THE WTO DISPUTE SETTLEMENT SYSTEM

THE LAMB MEAT CASE
(Australia v United States)[†]

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I. INTRODUCTION

Since the 1300s, the United Kingdom has created commissions and councils to assist and advise on matters of trade. By the 1600s, the Commonwealth became a trading bloc, witnessing the creation of committees in the Privy Council to act as intermediaries between the Crown and the colonies, among others, one such being the Judicial Committee.[1] The use of an intermediary to smoothen rocky relationships in the international trading community is therefore not new and this practice has continued to this day.

II. THE WTO'S DISPUTE SETTLEMENT BODY

Today, one such intermediary on an enormous scale is the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO), which has 140 Members and whose entire system created for settling disputes has met with approval in spite of the WTO's short existence. The system began when the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), one of the outcomes of the Uruguay Round negotiations,[2] became effective. The DSU appears as Annex 2 of the Uruguay Round Final Act signed in 1994, sometimes known as the Agreement Establishing the World Trade Organisation,

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[†] Appellate Report, WT/DS177/AB/R; WT/DS1178/AB/R, 1 May 2001 (01-2194), (Lamb, Appellate Report).

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[1] See generally "Trade, Board of", Encyclopædia Britannica, Volume XXIII (1888, 9th edition, Adam and Charles Black, Edinburgh) 497.

[2] The WTO Agreement comprises several instruments: Annex 1A Multilateral Agreements on Trade in Goods; Annex 1B General Agreement on Trade in Services; Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights; Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes; Annex 3 Trade Policy Review Mechanism; Annex 4 Plurilateral Trade Agreements; and the Understanding on Commitments in Financial Services.

or simply, the WTO Agreement. This Agreement entered into force on 1 January 1995.[3]

In 1996, the WTO adopted the Rules of Conduct for settling disputes, including the Working Procedures for Appellate Review (Working Procedures).[4] From its birth, the DSB stamped its authority on the cases presented before it. Although the cases appear to be increasingly contentious and political in content, this body has successfully averted disputes over a spread of issues that would have otherwise resulted in retaliatory behaviour by complainant States.

Basically, there are two stages in DSB proceedings – before the Panel Body and before the Appellate Body. The fact that not all Panel Reports are appealed to the Appellate Body evidences the faith that WTO Members have in the DSB.[5] In fact, less than a fortnight after the DSB was created, Singapore complained to this body against Malaysia in *Polyethylene and Polypropylene.*[6] More recent appeals include the United States' complaint against Mexico over high fructose corn syrup in *HFCS,*[7] Malaysia's complaint against the United States in *Shrimp,*[8] Poland's complaint against Thailand in *Steel*[9] and Canada's complaint against the European Communities in *Asbestos.*[10] Other complaints yet to be heard include Brazil's complaint against Argentina's definitive anti-dumping duties on Brazilian poultry[11] and Japan's complaint against the United States' quotas on Japanese steel products.[12]

Australia is no stranger to the WTO's dispute resolution system and has been a party on both sides of the fence.[13] For example, in *Salmon,*[14]

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[3] See generally WTO, "Legal texts: the WTO Agreements" at <www.wto.org/english/docs_e/legal_e/final_e.htm> (visited January 2002).
[4] WT/DSB/RC/1, 11 December 1996.
[5] Refer discussion at 216 below.
[6] WT/DS1, 13 January 1995.
[7] WT/DS132, 21 November 2001.
[8] WT/DS58, 21 November 2001.
[9] WT/DS122, 5 April 2001.
[10] WT/DS135, 5 April 2001.
[11] WT/DS241, 12 November 2001.
[12] WT/DS244, 4 February 2002.
[13] To date, Australia has been applicant and respondent in an equal number of cases. As applicant, the cases involved Hungary (WT/DS35); India (WT/DS91); Korea (WT/DS169); and United States (WT/DS178 and WT/DS217). As respondent, the

Australia was respondent following Canada's complaint against the importation of Canadian salmon, but more recently was one of the complainants against the United States regarding the (US) Continued Dumping and Subsidy Offset Act 2000.[15] A very recent case where Australia is the applicant is *Lamb Meat,*[16] presented below.

The following discussion will present the appellate proceedings in this case, followed by the Appellate Body's findings and conclusions, and a review of the success of the WTO's dispute settlement mechanism.

III. *LAMB MEAT* – APPELLATE BODY PROCEEDINGS

(a) Background

Like most, if not all, international disputes, this case is dotted with claims and counterclaims, starting in the Panel Body and ending in the Appellate Body.

In 1998, the United States International Trade Commission (USITC) initiated a safeguard investigation into imports of lamb meat.[17] By a presidential proclamation,[18] the United States imposed a definitive safeguard measure on imports of fresh, chilled and frozen lamb meat. This was cloaked as a tariff-rate quota that entered into effect on 22 July 1999.[19] Australia (and New Zealand) complained against this on 20 July 1999, alleging that the United States breached two international agreements, the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards 1994 (the Agreement). More specifically, the provisions allegedly breached were Articles I-II and XIX of GATT 1994 and Articles 2-5, 8, 11 and 12 of the Agreement.[20]

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106) and Switzerland (WT/DS119): WTO, "Dispute rulings, by country" at <www.wto.org/english/tratop_e/dispu_estatus_e.htm> (visited February 2002).

[14] WT/DS18, 6 November 1998 (Salmon).

[15] WT/DS217, 9 January 2001. This case is yet to be determined. The other co-complainants are Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand.

[16] Refer Lamb, Appellate Report. Note that this article incorporates several extracts from this report and it excludes New Zealand's position.

[17] Lamb, Appellate Report para 2.

[18] Refer (US) Proclamation 7208 of 7 July 1999 – To Facilitate Positive Adjustment to Competition from Imports of Lamb Meat.

[19] 64:131 United States Federal Register 37387-37392, 9 July 1999.

[20] WT/DS177/4 and WT/DS178/5, 15 October 1999; WT/DS178/5/Corr 1, 29 Octo-

On 21 March 2000, a Panel Body[21] was created to consider Australia's allegations.[22] In the panel proceedings, Canada and Japan reserved their rights to participate as third parties[23] and the European Communities filed a Third Party's submission under Rule 24 of the Working Procedures. On 21 December 2000, the Panel Body delivered its Report, circulating it to all DSB Members under the Procedures for the Circulation and Derestriction of WTO Documents.[24] The Report found that the United States breached its obligations under GATT 1994 and the Agreement by imposing the measure. As a result, the Panel Body recommended that the United States should change its rules.[25]

The parties appealed against various aspects of the above findings. The United States filed a Notice of Appeal under Rule 20 of the Working Procedures on 31 January and filed its appellant's submission under Rule 21 on 12 February 2001. Under Article 16(4) of the DSU, it also appealed against certain issues of law and legal interpretations developed in the Panel Report. On 15 February 2001, Australia (including New Zealand) filed an appellant's submission under Rule 23(1) of the Working Procedures and eleven days later, all of them filed separate appellee's submissions under Rules 22 and 23(3).

In the appellate proceedings, although Canada and Japan did not file written submissions, Canada was permitted to attend the oral hearing as a passive observer while Japan could "intervene when necessary and

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ber 1999.

[21] The three members were Professor Tommy Koh (Chairman), Professor Meinhard Hilf and Mr Shishir Priyadarshi.

[22] WT/DS177/R and WT/DS178/R (00-5361), 21 December 2000 paras 1.1-1.10.

[23] See Article 10 of the DSU on Third Parties and the protection of their interests.

[24] The Panel Report was circulated as an unrestricted document on 21 December 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents: WT/L/160/Rev1. According to Article 17(4) of the DSU, only parties to the dispute (not third parties) may appeal a Panel Report. Article 17(6) provides that appeals are limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel Body. Under Article 18(1), ex parte communication with the Panel Body is not allowed on matters under consideration. Under Article 16(4), the DSB has to adopt a Panel Report within 60 days after the date of its circulation unless the DSB decides by consensus not to adopt it or a party decides to appeal. Further, under the same provision, if the Panel Report is appealed to the Appellate Body, the DSB cannot consider its adoption until after the appeal is finalised.

