WORLD TRADE ORGANIZATION

WT/DS121/R
25 June 1999

(99-2217)

Original: English

ARGENTINA– SAFEGUARD MEASURES ON IMPORTS OF FOOTWEAR

Report of the Panel

The report of the Panel on Argentina – Safeguard Measures on Imports of Footwear is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 25 June 1999 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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

I. INTRODUCTION

1.1 On 3 April 1998, the European Communities requested consultations with the Government of Argentina under Article XXII:1 of the GATT 1994 ("GATT") and pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 14 of the Agreement on Safeguards with regard to provisional and definitive safeguard measures imposed by Argentina on imports of footwear.

1.2 The European Communities and Argentina held consultations on 24 April 1998, but failed to reach a mutually satisfactory solution.

1.3 On 10 June 1998, pursuant to Article 6 of the DSU, the European Communities requested the establishment of a panel with standard terms of reference.

1.4 At its meeting on 23 July 1998, the DSB established a panel pursuant to the request by the European Communities (WT/DS121/3).

1.5 At that DSB meeting, parties agreed that the Panel should have standard terms of reference. The terms of reference of the Panel are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS121/3, the matter referred to the DSB by the European Communities 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".

1.6 On 15 September 1998, the Panel was constituted as follows:

Chairman:	Mr. John McNab
Members:	Ms. Claudia Orozco
	Ms. Laurence Wiedmer

1.7 Brazil, Indonesia, Paraguay, Uruguay and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties on 30 November – 1 December 1998 and 3 February 1999. It met with the third parties on 1 December 1998.

1.9 The Panel submitted its interim report to the parties on 21 April 1999. On 10 May 1999, both parties submitted comments on the interim report, and Argentina requested that an interim review meeting be held. On 20 May 1999, the Panel held the interim review meeting with the parties. The Panel submitted its final report to the parties on 4 June 1999.

II. FACTUAL ASPECTS

2.1 This dispute concerns the application of provisional and definitive safeguard measures on imports of footwear by Argentina. Following a request made on 26 October 1996 by the Argentine Chamber of the Footwear Industry (CIC) for the application of a safeguard measure on footwear, and pursuant to Resolution MEYOSP No. 226/97[1], a safeguard investigation on footwear was initiated. At the same time, a provisional measure was imposed. The opening of the safeguard investigation

[1] Published in the *Boletín Oficial* of 24 February 1997. The Resolution was adopted on 14 February 1997 and became effective on 25 February 1997.

and the implementation of a provisional safeguard measure were notified to the Committee on Safeguards in a communication dated 21 February 1997.[2] In a communication dated 5 March 1997, a copy of Resolution 226/97 was transmitted to the Committee on Safeguards.[3]

2.2 On 25 July 1997 Argentina notified the Committee on Safeguards, pursuant to Article 12.1(b) of the Agreement on Safeguards, of the determination of serious injury made by the National Foreign Trade Commission ("CNCE").[4] On 1 September 1997, Argentina notified the Committee on Safeguards of the intention of the Argentine authorities to impose a final safeguard measure under Article 12.1(c) and Article 9 (footnote 2) of the Agreement on Safeguards.[5] Consultations between Argentina and the European Communities and the United States took place on 9 September 1997 pursuant to Article 12.3 of the Agreement on Safeguards.[6]

2.3 On 12 September 1997, Argentina published[7] a definitive safeguard measure, under Resolution 987/97, in the form of minimum specific duties on certain imports of footwear identified in Annex I of the Resolution, effective as of 13 September 1997. On 26 September 1997, Argentina transmitted to the Committee on Safeguards a copy of Resolution 987/97.[8] In a communication dated 26 September 1997, Uruguay, as Pro Tempore President of MERCOSUR[9] and on behalf of Argentina, notified under Article 12.1(c) and footnote 2 to Article 9 the definitive safeguard measure imposed by Resolution MEYOSP 987/97.[10]

2.4 On 31 December 1993, Resolution n° 1696/93 of the Argentine Ministry of Economy, Public Works and Public Services had introduced minimum specific duties on certain footwear imported into Argentina.[11] On the date of their original intended expiry (31 December 1994), the minimum specific duties were extended for one year by Article 15 and Annex XII of Decree 2275/94[12]. They were again prolonged until 31 December 1996 by Article 9 of Decree 998/95[13] and then until 31 August 1997 by Resolution 23/97 of 7 January 1997.[14] Various amendments were also made to the duties over the period.[15] Argentina adopted a Resolution repealing the minimum specific duties on imports of footwear[16] on 14 February 1997, the same day that Argentina adopted Resolution

[2] G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, 25 February 1997, Exhibit EC-11.

[3] G/SG/N/6/ARG/1Suppl.1 and G/SG/N/7/ARG/1/Suppl.1, 18 March 1997, Exhibit EC-12.

[4] G/SG/N/8/ARG/1, Exhibit EC-16.

[5] G/SG/N/10/ARG/1, G/SG/N/10/ARG/1, 15 September 1997, Exhibit EC-17, with corrigendum dated 18 September 1998, Exhibit EC-18.

[6] In accordance with Article 12.5 of the Agreement on Safeguards, the results of the consultations were notified to the Committee in a communication dated 10 September 1997, G/SG/14-G/L/195.

[7] *Boletin Oficial*, No. 28,729, 12 September 1997.

[8] G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, 10 October 1997, Exhibit EC-20.

[9] The Southern Common Market (MERCOSUR) was formed on 26 March 1991, when four Latin American countries (Argentina, Brazil, Paraguay and Uruguay) signed a treaty in Asuncion, providing for the creation of a common market among the four participants.

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

[11] Exhibit EC-1. The Resolution is dated 28 December 1993 and published in the Official Journal of the Argentine Republic of 30 December 1993, to enter into force the next day.

[12] Exhibit EC-2. Published in the Official Journal of the Argentine Republic of 30 December 1994, to enter into force on 1 January 1995.

[13] Exhibit EC-3.

[14] Exhibit EC-4.

[15] Similar minimum specific duties also applied to textiles and clothing. The minimum specific duties on textiles and clothing were the subject of WTO complaints by the United States (WT/DS56) and the European Communities (WT/DS77). The Panel in those disputes excluded minimum specific duties on footwear from its examination because these had been eliminated before the panel was formed.

[16] Resolution 225/97, Exhibit EC-5.

MEYOSP 226/97[17], referred to above, initiating the safeguard proceedings and imposing provisional measures in the form of minimum specific duties on imports of footwear.

2.5 On 28 April 1998, Argentina published Resolution 512/98[18] modifying Resolution 987/97.

2.6 On 26 November 1998, Argentina published MEYOSP Resolution 1506/98[19], further modifying Resolution 987/97. On 7 December 1998, Argentina published SICyM Resolution 837/98[20], implementing Resolution 1506/98.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 The European Communities requests the Panel to find that "Argentina has violated Articles 2:1, 4:2(a), 4:2(b), 4:2(c), 5:1, 6, 12:1 and 12:2 Agreement on Safeguard[s] and Article XIX:1(a) of GATT 1994."

3.2 The European Communities argues that:

> "All of the above violations, except for the violation of Article 5:1, relate to the way in which the investigation was conducted or the way in which procedural obligations were carried out by Argentina. Accordingly, any change to the measure which Argentina may introduce will only affect the violation of Article 5:1 (necessity of the measure and adequacy of the adjustment plan) and not the remaining violations."
>
> "Accordingly, the EC submits that Argentina's safeguard measures on imported footwear, however they may be adapted or adjusted in the meantime, should be removed."

3.3 In particular, "[b]ecause of the continued changes in the safeguard measures, the European Communities requests the Panel to find all Argentine measures based on the safeguard investigation subject of this dispute to be contrary to Argentine WTO obligations."

3.4 Argentina requests the Panel:

(a) "to give consideration to the issues of procedure raised in its first written submission" (section IV.A). First, Argentina "[does] not consider that the DIEMs applied to footwear and now revoked should be discussed by the Panel. [Argentina] therefore respectfully request the Panel not to take into account any of the claims made by the EC in this respect". Second, "Argentina respectfully requests the Panel not to make any ruling on Resolution 512/98, which was never the subject of consultations between the European Communities and Argentina and is not included in the terms of reference which the DSB adopted for the Panel's proceedings, although these were the subject of detailed discussions at two consecutive meetings of the DSB";

(b) "to reject the EC's request for a preventive ruling by the Panel on any change that Argentina might make to the measure";

(c) "to reject the request that the panel "find" that Argentina, in conducting its investigation, has failed to comply with the different provisions that the EC claims to

[17] Exhibit EC-6.
[18] Exhibit EC-28.
[19] Exhibit EC-32.
[20] Exhibit EC-35.

have been violated, in particular its obligations under Articles 2.1, 4.2(a), 4.2(b), 4.2(c), 6, 12.1 and 12.2 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994";

(d) "to reject the EC's request that any change to the measure which Argentina may introduce only affect the alleged violation of Article 5.1 and not the remaining alleged violations";

(e) "to reject the EC's request that the Panel "recommend" that however the measure may be adjusted, it should be removed."

[Parties' arguments in Sections IV through VI deleted from this version]

VII. INTERIM REVIEW

7.1 The Panel issued its interim report on 21 April 1999 and informed the parties that requests for the review of precise aspects of the interim reports had to be filed by 5 May 1999. On 30 April 1999, Argentina requested an extension of one week of the time-period for submitting comments on the interim report. On 3 May 1999, the Panel granted an extension until 10 May 1999.

7.2 On 10 May 1999, Argentina and the European Communities requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report. Argentina requested a further meeting with the Panel, whereas the European Communities did not consider such a meeting necessary. The interim review meeting with the parties was held on 20 May 1999.

7.3 The European Communities submitted a number of specific comments. The comments on the section entitled "the imposition of safeguard measures in the case of a customs union" addressed in particular the Panel's description of the European Communities' position on this issue and the specific phrasing of the legal reasoning interpreting the relationship between Articles XIX and XXIV of the GATT. Further to that, the European Communities made minor editing suggestions concerning the sections on "standard of review", "increased imports" and "the application of safeguard measures". Moreover, it suggested modifying the Panel's characterisation of the reason why the European Communities raised a claim under Article 5. The European Communities also criticised the Panel's reasoning on why it refrained from ruling on the EC's claim against the provisional safeguard measure. In response to these comments, we modified paras. 8.78, 8.79, 8.94, 8.287, and 8.292.

7.4 Argentina submitted a number of specific comments on the interim report which it grouped into three major categories: (i) comments concerning the descriptive part; (ii) comments related to the section entitled "factual background" introducing the Panel's findings and conclusions; and (iii) comments on the section of the findings addressing the EC's claims under Articles 2 and 4 of the Safeguards Agreement.

7.5 (i) As to the descriptive part, Argentina suggested changes to the account of events concerning its submission to the Panel of the entire record of the national investigation (Exhibit ARG-21). We carefully considered these suggestions but continue to believe that the description of the sequence of events in paras. 4.37-4.39 is accurate. We did introduce a sentence into para. 4.37 at the suggestion of Argentina, and made a few editing changes to this paragraph. Argentina further requested some editing changes in sections describing its arguments, including those concerning "the imposition of safeguard measures in the case of a customs union", some of which the Panel accepted in paras. 5.90, 5.97, 5.141, 5.269, 5.303, and 5.352. However, the Panel did not accept Argentina's proposals to shorten the description of certain responses by the European Communities to arguments made by Argentina.

7.6 (ii) With respect to the section dealing with the "factual background" to this case, the Panel did not accept Argentina's request to delete portions of this introductory section to the findings because they are an accurate summary of events discussed by both parties concerning the context of this dispute.

7.7 (iii) Argentina's fundamental criticism of the findings addressing the EC's claims under Articles 2 and 4 of the Safeguards Agreement was that it believed that the Panel had carried out a de novo review of the national authority's determinations of increased imports, serious injury and causation. Argentina argued that the Panel's review should have been restricted to considering whether the Comisión Nacional de Comercio Exterior (CNCE) had evaluated the proper factors in its report and whether it had a reasonable basis for its conclusion that negative effects on those factors were a result of increased imports. Argentina alleged that the Panel instead substituted its judgement and proceeded to identify those trends and evidence it considered the most relevant. In Argentina's view, the Panel asked the national authority to explain why it found certain evidence to be

compelling, rather than properly asking whether the evidence as a whole supported the CNCE's judgement, especially when asking Argentina to provide a complete analysis of any purportedly "adverse" data to the conclusion it reached. Argentina claimed that in not doing so, the Panel exceeded its authority because it was not the Panel's task to reweigh the evidence. Argentina submitted that it was for the national authority, as the trier of fact, to weigh all of the evidence and reach a conclusion. For Argentina it was the role of the Panel to determine whether the judgement of the national authority was one possible legitimate interpretation of the evidence, and not whether it was the correct interpretation because the standard based on international law principles is basically "what is not prohibited, is permitted".

7.8 While we do recognise the general interpretative principle "in dubio mitius"[400] raised by Argentina, we do not share Argentina's apparent opinion that under the Safeguards Agreement it is for the national authority to choose one of several possible factual or legal interpretations. Rather, regarding legal interpretations, a treaty must be interpreted, pursuant to Article 31 of the Vienna Convention, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Under the Safeguards Agreement, it is incumbent upon a national authority to adequately explain its factual conclusions on the basis of the evidence contained in the record of this case, and it is these explanations in the light of that evidence that we have reviewed in accordance with our standard of review, as explained in section VIII.E.3 of the findings. In this regard, the Safeguard Agreement is clear that the existence of increased imports, serious injury or threat, and causal link between the two, must be made on the basis of objective and quantifiable evidence on all relevant factors having a bearing on the situation of the industry, including factors other than increased imports that at the same time are causing injury. The Agreement also is clear that the detailed report on the case must set forth the findings and reasoned conclusions, and must demonstrate the relevance of the factors considered.

7.9 We consider Argentina's allegation that our findings amount to a de novo review of the case as unfounded. We believe that in addressing the EC claims we have kept with our decision not to engage in a de novo review. In accordance with Article 11 of the DSU,[401] a panel is required to make an objective assessment of the matter before it, including an objective assessment of the facts. In interpreting that article, the *United States - Underwear* panel found, a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by this article.[402] The panel on *New Zealand - Transformers* was also confronted with the argument of New Zealand that the determination of "material injury" by the competent authority of New Zealand could not be scrutinised by the panel.[403] The *Transformers* panel responded that

> "the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, the Panel could not share the view that such a determination

[400] The Appellate Body noted: The interpretative principle of *in dubio mitius*, widely recognized in international law as a 'supplementary means of interpretation', has been expressed in the following terms: 'The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.' …" Appellate Body Report on *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998, para. 165, footnote 154.

[401] Article 11 of the DSU: "… 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 …".

[402] Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear (United States - Underwear)*, (complaint by Costa Rica), WT/DS24/R, adopted on 25 February 1997, para. 7.10.

[403] Panel Report on *New Zealand - Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55.

> could not be scrutinised if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions and in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT."[404]

7.10 As noted in para. 8.119, the *United States - Underwear* panel[405] followed an approach similar to that developed by the *New Zealand - Transformers* panel. We agreed with this statement of the *New Zealand - Transformers* and the *United States - Underwear* panels in paras. 8.118-8.119 of our findings. Accordingly, we consider that, while it is in the first place the responsibility of the national authority of the importing country to carry out a safeguard investigation and make a determination, we must address in our findings the objections raised by the European Communities to the determinations made by the CNCE. In our view, Article 11 of the DSU requires us to conduct an assessment of the claims and the facts of the case before us as safeguard determinations made by a national authority are subject to scrutiny by a panel if they are challenged by another Member (para. 8.118).

7.11 In our review, we followed the test developed by the *United States - Underwear* and the *United States - Shirts and Blouses* panels (para. 8.119-8.120) which held that "an objective assessment would entail an examination of whether (i) the [national authority] had examined all relevant facts before it (including facts which might detract from an affirmative determination …), (ii) whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, (iii) whether the determination made was consistent with the international obligations of the [Member concerned]."[406]

7.12 According to this test, one essential element of a Panel's review of a national investigation is to evaluate whether "adequate explanation had been provided of how the facts as a whole supported the determination made". This standard of review is different from a *de novo* review by a panel of a national investigation and the determination made. As set forth in paras. 8.205-8.207, in our view, an assessment of whether an *explanation* was *as a whole adequate* concerns the logical relationship

---

[404] *Ibid*, para. 4.4.

[405] This panel did not see its "review as a substitute for the proceedings conducted by national investigating authorities or by the Textiles Monitoring Body (TMB). Rather … the Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is not the role of panels to engage in a *de novo* review. In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the context of cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. …" *United States - Underwear, op.cit.*, para. 7.12.

[406] The *United States - Underwear* panel also noted in footnote 18 to para. 7.13 to that report: "This approach is largely consistent with the approach adopted by the panel reports cited in footnote 16 *(Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, adopted on 27 April 1993, BISD 40S/205; *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 27 April 1994; *United States - Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, adopted on 3 June 1987, BISD 34S/194) although it should be pointed out that the standard of review was expressed in slightly different terms in each of the aforementioned panel reports."

between two given benchmarks, i.e., the facts of a case as collected by a national authority, on the one hand, and the safeguard determination made by it, on the other. Our assessment of this case has not involved questioning the facts as determined by the national authority; indeed, the European Communities did not challenge the facts gathered and compiled by the CNCE, but rather alleged that the determinations made could not be logically drawn from the facts as reflected in the CNCE's record of the investigation. As a result of these EC allegations it was necessary for the objective assessment which we are required to conduct to evaluate whether the explanation given by the national authority in evaluating the facts before it adequately supported the conclusions drawn with respect to the crucial conditions (i.e., (i) increases in imports, (ii) serious injury or threat thereof, and (iii) the existence of a causal link) and the safeguard determination made. The discussion of the *adequacy* of an explanation cannot merely consist in taking the explanation presented by a national authority at face value; it requires a process of evaluation of the reasoning by the national authority in its determination, in the light of arguments advanced by the complaining Member, and of responses by the respondent Member. Moreover, for an explanation to be adequate as a whole it must provide adequate reasoning on how the conclusions drawn flow from the facts of the case, including those facts that would appear to detract from such conclusions.

7.13 Argentina further alleged that the Panel created a new concept by requiring that for each single factor of injury analysis it is necessary to elaborate a reasonable explanation linking the data to the conclusion for each factor in isolation. In Argentina's view, it is sufficient to comply with the standard set by the Safeguards Agreement for a national authority to examine the totality of the data.

7.14 In para. 8.123, we noted that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of "all relevant factors of an objective and quantifiable nature having a bearing on the industry", in particular those listed therein. We also noted that despite the absence of an express requirement of a similar nature in the Agreement on Textiles and Clothing (ATC), the panels on *United States - Underwear* and *United States - Shirts and Blouses* ruled that each and every injury factor mentioned in Article 6.4 of the ATC had to be considered by the national authority. In our view, for an evaluation of how the facts *as a whole* supported the determination made it is necessary for the national authority to link through an adequate explanation *each of the relevant factors* within the meaning of Article 4.2(a) to the overall determination, including where such factors seem to detract from that determination. We believe that in our discussion of the EC's claims under Articles 2 and 4 we have done nothing more than evaluate whether each of the identified factors was analysed and whether adequate explanations are contained in the record of the investigation as carried out by the national authority regarding how each of the relevant injury factors supported or was reconciled with the overall determination made.

7.15 Argentina further submits that under the Safeguards Agreement national authorities have a broad discretion how to conduct a safeguard investigation. Therefore, there is no specific requirement as to the methodology to be used to measure increases in imports or as to how thoroughly any factor must be considered, as long as the approach is reasonable and not in conflict with the specific requirements provided for in the Agreement. In Argentina's opinion, in several instances the Panel has imposed standards and requirements which have no basis in the Agreement.

7.16 In this context, we recall that we endorsed in para. 8.120 the statement by the panel on *United States - Shirts and Blouses* which reasoned that

> "this is not to say that the Panel interprets the ATC as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. The relative importance of particular

> factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case."[407]

7.17 We agree in principle with Argentina that the Safeguards Agreement leaves a margin of discretion to the national authority to choose its methodology for carrying out its investigation, in particular with respect to data collection and the weighing of the relative importance of all relevant economic factors provided that an adequate explanation is given of how the facts as a whole supported the determination made. However, a juxtaposition of data and conclusions without adequate reasoning linking them is not sufficient under the terms of the Safeguards Agreement.

7.18 We did not find fault with the duration of the investigation period chosen by Argentina for measuring whether increases in imports occurred, nor with the beginning and end years of that period (1991 to 1995) as selected by the CNCE. Nor did we consider an end-point-to-end-point analysis of a given investigation period to be problematic *per se* under the Safeguards Agreement. However, in the light of Article 4.2(a)'s requirement that "the rate and amount of the increase in imports" be evaluated, we considered that only end-point-to-end-point data are not enough but also that analysis of import trends during the entirety of an investigation period is required (para. 8.159). In a factual situation where the variation by one year of the beginning and the end points of an investigation period yielded substantially different results and where intervening trends of declines in imports were of a more than temporary nature, we considered a mere end-point-to-end-point analysis to be insufficient for demonstrating an increase in import quantities as required by Article 2 of the Safeguards Agreement. We further note Argentina's statement that certain portions of the record, in some cases even not explicitly cited by the authorities, were nevertheless within their knowledge and should be assumed to have been considered by the administering authority. In this regard, we recall our conclusion, consistent with the previous panel reports mentioned above, that the national authority of the importing Member has the obligation to examine, at the time of its determination, at least all of the factors listed in Article 4.2(a) and to publish a report setting forth, in accordance with Article 3.1, its findings and reasoned conclusions reached on all pertinent issues of law and of fact. We cannot endorse a theory that certain portions of a record of 10,000 plus pages should be assumed, absent adequate reasoning in the published report on the investigation, to have been considered by the national authority when making its determination.

7.19 With respect to the publication of a report setting forth findings and reasoned conclusions, Argentina also emphasised that the Technical Report is an integral part of Act 338, and that these documents cannot be separated from each other. Accordingly, it is Argentina's position that both of these documents constitute Argentina's published report setting forth the competent authority's findings and reasoned conclusions reached on all pertinent issues of fact and law. We note that Argentina largely relied on Act 338 in its argumentation. We also recall our statements in paras. 8.126-8.128 that we deemed Act 338 to be the most important document, but that we also took the Technical Report into consideration where that report contained more specific and additional information. However, we noted that consideration of the raw data of the investigation in the 10,000-plus page investigation record appeared to be of lesser importance given that the contents were organised and summarised by the CNCE in Act 338 and the Technical Report. Nonetheless, pursuant to Argentina’s comments, we modified the end of para. 8.128.

7.20 Furthermore, Argentina pointed at certain legal and factual arguments which it believed the Panel should have addressed. In Argentina's view, failing to refer to these arguments, or relegating them to footnotes or final observations, would be a denial of procedural fairness. In this regard, we recall that the Appellate Body characterised an allegation that a panel has failed to conduct an

[407] Panel Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States - Shirts and Blouses)*, adopted on 23 May 1997, para. 7.52.

"objective assessment" in the meaning of Article 11 of the DSU as a very serious allegation.[408] In the Appellate Body's opinion, a panel may be said to have failed in this basic duty if it deliberately disregards or distorts a fact or a piece of evidence,[409] if in assessing the facts before it, it exhibits "gross negligence amounting to bad faith",[410] or an "egregious error that calls into question the good faith of a panel",[411] or if it "arbitrarily ignores or manifestly distorts evidence".[412] In the context of other fact-intensive cases -- similar to the one before us -- the Appellate Body noted that "a panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly".[413] In the *Korea - Liquor Tax* case, the Appellate Body also stated that "it is not an error … for the panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it".[414] In light of these considerations, we believe that in making our assessment of the matter before us we have ensured fundamental fairness and due process for both parties.

7.21 In particular, Argentina made specific comments on the Panel's factual description and evaluation of the adequacy of the CNCE's explanation regarding specific injury factors. In reaction to these comments, we modified para. 8.173 in the section on "production". With respect to "sales", we modified paras. 8.175 and 8.180, and we added paras. 8.177 and 8.181. As regards "productivity", we added language to paras. 8.183 and 8.211. In respect of "profits and losses" we added information to the table on "accounting data" (para. 8.188) and modified or shortened the discussion of profits and losses in the section on "differences in data", especially regarding the break-even point analysis in para. 8.224. In response to Argentina's comments concerning the factor "employment" we did not consider any adjustments necessary. Following a comment on market shares of imports, we also modified footnote 551.

7.22 Concerning the treatment by the CNCE of data for the year 1996, Argentina stated that 1996 data from the questionnaires were incomplete at least as to the financial indicators because the petitioners filed their request for safeguard action in October 1996. We recall our consideration in para. 8.213 that Argentina should have taken into account 1996 data as a relevant factor in the meaning of Article 4.2(a) to the extent such data were collected during the investigation and are contained in the CNCE's record of the case. In the alternative, the national authority should have given an adequate explanation why such consideration of available 1996 data by the national authority was unnecessary or irrelevant in the particular circumstances of this case. However, by no means did we imply an obligation for a national authority to constantly update its data collection. Nor do we consider our statement inconsistent with our acceptance of Argentina's choice of an investigation period from 1991 to 1995. More specifically, we modified footnote 540 to identify the extent to which the CNCE had data from 1996 available in the investigation record with respect to particular injury factors.

7.23 Argentina further criticised that the findings in para. 8.163 mentioned only the preliminary decision as referring to the impact of the imposition of DIEMs on imports as of 1993, but fail to mention that the CNCE's final determination also held that imports had declined after 1993 because of the imposition of the DIEMs. We inserted footnote 529 to refer in that respect to the CNCE's final determination. At any rate, regardless of whether Argentina raised this argument only in the

---

[408] Appellate Body Report on *European Communities - Measures Affecting the Importation of Certain Poultry Products (European Communities - Poultry)* adopted on 23 July 1998, para. 133.

[409] Appellate Body Report on *European Communities - Hormones*, para. 139.

[410] Appellate Body Report on *European Communities - Hormones*, para. 138.

[411] Appellate Body Report on *European Communities - Hormones*, para. 133.

[412] Appellate Body Report on *European Communities - Hormones*, para. 145.

[413] Appellate Body Report on *European Communities - Hormones*, para. 138.

[414] Appellate Body Report on *Korea - Taxes on Alcoholic Beverages (Korea- Liquor Tax)*, adopted on 17 February 1999, para. 164.

preliminary report or also in the final report, a *threat of increased imports* cannot be held to amount to a *threat of serious injury*. We reiterate our consideration (para. 8.284) that the Safeguards Agreement requires *actual* imports in increased quantities (in absolute terms or relative to domestic production) as one of the preconditions for imposing a safeguard measure and that a threat of additional imports as such is insufficient for a finding of a threat of serious injury.

7.24 Argentina also alleged that the Panel failed to reference a "cornerstone" of the CNCE's causation decision, i.e., the specific correlation of increasing import trends for footwear in 1991-1993 with declines in the gross domestic product (GDP) for footwear in the same period. In Argentina's view, this argument was reinforced by comparative declines in the Argentine footwear GDP versus increases of the Argentine GDP for the overall manufacturing sector. Argentina also pointed out that import increases in 1991 and 1992 were much higher in the footwear sector than overall imports to Argentina during the same period. We reflected this argument in para. 8.231 but continue to believe that above-average sectoral import increases and above-average sectoral GDP declines *per se* do not necessarily justify the imposition of safeguard measures in economic sectors whose performance is less successful than the performance of the national economy as a whole. We believe that a causal link needs to be established from an analysis of the impact of increased imports on the injury factors identified in the Safeguards Agreement.

