in this case should necessarily have concluded by this time; but, in my view, this phase should reasonably have proceeded further than it has.

46. Chile emphasizes that the PBS has served as a "cornerstone"¹⁰² of its agricultural policy for almost 20 years, its purpose having been to mitigate price fluctuations in the world markets for certain Chilean products. These price fluctuations, according to Chile, are attributable to the interventionist policies of other agricultural exporting States. Furthermore, Chile claims that the PBS was well-known to exist by Chile's trading partners during the Uruguay Round and that such partners provided assurances of the consistency of the PBS with Chile's commitments under the *Agreement on Agriculture*. As a result, Chile identifies a large opposition in Chile, that resists the modification of the PBS in the light of what Chile says such opposition views to be a defensive measure used to counteract others' distortive policies and a fully transparent mechanism previously understood and accepted by other WTO Members.¹⁰³

47. Argentina does not dispute the existence of significant opposition in Chile to repeal or reform of the PBS, nor does it contest the implications of such

⁹⁸ Award of the Arbitrator, para. 46.

⁹⁹ Chile's response to questioning at the oral hearing.

¹⁰⁰ Article 22.1 of the DSU.

¹⁰¹ Award of the Arbitrator, *Canada – Autos*, para. 49.

¹⁰² Chile's submission, para. 7.

¹⁰³ *Ibid.*, paras. 8–9, 51, and 57–58.

opposition for the passage of a WTO-consistent implementing measure. Instead, Argentina refers to previous arbitrators that have rejected the domestic "contentiousness" of a proposed measure as a basis for granting longer implementation periods.¹⁰⁴ In this regard, it has been rightly said that "[a]ll WTO disputes are 'contentious' domestically at least to some extent; if they were not, there would be no need for recourse by WTO Members to dispute settlement."¹⁰⁵ Simple contentiousness may thus not be a sufficient consideration under Article 21.3(c) for a longer period of time.

48. Nevertheless, the facts of this dispute, as identified by Chile and uncontested by Argentina, raise special concerns that warrant my taking them into account in my determination. I am of the view that the PBS is so fundamentally integrated into the policies of Chile, that domestic opposition to repeal or modification of those measures reflects, not simply opposition by interest groups to the loss of protection, but also reflects serious debate, within and outside the legislature of Chile, over the means of devising an implementation measure when confronted with a DSB ruling against the original law. In the light of the longstanding nature of the PBS, its fundamental integration into the central agricultural policies of Chile, its price-determinative regulatory position in Chile's agricultural policy, and its intricacy, I find its unique role and impact on Chilean society is a relevant factor in my determination of the "reasonable period of time" for implementation.

49. Previous arbitrators have noted that an implementing Member "may reasonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible."¹⁰⁶ Argentina refers to the "urgency procedure" provided for in the Constitution of Chile as the "flexibility" to which Chile should be expected to resort in this case and thus more promptly achieve implementation.¹⁰⁷ Both parties agree that Article 71 of the Constitution of Chile authorizes the President to denote before the National Congress the "urgency for passing a bill" ("*la urgencia en el despacho de un proyecto*")¹⁰⁸, and that this procedure is governed in greater detail by Law 18.918.¹⁰⁹ This "urgency procedure" permits (but does not require) the President, at each stage of the legislative process, to designate a bill as "urgent", "very urgent", or "for immediate discussion"¹¹⁰, and thereby seek to reduce the time for consideration of the bill at such stage to 30 days, 10 days, or

¹⁰⁴ See for example, Award of the Arbitrator, *Canada – Patent Term*, para. 58; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 42.

¹⁰⁵ Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 60.

¹⁰⁶ Award of the Arbitrator, *US – 1916 Act*, para. 39. See also Award of the Arbitrator, *US – Section 110(5) Copyright Act*, paras. 38–39; Award of the Arbitrator, *Canada – Patent Term*, para. 64.

¹⁰⁷ Argentina's statement at the oral hearing.

¹⁰⁸ Constitution of Chile, Art. 71, attached as Annex ARG-2 to Argentina's submission.

¹⁰⁹ Argentina identified the Chilean Constitution and Law 18.918 as the basis for the urgency procedure, and Chile did not contest this characterization. Argentina's and Chile's statements and responses to questioning at the oral hearing.

¹¹⁰ Article 26 of Law 18.918, attached as Annex ARG-4 to Argentina's statement at the oral hearing.