[25] WT/L/160/Rev1.

[when] given an opportunity to do so by the Appellate Body."[26] On 22-23 March 2001, the Appellate Body held the oral hearing[27] and, on 1 May 2001, published its Report.

(b) Claims of Error – United States as Appellant

The United States claimed that the Panel Body made a number of errors relating to (i) unforeseen developments, (ii) domestic industry, (iii) threat of serious injury, and (iv) causation.[28]

(i) Unforeseen Developments

The United States rejected the Panel Body's finding that it acted inconsistently with Article XIX:1(a) of GATT 1994 when determining 'unforeseen developments'.[29] It claimed the Panel Body erred by reading words into Article XIX, making this inconsistent with earlier Appellate Reports by nullifying the distinction between 'conditions' for applying a safeguard measure and 'circumstances' to be demonstrated as a matter of fact when applying a safeguard measure.[30] It argued that a Panel Body's role was to consider whether the Member taking the safeguard measure showed unforeseen developments existed as a matter of fact. As such, a Panel Body need not consider whether the authorities presented those facts in their Report as a separate finding or as a reasoned conclusion, *inter alia.*[31]

The United States added that USITC's Report showed unforeseen developments existed as a matter of fact and the factual record in the present case was clear and uncontested.[32] In support of its arguments, the United States referred to the practice under GATT 1947 and the

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[26] Lamb, Appellate Report paras 8-9.
[27] The members were Claus-Dieter Ehlerman (presiding), James Bacchus and AV Ganesan.
[28] Ibid Part IIA.
[29] Ibid para 11.
[30] See, for example, Dairy, WT/DS98/AB/R, 21 June 1999 (European Communities v Korea) (Dairy), Footwear, WT/DS121/AB/R, 14 December 1999, European Communities v Argentina).
[31] Lamb, Appellate Report para 13.
[32] Ibid.

negotiating history of the Agreement. It also referred to the Inter-sessional Working Party's Report on *Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Art XIX,* more commonly known as *Hatters' Fur,*[33] which suggested that when tariff concessions were made, it was abnormal for negotiators to foresee specific developments in the market place that could result in an injurious import surge.[34]

In response, Australia argued that the Panel Body had interpreted Article XIX:1(a) of GATT 1994 correctly, thus giving meaning and effect to all applicable provisions including the term unforeseen developments.[35] It stated that WTO Members applying a safeguard measure should satisfy the requirements of both Article XIX and the Agreement. Article 11.1(a) of the Agreement required those taking safeguard action under Article XIX to ensure that it accorded with the Agreement while Article 3.1 required the authorities to give reasoned conclusions on "all pertinent issues of fact and law".[36] Since the Appellate Body had established earlier in *Dairy* and *Footwear* that unforeseen developments were "circumstances that should be demonstrated as a matter of fact",[37] Australia submitted that Article XIX:1(a), read in the context of Article 3.1, required the authorities to reach a reasoned conclusion showing unforeseen developments existed.[38]

Australia added that in a DSB proceeding, a party need not show that unforeseen developments existed *ex post facto*. If not, this would allow USITC to discern from its Report an issue that had not been examined or even considered. Australia therefore rejected the United States argument that the Panel Body's approach had elevated the 'unforeseen developments' condition into an 'independent condition' when applying a safeguard measure.[39]

To satisfy the conditions imposed by Articles 2 and 4 of the Agreement, Australia argued that the USITC's determination should

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[33] GATT/CP/106, 22 October 1951.
[34] Lamb, Appellate Report para 13.
[35] Ibid para 21.
[36] Ibid 33.
[37] Ibid para 22.
[38] Ibid.
[39] Ibid.

include an evaluation of 'all relevant factors'.[40] As Article 4.2(c) provided explicitly, it should also publish a "detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined".[41] As a consequence, to satisfy the 'unforeseen developments' requirement, all it had to do was:[42]

- examine the existence of unforeseen developments based on the actual evidence before them at the time of the investigation;
- reach a conclusion based on that evidence that demonstrates the existence of unforeseen developments as a matter of fact; and
- present that conclusion in some form in the published Report.

(ii) Domestic Industry

The United States argued that the Panel Body defined 'domestic industry' wrongly by including growers and feeders of live lambs and packers and breakers of lamb meat, as this was not consistent with Article 4.1(c) of the Agreement. It claimed that where a continuous line of production and a coincidence of economic interests among various segments contributed to the finished product, the term 'producer' in Article 4.1(c) included the producers who primarily contributed to the finished product's value.[43] Since most sheep and lambs were meat-type animals kept primarily for meat, and the value added by the growers and feeders of live lambs accounted for about 88% of the wholesale cost of lamb meat in the United States, a definition of 'domestic industry' that excluded growers and feeders was artificial and rendered the establishment of serious injury or threat of injury meaningless.[44]

In response, Australia argued that the Panel Body concluded correctly that USITC's inclusion of growers and feeders of live lambs in the definition of producers of lamb meat was inconsistent with Article 4.1(c). This was because Article 4.1(c) did not support USITC's interpretation within the context of the object and purpose of the Agreement and previous Panel Reports.[45] It also claimed that the

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[40] Ibid para 23.
[41] Ibid.
[42] Ibid.
[43] Ibid para 14.
[44] Ibid.
[45] Ibid para 24.

meaning of 'producer of a like product' was clear and the term 'as a whole', found in Article 4.1(c), referred to a comprehensive investigation once the domestic industry was identified. However, this excluded the method used to define the domestic industry's scope.[46] Even if criteria such as vertical integration, continuous lines of production, economic interdependence or substantial coincidence of economic interests were relevant, the Panel Body's findings of fact showed that they were missing from the United States' lamb meat industry.[47]

(iii) Threat of Serious Injury

The United States rejected that USITC's data collection was inconsistent with Article 4.1(c) of the Agreement, stating that Australia did not discharge its onus on this point.[48] It argued that the Agreement did not impose a standard of 'representativeness' on authorities conducting safeguard investigations and submitted that USITC acted consistently with the Agreement.[49] The Agreement had only required the authorities to evaluate all factors of 'an objective and quantifiable nature' with a 'bearing' on the state of the industry, and to determine a causal link existed based on objective evidence under Article 4(2)(a)-(b).[50]

In response, Australia argued that the Panel Body concluded correctly that the data used did not sufficiently represent "those producers whose collective output...constitute[d] a major proportion of the total domestic production of those products" within the meaning of Article 4.1(c).[51] It alleged that USITC's determination was inconsistent with Article 2.1. By failing to consider such data, USTIC did not properly evaluate the state of the domestic industry in the United States. Also, USITC's reliance on statistically invalid, incomplete or absent data was not objective as it had no meaningful bearing on the factors that should be evaluated under Article 4.2(a).[52]

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[46] Ibid para 25.
[47] Ibid.
[48] Ibid para 17.
[49] Ibid para 18.
[50] Ibid.
[51] Ibid para 28.
[52] Ibid.