7.25 With regard to the issue of whether the phrase "under such conditions" in Article 2.1 requires national authorities to carry out a price analysis, we refer to our discussion and conclusion in paras. 8.249ff that this phrase does not constitute a specific legal requirement for a price analysis and that products may compete on other bases than price, as enumerated in para. 8.251. We recall, however, as reflected in para. 8.254, that although in our view a price analysis is not a requirement of Article 2.1, in this case the alleged price underselling by imports was a major basis for Argentina's causation finding. Consequently, it was necessary for the CNCE to collect and analyse data to support this finding. We note, however, that the investigation neither developed nor analysed data on import prices, and that Argentina informed the Panel that references in the final determination to "cheap imports" had to do with underinvoicing rather than underselling (paras. 8.258-8.262). In the absence of evidence on or an assessment of import prices, we concluded that the CNCE did not adequately explain how it was possible for the CNCE to infer that lower-priced imports had had an injurious effect on the domestic industry.

VIII. FINDINGS

A. FACTUAL BACKGROUND

8.1 This case concerns a challenge by the European Communities to provisional and definitive safeguard measures taken by Argentina to limit imports of footwear. The recent history of Argentina's actions concerning footwear imports includes several measures and developments.

8.2 On 31 December 1993, Resolution 1696/93 introduced minimum specific duties (derechos de importación espicíficos mínimos or "DIEMs") on certain footwear imports. This measure originally foresaw the possibility of a single non-renewable extension of six months. However, it was extended several times. The last extension took place on 7 January 1997 by Resolution 23/97.[415]

8.3 On 4 October 1996, the United States requested consultations in respect of *Argentina - Certain Measures Affecting Footwear, Textiles, Apparel and Other Items*[416] ("*Argentina - Textiles and Apparel*"). The US request covered DIEMs on footwear and other products and alleged violations of Articles II, VII, VIII and X of GATT.[417]

8.4 On 25 October 1996, the Chamber of the Footwear Industry (Cámara de la Industria del Calzado "CIC") petitioned the National Foreign Trade Commission (Comisión Nacional de Comercio Exterior "CNCE") of the Subsecretaría de Comercio Exterior ("Subsecretaria") of the Ministerio de Economia y Obras y Servicios Publicos ("MYOSEP") to initiate a safeguard investigation in respect of footwear.

8.5 On 14 February 1997, the Argentine Ministry of Economy and Public Works repealed the DIEMs on footwear by Resolution 225/97. On the same day, the CNCE initiated a safeguard investigation and imposed provisional measures in the form of minimum specific duties on footwear (Resolution 226/97 of 14 February 1997).

8.6 On 21 February 1997,[418] pursuant to Article 12.1(a) of the Agreement on Safeguards ("Safeguards Agreement"), Argentina notified the WTO Committee on Safeguards of the initiation of the investigation and the reasons for it, as well as of its intention to apply a provisional safeguard measure. On 25 February 1997, the provisional safeguard measure entered into force[419]. On the same day, the panel requested by the United States on *Argentina - Textiles and Apparel* was established by the DSB.

8.7 Subsequently, the panel on *Argentina - Textiles and Apparel* decided not to rule on the DIEMs on footwear which had been revoked on 14 February 1997. During that panel proceeding, the European Communities participated as a third party.

---

[415] Panel Report on *Argentina - Certain Measures Affecting Footwear, Textiles, Apparel and other Items* (WT/DS56), adopted 22 April 1997, para. 2.4.

[416] WT/DS56.

[417] On 23 April 1997, the **European Communities** initiated consultations regarding the same measures (WT/DS77).

[418] "Notification under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it" and "Notification under Article 12.4 of the Agreement on Safeguards before taking a provisional safeguard measure referred to in Article 6" (G/SG/N/6/ARG/1, G/SG/N/7/ARG/1) which were circulated to WTO Members on 25 February 1997. On 5 March 1997, Argentina added a supplement to these notifications (G/SG/N/6/ARG/1/Suppl.1, G/SG/N/7/ARG/1/Suppl.1) which was circulated to WTO Members on 18 March 1997.

[419] Official Journal of the Argentine Republic No. 28.592 of 24 February 1997.

8.8 On 25 July 1997, Argentina notified the Committee on Safeguards, pursuant to Article 12:1(b) of the Safeguards Agreement, of the determination of serious injury made by the CNCE.[420]

8.9 On 1 September 1997, Argentina notified the Committee on Safeguards, pursuant to Article 12.1(c) and Article 9 (footnote 2) of the Safeguards Agreement, of the intention of the Argentine authorities to impose a definitive safeguard measure.[421]

8.10 In accordance with Article 12.3 of the Safeguards Agreement, consultations were held between the European Communities and Argentina on 9 September 1997.[422]

8.11 On 12 September 1997, Argentina imposed a definitive safeguard measure (Resolution 987/97) in the form of minimum specific duties on imports of footwear, effective as of 13 September 1997.[423] The measure is valid for three years (as of the entry into force of the provisional safeguard measure on 25 February 1997) and provides that it shall be liberalised on 1 May 1998, 16 December 1998 and on 1 August 1999.

8.12 However, Article 9 of Resolution 987/97[424] provides that if imports increase by more than 30 per cent in the first year after the imposition of the definitive measure in comparison to the year preceding it, the Ministry of Economy and Public Works may suspend the liberalisation schedule for half a year and extend the safeguard measure accordingly.

8.13 On 26 September 1997, the definitive safeguard measure was notified to the Committee on Safeguards by Argentina[425] and by Uruguay as Presiding Member State of MERCOSUR.[426]

8.14 On 3 April 1998,[427] the European Communities made a request for consultations with Argentina pursuant to Article XXII:1 of GATT entitled *Argentina - Safeguard Measures on Footwear* (DS 121).

8.15 On 22 April 1998, the DSB adopted the reports of the Panel and the Appellate Body on *Argentina - Textiles and Apparel* (WT/DS56) which found Argentina's minimum specific import duties on a range of textiles and apparel products to be inconsistent with Article II of GATT "because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices

---

[420] Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports (G/SG/N/8/ARG/1) which was circulated on 21 August 1997.

[421] G/SG/N/10/ARG/1 and G/SG/N/11/ARG/1, dated 15 September 1997, and G/SG/N/10/ARG/1/Corr.1, G/SG/N/11/ARG/1/Corr.1, dated 18 September 1997.

[422] The outcome of these consultations was notified, pursuant to Article 12.5, to the Committee on Safeguards on 10 September 1997.

[423] Official Journal of the Argentine Republic No. 28,729.

[424] Article 9 of Resolution 987/97: "The Secretariat of Industry, Trade and Mining shall monitor total imports and the adjustment plan provided for in the commitments undertaken by the petitioner.

(a) To this end, the Secretary of Industry, Trade and Mining shall prepare a report to determine whether there has been an increase in imports subject to the safeguard measures and imports originating in the countries covered by Article 9, paragraph 1, of the Agreement on Safeguards. The report will provide a comparison between total imports measured in pairs in the period September 1997-August 1998 and the same imports for the immediately preceding 12-month period up to September 1997. The Ministry of the Economy and Public Works and Services shall examine the report of the Secretary of Industry, Trade and Mining, and if the increase in imports is greater than 30 per cent it may suspend the liberalisation provided for the period between 30 December 1998 and 31 July 1999, in which case the measure in force at the time will continue until 31 July 1999; while for the remaining period during which the safeguard measure is in effect, the liberalisation timetable provided for in Annex I of this Resolution shall be maintained. …".

[425] Resolution 987/97 was circulated to Member on 10 October 1997 (G/SG/N/10/ARG/1/Suppl.1 and G/SG/N/11/ARG/1/Suppl.1).

[426] G/SG/N/10/ARG/1/Suppl.2 and G/SG/N/11/ARG/1/Suppl.2 of 22 October 1997.

[427] WT/DS121/1, dated 8 April 1998.

in any relevant tariff category to which it applies, in levying of customs duties in excess of the bound tariff rate of 35 per cent *ad valorem* in Argentina's Schedule".[428]

8.16 The consultations in the case on *Argentina - Safeguard Measures on Footwear* (DS 121) were held on 24 April 1998, but did not lead to a satisfactory resolution of the matter.

8.17 On 28 April 1998, Argentina enacted, in accordance with Article 9 of Resolution 987/97, Resolution 512/98[429] which modifies the definitive safeguard measure by postponing the liberalisation schedule.

8.18 On 10 June 1998,[430] the European Communities requested the establishment of a panel. The DSB established this Panel on 23 July 1998 and it was composed on 15 September 1998.

8.19 On 16 November 1998, Argentina published Resolution 1506/98 which provided for another modification of the original definitive safeguard measure.[431] Article 2 of Resolution 1506/98 provides for a further extension of the liberalisation schedule and introduces a tariff quota system.

8.20 On 7 December 1998, Argentina published Resolution 837/98[432] which implements Resolution 1506/98 by regulating the distribution of three-month quota allocations within the tariff quota system introduced by the latter resolution.

---

[428] Appellate Body Report on *Argentina - Textiles and Apparel* (WT/DS56/AB/R), adopted on 22 April 1997, para. 87(a).

[429] Resolution 512/98: Amendment of Resolution No. 987/97, which provided for the closure of a safeguard investigation into footwear imports as regards the liberalization schedule (Exhibit EC-28):

Article 1: "The liberalization schedule established in Annex I to Resolution … No. 987[/97], of 10 September 1997 shall be modified in accordance with the new schedule contained in Annex I to this Resolution".

Article 2: "The Secretariat … shall monitor imports …"

(a) "To that end, an analysis shall be carried out with a view to determining the evolution of imports as from the date of application of the safeguard measure and to compare those imports with the quantities imported during a previous representative period …".

"On the basis of the result of these evaluations the Secretary … shall submit a report to the Ministry … on the appropriateness of maintaining the established liberalization schedule as provided for in the Annex to this Resolution."

[430] WT/DS121/3, dated 11 June 1998.

[431] Resolution 1506/98 (Exhibit EC-32):

Article 1: "The liberalization schedule established in Annex I to Resolution No. 512 of the Ministry … of 24 April 1998, amending Resolution No. 987 of the Ministry … of 10 September 1997, shall be modified in accordance with the new liberalization schedule contained in Annex I which ... is an integral part of this Resolution".

Article 2: "A *quantitative restriction* is hereby imposed on imports of footwear cleared through customs under MERCOSUR Common Nomenclature tariff headings … as listed in Annex II which … is an integral part of this Resolution". (Emphasis added).

Article 4: "A levy shall be paid on imports of footwear exceeding the quantity of pairs established in Article 2 at the rate of the Minimum Specific Duties of the Safeguard Measure described in Annex I to this Resolution, Article 1 of which amends Resolution No. 512 ... dated 24 April 1998, amending Resolution No. 987/97 ... of 10 September 1997, increased by 100 per cent (100%) as listed in Annex III which ... is an integral part of this Resolution".

[432] Resolution 837/98 setting forth the arrangements for the allocation and distribution of the three-month footwear import quotas established in Annex II to Resolution No. 1506/98 (Exhibit EC-35):

Article 1: "The allocation of three-month footwear import quotas established in Annex II to Resolution … 1506/98 shall be under the responsibility of the Directorate-General of Customs".

Article 4: "In no case shall the figure of 25 per cent (25%) of the total three-month quota assigned to each tariff heading per importer be exceeded".

B. CLAIMS

8.21 The European Communities alleges that the provisional and the definitive safeguard measure are in breach of Argentina's obligations under the Agreement on Safeguards and under the GATT. The European Communities alleges breaches of:

- Article XIX of GATT 1994 (in particular the lack of "unforeseen developments");

and of the following provisions of the Safeguards Agreement:

- Article 2 (especially the requirement of determining in an investigation that certain conditions are present and the non-discrimination obligation);

- Article 4 (in particular that all relevant factors must be investigated and the obligation to demonstrate the existence of a causal link);

- Article 5 (especially the condition that measures must only be applied to prevent or remedy serious injury);

- Article 6 (in particular the requirement of evidence of "critical circumstances"); and

- Article 12 (especially the notification obligations).

C. TERMS OF REFERENCE AND SCOPE OF THE MEASURES IN DISPUTE

1. Minimum specific duties (DIEMs)

8.22 The EC's position is that the previous panel on *Argentina - Textiles and Apparel* (DS 56)[433] should have reviewed the WTO compatibility of the DIEMs on footwear, but it does not ask this Panel to declare these DIEMs WTO-inconsistent. Argentina requests the Panel not to take into account any claims made by the European Communities regarding the DIEMs on footwear. In view of the facts that the DIEMs on footwear were repealed on 14 February 1997, that they were not specifically identified in the request for the establishment of this Panel, and that the European Communities makes no claims related thereto, we see no basis to make a ruling concerning them.

2. Subsequent modifications of the definitive safeguard measure

8.23 The European Communities claims that Resolutions 512/98, 1506/98 and 837/98 fall within this Panel's terms of reference since the definitive safeguard measure (Resolution 987/97) was listed in its panel request and is still in effect - albeit in a modified form.

8.24 Argentina responds that Resolution 512/98 of 28 April 1998, Resolution 1506/98 of 16 November 1998 and Resolution 837/98 of 4 December 1998 concerning the modification of the liberalisation schedule of the definitive safeguard measure are not within the terms of reference of this Panel given that the EC's request for the establishment of this Panel specifically mentions only Resolution 226/97 of 14 February 1997 on the imposition of a provisional measure and Resolution 987/97 of 12 September 1997 on the imposition of a definitive measure.

8.25 In response to a Panel question regarding how Argentina reconciles its arguments that Resolutions 512/98 and 1506/98 are based on and flow out of Article 9 of Resolution 987/97, on the one hand, and that these resolutions are outside the Panel's terms of reference because they are new

[433] Panel Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted on 22 April 1998, WT/DS56/R, paras. 6.14 - 6.15.

measures, Argentina indicates that it does not refer to two new measures. Rather, in Argentina's view, these are foreseen modifications to the measure adopted by Resolution 987/97, but do not come within the terms of reference of this Panel.

8.26 In the EC's view, Argentina itself has admitted that the subsequent resolutions are a simple application of Article 9 of Resolution 987/97 and thus an integral part of the definitive safeguard measure. Accordingly, they are modifications of Resolution 987/97 rather than new safeguard measures. The European Communities further points out that, contrary to the *Guatemala - Cement*[434] case where Mexico referred to an antidumping investigation, but failed to identify the definitive anti-dumping measure in its panel request, the European Communities has identified the definitive safeguard measure in its request for the establishment of this Panel.

8.27 Before addressing these questions, we recall that Article 6.2 of the DSU requires that both the "specific measures at issue" and the "legal basis for the complaint" (or the "claims") be identified in a request for the establishment of a panel. We note that the relevant part of the EC's request for the establishment of this Panel reads:

> "Under Resolution 226/97, published in the Official Journal of the Argentine Republic No. 28592 on 24 February 1997, Argentina imposed a provisional safeguard measure in the form of minimum specific duties on imports of footwear effective as of 25 February 1997. Under Resolution 987/97, published in the Official Journal of the Argentine Republic No. 28729 on 12 September 1997, Argentina imposed a definitive safeguard measure in the form of minimum specific duties on imports of footwear effective as of 13 September 1997."[435]

8.28 In *Guatemala – Cement*, the Appellate Body recently addressed in detail the issues of the terms of reference in Article 7 of the DSU and the specificity requirements set forth in Article 6.2 of the DSU:

> "[T]he task of a panel is to examine the '*matte*r referred to the DSB'. … Article 7 of the DSU itself does not shed any further light on the meaning of the term '*matter*'. However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term *'matter*' becomes clear. Article 6.2 specifies the requirements for a complaining Member to refer the '*matter*' to the DSB. In order to seek the establishment of a panel to hear its complaint, a Member must make, in writing, a 'request for the establishment of a panel' (a 'panel request'). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out 'the matter referred to the DSB'."[436]

8.29 Consequently, as a preliminary issue, we have to ascertain which "measures" have been specified consistently with the requirements of Article 6.2 of the DSU so as to fall within our terms of reference.

---

[434] Appellate Body Report on *Guatemala - Anti-dumping Investigation regarding Portland Cement from Mexico* (WT/DS60/AB/R), adopted on 25 November 1998, para. 86.

[435] WT/DS121/3, circulated on 11 June 1998.

[436] Appellate Body Report on *Guatemala - Cement*, para. 72.

8.30 In addressing Argentina's objections to inclusion of Resolutions 512/98, 1506/98 and 837/98 in this Panel's terms of reference, we recall that in *Brazil - Desiccated Coconut,*[437] the Appellate Body stated that:

> "a panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective - they give parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute."[438]

8.31 The panel request in this dispute clearly identified that Argentina's provisional and definitive measures on footwear are at issue in this dispute. The European Communities does not contest the obvious fact that the subsequent Resolutions which modified the definitive safeguard measure were not explicitly mentioned in the panel request. The question then becomes whether subsequent modifications of a definitive measure which are not explicitly mentioned in this request fall within the meaning of Article 6.2 of the DSU, i.e., that "the specific measures at issue" must be identified in the panel request.

8.32 The *European Communities - Bananas III*[439] panel addressed the issue of measures to be deemed covered by a panel's terms of reference in the light of the requirements of Articles 6.2 and 7 of the DSU. The panel request by Ecuador, Guatemala, Honduras, Mexico and the United States in *European Communities - Bananas III* read as follows:

> "The European Communities maintains a regime for the importation, sale and distribution of bananas established by Regulation 404/93(O.J. L 47 of 25 February 1993, p.1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implement, supplement and amend that regime."

8.33 Therefore, in the *European Communities - Bananas III* panel request, the "basic EC regulation at issue" was identified, and in addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend [the EC banana] regime". The *European Communities - Bananas III* panel found that for purposes of Article 6.2 this reference was sufficient to cover all EC legislation dealing with the importation, sale and distribution of bananas because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.[440] The Appellate

---

[437] Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, (WT/DS22/AB/R) adopted 20 March 1997, p. 22.

[438] Appellate Body Report on *Brazil - Desiccated Coconut*, p. 22. In this case, the Appellate Body also referred to the following Panel Reports: Panel Report on *United States - Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 27 April 1994, BISD 41S/229, para. 229. *United - States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 28 April 1994, BISD 41S/576, para. 212*; United States - Denial of Most-favoured-nation treatment as to Non-rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, para. 6.2; *European Communities - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, adopted on 30 October 1995, BISD 42S/17, para. 456.

[439] Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS/27/R), adopted on 25 September 1997, para. 7.35; Appellate Body Report *on European Communities - Regime for the Importation, Sale and Distribution of Bananas* (WT/DS/27/AB/R), adopted on 25 September 1997, para. 142.

[440] Panel Report on *European Communities - Bananas III*, para. 7.27.

Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".[441]

8.34 In the present dispute, Argentina's procedural objections concern modifications of the definitive safeguard measure which is a situation quite similar to the "subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend [the EC banana] regime" and were found to be within that panel's terms of reference. If there is a difference between *European Communities - Bananas III* and the case before us, it is the fact that the EC banana regime encompassed dozens of subsequent regulations which implemented, but also supplemented and amended the original Regulation 404/93 on the common market organisation for bananas. In the case before us, however, the subsequent resolutions change the legal form or the form of application of the definitive safeguard measure, while the safeguard investigation made at the outset, which remains the basis for the definitive safeguard measures, has not changed.

8.35 We further recall that the *Japan - Film* panel[442] considered certain measures which had not been listed in the panel request to be within its terms of reference because they were "implementing measures" based on a basic framework law, specifically identified in the panel request, which specified the form and circumscribed the possible content and scope of such implementing measures. From this we infer that a legal act not explicitly listed in a panel request but which has a direct relationship to a measure that is specifically described therein, can be said to be sufficiently identified to satisfy the requirements of Article 6.2. In this respect, we agree with the *Japan - Film* panel's statement that the requirements of Article 6.2 could be met in the case of a legal act that is subsidiary to or so closely related to a measure specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.[443] The *Japan - Film* panel reasoned:

> "The two key elements - close relationship and notice - are inter-related. Only if a legal act is subsidiary or closely related to a specifically identified measure will notice be adequate. For example, where a basic framework law dealing with a narrow subject matter that provides for implementing acts is specified in a panel request, implementing acts might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2."[444]

8.36 Accordingly, the *Japan - Film* panel excluded from its terms of reference measures which were based on a framework law of broad scope,[445] but included closely related and subsidiary measures which were based on a framework law with a narrow focus and a specific delegation of powers to take implementing measures.[446]

8.37 In case before us, the three subsequent Resolutions at issue are modifications of and based directly on the original definitive safeguard measure (in particular on Article 9 of Resolution 987/97)

---

[441] Appellate Body Report on *European Communities - Bananas III*, para. 140.

[442] Panel Report on *Japan - Measures Affecting Consumer Photographic Film and Paper* (WT/DS/44/R), adopted on 22 April 1998, para. 10.8.

[443] Panel Report on *Japan - Film*, paras. 10.10.

[444] Panel Report on *Japan - Film*, paras. 10.8.

[445] The *Japan - Film* panel considered the 1971 Japan Fair Trade Commission (JFTC) Rule No. 1 (International Contract Notification Requirement) not to be covered by its terms of reference because the explicitly listed Japanese Antimonopoly Law is a law of such a broad scope that the respondent could not be considered to be on notice of that rule.

[446] The *Japan - Film* panel considered the 1967 JFTC Notification No. 17 on premiums between businesses and the 1977 JFTC Notification No. 5 on premiums to customers to be covered by its terms of reference because the explicitly listed Japanese Premiums Law is a law of narrow focus and authorizes, in its Article 3, the JFTC to limit, if necessary, the use of premiums for purposes of consumer protection.

in a way that, in our view, is analogous to the situation where implementing measures are based on a framework law that specifies form, content and scope. Article 9[447] makes it clear that Resolution 987/97 and the definitive safeguard measure imposed by it remain in force, i.e., that the subsequent resolutions have not in any sense repealed or replaced it. Rather, these later resolutions have only modified particular aspects of the definitive measure as originally applied (i.e., suspended its liberalisation timetable and changed its form from a specific duty to a tariff rate quota) within the parameters set out in the original definitive safeguard measure. We find evidence of this in the fact that, first, Resolutions 512/98 and 1506/98 are explicitly characterised in this way as "modifying" "the safeguard measure" pursuant to Article 9 of Resolution 987/97, and second, Resolution 837/98 is characterised as only implementing the tariff rate quota system introduced by Resolution 1506/98 on a quarterly basis. Thus, the legal framework provided for in the "definitive safeguard measure" as such clearly remains in force, although its specific implementation has been subsequently modified in form.[448] This can clearly be distinguished from, e.g., the situation preceding this dispute when the DIEMs on footwear were repealed and replaced with an entirely new and legally distinct measure (albeit taking the same form), i.e., the safeguard measure at issue.

8.38 In the panel and Appellate Body reports concerning the dispute on *Australia - Measures Affecting Importation of Salmon,*[449] we find that a measure not explicitly mentioned in the request for the establishment of a panel may nevertheless be covered by its terms of reference. In its panel request, Canada identified the measure(s) in dispute as the "Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon … which include Quarantine Proclamation 86A, dated 19 February 1975, and any amendment or modification to it."[450] Throughout the case, the complainant referred to the Quarantine Proclamation 86A, as well as to the so-called "1988 Conditions"[451] and the so-called "1996 Requirements",[452] which concerned a heat-treatment requirement, and to the so-called "1996 Decision" which prohibited imports of fresh salmon from North America.[453] The Appellate Body found that the "1988 Conditions" and the "1996 Requirements" could not be considered to be included in that panel's terms of reference because they did not refer to an import prohibition of fresh salmon, but to a heat treatment requirement applicable to smoked salmon and salmon roe. At the same time, the Appellate Body considered that the "1996 Decision" fell within the panel's terms of reference because it referred to an import prohibition. From that Appellate Body finding we see that not explicitly listed legal acts which might modify the legal form but confirm in substance a previous measure identified in the panel request (i.e., QP86A) may fall within a panel's terms of reference.

8.39 The most recent case in which the Appellate Body extensively addressed the issue of a panel's terms of reference is the dispute on *Guatemala - Anti-dumping Investigation regarding Portland Cement from Mexico.* In this case, Mexico requested that a panel be established "to examine the

---

[447] Article 9 of Resolution 987/97 provides that: "… The Ministry … shall examine the report of the Secretary …, and if the increase in imports is greater than 30 per cent it may suspend the liberalisation provided for the period between 30 December 1998 and 31 July 1999, in which case the measure in force at the time will continue until 31 July 1999; while for the remaining period during which the [definitive] safeguard measure is in effect, the liberalisation timetable provided for in Annex I of this Resolution shall be maintained. …".

[448] For example, Resolution 837/98 implements and is thus clearly subsidiary to Resolution 1506/98. By the same token, Resolutions 512/98 and 1506/98 modify, and thus are clearly subsidiary to, Resolution 987/97, which remains the legal basis and sets out the parameters of the definitive safeguard measure.

[449] Panel Report and Appellate Body Report on *Australia - Measures Affecting Importation of Salmon*, (WT/DS/18/R and WT/DS/18/AB/R), adopted on 6 November 1998.

[450] WT/DS18/2, dated 10 March 1997.

[451] Conditions for the Importation of Salmonid Meat and Roe into Australia.

[452] Requirements for the Importation of Individual Consignments of Smoked Salmonid Meat.

[453] The so-called "1996 Decision" provides that "having regard to Australian Government policy on quarantine and after taking account of Australia's international obligations, importation of … salmonid product … should not be permitted on quarantine grounds". Appellate Body Report on *Australia - Salmon*, paras. 90-105.

consistency of the antidumping investigation by the Government of Guatemala into Guatemalan imports of portland cement with Guatemala's obligations … contained in the Anti-dumping Agreement." Although Mexico did not identify any provisional or definitive anti-dumping measure in its request, that panel refrained from dismissing the case. The Appellate Body found fault with this because "[a]s we understand the Panel, it would, in effect, suffice, under Article 6.2 of the DSU, for a panel request to identify only the 'legal basis for the complaint', without identifying the 'specific measure at issue'".[454] The Appellate Body indicated that "the Panel was entitled to examine Mexico's claims concerning the initiation and conduct of the investigation in this case only if the panel request properly identified a relevant anti-dumping measure as the "specific measure at issue" in accordance with Article 6.2 of the DSU".[455] Therefore, according to the Appellate Body in *Guatemala - Cement*, the measures to be identified in an anti-dumping case could be the provisional or definitive measure, or a price undertaking.

8.40 In the dispute before us, while the EC's panel request does cite the numbers of resolutions (226/97 and 987/97) and the promulgations in Argentina's Official Journal that imposed the provisional and the definitive measures, respectively, we consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference. In our view, this is consistent with the Appellate Body's findings in the *Guatemala – Cement* case.

8.41 Moreover, it appears that an interpretation whereby these subsequent Resolutions are considered to be measures separate and independent from the definitive safeguard measure, and thus outside our terms of reference, could be contrary to Article 3.3 of the DSU. Such an interpretation could allow a situation where a matter brought to the DSB for prompt settlement is not resolved when the defendant changes the legal form of the measure through a separate but closely related instrument, while the measure in dispute remains essentially the same in substance. In this way, Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a "moving target", and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB.

8.42 These considerations are particularly relevant where, as in the case before us, the crucial question before the panel is whether the safeguard investigation and determination at issue could serve as the legal basis for *any* safeguard measure, and not only the particular original definitive measure, or the subsequent modifications at issue. In our view, multilateral surveillance of safeguard investigations and determinations could be circumvented if, in such a dispute, a finding that there was no legal basis for a safeguard measure could not, for procedural reasons, have any remedial effect on the definitive safeguard measure in its then-current legal form only because the definitive measure (while continuing to have its original legal basis and identity in substance) had been modified in some way from its original legal form.

