

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

***Report of the Panel***

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## I. INTRODUCTION

1.1 On 14 September 2001, Chile requested consultations with Argentina pursuant to Article XXIII:1 of the General Agreement on Trade and Tariffs of 1994 (the "GATT 1994"), Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") and Article 14 of the Agreement on Safeguards. This request was related to the definitive safeguard measure applied by Argentina on imports of peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, imported under MERCOSUR Common Nomenclature (MCN) tariff codes 2008.70.10 and 2008.70.90.<sup>1</sup>

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

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

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

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

Chair: Ms. Elaine Feldman

Members: Mr. Jorge Castro Bernieri  
Mr. Mateo Diego-Fernandez

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

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

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

## II. FACTUAL ASPECTS

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

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<sup>1</sup> See WT/DS238/1.

<sup>2</sup> See WT/DS238/2.

<sup>3</sup> See WT/DSB/M/117.

<sup>4</sup> See WT/DS238/3.

<sup>5</sup> Ibid.

## 1. Regulatory framework

2.2 Argentina incorporated the Agreement on Safeguards into its domestic legislation by means of Law No. 24,425 of 7 December 1994.<sup>6</sup> The Argentine regulatory framework for the conduct of safeguard investigations and the eventual imposition of safeguard measures is contained in Decree No. 1059/96 of 19 September 1996.<sup>7</sup> Law No. 19,549<sup>8</sup> (Law on Administrative Procedure of the Republic of Argentina), together with its Regulatory Decree No. 1759/72<sup>9</sup>, regulates the administrative proceeding in general and is of suppletory application when there are gaps in the specific legislation.<sup>10</sup> Argentina has notified these laws, regulations and administrative procedures relating to safeguard measures to the WTO Committee on Safeguards.<sup>11</sup>

2.3 Decree No. 1059/96 provides that a safeguard measure may be applied only after an investigation has been conducted by the competent authority, which is the Minister of the Economy.<sup>12</sup> On receipt of an application for the initiation of a safeguards investigation, the Secretariat of Industry, Trade and Mining, which is within the Ministry of the Economy (the "ME"), refers the matter to the Undersecretariat of Foreign Trade<sup>13</sup> and to the National Foreign Trade Commission (the "CNCE")<sup>14</sup> who prepare a technical report prior to the final determination<sup>15</sup> (the "technical report") on whether or not there exist increased imports of the product in question which have caused or threaten to cause serious injury.<sup>16</sup> The CNCE is the authority responsible for the analysis, investigation and regulation in the determination of injury to domestic production.<sup>17</sup> After examining their reports<sup>18</sup>, the Secretariat of Industry, Trade and Mining submits a report to the Minister of the Economy indicating whether or not a safeguard measure should be adopted.<sup>19</sup> In the present case that report was Record No. 781.<sup>20</sup> The Minister then issues a resolution, which is published in the Official Bulletin, thereby providing public notice of the decision adopted as a result of the investigation. This resolution considers the different reports or determinations issued by the competent authorities in accordance with the prerogatives granted by the legislation in question, and introduces the administrative act containing a summary of the results of the injury investigation conducted and the reasons which led to the decision to adopt a safeguard measure, as well as the modalities of its adoption.<sup>21</sup> In the present case that resolution is Resolution ME No. 348/2001 of 6 August 2001, published in the Official Bulletin of 7 August 2001.

## 2. Safeguards investigation

2.4 On 27 November 2000, the Argentine Chamber of Industrial Fruit Production of Mendoza ("CAFIM") requested the predecessor of the Secretariat of Industry, Trade and Mining, within the ME, to initiate an investigation for the application of a safeguard measure on imports of peaches

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

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

<sup>8</sup> Published in the Official Bulletin by the Ministry of Justice, 27 April 1972.

<sup>9</sup> Ibid.

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

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

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

<sup>13</sup> The Undersecretariat of Foreign Trade is part of the SICyM within the ME.

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

<sup>15</sup> "Informe Técnico previo a la Determinación Final".

<sup>16</sup> See Article 10 of Decree No. 1059/96.

<sup>17</sup> See Article 1 of Decree No. 766/94.

<sup>18</sup> See Article 11 of Decree No. 1059/96.

<sup>19</sup> See Article 17 of Decree No. 1059/96.

<sup>20</sup> Record No. 781 is included in Exhibit CHL-1.

<sup>21</sup> See Argentina's response to questions Nos. 1 to 3 of the Panel.

preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, imported under MCN tariff codes 2008.70.10 and 2008.70.90 ("preserved peaches").<sup>22</sup>

2.5 On 2 January 2001, by Record No. 711, the Board of Directors of the CNCE decided by majority of its members that the application contained sufficient evidence of threat of serious injury to the domestic industry caused by imports, thereby meeting the conditions laid down by the regulations in force to implement possible provisional safeguard measures.<sup>23</sup>

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

2.7 Accordingly, Resolution ME No. 39 of 12 January 2001, published in the Official Bulletin on 18 January 2001<sup>25</sup>, announced the opening of a safeguards investigation of imports into Argentina of peaches, preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, imported under MCN tariff codes 2008.70.10 and 2008.70.90, establishing provisional minimum specific duties amounting to US\$0.50 per kg. net for a period of 200 days.<sup>26</sup>

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

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

2.10 The CNCE conducted the investigation taking into account information received from domestic producer companies in response to a CNCE questionnaire. The CNCE sent its questionnaire to all the companies registered as producers with CAFIM and received replies from six, of which five, representing 59 per cent of production in 2000, were verified, according to the Annex to Record 781. Those five surveyed companies<sup>29</sup> are La Colina, IAM, Cartellone, Benvenuto and Arcor.<sup>30</sup>

2.11 On 2 July 2001, the Board of Directors of the CNCE<sup>31</sup> met and, having concluded that the domestic industry was faced with a threat of serious injury within the meaning of Article 4 of the Agreement on Safeguards and that this was happening in the context of unforeseen developments, found that the conditions justifying the application of a safeguard measure had been satisfied.<sup>32</sup>

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

<sup>23</sup> Ibid.

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

<sup>25</sup> Published in the Official Bulletin of Argentina, 18 January 2001.

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

<sup>27</sup> See WT/DS/238/1.

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

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

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

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

<sup>32</sup> See Record No. 781, page 1 and 2 in Exhibit CHL-1.

Record No. 781 is the minutes of that meeting of the Board of Directors, and is part of investigation file No. 94/00, which includes technical report No. 08/01 as an integral part.<sup>33</sup>

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

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

### 3. Customs duties and countervailing measures

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

2.15 Argentina imposed countervailing duties on imports of peaches in syrup from the European Union in accordance with Resolution MEyOSP No. 06/96, which entered into force on 9 January 1996. The countervailing duty was imposed at a differential rate, according to the country of origin, on the f.o.b. import price for a period of five years (18.12 per cent for Italy, 12.55 per cent for Spain and 12.13 per cent for the other EU member States). At the beginning of 2002, Argentina reviewed the countervailing duties and decided to maintain them but at a single rate of 10.5 per cent for all EU member States.<sup>37</sup>

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<sup>33</sup> See Chile's first written submission, paragraph 3.7.

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

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

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

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

### **III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

#### 3.1 Chile requests the Panel:

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

#### 3.2 Argentina requests the Panel:

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

### **IV. ARGUMENTS OF THE PARTIES**

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

#### A. PROCEDURAL ARGUMENTS

##### **1. Working Procedures of the Panel**

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

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

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<sup>38</sup> See final conclusion in Chile's first written submission, page 42. See also Chile's rebuttal, paragraph 71.

<sup>39</sup> See Argentina's first written submission, paragraph 160, Argentina's rebuttal, paragraph 41 and Argentina's second oral statement, page 17.

The Panel may, in light of further developments, including the extent of the questions from the Panel allow the parties and third parties to submit longer summaries."

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

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

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

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

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

B. SUBSTANTIVE ARGUMENTS

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

- (a) Whether there was a prior finding or demonstration as a matter of fact of the existence of "unforeseen developments"

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

4.9 **Argentina** replies that both Record No. 781 and the technical report demonstrate and establish in a reasoned and adequate manner the existence of unforeseen developments.<sup>42</sup> Argentina contends that its investigating authority did establish and demonstrate, as a matter of fact and law prior to the adoption of the safeguard measure, the existence of "unforeseen developments" in conformity with the obligation laid down in Article XIX:1(a) of the GATT 1994.<sup>43</sup>

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

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

4.12 **Argentina** replies that the Argentine investigating authority applied the WTO rules since they have been incorporated in Argentine domestic law through Law No. 24,425, regulated by Decree No. 1059/96. Argentina believes that Record No. 781 and the technical report reveal that the investigating authority applied the WTO rules in this case. Argentina stresses that the implementing authority stated from the very beginning of its analysis that the investigation would be conducted in accordance with the regulations laid down in the framework of Article XIX of GATT 1994.<sup>47</sup> In this connection, Argentina explains, the Record No. 781 states that "... having concluded that the domestic industry is facing a threat of serious injury within the meaning of Article 4 of the Agreement on Safeguards and that this is happening in the context of unforeseen developments, the CNCE finds

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<sup>40</sup> In support of this argument, Chile quotes the Appellate Body Report, *US – Lamb*, paragraph 72.

<sup>41</sup> See Chile's first written submission, paragraph 4.1.

<sup>42</sup> See Argentina's first written submission, paragraph 30.

<sup>43</sup> See Argentina's first written submission, paragraph 32.

<sup>44</sup> See Chile's first written submission, paragraph 4.7(b).

<sup>45</sup> See Chile's first written submission, paragraph 4.8.

<sup>46</sup> See Chile's first written submission, paragraph 4.7(a).

<sup>47</sup> See Argentina's first written submission, paragraph 34; Argentina's first oral statement, paragraph 4.

that the conditions justifying the application of a safeguard measure under that Article have been met."<sup>48</sup>

4.13 In response to question No. 4 of the Panel<sup>49</sup>, **Argentina** explains that there is no difference between the word "context" of unforeseen developments which is used in both Record No. 781 and the technical report and the word "result" of unforeseen developments as provided in Article XIX:1(a) of the GATT 1994. Argentina indicates that, for the purposes of this case, the term "context" should be understood as being identical to the term "result".

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

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

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

4.16 **Argentina** recalls the Panel's argument in *US – Lamb*<sup>52</sup> to the effect that "[w]hile the Panel correctly stated that the demonstration of 'unforeseen developments' does not require the precise terminology of 'unforeseen developments' to be used, it is nevertheless necessary that the circumstances ... are in substance identified as such". Argentina understands that this was not

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<sup>48</sup> Argentina refers to Annex to Record No. 781, page 11. See Argentina's first written submission, paragraph 35.

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

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

<sup>51</sup> See Chile's first oral statement, paragraphs 10(a), 10(b) and 10(c).

<sup>52</sup> Argentina refers to the Appellate Body Report, *US – Lamb*, paragraph 61, which refers to the Panel Report, paragraph 7.31.

rejected by the Appellate Body and, accordingly, the CNCE Report in the present case demonstrates as a matter of fact the existence of unforeseen developments for the application of a safeguard measure. In support of this view, Argentina refers to four excerpts of Record No. 781: in the Annex containing the joint vote of the CNCE directors who voted in favour of the safeguard measure, page 6 which refers to imports and pages 9 and 10 which refer to world production and a trend in prices; in the technical report, page 47 which refers to the European Union's output and exports and pages 73 and 74 which refer to world production, exports and stocks (Exhibits ARG II, III and IV).<sup>53</sup> Argentina stresses that both the increase in world production and exports and the increase in world stocks are referred to in the Annex to the Record and in the technical report. However, in response to question No. 6 of the Panel<sup>54</sup>, Argentina indicates that the finding on unforeseen developments in the competent authorities' report can be found in three of these excerpts – the excerpt on pages 9 and 10 from the joint opinion of the CNCE directors who voted in favour of the safeguard measure, and the two excerpts on page 47 and on pages 73 and 74 from the technical report.<sup>55</sup>

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

4.18 In **Chile**'s view, in order to comply with the obligations laid down in Article XIX.1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards, it is essential that the competent authorities analyse and examine beforehand, and hence independently and specifically<sup>57</sup>, whether there were circumstances which, having developed in an unforeseen manner, resulted in imports in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry in question. Chile adds that the analysis must be adequate and sufficient in terms of demonstrating, not implicitly but explicitly, the existence of this prior condition in the file of the investigation.<sup>58</sup> In Chile's view, the comments of the directors that voted in favour of imposing the measure by no means constitute a prior, adequate, reasoned and independent evaluation of the "unforeseen development" requirement. Their analysis is biased, out of context, and in direct contradiction with the conclusion reached by the investigating authority.<sup>59</sup>

4.19 Regarding page 47 of the technical report, **Chile** argues that: (i) it should have focused on Greece, as the main origin of imports, rather than the European Union; (ii) it took 1998 as a base year which was not a representative year; and (iii) Argentina should have taken account of what the

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<sup>53</sup> See Argentina's first written submission, paragraphs 39 to 44.

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

<sup>55</sup> See Argentina's response to question No. 6 of the Panel. See also Argentina's first written submission, paragraphs 39 to 45.

<sup>56</sup> See Chile's first oral statement, paragraph 12.

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

<sup>58</sup> See Chile's first oral statement, paragraph 10(c). See also Chile's rebuttal, paragraph 4.

<sup>59</sup> See Chile's first oral statement, paragraph 11.

investigating authority stated on pages 57 and 58 of the technical report which speak of a recovery of supply in 1999, a similar level of supply in 2000 and lower levels of production in 2000.<sup>60</sup>

4.20 **Argentina** replies that the procedure followed by the investigating authority met the requirements of Article 3.1 of the Agreement on Safeguards and that, pursuant to Article 13 of Decree 1059/96, the administrative act providing for the initiation of the investigation came into force as from its publication in the Official Bulletin.<sup>61</sup> Article 3 of Decree 1059/96 stipulates that all of the interested parties, including the representatives of the exporting countries, shall have access during the course of the investigation to all of the information contained in the file, except information that is confidential. Furthermore, once the investigation is completed, the competent implementing authority issues a resolution, published in the Official Bulletin, providing public notice of the decision adopted as a result of the investigation which in this case was Resolution ME No. 348/2001, published in the Official Bulletin, which outlines the results of the injury (threat of injury) investigation conducted as well as the reasons which led to the decision to adopt a safeguard measure and the modalities of its adoption. Argentina concludes that Chile had access to the investigation procedures, that it had the possibility of making such observations as it deemed necessary at the appropriate stage in the proceedings, and that Argentina acted in conformity with Article 3.1 of the Agreement on Safeguards. Argentina notes that Chile did not make any observations during the proceedings.<sup>62</sup>

(b) Whether the facts on the record show that there were unforeseen developments

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

(i) *What are unforeseen developments?*

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

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

4.24 For **Chile**, different unforeseen developments must unquestionably be the cause of, or precede<sup>66</sup>, imports in such increased quantities, absolute or relative, and under such conditions as to

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<sup>60</sup> See Chile's rebuttal, paragraphs 11 to 13.