(iv) Causation

The United States rejected the Panel Body's finding that USITC's causation analysis breached Article 4.2(b) of the Agreement.[53] The Panel Body's analysis in *Lamb Meat* was almost identical to its earlier analysis in *Wheat Gluten*[54] but this analysis had been reversed on appeal.[55] In this appeal, the Panel Body finding "that increased imports 'alone', 'in and of themselves', or *'per se'*, should be capable of causing injury that was 'serious'", was rejected.[56] As a result, the United States argued that the Panel Body in *Lamb Meat* erred in approach by avoiding the appellate reasoning in *Wheat Gluten.*[57]

The United States added that the Panel Body's factual findings in *Lamb Meat* were insufficient to permit the Appellate Body to determine if USITC had properly applied the causation standard required by the Agreement. However, if the Appellate Body disagreed with this argument, it submitted *in lieu* that USITC met the requirements identified by the Appellate Body in *Wheat Gluten.*[58] Not only did USITC show a rise in lamb meat imports seriously threatened the lamb meat industry, it also analysed all relevant factors and showed that injury arising from other causes was not attributed to imports.[59]

In response, Australia argued that the Panel Body concluded correctly that USITC's causation analysis did not comply with Article 4.2(b), which was consistent with the Appellate Report in *Wheat Gluten.*[60] The need to show a 'genuine and substantial relationship' of cause and effect between increased imports and threat of serious injury implied more than a mere contribution to a threat of serious injury.[61] Also, the Panel Body's test of 'necessary and sufficient cause' articulated this standard even if imports did not *'by themselves'* cause a threat of serious injury

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[53] Ibid para 19.
[54] Panel Report, WT/DS166R, 31 July 2000; Appellate Report, WT/DS166/AB/R, 19 January 2001.
[55] Lamb, Appellate Report para 19.
[56] Wheat Gluten, Appellate Report para 79.
[57] Lamb, Appellate Report para 19.
[58] Ibid para 20.
[59] Ibid.
[60] Ibid para 29.
[61] Ibid.

and the Panel Body had been careful to distinguish the 'necessary and sufficient' test from the 'sole cause' test.[62]

Australia alleged that the United States failed to meet the Appellate Body's causation standard established in *Wheat Gluten* since it did not show that imports did not cause any threat of serious injury to other factors, as a matter of fact.[63] It also claimed that USITC did not assess the aggregate effect of factors other than increased imports and did not demonstrate that imports was not the cause.[64] Whether the obligation of non-attribution was met, it argued that USITC did not establish a 'causal link' between increased imports and did not establish that the threat of serious injury did not exist. More specifically, although it was necessary to show cause and effect to establish a genuine and substantial relationship, USITC did not do this.[65]

(c) Claims of Errors – Australia as Appellant

Australia claimed that the Panel Body made a number of errors relating to (i) unforeseen developments and (ii) threat of serious injury.

(i) Unforeseen Developments

Australia argued that if the Appellate Body reversed the Panel Body's conclusion on Article XIX:1(a) of GATT 1994, it would appeal the Panel Body's finding that a change in the product mix and/or cut size of imported lamb meat could qualify as unforeseen developments within the meaning of this provision.[66] It would also allege that the Panel Body's finding relied on a wrong interpretation of *Hatters' Fur*.[67] Further, since the United States used a change in the product mix and/or the cut size of imported lamb meat as the only factor to evidence unforeseen developments, Australia argued that it failed to show that unforeseen developments existed as a matter of fact as required by this provision.[68]

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[62] Ibid para 30.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid para 41.
[67] Ibid.
[68] Ibid.

In response, the United States argued that *Hatters' Fur* did not establish that a change in the structure of imports could 'never' constitute an unforeseen development since there was no basis for this limitation within the context of Article XIX:1(a).[69] On the other hand, the United States argued that Australia, as complainant, failed to show that the developments in the market place identified by USITC were not unforeseen. As a result, and to the extent that the factual record was clear and not contested, unforeseen developments existed in *Lamb Meat.*[70]

(ii) Threat of Serious Injury

The two issues under this heading were standard of review and evaluation of relevant factors.

Appealing against the Panel Body's interpretation and application of the standard of review, Australia argued that the Panel Body was wrong when it interpreted and applied Article 11 of the DSU and gave inappropriate deference to USITC. The Panel Body was therefore wrong to assume that it was enough that the necessary findings and conclusions were discernible from USITC's Report as examined in light of the United States' arguments.[71]

Australia claimed that the Panel Body had indicated that it would proceed by "taking at face value, *arguendo,* the data and reasoning contained in USITC's Report".[72] This meant that certain claims of the United States based on the 'evidence' and the conclusions drawn were not tested by the process of objective assessment required by Article 11 of the DSU.[73] Australia argued that in practice, the standard of review articulated by the Panel Body would allow the authorities (such as USITC) to avoid their duty to evaluate all relevant factors under Article 4.1(a) of the Agreement by stating simply that it was just too hard to find the relevant data. Consequently, the Panel Body should determine objectively if USITC had explained that the facts supported its finding of 'threat of serious injury', instead of drawing favourable inferences

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[69] See generally ibid para 53.
[70] Ibid.
[71] Ibid para 42.
[72] Ibid.
[73] Ibid.

from gaps in the data and leading the Panel Body to make wrong inferences.[74]

When evaluating relevant factors, Australia claimed that the Panel Body made errors when interpreting and applying the relevant legal standard to establish threat of serious injury. The errors were:[75]

1. The Panel Body erred in its application of the legal standard in determining that a 'significant overall impairment' was 'clearly imminent'. The Panel Body adopted a standard lower than that required in the Agreement and showed inappropriate deference to USITC.
2. Although the Panel Body stated correctly that a threat analysis should examine whether serious injury would occur unless a safeguard action was taken, the Panel Body ignored the fact that USITC never undertook such an examination.
3. The Panel Body erred in finding that USITC had satisfied the requirement of making a 'prospective analysis' when in fact the only prospective analysis that USITC undertook showed imports would increase.
4. The Panel Body deferred wrongly to USITC's view that serious injury was 'imminent' although USITC did not make a finding or state an opinion on the meaning of 'imminent'.
5. USITC was wrong to focus on declines following a spike in prices occurring within the later half of the investigation only. By accepting this, the Panel Body was wrong also since the data was restricted to the recent past. To assess whether serious injury was clearly imminent, it was necessary to measure the alleged 'significant overall impairment against the base position of the domestic industry'.
6. The data USITC relied on was insufficient to determine a threat of serious injury.
7. The Panel Body erred in finding that USITC had evaluated all the relevant factors listed in Article 4.2(a) of the Agreement. In particular, USITC did not evaluate capacity utilisation, employment, productivity or profits and losses.[76]

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[74] Ibid.
[75] Ibid para 43.
[76] Ibid para 44.

In response, the United States argued that Australia's appeal under Article 11 of the DSU should be dismissed because the 'high onus' required by this provision, laid down on appeal in *Hormones,*[77] was not discharged.[78] It claimed that Australia's challenge to the Panel Body's interpretation and application of the standard of review did not provide any basis for finding a breach of Article 11. It also argued that the Panel Body interpreted the standard of review correctly when it precluded a *de novo* examination of USITC's determination and the assessment was an objective evaluation of USITC's investigation and Report.[79] The Panel Body had addressed USITC's examination (if any) of all relevant facts and explained how the facts supported its determination. Consequently, the United States argued that the Panel Body had approached this task properly and in good faith.[80]

The United States added that Australia's claims regarding relevant factors should be dismissed, arguing that the Panel Body had properly interpreted and applied the legal standard when assessing what amounted to 'significant overall impairment in the position of the industry' and 'clearly imminent'.[81] On the meaning of 'clearly imminent', the United States claimed that the Agreement did not require the authorities to define this. Further, the Panel Body had properly identified and applied it, which in this case, amounted to an urgent need for a safeguard measure.[82]

The United States also argued that the Panel Body correctly upheld USITC's heavy reliance on data from the latter half of the investigation. This was because the Panel Body and USITC did not rely 'solely' on post-1996 data and USITC had examined the data on imports and the domestic industry's condition for a five year period, from January 1997-September 1998. USITC had found this period the most probative to determine the threat of serious injury and this approach was consistent with the Appellate Body's reasoning in *Footwear.*[83]

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[77] WT/DS26/AB/R, WT/DS48/AB/R, 13 February 1998 (United States and Canada v European Communities) (Hormones). See also the Appellate Reports in Poultry, WT/DS69/AB/R, 23 July 1998 (Brazil v European Communities), and in Salmon.
[78] Lamb, Appellate Report para 54.
[79] Ibid.
[80] Ibid.
[81] Ibid para 55.
[82] Ibid.
[83] See generally Lamb, Appellate Report para 56.