8.43 Finally, we recall the important due process objectives fulfilled by a panel's terms of reference, as emphasised by the Appellate Body in the *Brazil – Desiccated Coconut*[456] case. *Inter alia*, the terms of reference provide notice to the parties and third parties concerning the claims and measures at issue in a dispute, in order to allow them an opportunity to respond to the complainant's

[454] Appellate Body Report on *Guatemala - Cement*, para. 69.
[455] Appellate Body Report on *Guatemala - Cement*, para. 81.
[456] Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, (WT/DS22/AB/R) adopted 20 March 1997, p. 22.

allegation. In the light of the fact that the main question before us is whether the safeguard investigation and findings at issue can serve as the legal basis for a safeguard measure, and not just the particular legal form of the original definitive safeguard measure as identified in the panel request, in our view, the examination of the definitive safeguard measure in its original legal form but also in its subsequent legal modifications through Resolutions 512/98, 1506/98, and 837/98 could not in any way deprive Argentina or third parties of their right to adequate notice and due process concerning the claims of the European Communities in the present dispute. In this context, we recall the Appellate Body's statement in the case on *European Communities - Computer Equipment* that it could not see "how the alleged lack of precision of the terms, LAN equipment and PCS with multimedia capability, in the request for the establishment of a panel affect the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel".[457] Similarly, in the present case, the ability of Argentina to defend itself was not prejudiced by a lack of knowledge of which measures were of concern to the European Communities.

8.44 Indeed, for these modifications to be new safeguard measures, they would have to be based on a new investigation, and the conditions for the re-application of a safeguard measure, including the waiting period foreseen in Article 7.5, would have to be observed. In this respect, we note that Argentina itself considers the subsequent resolutions in substantive terms to be based on the same safeguard investigation as the definitive safeguard measure as originally applied, (Resolution 987/97), while arguing at the same time that these subsequent modifications are in procedural terms outside our terms of reference.[458] We further note that Argentina does not argue that these modifications are extensions of the safeguard measure within the meaning of paragraphs 2 and 4 of Article 7.

8.45 We do not here wish to imply that an expansion of the terms of reference of a panel in the complainant's first submission or even later could be permissible under Article 6.2 of the DSU. Clearly, due process and adequate notice would not be served if a complaining party were free to add new measures or new claims to its original complaint as reflected in its panel request at a later stage of a panel proceeding. But this is not the situation in the present dispute because, in our view (and also in the view of both parties), the subsequent resolutions do not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint.

8.46 In the light of these considerations, we find that our terms of reference include Argentina's provisional and definitive safeguard measures on footwear in their original legal form (Resolutions 226/97 and 987/97) as well as in their subsequently modified forms of application (Resolutions 512/98, 1506/98 and 837/98).

D. THE CLAIM UNDER ARTICLE XIX OF GATT 1994 AND "UNFORESEEN DEVELOPMENTS"

8.47 The European Communities raises a separate claim under Article XIX:1(a) of GATT with respect to the failure by Argentina to examine whether the import trends of the products under investigation are the result of "unforeseen developments" and the "effect of the obligations incurred by a Member under [the GATT], including tariff concessions". Since tariff concessions and other obligations are an additional element to "unforeseen developments", it necessarily follows for the European Communities that trade liberalisation *per se* cannot constitute such unforeseen developments. The European Communities submits that Argentina's trade liberalisation within MERCOSUR and the WTO framework was a conscious commercial policy and that the large increase

[457] Appellate Body Report on *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS/68/AB/R, adopted on 22 June 1988, para. 70.

[458] Argentina's answer to question 35 by the Panel, see para. 4.11 of the descriptive part.

in imports occurred "immediately after the opening up of the economy which began in 1989/90".[459] Therefore, the European Communities concludes that increased imports of footwear cannot be considered "unforeseen developments" within the meaning of Article XIX:1(a) of GATT because increases in imports have to be the result of other unforeseen developments.

8.48 Argentina opposes the EC's theory that the criterion of "unforeseen developments" applies to safeguard action taken under the WTO agreements. First, Argentina considers that there is a conflict with respect to the criterion of "unforeseen developments" between Article XIX and the WTO Safeguards Agreement and that, pursuant to the General Interpretative Note to Annex 1A to the Agreement Establishing the WTO, the latter prevails. In the alternative, Argentina argues that it could not have foreseen the extent of the surge of footwear imports resulting from the liberalisation programmes mentioned by the European Communities.

8.49 Article XIX:1(*a*) of GATT on "Emergency Safeguard Measures" reads:

> "If, as a result of *unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concession*s, 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 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." (emphasis added).

Article 2.1 of the WTO Agreement in turn 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." (footnote omitted).

8.50 While it is true that the Safeguards Agreement by and large incorporates and further develops in greater detail the conditions for the imposition of safeguard measures provided for in Article XIX of GATT, there is at least one difference. The condition in Article XIX that safeguard measures may not be imposed unless the increased imports alleged to cause or threaten serious injury are a result of unforeseen developments and of the effect of the obligations incurred by a Member does not appear in the Safeguards Agreement.

8.51 We note that the parties and third parties have addressed in some detail the questions (i) whether the provisions of the Safeguards Agreement prevail over the "unforeseen developments" criterion of Article XIX of GATT because they are in conflict with one another, (ii) whether all the requirements of Article XIX (including the criterion of "unforeseen developments") are subsumed by the provisions of the Safeguards Agreement,[460] and (iii) whether the requirements of Article XIX of GATT and the Safeguards Agreement have to be complied with on a cumulative basis. The parties seem to agree that, since the entry into force of the WTO agreements, safeguard measures can no longer be imposed through the exclusive application of Article XIX of GATT in and of itself.

---

[459] G/SG/N/8/ARG/1, Exhibit EC-16, p.3.

[460] Third party submission by the United States, see descriptive part, section VI.C.1.(d).

8.52 We start our analysis by examining whether any provision of the new Safeguards Agreement addressed the relationship between the Safeguards Agreement and Article XIX of GATT. In this respect we note that Article 1 of the Safeguards Agreement provides:

> "This Agreement establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994".

Article 11.1(a) of the Safeguards Agreement on the "Prohibition and Elimination of Certain Measures" in turn requires that:

> "[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement."

8.53 In the light of these provisions, we need to interpret the phrases "provisions of … Article [XIX] applied in accordance with this [Safeguards] Agreement", "application of safeguard measures", i.e., "those provided for in Article XIX of GATT". In accordance with the "customary rules of interpretation of public international law" referred to in Article 3.2 of the DSU, i.e., Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), we deem it appropriate to approach these questions in the light of the ordinary meaning, the context and the object and purpose of the Safeguards Agreement, Article XIX of GATT and, to the extent relevant, the General Interpretative Note to Annex 1A of the WTO Agreement.

8.54 The ordinary meaning of the term application can be described as "bringing of a general or figurative statement, a theory, principle, etc., to bear upon a matter"; "[the] applicability in a particular case", "relevance", "the bringing of something to bear practically in a matter", "put into practical operation".[461] These descriptions of the ordinary meaning of application imply that bringing the theory or principle, i.e., safeguard measures in the meaning of Article XIX, into practical operation, requires compliance with and implementation of the detailed rules and procedures of the Safeguard Agreement when introducing or maintaining safeguard measures.

8.55 We note in this respect that Article 1 of the Safeguards Agreement does not refer to the application of Article XIX as such. Rather, it refers to the application of safeguard measures, which are then defined as those measures provided for in Article XIX. However, Article 11 makes clear that "such [emergency] action" has to conform with Article XIX "applied in accordance with this [Safeguards] Agreement". In our view, this indicates that the application of safeguard measures in the meaning of Article XIX requires - since the entry into force of the Safeguards Agreement - conformity with the requirements and conditions of the latter agreement. Although all the provisions of Article XIX of GATT continue to legally co-exist with the Safeguards Agreement in the framework of the single undertaking of the Uruguay Round agreements, any implementation of safeguard measures in the meaning of Article XIX presupposes the application of and thus compliance with the provisions of the Safeguards Agreement.

8.56 To put it differently, we believe that the choice of the word *application* appears to imply that rules for the imposition of safeguard measures provided for in Article XIX of GATT and the rules for the imposition of safeguard measures deriving from the Safeguards Agreement have to be read in conjunction and have become intrinsically linked, if not inseparable from one another since the entry into force of the WTO Agreement. While the Safeguards Agreement does not supersede or replace Article XIX, which continues to remain in force as part of the GATT, the original conditions contained in Article XIX have to be read in the light of the subsequently negotiated and much more specific provisions of the Safeguards Agreement. Those provisions of the Safeguards Agreement

[461] The New Shorter Oxford English Dictionary on Historical Principles, Oxford (1993) p.100.

place the original rule of Article XIX within the entire package of the new WTO legal system and make it operational in practice.

8.57 In this regard, we recall that the *Brazil - Desiccated Coconut* case focused on the relationship between Article VI of GATT and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) as bases for the imposition of countervailing duties. In other words, that case concerned a situation which is analogous to the present dispute. In *Brazil - Desiccated Coconut*,[462] the Appellate Body noted that

> "the relationship between the GATT of 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT of 1947 were incorporated into, and became part of the GATT 1994, they are *not the sum total of the rights and obligations of WTO Members concerning a particular matter*. For example with respect to subsidies on agricultural products, Articles III, VI, XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture and the SCM Agreement reflect the latest statement of WTO Members as to their rights and obligations* concerning agricultural subsidies.[463]" (emphasis added).

The Appellate Body in *Brazil - Desiccated Coconut* also endorsed the panel's statement that:

> "the SCM Agreements[464] *do not merely impose additional substantive and procedural obligations* on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI *together define, clarify and in some cases modify the whole package of rights and obligations* of a potential user of countervailing measures."[465] (emphasis added).

8.58 Given the reasoning developed by the panel and the Appellate Body in the *Brazil - Desiccated Coconut* case, it is our view that Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction. Therefore, we conclude that Article XIX of GATT cannot be understood to represent the total rights and obligations of WTO Members, but that rather the Safeguards Agreement as applying the disciplines of Article XIX of GATT, reflects the latest statement of WTO Members concerning their rights and obligations concerning safeguards. Thus the Safeguards Agreement should be understood as *defining, clarifying, and in some cases modifying* the whole package of rights and obligations of Members with respect to safeguard measures as they currently exist. By the same token, and in the light of the principle of effective treaty interpretation, the *express omission* of the criterion of unforeseen developments in the new agreement (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must, in our view, have meaning.

8.59 We find support for this interpretation of Articles 1 and 11 of the Safeguards Agreement also in the immediate context of these provisions. Article 10 defines the temporal delimitation of the applicability of Article XIX of GATT 1947 and the new Safeguards Agreement, providing that:

---

[462] Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, AB-1996-4, WT/DS22/AB/R, adopted on 20 March 1997, p. 14.

[463] Panel Report on *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted on 20 March 1997, para. 227.

[464] The plural means the Tokyo Round Subsidies Agreement and the Uruguay Round SCM Agreement.

[465] Panel Report on *Brazil - Desiccated Coconut*, para. 246.

> "Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later."

8.60 This provision read in conjunction with Articles 1 and 11 of the Safeguards Agreement reinforces, in our view, the interpretation that safeguard measures under Article XIX of GATT - which is identical in wording with Article XIX of GATT 1947 - cannot be *applied*, i.e., made operational or put into practice, unless they are in *conformity*, i.e., in compliance with the requirements and conditions of the Safeguards Agreement.

8.61 Concerning the object and purpose of the Safeguards Agreement, we note that its preamble recognises as the object of the Safeguards Agreement "the need to *clarify* and *reinforce* the disciplines of GATT, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products)," as well as the purpose: "to *re-establish multilateral control* over safeguards and eliminate measures that escape such control,"[466] and that, therefore, "a *comprehensive agreement*, applicable to all Members and based on the basic principles of GATT, is called for".[467]

8.62 Accordingly, the object of the Safeguards Agreement is to "clarify and reinforce" the disciplines of Article XIX.[468] It is the very point of a new agreement clarifying existing disciplines that it implies some degree of refinement or modification, such as in this case, in respect of the express omission of the *unforeseen developments* criterion.

8.63 The preamble further reflects as one of the primary purposes of the Safeguards Agreement the need to "re-establish multilateral control over safeguards and eliminate measures that escape such control". This recital highlights the wide-ranging lack of discipline on safeguard measures in the pre-Uruguay Round international trade relations. Such a re-establishment of multilateral control implies a new balance of rights and obligations that in some cases modifies the whole package of rights and obligations resulting from the Uruguay Round negotiations. On the one hand, new, clearer and more stringent conditions for the imposition of safeguard measures apply and explicit prohibitions of grey-area measures are provided for in order to contain acts of circumvention. On the other hand, there are provisions that allow for more flexible conditions, such as Article 8.3 of the Safeguards Agreement, which provides for an explicit derogation postponing the right of affected Members to suspend equivalent concessions after the imposition of a safeguard measure. The express omission of the unforeseen development criterion in the new Safeguards Agreement would arguably fit in the latter category.

8.64 One could argue that such an interpretation of the purpose of the Safeguards Agreement, particularly with respect to the omission of the criterion of unforeseen developments, simply reflects the state-of-the-art in dispute settlement practice concerning safeguard measures with respect to this criterion since the *Hatters Fur* case of 1951.[469] The members of the Working Party (except for the United States) in that case agreed from a general perspective:

> "that the term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be

---

[466] Recital 2.

[467] Recital 4.

[468] The term *clarify* may be understood as meaning "make clear or plain to the understanding, remove complexity, ambiguity or obscurity, remove ignorance, misconception or error from, become transparent" The New Shorter Oxford English Dictionary on Historical Principles, Oxford (1993) p. 411.

[469] Working Party Report on *Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT*, GATT/CP/106, adopted on 22 October 1951.

> 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."

However, that same Working Party concluded with respect to the particular case before it that:

> "the fact that hat styles had changed did not constitute an 'unforeseen development' within the meaning of Article XIX, but that the effects of the special circumstances of this case, and particularly the degree to which the change in fashion affected the competitive situation, could not have reasonably be expected to have been foreseen by the US authorities in 1947 and that the condition of Article XIX that the increase in imports must be due to unforeseen developments and to the effect of the tariff concessions can therefore be considered to have been fulfilled."

8.65 It is probably fair to say that the interpretation of 'unforeseen developments' in that case made it easier for user governments of safeguard measures to meet this condition. Therefore, it has been argued that the *Hatters Fur* case essentially read the unforeseen developments condition out of the text of Article XIX:1(a) of GATT 1947.[470] While this statement has some explanatory value, it is of course not entirely accurate from a legal perspective since dispute settlement practice cannot add to or diminish the rights and obligations of the signatories of an international treaty. It would be wrong to proceed from the assumption that a single working party report from the early years of GATT 1947 could have a legal impact upon the wording of Article XIX of GATT. This principle was true under GATT 1947 and has been explicitly embodied in the framework of the WTO agreements, e.g., in Article 19.2 of the DSU. Therefore, one cannot assume that the prevailing practice of non-enforcement of the unforeseen developments condition in safeguard investigations in the decades since the adoption of the *Hatters Fur* Working Party report could have had the effect of modifying the rights and obligations of Contracting Parties to the GATT 1947 or changing the text of GATT as it forms part of the WTO agreements.

8.66 It would be unrealistic to assume that the practice of non-enforcement of the unforeseen developments condition was unknown when the new Safeguards Agreement was negotiated during the Uruguay Round. If it had been the object and purpose of the Safeguards Agreement to clarify and reinforce the disciplines of Article XIX and to re-establish multilateral control over safeguard measures also with respect to the unforeseen developments condition, the need for clear rules, detailed definitions and refined procedures regarding this condition would have been of particular importance. To put it differently, if the reinforcement of the unforeseen developments condition had been one of the objectives of the new Safeguards Agreement, one would expect to find detailed provisions concerning it in the new agreement, rather than an express omission of that criterion. In this regard, we recall that the fourth recital of the preamble to the Safeguards Agreement recognises the purpose to create:

> "a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994 …".

8.67 It appears that the negotiators intended the new Safeguard Agreement to comprehensively cover the field of the application of safeguard measures and deliberately chose not to include the unforeseen developments criterion in that new comprehensive agreement. As a result, since we must give meaning to the fact that the new Safeguards Agreement does not in so many words make a single reference to the unforeseen developments condition, conformity with the explicit requirements and conditions embodied in the Safeguards Agreement must be sufficient for the application of safeguard measures within the meaning of Article XIX of GATT.

---

[470] Jackson, John H., World Trade and the Law of GATT, Indianapolis (1969), pp. 560 *et seq*.

8.68 In arriving at this conclusion, we wish to emphasise that the issue before this Panel is not really whether the criterion of unforeseen developments of Article XIX is in outright conflict[471] - in the sense of being mutually exclusive or mutually inconsistent, quod non, with Article 2.1 or any other provision of the Safeguards Agreement. In this respect, we recall the statement of the *Indonesia - Automobiles* panel that in international law there is a presumption against conflict.[472] Nevertheless, if we were to assume that a conflict exists, the General Interpretative Note to Annex 1A to the Agreement Establishing the WTO would resolve the issue in the sense that the provisions of the Safeguards Agreement would prevail over Article XIX of GATT to the extent of that conflict.[473]

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

E. CLAIMS UNDER THE SAFEGUARDS AGREEMENT

8.70 In the following sections we discuss the claims under Articles 2, 4, 5, 6 and 12 of the Safeguards Agreement. In examining the claims under Articles 2 and 4, we will discuss, *inter alia*: (i) whether Article 2 (and the footnote to Article 2.1) permit including MERCOSUR imports in the investigation, while imposing the safeguard measure exclusively against non-MERCOSUR imports, (ii) the scope of the domestic industry and the products covered by the investigation, (iii) the appropriate standard of review by this Panel, (iv) whether there were imports in increased quantities in absolute or relative terms, (v) the review of Argentina's injury analysis, and (vi) the review of Argentina's causation analysis.

8.71 We will then address (i) the claim concerning the application of the safeguard measures within the meaning of Article 5, (ii) the imposition of provisional safeguard measures within the meaning of Article 6 and (iii) the claims concerning the notification requirements foreseen in Article 12.

1. The imposition of safeguard measures in the case of a customs union

8.72 One of the EC's core allegations against Argentina's safeguard investigation is that the Argentine authorities conducted an analysis of imports, injury and causation on the basis of statistics for all imports, i.e., from MERCOSUR countries as well as from third countries, and then applied the safeguard measure only against imports from non-MERCOSUR third countries. The European

---

[471] The most recent Appellate Body report to address the concept of "*conflict*" is the *Guatemala - Cement* case. However, in the *Guatemala - Cement* case the Appellate Body dealt with the question of the relationship between the special or additional dispute settlement provisions of the Anti-dumping Agreement as contained in Annex 1A to the *WTO Agreement* and the DSU as incorporated in Annex 2 to the *WTO Agreement*, whereas the present dispute concerns the relationship between the substantive provisions of an Annex 1A agreement and the GATT 1994.

[472] The Panel on *Indonesia - Certain Measures Affecting the Automobiles Industry* (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R), adopted on 23 July 1998, para. 14.28: "… In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the same parties. Second, the treaties must cover the same substantive subject-matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. … The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing evidence to the contrary."

[473] General Interpretive Note: "In the event of *conflict* between a provision of the GATT 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO …, the provisions of the other agreement shall *prevail* to the extent of the conflict."

Communities does not in principle challenge the exclusion of MERCOSUR imports from the application of the safeguard measure, provided, however, that MERCOSUR imports also are excluded from the "increased imports", "serious injury" and "causality" analyses. The European Communities contends that Argentina cannot, consistently with the Safeguards Agreement, include MERCOSUR imports in the injury and causation analyses and then exclude these imports from application of the resulting safeguard measures.[474]

8.73 Argentina responds that the European Communities suggests a methodology for the injury and causation analyses in the case of a customs union which reads obligations into the Safeguards Agreement that it does not explicitly contain. In Argentina's view, public international law allows a sovereign country to adopt one of several possible interpretations within the latitude that the wording of a treaty provision permits. Argentina relies in its argumentation concerning the interpretation of treaty law on the Appellate Body Reports in the *European Communities - Computer Equipment*[475] case and the *India - Patents* case.[476]

8.74 In particular, Argentina takes the position that Articles 2 and 4 of the Safeguards Agreement only refer to the concept of "*imports*" without any further limitation or clarification and that the footnote to Article 2 emphasises the lack of a common understanding concerning the application of safeguard measures in the case of a customs union. Argentina reads the third sentence of the footnote[477] to mean that only the "*conditions*" existing within that member State of the customs union should matter for the safeguard investigation. For Argentina this implies that all imports from intra- and extra-regional sources may be taken into consideration when assessing the "conditions in that member State" because the footnote does not explicitly prohibit the inclusion of imports from within the customs union in the injury or causation analyses.

8.75 In considering issues relating to the imposition of safeguard measures in the case of a customs union, in the dispute before us the essential question is whether Argentina was permitted under the Safeguards Agreement to take MERCOSUR imports into account in the analysis of injury factors and of a causal link between increased imports and the alleged (threat of) serious injury, and was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed.

---

[474] MERCOSUR imports accounted, e.g., in 1991 only for 1.90 million pairs of 8.86 million total imports (i.e., 21.4 per cent) and in 1995, for roughly one fourth of total imports, i.e., 5.83 of 19.84 million pairs. However, in 1996 MERCOSUR supplied the largest percentage (55.7 per cent) of total imports of 13.47 million pairs, i.e., 7.5 million pairs (as opposed to 5.97 million pairs from third countries).

[475] "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty." Appellate Body Report on *European Communities - Customs Classification of Certain Computer Equipment*, (WT/DS62, 67, 68/AB/R), para. 84.

[476] The Appellate Body also affirmed "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention.* But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended." Appellate Body Report on *India - Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, (WT/DS/50/AB/R), para 45.

[477] i.e., where a safeguard "is applied on behalf of a customs union's member State, all requirements for the determination of serious injury shall be based on the conditions existing in that member State and the measure shall be limited to that state".

(a) Article 2 and the footnote to Article 2.1

8.76 We note that Article 2 of the Safeguards Agreement sets out the basic requirements for the application of safeguard measures:

> "Article 2
> Conditions
>
> 1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source."

Footnote 1 to Article 2.1 of the Safeguards Agreement provides that:

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

8.77 We address first Argentina's argument concerning the footnote to Article 2.1, specifically that the footnote emphasises the lack of understanding among Members regarding the application of safeguard measures in the case of a customs union, and that the footnote's reference to "conditions in that member State and the measure shall be limited to that member State" does not explicitly prohibit the inclusion in the injury or causation analyses of imports from within a customs union. We consider this argument in accordance with the ordinary meaning of Article 2 and its footnote, as well as their context and in the light of their object and purpose.

8.78 According to the ordinary meaning of the text of the footnote to Article 2.1, in the case of measures imposed by a customs union there are two options for imposing safeguard measures, i.e., (i) as a single unit or (ii) on behalf of a member State. In the latter case, when a safeguard measure is imposed on behalf of a member State, the footnote's third sentence sets out two conditions, i.e., (i) "all requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State" and (ii) "the measure shall be limited to that member State".

8.79 Accordingly, the footnote also offers two options for conducting safeguard *investigations* in the case of measures to be applied by a customs union, i.e., (i) on a customs union-wide basis, or (ii) on a member State-specific basis. This dispute clearly centres around the second option. Argentina correctly points out that, as a result, the requirements for determining increased imports, serious injury and causation should be based on the "conditions existing in that member State". We agree with Argentina that this phrase would not appear to prevent the investigating authority of that member State from including imports from other member States of the customs union in question in its injury

and causation analyses. Thus the second option certainly permits Argentina to take imports from all sources, including those from within MERCOSUR, into consideration in its safeguard investigation.

8.80 The EC's argument is rather that if a safeguard measure is imposed only on imports from non-MERCOSUR sources, injury and causation analyses should be limited to non-MERCOSUR imports, too. In other words, in the EC's view, there should be a *parallelism* between, on the one hand, the *investigation* leading to and, on the other hand, the *application* of safeguard measures.

8.81 Thus, the next question is whether the ordinary meaning of the text of the footnote provides any guidance regarding *to whom*[478] a safeguard measure may be applied. We note that the first part of the footnote's third sentence ties the "conditions existing in that member State" to the examination of the "requirements" for the determination of serious injury or the threat thereof. Therefore, the first part of the footnote's third sentence addresses explicitly only *by whom*, and on the basis of which conditions, safeguard measures may be imposed, but not *to whom* such measures may be applied. Thus, the first part of this sentence leaves this question open.

8.82 The last phrase of the footnote's third sentence provides that "the measure shall be limited to that member State". In our view, the requirement to limit the measure “to that member State” makes it clear that, based on a member-State-specific investigation, the customs union may impose safeguard measures only on behalf of that member State, but not as if the causation of serious injury had been established for the entire customs union. In that case, the provisions of the footnote's second sentence would apply. In other words, the last phrase of the footnote’s third sentence means that the only market that can be protected by a safeguard measure is the market that was the subject of the underlying investigation. Hence, this phrase concerns only *by whom*, and not *to whom* a safeguard measure may be imposed. Therefore, this provision as well leaves open the question of whether there is a requirement to impose such safeguard measures either (i) against all sources of supply including the other member States of a customs union, or (ii) exclusively against third-country suppliers.

8.83 Thus, based on the analysis of the ordinary meaning of the text of the footnote to Article 2.1, we conclude that that footnote does not concern *to whom* but rather *by whom* a safeguard measure may be applied. Therefore, the ordinary meaning of that footnote does not clarify the question of whether the safeguard measure must be applied to all imports or may be applied solely to imports from third countries.

8.84 We next consider whether the context of the footnote indicates that a Member would be permitted to include imports from within a customs union in its injury and causation analyses while excluding such imports from the application of the safeguard measure. The immediate context of Article 2.1 and the footnote thereto is Article 2.2 which provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source," i.e., on the basis of the most-favoured-nation treatment principle. The ordinary meaning of Article 2.2 would appear to imply that, as a result of a member-State-specific investigation, safeguard measures have to be imposed on a non-discriminatory basis against products from all sources of supply, regardless of whether they originate from within or from outside of the customs union. Argentina has submitted that footnote 1 to Article 2.1 should be interpreted also to derogate from Article 2.2 and that, accordingly, customs unions should be deemed exempted from that MFN requirement. However, we are mindful of the fact that the footnote was inserted after the word "Member" in the first paragraph of Article 2. It therefore clearly refers solely to the question of who can impose a measure, and not to the supplier countries that might be affected by it. For the footnote to have a broader meaning, the drafters would have had to place it after the title of Article 2, or in both paragraphs of that article. The fact that they did not do so must have meaning and has to be taken into account in our interpretation.

[478] For ease of discussion, we use the term "to whom" to mean "to imports from which sources of supply".

8.85 We do not, therefore, share Argentina's view that the relationship between Article 2.2 and the footnote to Article 2.1 is one of a general provision and an exception. Consequently, we conclude that the footnote does not derogate from the MFN principle embodied in Article 2.2. In this regard, we note that where the Safeguards Agreement provides for an exception it does so in clear and explicit terms. For example, Article 9 exempts, subject to certain thresholds and limitations, imports from developing country Members from the imposition of safeguard measures where the injury and causation fully reflect the effects of those imports from developing countries.[479]

8.86 If a customs union imposes safeguard measures based on a customs-union-wide investigation as a single unit against third countries (the situation captured by the footnote's second sentence), the measure would necessarily be imposed only on third country suppliers, as all other suppliers would be part of the domestic industry. By contrast, in the situation captured by the footnote's third sentence, where the investigation was limited to one member State, and where it was determined that serious injury or threat thereof was caused by imports from intra-regional as well as extra-regional sources, we see nothing that would prevent a customs union from imposing a safeguard measure on imports from all of those sources in accordance with Article 2.2, i.e., not only imports from third countries, but also intra-regional imports from the other member States of the customs union.