<sup>61</sup> Argentina makes a reference to its response to question No. 1 of the Panel.

<sup>62</sup> See Argentina's rebuttal, paragraphs 1 to 5.

<sup>63</sup> See Chile's first written submission, paragraph 4.10.

<sup>64</sup> See Chile's first written submission, paragraph 4.11.

<sup>65</sup> Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 91.

<sup>66</sup> In response to question No. 27 of the Panel (namely, "*Could Chile clarify its view that unforeseen developments must "be the cause or precede" ("ser la causa o el antecedente") an increase in imports, in the light of the finding by the Panel in US – Lamb which rejected a so-called two-stage causation test? (See WT/DS177/R, paragraph 7.16)*"), Chile explained that the Panel's finding in *US – Lamb* on the so-called two-stage causation test does not in any way counter or contradict the assertion that unforeseen developments must be the "cause of, or precede", an increase in imports. As stated by the Panel in its Report, "unforeseen

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

4.25 In response to questions Nos. 7 and 8 of the Panel<sup>69</sup>, **Chile** explains that Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards establish a cause-effect relationship which requires, on the one hand, that one or more developments take place in an unforeseen manner, and on the other hand, that as a result of such unforeseen developments, a product be imported into the territory of another Member in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or to threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

(ii) *Whether there were unforeseen developments*

Whether the increase in imports was a recovery

4.26 For **Chile**, it is clear that the CNCE considered that the "unforeseen developments" condition correspond to a sharp and unexpected increase in imports, which took place entirely in the most recent past.<sup>70</sup> Chile notes that in different parts of the technical report, the investigating authority points out that the historical levels of imports of preserved peaches in Argentina were seriously disrupted during the period 1997/1998 as a result of severe climatic conditions which affected the primary production of preserved peaches in Greece, the world's leading producer and exporter. In view of this disruption, the authority determines that imports experienced a recovery rather than an increase in the period 1999/2000.<sup>71</sup> Chile contends that in spite of this finding, the CNCE, analysing only the trends for the most recent past (1999/2000), concludes that the increase in total imports was sharp and that the domestic industry faced a threat of injury in a context of unforeseen developments. Chile argues that after an isolated interruption of imports as a result of climatic conditions affecting the leading world producer and exporter, a recovery of those imports can, or should reasonably, be expected. Thus, in Chile's view, it is not objectively possible to find that there were unforeseen developments. Consequently, Chile concludes that the CNCE failed to examine this requirement objectively on the basis of the results of the investigation as reflected in the technical report.<sup>72</sup>

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developments" are an element or a requirement distinct from increased imports *per se*. The Panel notes that "it may be sufficient for a showing of the existence of this 'factual circumstance' that *unforeseen developments* have caused increased imports to enter 'under such conditions' and to such an extent as to cause serious injury or threat thereof". As emerges from the preceding reply, the Panel (a) starts from the premise that the competent authorities must demonstrate the existence of "unforeseen developments" before a safeguard measure is applied; (b) the developments in question must *be examined and identified as such* in the report of the competent authorities; and (c) as Chile asserts in its Rebuttal, these developments must be the cause of, or precede, imports in such increased quantities, absolute or relative, and under such conditions as to cause or threaten to cause serious injury.

<sup>67</sup> Chile refers to the Appellate Body Reports, *Korea – Dairy*, paragraphs 83-85; *Argentina – Footwear (EC)*, paragraphs 90-92; and *US – Lamb*, paragraph 72.

<sup>68</sup> See Chile's rebuttal, paragraph 5.

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

<sup>70</sup> See Chile's rebuttal, paragraph 10.

<sup>71</sup> See Chile's first written submission, paragraph 4.12.

<sup>72</sup> See Chile's first written submission, paragraph 4.14.

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

4.28 **Chile** contends that Argentina<sup>75</sup> is trying to distort the scope and meaning of an objective fact recorded and analysed by the investigating authority in the technical report. According to Chile, the authority determined that the increases in imports of preserved peaches into Argentina in the period 1999/2000 (the last two years of the investigation period) reflected a recovery of those imports, whose historical levels had been seriously disrupted during the period 1997/1998 as a result of severe climatic conditions which affected the primary production of preserved peaches in Greece, the world's leading producer and exporter. In its view, the CNCE openly contradicts this fact, which was recorded in the technical report itself, when it concludes that an analysis of the most recent past (1999/2000) reveals a sharp increase in imports and that the threat of injury was occurring in a context of unforeseen developments.<sup>76</sup> Furthermore, Chile argues, Argentina's explanations are merely an *ex post facto* analysis which does not appear anywhere in the Annex to Record No. 781 or the technical report, and which cannot alter or remedy the fact that the CNCE failed to provide an adequate and reasoned demonstration prior to the imposition of the measure. Chile states that nowhere in the technical report or its Annex is there any record of the information which Argentina is now submitting to the Panel as Exhibits ARG-III and ARG-IV.<sup>77</sup> Chile further contends that the file of the investigation reveals that the measure imposed by Argentina was basically aimed at imports of preserved peaches from their two main origins: Greece and Chile. Thus, Chile argues, the foreseen and expected recovery of imports as recorded by the investigating authority is not linked to world stocks, but to the isolated and particular situation affecting Greece as the leading world producer and exporter of the product under investigation in 1997 and 1998.<sup>78</sup>

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

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

4.31 In reference to the above, **Chile** submits that Argentina provides no arguments or explanations regarding the implications of this relationship between the recovery of imports and the countervailing duties for the purpose of evaluating whether or not there were unforeseen

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<sup>73</sup> See Argentina's first written submission, paragraph 47.

<sup>74</sup> See Argentina's first written submission, paragraph 48.

<sup>75</sup> See paragraph 4.27 of the present report.

<sup>76</sup> See Chile's first oral statement, paragraphs 13 to 14.

<sup>77</sup> See Chile's first oral statement, paragraph 15(c). See also Chile's rebuttal, paragraph 4.

<sup>78</sup> See Chile's first oral statement, paragraph 15(d).

<sup>79</sup> See Argentina's rebuttal, paragraphs 7 to 8.

<sup>80</sup> See Argentina's first written submission, paragraph 46.

developments. According to Chile, even if Argentina were to provide an explanation during what remains of the proceedings, it would be dealing with an *ex post facto* analysis which does not appear anywhere in the Annex to Record No. 781 or the technical report, and which cannot alter or remedy the fact that the CNCE failed to provide an adequate and reasoned demonstration prior to the imposition of the measure.<sup>81 82</sup>

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

Which were the unforeseen developments in this case?

4.33 **Argentina** contends that the investigating authority's determination of "unforeseen developments" was in fact corroborated by the file; indeed, the authority made the determination by establishing three circumstances constituting unforeseen developments: (a) increased production as a result of the exceptional Greek harvest; (b) substantial increase in world stocks; and (c) a downward price trend.<sup>84</sup> In response to question No. 28 of the Panel<sup>85</sup>, Argentina indicated that the authorities demonstrated the existence of unforeseen developments on pages 6, 9 and 10 of their report.

4.34 In response to question No. 5 of the Panel<sup>86</sup>, **Argentina** confirmed that it does not allege that increased imports themselves constitute an unforeseen development. However, it adds, if the "conditions under which the preserved peaches were being imported, or something else" refers to the low prices, the surplus harvest in Greece which exceeded the average for the entire decade, and the high concentrations of stocks, then yes, there were unforeseen developments.<sup>87</sup>

(iii) *When should the developments be unforeseen?*

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

4.36 Also in response to questions Nos. 7 and 8 of the Panel<sup>89</sup>, **Argentina** explains that that the "unforeseen developments" in this case occurred after the relevant tariff concession had been negotiated. Argentina argues that at the time the concessions were granted, the negotiators could not have foreseen the developments that took place.

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<sup>81</sup> Chile makes a reference to the Appellate Body Report, *US – Lamb*, paragraph 72.

<sup>82</sup> See Chile's first oral statement, paragraph 15(a).

<sup>83</sup> See Argentina's rebuttal, paragraphs 14 to 15.

<sup>84</sup> See Argentina's rebuttal, paragraph 9.

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

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

<sup>87</sup> See Argentina's response to question No. 5 of the Panel.

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

<sup>89</sup> See footnote 69 of the present report.

4.37 **Chile** replies that, regardless of Argentina's response, the analysis on when and by whom the developments were unforeseen cannot be found anywhere in the remarks of the CNCE directors that voted in favour of imposing the measure. Chile notes that the Uruguay Round took place between 1986 and 1994, and the WTO Agreement entered into force on 1 January 1995. Argentina incorporated, in its domestic legislation, the Final Act of the Uruguay Round and the Marrakesh Agreement on 5 January 1995. Chile claims that, despite the above, it cannot find, either in Argentina's response or in the "file of the investigation", any indication or record whatsoever of what Argentina's concession was on canned peaches when it was negotiated, when it was granted, or what the reasonable expectations of the Argentine negotiators were with respect to the preserved peaches market, including prices, production, inventories and exports at that moment or period, and above all, with respect to the "price" factor, since according to the "file of the investigation" this would appear to be the determining factor in the alleged increased imports and the alleged threat of serious injury to the domestic industry.<sup>90</sup>

4.38 **Argentina** submits that the negotiators could not reasonably have been expected to foresee that abnormal circumstances, such as the record production of 1992/1993, would become the rule rather than the exception.<sup>91</sup> In response to question No. 31 of the Panel<sup>92</sup>, Argentina clarified that the Argentine negotiators could not have foreseen that an exceptional case such as 1992/1993 might recur, and hence it was that they opted for the least trade-distortive alternative. Indeed, the tariff applied to the product in question was 35 per cent. Moreover, Argentina adds, the Agreement on Safeguards applies specifically to situations of injury under fair trading conditions which, owing to their exceptional nature, are difficult to predict.

4.39 **Chile** replies that the "record" world production of preserved peaches in 1992/1993 of which Argentina speaks in its reply is based on an assertion by the applicant, CAFIM, which, in turn, uses World Horticultural and U.S. Export Opportunities as a source. Nowhere in the technical report can Chile find any indication that the CNCE investigating authority verified that information or checked on its reliability for validation purposes. In Chile's view, if the CNCE itself only considered imports of preserved peaches from the European Union and Chile<sup>93</sup>, Argentina's reply, in addition to referring to the reasonable expectations of its negotiators with respect to a world production indicator, should have addressed these expectations with respect to the two main origins, or should, at least, have discussed how one or more specific world production indicators implied unforeseen developments with respect, at least, to prices, production, inventories and exports in Chile and the European Union (chiefly Greece).<sup>94</sup>

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

4.40 **Chile** claims that an examination of the file of the investigation reveals that Argentina did not demonstrate that during the period of investigation (1996/2000), preserved peaches were being "*imported in such increased quantities*"<sup>95</sup>, *absolute or relative to domestic production, and under such*

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<sup>90</sup> See Chile's rebuttal, paragraphs 17-18.

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

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

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

<sup>94</sup> See Chile's rebuttal, paragraphs 19-20.

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

*conditions*" as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.<sup>96</sup> Chile also alleges that the CNCE failed to provide a reasoned and adequate explanation of its determination in the file of the investigation.<sup>97</sup>

4.41 **Argentina**, on the contrary, submits that the increase in imports was both absolute and relative.<sup>98</sup> It contends that imports increased in both absolute and in relative terms inasmuch as they rose from 3,568 tons in 1998 to 7,271 tons in 1999 and then to 12,181 tons in 2000. According to Argentina, these volumes represented relative annual increases of 103.7 per cent and 68 per cent respectively<sup>99</sup> (Exhibits ARG-VII and ARG-VIII).<sup>100</sup> With regard to import volumes and as a percentage of domestic production, Argentina notes that a sharp increase of 10 per cent is observed between 1999 and 2000. Moreover, Argentina states that the growth rate of that indicator (imports as a percentage of production) was 90 per cent for 2000 compared with the previous year.<sup>101</sup>

(a) Whether there was an increase in imports in absolute or relative terms

4.42 As regards a determination of an increase in imports in absolute terms, **Chile** contends that the growth of imports during the two last years of the import period investigated by the Argentine authorities (1996/2000) reflects a foreseen and expected recovery of historical levels, which had been disrupted by severe climatic conditions that affected the production and exports of the product under investigation, particularly in Greece. Moreover, Chile states that if total imports over the entire investigation period are considered, imports for the year 2000 reached approximately 12,120 tons, while in 1996, they reached approximately 14,401 tons. In other words, the volume imported in 2000 was 16 per cent lower than the volume imported in 1996.<sup>102</sup> According to Chile, the facts recorded in the technical report and its annex do not support the CNCE's determination. Chile further alleges that neither Record No. 781 nor the technical report contain a substantiated, reasoned and adequate analysis explaining how, on the basis of what facts, and why Argentina arrived at this determination in the way that it did.<sup>103</sup>

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

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<sup>96</sup> See Chile's first written submission, paragraph 4.15.

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

<sup>98</sup> See Argentina's first written submission, paragraph 61.

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

<sup>100</sup> See Argentina's first written submission, paragraph 61.

<sup>101</sup> See Argentina's first written submission, paragraph 62.

<sup>102</sup> See Chile's first written submission, paragraph 4.16.

<sup>103</sup> See Chile's first written submission, paragraph 4.17.

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

<sup>105</sup> See Chile's first written submission, paragraph 4.19.