3 days, respectively.¹¹¹ Notwithstanding the President's designation, either house of the National Congress may reject the President's request for speedier consideration of the bill and revert to unlimited time for analyzing the bill.¹¹² If the President's designation is accepted by the particular house of the National Congress, review of the bill at such stage will be subject to these time limits, in contrast to the lack of time constraints generally governing each stage of the legislative process.¹¹³ The "urgency procedure" is thus envisioned by Chilean law as an expedited means of legislative review, distinct from the typical process because of the additional limitations accepted by the legislature.

50. Although referred to by the Chilean Constitution as an "urgency" measure, Argentina argues that the President's designation of a bill as "urgent" is, in fact, a "standard procedure" under Chilean law to which the President "regularly" makes recourse.¹¹⁴ In support of its argument, Argentina identifies 23 laws promulgated in Chile in 2002 following Presidential invocation of the urgency procedure.¹¹⁵ Whether these 23 laws evidence a consistent practice of using the "urgency procedure" so as to render it a *de facto* normal part of the Chilean legislative process cannot be determined on the basis of the evidence before me. The regularity of the "urgency procedure" cannot be evaluated without knowing, *inter alia*, how many laws in all were promulgated in Chile in 2002, for Argentina's argument is implicitly premised on the fact that the "urgency procedure" was employed for a statistically significant percentage of laws. In addition, the static portrait revealed by an examination of laws in one legislative year may not provide sufficient basis to deduce the "standard" nature of Executive practice in the process of lawmaking in Chile.

51. I referred earlier to the special status of the PBS in Chile's agricultural policy and the consequent difficulties imposed on the formulation of legislation to implement the recommendations and rulings of the DSB in this case.¹¹⁶ Having recognized the need for thorough discussion on any implementing measure modifying the PBS, it would not be right for me to *expect* that the President of Chile will necessarily seek truncated review of such a measure in the very legislative body intended for deliberation and debate on behalf of the public it represents. This severe reduction of legislative deliberation is precisely what Argentina seeks when suggesting that I factor the strict time limits of the "urgency procedure" into my determination of the "reasonable period of time" for implementation. Therefore, I find it unreasonable for me to *expect* or assume that Chile will necessarily make use of the "flexibility" arguably provided by the extraordinary "urgency procedure" when implementing legislation that modifies the PBS. Indeed, there is sufficient flexibility within the *ordinary* legislative procedure of Chile to enable it to implement the recommendations and rulings of

¹¹¹ Article 27 of Law 18.918, attached as Annex ARG-4 to Argentina's statement at the oral hearing.

¹¹² Chile's response to questioning at the oral hearing.

¹¹³ *Ibid.*

¹¹⁴ Argentina's comments on the document presented by Chile at the oral hearing, 20 February 2003.

¹¹⁵ Annex ARG-5 to Argentina's statement at the oral hearing.

¹¹⁶ See *supra*, paras. 46-48 of this Award.

the DSB in this case within a time frame of less than the 18 months which it seeks.

52. Nevertheless, the relevant laws of Chile, namely, the Constitution and Law 18.918, appear to enable Chile to resort to this "extraordinary" legislative procedure when proposing a law to modify the PBS. Because of the significant passage of time since adoption of the panel and Appellate Body reports in this case, and the lack of progress made thus far in implementing the recommendations and rulings of the DSB¹¹⁷, Chile may itself decide to resort to the "urgency procedure" at certain stages of the legislative process. Chile recognizes that it must implement those recommendations and rulings in good faith towards other Members of the WTO. It must therefore do everything it reasonably can to act expeditiously in this process of implementation. Perhaps this will call for Chile to invoke its "urgency procedure". Perhaps it will not. On the facts of this case and the evidence before me, I believe that whether and at what stages Chile utilizes the "urgency procedure" are questions for Chile to determine for itself. But, whatever it does, Chile must implement the recommendations and rulings of the DSB promptly.

53. Argentina refers to the passage of Laws 19.772 and 19.716 as examples of analogous situations in which the Chilean legislature acted promptly when it was sufficiently motivated to do so. Law 19.772 established, *inter alia*, a new bound tariff rate for sugar. The law was passed by the National Congress subsequent to a series of consultations with Chile's trading partners because Chile had invoked GATT Article XXVIII.¹¹⁸ Pursuant to those discussions, Chile *raised* its bound tariff rate on sugar beyond that which had been established in the Uruguay Round as part of Chile's GATT Article II tariff bindings.¹¹⁹ Law 19.772, in this regard, focused on *one* particular product (that is, sugar) and provided *increased* protection to sugar producers by raising the maximum possible tariff that Chile could apply to sugar imports. In contrast, compliance with the recommendations and rulings of the DSB in this case, as Chile observes, will require modifications to the price band *system*, thereby possibly affecting a much larger portion of the agricultural sector, and will be unlikely to provide greater protection than that afforded by the status quo.¹²⁰ I therefore do not find the passage of Law 19.772 to be of guidance in calculating the period of time for passage of a measure to modify the PBS for the purposes of this dispute.