The United States claimed that the Panel Body found correctly that USITC had conducted a valid prospective analysis and had made projections for factors other than imports. It argued that USITC had assessed 'relevant factors' as a whole to determine that serious injury was imminent, adding that the appeals on this issue invited the Appellate Body to revisit factual questions, thereby exceeding the scope of appellate review in the process.[84] Finally, it also argued that the Panel Body did not err but was correct in finding that USITC had properly considered the evidence and properly evaluated 'relevant factors' according to Article 4.2(a) of the Agreement.[85]

(d) Australia's Conditional Appeals

In a novel pre-emptive move, Australia lodged a conditional appeal in case the Appellate Body reversed the Panel Body's conclusion that the safeguard measure breached the Agreement and Article XIX:1(a) of GATT 1994.[86] In other words, assuming the Appellate Body reversed any finding of the Panel Body based on the United States' arguments, Australia's conditional appeal required an analysis of the Panel Body's exercise of judicial economy. This related to its claims under Articles 2.2, 3.1, 5.1, 8.1, 11.1(a) and 12.3 of the Agreement.[87] In response, the United States argued that the conditional appeal should be rejected because it had complied with Articles 2.2, 3.1, 8 and 11-12 of the Agreement and Articles I-II of GATT 1994.[88]

Here, it is noted that Australia had another conditional appeal, on the Panel Body's findings on unforeseen developments discussed above. However, the Appellate Body did not deal with this since the condition on which the requests were predicated did not eventuate.[89]

(e) The European Communities as Third Party

As Third Party, the European Communities raised two issues relating to unforeseen developments and causation respectively.[90]

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[84] Lamb, Appellate Report, para 57.
[85] Ibid para 58.
[86] Ibid para 45.
[87] Ibid.
[88] Ibid para 60.
[89] See the Appellate Body's conclusion ibid para 195.
[90] Ibid para 61.

(i) Unforeseen Developments

The European Communities agreed with the Panel Body that the United States' action was inconsistent with Article XIX:1(a) of GATT 1994 as USITC's Report was silent on the ascertainable and conclusive evidence of unforeseen developments. It also agreed that although unforeseen developments were not articulated, they had to be shown (this could not be *ex post facto),* including the two circumstances as required by Article XIX:1(a). They were (1) the circumstances constituting the developments led to an injurious import surge and (2) the circumstances showed that the developments were unforeseen.[91]

In this regard, the European Communities agreed that Article 3.1 of the Agreement could be used as relevant context, as seen in *Footwear.*[92] Since Article 3.1 referred broadly to 'all pertinent issues of fact', it was not limited to issues arising under the Agreement. If an issue was pertinent by virtue of Article XIX:1(a), it would also be 'pertinent' within Article 3.1. The European Communities reasoned that any other interpretation would exclude Article XIX from the *"inseparable package* of rights and disciplines" governing safeguard measures.[93]

(ii) Causation

The European Communities argued that the Panel Body's articulation of the required standard was correct, suggesting that the United States' interpretation of the causation standard was inconsistent with the object and purpose of the Agreement. On the other hand, if the United States' interpretation was accepted, this could impose trade restrictions against imports to remedy difficulties of the domestic industry unrelated to imports, thus making the injury standard for safeguard actions lower than that required in anti-dumping and countervailing duty actions.[94]

The European Communities stressed that the legal structure governing safeguard measures in WTO law emphasised an *'exclusive link'* between the import surge and serious injury to the domestic industry, as shown in Article 2.1 and the first sentence of Article 4.2(b) of the

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[91] See generally ibid.
[92] See Footwear, Appellate Report para 81.
[93] See Lamb, Appellate Report para 61.
[94] Ibid para 62.

Agreement.[95] The latter meant that the method for assessing 'serious injury' as a legally defined standard did not end with the assessment of 'relevant factors' listed in Article 4.2(a) since the 'non-attribution' process had to be completed.

Also, a finding under Article 4.2(a) could not be made unless and until the effects of other factors (besides imports) were disregarded. Even though imports could contribute to the domestic industry and the Agreement did not require only imports to have contributed to it, a 'serious injury' finding under Article 4 should be based on the sole impact of imports. Therefore, the European Communities concluded that this was precisely what the Panel Body meant when referring to imports as the 'necessary and sufficient' cause of serious injury.[96]

IV. *LAMB MEAT* – THE APPELLATE BODY'S REASONING

The Appellate Body identified the following issues:[97]

a. Did the Panel Body err in finding that the United States acted inconsistently with Article XIX:1(a) of GATT 1994 by failing to demonstrate the existence of 'unforeseen developments' as a matter of fact? If so, did the changes in the product mix of imported lamb meat and/or in the cut size of imported lamb meat constitute 'unforeseen developments' within the meaning of this provision?
b. By defining the relevant domestic industry to include growers and feeders of live lambs for the purposes of the safeguard investigation, did the Panel Body err in finding that the United States acted inconsistently with Article 4.1(c) of the Agreement, and as such, with Article 2.1 too?
c. Did the Panel Body err in its review of USITC's determination that there existed a 'threat of serious injury'? (In particular, this related to the Panel Body's interpretation and application of the appropriate standard of review under Article 11 of the DSU and the requirement in Article 4.2(a) to 'evaluate all relevant factors'.)

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[95] Ibid para 63.
[96] Ibid.
[97] Ibid para 64.

d. Did the Panel Body err in finding that USITC's examination of causation was inconsistent with Article 4.2(b) and, as a result, with Article 2.1 too?
e. Did the Panel Body err in its exercise of judicial economy?
f. Assuming the Panel Body erred in finding that the United States' safeguard measure was inconsistent with Articles 2.1, 4.1(c) and 4.2(b), would the measure be inconsistent with Articles I-II of GATT 1994 and Articles 2.2, 3.1, 5.1, 8.1, 11.1(a) and 12.3 of the Agreement instead?

(a) Unforeseen Developments

The Appellate Body began this deliberation by referring to Article XIX:1(a) of GATT 1994, which states:[98]

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

In *Footwear* and *Dairy,* the Appellate Body had earlier examined the relationship between Article XIX of GATT 1994 and the Agreement.[99] It queried whether Article XIX continued to impose obligations on WTO Members when they applied safeguard measures after the Agreement entered into force. It observed that Article XIX and the Agreement overarched the WTO Agreement and these various instruments should be read 'harmoniously' as 'an inseparable package of rights and disciplines'.[100]

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[98] Ibid paras 68-69.
[99] Footwear, Appellate Report para 81; Dairy, Appellate Report para 75.
[100] Lamb, Appellate Report para 70.

Referring to the two clauses of Article XIX:1(a) as logically connected, the Appellate Body stated that the first clause partly contained the 'circumstance' of 'unforeseen developments' while the second related to the three 'conditions' for safeguard measures, reiterating Article 2.1 of the Agreement.[101] Therefore, it concluded that the fulfilment of these conditions should be the central element of USITC's Report, which should be published under Article 3.1 of the Agreement.[102] Further, the logical connection of the circumstances in the first clause and the conditions in the second clause dictates that the demonstration of the existence of these circumstances should feature in the Report. Any other approach would sever the 'logical connection' between the two clauses, and leave vague and uncertain how the first clause should be complied with.[103]

The Appellate Body noted that USITC's Report did not address the issue of unforeseen developments although it showed two changes in the type of lamb meat products imported into the United States.[104] They were (1) the rise in imported fresh and chilled lamb meat (not imported frozen lamb meat) and (2) the cut size of imported lamb meat. The Report referred to the first change when examining 'like products' under 'causation', describing the substitutability of domestic and imported lamb meat in the domestic marketplace at the same time.[105] However, it did not discuss or explain why these changes could be regarded as unforeseen developments within Article XIX:1(a). Therefore, the Appellate Body agreed with the Panel Body and found that USITC's Report did not show, as a matter of fact, the existence of unforeseen developments required by this provision. Consequently, an examination of Australia's conditional appeal on the issue of whether a change in the product mix and/or the cut size of imported lamb meat could qualify as unforeseen developments within the meaning of this provision was not needed.[106]

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[101] Ibid paras 70-72.

[102] At the Appellate Body oral hearing, all the participants agreed that the fulfilment of these three conditions should feature in USITC's Report: Lamb, Appellate Report para 72.