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

4.45 **Argentina** contends that Chile's above statements reflect a misinterpretation of certain matters. Argentina considers that Chile proceeds from the false premise that the implementing authority acted improperly in considering an investigation period (1996/2000)<sup>107</sup> and finding that there was an increase in imports in a period that did not coincide exactly with that investigation period, but fell within that period. Argentina is of the view that this interpretation by Chile is not substantiated by any rules or regulations, either domestic or under the WTO, or by WTO precedent. In particular, the Agreement on Safeguards does not stipulate a period which must obligatorily be taken to determine whether there are increased imports, nor does Argentine legislation differ from the Agreement on Safeguards in this respect. Regarding Argentine legislation, Decree No. 1059/96 requires that applicants for the initiation of an investigation should supply data on imports relating to the five most recent complete years substantiating a significant increase, in absolute or relative terms, in the product at issue. However, Argentina argues, this obligation concerns the applicant for the initiation of an investigation only, and not the implementing authority. In order to support its views, Argentina refers to the Appellate Body Reports on *Argentina – Footwear (EC)*<sup>108</sup> and *US – Lamb*.<sup>109 110</sup> Argentina maintains in addition that the investigating authority acted in accordance with WTO precedents, inasmuch as those precedents establish that it is the most recent period that must be taken into account for purposes of the application of a safeguard measure.<sup>111</sup>

4.46 **Chile** points out that although the competent authorities should attach importance to data from the most recent period, they should not consider such data in isolation from the data pertaining to the entire period of investigation. Otherwise, Chile argues, it is impossible to understand objectively the real significance of short-term trends in the most recent data.<sup>112 113</sup> Chile explains that, in the case of the CNCE's determination, the directors who voted in favour of imposing the measure made their finding of alleged increased imports in absolute or relative terms on the basis of data from the end of the period (1999/2000) and taking 1998 as a base year.<sup>114</sup> According to Chile, there can be no question that if 1998 is taken as a base year, any determination of increased imports is bound to be lacking in objectivity and in fact highly questionable, since 1998 is not a year which is representative

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<sup>106</sup> See Chile's first written submission, paragraphs 4.22(a), (b) and (c).

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

<sup>108</sup> Argentina refers to the Appellate Body Report, *Argentina – Footwear (EC)*, paragraphs 130 to 131.

<sup>109</sup> Argentina refers to the Appellate Body Report, *US – Lamb*, paragraph 137.

<sup>110</sup> See Argentina's first written submission, paragraphs 54 to 59.

<sup>111</sup> See Argentina's first oral statement, paragraph 11.

<sup>112</sup> Chile refers to the Appellate Body Report, *US – Lamb*, paragraphs 137 and 138.

<sup>113</sup> See Chile's rebuttal, paragraph 29.

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

of the normal behaviour of the imports in question.<sup>115</sup> The file of the investigation shows that imports of preserved peaches in Argentina are cyclical owing to their association with market fluctuations affecting the leading producer and exporter of the product under investigation, Greece. In 1997 and 1998, following unforeseen climatic circumstances, Greece suffered a substantial loss in its capacity to produce and export preserved peaches. This isolated situation involved a disruption of the historical share of Greek imports in the Argentine market, both in absolute and in relative terms (apparent consumption), as represented by the first year of the investigation period, 1996.<sup>116</sup> According to Chile, this comes out clearly when the CNCE directors make their finding of an alleged increase in imports in absolute and relative terms during 1999 and 2000. It is obvious to Chile that a comparison of imports during those years with the situation in 1998 will inevitably show strong increases towards the end of the period, when the process of recovery by imports of their historical levels began. If, on the other hand, the CNCE directors had examined the data from 1999 and 2000 without isolating it from the data of 1996, its conclusion, objectively, would have had to be the same as that reached by the investigating authority in the technical report, i.e. that the increase in imports during 1999 and 2000 reflected a recovery, in both absolute and relative terms, of their normal and historical levels that had been disrupted starting in 1997.<sup>117 118</sup>

4.47 According to **Chile**, for the determination of increased imports to qualify as objective, unbiased and well founded rather than subjective, biased and unfounded, it is not enough for the authority concerned merely to announce that its investigation will cover a period of five years and then, upon making its determination, to consider the data from the most recent past (1999/2000) only, to compare it with data for a year that is not representative of the normal behaviour of those imports (1998) and to isolate it from data for a year that does represent normal behaviour (1996).<sup>119</sup> Chile argues that Argentina did not manage to explain satisfactorily why its competent authorities excluded 1996 from the analysis and why 1998 would in fact be objectively representative of subsequent trends. What is more, Argentina never explained why the CNCE excluded, in the ITDF and its Annex, all information on apparent consumption for 1996.<sup>120</sup>

4.48 **Argentina** contests Chile's interpretation that what was occurring was simply a recovery by Greek peach imports of their historical levels which were represented by 1996 and insists that what the industry was facing was not a hypothesis of recovery by imports of their historical levels, but "unforeseen developments".<sup>121</sup> As regards 1996, Argentina contends that countervailing duties were applied to peaches from the EU since the month of January. Hence, the flow of imports from that origin must be considered to have been affected. As can be seen in page 10 of the Annex to Record No. 781 and contrary to what Chile claims, the investigating authority did take account of the impact of the countervailing duties.<sup>122</sup> In response to question No. 33 of the Panel<sup>123</sup>, Argentina clarified that Resolution MEyOSP No. 06/96 of 3 January 1996 introduced countervailing duties on imports of peaches from the European Union. This resolution entered into force on 9 January 1996 upon publication in the Official Bulletin. The countervailing duties continued to be applied during the investigation period relevant to file CNCE No. 94/00. The flow of imports was affected through the neutralization of the subsidy component of the imports from the European Union.

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<sup>115</sup> See Chile's rebuttal, paragraph 30.

<sup>116</sup> See Chile's first oral statement, paragraphs 18 to 19.

<sup>117</sup> See technical report, pages 32, 57 and 58.

<sup>118</sup> See Chile's rebuttal, paragraph 31.

<sup>119</sup> See Chile's second oral statement, paragraph 16.

<sup>120</sup> See Chile's rebuttal, paragraph 32.

<sup>121</sup> See Argentina's rebuttal, paragraphs 18 and 19.

<sup>122</sup> See Argentina's rebuttal, paragraph 20.

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

4.49 In response to question No. 15 of the Panel regarding the representativeness of the statistics for 1997 and 1998<sup>124</sup>, **Argentina** indicates that in 1997 and 1998 total Argentine imports fell by 55 per cent and 45 per cent respectively, owing to severe climatic conditions that affected world production and, consequently, trade in the product in question. Argentina explains that an analysis of average f.o.b. prices shows that they increased in 1997, as did the prices of the main exporter: Greece. In 1998, Argentina adds, such prices continued to rise, though to a lesser extent on average, but in the case of the aforementioned country they fell by some 15 per cent to a level of US\$0.594/kg. Also in response to question No. 35 of the Panel<sup>125</sup>, Argentina explained that the investigating authorities took all these data into account as indicated in Section V of the Annex to Record No. 781.

(b) Whether the 1994/1996 sectoral study was of relevance

4.50 **Chile** submitted two tables showing the apparent consumption of preserved peaches in Argentina from 1994 to 1996 in tons and percentages, which it had calculated on the basis of a "Sectoral Study on Canned Peaches" of October 1998.<sup>126</sup> With reference to these two tables, Chile notes that the average historical level of sales of Argentine preserved peaches in the domestic market is approximately 73.3 per cent for the period 1994/1996; in other words, the average apparent consumption of imported preserved peaches for that period is 26.7 per cent. Further, Chile points out the contrasts with the apparent consumption of imported preserved peaches of 11 per cent for 1999, and 17 per cent for 2000, less than the average figure for 1994/1996, not to mention the figure for 1996 alone.<sup>127</sup>

4.51 **Argentina** submits that the above data<sup>128</sup> are based on a CNCE sectoral study of apparent consumption measured in cans of peaches weighing less than 1 kilogram which do not correspond to the product under investigation in the present case, whereas the relevant paragraphs in the technical report use tons as a unit of measurement.<sup>129</sup> Thus, Argentina argues, the citation of that sectoral study is inaccurate. Argentina adds that this study has been available on the CNCE web page and therefore available to the general public since before the initiation of the investigation. In response to question No. 11 of the Panel<sup>130</sup>, Argentina clarified that the technical report does not take account of the data from the sectoral study because the product in the study does not correspond to the product at issue in the safeguard investigation, the quantities in the study are expressed in different units of measurement (cans, as opposed to tons), and refer to different periods of analysis, etc.

4.52 **Chile** replies<sup>131</sup> that, regardless of whether the apparent consumption of preserved peaches is measured in units of 0.820 kg (cans of peaches) or in tons, the figures and results obtained in the comparison process remain every bit as representative and real. According to Chile, what counts is that the structure of apparent consumption of preserved peaches recorded in the sectoral study for 1994/1996, measured in percentages, is fully representative, genuine and objective. Moreover, Chile says, although the unit of measurement behind the information recorded in the technical report is sometimes expressed in tons, those tons are calculated on the basis of a unit of canned peaches of

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

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

<sup>126</sup> See Chile's first written submission, paragraph 4.24 and Exhibit CHL-6.

<sup>127</sup> See Chile's first written submission, paragraphs 4.25 and 4.26.

<sup>128</sup> See paragraph 4.50 of the present report.

<sup>129</sup> See Argentina's first written submission, paragraph 64.

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

<sup>131</sup> See paragraph 4.51 and footnote 130 of the present report.

0.820 kg.<sup>132</sup> Chile also indicates that the argument that the sectoral study did not refer to the same product that was investigated in connection with the imposition of a safeguard measure is not true. Chile claims that the Study comes from the file of the CNCE Investigation No. 28/95 and concerns the imposition of countervailing duties on imports of canned peaches from the European Union and therefore it refers to exactly the same product. In fact, Chile adds, the annex to the technical report itself includes that file in its statistical charts.<sup>133 134</sup>

4.53 **Argentina** insists that the sectoral study took as a reference the investigation conducted under File CNCE No. 28/95 in which the product investigated was "peaches in syrup", while in the safeguards investigation the product under analysis was "peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water".<sup>135</sup> Hence, for Argentina, the product analysed in the safeguard investigation clearly covered a broader universe than the product considered in File No. 28/95.<sup>136</sup>

4.54 Also concerning apparent consumption, **Argentina** considers that the upward trend is beyond question and that the relative importance of imports follows a pattern similar to that of the imports/production ratio. According to Argentina, after imports had recovered in 1999 to the relative share that they had enjoyed prior to the year of the world production crisis, there was a significant growth in 2000 which went well beyond the recorded historical levels<sup>137</sup>. Argentina claims that this was the result of the unforeseen developments.<sup>138</sup> Argentina contends that the presence of low-price imports (due either to unfair competition during the period 1994/96 or to world market surpluses during the most recent years) has logically led to a greater share of imports in apparent consumption, which is significant.<sup>139</sup>

4.55 Moreover, **Argentina** argues that the comparison of periods – such as 1994/96 with 1999/2000 – is clearly questionable, since they involve market and marketing structures that were completely different and a change in supply that was heavily influenced by the launching of the restructuring programme in the domestic production sector.<sup>140</sup> In response to question No. 21 of the Panel<sup>141</sup>, Argentina clarifies that the transformations in the market include changes in distribution channels with a concentration of demand and purchasing power, in the composition of importers and in consumer habits and related prices. As regards the restructuring process, Argentina submits that there were significant differences in the state of the industry following major technological improvements, an increase in the level of integration of the production process involving considerable investment, restructuring of manufacturing plants, and increased industrial concentration.

### 3. **Determination of threat of serious injury. Article XIX:1(a) of GATT 1994 and Articles 2.1, 3.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards**

4.56 **Chile** submits that it has shown that there was no increase in imports, either in absolute or relative terms, and that there were no unforeseen developments either, so that it was impossible for the Argentine preserved peaches industry to have been in a situation where serious injury was clearly imminent. Indeed, Chile adds, if the increased imports (either in absolute or relative terms) must be

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

<sup>133</sup> Chile refers to the Annex to the technical report, charts 5.1 and 5.2.

<sup>134</sup> See Chile's rebuttal, paragraph 34.

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

<sup>136</sup> See Argentina's second oral statement, paragraph 32.

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

<sup>138</sup> See Argentina's first written submission, paragraph 63.

<sup>139</sup> See Argentina's first written submission, paragraph 65.

<sup>140</sup> See Argentina's first written submission, paragraph 66.

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

the result of unforeseen developments, and if the threat of serious injury must have as its genuine and substantial cause an absolute or relative increase in imports, it is impossible, in fact and in law, for the Argentine industry to have faced a threat of serious injury under Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards. According to Chile, the inconsistencies described above show *per se* that Argentina's determination of threat of serious injury violates the covered WTO Agreements.<sup>142</sup>

4.57 **Chile** notes that Articles 4.1(a) and (b) and Article 4.2(a) of the Agreement on Safeguards impose procedural and substantive obligations. On the one hand, Chile argues, the Member wishing to apply a safeguard measure must evaluate all relevant factors of an objective and quantifiable nature pertaining to the most recent past, but without isolating them from the data relating to trends spanning the entire investigation period; and on the other hand, the Member must demonstrate that there has been a threat of serious injury, providing a reasoned and adequate explanation of how the factors analysed support such a finding.<sup>143</sup> As regards this second substantive obligation, Chile specifies that it requires the Member to conduct a substantive evaluation of the "bearing" – or of the "influence", "effect" or "impact" – of these relevant factors on the "situation of [the domestic] industry", i.e., to provide a reasoned and adequate explanation of the way in which the relevant factors corroborate or support their determination.<sup>144 145</sup>

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

- (a) Whether the CNCE evaluated all of the relevant factors listed in Article 4.2(a) of the Agreement on Safeguards having a bearing on the situation of the domestic industry

4.59 **Chile** claims that, under Article 4.2(a) of the Agreement on Safeguards, the CNCE had to evaluate and investigate all of the relevant factors having a bearing on the situation of the Argentine preserved peaches industry, and at a minimum those explicitly mentioned in the said provision.<sup>148</sup> However, Chile argues, there is no evidence of any investigation or evaluation of productivity, capacity utilization or level of employment.<sup>149</sup> The only clues are a few statistical tables annexed to the technical report in which much of the content is concealed, and a mere mention of the employment factor in the Annex to the Record. In any case, Chile adds, the information relating to

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<sup>142</sup> See Chile's first written submission, paragraph 4.34.

<sup>143</sup> See Chile's first written submission, paragraph 4.31. See also Chile's first oral statement, paragraphs 24 and 25.

<sup>144</sup> Chile refers to the Appellate Body Reports, *US – Lamb*, paragraphs 103 and 104; and *US – Wheat Gluten*, paragraph 71.

<sup>145</sup> See Chile's first oral statement, paragraph 37.

<sup>146</sup> See Argentina's second oral statement, paragraphs 46 and 47.

<sup>147</sup> See Argentina's second oral statement, paragraph 48.

<sup>148</sup> See Chile's first written submission, paragraph 4.60.

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

these factors, partially recorded in the technical report, shows that the situation of the domestic industry by no means reflected a threat of injury.<sup>150</sup>

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

4.61 In response to question No. 50 from the Panel<sup>152</sup>, **Chile** acknowledges that the technical report contains tables for capacity utilization and employment but indicates that none of them expressly refers to the "productivity" factor. In Chile's view, Argentina describes this factor as "*producto medio físico del empleo*", the meaning of which is unclear to Chile.<sup>153</sup> It further argues that, unlike the other statistical tables, there is no explanation whatsoever, in annex I to the technical report, of the data in Table No. 7 or of the data recorded as "*producto medio físico del empleo*". In any event, Chile adds, recording data in statistical tables – as the competent authorities have done – is one thing, but a proper and reasoned evaluation of the data or factors, in order to explain and demonstrate how such information supports a determination, is a different matter altogether.