8.87 This result supports the interpretation that the two options offered by the footnote to Article 2.1 read in conjunction with Article 2.2 imply a *parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures. Thus, in the light of the context of the footnote to Article 2.1, a member-state-specific investigation in which serious injury or threat thereof is found based on imports from all sources could only lead to the imposition of safeguard measures on a MFN-basis against all sources of intra-regional as well as extra-regional supply of a customs union. By the same token, a customs-union-wide investigation could only lead to the application of safeguard measures to all sources of extra-regional supply and could not justify the application of safeguard measures against some or all sources of intra-regional supply, as these would be part of the domestic industry in that context.

8.88 Finally, we consider these provisions in the light of the object and purpose of the Safeguards Agreement. We recall that the preamble to the Agreement[480] recognises, *inter alia*, as the object of the Safeguards Agreement the need to clarify and reinforce the disciplines of GATT (including those of Article XIX). It also underscores that it is the purpose of that agreement to re-establish multilateral control over safeguards and to eliminate measures that escape such control. In our view, in order to give this object and purpose meaning, a strict interpretation and implementation of the disciplines provided for in the Safeguard Agreement is needed. Otherwise, the reinforcement of disciplines, re-establishment of multilateral control and elimination of so-called "grey-area" measures could not be achieved. The preamble[481] further recognises that a "comprehensive agreement, applicable to all Members and based on the basic principles of GATT, is called for". We believe that these "basic principles" also include the most-favoured nation principle which, pursuant to Article 2.2, governs the imposition of safeguard measures on products from all sources of supply.

8.89 If we were to follow Argentina's position regarding the interpretation of Article 2 and the footnote to Article 2.1, in our view, the objectives of reinforcing disciplines concerning safeguard measures, re-establishing multilateral control and eliminating measures that escape such control may not be met for the following reasons. If, on the one hand, on the basis of an investigation taking into account third-country imports that cause (or threaten) serious injury to the domestic industry in the customs union in its entirety, a customs union decided to impose safeguard measures as a single unit,

[479] The exception of Article 9 is a qualified one. It only applies to developing country Members whose share in the importing Member's market does not exceed 3 per cent, provided that such developing country Members collectively account for not more than 9 per cent of the total imports of the product concerned.

[480] Recital 2.

[481] Recital 4.

in accordance with the footnote's second sentence, such an investigation would lead to the imposition of safeguard measures against third-country imports only. If, on the other hand, a national safeguard authority were to conduct a member-State-specific investigation, taking into account serious injury caused or threatened by imports from other member States of a customs union as well as third-country imports, but the Members of the customs union had agreed not to apply safeguard measures amongst themselves, under Argentina's methodology such an investigation again would lead to the imposition of essentially identical safeguard measures against third-country imports only. We are not persuaded that, given the Safeguards Agreement's detailed rules on, e.g., increased imports, serious injury, causation and level of permissible safeguard measures, two substantially different safeguard investigations, i.e., one customs-union-wide and the other member-State-specific, could properly yield essentially the same outcome, i.e., the imposition of safeguard measures exclusively against third-country imports.

8.90 We believe that our reading of Articles 2.1 and the footnote thereto in conjunction with Article 2.2 and the object and purpose of the Safeguards Agreement gives meaning to all the parts of these provisions and does not reduce any of them to redundancy or inutility.

8.91 Thus, in applying Article 31 of the Vienna Convention we have interpreted Article 2 (and footnote to Article 2.1) in the light of their ordinary meaning, their context, and the object and purpose of the Safeguards Agreement, with a view to determining the scope and the nature of the obligations pertaining to the use of safeguard measures in the case of a customs union. On the basis of this analysis, we conclude that a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources cannot serve as a basis for imposing a safeguard measure on imports only from third-country sources of supply.

8.92 We arrive at this conclusion regarding Article 2 and the footnote to Article 2.1 without having considered yet the possible implications of Article XXIV of GATT. We will turn to these issues next.

(b) Article XXIV of GATT

8.93 Argentina emphasises that the last sentence of the footnote to Article 2.1 explicitly states that an agreed understanding on the relationship between Articles XIX and XXIV of GATT does not exist. Argentina claims that it could not impose safeguard measures against imports from other MERCOSUR countries because Article XXIV of GATT as well as secondary MERCOSUR legislation prohibit it from doing so. With respect to Article XXIV of GATT, Argentina emphasises that Article XIX of GATT is not listed in Article XXIV:8(a)(i) or (b) of GATT among the exceptions from the requirement to abolish all duties and other restrictive regulations of commerce on substantially all trade between the constituent territories of a customs union or a free-trade area. Therefore, it is, in Argentina's view, incompatible with the purpose of Article XXIV:8 of GATT to impose safeguard measures within the MERCOSUR customs union.

8.94 The European Communities contends that Article XXIV:8 of GATT does not prohibit the maintenance of the possibility to impose safeguard measures within customs unions or free-trade areas, either during the transitional period leading to their formation, or after their completion. The European Communities argues that safeguard measures are an exceptional emergency instrument of a temporary nature and are limited to a specific product, and that safeguard measures do not as such affect the establishment and the nature of a customs union or a free-trade area. Article XXIV of GATT permits the members of a customs union or free-trade area to decide whether, when applying a safeguard measure pursuant to Article XIX of GATT 1994 and the Agreement on Safeguards, to exempt other members of the customs union or free-trade area from the measure.

8.95 We recall in this regard that the last sentence of the footnote to Article 2.1 provides that:

> "Nothing in the [Safeguards] Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of the Article XXIV of GATT 1994."

8.96 In addressing this issue we note that Article XXIV:8[482] of GATT on "Customs Unions and Free-Trade Areas" defines that, for purposes of GATT, a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories. Articles XXIV:8(a)(i)(ii) and (b) provide that - within the group of customs territories forming a customs union or a free-trade area - duties and other restrictive regulations of commerce are to be eliminated (except for those permitted under Articles XI, XII, XIV, XV and XX) with respect to *substantially all trade* between the constituent territories. These exceptions from the prohibition of "other restrictive regulations of commerce" do not include Article XIX. Practice of the Contracting Parties to the GATT of 1947 and of WTO Members is inconclusive on the issue of the imposition or maintenance of safeguard measures between the constituent territories of a customs union of a free-trade area. It is a matter of fact that many agreements establishing free-trade areas or customs unions allow for the possibility to impose safeguard measures on intra-regional trade, while few regional integration agreements explicitly prohibit the imposition of intra-regional safeguard measures once the formation of such an integration area is completed.

8.97 Although the list of exceptions in Article XXIV:8 of GATT clearly does not include Article XIX, in our view, that paragraph itself does not necessarily prohibit the imposition of safeguard measures between the constituent territories of a customs union or free-trade area during their formation or after their completion. A frequently advanced justification for the maintenance or introduction of safeguards clauses within regional integration areas is the argument that the obligation of Article XXIV:8 to eliminate all duties and other restrictions of commerce applies only to "*substantially all*" but not necessarily to "*all*" trade between the constituent territories. It could be argued that for all practical purposes the application of safeguard measures to particular categories of like or directly competitive products is unlikely to affect a trade volume that could put the liberalisation of "substantially all trade" between the constituent territories of a customs union into question. But the persuasiveness of this argument depends mainly on the extent to which safeguard measures are actually imposed. Thus we do not exclude the possibility that extensive use of safeguard measures within regional integration areas for prolonged periods could run counter to the requirement to liberalise "substantially all trade" within a regional integration area. In our view, the express omission of Article XIX of GATT from the lists of exceptions in Article XXIV:8 of GATT read in combination with the requirement to eliminate all duties or other restrictions of commerce on "substantially all trade" within a customs union, leaves both options open, i.e., abolition of the possibility to impose safeguard measure between the member States of a customs union as well as the maintenance thereof.

8.98 In the alternative, even if one were to presume that the maintenance of intra-regional safeguards clauses between the member States of customs unions or free-trade areas is difficult to

---

[482] "For the purposes of this Agreement:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

reconcile with the wording of Article XXIV:8 of GATT (i.e., the omission of Article XIX from the exemption list), we recall that Article XXIV of GATT does not require the immediate completion of a customs union or free-trade area with full integration of intra-regional trade and immediate compliance with all the requirements foreseen in Article XXIV of GATT. For a "reasonable period" of normally not more than ten years,[483] interim agreements leading to the *gradual* formation of a customs union or a free-trade area are permissible under Article XXIV. In the case of the MERCOSUR treaty, the temporary lack of full integration of "substantially all trade" due to the maintenance of intra-regional safeguards clauses would still be justifiable with this *transitional* status of the customs union. Accordingly, pending the completion of integration within MERCOSUR, the requirements of Article XXIV would not force Argentina to apply safeguard measures exclusively against third countries.

8.99 There is also no doubt in our minds that the letter and spirit of Article XXIV:8 of GATT permit member States of a customs union to agree on the elimination of the possibility to impose safeguard measures between the constituent territories. The Safeguards Agreement as well leaves each Member free to agree with other Members in the framework of a customs union to renounce the possibility to impose safeguard measures between the constituent territories with a view to completing the substitution of a single customs territory for two or more customs territories as envisaged by Article XXIV:8 of GATT. However, even if we accept the common understanding of the parties that the imposition of safeguard measures between member States of MERCOSUR is prohibited,[484] Argentina and MERCOSUR are not left without recourse. Indeed, where a customs union such as MERCOSUR has elected as a matter of policy not to use safeguard measures internally, that customs union retains the option of imposing safeguard measures by the customs union as a single unit. Therefore, our interpretation of Article XXIV, read in conjunction with Article 2 and the footnote to Article 2.1 would by no means deprive a customs union of its right to impose safeguard measures as a single unit.

8.100 Argentina further submits that it is US practice under the escape clause of Section 202 of the US Trade Act of 1974 to make injury determinations on the basis of global imports, while it is possible, according to Article 802 of NAFTA, to exclude, subject to certain conditions, imports from other NAFTA-countries from the application of safeguard measures.[485] We note that it is not within our terms of reference to make any determinations concerning the consistency or inconsistency with WTO law of the safeguard provisions of NAFTA, or of individual safeguard determinations based thereon. We recall, however, that MERCOSUR is a customs union, whereas NAFTA is a free-trade agreement, and that the footnote to Article 2.1 of the Safeguards Agreement concerns only regional integration in the form of a customs union. In these circumstances, we consider that arguments concerning Chapter 8 of the NAFTA Treaty in general and the *Wheat Gluten* case in particular have no bearing on the present dispute.

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

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

---

[483] Understanding on Article XXIV of GATT 1994, para. 3.
[484] EC answer to question 1 by the Panel, see descriptive part, para. 5.132 .
[485] Argentina mentions specifically the *Wheat Gluten* case, see descriptive part, para. 5.97.

8.103 We continue our analysis of the EC's claims because, without fully considering Argentina's investigation, it would not be possible to ascertain whether it provides the legal basis for the imposition of a safeguard measure. In the following sections we thus examine whether the safeguard investigation has established the essential conditions under the Safeguards Agreement for imposing a safeguard measure, i.e., (i) imports in such increased quantities, (ii) serious injury or threat thereof and (iii) the existence of a causal link between these two criteria, even if imports from all sources of supply are taken into account.

2. Background to the investigation

(a) The domestic industry

8.104 Argentina's report on its investigation indicates that the Argentine footwear industry is composed of a large number of large, medium and small manufacturers.[486] According to Argentina, three principal manufacturers account for 35 per cent of domestic production while the other 65 per cent is spread over some 1,500 footwear makers. Widespread use of subcontracting in certain stages of production is typical of Argentina's footwear industry. There are also licensing or supply agreements or contracts with foreign firms to produce footwear with international marks for the domestic market.

8.105 The Argentine domestic industry, represented by the Chamber of the Footwear Industry (Cámara de la Industria del Calzado or "CIC"), lodged a request for a safeguard investigation on 26 October 1996 pursuant to the provisions of the Decree 1059/96 which implements the WTO Safeguards Agreement in the Argentine legal system. The Chamber for the Production of and International Trade in Footwear and Related Products (Cámara de Producción y Comercio Internacional de Calzado y Afines or "CAPCICA") which represents the producer-importers and importers opposed the request for the application of safeguard measures.[487]

8.106 We recall that Argentina submits that the CIC represents more than 71 per cent of the domestic footwear industry.[488] We also note that the European Communities has not contested these figures and that it has not questioned that the petitioners in Argentina's safeguard investigation represent *a major proportion* of the domestic footwear industry[489] in the meaning of Article 4.1(c) of the Safeguards Agreement.[490]

8.107 For purposes of information collection through questionnaires, the National Foreign Trade Commission (Comisión Nacional del Comercio Exterior or "CNCE") divided the domestic industry into three categories according to the number of workers employed, i.e., (a) large companies (more than 100 workers), (b) medium-sized companies (between 41 and 100 workers) and (c) small companies (fewer than 41 workers). Importers were classified into categories according to the value of their imports,[491] i.e., (a) large importers (more than US$1,000,000), and (b) medium-sized and

[486] G/SG/N/8/ARG/1, p.12 *et seq*.

[487] G/SG/N/8/ARG/1, p.3; Nike Argentina S.A. and RBK Argentina S.A. also came forward in their capacity as importers.

[488] The CIC noted that, together with its equivalents in the provinces of Córdoba and Santa Fé, it makes up the Argentine Federation of the Footwear and Related Products Industry (Federación Argentina de la Industria del Calzado y Afines, FAICA), thus representing 85 per cent of the domestic industry.

[489] The other association at issue, i.e., CAPCICA, represents importers or producer-importers.

[490] Article 4.1(c): "… a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within a Member's territory, or whose collective output of these products constitutes a *major proportion* of the total domestic production of those products." (emphasis added).

[491] During the period from January to November 1996, the period for which at that point importers had information available. (See, G/SG/N/8/ARG/1, p. 6).

small (between US$100,000 and US$1,000,000). Sixty questionnaires were returned by national producers[492] and 69 by importers.[493] Argentina indicates that the results were verified by the CNCE.

(b) The footwear products

8.108 Argentina's safeguard investigation, as well as the provisional and definitive safeguard measures covered footwear products categorised in the following tariff headings of the MERCOSUR Common Tariff Nomenclature: 6401.10.00, 6401.91.00, 6401.92.00, 6401.99.00, 6402.12.00, 6402.19.00, 6402.20.00, 6402.30.00, 6402.91.00, 6402.99.00, 6403.12.00, 6403.19.00, 6403.20.00, 6403.30.00, 6403.40.00, 6403.51.00, 6403.59.00, 6403.91.00, 6403.99.00, 6404.11.00, 6404.19.00, 6404.20.00, 6405.10.10, 6405.10.20, 6405.10.90, 6405.20.00, 6405.90.00. For the description of these tariff lines, see Annex [I], *infra*.

8.109 The weighted average tariff level[494] for these product categories in 1995 was 28 per cent for footwear from non-MERCOSUR third countries,[495] and 12 per cent for footwear from within MERCOSUR countries.[496]

8.110 In the investigation, the Chamber of the Footwear Industry (CIC) argued "that there is only one product, namely footwear" because of a high degree of substitutability, in terms of both supply and demand, which would tend to confirm the need to analyse the sector as a whole.[497] On the supply side, the producers argued that any producer could, if necessary, vary the type of footwear it manufactured and that the Argentine industry, taken as a whole, produced almost every kind of footwear.

8.111 The importers, however, argued that brand name and product image are the most important characteristics, at least for "high-tech" performance sport footwear. Thus, the importers argued, there were no domestically manufactured products at all which could be deemed "like or directly competitive" to imported brand-name performance footwear, e.g., Nike or Reebok footwear (except for the production of local subsidiaries). In the alternative, the importers suggested that the CNCE break down footwear products on the basis of the customs nomenclature into very narrow product categories.

8.112 The CNCE, in its data collection, took account of the fact that in the highly heterogeneous footwear market certain series of types of footwear "were more or less homogeneous from the standpoint of competitive conditions, this is to say, for which within each group there was greater substitutability of both supply and demand than between products from different groups", noting as well that there was evidence of a certain degree of specialisation in different types of footwear by the enterprises that made up the industry. Thus the CNCE recognised the usefulness to break down the market for the purposes of the investigation: "Even within a unitary investigation it was necessary to establish the extent to which different segments of the industry may be affected by imports". The five categories with respect to which the CNCE collected data were:

(i) performance sportswear;

---

[492] 24 by large and medium-sized companies and 36 by small companies in simplified multiple-choice format.

[493] Acta No. 338 de la CNCE, Determinación Final de la Existencia de Daño de la CNCE, Exhibit ARG-2, p.5.

[494] G/SG/N/8/ARG/1, p.9.

[495] At a tariff headings level, five headings corresponded to 20 per cent, 3 to 28 per cent and the other 17 to 29 per cent.

[496] The duty rates were 0 per cent for 13 headings, which in 1995, represented 39 per cent of the total imports from Brazil, Paraguay and Uruguay, the other 61 per cent paid duty at 20 per cent.

[497] G/SG/N/8/ARG/1, p.10.

(ii) non-performance sportswear;

(iii) exclusively women's footwear;

(iv) town and/or casual footwear;

(v) other.[498]

8.113 Eventually, however, the CNCE concluded that there was a single category of like or directly competitive products – all footwear (excluding ski boots) – due to a sufficient degree of substitutability among products on the supply[499] and the demand[500] side.

8.114 The European Communities does not challenge this determination of "like or directly competitive products" as such. The European Communities argues, rather, that, having adopted an approach of product segmentation for purposes of data collection, Argentina was obliged to follow it consistently through its injury analysis and to prove serious injury in all segments in which safeguards were to be imposed.

8.115 Argentina responds that the CNCE used in the product segmentation approach for purposes of collecting pertinent information and then conducted the injury analysis for the footwear industry in its entirety. Consequently, there was no need for a disaggregated consideration of all the different injury factors with respect to the five product categories.

8.116 We address the issue of whether Argentina should have conducted its injury and causation analysis on an aggregated or on an disaggregated basis, *infra*, in section E.4.(a). Given the absence of a challenge by the European Communities to Argentina's determination of the like or directly competitive product, we do not need to address whether this determination met the requirement of Article 2.1 in the sense that there was a sufficient degree of competition between the product groups across the range of footwear products at issue in this dispute.[501]

3. Standard of review

(a) No *de novo* review

8.117 Before considering the specifics of the claims concerning Argentina's injury and causation findings, we must consider the standard of review that we will apply. In our view, we have no mandate to conduct a *de novo* review of the safeguard investigation conducted by the national

---

[498] i.e., all other footwear not included in the previous categories such as espadrilles, work boots, gum boots, slippers, sea boots, riding boots, fishing boots, and men's and unisex sandals.

[499] "On the demand side, the Commission concluded that there is a broad range of footwear types, prices, qualities, uses and marks which although not in strong competition at the various extremes, do create competition between adjacent groups; therefore, although the definition of footwear as a 'protective foot covering' is a simplification, it acquires great significance when the substitutability between different kinds of footwear is taken into account". (G/SG/N/8/ARG/1, page 11).

[500] "On the supply side, the Commission concluded that the concept of a 'footwear industry' is also significant, since although it is well known that manufacturers specialize in different segments of the market, they share various critical factors that make possible the reallocation of resources, re-specialization and significant competitive shifts. Thus, it is easy to reallocate labour between different product lines, and this also applies to much of the equipment and many of the raw materials." (G/SG/N/8/ARG/1, page 11).

[501] We note that the question whether foreign products are "like or directly competitive" for purposes of WTO law has to be made on a case-specific and provision-specific basis. In this regard we consider as relevant the demand-side and supply-side criteria relied on by Argentina, e.g., physical or technical descriptions, consumer use, perception of consumers and manufacturers, production process, production plants and workforce, commercial marks, quality, commercial channels, substitutability between different kinds of footwear, possibility of reallocation of resources, re-specialization and significant competitive shifts.

authority. Rather, we must determine whether Argentina has abided by its multilateral obligations under the Agreement on Safeguards, as we discuss in paras. 8.205-8.207, in reaching its affirmative finding of injury and causation in the footwear investigation.

8.118 This approach is consistent with the reports of panels reviewing national investigations in the context of the Tokyo Round *Agreement on Implementation of Article VI of GATT* ("*Anti-dumping Agreement*") and the Tokyo *Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT* ("*Subsidies Agreement*") and the *WTO Agreement on Textiles and Clothing* ("ATC"). The panel on *New Zealand - Imports of Electrical Transformers from Finland*[502] panel took the view that, while the responsibility to make an anti-dumping determination rested in the first place with the authorities of the importing country, such determinations were subject to scrutiny by a panel if they were challenged by another country.[503] The panel on *United States - Anti-dumping Duties on Import of Salmon from Norway* concluded that it should not engage in a *de novo* review of the evidence examined by the national investigating authority.[504]

8.119 The panel on *United States - Underwear*[505] followed this approach by noting, however, that it did not see its

> "review as a substitute for the proceedings conducted by national investigating authorities or by the Textiles Monitoring Body (TMB). Rather … the Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA. We draw particular attention to the fact that a series of panel reports in the anti-dumping and subsidies/countervailing duties context have made it clear that it is *not the role of panels to engage in a de novo* review.[506] In our view, the same is true for panels operating in the context of the ATC, since they would be called upon, as in the cases dealing with anti-dumping and/or subsidies/countervailing duties, to review the consistency of a determination by a national investigating authority imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. …"[507] (emphasis added).

Accordingly, the panel on *United States - Underwear* decided,

> "in accordance with Article 11 of the DSU, to make an objective assessment of the Statement issued by the US authorities … which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel without, however, engaging in a *de novo* review. … an objective assessment would entail an examination of whether the CITA had examined all relevant facts before it (including facts which might detract from an affirmative determination in accordance with the second sentence of Article 6.2 of the ATC), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the

---

[502] Panel Report on *New Zealand - Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55.

[503] Panel Report on *New Zealand - Transformers*.

[504] Panel Report on *United States - Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, dated 30 November 1992, para. 494, p. 186f.

[505] Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, adopted on 25 February 1997 (WT/DS24/R).

[506] See, *inter alia*, *Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States*, adopted on 27 April 1993, BISD 40S/205; *United States - Imposition of Anti-dumping duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 27 April 1994; *United States - Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, adopted on 3 June 1987, BISD 34S/194.

[507] *United States - Underwear*, *op.cit*., para. 7.12.

> determination made was consistent with the international obligations of the United States."[508]

8.120 The panel on *United States - Shirts and Blouses* also stated that

> "This is not to say that the Panel interprets the ATC as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. The relative importance of particular factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case."[509]

8.121 These past GATT and WTO panel reports make it clear that panels examining national investigations in the context of the application of anti-dumping and countervailing duties, as well as safeguards under the ATC, have refrained from engaging in a *de novo* review of the evidence examined by the national authority.

(b) Consideration of "all relevant factors"

8.122 Argentina argues that the requirement of Article 4.2(a) to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the industry" implies an obligation to evaluate factors only to the extent that they are *relevant*, but not an obligation to *examine each and every* factor. In this respect, Argentina contests the reliance on past precedents in cases involving the review of a determination made by a national authority (e.g., *United States - Underwear, United States - Shirts and Blouses, New Zealand - Transformers, United States - Antidumping Duties on Salmon from Norway*) under the Tokyo Round Agreements on Anti-dumping as well as Subsidies and the WTO Agreement on Textiles and Clothing (ATC) on the grounds that these cases did not concern the review of safeguard investigations under the Safeguards Agreement. The European Communities contends that Article 4.2(a) implies a requirement for the national authority to investigate at the least all factors listed in that article.

8.123 We note, first, that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of "all relevant factors", in particular those listed in that article. Second, Article 6.4 of the ATC[510] contains no such express requirement and recognises that "none of these factors … can necessarily give decisive guidance. Nonetheless, the panels on *United States - Underwear* and *United States - Shirts and Blouses* ruled that each and every injury factor mentioned in Article 6.4 of the ATC has to be considered by the national authority. With regard to the obligation to evaluate "all relevant factors" we consider these past panel reports relevant. Consequently, in accordance with the text of the Safeguards Agreement and past practice, we consider that an evaluation of all factors listed in Article 4.2(a) is required.

8.124 In the light of the fact that the parties agree that *de novo* review is not appropriate, and appear also to generally share our view of the appropriate standard of review,[511] we, too, will not engage in a *de novo* review of the evidence examined by the national authorities of Argentina. Therefore, our

---

[508] *United States - Underwear*, *op.cit.*, para. 7.13.

[509] Panel Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, 6 June 1997, WT/DS33/R, para. 7.52.

[510] Article 6.4 of the ATC: "… The Member or Members to whom serious damage, or actual threat thereof … is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other commercial transaction*; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance*. …".

[511] For the EC's view, see, descriptive part, para. 5.136 - 5.140. For Argentina's view, see, descriptive part, para. 5.141.- 5.143

review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement. We note that this was the standard of review applied by the Panel in *United States – Underwear*, with which we agree.

(c) Argentina's report on the "detailed analysis of the case" setting forth its "findings and reasoned conclusions"

8.125 During the course of these proceedings, Argentina submitted to the Panel an exhibit containing the entire 10,000-plus page record of its investigation. Argentina indicated that it considered this documentation of fundamental importance to the Panel's reaching a decision regarding the consistency of the determination with the WTO rules. Argentina states that without the complete record of the investigation, the Panel would not have at its disposal all of the pertinent elements on which to decide the dispute. Argentina also submitted a list indicating those portions of the entire record which it considers to be of particular relevance for this dispute.

8.126 In our view, under the above standard of review as applied to the facts of this particular dispute, it is the published "detailed analysis of the case under investigation" and the published "report setting forth [the] findings and reasoned conclusions", provided for respectively in Article 4.2(c) and Article 3.1, rather than the full record of the investigation[512], that must be the focus of our

[512] In response to a request from the EC at the second substantive meeting to identify the most relevant pages of the investigation record that had not previously been submitted to the Panel, Argentina submitted an annotated list of pages pertaining to specific issues or factors. We note that the pages of the record identified in that list contain essentially raw data, either in uncompiled or compiled form. In keeping with our standard of review, we find these pages of secondary relevance to our consideration of Argentina's injury and causation *analysis* and *explanation* in its investigation.
Argentina identified the following pages of the entire investigation record as relevant for particular issues:

Increased imports: Act 338, p. 5329; Informe técnico previo a la determinación final, Anexo 5, Cuadros 15-21, pp. 5477-5490; información de los productores respecto a las importaciones, pp. 44-48; aranceles y preferencias correspondientes, pp. 173-177; información sobre importaciones fuente INDEC, pp. 250-251; información de las cámaras sectoriales sobre el indice de agresión de las importaciones, pp. 401-411; Acta 266 e Informe técnico previo a la apertura de la investigación, pp. 602-607; presentación de la demandante con posterioridad a la Audencia Pública, pp. 5176-5179;

Employment: Technical Report , p. 5639; presentación del sector respecto al cierre de empresas, pp. 197-226 (or 193-223); *idem* respecto a despidos y suspensiones de personal, pp. 414-418; Acta 266 e informe técnico previo a la apertura de la investigación, pp. 569-592; Anexo estadístico del informe técnico previo a la apertura de la investigación, pp. 629-701; presentación de la unión de trabajadores posterior a la Audencia Pública, pp. 5148-5168; informe técnico previo a la determinación final, Anexo 2, Cuadro 17, p. 5583, (pp. 5564-5583); Anexo 3, Cuadros 45-47, , pp. 5638-5640, pp. 5641-5643; presentación de la Cámara de importadores con cifras de desempleo, pp. 5073-5075;

Imports relative to domestic production and consumption: Informe técnico previo a la apertura de la investigación, pp. 574-575; respuestas a los formularios de las encuestas a productores, pp. 1176-2920; sistemizada en el informe técnico previo a la determinación final, Anexo 2, pp. 5578-5584, Anexo 3, pp. 5585-5646, Anexo 4, pp. 5647-5716; respuestas de los importadores, pp. 1197-2721, pp. 4586-4651; información de la Cámara peticionante sobre el consume aparente, pp. 4803-4804; información de la CAPCICA sobre el consume aparente, pp. 5064-5067; informe técnico previo a la determinación final, pp. 5498-5507;

Sales: información de los productores, pp. 1176-2920, sistemizada en el informe técnico previo a la determinación final, Anexo 2, pp. 5578-5584; información verificada, en fojas varias de pp. 4421 à 5017; Informe técnico previo a la determinación final, Anexo 3, pp. 5585-5646, Anexo 4, pp. 5647-5716; Acta 266 e Informe técnico previo a la apertura de la investigación, , pp. 592-601, 629-701; Informe técnico previo a la determinación final, Anexo 3, pp. 5603-5611, 5321-5323, Acta 338, pp. 5344-5346;

Profits and losses: Acta 266 e informe técnico previo a la apertura de la investigación, pp. 592-601, 660-671, Cuadros 28-29, pp. 669-670, Gráfico 5, p.668; información de los productores, pp. 1176-2920;

review. This is because the European Communities does not challenge the data generated and relied upon in the investigation as such, but rather Argentina's analysis and interpretation of those data. If the European Communities had claimed that Argentina's compilation of the data for one or another injury factor were incorrect, it might have been necessary for us to consider the raw information (e.g., questionnaire responses) from which those data were compiled. However, because the European Communities accepts the aggregated data as presented by Argentina in its various documents concerning the results of the investigation, but challenges rather the reasoning based thereon, consideration of the underlying raw information is of secondary importance. If we were to conduct our own assessment of the underlying evidence as contained in the entire record of Argentina's investigation, we believe that we would effectively be engaging in a *de novo* review, which we and both parties agree would be inappropriate. Nonetheless, we have reviewed and taken note of those portions of the entire record of the investigation which Argentina has identified in the above-mentioned list as being the most relevant for, *inter alia*, the injury and causation analyses.