[103] See generally para 71 ibid.

[104] Ibid para 73.

[105] USITC Report para I-11, I-22 and I-23.

[106] Lamb, Appellate Report para 74.

In reaching this conclusion, the Appellate Report stated that USITC's failure to address unforeseen developments was not surprising since it was not obliged by any domestic legislation, regulation or other rule to examine the existence of unforeseen developments when investigating the situation in the domestic industry. Although the United States modified its position on this issue subsequently,[107] it had argued as a Third Party in *Dairy* and *Footwear* that the omission of unforeseen developments from the Agreement meant that it was no longer necessary to show this.[108] However, on this point, it was noted that both *Footwear* and *Dairy* required unforeseen developments to be shown as a matter of fact.[109] Further, their Appellate Reports were circulated on 14 December 1999, more than seven months after USITC's Report on the domestic lamb meat industry was published in April 1999. Therefore, the Appellate Reports were unknown to USITC when it rendered its Report in *Lamb Meat.*[110]

Since the Appellate Body concluded that Australia did not allege that the United States acted inconsistently with Article 3.1 on unforeseen developments,[111] it held that it need not decide whether USITC and, hence, the United States acted inconsistently with Article 3.1. This provision required USITC to make findings and give reasoned conclusions on all pertinent issues of fact and law in its Report.[112] However, since Article XIX:1(a) required unforeseen developments be shown as a matter of fact before applying a safeguard measure, the presence of unforeseen developments was a pertinent issue of both fact and law under Article 3.1. Thus, USITC's Report should have included a finding or reasoned conclusion on this issue.[113]

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[107] Ibid para 75.
[108] Dairy, Appellate Report paras 64-66; Footwear, Appellate Report paras 60-63.
[109] Lamb, Appellate Report para 74.
[110] Ibid.
[111] Australia identified Article 3 of the Agreement in its request for the establishment of a Panel Body. However, in its arguments on unforeseen developments, it did not assert an inconsistency with Article 3.1 of the Agreement. Instead, it claimed under Article XIX:1(a) of GATT 1994 only. At the appellate oral hearing, it confirmed that its claim regarding unforeseen developments was made under Article XIX:1(a) and not Article 3.1 of the Agreement, although it made arguments under Article 3.1 when developing its claim under Article XIX: ibid.
[112] Ibid para 76.
[113] Ibid para 74.

(b) Domestic Industry

As a preliminary matter, the Appellate Body noted that USITC's Report stated that the United States safeguard statute did not address the issue on whether the producers of an input product could be included in the domestic industry producing the processed product.[114] The United States confirmed at the appellate hearing that neither its safeguard statute nor the United States Code of Federal Regulations applying to safeguard investigations and determinations mandated USITC's two-prong test to decide this issue. It also confirmed that USITC adopted this test to define domestic industry in safeguard actions as a matter of practice in the evolution of its case law but this test was not enacted into law or promulgated as a regulation.[115]

Addressing this issue, the Appellate Body turned to the definition of 'domestic industry' as used in Article 4.1(c) of the Agreement. Article 4.1(c) provides:[116]

> In determining injury or threat thereof, a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

The Appellate Body found that the definition referred to two elements. In the first element, it was noted that the industry consisted of 'producers'. As the Panel Body stated, producers were those who grew or manufactured an article or who brought a thing into existence.[117] However, the second element qualified the meaning of producers, which identified the particular products that should be produced by domestic producers so as to qualify for inclusion in the domestic industry.[118] According to the express words of Article 4.1(c), the term 'domestic industry' extended solely to the producers 'of the like or directly competitive products'. This definition therefore focused

[114] USITC's Report para I-12.
[115] Lamb, Appellate Report para 82.
[116] Ibid para 83.
[117] See paras 83-84 ibid.
[118] Ibid para 84.

exclusively on the producers of a very specific group of products and excluded producers of products that were not 'like or directly competitive products'.[119]

Article 2.1 of the Agreement supported this definition of domestic industry, which was part of the relevant context establishing the basic conditions for imposing a safeguard measure.[120] Article 2.1 reads:

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

Accordingly, the Appellate Body concluded that the first step to determine the scope of the domestic industry was to identify the products that were 'like or directly competitive' with the imported product. Only when the products were identified would it be possible to identify their producers.[121]

In *Lamb Meat,* the United States had imposed a safeguard measure on a specific 'product' (the imported product), but the measure could only be imposed if the specific product ('such product') had the stated effects upon the "domestic industry that produce[d] like or directly competitive products."[122] It had argued that growers and feeders of live lambs could be included in 'domestic industry' for two reasons:[123]

1. USITC had found that there was a 'continuous line of production' from the raw product (live lambs) to the end product (lamb meat); and
2. a 'substantial coincidence of economic interests' existed between the producers of the raw and end products.

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[119] Ibid.
[120] Ibid para 85.
[121] Ibid para 87.
[122] Ibid.
[123] Ibid para 89.

The Appellate Body held that although this interpretation could have a basis in standard case law, it had no basis in the Agreement.[124] The text of Article 4.1(c) defined 'domestic industry' by exclusive reference to the "producers...of the like or directly competitive product" but there was no reference to the two criteria the United States had relied upon.[125] As a result, the Appellate Body found (1) the safeguard measure was based on a determination of serious injury caused to an industry other than the relevant domestic industry and (2) the measure was imposed without serious injury to the domestic industry being determined.[126] If it were defined properly, it would be limited to packers and breakers of lamb meat only. For these reasons, it upheld the Panel Body's finding on this point and found that the safeguard measure violated Articles 2.1 and 4.1(c) of the Agreement.[127]

(c) Threat of Serious Injury

Two issues arose here: (1) standard of review and (2) determination of threat of serious injury.

(i) Standard of Review

When considering the standard of review found in Article 11 of the DSU, the Appellate Body referred to its earlier report in *Hormones,* stating that "the applicable standard is neither *de novo* review as such, nor 'total deference'. Instead, it is the objective assessment of the facts".[128] It also referred to its earlier Report in *Footwear* where the standard was laid down for claims under Article 4 of the Agreement:[129]

> [T]he standard of review that applies in safeguard disputes, as set out above, requires us to refrain from a *de novo* review of the evidence reflected in the Report published by the competent national authorities. Our task is limited to a review of the determination made by USITC and to examining whether the

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[124] Ibid para 90.
[125] Ibid.
[126] Ibid para 96.
[127] Ibid.
[128] Ibid para 101.
[129] Ibid para 102.

> published Report provides an adequate explanation of how the facts as a whole support USITC's threat determination.

Thus, an 'objective assessment' of a claim under Article 4.2(a) of the Agreement had two elements:[130]

a. a Panel Body should review whether the authorities had evaluated all relevant factors; and
b. Panel Body should review whether the authorities had provided a reasoned and adequate explanation of how the facts supported their determination.

Although a Panel Body could not conduct a *de novo* review of the evidence or substitute its own conclusions for those of the authorities, the Appellate Body stated that this did not mean that it should simply accept the authorities' conclusions. On the contrary, in examining a claim under Article 4.2(a) of the Agreement, it could assess whether the authorities' explanations were reasoned and adequate, subject to a critical examination of the facts presented to it.[131]

Therefore, the assessment had two aspects, the formal and the substantive. The first referred to the authorities' evaluation of 'all relevant factors' while the second referred to the authorities' reasoned and adequate explanation for their determination.[132] Accordingly, the Appellate Body concluded that the Panel Body had correctly interpreted the standard of review appropriate to the examination of Australia's claim.

(ii) Determination of 'Threat of Serious Injury'

The Appellate Body began by referring to the definition of 'threat of serious injury' found in Article 4.1(b) of the Agreement:[133]

> '[T]hreat 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

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[130] Ibid para 103.
[131] Ibid para 106.
[132] Ibid para 103.
[133] Ibid para 121.

> injury shall be based on facts and not merely on allegation, conjecture or remote possibility...

An integral element of this definition was the reference to 'serious injury' as defined in Article 4.1(a):[134]

> '[S]erious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry...