(i) *Productivity*<sup>154</sup>

4.62 **Argentina** submits that productivity is analysed in the Record and the technical report on the basis of an approximation determined by average physical output per employee. In this connection, it claims, an examination of the coefficient obtained by measuring own-production against the number of employees in the production sector (Table 7(e) of the technical report) reveals that in 2000, as an unquestionable result of the fall in production, the indicator fell to 32 points following an increase that reflected improved performance of the sector, ending up more than 10 per cent lower than in 1999. Argentina is of the view that this decrease in the mentioned ratio has an impact on the unit cost of the product, increasing the relative incidence of productive labour in the majority of the companies.<sup>155</sup>

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

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<sup>150</sup> See Chile's first written submission, paragraph 4.62.

<sup>151</sup> See Argentina's rebuttal, paragraphs 24 and 25.

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

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

<sup>154</sup> See footnote 149 to the present report.

<sup>155</sup> See Argentina's first written submission, paragraph 91.

parties, but their total figures do not distinguish the incidence of such production from that of the plants' own production.<sup>156</sup>

(ii) *Capacity utilization*

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

4.65 **Chile** replies that Argentina fails to provide any explanation of why or how it came to the conclusion that this factor supported the determination of threat of serious injury. Chile claims that Argentina merely states that the degree of utilization of production capacity is analysed in the Record and the technical report and, unlike the CNCE directors, it goes on to provide explanations of the figures partially recorded in the annex to the technical report.<sup>160</sup> However, Chile argues, nowhere does it emerge that this factor was examined.<sup>161</sup> Furthermore, Chile submits, the information recorded in the technical report does not support the CNCE's determination of "threat of serious injury". According to that information, Chile argues, the degree of utilization of preserved peaches production capacity for the entire domestic industry experienced an increase as from 1997, reaching 83 per cent in 1999 and remaining at that level in 2000.<sup>162</sup>

(iii) *Employment*

4.66 **Argentina** submits that, as indicated in section 2 of the Annex to Record No. 781 (Situation of the Domestic Industry), the level of employment fell, particularly towards the end of the period. Indeed, Argentina argues, as shown in Table 7a of the technical report, the number of employees employed in production for the companies taken as a whole decreased by 4 per cent in 2000.<sup>163</sup> In Argentina's view, the same pattern can be observed in the total production wage bill (Table 8 of the technical report), while the average salary per employee in the production sector declined

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

<sup>157</sup> See Argentina's first written submission, paragraph 92.

<sup>158</sup> See Argentina's first written submission, paragraph 93.

<sup>159</sup> See Argentina's first written submission, paragraph 94.

<sup>160</sup> Chile refers to paragraphs 92 to 94 in Argentina's first written submission, Annex to the technical report, Table No. 6.

<sup>161</sup> See Chile's first oral statement, paragraph 27.

<sup>162</sup> See Chile's first oral statement, paragraph 28.

<sup>163</sup> See Argentina's first written submission, paragraph 104.

continuously, at a varying rate, during each of the years.<sup>164</sup> According to Argentina, the correlative effort to ensure adequate cost and productivity levels helps to explain why the correlation between these factors is not more explicit. However, the analysis that was conducted of the variations relating to the other products produced by the companies shows different patterns, indicating that the decrease in the production of peaches had a real impact on this factor.<sup>165</sup>

4.67 **Chile** stresses that the only instance in the file of the investigation in which this factor was examined is a very minor one. In Chile's view, the CNCE directors that voted in favour of imposing the measure merely pointed out that the "analysis of the other parameters shows a fall in the level of employment and labour productivity ... The trends in these factors directly reflect the changes in sales and production."<sup>166</sup> Chile further argues that the technical report<sup>167</sup> does not in fact provide employment figures for each company, but merely provides overall data for this factor. As can be seen, Chile adds, the CNCE, rather than evaluating and verifying this information, merely repeats what is stated in the technical report. Chile further indicates that, similarly, the technical report indicates that the level of employment in the preserved peaches production sector hardly declined at all in 2000, and that the level in other production sectors decreased by no more than 7 per cent on average during that year.<sup>168 169</sup>

- (b) Whether the CNCE provided a reasoned and adequate explanation of how the evidence gathered on the evaluated relevant listed injury factors justifies a finding of "threat of serious injury"

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

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

4.70 **Argentina** contends that the CNCE did provide a reasoned and adequate explanation of how the evidence gathered on the evaluated relevant listed injury factors justified a finding of threat of serious injury. Argentina explains that the evolution of the relevant import-related variables is closely linked to the evolution of the international market. Argentina argues that, in the 1998/1999 and 1999/2000 seasons, world production grew by 16 per cent<sup>172</sup>, a highly significant growth rate if it is borne in mind that practically throughout the 1990s, world production of preserved peaches remained fairly stable in the vicinity of 1 million tons per year.<sup>173</sup> Argentina argues that what is significant in the analysis of international market trends is the availability of exportable surpluses, and this analysis reveals Greece's structural exporter status, which is clearly reflected in the relationship between

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<sup>164</sup> See Argentina's first written submission, paragraph 105.

<sup>165</sup> See Argentina's first written submission, paragraph 106.

<sup>166</sup> Chile refers to the Annex to Record No. 781, page 8.

<sup>167</sup> Chile refers to the Annex to the technical report, Table No. 7.

<sup>168</sup> Chile refers to the Annex to the technical report, Table No. 7.

<sup>169</sup> See Chile's first oral statement, paragraphs 29 to 31.

<sup>170</sup> See Chile's rebuttal, paragraph 35(d).

<sup>171</sup> See Argentina's rebuttal, paragraph 35.

<sup>172</sup> Argentina refers to the technical report, page 73, sheet 1407.

<sup>173</sup> See Argentina's first written submission, paragraph 69.

production, exports and availability of stocks over the past decade.<sup>174 175</sup> Exports represented 97.2 per cent of production for the period 1990/2000 with a value exceeding 100 per cent for certain years, proving that there were plenty of readily available stocks that could easily be poured on to the international market.<sup>176</sup> In the case of Greece, these values can be explained by natural conditions for the production of peaches.<sup>177</sup> Greek peaches also share enormous price flexibility which is reflected in the great diversity of f.o.b. price quotations for Greek exports, depending on their destination.<sup>178 179</sup> In Argentina's view, the logical corollary to this can be found in the behaviour of the domestic market for peaches during the 1999/2000 season when the fall in the volume of production was coupled with a significant decrease in the unit value of the product and, more importantly, in the per unit mark-up, since although costs decreased during the reference period, prices were subjected to an even greater downward pressure. This can be seen from the fact that the unit price/cost ratio fell sharply for all of the companies surveyed in the 1999/2000 season<sup>180</sup>, confirming the imminence of a threat of serious injury within the meaning of Article 4.1(b) of the Agreement on Safeguards.<sup>181</sup> In response to question No. 16 of the Panel<sup>182</sup>, Argentina confirmed that the above information can be found in the technical report (pages 54/59, 73/74, 81/82 and annex I – Methodological Notes and Statistical Tables). The competent authority considered that this information showed that there was a threat of serious injury.<sup>183</sup>

4.71 **Argentina** further argues that the implementing authority did not analyse the relevant indicators out of context, but rather in the light of the changes that were taking place on the international market and the greater or lesser degree to which the Argentine economy was exposed to such developments.<sup>184</sup> For example, Argentina adds, the CNCE did not disregard the fact that 1998 was an atypical year in terms of production in the Northern Hemisphere owing to drought, and that, as a result, production levels in the following year were bound to be higher. Nor was the CNCE unaware of the fact that imports, measured in absolute or relative terms, and analysed in the context of the entire decade of the 90s, reached their highest volumes in 1993.<sup>185</sup>

4.72 **Chile** does not agree with the above comments made by Argentina. In Chile's view, the non-confidential information recorded in the technical report does not justify these comments: they are based on information that is not recorded in the file of the investigation and they are based on data from the most recent past that was not analysed in the context of trends spanning the entire investigation period. Moreover, Chile draws the attention of the Panel to the fact that Argentina has offered a number of arguments and lines of reasoning which cannot be found in the comments and determinations of the CNCE directors that voted in favour of imposing the challenged measure, hence representing *ex post facto* clarifications.<sup>186</sup>

4.73 In **Chile**'s view, any attempt by a Member to cure investigative or procedural deficiencies on the part of the competent authorities *ex post facto* by presenting possible explanations and reasons for

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

<sup>175</sup> See Argentina's first written submission, paragraph 72.

<sup>176</sup> See Argentina's first written submission, paragraph 73.

<sup>177</sup> See Argentina's first written submission, paragraph 76.

<sup>178</sup> Argentina refers to the technical report, page 82, sheet 1416.

<sup>179</sup> See Argentina's first written submission, paragraph 77.

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

<sup>181</sup> See Argentina's response to question No. 16.

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

<sup>183</sup> See Argentina's first written submission, paragraph 79.

<sup>184</sup> See Argentina's second oral statement, paragraphs 41 to 43.

<sup>185</sup> See Argentina's second oral statement, paragraphs 44 and 45.

<sup>186</sup> See Chile's first oral statement, paragraph 33.

their determinations that were not provided by the authorities themselves is contrary to the Agreement on Safeguards. The time and place for providing explanations and reasons for a determination are prior to the imposition of the measure, in the file of the investigation, and this must be done by the competent authorities. In the specific case of Argentina, Chile adds, the task of providing a reasoned and adequate evaluation falls to the CNCE directors.<sup>187</sup>

- (i) *Rate and amount of the increase in imports of the product at issue in absolute and relative terms. Share of domestic market taken by increased imports.*

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

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

4.76 **Argentina** considers that it has sufficiently dealt with Chile's claims regarding the rate and amount of imports when dealing with the increased imports.<sup>193</sup> In this regard, it insists that it has already pointed out that the most relevant data for the purposes of a determination is the data from the most recent past and that this is precisely what the investigating authority did in the case at issue.<sup>194</sup> It further argues that the leading world producer and exporter of peaches, Greece, recorded an increase in its exports to Argentina of 207 per cent in 1998, 309 per cent in 1999 and 110 per cent in 2000.

<sup>187</sup> See Chile's first oral statement, paragraph 36.

<sup>188</sup> See Chile's first written submission, paragraph 4.35.

<sup>189</sup> See Chile's first oral statement, paragraph 34(a).

<sup>190</sup> See Chile's first written submission, paragraph 4.36.

<sup>191</sup> See Chile's first written submission, paragraph 4.37.

<sup>192</sup> See Chile's first written submission, paragraph 4.38.

<sup>193</sup> Argentina refers to paragraphs 52 to 67 of its first written submission. See Section IV.B.2 of the present report.

<sup>194</sup> See Argentina's rebuttal, paragraphs 29 and 30.

Argentina indicates that this rate and amount of increase in imports was within the context described in Section IV.B.2 of overproduction and accumulation of stocks that could be poured onto the international market. To take this last factor alone, Argentina points out that in 1999 and 2000, available stocks in Greece were 152.1 per cent and 173.1 per cent higher, respectively, than the average recorded for the entire 1990s. Measured as a percentage of Argentine production, these stocks represented 183 per cent in 1999 and 225 per cent in 2000.<sup>195</sup> Argentina maintains that the increase in imports was less in terms of value and that this is due to the sharp fall in world prices, in particular in Greece, where in 2000, an increase in the volume of imports of 110 per cent corresponded to an increase in the value of imports of 76 per cent.<sup>196</sup>

4.77 **Argentina** submits that the Argentine domestic market has developed over the last years thanks to various factors, such as a general growth in demand and changes in consumption patterns for a series of products. In this connection, Argentina explains, the massive presence in the domestic Argentine market of relatively low-priced products has caused part of the market to be taken by those products.<sup>197</sup> As far as preserved peaches are concerned, Argentina argues, apparent consumption followed an upward trend, disturbed only in 1998 by adverse climatic conditions in the Northern Hemisphere and a domestic supply which, although the adjustment process was under way, proved insufficient.<sup>198</sup> Argentina contends that the prices of imported peaches on the market (even after the Greek price had been corrected by the countervailing duty) declined for the most part, particularly from the main countries of origin, recording levels up to 20 per cent below the domestic price.<sup>199</sup> In this context, Argentina submits, the share of imports in the domestic market measured through apparent consumption (see Exhibit ARG-VI) grew significantly in 2000 to the detriment of sales of the domestic product, affecting prices, production and utilization of installed capacity.<sup>200</sup>

(ii) *Changes in the level of sales, in volume and value*

4.78 **Chile** notes that, based on the information supplied by the portion of the domestic industry analysed by the CNCE, the volume of sales of preserved peaches totalled 24,386 tons in 1997, 26,422 tons in 1998, 37,264 tons in 1999 and 37,113 tons in 2000. Chile further notes that this represents a variation, according to the CNCE, of 8 per cent, 41 per cent, and –minus 0.4 per cent respectively. In terms of price (Argentine pesos), the CNCE's estimated variation is 5 per cent, 28 per cent and minus 14 per cent respectively.<sup>201</sup> Chile points out that in the file of the investigation, with the exception of the company ARCOR, the monthly sales data for that portion of the industry, in volume and in pesos, is not recorded for each company individually. Chile explains that the CNCE treats it as confidential information and that the sales data in pesos does not even include the totals for the survey list. Consequently, Chile submits that it has no way of verifying the estimated total annual sales in tons, and still less, the estimated sales in pesos.<sup>202</sup>

4.79 **Chile** notes that in evaluating this factor, the CNCE states that domestic market sales of the companies analysed taken as a whole decreased, in value, by 14 per cent in 2000 as compared to the previous year, and that domestic sales calculated for the purposes of the estimate of apparent consumption declined in 2000. It adds that this loss took place in a context of growth in apparent consumption starting in 1999. In Chile's view, this evaluation is clearly insufficient.<sup>203</sup> Chile submits that the CNCE gives no reason why its estimated decline in the value of sales towards the end of the investigation period (14 per cent) should reflect a clearly imminent threat of serious injury in the near

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<sup>195</sup> See Argentina's first written submission, paragraphs 81 and 82.

<sup>196</sup> See Argentina's first written submission, paragraph 83.

<sup>197</sup> See Argentina's first written submission, paragraph 84.

<sup>198</sup> See Argentina's first written submission, paragraph 85.

<sup>199</sup> See Argentina's first written submission, paragraph 86.

<sup>200</sup> See Argentina's first written submission, paragraph 87.