8.127 In considering which document or documents constitute the published report(s) referred to in Article 3.1 and Article 4.2(c), we recall that annexed to its first submission, Argentina submitted among other documents both Act 338 and the "Technical Report Prior to the Final Determination" ("Technical Report") of the investigation prepared by the CNCE. We further recall that we sought clarification from Argentina, in a written question, concerning which of the documents submitted to the Panel constituted the published report referred to in Article 3.1 of the Agreement. Argentina replied that Act 338 is the published report of the CNCE's findings regarding serious injury, and that it incorporates by reference the Technical Report. According to Argentina, the Technical Report provides a detailed summary of all of the factual data gathered during the investigation.[513] Argentina further stated that all interested parties had access to the complete record of the investigation except the information therein designated as confidential, and were provided with additional information in connection with the hearings held during the investigation. Argentina also stated in response to a question from the Panel that Act 338 addresses the relevance of each factor considered (as required under Article 4.2(c)), on the basis of the detailed information contained in the Technical Report.

8.128 We conclude from the foregoing that Act 338 constitutes both the published report "setting forth [the] findings and reasoned conclusions reached on all pertinent issues of fact and law" referred to in Article 3.1 of the Safeguards Agreement, and the published document containing the "detailed analysis of the case under investigation" and the "demonstration of the relevance of the factors examined" referred to in Article 4.2(c). Thus, we will base our review in the first instance on Act 338. We note, however, that Act 338 is based on and summarises information that is set forth in more detail in the Technical Report. Thus, while Act 338 is the most relevant document, the Technical Report also forms an integral part of the record of the investigation and is closely related to Act 338.

4. Claims under Articles 2 and 4 of the Agreement on Safeguards regarding Argentina's investigation, and findings of serious injury, threat of serious injury and causation

8.129 The European Communities raises a number of claims under Articles 2 and 4 concerning Argentina's investigation and findings of serious injury, threat of serious injury and causation. In particular, the European Communities argues that the investigation was flawed in a number of ways that violate these articles, and that the findings of serious injury, threat and causation also violated these articles.

---

verificaciones realizadas por el CNCE a la información precedente, en fojas varias de pp. 4421 à 5017; sistemizada en el informe técnico previo a la determinación final, Anexos 2, pp. 5578-5584, Anexo 3, pp. 5585-5646, Anexo 4, pp. 5647-5716; balances de las empreseas, pp. 464, 560, 2886, 4222-4223, 5060, 5082; Acta 338, pp. 5326-5327, 5465-5474, Anexo 2, pp. 5582-5583, Anexo 3, pp. 5631-5633;

[513] See descriptive part, para. 5.251.

8.130 In examining the claims under Articles 2 and 4, we address first the product segmentation in Argentina's investigation.

8.131 With respect to the existence of increased imports, we address (i) increases in absolute terms; (ii) increases relative to domestic production; (iii) end-point-to-end-point comparison of imports; and (iv) the selection of the relevant investigation period.

8.132 Regarding the existence of serious injury, we examine (i) Argentina's consideration of the injury factors production, sales, productivity, capacity utilisation, profits/losses and employment; (ii) Argentina's consideration of other injury indicators such as stocks, costs, domestic prices, investment and exports; (iii) whether all injury factors listed in the Safeguards Agreement were considered in the investigation, and (iv) whether the findings and conclusions of the investigation are supported by the evidence.

8.133 As to the existence of a causal link between increases in imports and serious injury, we consider (i) whether there was a coincidence of trends in the relevant data, (ii) whether imports occurred "under such conditions" as to cause serious injury, and (iii) whether factors other than increased imports caused or threatened to cause serious injury.

8.134 In a final section, we summarise our considerations and conclusions and make a finding concerning Articles 2 and 4.

(a) Product segments

8.135 Regarding Argentina's segmentation of footwear into five product groups in its investigation (performance sports footwear, non-performance sports footwear, exclusively women’s footwear, town and/or casual footwear, and other) (paras. 8.112), the European Communities argues that having adopted this segmented approach, Argentina was obliged to follow it consistently through its injury analysis and to prove serious injury in all segments in which safeguards were to be imposed. The European Communities claims that "serious injury" was not proven in any of the selected five segments, and that Argentina merely used data of one or another sector as it considered appropriate for its purpose. The European Communities argues in particular that factors relating to import trends, market share, profits and losses and employment were not investigated for each market segment. At the same time, however, the European Communities states that it does not challenge Argentina's definition of a single category of like or directly competitive products, namely all footwear.

8.136 Argentina responds that the European Communities is confusing the CNCE's injury analysis of the whole of the footwear industry with the product categories that the CNCE used in the questionnaires for purposes of collecting pertinent information. In Argentina's view, a *single* "like or directly competitive" product and a *single* national industry are at issue in this case because there is sufficient elasticity of substitution on the supply and demand sides between all different segments of one single footwear market. Therefore, Argentina argues, the CNCE conducted an injury analysis regarding the footwear industry in its entirety. Consequently, there was no need for a disaggregated consideration of all the different injury factors with respect to the five product categories.

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

required at a minimum to consider each injury factor with respect to all footwear.[514] By the same token the European Communities, having accepted Argentina's aggregate like product definition, has no basis to insist on a disaggregated analysis in which injury and causation must be proven with respect to each individual product segment.[515] Thus, in our review of the injury finding, we will consider the analysis and conclusions pertaining to the footwear industry in its entirety.

(b) Are there "increased" imports in the sense of Article 2.1 and Article 4.2(a) of the Agreement?

8.138 The Agreement on Safeguards requires an increase in imports as a basic prerequisite for the application of a safeguard measure. The relevant provisions are in Articles 2.1 and 4.2(a).

8.139 Article 2.1, which sets forth the conditions for the application of a safeguard measure, reads as follows:

> "A Member (footnote omitted) 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 the like or directly competitive products."

8.140 Article 4.2 sets forth the operational requirements for determining whether the conditions identified in Article 2.1 exist. Regarding increased imports, Article 4.2(a) requires in relevant part that:

> "[I]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate…the rate and amount of the increase in imports of the product concerned in absolute and relative terms…"

8.141 Thus, to determine whether imports have increased in "such quantities" for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production.

8.142 As discussed in detail in the following sections, the European Communities claims that there was neither an absolute nor a relative increase in imports, and that Argentina therefore violated Articles 2.1 and 4.2(a).[516] The European Communities argues in this context not only that the analysis of imports was incorrect as it included MERCOSUR imports, but also that regardless of whether MERCOSUR imports are included or excluded, no increase in imports occurred.

8.143 Argentina maintains that there was both an absolute and a relative increase in imports, and that the requirements of Articles 2.1 and 4.2(a) therefore were satisfied.

---

[514] Or, to the extent that Argentina relied on data for particular product segments as the basis for conclusions pertaining to the entire industry, it was required to explain how its analysis regarding those segments related to or was representative of the industry as a whole.

[515] We note that in any case, only if serious injury or a threat thereof exists with respect to the product market segments accounting for the bulk of the industry's output will injury be evident with respect to the industry as a whole. The European Communities appears to acknowledge this, in indicating that the share of a given product category of the total industry is relevant for the injury analysis of the entire industry. See descriptive part, note 201.

[516] The European Communities also argues that Argentina's evaluation of "increased imports", because it compared end-points of the investigation period and did not consider intervening trends, violated Article 4.2(c)'s requirement that the "relevance" of those trends be explained. See descriptive part, para. 5.155.

(i) Imports in absolute terms

8.144 The data on the absolute levels of imports relied upon by Argentina in its investigation, and relied upon by both parties in their arguments before the Panel, are set forth in the table below. We note that both parties accept the accuracy of these data.

Total Imports of Footwear into Argentina, 1991-1996

	Quantity (million pairs)	Value (US$ millions)
1991	8.86	44.41
1992	16.63	110.87
1993	21.78	128.76
1994	19.84	141.48
1995	15.07	114.22
1996	13.47	116.61

8.145 The parties disagree on whether these data show an increase in the absolute level of imports consistent with the Agreement's requirement. In its investigation, and in its arguments before the Panel, Argentina compares the 1991 level of Argentina's total imports of footwear (8.86 million pairs) to the 1995 level (15.07 million pairs), and also compares the 1991 value of total imports (US$44.41 million) to the 1995 value (US$114.22 million). On this basis, Argentina concludes that there has been an absolute increase in imports, and that the Agreement's requirement for increased imports therefore has been satisfied. In Resolution 987/97 applying the definitive safeguard measure, Argentina also refers to the level of imports in 1996, stating in the fourth recital of the resolution that imports "increased during the period 1991-1996".

8.146 The European Communities argues, in part, that Argentina's analysis, which is based on an end-point-to-end-point comparison, fails to satisfy the Agreement's requirement of increased imports because it ignores intervening, declining trends over the period considered. The European Communities argues that there must be an increasing trend (in its first submission, the European Communities argues a "sharply" increasing trend) at the time the safeguard measure is imposed, citing the Agreement's language that the "product *is being imported* … in such increased quantities…". For the European Communities, therefore, the existence of a sustained downward trend over the most recent years of the period of investigation is fatal to Argentina's conclusion that there was an increase in imports. In this regard, the European Communities argues specifically that the level of imports began to decline in 1994 and that this decline continued steadily through 1996, the latest period for which data were gathered in Argentina's investigation. Thus, for the European Communities, Argentina's finding of an absolute increase in imports violates Article 2.1.

8.147 In connection with these arguments, the European Communities also appears in its first submission to criticise the five-year period of investigation chosen by Argentina, arguing regarding Argentina's comparison of 1995 to 1991 import levels that "the nature of safeguards as 'emergency' measures makes clear that their use is not appropriate in the case of a long-term increase in imports".[517] In its first oral statement,[518] the European Communities clarifies its argument on this point, stating that while the European Communities does not contest the fact that an investigation is carried out over a five year period, figures relating to a period five years in the past are of only limited

[517] See descriptive part, para. 5.149.
[518] See descriptive part, para. 5.197.

relevance, and the increase of the imports still has to be relevant at the time the decision is made to apply the measure.[519]

8.148 Argentina's response is two-fold. First, Argentina argues that that the Spanish version of Article 2.1's requirement for increased imports is in the past tense (i.e., "*han aumentado*"). Thus, it appears that for Argentina, a past increase in imports, whenever during the period of investigation it takes place, satisfies the Agreement's requirement of increased imports, even where there is an intervening decline. Second, Argentina argues that the Agreement also is silent with regard to how, specifically, an increase in imports is to be measured, thus permitting an end-point-to-end-point comparison, and that it also is silent with regard to how long and how recent a period of investigation must be. Regarding the latter point, Argentina argues that its domestic legislation requires the investigation period to be defined as the most recent five full calendar years prior to the date of the filing of the petition for a safeguard measure. For Argentina, over the 1991-1995 investigation period thus established, an end-point-to-end-point comparison of the import data shows an increase, and thus the Agreement's requirement of increased imports is satisfied. In addition, Argentina explains that 1991 was particularly relevant, as this was the year in which Argentina's market opening started to take effect.

(ii) Imports Relative to Domestic Production

8.149 Act 338[520], in which the findings and conclusions of Argentina's injury investigation were published (and which also constituted Argentina's notification under Article 12.1(c)), briefly addresses the question of whether imports increased relative to domestic production. No data table is provided in this respect in Act 338, however.

8.150 The Panel, seeking clarification, asked Argentina to identify where in the record of the investigation the analysis of imports relative to domestic production could be found, and also asked Argentina to clarify which production figures (total production, or total own production[521], and whether inclusive or exclusive of exports) had been used for this analysis. Argentina replied that total production, including exports, should be used and was used for this purpose, and referred the Panel to sheets 5429 et. seq. of the Technical Report, which Argentina states explain the estimation of production in pairs and pesos. In the tables in those pages (in particular sheets 5501 and 5505) ratios of imports to domestic production are calculated by volume and value, and a footnote to these ratios indicates that they are calculated not on the basis of production for the domestic market (shown in the table), but rather total production (not shown in the table). These ratios are referred to in the text of Section VIII.2 of Act 338.

8.151 The following are the ratios of imports to domestic production taken from sheets 5501 and 5505 of the Technical Report:

Total imports/production

	by volume	by value

[519] As indicated above, we note that the European Communities also argues, regarding the question of an absolute increase in imports, that imports from MERCOSUR countries were solely responsible for any increase in imports, and that the imports to which the measure applies (i.e., non-MERCOSUR countries) declined over the relevant period. Argentina responds that under the Agreement, a determination regarding increased imports can only be based on total imports, and that there is no possibility under the Agreement for considering only a portion of the imports. We address the general question of MERCOSUR in section E.1., *supra*, and the question of the treatment of MERCOSUR imports in the investigation in section E.4.d.iv, *infra*. In this section, we confine our consideration to total imports.

[520] WTO document G/SG/N/8/ARG/1 (Exhibit EC-16).

[521] "Own production" as used by Argentina, refers to total production exclusive of production under contract and for joint ventures.

1991	12%	11%
1992	22%	24%
1993	33%	34%
1994	28%	36%
1995	25%	34%
1996	19%	28%

On the basis of these data, Argentina argues that imports increased relative to domestic production between 1991 and 1995 (on the basis of an end-point-to-end-point comparison).[522]

(iii) Evaluation by the Panel

8.152 Before evaluating whether Argentina's finding of increased imports was in accordance with the requirements of Article 2.1 and 4.2(a), we note, first, that both parties have referred to data on both the quantity and the value of imports in connection with this requirement. The Agreement is clear that it is the data on import quantities both in absolute terms and relative to (the quantity of) domestic production that are relevant in this context, in that the Agreement refers to imports "in such increased *quantities*" (emphasis added). Therefore, our evaluation will focus on the data on import quantities[523].

a. End-point-to-end-point comparison

8.153 In order to address the European Communities' argument that an end-point-to-end-point analysis does not satisfy the requirements of the Agreement (para. 8.146), we consider first Argentina's argument that because imports in 1995 were higher than those in 1991, in both absolute and relative terms, the Agreement's requirement of an increase in imports is satisfied. With respect to the absolute import volumes, while there was as Argentina points out an end-point-to-end-point increase between 1991 and 1995 in total imports, there also was, as the European Communities points out, a decrease in 1994 and 1995, which continued in 1996. Thus, during the most recent two years of the 1991-1995 investigation period as defined by Argentina, as well as in the following year, total imports declined in absolute terms.

8.154 Given these mixed trends in the data, we note that the choice of base year has a decisive influence on whether an end-point-to-end-point comparison shows an increase or a decrease. In particular, if the base year is taken as 1992 rather than 1991, total imports declined even based on an end-point-to-end-point comparison for 1992-1995 and 1992-1996. Thus, only if 1991 is the base year is any absolute increase in total import volume apparent.

8.155 The trend in the ratio of imports to domestic production is quite similar. That is, this ratio increased in 1992 and 1993, compared to 1991, then fell steadily in 1994, 1995 and 1996. We note that the declines in the ratio of imports to production since 1993 were continuous. While the 1995 ratio was considerably higher than the 1991 ratio, a comparison of 1992 and 1995 shows only a 3 percentage point increase, and a comparison of 1992 and 1996 shows a decline. This is explained by the steady declines in imports starting in 1994 which nearly halved the ratio of imports to production between 1993 and 1996. In fact, the 1996 ratio was lower than in any preceding year of the period *except* 1991. Thus, as with the absolute volume data, the outcome of an end-point-to-end-point comparison very much depends on which years are used as the end points, as even a one-year shift can reverse the result.

[522] See, e.g., descriptive part, para. 5.159.
[523] We note that the trends in the data on import values generally confirm those on import quantities.

8.156 We believe that in assessing whether an end-point-to-end-point increase in imports satisfies the increased imports requirement of Article 2.1, the sensitivity of the comparison to the specific years used as the end-points is important as it might confirm or reverse the apparent initial conclusion. If changing the starting-point and/or ending-point of the investigation period by just one year means that the comparison shows a decline in imports rather than an increase, this necessarily signifies an intervening decrease in imports at least equal to the initial increase, thus calling into question the conclusion that there are increased imports.

8.157 In other words, if an increase in imports in fact is present, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period. That is, the two analyses should be mutually reinforcing. Where as here their results diverge, this at least raises doubts as to whether imports have increased in the sense of Article 2.1.

8.158 We note as well that both parties appear to consider relevant the question of whether any reversal of an increase in imports during the period considered is "temporary". In particular, the European Communities notes the US statement[524] that there may be reasons why imports may show a decreasing trend, including the timing of shipments, seasonality of the product, or importer concerns about the investigation. The European Communities agrees with the United States that in deciding whether the requirements of Article 2.1 are satisfied, the relevance of such trends, as well as possible others, should be carefully considered (see note 141). Thus it appears that for the European Communities, a "temporary" decrease in imports during the course of an investigation would not necessarily invalidate a finding of increased imports. Similarly, Argentina argues that it should not be impossible to make an injury and causation finding when an increase in imports has "*temporarily* stopped"[525] (emphasis added).

8.159 We too believe that the question of whether any decline in imports is "temporary" is relevant in assessing whether the "increased imports" requirement of Article 2.1 has been met. In this context, we recall Article 4.2(a)'s requirement that "the rate and amount of the increase in imports" be evaluated.[526] In our view this constitutes a requirement that the intervening *trends* of imports over the period of investigation be analysed. We note that the term "rate" connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change.

8.160 Applying this approach to imports during the investigation period defined by Argentina, we note that total imports of footwear into Argentina declined continuously after 1993. In particular, the absolute volume of imports declined by 9 per cent between 1993 and 1994, and by 24 percent between 1994 and 1995, for a cumulative decline of 31 per cent between 1993 and 1995. Similarly, the ratio of imports to domestic production in 1994 was 5 percentage points lower than in 1993, and the ratio in 1995 was 3 percentage points lower than in 1994 (a cumulative reduction of 8 percentage points between 1993 and 1995). The data for 1996 (which Argentina collected and analysed, but which it did not treat formally as within the period of investigation) confirm the declining trend in imports. In particular, the 1996 import volume was 11 percent below the 1995 level, and the ratio of

[524] See descriptive part, para. 6.39.
[525] See descriptive part, para. 5.163.
[526] We recognise that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in "*such* increased quantities" (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.

imports to production was 6 percentage points lower than in 1995.[527] Thus, between 1993 and 1996, the absolute volume of imports declined by 38 percent, and the ratio of imports to production was nearly halved, from 33 per cent to 19 per cent. Declines of this magnitude, taking place consistently over the most recent three years of the period for which data were collected can only be seen as a long-term change; such declines cannot be characterised as "temporary" reversals of an overall increase in imports.

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

8.162 We are thus unpersuaded that Argentina's end-point-to-end-point comparison for the period 1991-1995 is sufficient demonstration of "increased imports" in the sense of the Agreement. Where, as here, the volume of imports has declined continuously and significantly during each of the most recent years of the period, more than a "temporary" reversal of an increase has taken place (as reflected as well in the sensitivity of the outcome of the comparison to a one-year shift of its start or end year). In this regard, we recall the quite restrictive nature of the safeguard remedy, which is justified by the purpose of that remedy, namely to address urgent situations where a domestic industry needs temporary "breathing room" to adjust to altered conditions of competition brought about by increased imports. We cannot reconcile this purpose with a situation in which the increasing trend in imports reversed several years before the investigation began.

8.163 Finally, we note the statements concerning imports in the Preliminary Report of the Under Secretary of Foreign Trade concerning the decision to open the investigation and to apply a provisional safeguard measure[528]. In particular, regarding imports, that Resolution refers exclusively to an *anticipated* increase in imports following the removal of the DIEMs on footwear. Section seven and the conclusions of the Preliminary Report state that:

[527] Regarding the period examined by Argentina, Argentina argues that "complete" data were not available for 1996 at the time it initiated the investigation, which led it to use 1995 as the end-point of its period of investigation, and to count backward five full years as is, according to Argentina, required by its domestic law. We note, however, that data for 1996 were requested and collected in the CNCE's questionnaires, and are referred to throughout Act 338 and the Technical Report, demonstrating that in fact these data were fully available. See footnote 540, *infra*, for details on the availability of 1996 data.

[528] Exhibit ARG-1 at Section 7, and section on "Conclusions".

> "Act 266 of 10 December 1996 found that the petitioners' allegations that the absolute increase in imports of footwear would have caused serious injury to the domestic industry correspond to the evidence presented *when imports are estimated* under the hypothesis of elimination of the DIEMS; thus, the Commission finds preliminarily that there exists in the petition and in the report clear evidence that the *potential* increase in imports threatens to cause serious injury, justifying the opening of an investigation.
>
> …
>
> Regarding the circumstances necessary to make possible the application of provisional safeguard measures, *these would be recreated* only in the absence of the DIEMs." (emphasis added.)

We note that the import data considered in making this assessment covered the same products and period as those used in Argentina's definitive finding (i.e., total imports of footwear during 1991-1995)[529].

8.164 In sum, we find highly significant that the absolute volume of footwear imports and the ratio of those imports to domestic production, increased only until 1993, i.e., during the first two years of the period for which Argentina collected data, and declined continuously thereafter. We also find significant that these decreases were of such a magnitude that a one-year change in base year of the data series on the volume of imports transforms the increase relied upon by Argentina into a decline, and that the resolution applying the provisional measure refers only to anticipated increases in imports, showing that at that time, no increase in imports was present. For these reasons, we find that Argentina's investigation of footwear did not demonstrate increased imports in "such … quantities" in absolute or relative terms, as required by Article 2.1 and Article 4.2(a) of the Agreement.

8.165 We are not persuaded, however, by the argument advanced by the European Communities in its first submission that only a "sharply increasing" trend in imports at the end of the investigation period can satisfy this requirement. In our view, each situation is different, and the Agreement certainly does not identify a unique pattern of importation that satisfies the "increased imports" requirement. Depending on the particular case, there might indeed be a *temporary* downturn in imports during an investigation period which would nevertheless not invalidate a finding of increased imports.

b. Relevant period

8.166 We note the EC's criticisms of the period covered by the import data in the investigation, both that it was too long and that it ended too far in the past, and Argentina's response, in part, that the Agreement is silent regarding the investigation period, and that the Spanish text "*han aumentado*" is in the past tense, connoting a past increase in imports.[530] We agree with Argentina that the Agreement

---

[529] We note as well that Act 338, at folio 5350 (Exhibit EC-16 at 37), also refers to and confirms the decreases in imports starting in 1993, attributing these decreases to the DIEMs.

[530] In this context, we note that unlike the Spanish text, the English text of Article 2.1 authorizes the application of safeguard measures only where the product at issue "*is being imported* in such increased quantities … so as to cause or threaten to cause serious injury" which would seem to indicate that, whatever the starting-point of an investigation period, it has to end no later than the very recent past. The French text conveys the same meaning as it is in the present tense "ce produit *est importé* sur son territorire en quantités tellement accrues". The Spanish text is more ambiguous, as the phrase "que las importaciones de ese producto en su territorio *han aumentado* en tal cantidad" unequivocally means that imports have increased in the past, but it does not clearly imply that imports which have started to increase in the past necessarily also have to continue to increase at least through the recent past.

is silent regarding the period of investigation, and we also consider that it can be quite useful to an investigating authority to have five years of historical data to refer to in making its determinations. Nevertheless, we find problematic that Argentina, where it collected data for 1996, did not take them into account in its assessment of whether there were increased imports; as discussed above, the decline in imports in 1996 confirms the more than temporary nature of the decline in imports after 1993.

(c) Serious injury

8.167 In keeping with the standard of review enunciated in section E.3. (paras 8.117 - 8.121) above, we view our task in considering Argentina's serious injury analysis and determination as, in the first instance, to consider whether all injury factors listed in Article 4.2(a) - i.e., production, changes in the level of sales, productivity, capacity utilisation, profits and losses, and employment - have been considered by Argentina's national authorities, and whether an analysis of the data pertaining to those factors has been carried out. Second, we must evaluate the reasoning set forth by Argentina in its findings and conclusions to determine whether they were adequately explained and are supported by the evidence.

8.168 In its investigation, Argentina found that the domestic footwear industry was both seriously injured and threatened with serious injury caused by increased imports. In reaching this finding, Argentina primarily relied upon a comparison of data for 1991 and 1995, although it collected and analysed data for 1996 as well. We will consider first Argentina's analyses of serious injury and causation, and then separately consider Argentina's analysis of threat of serious injury. In considering the injury analysis, we will consider in turn Argentina's analysis of each factor identified in the Agreement, as well as any additional factors examined by Argentina.

(i) Production

8.169 Argentina, on the basis of a comparison of data for 1995 and 1991, concluded in its investigation that production declined, constituting evidence of serious injury to the domestic industry. Argentina considered data both for so-called "own production" (i.e., excluding production under contract and for joint ventures) and for own production plus production under contract and for joint ventures. Argentina notes that the data were estimated for the industry as a whole on the basis of macroeconomic statistics. Argentina also states, as indicated in Act 338, that there was a 7.7 per cent increase in the value of production between 1991 and 1995, which Argentina states was the result of a "change in product mix following a decision to concentrate on products with a higher unit value".

8.170 The European Communities disagrees that production declined, in view of Act 338's indication that the value of production did not decrease, but increased by 7.7 percent, between 1991 and 1995. The European Communities asserts that Argentina "discarded" this positive figure by stating that the industry shifted production to higher-unit-value products. The European Communities

---

Nonetheless, we do not share Argentina's view that in the light of the ambiguous meaning of the Spanish version of Article 2.1 of the Safeguards Agreement, WTO Members whose official language is Spanish should on that basis enjoy a greater latitude in choosing and analysing investigation periods for purposes of safeguard investigations. In this regard, we recall that Article 33.1 of the Vienna Convention on the Law of Treaties recognizes that treaties authenticated in several languages are equally authoritative in each of these languages, while Article 33.3 provides that the terms of a treaty are presumed to have the same meaning in each authentic text. Where treaty texts in different languages disclose differences in meaning which the general rules on treaty interpretation do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty should be adopted pursuant to Article 33.4 of the Vienna Convention. In this regard, we would note that the object and purpose of the Agreement (i.e., emergency action to prevent or remedy serious injury caused by increased imports) would seem to imply rapid action with respect to an ongoing (or at least quite recent) situation.

argues that Argentina was unable to explain in response to a Panel question on this point how this move toward higher-valued products was indicative of serious injury. The European Communities also questions the representativeness of the sample reflected in the questionnaire responses.