The Appellate Body held that the standard for 'serious injury' found in Article 4.1(a) was very high. On appeal in *Wheat Gluten,*[135] this was described as 'exacting', and the adjective 'serious' was used to qualify 'injury',[136] emphasising the extent and degree of the 'significant overall impairment' the domestic industry should suffer or about to suffer before the standard was met.[137] This standard contrasted with the standard of 'material injury' envisaged by GATT 1994, the Anti-Dumping Agreement, and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[138] In this context, 'serious' implied a higher standard of injury than 'material',[139] which accorded with the object and purpose of the Agreement and lifted the injury standard above that established for countervailing or anti-dumping measures.[140]

The Appellate Body noted that threat of serious injury was related to serious injury, a future event that might not even occur. It rested on how serious injury was defined, to show what constituted a threat, the serious injury being clearly imminent.[141] 'Imminent' related to when the threat was likely to occur and threat implied an anticipated serious injury about to occur.[142] The use of 'clearly', qualifying 'imminent', showed that there should be a high chance of an anticipated serious injury occurring

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[134] Ibid para 122.
[135] Wheat Gluten, Appellate Report para 149.
[136] Lamb, Appellate Report para 123.
[137] Ibid.
[138] 'Material injury' was the standard found in Article VI of GATT 1994, Article 3 of the Anti-Dumping Agreement and Articles 5 and 15 of the SCM Agreement: ibid.
[139] Support for this view was found in the French and Spanish texts of the relevant Agreements where the equivalent terms were 'dommage grave' and 'dommage important' (French) and 'daño grave' and 'daño importante' (Spanish): ibid note 77.
[140] Ibid para 123.
[141] Ibid para 124.
[142] Ibid.

in the very near future. Article 4.1(b) provided that any evaluation of a threat of serious injury should "be based on facts and not merely on allegation, conjecture or remote possibility." Therefore, 'clearly' was related to the factual demonstration that threat existed, and 'clearly imminent' indicated that, as a matter of fact, it was manifest that the domestic industry was about to suffer serious injury.[143]

(d) Relevant Factors under Article 4.2(a) of the Agreement

The Appellate Body stated that the authorities, when determining 'threat of serious injury', had to follow the correct process in making their determination and evaluate 'all relevant factors'.[144] This raised two general interpretive questions. First, should the evaluation under Article 4.2(a) rest on data sufficiently representative of the domestic industry? Secondly, did an appropriate temporal focus exist to enable the authorities (namely, USITC) to evaluate the data to show a threat of serious injury in the imminent future?

The Appellate Body stated that although Article 4.2(a) of the Agreement required the authorities to investigate whether the domestic industry faced 'serious injury', the Agreement was silent on the extent of the *sufficiency of the data.* This concerned data collection and whether the authorities should have before them data that represented the domestic industry.[145] On this point, the Appellate Body observed that the authorities should determine 'overall' if the domestic industry was seriously injured or threatened with such injury.[146] Further, 'domestic industry' meant, at least, the producers of a "major proportion of the total domestic production of the products in issue."[147] This involved an evaluation of the 'bearing' the relevant factors had on the domestic industry to allow the 'overall' situation of that industry to be determined and premised on a sufficient factual basis.[148]

The Appellate Body found that although USITC relied on events at the end of the investigation period (21 months) instead of during the entire

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[143] Ibid.
[144] Ibid para 126.
[145] Ibid paras 126-128.
[146] Ibid para 128.
[147] Ibid para 130.
[148] Ibid.

period, the data was sufficiently recent to allow 'significant overall impairment' and 'imminent in the near future' to be evaluated. This was how the *temporal focus of the data* should be evaluated,[149] namely, the 'threat' should be 'clearly imminent', 'future oriented' and based on facts, not conjecture.[150] By requiring a threat determination to be based on 'facts' (not 'conjecture') and pertain to the past and present (not future), Article 4.1(b) of the Agreement created an unavoidable tension between fact and conjecture. However, this could be resolved by using facts from the present and past to justify a conclusion on the future, namely, that serious injury was 'clearly imminent'.[151]

A fact-based evaluation under Article 4.2(a) should therefore be used to project a high degree of likelihood of serious injury to the domestic industry in the very near future.[152] Accordingly, the Appellate Body agreed with the Panel Body that the evaluation of the data must be sufficiently representative of the domestic industry to allow determinations to be made.[153] It also agreed that the Agreement provided no particular methodology to determine serious injury or its threat.[154]

(e) USITC's Determination of 'Threat of Serious Injury'

According to the Appellate Body, two matters formed the 'the heart' of Australia's appeal.[155] They were to determine if the Panel Body applied the appropriate standard of review to USITC's evaluation of the state of the domestic industry under Article 4.2(a) of the Agreement and USITC's determination whether threat of serious injury existed.[156]

The Appellate Body reiterated that when examining a claim under Article 4.2, a Panel Body should apply the appropriate standard of review to the authorities' determination. This had two aspects, the formal and the substantive. First, a Panel Body should review whether the authorities had, as a *formal* matter, evaluated *all relevant factors.*

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[149] Ibid para 134.
[150] Ibid para 135.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Ibid
[155] Ibid para 139.
[156] Ibid.

Secondly, it should review whether the authorities had, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts supported their determinations.[157]

After examining the technical evidence on prices, market share and the Panel Body's approach, *inter alia,*[158] the Appellate Body concluded that USITC did not explain adequately how the facts on prices supported its determination. Further, USITC failed to demonstrate that the domestic industry was threatened with serious injury. Accordingly, the Appellate Body found that the United States had acted inconsistently with Article 4.2(a) and hence, with Article 2.1 of the Agreement also.[159]

(f) Causation

In assessing causation, the Appellate Body agreed with the United States that the Panel Body's interpretation of causation found in Article 4.2(a)-(b) of the Agreement was wrong. As stated above, this interpretation in *Lamb Meat* was very similar to the Panel Body's earlier interpretation in *Wheat Gluten,* which was reversed on appeal.[160] Both Panels had wrongly stated that increased imports should be 'sufficient' to cause serious injury[161] and other factors contributing to this injury should be sufficient to aggravate the domestic industry. As a result, increased imports was just one of the many causes of injury.[162]

On this point, the Appellate Body in *Lamb Meat* began by examining causation in the *Wheat Gluten* appeal. It observed that the first sentence of Article 4.2(b) provided that a determination "shall not be made unless [the] investigation demonstrate[d]...the existence of the causal link between increased imports...and serious injury or threat thereof."

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[157] Ibid para 140.
[158] Ibid paras 141-158.
[159] Ibid para 160.
[160] Here, it should be noted that in Lamb, the Panel Body continued to rely on its earlier interpretation laid down in Wheat Gluten even though this case was reversed on appeal: ibid para 164.
[161] Lamb, Panel Report paras 7.238 and 7.241; Wheat Gluten, Panel Report para 8.138.
[162] Lamb, Panel Report para 7.238; Wheat Gluten ibid.

When interpreting this provision in *Wheat Gluten*, the Appellate Report had stated:[163]

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

Further, noting the crucial significance of the second sentence of Article 4.2(b), the Appellate Body in *Wheat Gluten* added:[164]

> Clearly, the process of attributing 'injury', envisaged by this sentence, can only be made following a separation of the 'injury' that should then be properly 'attributed'. What is important in this process is separating or distinguishing the effects caused by the different factors in bringing about the 'injury'.

The Appellate Body in *Wheat Gluten* also emphasised that the non-attribution language in the second sentence meant that the effects of increased imports separated and distinguished from the effects of other factors should be examined. The words in Articles 2.1 and 4.2(a) supported using such non-attribution language in the second sentence. This determined whether the effects of imports had a 'genuine and substantial relationship of cause and effect' between the increased imports and serious injury.[165]

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[163] Wheat Gluten, Appellate Report para 67, cited in Lamb, Appellate Report para 165.

[164] Wheat Gluten, Appellate Report para 68, cited in Lamb, Appellate Report para 168.