<sup>201</sup> See Chile's first written submission, paragraph 4.39.

<sup>202</sup> See Chile's first written submission, paragraph 4.40.

<sup>203</sup> See Chile's first written submission, paragraph 4.41.

future. Moreover, Chile claims that Argentina fails to explain why it does not give any consideration to its estimate of sales in volume, which shows practically no decrease in 2000.<sup>204</sup> Nor does it explain how this relationship between its estimate of the value of sales for 2000 and its estimate of apparent consumption for 1999 and 2000 justifies its determination of threat of serious injury.<sup>205</sup>

4.80 **Chile** notes that apparent consumption shows that domestic industry sales declined by only 1 per cent in 2000 as compared to 1999, and that their share in the market with respect to imports merely decreased from 89.41 per cent to 83.44 per cent in 2000. Thus, according to Chile, it is difficult to speak of "a fall in the share of sales" in 2000, when this "fall" represents a variation of minus 5 per cent and when sales decreased by 1 per cent.<sup>206</sup> Moreover, Chile argues, the CNCE confines itself to the trends for the most recent period without analysing the share of sales in apparent consumption for the entire investigation period. In Chile's view, the CNCE should not have excluded the trends for 1996, since they are important to the behaviour of imports and apparent consumption. The greatest increase in sales in value and pesos and the greatest share of the domestic industry in apparent consumption were recorded in 1998, with the situation beginning to recover in 1999.<sup>207</sup>

4.81 **Argentina** argues that domestic market sales by Argentine companies which, after consecutive increases in 1998 and 1999 had decreased by only 0.4 per cent in tons, had in fact decreased by 14 per cent in terms of value. Moreover, Argentina adds, this decrease is reflected in the statistics of each one of the companies (Record No. 781, Annex, section 2, page 7 – Situation of the domestic industry – and Table 2.2 of the technical report).<sup>208</sup> In Argentina's view, this decrease – more than proportional in value – reflects the fall in the price of the domestic product, provoked by the presence in the market of a considerable and growing volume of imports at decreasing prices. Argentina submits that the fall in price of the domestic product, adversely affected by imports, limited the losses in volume of sales to a minimum, but at the cost of lost profitability and a general negative impact on the industry.<sup>209</sup>

4.82 In reference to the above, **Chile** argues that Argentina failed to provide any justification, under the Agreement on Safeguards for: (i) the fact that Chile had no way of verifying the estimated total annual and monthly sales, in volume and value, of the companies on the survey list, because for reasons of confidentiality, practically none of the supporting information was included in the CNCE Report<sup>210</sup>; (ii) the fact that the CNCE determined that there was a threat of serious injury in circumstances in which sales from the domestic industry declined by only 1 per cent in 2000, and their share in apparent consumption decreased by less than 6 per cent during the same year<sup>211</sup>; and (iii) the fact that the CNCE, without any explanation, disregarded the figures provided by CAFIM for sales in tons by the Argentine industry in 2000. Chile argues that pursuant to CAFIM's figures, these sales increased by 13 per cent in 2000 as compared to 1999.<sup>212 213</sup>

4.83 **Argentina** replies that the classification of some of the information as confidential did not mean that the investigating authority could not draw proper conclusions from that information. In Argentina's view, the issue of the decline in sales has been duly explained. It argues that it reflects the fact that the fall in the price of the domestic product, adversely affected by imports, limited the losses in volume of sales to a minimum, at the cost of lost profitability and a general negative impact on the

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<sup>204</sup> See Chile's first written submission, paragraph 4.42.

<sup>205</sup> See Chile's first written submission, paragraph 4.43.

<sup>206</sup> See Chile's first written submission, paragraph 4.44.

<sup>207</sup> See Chile's first written submission, paragraph 4.47.

<sup>208</sup> See Argentina's first written submission, paragraph 88.

<sup>209</sup> See Argentina's first written submission, paragraph 89.

<sup>210</sup> See Chile's first written submission, paragraph 4.40.

<sup>211</sup> See Chile's first written submission, paragraph 4.44.

<sup>212</sup> Chile refers to the Annex to the technical report, Tables 19.1 and 19.2.

<sup>213</sup> See Chile's first oral statement, paragraph 34(b).

industry. Argentina further argues that the investigating authority did not act arbitrarily in analysing the sales figures, but examined all of the information at its disposal.<sup>214</sup>

(iii) *Production*

4.84 In its first written submission, **Chile** argues that the technical report contains no analysis of this factor and that it merely provides, in an annex, a statistical table showing data on domestic production.<sup>215</sup> Chile explains that, for the CNCE, the information supplied by CAFIM shows a decrease of some 4.5 per cent in 1998, followed by stability in 1999 and 2000 at about 65,000 tons. However, the CNCE adds that the companies on the survey list, while they experienced growth in 1998 and 1999, in 2000 their production as a whole fell by 14 per cent.<sup>216</sup> Chile contends that the CNCE carried out another analysis, disregarding the data provided by CAFIM because it did not reflect trends that fitted in with its determination of threat of serious injury. According to Chile, without any kind of explanation to justify or support its new finding, the CNCE concluded that there was a decline in domestic production in 2000 which was consistent with the decline recorded in the companies analysed. It estimated the decrease at 12 per cent compared to 1999, with domestic production totalling 57,847 tons.<sup>217</sup> Chile submits that the CNCE does not consider 1996 and it confines itself to making estimates and using information from the technical report without providing a reasoned and adequate explanation of how that information supports its conclusions.<sup>218</sup> In any case, Chile argues, the estimate made by CAFIM, which is representative of the domestic industry, does not justify the finding of "threat of serious injury", nor indeed does the 12 per cent decrease estimated by the CNCE, since it takes place in the context of the recovery of imports. Furthermore, Chile contends, these CNCE estimates do not indicate any relationship between this recovery and the lower productivity. According to Chile, domestic production in 1998, when imports to Argentina reached their low point, was 4 per cent lower than in 1997 and 6.5 per cent lower than in 2000.<sup>219</sup>

4.85 **Argentina** contests the above statement by Chile and submits that the indicators analysed and verified for the mentioned subgroup of companies show that production grew in 1998 and 1999 (20 per cent and 39 per cent respectively) and declined in 2000 (14 per cent). According to Argentina, it should be borne in mind that the adjustment process launched by the sector led to an increase in production which was reversed by massive imports in such conditions as to negatively influence that variable.<sup>220 221</sup>

4.86 **Chile** claims that Argentina's above explanation fails to provide any justification under the Agreement on Safeguards for the fact that the CNCE, without providing any explanation of its determination, decided to disregard the domestic production figures provided by CAFIM, which show no decrease for 1999 and 2000; that on the contrary, it chose to adjust its estimate on the basis of the companies in the survey list, which did suffer a decline in 2000.<sup>222 223</sup>

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<sup>214</sup> See Argentina's rebuttal, paragraphs 32 to 34.

<sup>215</sup> See Chile's first written submission, paragraph 4.49.

<sup>216</sup> See Chile's first written submission, paragraph 4.50.

<sup>217</sup> See Chile's first written submission, paragraph 4.51.

<sup>218</sup> See Chile's first written submission, paragraph 4.53.

<sup>219</sup> See Chile's first written submission, paragraph 4.54.

<sup>220</sup> Argentina refers to Annex to Record No. 781, section 2, page 7 - Situation of the domestic industry - and Table 1 of the technical report.

<sup>221</sup> See Argentina's first written submission, paragraph 90.

<sup>222</sup> Chile refers to Annex to Record No.781, page 7.

<sup>223</sup> See Chile's first oral statement, paragraph 34(c).

(iv) *Profits and losses*

4.87 **Chile** submits that it is impossible to verify each and every one of the items of information provided by the Argentine producers. In Chile's view, the CNCE merely repeats what was stated by the producers on the basis of their general accounting statements and their specific sales accounts for the product under investigation. Chile claims that there is no knowledge of the methodologies used by producers in arriving at such conclusions, and the file of the investigation does not state that the CNCE investigated the data, let alone verified it to see whether it corresponded to the reality.<sup>224</sup> According to Chile, what the file does reveal is that the Argentine industry made heavy investments in connection with a reconversion of the primary and secondary sectors, that the total average cost of peaches as a raw material decreased throughout the investigation period, and that it is common for part of that industry to entrust its production of preserved peaches to processing plants belonging to third parties. Chile submits that the CNCE fails to evaluate any of these circumstances which influence production costs and profits.<sup>225</sup>

4.88 **Chile** observes that the CNCE itself acknowledges that the accounting statements of the companies are limited from the analytical point of view in that these are multi-product companies. This is why, in Chile's view, it decided to obtain from the companies in question the accounts specifically relating to preserved peaches. However, Chile adds, it remains silent as to the impact of the profitability of sales of that product for each multi-product enterprise in terms of billing.<sup>226</sup> Chile argues that, according to the actual information provided by the companies on the survey list, sales of preserved peaches represented between 1 per cent and 40 per cent; but it is impossible to verify the impact of these billings on their total sales, since the CNCE reveals this information for ARCOR only.<sup>227</sup> Moreover, Chile submits, all of the companies on the survey list indicate a high debt ratio which has persisted since 1997. Chile claims that the CNCE has failed to investigate how this historical indebtedness might have been affecting the domestic industry's profitability.<sup>228</sup>

4.89 **Argentina** submits that, in analysing the evolution of the profitability and net worth of the enterprises in relation to the impact of imports on the domestic industry, it should be borne in mind that since these are multi-product enterprises, for an analysis to be more specific and directly relevant, as well as objective, it must be conducted on the basis of the accounts containing the results for the product in question.<sup>229</sup> In Argentina's view, the fact that the CNCE was dealing with a multi-product industry and Chile's claim that there are no disaggregated profitability indicators for each product do not preclude the possibility of the CNCE having reached consistent conclusions on threat of injury to the preserved peaches industry.<sup>230</sup> Argentina notes that there are disaggregated accounts for the production of peaches in terms of cost, price, employment and corresponding wages, as well as the evolution of sales (in volume and value) and the per unit mark up for the product measured as the unit price/cost ratio.<sup>231</sup> Argentina is of the view that circumstances dictated that the analysis of specific accounts for a major portion (more than 60 per cent) of the domestic industry was the most appropriate and relevant approach.<sup>232</sup>

4.90 Looking at the analysis of productivity of the product based on specific accounts, **Argentina** submits, the 11 per cent fall in the marginal contribution on sales after covering the variable costs, and

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<sup>224</sup> See Chile's first written submission, paragraph 4.55.

<sup>225</sup> See Chile's first written submission, paragraph 4.56.

<sup>226</sup> See Chile's first written submission, paragraph 4.57.

<sup>227</sup> See Chile's first written submission, paragraph 4.57.

<sup>228</sup> See Chile's first written submission, paragraph 4.58.

<sup>229</sup> See Argentina's first written submission, paragraph 95.

<sup>230</sup> See Argentina's first written submission, paragraph 96.

<sup>231</sup> See Argentina's first written submission, paragraph 97.

<sup>232</sup> See Argentina's first written submission, paragraph 98.

a sales/breakeven point ratio<sup>233</sup>, which fell from 1.25 in 1999 to 0.67 in 2000, i.e. 33 per cent below the 1/1 limit, reveals a negative profitability at the end of the period, corresponding to the sharp growth in imports at decreasing prices and the consequent impact on domestic prices.<sup>234</sup> At the same time, the price/cost ratio at the end of the period was close to or less than one, depending on the company, with considerable decreases recorded in 2000. Argentina argues that these results which, in accordance with the methodology used, corresponded exclusively to the product under analysis, must be seen in the context of multi-product enterprises in which the sale of preserved peaches does not exceed 40 per cent of total billing and whose balance pages, as indicated in the technical report, are affected by company transfers and influenced by the operating results for other products as well as non-operating and non-recurring results.<sup>235</sup>

4.91 **Argentina** contends that, during the most recent period, when imports grew to unforeseen levels, most of the companies on the survey list representing the sector were experiencing decline: a 14 per cent fall in production, a 14 per cent decrease in the value of sales, and a 10 per cent fall in average physical output per employee (as an approximation of productivity), owing mainly to the 14 per cent decrease in production, which was higher than the decrease in employment. Thus, Argentina argues, the production capacity increased (following the restructuring mentioned earlier on) while capacity utilization decreased in 2000. In Argentina's view, this negative evolution of the degree of utilization of capacity was not attributable to the growth in capacity, but to the fall in production.<sup>236</sup>

4.92 **Argentina** further argues that, in addition to its above arguments regarding the special cost-benefit accounts for peaches, the analysis of employment indicators (average wage and total wage bill) reconfirms the relativity of the consolidated balance pages, given the multi-product industry status. According to Argentina, this can be seen in the negative ratio of the above-mentioned indicators and the evolution of wage indicators for the rest of the production of the companies on the survey list. These indicators are positive for 1999 and 2000, a fact that, in Argentina's view, could only reflect a difference in profitability *vis-à-vis* the production of peaches.<sup>237</sup> Argentina concludes that it is obvious that the positive values (alleged by Chile) in the consolidated balance pages can only be explained by the results for the other products, and not by the billing for peaches, whose prices were seriously affected by the downwards pressure exerted by imports.<sup>238</sup>

4.93 **Chile** submits that Argentina fails to provide any argument to justify, in the light of the Agreement on Safeguards: (i) the fact that the CNCE does not explain or demonstrate the true incidence of billing for sales of preserved peaches by companies of the survey list on total sales or the profitability indices of these multi-product companies; and (ii) the fact that the CNCE provides no explanation of the methodologies used by the companies in presenting this information and of how it is possible to verify this information when the bulk of it is treated as confidential.<sup>239</sup> <sup>240</sup> Chile further responds to Argentina<sup>241</sup> that the whole point of a reasoned and adequate explanation supported by

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<sup>233</sup> Argentina refers to the technical report, Statistical Annex, specific accounts for preserved peaches, sheet 1475.

<sup>234</sup> See Argentina's first written submission, paragraph 99.

<sup>235</sup> See Argentina's first written submission, paragraph 100.

<sup>236</sup> See Argentina's first written submission, paragraph 101.

<sup>237</sup> See Argentina's first written submission, paragraph 102.

<sup>238</sup> See Argentina's first written submission, paragraph 103.

<sup>239</sup> Chile refers to the Annex to the technical report, Tables 12, 13 and 14; Annex to Record No. 781, page 8; Chile's first written submission, paragraphs 4.57 and 4.58.

<sup>240</sup> See Chile's first oral statement, paragraph 34(d).