8.171 We note that, as shown below, the data provided in the questionnaire responses accounted for only one-third to one-half of the total estimated level of production.

Production

(volume in million pairs; value in million US dollars)

	Estimated data for industry as a whole		Questionnaire data
	Total production		Own production
	Volume	Value	Volume
1991	71.4	861	29.14
1992	76.9	1,036	29.29
1993	65.1	914	26.44
1994	70.3	1,001	28.80
1995	60.8	927	22.61
1996	70.7	1,097	22.07

8.172 Regarding the estimated data on total production volume, we note that on the basis of an end-point-to-end-point comparison, total production declined between 1991 and 1995 (by 14.8 percent), between 1991 and 1996 (by only one percent), and between 1992 and 1996 (by 8 percent). We also note, however, the mixed trends over the period, in particular the significant decrease between 1994 and 1995, followed by the rebound between 1995 and 1996 to slightly more than the 1994 level. Regarding the value of production, we note the 7.7 percent increase between 1991 and 1995, as well as the further increase in 1996.

8.173 The questionnaire data on the volume of own production (which represent no more than 40 percent of estimated data for the industry) show somewhat different trends. Namely, except for 1994, these data show declines throughout the period of investigation. No questionnaire data are available on the value of production.

(ii) Sales

8.174 Regarding sales, the European Communities argues that the industry's total sales were stable. The European Communities points as well to increases in the sales of women's and town and casual footwear, in spite of which, the European Communities argues, the safeguard measure was applied with respect to these categories.

8.175 Although Argentina submitted to the Panel estimated sales volume and value for the industry as a whole (used in the investigation to calculate apparent consumption – see below), its analysis of the injury factor "sales", as reflected in the discussion in Act 338 and the Technical Report, relies on the data for the sample of large and medium-sized companies from which it collected data through questionnaires. For "sales", Argentina used data on sales of own production for the domestic market, i.e., exclusive of exports, and exclusive of contract and joint venture production/sales.

8.176 The text of Act 338 states that domestic sales volume as reflected in questionnaire responses for large and medium-sized firms declined 27 percent by volume and 15 percent by value between

1991 and 1995. The text of Act 338 further indicates that volume declined in 1992, 1993, 1995 and 1996, and that value showed "a similar decline" except for 1992 when value increased by 13 percent.

8.177 The data on sales from questionnaire responses, below, are as they appear in Act 338, except those for 1996 which are taken from the Technical Report. (We note that although the text of Act 338 refers to 1996 data, the relevant data tables of Act 338 end in 1995.) The estimated data for the industry as a whole, below, were provided by Argentina in its 21 December 1998 response to Panel question 36. In that question, the Panel asked Argentina to provide inter alia questionnaire data as well as estimated data for the industry as a whole on the quantity and value of sales. The estimated data also appear in the Technical Report, at folios 5501 and 5505, where they are identified as "production destined for the domestic market", and are used in the calculation of apparent domestic consumption and import penetration. In addition, data identified as "sales for domestic market – own production" in tables on pages 50 and 53 (pairs), and 59 and 62 (pesos) of Argentina's notification of a finding of serious injury and causation (Exhibit EC-16) (Technical Report, folios 5501-5503 and 5505-5507, Exhibit ARG-3), which are broken out between performance sports footwear and other footwear, reconcile with the estimated data for the entire industry, shown below[531].

Own production for domestic sales

(volume in million pairs; value in million dollars)

	Questionnaire data		Data estimated for entire industry	
	Volume	Value	Volume	Value
1991	26.82	345.30	65.3	824.8
1992	27.21	410.45	74.0	1,010.2
1993	25.30	395.94	62.6	883.2
1994	25.58	433.39	66.6	967.0
1995	20.46	324.70	56.2	858.6
1996	19.63	311.52	67.3	1,048.6

8.178 We note first of all that the percentage changes in the sales data cited in the text of Act 338 do not correspond in all cases to those calculated from the above questionnaire data, although that text indicates that it is based on those data. Specifically, the 1991-1995 decrease in sales volume was 24 percent rather than 27 percent, while that in value was 6 percent rather than 13 percent. Sales volume increased in 1992 rather than decreasing, and sales value increased in both 1992 and 1994, rather than just in 1994. Moreover, the 1992 increase in value was 19 percent, not 13 percent.

8.179 The trends in the estimated data on own production for domestic sales differ from those in the questionnaire data. There is an increase between 1991 and 1996 in volume (3.1 per cent), and a decrease between 1992 and 1996 (9.1 per cent), and between 1991 and 1995 (13.9 per cent). Again, the trends are mixed over the period, and again there is a decrease between 1994 and 1995, followed by an increase between 1995 and 1996. On a value basis, there are increases between 1991 and 1995, 1991 and 1996, 1992 and 1996, and 1995 and 1996.

8.180 As in the case of production, the data estimated for the industry as a whole on own production for domestic sales are twice to three times higher than those compiled from questionnaire responses, and show different trends, as well. In response to a question from the Panel regarding how the questionnaire data were reconciled by Argentina with the higher figures that it estimated for the industry as a whole, Argentina stated that it conducted a detailed analysis of a sample of footwear-

[531] The value data reconcile exactly except for 1996, where they differ by $1.6 million, and the quantity data reconcile closely.

producing enterprises representing 50 percent of domestic production, and that the estimate for the industry as a whole was made for calculating apparent consumption and import market share. Argentina further stated that the CNCE also gathered qualitative information from small firms. Argentina did not respond regarding the reconciliation of the differences in the two sets of data[532].

8.181 Argentina, which as indicated had presented the estimated data, above, to the Panel as sales data in response to a question, and had discussed them as such in response to a follow-up question, at the interim review stage criticised the Panel for identifying them as sales data. Specifically, in its interim review comments, Argentina argued for the first time that the data are production data rather than sales data, that as such they are not comparable to the sales data derived from the questionnaire responses, and that the CNCE did not claim them to be comparable. Given Argentina's own representation to the Panel of these data as sales data throughout the proceedings, this criticism at the interim review stage of the Panel's use of these data is surprising, particularly given that these data reconcile to data labelled as "sales" in tables in the record of the investigation, as indicated above. Argentina's belated criticism thus raises questions about the data used in the investigation, and in particular calls into question the representativeness of the sales data from questionnaire responses that were relied upon by Argentina in its analysis of sales.

(iii) Productivity

8.182 The European Communities argues that this factor is not specifically addressed "in a separate heading in its investigation", but that the "Centro de Estudios para la Producción", in a study submitted to the Panel by the European Communities[533], found an increase in productivity in the footwear industry of 24 to 29 per cent between 1991 and 1996. We note that neither Act 338 nor the Technical Report makes specific reference to the injury factor productivity. A data series on percentage changes in productivity from the Institute for Industrial Development of the Argentine Industrial Union is included in the Final Report of the Under Secretary of Foreign Trade,[534] but no discussion or analysis of productivity appears in that report.

8.183 In answer to a Panel question regarding where in the record of the investigation an analysis of productivity can be found, Argentina stated only that the information on employment and production gathered in the questionnaire responses showed no increase in productivity between 1991 and 1995. At the interim review stage, however, Argentina pointed to a contradictory representation by the domestic industry (i.e., the petitioner, the CIC), reflected in Act 338, that productivity had increased due to investments in new equipment:

> "…these investments had made possible the transformation of the sector with improvements in productivity and product quality to enable it to compete on the domestic and foreign markets. It is important to note, however, that according to the CIC, these investments were basically directed towards improving productivity and the quality of domestic footwear."[535]

(iv) Capacity Utilisation

8.184 Regarding capacity utilisation, the European Communities notes that installed capacity increased over the period of investigation, and that Argentina seemed not to have provided statistics on capacity utilisation.

---

[532] Argentina's 15 February 1999 response to Panel question 3.
[533] Exhibit EC-29.
[534] Exhibit ARG-5.
[535] Exhibit EC-16, Section VI.6, at 18.

8.185 We note that Act 338 refers to representations by the petitioners to the CNCE regarding declines in capacity utilisation, but does not indicate whether these data were evaluated by the CNCE during the course of the investigation.[536] Act 338 does discuss the data gathered by the CNCE on installed capacity for various segments of the industry, which indicate among other things an increase between 1991 and 1995, and a further increase in 1996, in capacity to produce performance sports footwear. (Act 338's discussion on capacity utilisation and installed capacity is repeated in the Technical Report.) However, we note that the data on the industry's total capacity do not appear to have been aggregated or considered in the investigation; the relevant table of the Technical Report containing capacity data shows the data broken out by market segment, but not in total for all segments. The data on installed capacity, as set forth in the Technical Report, are as follows:

Installed Capacity

(thousand pairs)

	Performance sports	Non-performance sports	Women's	Town and casual	Other
1991	14,813	15,280	294	857	12,797
1992	15,317	15,513	340	1,266	12,753
1993	17,368	15,747	628	2,096	2,966
1994	17,038	14,649	725	2,277	3,028
1995	18,675	15,309	801	1,874	2,945
1996	19,799	15,192	448	2,205	2,945

There is no corresponding table in Act 338 or the Technical Report, however, concerning the *utilisation* of installed capacity.

8.186 We note that Argentina attaches as an exhibit to its first submission a graph showing changes in capacity utilisation for the industry as a whole between 1991 and 1995. In the text of that submission, Argentina states that to examine capacity utilisation, it is necessary to analyse production and capacity, and in this regard refers to data obtained in questionnaire responses. The submission goes on to state that "on the basis of the analysis of the installed capacity and production figures" (presumably from the questionnaire data), "the CNCE reached the conclusion" that capacity utilisation had decreased between 1991 and 1995. In answer to a Panel question, Argentina provided a data series on capacity utilisation. In answer to a further Panel question regarding where in the record of the investigation these data and the analysis on capacity utilisation could be found, Argentina indicated that the data were derived from the data tables in the Technical Report on capacity and production.

(v) Profits and losses

8.187 The European Communities argues that the evidence gathered in the investigation concerning profit-and-loss was insufficient to demonstrate serious injury or threat, and that the methodology was questionable because it was based on global financial data for the responding companies, and because different subsets of companies were used for different indicators. The European Communities argues that although Act 338 refers to sales below breakeven point, the profit-and-loss data contained therein do not show any losses.

[536] Exhibit EC-16, Section VI.6, at 17.

8.188 Act 338 discusses and contains data on a range of financial indicators, including gross margin/sales; operating profit(loss)/sales; net margin/sales; net margin/assets; net margin/equity; average cost of commercial and financial debt; interest coverage; current ratio; acid test ratio; and total indebtedness, *inter alia*. The data and discussion in Act 338 on these financial indicators also appear in the Technical Report. A summary of the data from Act 338 and the Technical Report on financial indicators is set forth below:

Accounting Data

	Total enterprises		Exclusively footwear mfg.	
	1991	1995	1991	1995
Gross margin/sales				
mean	32%	27%	48%	27%
median	30%	26%	48%	26%
Operating profit (loss) sales				
mean	14%	4%	26%	10%
median	12%	6%	26%	10%
Net margin/sales				
mean	15%	1%	24%	6%
median	13%	4%	24%	6%
Net margin/assets				
mean	18%	3%	33%	13%
median	13%	4%	33%	13%
Net margin/equity				
mean	27%	2%	57%	23%
median	25%	6%	57%	23%
Average cost of commercial and financial debt				
mean	9% (1993)	14%	4% (1993)	6%
median	8% (1993)	12%	5% (1993)	8%
Interest coverage (times interest earned)				
mean	3.92 (1993)	3.10	4.32 (1993)	3.64
median	4.02 (1993)	0.68	4.32 (1993)	3.64
Current ratio				
mean	727%	178%	190%	225%
median	190%	183%	190%	250%
Acid test ratio				
mean	446%	107%	118%	141%
median	95%	89%	118%	129%
Total indebtedness				
mean	70%	136%	74%	91%
median	74%	80%	74%	72%

Sales/Breakeven Point for Footwear Operations of Multi-Product Firms
(questionnaire data)

1991	19.80%
1992	33.70%
1993	6.57%
1994	8.42%
1995	-34.16%
1996	-24.51%

8.189 Argentina indicates that the data on various profit margins (gross profit, operating profit and net profit) were taken from the accounting statements of six large and six medium-sized companies responding to questionnaires. Four of the medium-sized companies produced only footwear, and their accounting data were broken out separately. In response to a question from the Panel at the second meeting, Argentina indicated orally, with respect to the responding companies producing other products along with footwear (i.e., the "multi-product" companies), that footwear accounted for at least 70 percent of each of those companies' total operations. Argentina also indicates that it gathered through questionnaires financial data specifically on the footwear operations of ten responding companies, from which it calculated a "break-even point", that is, the "point at which average income on sales covers the variable costs of the pairs sold and the fixed costs of the pairs produced."

8.190 We note that the profit-and-loss data above show that the operating profit of the footwear-only enterprises declined from 26 percent to 10 percent of sales between 1991 and 1995, while the net profit of these companies, declined from 24 percent to 6 percent. We also note that both groups of companies remained profitable at the end of the investigation period. By contrast, the breakeven analysis for footwear operations shows that sales revenue was 34.2 percent below the breakeven point in 1995 and 24.5 percent below breakeven in 1996, down from 19.8 percent above breakeven in 1991. In response to a Panel question regarding the substantial differences between these two sets of data, Argentina responded in part that both data series, in spite of differences in how they were calculated, show negative trends.

(vi) Employment

8.191 The European Communities argues that the data on employment show relative stability, contrary to Argentina's characterisation that employment declined over the period of investigation. In support of this argument, the European Communities notes Act 338's reference to a five percent decline in employment between 1991 and 1995 based on questionnaires; the European Communities refers as well to employment data contained in the document from the Centro de Estudios Para la Produccion[537].

8.192 Argentina states that Act 338, on the basis of questionnaire responses, indicates a 5 percent decline in employment between 1991 and 1995. Act 338 also indicates that the petitioner, CIC, argued that employment in the footwear industry had declined from 42,317 to 27,896 between 1991 and 1995, or by 34 per cent. The questionnaire data set forth in Act 338 are show in the table below.

[537] Exhibit EC-29

Total Number of Employees of Responding Companies
(questionnaire data)

	Operations Related to footwear production	Total
1991	10,797	13,995
1992	11,493	15,338
1993	11,258	14,863
1994	11,040	14,468
1995	10,237	13,160
1996	10,098	12,818
1991-1995	-5%	-5%

8.193 The panel asked Argentina where in the record of the investigation it had discussed and reconciled the very different levels and trends in the data from the CIC and the questionnaire responses. Argentina replied that the questionnaires had provided a "representative sample" of enterprises, which had "confirmed the downward trend in employment", a trend that also was confirmed by the Final Report of the Under Secretary of Foreign Trade[538] which showed a 21 percent decline based on information from the Industrial Development Institute of the Argentine Industrial Union. Furthermore, although Act 338 indicates that the questionnaires showed a 5 per cent decline in employment, Argentina stated in answer to a Panel question that the questionnaire data show a 13 per cent decline. At the second meeting of the Panel, Argentina indicated that the 13 percent decline was the decline in employment for firms that reported data for both 1991 and 1995. The five percent decline represented the decline in employment for all firms reporting in 1991 and all firms reporting in 1995, whether or not those individual firms reported data in both years. Argentina accounts for the difference by indicating that some new firms entered the footwear industry between 1991 and 1995. In Argentina's view, the 13 percent decline is the more representative figure, because it comes from a consistent sample of companies.

(vii) Other injury indicators considered

a. Stocks (inventories)

8.194 The data collected in the questionnaires are presented separately for the five product segments. The data show increases in inventories between 1991 and 1995 and 1996 for all product lines except women's shoes (which is a very small part of the total). The reasons for the inventory build-up are presented separately, and are reviewed in the Technical Report firm by firm. Most of the firms indicate that an increase in imports was the cause. A footnote to this section of the report indicates that the sample of companies responding varied considerably from year to year, rendering non-representative a comparison of data for different years.

8.195 The European Communities makes no specific argument with respect to this factor.

b. Costs

8.196 Argentina indicates that on average, producers responding to the questionnaire reported increased costs over the period (a mean increase of 17 per cent and a median increase of 12 percent). A variety of domestic and imported input materials whose costs had increased are identified in Act 338.

[538] Exhibit ARG-5.

8.197 The European Communities makes no specific argument with respect to this factor.

c. Domestic prices

8.198 In Act 338 Argentina noted wholesale and retail price index data published in INDEC, which in general show increases between 1991 and 1995. Argentina attributed these increases to increased costs and to the change in product mix, noting that indices have difficulty reflecting product mix changes, and thus must be used with caution. There does not appear to be any other data specifically regarding domestic producers' prices in Argentina's reports concerning the investigation.

8.199 The European Communities argues that domestic price is often one of the more significant indicators to establish whether a given sector has suffered damage as a consequence of imports. According to the European Communities, the official statistics cited in Act 338 regarding domestic prices show no reduction in price between 1991 and 1995, and show an increase between 1991 and 1996. Despite these trends, the European Communities maintains, Argentina found it necessary to impose safeguard measures.

d. Investment

8.200 Significant levels of investment were reported during the period investigated, although on a year-to-year basis they showed a somewhat declining trend. Act 338 indicates that in the early part of the period, investment was in new machines, then subsequently in marks and plants; and that the CIC stated in the petition that the investment had been to improve competitiveness through new technology, closing inefficient plants and developing new product lines.

8.201 The European Communities argues that Argentina in Act 338 notes the industry's substantive efforts to improve productivity, and specifically indicates that 168 million pesos were invested during 1991-1995, with a further 17 million pesos in 1996. For the European Communities, these positive statements hardly support an impression of an industry which suffers "significant overall impairment", but on the contrary an optimistic industry.

8.202 Argentina disagrees with the European Communities that the investments made in the sector were an indicator of good health. According to Argentina, the change in consumer patterns made it necessary to change the domestic product mix in order to adapt to the new conditions, and this called for investments, particularly in machinery, equipment and tooling, both domestic and imported, that were independent from the economic results and represented the only way of remaining in the market.

e. Exports

8.203 The following data on exports (from questionnaire responses from medium and large companies; and compiled by CNCE from official statistics from INDEC) were compiled during the investigation:

Exports
(in thousands of pairs)

	Own production (Questionnaire data)			INDEC Data
	Total	Mercosur	Other	Total
1991	199	124	75	N/A
1992	1,461	730	731	2,670
1993	2,158	1,592	567	3,470
1994	2,472	1,713	758	3,040
1995	2,913	2,360	553	4,510
1996	3,148	2,791	358	3,240

Act 338 emphasises specifically the growth in exports to Mercosur countries, and notes the fluctuating trend in exports to other destinations. Act 338 draws no conclusion about exports.

8.204 The European Communities makes no specific arguments regarding Argentina's exports of footwear.

(viii) Evaluation by the Panel

8.205 Articles 4.2(a) and (b), and 4.2(c) which includes by cross-reference Article 3, respectively set forth the Agreement's requirements concerning the investigation regarding serious injury and concerning the report(s) containing the investigation's results. Article 4.2(a) requires that during the investigation, the competent authority shall "evaluate all relevant factors of an objective and quantifiable nature". It appears that to satisfy this requirement, the authority should first conduct an appraisal of the data, including confirmation or verification of their accuracy and representativeness. Second, Article 4.2(a) and (b) require full analysis and evaluation of those data, and 4.2(c) including by cross-reference Article 3, requires written presentation of a detailed analysis of the case, including the findings and reasoned conclusions reached on all pertinent issues of fact and law, and a demonstration of the relevance of the factors examined.

8.206 In the light of these requirements, we must consider, first, whether all injury factors listed in the Agreement were considered by Argentina, as the text of Article 4.2(a) of the Agreement ("all relevant factors….including …changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment") is unambiguous that at a minimum each of the factors listed, in addition to all other factors that are "relevant", must be considered (see paras. 8.122 8.124).

8.207 Second, in accordance with Articles 4.2(c)/3 and 4.2(a) and (b), we must consider whether Argentina's findings and conclusions, as set forth in the reports containing the results of the investigation, are supported by the evidence, i.e., whether the explanations and discussion in the reports convincingly demonstrate the link between the investigation's findings and conclusions and the evidence relied upon.

a. Consideration in the investigation of the injury factors listed in the Agreement

8.208 Turning to the first question, we note as discussed above that the analysis by the CNCE includes consideration of the following factors: sales, production, profits and losses and employment.

8.209 Regarding *capacity utilisation*, in the investigation the data on installed capacity appear to have been collected and discussed only on a disaggregated basis by market segment; the discussion in the texts of Act 338 and the Technical Report also refers to changes in installed capacity (but not capacity utilisation) on a firm-by-firm basis for ten firms responding to the questionnaire. The only

reference to capacity utilisation in Act 338 and the Technical Report is to a representation by the petitioners. There is no indication in those texts that this representation was either confirmed or relied upon by CNCE, nor is there any discussion or explanation of how the information for individual firms was related to the situation of the industry as a whole. In addition, Argentina's submissions in this dispute, which present calculations of capacity utilisation based on questionnaire responses, show different rates of capacity utilisation from those submitted by the petitioners quoted in Act 338 and the Technical Report, confirming that the CNCE did not rely on the petitioners' representations regarding capacity utilisation.

8.210 Thus, although Argentina's submissions in this dispute contain data and discussion of this factor, there is no evidence that it was fully considered in the injury investigation. To the contrary, it appears that this analysis was conducted specifically for this dispute settlement proceeding.

8.211 The situation with respect to *productivity* is similar. As noted above, while the Final Report of the Under Secretary of Foreign Trade[539] contains an index of changes in the productivity of the Argentine footwear industry from the Institute of Industrial Development of the Argentine Industrial Union, there is no analysis of changes in productivity either in this document or in the text of Act 338 or the Technical Report. Moreover, given that this document postdates the completion of the CNCE's investigation and the forwarding of its conclusions, it is clear that the statistical information contained therein was not considered by the CNCE in reaching its finding of serious injury. Further, regarding the representation by the petitioners that productivity increased, there is no indication in the Technical Report that this was confirmed or relied upon by the CNCE. In fact, Argentina's answer to a Panel question indicates that the employment and production data show no increase in productivity.

b. Whether the findings and conclusions of the investigation are supported by the evidence

8.212 Moving to the second question, i.e., whether the findings and conclusions of the investigation are supported by the evidence, we find a number of aspects of the investigation to be problematic. Our primary concerns are (1) the treatment of the data for 1996; (2) the almost exclusive reliance on end-point-to-end-point analysis; and (3) the lack of apparent support in the evidence considered and reasoning applied for various of the conclusions related to injury, in part due to unreconciled differences in some of the data series relied upon.

i. Treatment of 1996 data

8.213 Regarding the treatment of the 1996 data, we note that although these data were gathered during the normal course of the investigation[540], in most instances Argentina's evaluation and

[539] Exhibit ARG-5.

[540] As noted above, the questionnaires sent by the CNCE requested data on the period 1991-1996. In its interim review comments, Argentina stated, particularly regarding the financial data, that the 1996 data were incomplete and therefore would skew any trend analysis. A review of the Technical Report shows that data for 1996 are contained in essentially all of the tables included in the Technical Report concerning the situation of the Argentine industry; and the Technical Report does not indicate any problem of incompleteness of the 1996 data or lack of comparability with the data for the earlier years. Although, as Argentina points out, and as explained below, the tables on the financial data show that, for certain indicators, the sample size in 1996 was smaller than in some of the earlier years, these data are included in all of the graphs on financial ratios, with no disclaimers as to their reliability or comparability, and some of the 1996 data also are referred to in the Technical Report's discussions, again with no disclaimers. The details of the periods covered by the data in the Technical Report are as follows:

Body of Technical Report (folios 5353-5523): Except where specifically indicated otherwise, all tables and graphs contain 1996 data, with no indication of any issues of incompleteness or lack of comparability --

conclusions regarding the different injury factors were based only on data through 1995. We recall here Article 4.2(a)'s requirement that "all relevant factors" must be considered. In our view, in the context of a safeguard investigation, the most *relevant* information is certainly the most *recent*. We must emphasise here that we do not find that an investigating authority must continuously update the data in its investigation. Such a requirement would be unnecessarily burdensome and difficult to administer. Rather we believe that in requiring consideration of all "relevant" information, the Agreement requires consideration of the most *recent* information available at the time the investigation is conducted. Where, as here, such data are available, we believe that they must be fully taken into consideration in the investigation; in the absence of adequate explanation by the investigating authority, they cannot simply be disregarded.

8.214 In this regard, while of course the data for 1995 are highly relevant in the context of Argentina's investigation, the data for 1996 are as well. We note in particular that the data for 1996 for some injury factors -- notably estimated data on production and sales (or production for the domestic market) -- show upturns from the 1995 levels. We do not consider that such upturns would necessarily foreclose the possibility that serious injury could be found. Nevertheless, their existence certainly would put an extra demand on the investigating authority to explain why, despite the apparent improvement, serious injury was still present or imminent. Argentina, while acknowledging

---

Tables 1-5 – undated company-specific qualitative information including on the conduct of the investigation, as well as undated information on tariff classification and on the DIEMs; Tables 6 and 7 (and accompanying graphs) – comparison of value added in footwear sector with other economic indicators; Tables 8-11 -- financial data for 1991 and 1995 only (extracted from 1991-1996 data series contained in Annex 4 – see below); Table 12 – breakeven analysis (table contains 1996 data, which text refers to and uses, with no indication of any lack of comparability with earlier years' data); Tables 13-15 – import and export and trade balance data; Tables 16-18 – imports by country of origin; Table 19 – ranking of importers; Tables 20a-c and 21a-c – apparent consumption and import market share.

Annex 2 (folios 5578-5584) – qualitative information from small enterprises covering the period 1991-1996, inclusive.

Annex 3 (folios 5585-5646) – questionnaire data from medium and large enterprises. Except where specifically noted, all tables and graphs contain 1996 data: Tables 1-11 – undated qualitative information on plant locations, types of shoes produced, etc.; Tables 12-15 – own production; Table 16 – contractor and joint venture production; Table 18 – total production; Tables 18.I-III, 19.I-III, 20.I-III – domestic sales of own production; Table 21 – undated qualitative information on firms' exporting activity; Tables 22-30 and 31.a-c – exports of own production; Tables 32-34 – inventories (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 35a-b, 36a-b, 37a-b – purchases of inputs; Tables 38-40 set forth 1991-1995 end-point-to-end-point percent changes in costs and prices and in use of different input materials; Tables 41-43 – installed capacity (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 44a-b – investment; Tables 45-47 – employment (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 48-50 – total salaries (notes indicate variability in sample size over the period, not affecting 1996 data); Tables 51-52 – undated qualitative information on materials and technology of footwear imported by producers.

Annex 4 (folios 5647-5716) – equity and financial situation of medium and large enterprises: All tables and charts contain 1996 data. The tables indicate the number of firms responding in each year, and for most indicators show a smaller number of responses in 1996 than in most other years surveyed. Neither the methodological notes in Annex 4 (folio 5648), nor the text in the body of the Technical Report concerning the financial data (folios 5465-5474) as noted above, makes any reference to a lack of comparability of the 1996 financial data with data for the other years. The graphs in Annex 4 also all cover the period 1991-1996, again with no disclaimer concerning the 1996 data.

Annex 5 (folios 5717-5749) – INDEC data on exports and imports: All tables and charts contain 1996 data.

Note that the question of 1996 data is not relevant for Annex 1 (folios 5524–5577), which concerns the international footwear industry, i.e., in countries other than Argentina, and which draws its statistical data from a study entitled "World Footwear Markets 1997" conducted by SATRA, a British footwear technology centre (see folio 5408, footnote 23). Nor is this issue relevant for Annex 6 (folios 5750-5823), which summarises the parties' arguments in the investigation and contains no statistical data.

that such upturns took place, has not provided the necessary explanation and context to demonstrate that upturns in 1996 would not affect the conclusions reached on the basis of 1991-1995 data.