¹¹⁷ See *supra*, paras. 43–45 of this Award.

¹¹⁸ Chile's response to questioning at the oral hearing. Article XXVIII of GATT provides, in part, as follows:

... a contracting party ... may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest ... and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, modify or withdraw a concession included in the appropriate schedule annexed to this Agreement. (footnotes omitted)

¹¹⁹ Chile's response to questioning at the oral hearing.

¹²⁰ Chile's statement at the oral hearing.

54. Law 19.716 was enacted to modify Chile's spirits taxes in accordance with the findings of the panel and Appellate Body in *Chile – Alcoholic Beverages*. The Article 21.3(c) arbitration in that dispute established 14 months and nine days as the "reasonable period of time" for implementation.¹²¹ Chile engaged in consultations with the European Communities, the complainant in that case, for approximately ten months as part of the pre-legislative phase discussed earlier.¹²² Additionally, in the light of the short time remaining within the "reasonable period of time" determined by the Arbitrator in *Chile – Alcoholic Beverages*, the President employed the urgency procedure to seek particularly expeditious consideration of the proposed implementing legislation.¹²³ As noted earlier, the use of the urgency procedure in a previous instance does not convince me that Chile should be expected to employ the same means of truncated review when passing a law to modify what I find to be a significantly more complex and systemic measure than that at issue in *Chile – Alcoholic Beverages*, that is, the PBS. Accordingly, I find the analogy to the passage of Law 19.716 inapposite to my determination of the "reasonable period of time" for implementation in this dispute. However, what the passage of that law does show is that the legislative processes of Chile are sufficiently tractable to enable Chile to adopt the urgency procedure in an appropriate case.

55. Finally, the DSU renders relevant to my determination the developing country status of Members involved in dispute settlement. Article 21.2 of the DSU provides:

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

I agree with the following statement by the arbitrator in *Chile – Alcoholic Beverages* that "an arbitrator functioning under Article 21.3(c) [must] be *generally mindful* of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB."¹²⁴ This arbitration is, however, the first arbitration under Article 21.3(c) to include developing countries as both complainant *and* respondent. The period of time for implementation of the recommendations and rulings of the DSB in this case is thus a "matter[] affecting the interests" of both Members: the general difficulties facing Chile as a developing country in revising its longstanding PBS, and the burden imposed on Argentina as a developing country whose access to the Chilean agricultural market is impeded by the PBS, contrary to WTO rules.

56. Furthermore, Chile has not pointed to additional *specific* obstacles that it faces *as a developing country* under present circumstances. This is a matter

¹²¹ Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 46.

¹²² Chile's response to questioning at the oral hearing.

¹²³ *Ibid.* Chile reported the use of the urgency procedure by its President in Chile's status report to the DSB on implementation. See *Status Report by Chile: Addendum*, WT/DS87/17/Add.1, WT/DS110/16/Add.1, 19 January 2001.

¹²⁴ Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 45 (emphasis added).

which I should take into account in evaluating whether a longer period of time may be needed for implementation. The absence of presently-existing, concrete difficulties in Chile's position as a developing country stands in contrast to previous arbitrations, wherein Members have identified, not simply their positions as developing countries, but also "severe"¹²⁵ or "dire"¹²⁶ economic and financial situations existing at the time of the proposed period of implementation. In contrast, the acuteness of Argentina's burden as a developing country complainant that has been successful in establishing the WTO-inconsistency of a challenged measure, is amplified by Argentina's daunting financial woes at present. Accordingly, I recognize that Chile may indeed face obstacles as a developing country in its implementation of the recommendations and rulings of the DSB, and that Argentina, likewise, faces continuing hardship as a developing country so long as the WTO-inconsistent PBS is maintained. In the unusual circumstances of this case, therefore, I am not swayed towards either a longer or shorter period of time by the "[p]articular attention"¹²⁷ I pay to the interests of developing countries.

57. Looking at the matter sensibly, reasonably, and fairly, and having reviewed the shortest period possible in which Chile may be expected to implement the recommendations and rulings of the DSB, and evaluating the particular circumstances claimed by the parties in this dispute, I do not find Chile's proposal of 18 months to be necessary, nor do I find Argentina's proposal of nine months and six days to be a sufficiently "reasonable" period within which Chile should complete implementation.