<sup>241</sup> Chile refers to paragraph 103 of Argentina's first written submission where Argentina states that it is obvious that the positive values (alleged by Chile) in the consolidated balance sheets can only be explained by the results for the other products. See paragraph 4.92 of the present report.

sufficient evidence is to avoid this kind of assumption or conjecture. Objectively, it says, the CNCE's determinations should be evident and well-founded for all Members, and not only for Argentina.<sup>242</sup>

(v) *Other considerations*

4.94 **Argentina** contends that Chile undervalues certain variables which, in Argentina's view, are essential when it comes to evaluating threat of injury, namely:

- (a) Chile does not attach enough importance to the fact that the growth rate in imports was positive from 1998 onwards, and that imports grew at a faster rate than in 1996<sup>243</sup>;
- (b) Nor does Chile attach enough importance to the fact that 1998/2000 was a period of recession in Argentina which, until 1997, had experienced sustained growth, so that low-priced imports, in the context of substitution of consumption to which Argentina has already referred, had considerably more potential for injury due to the downward pressure they exerted;
- (c) Chile does not attach enough importance to the incontrovertible fact that the volume of stocks available in Greece to be poured on to the international market during the 1999/2000 period represented 1.83 and 2.25 times Argentina's production for those years respectively. In 2000, Argentine production fell by 12 per cent<sup>244</sup>;
- (d) Chile does not give due consideration to the fact that that stock could easily have been poured on to the Argentine market for macroeconomic reasons (1 to 1 parity as a result of the currency board) and the fact that it is a counter-seasonal market with growing apparent consumption. Argentina comments that the seasonality component was highlighted by the investigating authority on page 9 of the Annex to Record No. 781, and is also reflected in Table 15.2 of the technical report<sup>245</sup>;
- (e) Chile does not correctly analyse the historical volumes in Greece which, with its enormous production capacity and its high export coefficient, is unquestionably the country with the greatest potential to pour excedent production on to the world market, and focuses exclusively on the unfair competition component, which was duly remedied by applying countervailing duties. The investigating authority specifically refers to this circumstance on page 10 of the Annex to Record No. 781;
- (f) Chile underestimates the high potential for the said production volumes to be poured on to a market like the Argentine market. In addition to Greece, the European market has other major suppliers (Spain, Italy and France), and the other large consumer market in the Northern Hemisphere, the United States, has historically been almost entirely self-sufficient;
- (g) Chile overlooks the fact that during the preceding years, the Argentine industry had been pursuing a significant investment and productive expansion plan, so that the downward pressure exerted by imports on prices, on top of the considerations set forth in subparagraph (b) above, aggravated the injury to the domestic industry that much more.

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<sup>242</sup> See Chile's first oral statement, paragraph 35.

<sup>243</sup> Argentina refers to Exhibit ARG-XVII.

<sup>244</sup> Argentina refers to the technical report, page 59 and Table 1.

<sup>245</sup> Argentina refers to Exhibit ARG-XVIII.

4.95 **Argentina** maintains that, taking the period 1995/1996, one could quite clearly see that the annual growth rate of imports decreased up until 1998. On the other hand, Argentina submits, during the period 1998/2000, the annual growth rate of imports rose steadily, reaching figures which, if we look at the entire decade, were only exceeded in 1993. Similarly, there was an upward trend in both apparent consumption and growth in international stocks in 1998/2000. Argentina stresses that the figure (in thousands of tons) for average annual stocks in Greece, the leading world exporter and producer was 47.6, while for 1995/1996, it was 43.25. Argentina explains that taking the mentioned average for the 1990s (47.6), available stocks in Greece for 1999 exceeded that figure by 152 per cent, and in 2000 by 173 per cent.<sup>246 247</sup>

(c) Whether the CNCE considered all relevant injury factors not listed in Article 4.2(a) of the Agreement on Safeguards. Industry readjustment

4.96 According to **Chile**, the producers that took part in the investigation showed that domestic production had expanded considerably over the past decade following heavy investments and business strategies involving the plantation of new, highly efficient varieties of peaches for preserves with good market prospects, vertical integration of production between the primary and secondary sectors, international scientific and technical counselling, protection against climatic risks and industrial concentration in plants offering economies of scale. This extensive readjustment led to a significant increase, *inter alia*, in productivity, production, sales and degree of utilization of production capacity. Chile indicates that all of this took place in the framework of trade liberalization, an indication of the confidence of the domestic industry in its ability to compete on export markets in the long term. Chile is of the view that, under these conditions, it is impossible that the CNCE should have found that this industry was facing a threat of serious injury.<sup>248</sup>

4.97 **Argentina** responds that the CNCE sent questionnaires to 100 per cent of the companies registered as producers in CAFIM, and received replies from a large percentage of the domestic industry: six companies, of which five, duly verified, represented 68 per cent of production in 1999. These companies as a whole were referred to throughout the Record and the technical report as the "survey list" or the "companies surveyed", without distinction.<sup>249</sup> Argentina maintains that the information supplied, together with the verifications, revealed that the sector was being restructured on the basis of new primary "productive units" which had led to a growth of 21 per cent in the production of preserved peaches up to 1999. This trend was reversed in 2000 under the pressure of imports in conditions which produced a significant decline in domestic production, making the industry more sensitive and marking out a clear and foreseeable path towards imminent injury.<sup>250</sup>

4.98 In response to question No. 17 of the Panel<sup>251</sup>, **Chile** indicates that the legal basis of its claim regarding industry readjustment is the obligation imposed by Article 4.2(a) of the Agreement on Safeguards according to which the competent authorities must not only evaluate, at a minimum, the factors indicated therein, but must also evaluate any other factor that is relevant or pertinent to the situation of the domestic industry concerned, with a view to determining whether that industry is facing serious injury or a threat thereof. In response to question No. 42 of the Panel<sup>252</sup>, Chile clarified that, in its view, an industry readjustment process can perfectly be measured and quantified on the

<sup>246</sup> Argentina refers to Exhibits ARG-IX and ARG-XVII.

<sup>247</sup> See Argentina's second oral statement, paragraph 49.

<sup>248</sup> See Chile's first written submission, paragraph 4.64.

<sup>249</sup> See Argentina's first written submission, paragraph 79.

<sup>250</sup> See Argentina's first written submission, paragraph 80.

<sup>251</sup> Namely, "What exactly is the legal basis of Chile's claim regarding industry readjustment in paragraphs 4.63-4.64 of its first written submission?".

<sup>252</sup> Namely, "Chile's answer to question 17 indicates that it claims that industry readjustment was another factor relevant or pertinent to the situation of the domestic industry. Could such a process be considered "of an objective and quantifiable nature" in the sense of Article 4.2(a) of the Agreement on Safeguards? Why, or why not? ".

basis of objective data on indicators of such a process, considered as an additional factor; these include production, investment, technological innovation, exportable surpluses, and so forth.

4.99 Also in response to question No. 42 of the Panel, **Argentina** indicates that it considers that although the industry readjustment may have the characteristics of an objective and possibly quantifiable fact, it is not one within the meaning of Article 4.2(a) which, moreover, does not list it among the objective and quantifiable facts for the purposes of the Article 4 determination.

(d) Whether the CNCE based its finding of "threat of serious injury" merely on conjecture or remote possibility and failed to demonstrate adequately that it was clearly imminent

4.100 **Chile** claims that the CNCE based its finding of "threat of serious injury" merely on conjecture or remote possibility and not on facts, and that it failed to demonstrate adequately that in the year 2000 there was a high probability or imminence that such injury would occur in the near future. The CNCE maintains that the factors it considered showed the high degree of sensitivity of the domestic industry to the change taking place in the market as a result of imports and that the behaviour of those imports towards the end of 2000, in terms of price and volume, had the capacity to cause serious injury. On that basis, it determined that there was a threat of serious injury, stating that in the international market there were no indicators that suggested that the volume and price of world production and exports, both present and future, should not be equal to or even greater than in 2000.<sup>253</sup> Chile submits that all relevant factors of an objective and quantifiable nature, properly evaluated, do not indicate that the behaviour of imports towards the end of 2000 constituted a threat of serious injury.<sup>254</sup>

4.101 According to **Chile**, the CNCE unjustifiably predicts that serious injury will occur based on the simple assertion that there were no indicators in the international markets to prove that the volume and price of world production and exports would decrease either then or in the future. The CNCE does not provide any analysis to demonstrate the truth of its assertion or explain how and why, nor does it provide empirical evidence in support of its prediction. Its assertion rests on an assumption based on the lack of indicators in the international market. In other words, on the basis of a negative fact, it assumes a positive fact, that the volume and price of world production and exports in 2000 and in subsequent years could be the same or even higher. It bases its finding of threat of serious injury on a highly vague and ambiguous assumption, stating that the said assumption justifies the conclusion that such a threat exists because international market conditions such as they are will not be changing in future years. In other words, it bases one assumption on another assumption. Chile also argues that the CNCE should have focussed more specifically on production and exports from the two main origins: Greece and Chile.<sup>255</sup>

4.102 **Argentina** emphasizes that the determination of threat of serious injury, far from having been made on the basis of mere conjecture or remote possibility, was based on facts. Argentina observes that Chile itself appears to recognize that the analysis effected by Argentina supports a determination of the existence of the threat of serious injury. Argentina argues that according to Chile, the Argentine investigating authority was guilty of inconsistency in maintaining that the volume and price of world production and exports would not decrease in the future. It is obvious to Argentina that Chile agrees that the current situation is one of threat of injury. Otherwise, why would it lay stress on the future if it could demonstrate that the information considered by the investigating authority at the time of its determination was false. Argentina also submits that the Appellate Body in *US – Line Pipe* found that before serious injury occurs "there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury', serious injury does not generally occur suddenly...". Accordingly, the Appellate Body found that the threat of serious

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<sup>253</sup> See Chile's first written submission, paragraph 4.65.

<sup>254</sup> See Chile's first written submission, paragraph 4.66.

<sup>255</sup> See Chile's first written submission, paragraph 4.68.

injury requires a lower threshold than serious injury and this distinction serves to allow an importer Member to act sooner to take preventive action when increased imports posed a 'threat' of 'serious injury' to a domestic industry, but have not yet caused 'serious injury'.<sup>256</sup>

**4. Demonstration of the existence of a causal link. Articles 2.1, 3.1 and 4.2(b) of the Agreement on Safeguards.**

4.103 **Chile** submits that the CNCE failed to establish a genuine and substantial causal link between the alleged increased imports and the alleged threat of serious injury to the domestic industry as required by Articles 2 and 4.2(b) of the Agreement on Safeguards. According to Chile, Article 4.2(b) requires that the competent authorities demonstrate, "on the basis of objective evidence", the existence of a causal link.<sup>257</sup> Chile further submits that these violations point to a breach of Article 3.1 of the Agreement on Safeguards, since the CNCE's report does not provide any reasoned and adequate explanation of the findings and conclusions reached on all pertinent issues of fact and law relating to the determination of causal link.<sup>258</sup>

4.104 **Chile** maintains that, for an analysis of causation to be consistent with Articles 2 and 4.2(b) of the Agreement on Safeguards, the methodology adopted by the investigating authorities must consist of a three-stage approach that complies with the so-called principle of non-attribution of injurious effects of other factors as has been described by the Appellate Body.<sup>259 260</sup> Chile contends that, in order to explain their determination of causal link, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. In its view, this explanation must be clear and unambiguous, it must not merely imply or suggest an explanation and it must be a straightforward explanation in explicit terms.<sup>261 262</sup>

4.105 **Argentina** contests these claims and refers to Section V.4 of the Annex to Record No. 781 concerning the determination of threat of injury as a result of imports which concludes with the statement "[t]he import situation and the degree of variation and sensitivity of the indicators listed and described in Section V.2 prove the existence of a causal link between the investigated imports and the threat of serious injury."<sup>263</sup>

4.106 **Chile** replies that Argentina's defence merely repeats part of what was stated by the CNCE.<sup>264</sup> In Chile's view, the CNCE's analysis does not meet the obligations laid down in Article 4.2(b) since the CNCE fails to:

- (a) ensure objectively that an alleged threat of injury is correctly attributed to an alleged increase in imports;
- (b) identify other possible factors that could explain the alleged threat of injury other than an alleged increase in imports;

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<sup>256</sup> See Argentina's first oral statement, paragraph 53.

<sup>257</sup> See Chile's first written submission, paragraph 4.72.

<sup>258</sup> See Chile's first written submission, paragraph 4.100.

<sup>259</sup> Chile refers to the Appellate Body Reports, *US – Wheat Gluten*, paragraph 69 and *US – Lamb*, paragraph 177.

<sup>260</sup> See Chile's first written submission, paragraph 4.74.

<sup>261</sup> Chile refers to the Appellate Body Report, *US – Line Pipe*, paragraphs 216 and 217.

<sup>262</sup> See Chile's first written submission, paragraph 4.75. See also Chile's First Oral statement, paragraph 39.

<sup>263</sup> See Argentina's first written submission, paragraph 108.

<sup>264</sup> See Chile's first oral statement, paragraph 42.

- (c) separate the injurious effects of an alleged increase in imports from those caused simultaneously by other factors;
- (d) identify the nature and scope of the injurious effects of an alleged increase in imports as distinct from the injurious effects of other known factors;
- (e) explain satisfactorily the nature and scope of these injurious effects;
- (f) establish explicitly, through a reasoned and adequate explanation, that the alleged threat of injury caused by factors other than the alleged increase in imports is not attributed to increased imports; and
- (g) provide a clear and unequivocal explanation; merely implying or suggesting an explanation.<sup>265</sup>

4.107 **Chile** further contends that regardless of whether there is any foundation for Argentina's arguments, the fact is that these arguments are merely a set of *ex post facto* explanations which cannot be found among the remarks made by the CNCE directors at the time when they should have been analysing the causal link between the alleged increased imports and an alleged threat of serious injury.<sup>266 267</sup>

- (a) Whether Argentina followed any rule with respect to the determination of the causal link

4.108 **Chile** claims that Argentina gave inadequate consideration to certain relevant factors while failing to analyse others. In Chile's view, most of the relevant factors, if not all, that the CNCE considered or failed to consider, do not point to any causal link between the alleged threat of serious injury and the alleged increase in imports.<sup>268</sup> Chile is also of the view that, in supporting its determination, the CNCE does not distinguish or separate the effect of the factors that it did consider from the effect of others factors that it did not analyse and which may have had an influence on the loss of market share adduced by the industry. Thus, from a methodological point of view, the CNCE's examination of causality did not enable it to establish whether there was a genuine and substantial causal link between the adduced loss of market share and the recovery of imports. In Chile's view, this constitutes a violation Article 4.2(b) of the Agreement on Safeguards.<sup>269</sup> Chile claims that the CNCE attributes its determination of threat of serious injury, in absolute terms, to alleged increased imports. Chile maintains that although other factors were recorded in the investigation, they were excluded by the authority when it came to analysing them or determining their impact on the situation of the domestic industry. Chile contends that, not only does Argentina fail to include anywhere the objective criteria justifying this manner of proceeding, but it does not even recognize the existence of other factors that could have had an influence on the loss of market share.<sup>270</sup>

4.109 **Argentina** responds that Chile's assertions regarding its understanding of the causal link are erroneous. Argentina points out that the investigating authority acted correctly in considering the effect caused by imports separately from the effect caused by other factors. In this regard, Argentina submits that this point was established by the Appellate Body.<sup>271</sup> Argentina considers that Chile interprets the Agreement on Safeguards incorrectly when it contends that imports by themselves, separately from other factors, must reach the necessary threshold in order to qualify as a threat of

<sup>265</sup> See Chile's first oral statement, paragraph 43. See also Chile's rebuttal, paragraph 42.