8.215 In this context, we note Argentina's argument that its domestic safeguard legislation required the period of investigation to be 1991-1995 (i.e., the five full calendar years preceding the date on which the petition was filed). As a factual matter, the only reference that we find in the law[541] to any time period is in the section outlining the requirements for safeguard *petitions*, which specifies that any *petition* for a safeguard measure must contain *import statistics* covering the most recent five full calendar years prior to the submission of the petition. (The law is silent regarding the period to be covered by the data for the remaining injury factors to be included in a petition.) While a basis of five years of historical data in a petition clearly can be useful to an authority in deciding whether to initiate an investigation, this certainly does not and should not preclude the analysis of additional and more recent available information in the investigation.

8.216 Regarding the investigation's almost exclusive reliance on end-point-to-end-point comparisons in its analysis of the changes in the situation of the industry, we have the same concerns as were noted above with regard to the "increased imports" analysis. Here we note in particular that if intervening trends are not systematically considered and factored into the analysis, the competent authorities are not fulfilling Article 4.2(a)'s requirement to analyse "all relevant factors", and in addition, the situation of the domestic industry is not ascertained in full. For example, the situation of an industry whose production drops drastically in one year, but then recovers steadily thereafter, although to a level still somewhat below the starting level, arguably would be quite different from the situation of an industry whose production drops continuously over an extended period. An end-point-to-end-point analysis might be quite similar in the two cases, whereas consideration of the year-to-year changes and trends might lead to entirely opposite conclusions.

8.217 We believe that consideration of changes over the course of the investigation period in the various injury factors is indispensable for determining whether an industry is seriously injured or imminently threatened with serious injury. An end-point-to-end-point comparison, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors as required[542].

ii. Differences in data

8.218 We have certain concerns over how the data were analysed in the investigation. While we acknowledge the challenging task of gathering comprehensive information due to the scope of the product definition, in a number of cases, the data relied on show discrepancies which were not explained or reconciled in Act 338 or the Technical Report, and in addition no explanations were offered regarding why one set of data was used in preference to another. In the absence of such explanations, the findings and conclusions reached on the basis of such data are not "reasoned" in the sense of Article 3.1/4.2(c), and therefore are not supported by the evidence.

8.219 Regarding the lack of explanation over the derivation and representativeness of, and the differences between, the multiple data series on some of the factors, we note that for a number of factors, the CNCE developed multiple data series. Some of these were based on questionnaire responses compiled by the CNCE, some were estimated by the CNCE from macroeconomic, census or other published data, and some represented different methods for calculating similar indicators (for example, in the case of employment and profit and loss data). We recognise and appreciate the CNCE's efforts to conduct a thorough investigation and to consider as much data in as many forms as

[541] WTO document G/SG/N/1/ARG/3, submitted as Exhibit EC-10.

[542] We note that our concerns over the near-exclusive use of an end-point-to-end-point analysis are heightened by the treatment of 1996 data as set forth in the preceding section.

possible. What we find problematic, however, is that the CNCE's findings fail to make clear in some cases the basis on which the different data series were developed, which ones are the most representative and how the sometimes significant differences between them can be reconciled.

8.220 For example, on employment, Act 338 refers to a representation by the petitioners that employment declined by 34 percent between 1991 and 1995, but also indicates that questionnaire results reflected a 5 percent decline. In response to a Panel question, Argentina stated that the questionnaire data showed a 13 percent decline, and referred as well to employment data from the Argentine Industrial Union showing a 21 percent decline. Upon questioning by the Panel as to how these different data could be reconciled, Argentina replied that all of the data showed declines, and only then provided the explanation noted above as to the different compositions of the questionnaire responses included in the calculations of the 5 percent and 13 percent declines.

8.221 We must take issue with Argentina's failure to explain or to put into context these figures. In determining whether serious injury exists or is threatened, we believe that the size of a decline is indeed important, and that there must be sufficient explanation (as required under Article 4.2(c)) of the "relevance" of the decline. That is, there should be a full explanation of why one set of data is more representative and reliable than the others, and why, for example, an employment decline of a given percentage supports a finding of serious injury or threat to the particular industry being considered.

8.222 The data presented on production and sales (or production for the domestic market) present similar issues. As noted, the CNCE gathered data on these injury factors through questionnaire responses, and then used these data in some, but not all, contexts. Rather, the CNCE used as well its own estimates of total data for the industry as a whole. Although the questionnaire data accounted for only 40 percent or less of the estimates for the industry as a whole, there is no systematic explanation reconciling these estimates to the questionnaire responses, particularly where their trends diverge. Nor is there an explanation in Act 338 or the Technical Report of why the questionnaire data are used in one context and the estimated data in another. In response to a question from the Panel on this point, Argentina stated that the estimated data were used to calculate apparent consumption and import market share. We do not find this to provide sufficient explanation or reconciliation of the different data sets. First, it was provided only in response to a Panel question, and did not form part of the CNCE's analysis and report on the investigation. Second, this response does not reflect the fact that in Act 338 it is the estimated data that are used in the discussion of changes in production. Moreover, regarding the questionnaire data on sales, we recall the unexplained discrepancies between the percentage changes referred to in the text of Act 338 and those that are calculated from the data tables on which the text relies. Such discrepancies further call into question the conclusions drawn from the data.

8.223 We note that similar issues surround the data on various financial indicators. Argentina has explained that the data on gross profitability, operating profitability and net profitability were derived from the accounting statements of the reporting firms, and that four of these companies produced only footwear while the other eight produced other products as well. Also according to Argentina, footwear accounted for at least 70 percent of the multi-product firms' operations. While the data from accounting statements show that for both sets of companies, gross profits, operating profits and net profits all declined as a percentage of sales between 1991 and 1995, we note that footwear-only companies performed better than the multi-product firms during this period. In particular, the 1995 profitability ratios were higher for the footwear-only companies than for the multi-product firms. We also note that for both groups of companies, all measures of profitability remained positive in 1995.

8.224 The "break-even" analysis performed by Argentina on the basis of questionnaire data exclusively for footwear operations of multi-product firms shows that sales fell short of the break-even point by approximately 34 percent in 1995, whereas in 1991 sales had exceeded break-even by 20 percent. We note that footwear accounted for the large majority of the operations of the firms

providing financial data, and that breakeven analysis is another method for calculating net profit[543]; and although there were downward trends in both sets of data, the significant divergence between the results of the net profit analysis based on accounting data for all firms and the results of the breakeven analysis for the subset of multi-product firms raises questions.

iii. Conclusions unsupported by data

8.225 Our concern regarding conclusions unsupported by reasoning and/or statistical evidence is partly based on the problems outlined above. That is, where several sets of data are identified, but their differences are not explained or reconciled (as is the case, for example, with employment and profit and loss data), the conclusion drawn is not in our view properly supported by the evidence. More generally, it is not sufficient to only present data (whether in one or several series), and then state a conclusion. Rather, there is a need for a reasoned explanation *linking* the data to the conclusion.

8.226 We note this problem *inter alia* in connection with production. Act 338 and the Technical Report indicate that the data on production estimated for the industry as a whole support a finding of serious injury, noting that production volume declined between 1991 and 1995. These documents also point out, however, that the value of production increased. The explanation provided for the increase in value is that domestic producers had chosen to shift toward production of higher-valued footwear. Similarly, Act 338's references to domestic producers' prices indicate an increasing price trend, which Act 338 attributes to the same shift in product mix. While Act 338's implication clearly is that such a shift is evidence of serious injury, Argentina does not explain this counterintuitive proposition. Thus, while it is not impossible that such a shift might occur in the context of serious injury, if so it requires a detailed explanation based on objective factual evidence. We find neither such an explanation nor such evidence in the materials cited by Argentina in connection with the analysis of production in the investigation.

8.227 Another example of this problem is with respect to the data on sales. As discussed, although during the panel proceedings Argentina identified to the Panel certain data in the record as estimated sales data for the industry as a whole, at the interim review stage Argentina criticised the Panel for having relied on these data as such. Whether these are sales data in the strict sense or data on production destined for the domestic market, we note that they were used by Argentina in its investigation at a minimum as a proxy for industry-wide sales (i.e., as the domestic industry's contribution to domestic consumption), and they are more than twice the level of the sales data from the questionnaires, and show different trends, including in 1996. If as Argentina argued at the interim review stage, these data are simply not comparable to the questionnaire data on sales, then it is not clear on what basis the representativeness of the questionnaire data could have been judged during the investigation. This calls into the question the reliability of the CNCE's conclusions as to sales trends for the industry as a whole. We note in this regard in addition that Argentina's criticism of the Panel's use of the industry-wide data refers in part to the fact that as production data, they would include inventories. While this may be the case, we note that there appear to be no consistent data in the record regarding inventories which could have been used by Argentina to adjust the data on production destined for the domestic market. In fact, the Technical Report states concerning the data

[543] The breakeven point is the point at which net profit exactly equals zero, i.e., where sales revenues exactly cover fixed and variable costs. See, e.g., C. Horngren and G. Sundem, Introduction to Management Accounting, 7th ed., Prentice-Hall, 1987, p. 30-43.

on inventories that the sample of responding companies varied considerably from year to year, rendering non-representative a comparison of inventory data for different years[544].

(d) Causation

8.228 We consider next Argentina's finding that increased imports had caused serious injury to the domestic industry. In keeping with our standard of review, we will base our judgement on whether this finding was adequately explained and supported by the evidence of record in the investigation. In this regard, we recall the relevant provisions of the Safeguards Agreement, namely subparagraphs (a - c) of Article 4.2:

> "2.(a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of the Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales production, productivity, capacity utilisation, profits and losses and employment.
>
> (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.
>
> (c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

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

(i) Summary of parties' arguments

8.230 The European Communities argues that Argentina's analysis of causation is inadequate. The European Communities cites a number of passages from the notification of the decision to apply a safeguard measure (which are repeated in Act 338's findings on imports and causation), describing the changes in imports levels and market share between 1991 and 1995, and the conclusion that imports increased during that period. The European Communities cites additional passages from the notification of the decision to apply a safeguard measure, (which also are repeated in Act 338) on "the effects of imports on domestic production", in particular the conclusion that domestic production declined between 1991 and 1995, and was "replaced by imports, essentially cheap imports". In the EC's view, these passages constitute Argentina's analysis of causation.

[544] Exhibit ARG-3, folio 5453, footnote 36.

8.231 Argentina also indicates that the analysis and basis for its conclusion that there was a causal link is contained in the same passages cited by the European Communities from the notification of the decision to apply a safeguard measure/Act 338. In this regard, Argentina argues that it "correlated" the increase in imports with increases in import market share, declines in domestic production and employment, increases in domestic production costs, declines in profitability, etc. In addition, in response to a question from the Panel, Argentina states that the causal relationship "is developed throughout the 10,000 pages making up the file", and "arises logically" from the interaction between "the rapid growth of imports and the deteriorating employment situation in the footwear industry which led to the replacement of domestic production by imports". In other words, Argentina argues, the causal relationship "emerges from the analysis of each one of the relevant parts of the file" of the investigation. In addition Argentina argues that the CNCE determined that the contribution of the footwear industry to GDP fell between 1992 and 1993, showing a relative deterioration in that industry compared with production in the economy as a whole, and that this deterioration was correlated with the faster growth of footwear imports than total imports between 1991 and 1992[545].

8.232 The passages from the notification/Act 338 cited by both parties as the relevant ones concerning imports are as follows:

> "(a) Imports: the increase in imports, both in absolute terms and relative to domestic production, is of the kind covered by the Agreement on Safeguards. There is an increase such as to cause significant impairment to the domestic industry. This conclusion is based on the following facts:
>
> - The c.i.f. value of imports increased by 157 per cent between 1991 and 1995, and by 163 per cent between 1991 and 1996 (Section VII.1).
>
> - The quantity of pairs imported increased by 70 per cent between 1991 and 1995, and by 52 per cent between 1991 and 1996 (Section VII.1).
>
> - The domestic market share of imports also increased substantially. For all types of footwear, the share of imports in apparent consumption, measured at current prices (pesos), increased from 10 per cent in 1991 to 27 per cent in 1995, while measured in numbers of pairs it rose from 12 per cent in 1991 to 21 per cent in 1995, reaching a peak of 25 per cent in 1997 (Section VIII.1 and VIII.2).
>
> - The growth of imports was greater in the performance sports shoe segment than for other types of footwear (Section VIII.2).
>
> - Owing to their lower price, imports exerted strong pressure on the industry, significantly affecting results (Section XIII.1).
>
> - The international picture shows a strong growth of imports of footwear and major restructuring processes, together with many cases of government action to restrict such imports (Section IX).
>
> Thus, an absolute growth of imports between 1991 and 1995 has been found to exist. Furthermore, this increase has also taken place relative to domestic production and the domestic market."

[545] Exhibit ARG-3, Tables 6 and 7 (folios 5431 and 5432), Charts 7 and 8 (folios 5434 and 5435), and Exhibit EC-16 (Act 338), Table 1.

8.233 The passages from the notification/Act 338 cited by both parties as the relevant ones concerning the effects of imports are the following:

"(b) Effects of imports on domestic production: increased imports are causing serious injury to the domestic industry and there is a further threat of injury in the absence of safeguard measures, according to the factual findings of the investigation:

- During the period under investigation, the volume of output declined both overall and for the domestic market. The decline was greater for the sample of enterprises surveyed than for estimated total output based on macroeconomic statistics (Section VI.1).

- The performance of production measured at current prices was different from that of production in physical terms, showing a growth of 7.7 per cent between 1991 and 1995. This is accounted for by the fact that the industry shifted production to higher unit-value products in response to demand factors and the need to compete in the international footwear trade within the constraints of the Argentine rules of the game (Section VI.1).

- This decline in output was replaced by imports, essentially cheap imports, as the investigation shows a growth in apparent consumption, both in current pesos and in pairs, with the sole exception of the latter estimate for the year 1995, which showed a significant drop due to the economic recession (Section XIII.1).

- Production for the domestic market declined proportionally more than total output, as exports increased significantly over the period 1991-1995 (Section VI.2 and VI.3).

- Although the effect of the special minimum import duties (DIEMs) began in 1994 and increased between 1995 and 1996, the industry's condition has deteriorated, with a demonstrated reduction in employment, rising inventories and worsening of the economic and financial situation of companies (Section VI)."[546]

8.234 In the view of the European Communities, most of the explanations of causal link contained in the above passages are in reality simple juxtapositions of statements about increased imports and injury, and thus are not sufficient to satisfy the requirements of Article 4.2. The European Communities recalls the statement of the Panel in *Brazil – Milk Powder* that it was not sufficient for an authority to refer to the evidence it considered and then state its conclusion, but rather that "[i]t was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding".[547]

8.235 The European Communities further argues that only in the statements in Act 338 concerning the prices of imports is there any reference to the relationship between the situation of the domestic industry and the imports, but in the EC's view, these statements are unsupported by any evidence

[546] See Exhibit EC-17, document G/SG/N/10/ARG/1, G/SG/N/11/ARG/1 of 15 September 1997, pp. 2-3. The same reasons are also given in the injury notification of 25 July 1997, Exhibit EC-16, document G/SG/N/8/ARG/1, pp. 37 and 38. See also Exhibit EC-20, document G/SG/N/10/ARG/1/Suppl. 1, G/SG/N/11/ARG/1, Suppl. 1, p. 2.

[547] Panel Report on *Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the EEC*, adopted on 28 April 1994, BISD 41S/467, 550, para. 286.

because no analysis of the price of imports was conducted during the investigation. The statements referred to by the European Communities in this regard are:

> "Owing to their lower price, imports exerted strong pressure on the industry, significantly affecting results"; and
>
> "This decline in output was replaced by imports, essentially cheap imports".

The European Communities submits that given the absence of an analysis of the prices of imports, there is no basis to even start to examine whether import prices might have "'exerted pressure'" on the domestic industry.

8.236 Argentina maintains that it did conduct a price analysis in its investigation, but notes that price indices and any sort of price series for footwear are not easily constructed and tend to be unreliable given changes in styles and product mix over time. Argentina also, in answer to a Panel question concerning price analysis in the investigation, refers to "the growing share" of imports in the market, and states that this had an impact on sales prices of domestic products, which according to Argentina is reflected in the shortfall of revenue below the break-even point. In answer to the same Panel question, Argentina also states that the CNCE "observed a decline in the price/cost ratio, indicating that the prices of outside competitors were exerting pressure on domestic prices".

(ii) Coincidence of trends

8.237 In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the "rate" (i.e., direction and speed) and "amount" of the increase in imports and the share of the market taken by imports, as well as the "changes" in the injury factors (sales, production, productivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that the *trends* -- in both the injury factors and the imports -- matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.

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

a. Market share of imports

8.239 We begin our assessment of the question of coincidence of trends by considering first the data on the market share of imports. Argentina maintains in Act 338 and its submissions (in part on the basis of these data) that imports displaced domestic production.

8.240 The European Communities argues that the market share data do not support Argentina's determinations. The European Communities notes that Act 338 states both that the market share of imports increased substantially, and that the market share of all footwear imports decreased in 1996. The European Communities quotes Act 338 as stating that "'[t]he market share of imports increased from 10 percent in 1991 to 20 percent in 1992, 26 percent in 1993, 27 percent in 1994 and 1995, and 23 percent in 1996'".

8.241 Argentina calculates the market share of imports by first adding estimates of production for the domestic market to imports to derive estimated apparent domestic consumption, then dividing imports by apparent consumption. The market shares thus calculated, and referred to by Argentina in this context in Act 338, are as follows:

Import Market Share

	(in pairs)	(in pesos)
1991	12%	10%
1992	18%	20%
1993	25%	26%
1994	23%	27%
1995	21%	27%
1996	16%	22%

As shown, the market share of imports, by volume, increased on an end-point-to-end-point basis between 1991 and 1995, and between 1991 and 1996, but decreased between 1992 and 1996. The market share by value, on an end-point-to-end-point basis increased between 1991 and 1995, 1991 and 1996, and 1992 and 1996.

8.242 When examining the trends over the period, we note that the import market share by volume and value largely track the data on the absolute volumes and values of imports. In particular, import market share by volume decreased steadily between 1993 and 1996, during which period it was reduced by one-third, from 25 per cent to 16 per cent. A slightly different pattern is evident in the data on market share by value: while the import market share by value in 1991 was lower than that by volume (10 percent compared to 12 percent), beginning in 1992 this relationship was reversed. In addition, while import market share by volume declined between 1993 and 1994 and further between 1994 and 1995, by value it increased slightly between 1993 and 1994, and remained constant through 1995. The declines in market share by volume and value in 1996 were identical in absolute terms (5 percentage points), but the 1996 import market share in value terms (22 percent) was significantly above that in volume terms (16 percent).

b. Situation in 1995

8.243 We note Argentina's reliance, in both its report and its arguments before the Panel, on the comparison of data for 1995 with that for 1991, both regarding imports and the situation of the industry. Thus, it appears that Argentina effectively bases its injury and causation analysis on the relationship between imports and the situation of the domestic industry in 1995. For the reasons discussed above, we find such an end-point-to-end-point analysis to be insufficient. Even on this basis, however, we fail to see the expected coincidence of trends in imports and the four injury factors that were fully analysed in the investigation (i.e., production, sales, employment, and profit-and-loss). We note in particular that during 1995, production fell to its lowest level during the 1991-1995 period relied on by Argentina[548]; the volume and value of sales[549] in 1995 declined sharply from their levels during the preceding years (volume to its lowest level during the period); the data on employment also show a decline in 1995 from their levels during the preceding years; and the data on profit-and-loss and break-even also show a decline in 1995 from their 1991 levels[550]. At the same time, however,

[548] Based on the data estimated by Argentina for the industry as a whole.

[549] Based on the data (production destined for the domestic market) estimated by Argentina for the industry as a whole, as well as on the data from questionnaire responses.

[550] Moreover, as noted above, the financial data are equivocal, in that the profitability data show that footwear-only companies outperformed multi-product companies, and in that the results of the break-even analysis for the subset of multi-product firms diverge significantly from the profit-and-loss data for total operations of all firms.

imports from all sources also dropped, continuing their multi-year decline and falling to their lowest level of the period other than 1991. In other words, these indicators of the health of the domestic industry were declining when imports were declining. This suggests that factors other than imports were having an effect on the industry.

8.244 Theoretically it may be possible, even in the absence of coincidence in the most recent trends in imports and injury factors, that a causal link exists. Such a counterintuitive situation would highlight the need for the authorities to investigate the situation, and to convincingly explain such a conclusion.

8.245 In this regard, we note that Argentina in several instances states that in spite of the decreases in imports since 1993, imports remained high relative to their 1991 levels, and therefore continued to cause injury to the domestic industry in spite of having declined. For example, in Act 338, Argentina states that:

> "[a]lthough the minimum specific duties began to bite in 1994 and their effect increased between 1995 and 1996, the industry's condition has continued to deteriorate…"[551]

In its arguments before the Panel, Argentina states that:

> "In spite of the effects of the DIEMs, which managed to keep imports below 1993 levels, the effects of imports continued to cause serious injury"; and
>
> "The European Communities is mistaken in concluding that import levels no longer caused injury following the application of the DIEMs. The Commission simply found that imports had decreased to a certain extent, but its complete analysis confirms (paragraph 98)[552] that the injury continued and that there was an additional threat of injury in the absence of the DIEMs which were to be withdrawn".

8.246 In our view, these statements do not provide the sort of detailed and reasoned explanation that would be necessary to reconcile the consistently and significantly declining trend in imports with a finding of current serious injury caused by increased imports. Moreover, the latter two statements were only made in the context of the Panel process, and are not found in the reports and other documentation concerning the conclusions of the investigation. We note as well the EC's argument concerning the above quotes that they do not demonstrate the required causal link, but rather the opposite. The European Communities states that the Agreement requires that increased imports cause serious injury, and that it is impossible to conclude, while respecting the Agreement, that there was serious injury caused by increased imports when in fact imports had decreased. For the European Communities, if it is true that there is injury, this simply proves that there must be some cause other than increased imports. We consider that there is no convincing explanation of how, in spite of their *declining* trend, imports nevertheless were causing serious injury in 1995.

(iii) "Under such conditions"

8.247 We next address the EC's claim regarding "under such conditions" in Article 2.1 of the Agreement. In the EC's view, Argentina failed to meet its obligations under the Agreement by not

[551] Exhibit EC-16, at 38. In its interim review comments, Argentina stated that as of 1995, the market share of imports was more than 20 per cent.

[552] It is not clear to what the citation to "paragraph 98" in this passage refers. Paragraph 98 of the document in which this passage appears (Argentina's first written submission), see descriptive part, para. 5.301 refers not to the CNCE's analysis of injury, but rather to tariff classification categories for footwear.

conducting a separate analysis related to this reference. For the European Communities, the reference to "under such conditions" in Article 2.1 refers especially (although not necessarily exclusively) to price analysis. The European Communities argues that it is through price that imports compete with like or directly competitive domestic products, and that therefore a price analysis (i.e., a comparison of imported to domestic prices) is required under the Agreement. For the European Communities, "under such conditions" thus constitutes a separate analytical requirement from the injury and causation analysis required under Article 4.2 (a) and (b). That is, in the EC's view, there must be affirmative findings of increased imports, injury, causation and imports "under such conditions" (i.e., at such prices) before a safeguard measure is permitted.

8.248 Argentina responds that a price analysis is not legally required under the Agreement, as it is not listed as one of the factors in Article 4.2(a). For Argentina, the phrase "under such conditions" connotes the characteristics of the imports (e.g., quantity, quality, composition, specific nature, end use, degree of substitutability for domestic products, technology, consumer taste, influence of brand names in marketing, and price), as well as the totality of the circumstances under which the increase in imports has taken place. In this respect, Argentina views the "rate and amount" of the increase in imports, and imports' share of the domestic market, as particularly relevant. While Argentina concedes that a price analysis may be relevant, and even necessary in a particular investigation, this does not mean that it is *per se* legally required in every investigation. In any case, Argentina argues, the point is moot in the present dispute as Argentina did conduct a price analysis.[553]

8.249 In our view, the phrase "under such conditions" does not constitute a specific legal requirement for a price analysis, in the sense of an analysis separate and apart from the increased import, injury and causation analyses provided for in Article 4.2. We consider that Article 2.1 sets forth the fundamental legal requirements (i.e., the conditions) for application of a safeguard measure, and that Article 4.2 then further develops the operational aspects of these requirements. We find no textual support in the Safeguards Agreement for the EC's argument that price analysis as such is required.

8.250 We believe that the phrase "under such conditions" would indicate the need to analyse the *conditions of competition* between the imported product and the domestic like or directly competitive products *in the importing country's market*. That is, it is these "conditions of competition" in the importing country's market that will determine whether increased imports cause or threaten to cause serious injury to the domestic industry. The text of Article 2.1 supports this interpretation, as the relevant phrase in its entirety reads "under such conditions *as to cause* or threaten to cause serious injury" (emphasis added). Seen another way, for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are *such* that the increased imports can and do cause or threaten to cause serious injury. Article 4.2(a) confirms this interpretation, in requiring that the competent authorities "evaluate all relevant factors of an objective and quantifiable nature *having a bearing* on the situation of that industry", which is further reinforced by Article 4.2(b)'s requirement that the analysis be conducted on the basis of "objective evidence". In our view, these provisions give meaning to the phrase "under such

[553] In this regard, Argentina points to various references in Act 338 and the Technical Report to domestic producers' prices, to the difficulties (due to changes in product mix) in constructing multi-year price indices or time-series for footwear, whether for product groups or individual products, and to the difficulties that the CNCE encountered in obtaining data on the prices of imports from importers. In the latter regard, Act 338 indicates that the CNCE found that the importers did not cooperate in providing the data requested by the CNCE, and that therefore the CNCE concluded (as "best information") that the price of imports must be below that of the domestic products. In answer to a question regarding whether the CNCE in its investigation had considered any secondary sources of information (for example, the average unit value of imports) to confirm its conclusions regarding the prices of imports relative to domestic products, Argentina responded by providing such a comparison. Argentina, although asked by the Panel, provided no citation to the record of the investigation where this analysis could be found, and the Panel in reviewing that record finds no evidence that any such analysis was performed during the investigation.

conditions", and support as well our view that for an analysis to demonstrate causation, it must address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country. That is, we believe that the phrase "under such conditions" in fact refers to the *substance* of the causation analysis that must be performed under Article 4.2(a) and (b).

8.251 We note in this regard that there are different ways in which products can compete. Sales price clearly is one of these, but it is certainly not the only one, and indeed may be irrelevant or only marginally relevant in any given case. Other bases on which products may compete include physical characteristics (e.g., technical standards or other performance-related aspects, appearance, style or fashion), quality, service, delivery, technological developments consumer tastes, and other supply and demand factors in the market. In any given case, other factors that affect the conditions of competition between the imported and domestic products may be relevant as well. It is these sorts of factors that must be analysed on the basis of objective evidence in a causation analysis to establish the effect of the imports on the domestic industry.

8.252 Therefore, in the present dispute, while the phrase “under such conditions” does not require a price analysis *per se*, it nevertheless has an implication for the nature and content of a causation analysis, which may logically necessitate a price analysis in a given case. Moreover, the absence of an analysis of the conditions of competition in the domestic market for the product in question, in which the interaction of the imported with the domestic product is explained in the report on the investigation (including *inter alia* a price analysis where relevant), results in an incomplete analysis of the causal link.

8.253 We note in this regard the passages cited in paras. 8.232-8.233, above which both parties indicate constitute the relevant explanations in the published reports of the analysis of the causal link, and which Argentina indicates also constitute the analysis of the “relevance” of each factor as required by the Agreement. We also note Argentina’s implicit suggestion that it is for the Panel to peruse the entire 10,000-page record of the investigation -- from which “arises” the causal link – to find for itself the specific basis in fact for Argentina’s conclusion that that link exists. As noted above, however, if the Panel were to engage in such an exercise, this would constitute the very *de novo* review that neither party (nor we ourselves) considers to be within our mandate. The language of the Agreement is clear – it is the investigating authority that must conduct this analysis and publish a report explaining it in detail.