IV. THE AWARD

58. For the reasons set out above, I determine that the "reasonable period of time" for Chile to implement the recommendations and rulings of the DSB in this case is 14 months from the date of adoption of the panel and Appellate Body reports by the DSB, namely, 23 October 2002. The "reasonable period of time" will therefore expire on 23 December 2003.

¹²⁵ Award of the Arbitrator, *Argentina – Hides and Leather*, para. 51.

¹²⁶ Award of the Arbitrator, *Indonesia – Autos*, para. 24.

¹²⁷ Article 21.2 of the DSU.

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Report of the Appellate Body	DSR 1998:IX, 3767
Report of the Panel	DSR 1998:IX, 3797
Guatemala - Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico	
Complaint by Mexico (WT/DS156)	
Report of the Panel	DSR 2000:XI, 5295

India – Measures Affecting the Automotive Sector

- Complaint by European Communities (WT/DS146,) complaint by the United States (WT/DS175)
- Report of the Appellate BodyDSR 2002:V, 1821
- Report of the Panel.....DSR 2002:V, 1827

India - Patent Protection for Pharmaceutical and Agricultural Chemical Products

- Complaint by European Communities (WT/DS79); complaint by the United States (WT/DS50)
- Report of the Appellate Body (United States).....DSR 1998:I, 9
- Report of the Panel (European Communities).....DSR 1998:VI, 2661
- Report of the Panel (United States).....DSR 1998:I, 41

India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products

- Complaint by the United States (WT/DS90)
- Report of the Appellate BodyDSR 1999:IV, 1763
- Report of the Panel.....DSR 1999:V, 1799

Indonesia - Certain Measures Affecting the Automobile Industry

- Complaint by European Communities (WT/DS54); complaint by Japan (WT/DS55, WT/DS64); complaint by the United States (WT/DS59)
- Report of the Panel.....DSR 1998:VI, 2201
- Award of the Arbitrator under Article 21.3(c) of the DSUDSR 1998:IX, 4029

Japan - Measures Affecting Agricultural Products

- Complaint by the United States (WT/DS76)
- Report of the Appellate BodyDSR 1999:I, 277
- Report of the PanelDSR 1999:I, 315

Japan - Measures Affecting Consumer Photographic Film and Paper

- Complaint by the United States (WT/DS44)
- Report of the PanelDSR 1998:IV, 1179

Japan – Taxes on Alcoholic Beverages

- Complaint by Canada (WT/DS10); complaint by the European Communities (WT/DS8); complaint by the United States (WT/DS11)
- Report of the Appellate BodyDSR 1996:I, 97
- Report of the Panel.....DSR 1996:I, 125
- Award of the Arbitrator under Article 21.3(c) of the DSUDSR 1997:I, 3

Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products

- Complaint by the European Communities (WT/DS98)
- Report of the Appellate BodyDSR 2000:I, 3
- Report of the PanelDSR 2000:I, 49

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef

- Complaint by Australia (WT/DS169); complaint by the United States (WT/DS161)
Report of the Appellate BodyDSR 2001:I, 5
Report of the PanelDSR 2001:I, 59

Korea - Measures Affecting Government Procurement

- Complaint by the United States (WT/DS163)
Report of the Panel DSR 2000:VIII, 3541

Korea - Taxes on Alcoholic Beverages

- Complaint by the European Communities (WT/DS75); complaint by the United States (WT/DS84)
Report of the Appellate BodyDSR 1999:I, 3
Report of the PanelDSR 1999:I, 44
Award of the Arbitrator under Article 21.3(c) of the DSU DSR 1999:II, 937

Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States

- Complaint by the United States (WT/DS132)
Report of the Panel DSR 2000:III, 1345
Report of the Appellate Body - Recourse to Article 21.5 of the DSU DSR 2001:XIII, 6675
Report of the Panel - Recourse to Article 21.5 of the DSU.... DSR 2001:XIII, 6717

Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland

- Complaint by Poland (WT/DS122)
Report of the Appellate Body DSR 2001:VII, 2701
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Turkey - Restrictions on Imports of Textile and Clothing Products

- Complaint by India (WT/DS34)
Report of the Appellate BodyDSR 1999:VI, 2345
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United States - Anti-Dumping Act of 1916

- Complaint by the European Communities (WT/DS136); complaint by Japan (WT/DS162)
Report of the Appellate Body DSR 2000:X, 4793
Report of the Panel (European Communities)..... DSR 2000:X, 4593
Report of the Panel (Japan)..... DSR 2000:X, 4831
Award of the Arbitrator under Article 21.3(c) of the DSU DSR 2001:V, 2017