<sup>266</sup> Chile refers to the arguments by Argentina in paragraphs 108 to 127 of its first written submission and paragraphs 54 to 74 of its first oral statement.

<sup>267</sup> See Chile's rebuttal, paragraph 43.

<sup>268</sup> See Chile's first written submission, paragraph 4.100.

<sup>269</sup> See Chile's first written submission, paragraph 4.76.

<sup>270</sup> See Chile's first written submission, paragraphs 4.77 to 4.78.

<sup>271</sup> Argentina refers to the Appellate Body Report, *US – Lamb*, paragraph 179.

serious injury. In Argentina's view, although the increased imports must contribute to causing the injury or the threat of injury, this does not mean that they are capable by themselves of causing injury or threat thereof. In other words, there is no implication that imports must be the only cause of serious injury or threat of serious injury. Argentina submits that the Appellate Body has already established that the way Chile interprets the obligations under the Agreement on Safeguards is inaccurate.<sup>272 273</sup>

4.110 **Chile** contends that Argentina is misinterpreting Chile's arguments. Chile explains that it never said that the CNCE in fact identified, distinguished and separated the effects of alleged increased imports from the effects of other factors. Chile contends that it argued and proved exactly the opposite. It points out that it demonstrated that the CNCE directors, without going through the exercise of identifying, separating and evaluating the effects of other factors which coincided with the alleged increased imports, simply attributes all of the alleged threat of injury to those imports. Chile further submits that what it has said is that in order to attribute threat of injury properly, the competent authorities must demonstrate that an alleged increase in imports has alone reached the threshold for qualification as "serious". By this, it intended to make it clear that there must at least be a genuine and substantial cause-effect relationship between the alleged increased imports and a threat of serious injury, regardless of any other factors which may at the same time be contributing to the existence of such a threat.<sup>274 275</sup>

(b) Whether there were other objective and quantifiable factors that the CNCE did not analyse

4.111 **Chile** claims that the file of the investigation records a series of relevant factors which may have had an influence on the loss of market share adduced by the Argentine industry that the CNCE did not consider or evaluate in making its finding of a causal link. In addition, there are other public and well-known economic factors which the CNCE could not objectively overlook.<sup>276</sup> Chile contends that, although the majority of these factors are recorded in the file of the investigation, and although some of them were well known to the public, they are not even identified by the CNCE in its causal analysis. Chile submits that Argentina at no time provides any explanation of this fundamental omission – rather, it says, it simply tries to address the possible injury factors indicated by Chile, arguing that they are not alleged injury factors and consequently bear no causal relation to the said threat.<sup>277</sup> Chile argues that, regardless of whether this explanation by Argentina is correct or not, it does not appear in, or form part of, the CNCE's causal analysis. In its view, the entire argument is an *ex post facto* explanation.<sup>278</sup>

4.112 **Argentina** replies that it conducted its threat of injury analysis in compliance with Article 4.2(a) and (b) of the Agreement on Safeguards.<sup>279</sup> Argentina argues that in the course of the investigation, as Chile acknowledges, the investigating authority did establish the serious injury factors other than increased imports. In doing so, the investigating authority distinguished between the effects of these factors and the impact of imports, and also explained their nature and scope. Thus, Argentina contends, it is difficult to agree with Chile's assertions to the effect that the investigating authority did not act in conformity with Article 4.2(a) of the Agreement on Safeguards. In

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<sup>272</sup> Argentina refers to the Appellate Body Reports, *US – Wheat Gluten*, paragraph 67; and *US – Line Pipe*, paragraph 209.

<sup>273</sup> See Argentina's first oral statement, paragraphs 54 to 56.

<sup>274</sup> Chile refers to paragraph 4.77 of its first written submission and paragraphs 38 et seq. of its first oral statement. See paragraph 4.108 of the present report.

<sup>275</sup> See Chile's rebuttal, paragraphs 37 to 42.

<sup>276</sup> See Chile's first written submission, paragraph 4.79.

<sup>277</sup> Chile refers to paragraphs 109 to 127 of Argentina's first written submission.

<sup>278</sup> See Chile's first oral statement, paragraph 45

<sup>279</sup> See Argentina's first written submission, paragraph 109.

Argentina's view, if Chile recognizes that the effects of the factors other than imports are recorded in the file of the investigation, it cannot at the same time claim that the argument is belated.<sup>280</sup>

(i) *Whether CNCE analysed other factors that appear in the technical report*

Imports from Greece

4.113 **Chile** submits that, assuming for a moment that the threat of injury alleged by CAFIM was real, and based strictly on the facts and considerations recorded in the CNCE report, there was no separate identification in that report of the alleged injurious effects of a factor which is qualified in the file itself as the substantial and authentic cause of the said threat, that factor being specific imports from Greece which, according to the report, are the main origin, and which, given that country's pricing structures and policies, enter the Argentine market under unfair trading conditions<sup>281</sup>, with a clear capacity to displace the domestic industry and cause it serious injury.<sup>282</sup> Chile further submits that it is not its intention to make a value judgement or a pronouncement on whether or not exports of Greek peaches represent unfair trading practices. Chile indicates that it is making this argument in accordance with the objective merit of the record contained in the investigation file, which is what in principle and in the final analysis is important, to ascertaining whether Argentina acted consistently with its WTO obligations.

4.114 As **Chile** sees it, the requirement of threat of serious injury or serious injury under Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards applies to imports in general, without distinction as to origin, which enter the market of a specific Member under "fair" trading conditions.<sup>283</sup> Chile contends that any reader, upon reading the "file of the investigation", would objectively conclude that on the merits of that file, the genuine and substantial cause of the alleged threat of injury determined by the CNCE and alleged by CAFIM was not imports in general occurring under fair competition. Rather, it claims, it was imports specifically from Greece (the main origin), and not Chile, that were able, owing to their volume, but above all to their price, to cause injury to the domestic industry, a situation that was aggravated by the seasonal differences in the production and harvest of the product under investigation between Argentina (Southern Hemisphere) and Greece (Northern Hemisphere).<sup>284 285</sup> Chile points out that this was the case in spite

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<sup>280</sup> See Argentina's rebuttal, paragraph 37.

<sup>281</sup> In response to question No. 56 of the Panel ("*Please refer to paragraph 50 of Chile's written rebuttal. Does Chile allege that an investigating authority must establish that products are being imported in conditions of fair competition before it imposes a safeguard measure?*"), Chile explains that although the investigating authority is not required to establish in its report whether products from a specific origin are being imported in conditions of fair competition before it imposes a safeguard measure, it must evaluate the characteristics of the imports from such origin and the conditions in which they compete with the domestic product, as compared with the characteristics and conditions of competition of imports from other origins. An investigating authority can thus perfectly determine whether the genuine and substantial cause of an alleged threat of injury is imports from one origin in particular on the basis of the conditions in which they enter its market. If the causal link is demonstrated by the facts under investigation, it is not appropriate to impose a safeguard measure on imports in general, without discrimination as to their origin. Moreover, if imports from one origin in particular enter the country in conditions of unfair competition, the appropriate measure would be an anti-dumping or countervailing duty. If those imports were already subject to a countervailing duty but this failed to effectively offset the effects of the subsidy, it would be appropriate to increase that duty but not to impose a safeguard measure.

<sup>282</sup> See Chile's first oral statement, paragraph 46.

<sup>283</sup> See Chile's first oral statement, paragraph 48.

<sup>284</sup> See Chile's rebuttal, paragraph 45.

<sup>285</sup> See also Chile's response to question No. 20.a) of the Panel ("*Why does Chile assert that, in the view of Argentina and CAFIM, a situation of unfair competition continued to exist despite the imposition of countervailing measures?*") and 20.b) ("*Does Chile believe that the imposition of countervailing measures on imports of certain products prevents the imposition of safeguard measures on imports of the same products? If so, on what basis?*") of the Panel.

of the imposition of countervailing duties in September 1996 on imports of preserved peaches from the European Union. Chile submits that the imposition of countervailing duties, in spite of the minimum specific import duty of US\$0.20 per kg imported, failed to place the imports from the main origin (Greece) in a fair-trade situation.<sup>286</sup> In paragraph 47 of its Rebuttal, Chile cites 36 passages from the "file of the investigation"<sup>287</sup>, including passages from a) the opinions of the directors who voted in favor as well as against the measure, as included in the Annex to Record No. 781; and b) the conclusions of the investigation authority and the arguments of CAFIM and its associated companies, as included in the technical report. It also submits that a proper analysis of the statistical tables and charts in the annex to the technical report reveals that the cited passages are merely a faithful reflection of that data.<sup>288</sup>

4.115 **Argentina** contests Chile's argument to the effect that it is peaches of a distinct origin that are responsible for the situation of the industry and, in particular, its statement whereby the investigation itself attributes the situation to peaches from the European Union (more specifically, from Greece). Argentina indicates that in its reply to the questions of the Panel, it provided a detailed account of the situation with respect to the application of countervailing duties to peaches from the European Union. However, it adds, the analysis of this element carried out in the framework of the investigation essentially concerned matters relating to the capacity to generate stocks, the excess harvest in Greece owing to favourable climatic conditions and the price flexibility of peaches of that origin. In its view, it bears no relationship to the notion that in spite of the application of countervailing duties, peaches of European origin continued to be traded under unfair competition.<sup>289</sup> It further argues that a passage cited by Chile in footnote 27 of its first oral statement confirms this.<sup>290</sup> In response to question No. 55 of the Panel<sup>291</sup>, **Argentina** indicated that the subsidy component of the imports from Greece was duly neutralized by the countervailing duties.

#### Cyclical nature of imports and net importer status

4.116 **Chile** maintains that the international preserved peaches market is cyclical because it is so closely associated with agricultural fluctuations affecting producers, particularly Greece. At the same time the supply of preserved peaches from Greece has a strong influence on international prices, and hence on the volume of exports to its markets of destination. Climatic factors in Greece led to a sharp fall in Argentine imports in 1997/1998. If, according to Chile, over the past ten years Argentina has pursued a policy of opening up to the international preserved peaches market, it is logical that its industry should be sensitive to changes in that market, particularly the fluctuations and cycles of the leading world producer and exporter. In fact, Chile claims, the technical report shows that the domestic industry increased the volume of sales on the domestic market, having to reduce its exports, at least in 2000, to satisfy domestic demand.<sup>292</sup>

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<sup>286</sup> See Chile's rebuttal, paragraph 46.

<sup>287</sup> Chile cites passages from pages 6 to 14 of the Annex to Record No. 781 and from pages 32 to 91 of the technical report.

<sup>288</sup> Chile refers to Table 15.3, to Charts 3, 4, 5.1 and 5.2, Tables 16.1 and 16.2, Charts 6, 7.1, 7.2, 8.1, 8.2, Tables 17 and 18 and Chart 9 of the technical report.

<sup>289</sup> Argentina refers to Exhibits ARG-II, ARG-III, ARG-IV, ARG-IX and ARG-XI.

<sup>290</sup> Argentina cites *"These changes at the international level have resulted in unforeseen and unexpected imports of the product under investigation from different origins, with a growth in imports from the EU, taking place under conditions such that although fair competition has been restored through the application of countervailing duties, the increase has been sharp over the past two years."*

<sup>291</sup> Namely, "Chile's answer to question 20(c) indicates that it believes that "the cause of the alleged threat of serious injury appears to be imports from Greece in conditions of 'unfair' competition". Could subsidization of production in Greece have contributed to the threat of serious injury to the Argentine industry? If not, why not? If so, where did the competent authorities take it into account in their assessment of the causal link between the increased imports and the threat of serious injury?"

<sup>292</sup> See Chile's first written submission, paragraphs 4.82 to 4.87.

4.117 **Argentina** does not agree that the international preserved peaches market is cyclical "because it is so closely associated with agricultural fluctuations affecting producers" and refers to Tables 5 to 13 in the "International market" section of the technical report as showing that there was no evolution of the kind described by Chile. Nor does Argentina agree with the reference to Argentina's "position of net importer" because it takes no account of the structural changes that took place in the Argentine productive sector when Argentina began opening up its market.<sup>293</sup>

#### Change from the status of importer to a more export-oriented position

4.118 **Chile** claims that, notwithstanding the low volume of exports in 2000 as a result of the need to satisfy domestic demand, the recent evolution of domestic production, as recorded in the technical report, reflects a change in the position of the domestic industry from net importer to exporter. Chile explains that, leaving aside 1998, during which imports were minimal, in 1999, when their recovery was already nearing completion, Argentina exported 6,878 tons and imported 6,601 tons. In Chile's view, this trend towards a more export-oriented position could be having an influence on the loss of market share adduced by the domestic industry.<sup>294</sup>

#### Climatic factors

4.119 As regards local climatic risks and integration of production, **Chile** contends that, according to the technical report, one element which has a direct impact on local output is the high climatic risk in the Mendoza area which affects the quantities, and hence the prices, of peaches available for the industry. The fact that the manufacturing industry has become closely integrated with the primary sector has meant that the manufacturing industry now has to assume the risks associated with the climate directly. This factor is of particular importance in determining the levels of competitiveness of the peach processing industry as well as its fixed costs, and could have a direct impact on the loss of market share adduced by CAFIM.<sup>295</sup> As regards world climatic factors, Chile submits that, although between 1997 and 1998 there was a disruption in the historical levels of imports, the CNCE failed to take into consideration and evaluate the possible effect of this factor in its analysis. On the contrary, Chile claims, it makes its findings by comparing the situation of the domestic industry during 1999 and 2000 without considering the trends for those years in the context of a recovery of imports. As an example, Chile mentions that Greece's lower prices in 1999 and 2000 can be explained to a considerable extent by the fact that those years were preceded by two years of high prices due to the lack of supply of canned peaches and to the increase in exportable production.<sup>296 297</sup>

4.120 **Argentina** submits that, as regards the climatic factors, both domestic and international, these were evaluated in the context of Record No. 781 and the corresponding report. Firstly, it argues, the surplus harvest in Greece in the 1999/2000 season was reflected in the volumes and stocks available to be poured onto the export markets on top of the average values for the decade, as shown in the section on the evolution of international trade in preserved peaches (pages 46 to 72 of the technical report) containing tables reflecting the breakdown by country of the evolution of world production as well as exportable volume and stocks, based on USDA information. According to Argentina, these values show (technical report, page 59, Table No. 7) that in the case of the leading world exporter and supplier (Greece), available stocks in 1999 and 2000 were 152.25 per cent and 173.27 per cent higher, respectively, than the average for the whole period 1990/2000. In its view, these stocks, in a context such as the Argentine one in which consumption of preserved peaches was growing during the period

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<sup>293</sup> See Argentina's first written submission, paragraphs 110 and 111. See also Argentina's first oral statement, paragraph 57 and 58.