8.254 We agree with the European Communities that the passages cited in paras. 8.232 - 8.233 are essentially a juxtaposition of statistics on imports and injury factors. Such a juxtaposition does not constitute an analysis of the conditions of competition between the imports and the domestic product. Moreover, we note that the *only* references in those passages that seem to link imports to injury are the statements concerning the prices of imports (i.e., the references to “cheap imports”). As stated above, in our view, the Safeguards Agreement does not require a price analysis *per se*. However, because the statements about the prices of imports relative to domestic products were central to Argentina’s causation finding, the question of price is of particular importance to the analysis. That is, the allegedly low prices of imports, and their asserted effects on the domestic industry, appears to have been the only "condition of competition" between imports and domestic products on which Argentina's causation finding was based. Thus, we will focus our assessment of this analysis primarily on whether there is support in the record for Argentina's conclusions about import prices and their effect on the domestic industry.

8.255 We recall the EC’s assertion that these statements about price are unsupported by any factual evidence in the record of the investigation. The European Communities states, first, that Argentina relied upon best information available concerning import prices to draw an inference that imports were cheaper than domestic products, on the basis of alleged non-cooperation by the importers. The

European Communities asserts that the "non-cooperation" in question was the inability of the importers to provide in their questionnaire responses the requested data on the basis of the five product categories used in the investigation, and states that they provided instead data on the basis of tariff classifications. The European Communities argues that nowhere does Argentina indicate that the importers refused to provide data, and that given the eventual definition of the domestic industry as that producing footwear as a whole, the lack of the import price data broken out as initially requested was no longer relevant, and the submitted data therefore should have been used. The European Communities also argues that there is no evidence that in the investigation, Argentina conducted the comparison of unit values of domestic and imported footwear that it provided in answer to the specific question from the Panel. Finally, the European Communities notes Argentina's statement[554] that the references to "cheap imports" had more to do with under-invoicing than with the market price of the imports. For the European Communities, a safeguard measure is not an appropriate remedy for underinvoicing.

8.256 Argentina, while maintaining that it did conduct a price analysis, also states that price indices and any sort of price series for footwear are either impossible to construct or unreliable given the effects of changes in styles and product mix. In answer to Panel questions, Argentina also confirms that the product mix of the domestic industry shifted to higher-unit-value goods during the period of investigation, as did the product mix of imports.[555]

8.257 The shift in imports to higher-valued products is evident from the different trends between the volume-based and value-based import market share data.[556] In particular, the fact that the market shares by value are higher in absolute terms, and show smaller declines in the latter part of the period than in volume terms, implies that the average value of the imported footwear was increasing, which would signify either that the product mix of imports was shifting to higher-valued goods, or that the price of imported footwear was increasing, or both.

8.258 In the light of the above data, the Panel asked Argentina to reconcile the apparent upward trend in the unit value of imports with its conclusions in Act 338 that "cheap imports" had undercut the price of the domestic product, thereby causing injury. Argentina's response noted first that the impossibility of competing with imported goods owing to their low prices constitutes a negative factor for domestic producers. Argentina went on to acknowledge, however, a "change in the behaviour of imports", which Argentina attributes to the application of the DIEMs, specifically, that "the DIEMs cause the value of imports to grow faster than the volume and at the same time change the composition of those imports towards footwear with a higher unit value that are not affected by the DIEMs. Added to which, there is no longer any possibility of under-invoicing". When the Panel asked how these trends demonstrate injury and causation, and how the shift in the imports to higher-valued products could be reconciled with the statements about "cheap imports", Argentina referred to the Technical Report and the Preliminary Report of the Department of Foreign Trade, and indicated that the shift in the composition of imports was attributable to the application of the DIEMs.

8.259 We can find no evidence in the record to support the statements that the imports were cheaper than the domestic goods. In particular, there is no evidence that any price comparisons of imported and domestic footwear were made in the investigation, including on the basis of average unit values of all imports and all domestic products. Indeed, the answer provided by Argentina to the Panel's question on this point confirms this, as the source given for the comparison provided in that answer is the pages in the Technical Report where the underlying data for the comparison (but not the comparison itself) are set forth. Without such price comparisons, there is no factual basis for the statements regarding lower-priced imports.

---

[554] See para. 8.258, *infra*.
[555] See descriptive part, note 181.
[556] See paras. 8.241 - 8.242, *supra*.

8.260 In this connection, we note in addition Argentina's statements that the references to "cheap imports" had mostly to do with a problem of customs valuation (underinvoicing), and that the composition of imports shifted to higher-valued goods following the 1993 imposition of the DIEMs. In our view, these statements are inconsistent with the implication of the causation finding that *as of 1995*, imports were undercutting domestic prices so as to cause the asserted serious injury to the domestic industry.

8.261 Moreover, we find no basis in the investigation or arguments of Argentina to indicate that any such lower-priced imports had any injurious effect on the domestic industry. In particular, the report on the investigation contains no evidence to indicate that the effect of the prices of imported footwear on domestic producers' prices, production, etc., was specifically analysed, in spite of the fact that the causation finding was fundamentally based on price considerations. Rather, aggregate trends in broad statistical indicators were compared and conclusory statements made (e.g., that "the decline in output was replaced by imports, essentially cheap imports". This is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2.[557] (Indeed, as indicated above, the information on the shift in the product mix of imports toward higher-valued goods at least on its face would appear inconsistent with a finding of causation based on "cheap imports".)

8.262 Thus, in our view, Argentina in its investigation did not demonstrate either (i) that imports were lower priced than comparable domestic goods, or (ii) that any such lower-priced imports had an injurious effect on the domestic industry.

8.263 Further, regarding Article 4.2's requirement that the "relevance" of each factor be considered, we note Argentina's reference, in answer to a Panel question on this point, to the same pages in Act 338 and the Technical Report that it indicates contain the causation analysis. We consider that these statements are juxtapositions of data on imports and data on injury factors, rather than an analysis of causation. As such, we do not consider that they constitute a demonstration of the "relevance" of factors examined as required by Article 4.2.

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

(iv) Other factors

8.264 The third element of a causation analysis is the consideration of whether factors other than increased imports are causing or threatening to cause serious injury to the domestic industry. If so, Article 4.2(b) requires that such injury not be attributed to increased imports.

8.265 The European Communities argues in this regard that Act 338 refers to several elements which the European Communities views as "other factors" that in fact were responsible for any injury suffered by the Argentine footwear industry. These factors were (i) the "tequila effect", i.e., the domestic recession in Argentina brought on by the collapse of the Mexican peso; (ii) imports under the Industrial Specialisation Regime;[558] and (iii) imports from Mercosur countries. The European Communities claims that Argentina did not sufficiently examine these factors, and that it therefore wrongly attributed injury caused by them to imports.

8.266 Argentina argues that it did examine the only other factor it considered relevant to the injury, the tequila effect, and that it ensured that the injury caused by that factor was not attributed to the increased imports. Argentina does not specify explicitly how this was done in its investigation. In its arguments to the Panel, Argentina makes comparisons of the macroeconomic indicators (GDP) for the footwear sector and for the economy as a whole, and concludes that the decline in footwear in 1995 was sharper than for the economy overall, implying that imports were responsible, beyond the effects of the recession.

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

a. The "tequila effect"

8.268 Regarding the so-called "tequila effect", we note that Act 338 and the Technical Report make a number of references to the "tequila effect" as such as well as to the domestic recession in 1995. For example, in its discussion of production, Act 338 [559] notes the decline in production in 1995, and states that in that year, "domestic consumption was much affected by the recession ('tequila effect')". Act 338 makes a similar reference to a "sharp drop" in consumption in 1995 in its discussion of the effects of imports on domestic production. Similarly, in discussing the trends in imports, Argentina acknowledges that imports decreased in 1995, when "irrespective of any trade policy developments [i.e., the DIEMs], the Argentine economy experienced a severe recession with negative effects on all imports". We note further that Argentina, in answer to a Panel question, states that during the investigation the CNCE considered the possible impact of the tequila effect as a cause of injury to the footwear industry, and that this analysis "verified that even in a context of depressed macroeconomic conditions, imports in themselves continued to cause injury to domestic production". Argentina makes a similar statement in its first written submission.

8.269 In our view, the comparison of the macroeconomic indicators for footwear and for the economy as a whole is not a sufficient consideration of the potential injury from the "tequila effect" to the domestic industry. Particularly given Argentina's several acknowledgements that the domestic recession significantly depressed *both* imports and domestic consumption (and certainly thereby the

[558] The Industrial Specialization Regime, which terminated in 1996, allowed footwear producers to import duty-free a certain volume of footwear to round out their production lines, based on the volume of their footwear exports.

[559] Exhibit EC-16, p.14.

production and other performance indicators of the domestic industry), an analysis separating the effects of the recession from those of imports would have been necessary.

b. The Industrial Specialisation Regime

8.270 Regarding the Industrial Specialisation Regime, Argentina argues that because imports under this programme were never more than 10 percent of total imports in any one year, they were found to be insignificant as a potential cause of injury.

8.271 Although we note that the consideration in Act 338 of the Industrial Specialisation Regime is relatively cursory, the low volume of the imports under this programme supports Argentina's conclusion regarding their insignificance as a potential cause of injury.

c. Imports from other MERCOSUR countries

8.272 As regards imports from other MERCOSUR countries, the European Communities argues that even if it were correct to include the volume of imports from MERCOSUR countries in total imports, and even if Argentina had been able to show a causal link between these increased total imports and serious injury, it would still have been necessary to examine whether and to what extent the MERCOSUR imports had been causing injury and so as not to attribute this injury to the third-country imports given that any safeguard measure would not apply to MERCOSUR imports. In the EC's view, MERCOSUR imports, which increased throughout the investigation period and which were exempted from the application of the safeguard measure, were responsible for any import-related injury to the Argentine footwear industry.

8.273 Argentina, while contesting that imports from MERCOSUR caused injury, nevertheless states that the conditions of footwear imports had an important MERCOSUR component that could not be ignored. Act 338 states that it was appropriate to consider the imports from MERCOSUR countries on equal terms with other imports, as in the absence of the DIEMs or protective measures, there would have been at least an equal flow of imports from the rest of the world into Argentina.

Import volumes:[560]

(in million of pairs)	1991	1992	1993	1994	1995	1996
Total imports	8.86	16.63	21.78	19.84	15.07	13.47
MERCOSUR	1.90	3.97	5.08	5.83	4.99	7.50
Third countries	6.96	12.66	16.70	14.01	10.07	5.97

Import values:[561]

(million US$ c.i.f.)	1991	1992	1993	1994	1995	1996
Total imports	44.41	110.87	128.76	141.48	114.22	116.61
MERCOSUR	4.66	18.30	16.87	25.59	24.84	47.48
Third countries	39.75	92.58	111.89	115.89	89.39	69.09

8.274 We note that the import statistics in Act 338 and the Technical Report indicate that after 1993, imports from MERCOSUR member countries were the sole source of growth in footwear imports into Argentina. While imports from MERCOSUR countries increased steadily and significantly in every year between 1991-1996 except 1995, imports from all other countries steadily declined after 1993.

[560] See document G/SG/N/8/ARG/1, submitted as Exhibit EC-16, p.21.
[561] *Ibid*.

As a result, by 1996, MERCOSUR countries accounted for one-half of total footwear imports, up from less than one-fifth in 1991.

(v) Summary regarding the claims under Articles 2 and 4

8.275 As discussed above, we have considered all three major elements of Argentina's safeguard investigation and determination – the existence of (i) increased imports, (ii) serious injury, and (iii) a causal link - which the European Communities challenges as inconsistent with the requirements of Articles 2 and 4 of the Safeguards Agreement.

8.276 Regarding increased imports, we note that to meet Article 2 and 4's requirements regarding increased imports, it is necessary to consider the trends in imports over the entire period of investigation (rather than just comparing the end points), and that a decline in imports that is more than only "temporary" calls into question a finding that imports have increased. In this case, Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used.

8.277 Regarding the serious injury investigation and determination, we consider that Argentina did not evaluate all of the listed factors (in particular, capacity utilisation and productivity); and that by not considering the available data for 1996 in its investigation and determination (in spite of having gathered those data along with data for 1991-1995 in its questionnaire), Argentina did not consider "all relevant factors…having a bearing on the situation of [the] industry" within the meaning of Article 4.2(a), particularly in view of the fact that in some cases the 1996 data showed upturns which were not explained. We also consider that an end-point-to-end-point comparison does not meet Article 4.2(a)'s requirement to consider all relevant factors especially where intervening trends in the injury indicators would be highly relevant to determining whether an industry was experiencing serious injury. In addition, we consider that because discrepancies in certain data series were not addressed or explained, and because other assertions were not linked to the statistical data, some of the conclusions drawn were not adequately supported by the evidence.

8.278 Regarding the existence of a causal link between increased imports and serious injury suffered by the domestic industry, we consider that the investigation did not demonstrate a coincidence in trends in injury factors and imports; that the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price); and that "other factors" identified by the CNCE in the investigation were not sufficiently evaluated, in particular, the tequila effect. Thus, in our view, Argentina’s findings and conclusions regarding causation were not adequately explained and supported by the evidence.

8.279 For the foregoing reasons, we conclude that Argentina’s investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a); that the investigation did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry within the meaning of Article 4.2(a); that the investigation did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article 2.1 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b); and that the published report concerning the investigation did not set forth a complete analysis of the case under investigation as well as a demonstration of the relevance of the factors examined within the meaning of Article 4.2(c).

8.280 Therefore, we find that Argentina’s investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the Safeguards Agreement. As such, we find that Argentina’s investigation provides *no* legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure.

(e) Threat of serious injury

8.281 The European Communities claims that Argentina's finding of threat of serious injury violates Articles 4.1 and 4.2 of the Agreement, as it was based on a prognosis of what would happen if the DIEMs were removed. The European Communities submits that because Article 4.2(a) requires an investigation on the basis of "objective and quantifiable" information, a hypothetical analysis does not satisfy this requirement. In particular, the European Communities argues that there were no increased imports, and that therefore the threat finding constituted a finding of threat of increased imports, rather than a threat of serious injury. For the European Communities, no threat finding can be made absent actual increased imports.

8.282 The CNCE stated in its conclusions in Act 338 that it found in addition to serious injury a threat of serious injury in the absence of the measures additional to the Common External Tariff. We can find no specific reference to an analysis of threat, as such, either in Act 338 or in the Technical Report, however. In answer to a Panel question regarding the basis for Act 338's threat of serious injury finding, Argentina indicated that the finding of threat had been the basis for the application of the provisional measure. Argentina stated that the industry's condition worsened during the course of the investigation, leading to the decision to apply the definitive measure. In response to a Panel question regarding whether it is possible to simultaneously find present serious injury and threat thereof, Argentina indicated that this is possible, as the concepts of serious injury and threat thereof, in the meanings of Articles 4.1(a) and (b), respectively, are not mutually exclusive.[562]

8.283 We recall that pursuant to Article 4.1(b):

> "'threat of serious injury' shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility;"

8.284 Thus, the question of threat, whether instead of or in addition to a finding of present serious injury, must be explicitly examined in an investigation and supported by the evidence in accordance with Article 4.2(a-c). Moreover, if only a threat of increased imports is present, rather than actual increased imports, this is not sufficient. Article 2.1 requires an actual increase in imports as a basic prerequisite for a finding of either threat of serious injury or serious injury. A determination of the existence of a threat of serious *injury* due to a threat of increased *imports* would amount to a determination based on allegation or conjecture rather than one supported by facts as required by Article 4.1(b).

8.285 Given that the question of threat as such was not adequately addressed or analysed in Act 338 or in the Technical Reports, we do not consider it necessary to rule on the question of whether it is possible to make simultaneously findings of serious injury and threat of serious injury. We further note that, pursuant to paragraphs 1(b) and 2(a) of Article 4, any determination of threat must be supported by specific evidence and adequate analysis.

8.286 For the foregoing reasons, we find that Argentina's determination of the existence of a threat of serious injury does not conform to the requirements of Articles 2 and 4 of the Agreement.

5. Claims regarding the application of safeguard measures (Article 5)

8.287 The European Communities also claims, in the event the Panel should find that the analyses by Argentina's national authorities of "increased imports", "serious injury" and "causation" were

[562] See descriptive part, paras. 5.303.

consistent with the Safeguards Agreement, that Argentina violated Article 5.1. The European Communities alleges that Argentina did not demonstrate that safeguard measures were applied only "to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". Specifically, the European Communities requests the Panel to find Argentina's provisional and definitive measures based on the safeguard investigation subject to this dispute, however adapted or adjusted in the meantime (including Resolutions 512/97, 1506/98 and 837/98), to be in violation of Article 5.1.

8.288 Argentina contends that such claims amount to hypotheses about "future" measures and that preventive adjudication is not the function of the dispute settlement system. Argentina reiterates that the modifications of the definitive safeguard measure are not within this Panel's terms of reference. Since Articles 3.7[563] and 19.[564] of the DSU only require the withdrawal of measures that *are* WTO-inconsistent, it is Argentina's position that measures that are not in existence at the time of a Panel's establishment cannot be subject to dispute settlement because they only *could* be inconsistent with the WTO agreements.

8.289 In the light of our findings, *supra*, that the safeguard investigation and determination leading to the imposition of the definitive safeguard measure is inconsistent with Articles 2 and 4 of the Safeguards Agreement, and thus provide no legal basis for the application of a safeguard measure, we do not consider it necessary to make findings on the European Communities' claims concerning Argentina's alleged violations of Article 5.

6. Claims regarding the provisional safeguard measure (Article 6)

8.290 The European Communities has raised a claim that the provisional measure applied by Argentina violated Article 6 of the Safeguards Agreement. In particular, the European Communities claims that the measure, which according to Argentina was applied on the basis of a finding of clear evidence of a threat of serious injury, was in fact applied on the basis of a threat of increased imports. The European Communities maintains that the resolution applying the measure makes this clear, in that it refers to a threat of serious injury from future increases in imports expected to result from the removal of the DIEMs on footwear. In the view of the European Communities, it is not a sufficient basis for the application of a provisional measure to equate a threat of increased imports with a threat of serious injury. Rather, there must be an actual increase in imports and clear evidence of at least a threat of serious injury for a provisional measure to be applied consistently with the Agreement on Safeguards.

8.291 Argentina argues that the increased imports requirement was satisfied at the time of the decision to apply the provisional measure, and further maintains that the Panel should not rule on the provisional measure as it had expired well before the commencement of this Panel proceeding.

8.292 In the light of our findings concerning the investigation and the definitive measure, we do not find it necessary to make a finding concerning this claim.

7. Claims regarding notification requirements (Article 12)

8.293 The European Communities' claims under Article 12 have two main elements. First, the European Communities alleges that Argentina failed to notify "all pertinent information" relating to

[563] Article 3.7 of the DSU: "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. … the first objective of dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."

[564] Article 19.1 of the DSU which provides "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measures into conformity with that agreement."

its serious injury and causation findings, as required under Article 12.1(b). Second, the European Communities claims that by failing to notify Resolutions 512/98, 1506/98 and 837/98, which modified the *definitive* safeguard measure after its imposition, Argentina violated the notification obligations of Article 12.1 and 12.2, as in the European Communities' view these provisions require notification of the safeguard measure as actually applied.

(a) The notification of "all pertinent information"

Articles 12.1 and 12.2 of the Safeguards Agreement read as follows:

> "1. A Member shall immediately notify the Committee on Safeguards upon:
>
> (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
>
> (b) making a finding of serious injury or threat thereof caused by increased imports; and
>
> (c) taking a decision to apply or extend a safeguard measure.
>
> 2. In making the notifications referred to in paragraphs 1(b) and (c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed data of introduction, expected duration and timetable for progressive liberalisation. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure."

8.294 Regarding the first claim, the European Communities argues that Article 12.1(b) requires a Member to *notify "all pertinent information*" concerning its injury and causation finding. In the European Communities' view, this constitutes a requirement to notify "all facts, investigated data, and evaluations needed to establish 'increased imports', 'serious injury or threat' and 'causal link'". The European Communities challenges Argentina's argument that "the relevant information for evaluating compliance with Articles 2 and 4 cannot consist only of the information notified to the Committee according to the approved formats". In the European Communities' view, this argument implies that information relevant to the determination of compliance with Article 4.2 could be missing from the Article 12 notifications. For the European Communities, Article 12 notifications should provide the basis for other Members to "verify whether the conditions of Article 2 and 4 had been met".

8.295 Argentina argues that the European Communities confuses the procedural requirements of Article 12 concerning notification with the substantive requirements of Articles 2 and 4 for the application of a safeguard measure. In Argentina's view, if the European Communities' arguments were accepted, this would add the substantive requirements under Article 2.1 to the notification obligations under Article 12, implying a double failure by Argentina to comply with the Agreement and establishing a standard of notification that the Agreement does not provide for. Argentina also argues that if it were to follow the methodology proposed by the European Communities, it would have to notify the entire 10,000-plus page record of the investigation.

8.296 The European Communities disagrees with Argentina's argument that the European Communities "confuses" the substantive and notification requirements of the Agreement,

acknowledging that these are separate obligations. For the European Communities, this separateness does not exclude the possibility, however, that a violation of one of these requirements can lead to the violation of the other. That is, the European Communities maintains, if a Member does not provide, in its Article 12 notification, the evidence necessary to prove that the requirements of Articles 2 and 4 have been fulfilled, then Article 12 automatically would be violated – in this case the violation of Article 12 (in particular Article 12.2) would derive from a violation of Articles 2 and 4. For the European Communities, Article 12 also could be violated without relying on Articles 2 and 4, for example when a justified safeguard measure is taken without any (or insufficient) notification. The European Communities also disagrees that it has implied that the entire record of the investigation should have been notified. Rather, the European Communities argues, all "pertinent" information from that record should have been notified.

8.297 We note that the European Communities' arguments seem to imply that an insufficient notification under Article 12 *per se* implies or leads to a violation of Articles 2 and 4 (i.e., its argument that it is the notifications that permit other Members to judge substantive compliance with Articles 2 and 4). The European Communities also seems to argue this point *vice versa* (i.e., its argument that the violation of Article 12 in this case was "derived from" the substantive violation of Articles 2 and 4). By this, we understand the European Communities to mean that adequate notification under Article 12 is impossible where the substantive requirements of Articles 2 and 4 have not been satisfied.

8.298 In our view, the notification requirements of Article 12 are separate from, and in themselves do not have implications for, the question of substantive compliance with Articles 2 and 4. Similarly, we consider that the substantive requirements of Articles 2 and 4 do not have implications for the question of compliance with Article 12. Article 12 serves to provide transparency and information concerning the safeguard-related actions taken by Members. We note in this context that notification under Article 12 is just the first step in a process of transparency that can include, *inter alia*, review by the Committee as part of its surveillance functions (Article 13.1(f)), requests for additional information by the Council for Trade in Goods or the Committee on Safeguards (Article 12.2), and/or eventual bilateral consultations with affected Members if application of a measure is proposed (Article 12.3). In this regard, the important point is that the notifications be sufficiently descriptive of the actions that have been taken or are proposed to be taken, and of the basis for those actions, that Members with an interest in the matter can decide whether and how to pursue it further.

8.299 In this context, we recall the statement of the Panel in *Guatemala - Cement* that

> "… [a] key function of the notification requirements in the [Anti-dumping Agreement] is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests…."[565]

8.300 Articles 12.2 and 12.3 in our view confirm that Members are not required to notify the full detail of their investigations and findings. Article 12.2 specifically provides for the possibility of requests for further information by the Council for Trade in Goods or the Committee on Safeguards. Article 12.3 provides, *inter alia*, for consultations, upon request, with other Members, to review the information contained in the notifications. Thus, these provisions specifically create opportunities for further information to be provided, upon request, concerning the details of the actions summarised in the notifications. Ultimately, should a violation of Articles 2 and 4 be alleged, it would be the more detailed information from the record of the investigation, and in particular the published report(s) on the findings and reasoned conclusions of that investigation, that would form the basis for evaluation of such an allegation.

---

[565] Panel report on *Guatemala – Anti-dumping Investigation regarding Portland Cement from Mexico* (WT/DS60/R), adopted on 25 November 1998, para. 7.42.

8.301 We note that Argentina's notification to the Committee on Safeguards, under Article 12.1(b), in fact is the full text of Act 338, which Argentina indicates in response to a Panel question is the published report on its serious injury finding (although it also refers to some portions of the "Technical Report"). We find that by having notified this full text, Argentina certainly met the requirements, which we find to be rather descriptive, applicable to notifications under the Articles 12.1 and 12.2. Therefore, we reject the European Communities' claim that Argentina's notification of its finding of serious injury and causation was insufficient, and conclude that in this respect Argentina has not violated Articles 12.1 and 12.2.

(b) Notification of subsequent modifications

8.302 We now turn to the second aspect of the European Communities' claims regarding notifications which is that Argentina should have notified under the Agreement on Safeguards Resolutions 512/98, 1506/98 and 837/98, which modify the definitive safeguard measure. In the European Communities' view, Members are obligated to notify safeguard measures as applied. The European Communities has argued that these resolutions have made the safeguard measure more restrictive than it was when originally applied. We note that the modifications of definitive safeguard measures foreseen in the Agreement (namely early elimination or faster liberalisation potentially resulting from mid-term reviews under Article 7.4, [566] and extension of measures beyond the initial period of application under Article 7.[567] and 7.4), all are subject to notification requirements under Articles 12.5 and 12.1(c)/12.2, respectively.

8.303 In this context, we note that the *only* modifications of safeguard measures that Article 7.4 contemplates are those that *reduce* its restrictiveness (i.e., to eliminate the measure or to increase their pace of its liberalisation pursuant to a mid-term review). The Agreement does not contemplate modifications that *increase* the restrictiveness of a measure, and thus contains no notification requirement for such restrictive modifications.

8.304 We note that the modifications of the definitive safeguard measure made by Argentina are not contemplated by Article 7, and thus Article 12 does not foresee notification requirements with respect to such modifications. Any *substantive* issues pertaining to these subsequent Resolutions would need to be addressed under Article 7, but the European Communities made no such claim. Where the situation at issue is primarily one of substance, i.e., modification of a measure in a way not foreseen by the Safeguards Agreement, we believe that we cannot address the alleged procedural violation concerning notification arising therefrom, as no explicit procedural obligation is foreseen. Therefore, we see no possibility for a ruling on this aspect of the European Communities' claim under Article 12.

(c) Concluding remark

8.305 We recall our findings that our terms of reference include the definitive safeguard measure in its original legal form (i.e., Resolution 987/97) as well as in its subsequently modified form (i.e.,

---

[566] Article 7.4: "In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalise it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalisation. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalised."

[567] Article 7.2: "The period mentioned in paragraph 1 [the initial period of application] may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed."

Resolutions 512/98, 1506/98 and 837/98). We further recall our findings that Argentina's safeguard investigation and determination underlying the definitive safeguard measure are inconsistent with Articles 2 and 4 of the Safeguards Agreement and thus cannot serve as a legal basis for any safeguard measure. Given that the subsequent modifications of the definitive safeguard measure are based on the same safeguard investigation and determination, we are of the view that our findings of violations of Articles 2 and 4 resolve the dispute with respect to these modifications as well.

IX. CONCLUSIONS

9.1 The Panel concludes that for the reasons outlined in this Report the definitive safeguard measure on footwear based on Argentina's investigation and determination is inconsistent with Articles 2 and 4 of the Agreement on Safeguards. We therefore conclude that there is nullification or impairment of the benefits accruing to the European Communities under the Agreement on Safeguards within the meaning of Article 3.8 of the DSU.

9.2 The Panel recommends that the Dispute Settlement Body request Argentina to bring its measure into conformity with the Agreement on Safeguards.