United States-Anti-Dumping and Countervailing Measures on Steel Plate from India

- Complaint by India (WT/DS206)
Report of the Panel.....DSR 2002:VI, 2073

- United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea**
 Complaint by Korea (WT/DS99)
 Report of the Panel DSR 1999:II, 521
- United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan**
 Complaint by Japan (WT/DS184)
 Report of the Appellate Body DSR 2001:X, 4697
 Report of the Panel DSR 2001:X, 4769
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- United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea**
 Complaint by Korea (WT/DS179)
 Report of the PanelDSR 2001:IV, 1295
- United States – Continued Dumping and Subsidy Offset Act of 2000**
 Complaint by Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand (WT/DS217)
 Report of the Appellate BodyDSR 2003:I, 375
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- United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany**
 Complaint by European Communities (WT/DS213)
 Report of the Appellate BodyDSR 2002:IX, 3781
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- United States – Countervailing Measures Concerning Certain Products from the European Communities**
 Complaint by European Communities (WT/DS212)
 Report of the Appellate BodyDSR 2003:I, 5
 Report of the Panel.....DSR 2003:I, 73
- United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea**
 Complaint by Korea (WT/DS202)
 Report of the Appellate BodyDSR 2002:IV, 1403
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- United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities**
 Complaint by the European Communities (WT/DS166)
 Report of the Appellate Body DSR 2001:II, 717
 Report of the Panel DSR 2001:III, 779

United States – Import Measures on Certain Products from the European Communities

Complaint by the European Communities (WT/DS165)

Report of the Appellate BodyDSR 2001:I, 373

Report of the Panel DSR 2001:II, 413

United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom

Complaint by the European Communities (WT/DS138)

Report of the Appellate Body DSR 2000:V, 2595

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United States - Import Prohibition of Certain Shrimp and Shrimp Products

Complaint by India (WT/DS58); complaint by Malaysia (WT/DS58); complaint by Pakistan (WT/DS58); complaint by Thailand (WT/DS58)

Report of the Appellate Body DSR 1998:VII, 2755

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Report of the Appellate Body - Recourse to Article 21.5

of the DSU (Malaysia) DSR 2001:XIII, 6481

Report of the Panel - Recourse to Article 21.5

of the DSU (Malaysia) DSR 2001:XIII, 6529

United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India

Complaint by India (WT/DS33)

Report of the Appellate BodyDSR 1997:I, 323

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United States - Measures Treating Export Restraints as Subsidies

Complaint by Canada (WT/DS194)

Report of the PanelDSR 2001:XI, 5767

United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada

Complaint by Canada (WT/DS236)

Report of the Panel.....DSR 2002:IX, 3597

United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear

Complaint by Costa Rica (WT/DS24)

Report of the Appellate BodyDSR 1997:I, 11

Report of the PanelDSR 1997:I, 31

United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia

Complaint by Australia (WT/DS178); complaint by new Zealand (WT/DS177)

Report of the Appellate BodyDSR 2001:IX, 4051

Report of the PanelDSR 2001:IX, 4107

United States - Section 110(5) of the US Copyright Act

Complaint by the European Communities (WT/DS160)

Report of the Panel	DSR 2000:VIII, 3769
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Award of the Arbitrator under Article 25 of the DSU.....	DSR 2001:II, 667
United States - Sections 301-310 of the Trade Act of 1974	
Complaint by the European Communities (WT/DS152)	
Report of the Panel	DSR 2000:II, 815
United States – Section 211 Omnibus Appropriations Act of 1998	
Complaint by the European Communities (WT/DS176)	
Report of the Appellate Body	DSR 2002:II, 589
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United States- Section 129(c)(1) of the Uruguay Round Agreements Act	
Complaint by Canada (WT/DS221)	
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United States – Standards for Reformulated and Conventional Gasoline	
Complaint by Brazil (WT/DS4); complaint by Venezuela (WT/DS2)	
Report of the Appellate Body	DSR 1996:I, 3
Report of the Panel	DSR 1996:I, 29
United States - Tax Treatment for "Foreign Sales Corporations"	
Complaint by the European Communities (WT/DS108)	
Report of the Appellate Body	DSR 2000:III, 1619
Report of the Panel	DSR 2000:IV, 1675
Report of the Appellate Body - Recourse to Article 21.5 of the DSU	DSR 2002:I, 55
Report of the Panel - Recourse to Article 21.5 of the DSU	DSR 2002:I, 119
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United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan	
Complaint by Pakistan (WT/DS192)	
Report of the Appellate Body	DSR 2001:XII, 6027
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