[165] See Wheat Gluten, Appellate Report para 69, cited in Lamb, ibid.

Australia's claims on causation focused on the requirements in Article 4.2(b) that injury caused by factors other than increased imports should not be 'attributed' to the imports. Determining this issue, the Appellate Body once again referred to its earlier decision in *Wheat Gluten* where it formulated a multi-step process to determine causation.[166]

The first step distinguished the injurious effects caused to the domestic industry by increased imports from those caused by other factors. The second distinguished a cause attributed to increased imports or implied by other relevant factors from an 'injury' caused by different factors (including increased imports.) In this process, the authorities had to comply with Article 4.2(b) and ensure that any injury to the domestic industry actually caused by other factors (besides increased imports) was not attributed to increased imports. The third and final step was to determine a causal link between increased imports and serious injury, and determine whether this link involved a genuine and substantial relationship of cause and effect, as required by the Agreement.[167]

The Appellate Body emphasised that the steps simply described a logical compliance process concerning the causation obligations in Article 4.2(b) and they were not legal 'tests' under the Agreement. Neither was it imperative that each step be subjected to a separate finding or reasoned conclusion. Indeed, the steps left open many methodological questions on the non-attribution requirement found in the second sentence of Article 4.2(b).[168] The Appellate Body stressed that the Agreement did not specify the method and approach WTO Members could use to separate the effects of increased imports and other causal factors as the Agreement had simply required respect for the obligations in Article 4.2 when a safeguard measure was applied.[169]

USITC's Report had stated that the "worsen[ing]" financial situation of the domestic industry resulted from the increase in imports.[170] In addition, it identified six factors (besides increased imports) that

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[166] Lamb, Appellate Report para 177.
[167] Ibid.
[168] Ibid para 177.
[169] Ibid.
[170] USITC's Report para I-24.

allegedly contributed to the domestic industry at the same time.[171] Applying the statutory standard under United States law, USITC considered whether each individual factor was a 'more important cause' of the threat of serious injury than increased imports, and concluded that the increase in imports was just as important as any other cause of threat of serious injury.[172]

However, the Appellate Body in *Lamb Meat* found nothing in USITC's Report to indicate that it fulfilled the obligation found in the second sentence of Article 4.2(b). Further, it could not find a basis for assessing the adequacy of USITC's process when determining non-attribution since the Report did not explain how the injurious effects of the different causal factors were separated. The Report also did not explain how USITC ensured that the injurious effects of the other causal factors were not used when assessing the injury blamed on increased imports. Since it could not understand USITC's six factors and since it was not satisfied on the injury's nature and extent which USITC had blamed on increased imports, the Appellate Body upheld the finding that the United States breached Article 4.2(b) and, hence, Article 2.1 of the Agreement.[173]

(g) Judicial Economy[174]

To determine Australia's claims based on Articles I-II of GATT 1994 and Articles 2.2, 3.1, 5.1, 8, 11 and 12 of the Agreement, the Panel Body applied the Appellate Body's statements on 'judicial economy' in *Shirts and Blouses*[175] and *Salmon.* However, the Appellate Report in *Patents*[176] showed that the discretion to exercise judicial economy had limits. For the DSB to make precise recommendations and rulings so

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[171] The six factors were: (1) the cessation of subsidy payments under the National Wool Act 1954; (2) competition from other meat products, such as beef, pork and poultry; (3) increased input costs; (4) overfeeding of lambs; (5) concentration in the packing segment of the industry; and (6) a failure to develop and maintain an effective marketing program for lamb meat: USITC's Report para I-24 – I-26; see also Lamb, Appellate Report para 181 note 138.

[172] Ibid.

[173] USITC's Report paras 7.279, 8.1(f) and 8.1(g).

[174] The Panel Body made a single finding on this claim by Australia and New Zealand: see Lamb, Appellate Report para 188.

[175] WT/DS33/AB/R, 23 May 1997 (India v United States).

[176] WT/DS50/AB/R, 16 January 1998 (United States v India).

that a WTO Member could comply with them promptly, a Panel Body had to adequately address the claims. On this point, the Appellate Body referred to two earlier appeal decisions, *Footwear* and *Wheat Gluten.*

In *Footwear,* the European Communities had asked the Appellate Body to address the claim on 'unforeseen developments'. In *Wheat Gluten,* the European Communities asked the Appellate Body to overturn the Panel Body's exercise of judicial economy. When determining these claims under Article I of GATT 1994 and Article 5 of the Agreement, the Appellate Body upheld the Panel Body's finding in both cases and found that the safeguard measure was inconsistent with Articles 2 and 4 of the Agreement.[177] It held that since the Panel Body found that the safeguard measure lacked a legal basis, the Panel Body had exercised its discretion correctly when it decided not to address unforeseen developments under Article XIX:1(a).[178]

The Appellate Body in *Lamb Meat* also held that the Panel Body's findings amounted to USITC's substantive determinations.[179] However, as in *Footwear* and *Wheat Gluten,* they deprived the safeguard measure of a legal basis. Consequently, the Appellate Body concluded that a meaningful distinction could not be drawn between the Panel Body's exercise of judicial economy in *Lamb Meat* and in the earlier cases.[180]

V. *LAMB MEAT* – THE APPELLATE FINDINGS AND CONCLUSIONS

The Appellate Body made the following findings and conclusions:

(a) The Report upheld the Panel Body's finding that the United States had breached Article XIX:1(a) of GATT 1994 by not

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[177] Lamb, Appellate Report para 191; see also Salmon, Appellate Report para 223.

[178] Lamb, Appellate Report 191; see also Wheat Gluten, Appellate Report paras 183-184.

[179] Refer Lamb, Appellate Report para 192. Here, the Appellate Body referred to the Panel Body's findings that the United States: (1) acted inconsistently with Article XIX:1(a) of GATT 1994 and the Agreement (Article 2.1 and various provisions of Article 4); (2) failed to 'demonstrate', as a matter of fact, 'the existence of unforeseen developments'; (3) defined its domestic lamb industry inconsistently with the provisions of Article 4.1(c) of the Agreement; (4) relied on data insufficient to support its determination of a threat of serious injury under Article 4.2(a); and (5) erred in its assessment of causation under Article 4.2(b): ibid.

[180] Ibid para 193.

showing 'unforeseen developments' existed as a matter of fact.

(b) The Report upheld the Panel Body's finding that the United States had breached Articles 2.1 and 4.1(c) of the Agreement because it wrongly included growers and feeders of live lambs when determining the relevant 'domestic industry'.

(c) The Report upheld the Panel Body's finding that USITC had determined 'domestic industry' by using data that did not sufficiently represent the industry. The Report also modified the Panel Body's ultimate finding that the United States breached Articles 2.1 and 4.1(c) of the Agreement, when it should have been, more correctly, a breach of Articles 2.1 and 4.2(a).

(d) The Report held that the Panel Body had correctly interpreted the standard of review found in Article 11 of the DSU to enable an appropriate examination of claims under Article 4.2 of the Agreement. However, the Report concluded that the Panel Body had wrongly applied that standard when examining USITC's determination that a threat of serious injury existed. The Report also found that the United States beached Articles 2.1 and 4.2(a) of the Agreement because USITC's Report did not adequately explain its determination that there was a threat of serious injury to the domestic industry.

(e) The Report reversed the Panel Body's interpretation of the causation requirements in the Agreement. However, for different reasons, it upheld the Panel Body's ultimate finding that the United States had acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement.

(f) The Report upheld the Panel Body's exercise of judicial economy when it declined to rule on the claim under Article 5.1 of the Agreement.

(g) The Report declined to rule on the respective conditional appeals of Australia relating to Articles I, II and XIX:1(a) of GATT 1994 and Articles 2.2, 3.1, 5.1, 8.1, 11.1(a) and 12.3 of the Agreement.

In accordance with the Panel Report as modified by the Appellate Report, the Appellate Body recommended that the DSB request the United States to make its safeguard measure consistent with GATT 1994 and the Agreement. This Report was adopted on 16 May 2001.

VI. CONCLUSION

Lamb Meat has shown that the DSB has been developing a body of law during the WTO's short years that facilitates the interpretation and application of WTO instruments. According to the statistics published on this body's dispute resolution system between 1996 and 2000,[181] there were 59 Panel Reports, 33 Appellate Reports, 13 Arbitrator's Reports and at least one Mutually Acceptable Solution.[182] By January 2002, there were 242 complaints on 180 distinct matters including more than 40 Appellate Reports.[183] These figures indicate the general willingness of WTO Members to use the system in the manner intended and, in the process, make it work. More importantly, they show a general confidence and faith in the system.

In comparison, although the International Court of Justice (ICJ) is more than 50 years old and all United Nations Members (and others)[184] may bring their disputes to this court,[185] the number of disputes it has dealt with is but a fraction of the number that has been submitted to the comparatively youthful DSB. Since its first judgment was delivered in 1947,[186] the ICJ has delivered approximately 75 judgments, making it an average of less than 1.5 per annum, and it has delivered 24 advisory opinions.[187]

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[181] See SICE Foreign Trade Information System, "WTO Dispute Settlements (1996-2000)" at <www.sice.oas.org/DISPUTE/wtorepe.asp>. One of the reports, on a claim by the United States against Australia under Article 21.5 of the DSU, had amended an earlier report: Automotive (Howe) Leather, WT/DS126/ RA/Corr.1, 2 February 2000.

[182] Alcoholic Beverages, WT/DS8/17; WT/DS10/17; WT/DS11/15, 30 July 1997 (European Communities, Canada and United States v Japan).

[183] WTO, "Dispute Settlement: the Disputes – List of panel, appeal and arbitration rulings" at <www.wto.org/english/tratop_e/dispu.e/database_e.htm> (visited February 2002). Some complaints do not reach the Panel Body since they are resolved beforehand following 'Consultations' in accordance with Article 4 of the DSU or other informal dispute resolution procedures. Consultations allow the parties to resolve their differences in "good faith...with a view to reaching a mutually satisfactory solution" under Article 4(3). The DSU also provides for good offices, conciliation and mediation under Article 5 and arbitration under Article 25.

[184] See United Nations Charter Article 93(1)-(2).

[185] Article 36(1) of the ICJ Statute provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".

[186] The case was Corfu Channel (Merits) [1949] ICJ Reports 4.

[187] See ICJ, "List of Cases brought before the Court since 1946" at <www.icj-cij.org/icjwww/idecisions.htm> (visited January 2002); see also ibid, "General

A major stumbling block the ICJ faces is the requirement that the parties to a dispute submit to its jurisdiction under Article 36 of its Statute before contentious proceedings may begin. If a party does not do so either compulsorily or *ad hoc* under this provision, the ICJ cannot rule on the merits of the claim.[188]

The ICJ is also not known to act quickly and a reason is its cumbersome procedures and processes. For example, the ICJ took ten years to deliver its judgment in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain).*[189] Recently, this problem was publicly acknowledged. For example, on 12 January 2002, in an effort to increase its activities the ICJ shortened the duration of certain incidental proceedings by amending Articles 79-80 of its Rules.[190]

Furthermore, since Article 94 of the United Nations Charter ensures that a judgment of the ICJ has 'teeth', it is not surprising that a State would want to avoid the ICJ's jurisdiction just in case it commits an internationally wrongful act. Under Article 94(1), the parties to contentious proceedings before the ICJ undertake to comply with its decision and failure to do so by one party entitles the other party "to have recourse to the Security Council" under Article 94(2). When this happens, Article 94(2) provides further that the Security Council "may, if it deems necessary, make recommendations or decide upon measures to be taken" to give effect to the judgment.

So what is it that makes the DSB, more particularly, the Panel Body, successful?

First, on the whole, it appears that States are more willing to accept a treaty on the settlement of disputes if it is couched in less mandatory language. To illustrate, under the DSU, the decisions of the Panel Body and the Appellate Body are in the nature of recommendations to the

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information – The Court at a glance", 17 January 2002 at <www.icj-cij.org/icjwww/igeneralinformation/icjgnnot. html>.

[188] Refer note 85 above.

[189] [2001] ICJ Reports (forthcoming); refer 361-402 below.

[190] See generally International Court of Justice, "The International Court of Justice amends two Articles of its Rules", Press Release 2001/1, 12 January 2001. Refer the discussion at 318 above.

DSB. Although in a practical sense a Panel Report is binding, the fact remains that this will not happen until after the disputing parties are given the opportunity to participate fully in the DSB's consideration of the Report and their views recorded according to Article 16 of the DSU. Similarly, although the Appellate Report is unconditionally binding, it will not be adopted if there is no consensus to do so in the DSB according to Article 17(14).[191]

Secondly, the Panel Body, as the tribunal of first instance, is established as a less formal tribunal and, as such, less daunting and less expensive. It is not a standing body and is without a permanent seat. Under Article 6 of the DSU, it is only established when a complaining State so requests and under Article 8 Panel Members are appointed as and when the need arises.[192]

Thirdly, the WTO has been mindful of the fact that some States are more equal than others are. Although in theory all States are equal as reflected in Article 2(1) of the United Nations Charter on the principle of sovereign equality, the WTO has recognised the very real divide between the have and the have not States and between the developed and developing States. It has articulated this by adding special provisions in the DSU to address issues of equity between States. For example, the DSU in Article 24 provides special procedures for a WTO Member deemed to be 'least-developed country' and Article 12(11) further provides for 'developing country Members'.

Fourthly, it is generally true to say that disputing parties prefer their differences to be settled as quickly and as efficiently as possible. When describing the International Tribunal for the Law of the Sea that opened for business at about the same time as the DSB,[193] United

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[191] Compare Article 60 of the ICJ Statute which provides that decisions of the ICJ are final and without appeal; Article 33 of the Statute of the International Tribunal for the Law of the Sea (ITLOS) (annexed to the 1982 Convention on the Law of the Sea) provides that the decisions of the Tribunal are final and binding.

[192] In contrast, the Appellate Body is a standing body comprising seven members, three of whom shall serve in any one case, on a rotation basis: DSU Article 17(1).

[193] The 1982 Convention on the Law of the Sea entered into force on 16 November 1994 and the judges were first convened on 1 October 1996: "Ceremonial inauguration of the judges of the International Tribunal for the Law of the Sea", 18 October 1996 at <www.un.org/Depts/los/itlos_new/press_releases/ITLOS_2.htm>. The DBS came into being when the WTO Agreement entered into effect on 1 January

Nations Secretary-General, Kofi Annan, called it "a modern court that can respond quickly".[194] 'Modern' and 'respond quickly' are key words that are also relevant to the DSB, aptly describing it. Under the DSU, a number of clauses provide expressly for the DSB's efficiency and speed. For example, Article 12(2) provides for flexible panel procedures "to ensure high quality panel reports". Article 12(8) refers to procedures to make the Panel Body 'more efficient' by establishing short and fairly strict compliance time lines for the issue of Panel Reports. And Article 20 refers to the comparatively short time frame for DSB decisions, generally speaking.

Therefore, is the consensus philosophy underpinning the DSB the reason or one of the reasons for this success? Is the success linked to the DSB's more *ad hoc* nature? Has the parties' greater participation in the process under the DSU something to do with it? What about the greater choice of fora? After all, the parties may choose from Consultations to the Appellate Body. Has this played a role? By inserting Articles 8(10) into the DSU to level the playing field, so to speak, is this another contributing factor? Has Article 24 helped also in this regard? By mandating that the dispute resolution process be quick and efficient pursuant to Article 12, has this been an added consideration?

Whatever the above answers and whether they are to be taken collectively or individually, the experience so far is that member States of the WTO have voted with their feet and marched directly to the DSB with their disputes in hand.

1995 and the Panel Body received its first complaint less than two weeks later in Polyethylene and Polypropylene: refer 209 above.

[194] Press Release, International Tribunal for the Law of the Sea, ITLOS/Press 58, 18 October 2001 at <www.un.org/Depts/los>.