<sup>294</sup> See Chile's first written submission, paragraphs 4.88 to 4.89.

<sup>295</sup> See Chile's first written submission, paragraphs 4.90 to 4.92.

<sup>296</sup> Chile refers to the analysis made by one of the directors who voted against the application of the measure, Annex to Record No. 781, page 14, paragraph 5.

<sup>297</sup> See Chile's first written submission, paragraphs 4.93 to 4.94.

under analysis while import prices were falling steadily (technical report, Table No. 16, page 1484) to the point where imports were systematically marketed at prices lower than domestic prices – by up to 20 per cent in 1999 and 2000 – and with domestic production increasing until 1999, cannot in any way be considered part of the normal cycle of recovery of the sector - in fact, they constitute a threat of injury scenario.<sup>298</sup>

4.121 **Argentina** considers that Chile's argument is biased and partial, in that it takes no account of the difference in context between the 1995/96 period and the 1999/00<sup>299</sup> whilst, at the same time, even Chile could not but acknowledge the importance of Greece in world trade in preserved peaches<sup>300</sup>, and hence Greece's capacity to influence the world cycle, particularly prices, with its enormous production capacity and above all, its export capacity.<sup>301</sup> In Argentina's view, this can be seen in the enormous diversity of f.o.b. price quotations for Greek peaches depending on the market of destination, the quotation for the Argentine market being, in 1999, among the lowest, a fact which explains the increase in exports during 2000.<sup>302</sup> Argentina submits that Chile's claim is without foundation given the fall in Argentine production in 2000 of 12 per cent in the context of growth in apparent consumption over the previous year.<sup>303</sup> As regards company strategy in this sector during the 1990s, Argentina replies<sup>304</sup> that there was an extensive adjustment that enabled these companies to reduce climatic risks while ensuring a more reliable supply of raw materials, through technical improvements and vertical integration with the primary sector. Argentina submits that Chile itself admits that Argentina improved its competitive capacity, as demonstrated beyond question by the evolution of production costs for peaches.<sup>305 306</sup>

(ii) *Whether there were other factors which the CNCE should have analysed that do not appear in the technical report*

4.122 **Chile** claims that there are various factors which are not reflected in the technical report, such as the devaluation of the euro against the dollar and the Argentine economic situation which should have been analysed by the CNCE.

Devaluation of the euro against the dollar

4.123 **Chile** observes that, as soon as the euro was introduced in 1999, it began to devalue against the dollar (as did the drachma in Greece, which adopted the euro in January 2000). Chile indicates that, coupled with the dollarization of the Argentine peso until recently, this could reasonably be seen to have had an influence on the rate of recovery of imports of preserved peaches from the European Union, particularly Greece. To Chile, it follows that this factor could have been linked to the loss of market share adduced by the domestic industry.<sup>307</sup>

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<sup>298</sup> See Argentina's first written submission, paragraphs 112 to 115. See also Argentina's first oral statement, paragraphs 59 to 62.

<sup>299</sup> See Argentina's first written submission, paragraph 116.

<sup>300</sup> Argentina refers to paragraph 4.82 of Chile's first written submission. See paragraph 4.116 of the present report.

<sup>301</sup> See Argentina's first written submission, paragraph 117.

<sup>302</sup> See Argentina's first written submission, paragraph 118.

<sup>303</sup> See Argentina's first written submission, paragraph 119. See also Argentina's first oral statement, paragraphs 63 to 66.

<sup>304</sup> Argentina refers to paragraph 4.91 of Chile's first written submission. See paragraph 4.119 of the present report.

<sup>305</sup> Argentina refers to Tables 10.1, 10.2, 10.3 and 10.4 of the annex to the technical report; sheets 1452 to 1455.

<sup>306</sup> See Argentina's first written submission, paragraphs 120 to 121. See also Argentina's first oral statement, paragraphs 67 to 68.

<sup>307</sup> See Chile's first written submission, paragraph 4.95.

4.124 **Argentina** responds that, first of all, regardless of whether or not there was an analysis of this variable, it should be recalled that in normative terms, the evolution of the exchange rate, particularly if the resulting competitive improvement is sustained over time, does not preclude the legitimate right of a country to adopt the necessary measures to protect its industry which could otherwise be seriously impaired. In Argentina's view, although obvious, it bears recalling that a safeguard is a mechanism that is activated in conditions of fair competition in response to an objective situation of competitive difference where there is injury or threat of injury to the domestic industry. Argentina adds that the fact that the situation may be the result of a technological improvement, the accumulation of inventories, production shocks or whatever in no way changes the situation as regards the justification of the measure, provided all of the relevant factors have been properly evaluated. Secondly, Argentina argues, in macroeconomic terms, it is a well-known fact that the effects of a devaluation are never immediate, particularly in the case of primary products whose production is distinctly seasonal. In other words, when it comes to explaining the surplus harvest in Greece and the historical accumulation of stocks, Greek overproduction precedes the devaluation in causal terms. Moreover, Argentina insists, the values referred to by Chile are purely nominal, i.e. they do not reflect the effective exchange rate (net of the relevant inflation index and possible export taxes).<sup>308</sup>

#### Argentine economic situation

4.125 **Chile** claims that the CNCE completely avoided recording and examining the Argentine economic situation. Indeed, Chile argues, towards the end of 2000, Argentina's level of indebtedness, both private and State, was extremely high and there was a general default on payments and decline in the purchasing power of the various economic intermediaries, a situation that did not spare the domestic preserved peaches industry. In view of this situation of imminent economic crisis, Chile claims that it is difficult to understand why the CNCE completely avoided recording and examining this factor in its investigation for the purposes of analysing the possible reasons for the domestic industry's loss in market share.<sup>309</sup>

4.126 **Argentina** responds that imports at decreasing, and, relatively speaking, low prices, introduced a substitution effect at the consumption-related stage of the product's cycle. Argentina explains that the fall in imports in 1998 due to the influence of climatic factors, and the subsequent stage, involving a recovery followed by progress beyond historical values, took place in a context in which the production situation in the preserved peaches sector in Argentina was changing and consumption was affected by a high rate of price-induced substitution. On this basis, Argentina submits, it was found that the effect of the economic recession in Argentina was not a factor in the deterioration of the sector as Chile claims, but that the chain of negative effects for a sector whose production was undergoing adjustment was initiated and aggravated by the presence of a volume of low-price imports.<sup>310</sup>

(c) Whether the upward trend in imports coincides with negative trends in other injury factors

4.127 **Chile** considers that, as stated in the file of the investigation, most, if not all, of the threat of injury factors which the CNCE may or may not have invoked in support of its threat of injury finding, point to the exact opposite. According to Chile, those factors were either negative before the recovery

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<sup>308</sup> See Argentina's first written submission, paragraphs 123 to 124. See also Argentina's first oral statement, paragraphs 69 to 71.

<sup>309</sup> See Chile's first written submission, paragraph 4.96.

<sup>310</sup> See Argentina's first written submission, paragraphs 126 to 127. See also Argentina's first oral statement, paragraphs 72 to 74.

of imports during 1999 and 2000, or evolved positively when the recovery took place, or suffered only a very small decline in 2000, or did several of the above at the same time.<sup>311</sup>

4.128 According to **Chile**, the annual production capacity of preserved peaches for companies in the survey list totalled 38,110 tons in 1997 and 44,430 tons in 1998. During the years that followed, in which the CNCE describes a sharp and unforeseen increase in imports, production capacity rose to 51,010, and 53,130 respectively. Chile further indicates that the degree of utilization of production capacity for the companies in the survey list was 71 per cent in 1997 and 73 per cent in 1998, while in the two following years it reached 88 per cent and 73 per cent respectively. It adds that the profitability (net result/total assets) of the companies in the survey list rose at the end of the period when imports began to recover, and fell when imports were interrupted. Examples of the former are La Colina: with an increase from 2 per cent in 1999 to 3 per cent in 2000, and IAM, which remained at 4 per cent from 1998 to 2000. An example of the latter is Cartellone, with a profitability of close to 0 per cent in 1997, falling to minus 2 per cent during the year in which the disruption reached its peak (1998), and remaining negative up to 2000. In the case of Benvenuto, profitability was at 9 per cent during 1997, falling to 6 per cent during the following year and remaining at 5 per cent during 1999 and 2000. As regards the apparent consumption of preserved peaches of Argentine origin for 1999 and 2000, when the CNCE claims that there was a sharp and unforeseen increase in imports, they totalled 55,763 tons for 1999 and 55,020 tons for 2000. However, these are CNCE estimates made without any explanation of the methodology used. Chile adds that the figures provided by CAFIM were 55,763 tons for 1999 and 32,774 tons for 2000. Chile argues that, if we compare 1998 and 2000 on the basis of the CNCE estimate, we find that in 1998, when imports were at a minimum, and in 2000, when growth in apparent domestic consumption was 17,383 tons: imports (adjusted for inventories) increased by 7,308 tons, and sales of the domestic product increased by 10,075 tons. As regards the employment level in the peach production sector, Chile sustains that it increased by 18 per cent in 1999, decreasing slightly (by 4 per cent) in 2000.<sup>312</sup> According to Chile, this shows that there is no causal link between the upward trend of imports during 1999 and 2000 (recovery) and the alleged threat of injury claimed by CAFIM and found by the CNCE.<sup>313</sup>

## 5. Permissible extent of application of the measure. Article 5.1 of the Agreement on Safeguards

4.129 **Chile** maintains that the concept of serious injury or threat of serious injury in Article 5.1 of the Agreement on Safeguards is the same as that which appears in Article 4. Chile claims that, with respect to Article 4.2(b) in particular, the safeguard measure that is imposed must necessarily be proportionate to the injury or threat of injury attributable to the increase in imports that the competent authorities have adequately determined on the basis of an objective examination of the causal link.<sup>314</sup> Chile submits that, bearing in mind that Argentina failed to comply with its obligations under Article 4.2(b) of the Agreement on Safeguards, the measure at issue can also be presumed to violate Article 5.1.<sup>315</sup> <sup>316</sup> Chile further argues that, without prejudice to the above, the facts show that the measure, its level and the way it was formulated, went beyond and continues to go beyond the extent necessary to prevent the alleged threat of serious injury and facilitate adjustment. The specific duty imposed is so out of proportion that it is tantamount to an import prohibition. This is confirmed by

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<sup>311</sup> See Chile's first written submission, paragraph 4.97.

<sup>312</sup> See Chile's first written submission, paragraph 4.97.

<sup>313</sup> See Chile's first written submission, paragraph 4.99.

<sup>314</sup> See Chile's first written submission, paragraph 4.104.

<sup>315</sup> In response to question No. 23 of the Panel ("*Does Chile allege that the measure falls within Article 5.1, second sentence, of the Agreement on Safeguards, which applies to quantitative restrictions?*"), Chile confirmed that it alleges that the Argentine safeguard measure violates the first sentence of Article 5.1 of the Agreement on Safeguards.

<sup>316</sup> See Chile's first written submission, paragraph 4.105.

the fact that since the application of the provisional safeguard measure, to date, Argentina has not imported any preserved peaches from Chile or indeed any other country.<sup>317</sup>

4.130 **Argentina** submits that Chile is confining itself to dogmatic statements to the effect that the measure does not meet the requirements of Article 5.1 of the Agreement on Safeguards. Argentina submits that, contrary to what Chile maintains, it has shown that it complied with the requirements of Article 4 of the Agreement on Safeguards.<sup>318</sup> Argentina also refers to Chile's statement to the effect that Argentina has failed to comply with Article 5.1 of the Agreement on Safeguards because the measure, consisting of the application of specific duties, went beyond the extent necessary to prevent the threat of serious injury and to facilitate adjustment.<sup>319</sup> Argentina responds that Chile substantiates this statement by merely indicating the amount of the specific duties and their share of the percentage of customs duties applied to Chilean exports, and maintaining, without further explanation, that this amounted to an import prohibition. In this connection, Argentina points out that in accordance with Article 2.2 of the Agreement on Safeguards, a safeguard is applied to a product being imported irrespective of its source.<sup>320</sup>

4.131 **Chile** replies<sup>321</sup> that the concept of serious injury (including threat of serious injury) used in Article 4.2(b) of the Agreement on Safeguards is the same as the concept used in Article 5.1. Consequently, Chile argues, if the CNCE made no analysis enabling it properly to attribute the alleged threat of serious injury to an alleged increase in imports, it is impossible for that authority to have determined and known what was the extent necessary to prevent that threat and to facilitate adjustment. Chile stresses that the mere fact of having demonstrated that the CNCE did not comply with its obligations under Article 4.2(b) of the Agreement on Safeguards establishes a presumption or a prima facie case that the Argentine measure in turn violated Article 5.1 of the said Agreement.<sup>322</sup> In Chile's view, this prima facie case or presumption is not in any way rebutted by Argentina.<sup>323</sup>

4.132 **Argentina** considers that, as argued by the United States in its third party submission in this dispute, even if Argentina had acted inconsistently with Article 4.2(b) of the Agreement on Safeguards, that does not justify the presumption that the said inconsistency automatically entails non-compliance with Article 5.1 of the Agreement on Safeguards.<sup>324</sup> In this connection, Argentina points out that, where such a presumption exists under the WTO Agreements, it is explicitly indicated.<sup>325</sup> In response to question No. 22 of the Panel<sup>326</sup>, Argentina explained that the views of Chile and the European Communities are based on the Appellate Body Report in *US – Line Pipe*. In Argentina's view, the circumstances of that dispute do not match the circumstances of this case since the conclusions of the Appellate Body in that case are based on the circumstance that the United States had not acted in conformity with Article 4.2(b) of the Agreement on Safeguards, nor had it refuted that claim. Argentina submits that neither of these two elements of this precedent apply to this case,

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<sup>317</sup> See Chile's first written submission, paragraphs 4.106 to 4.108.

<sup>318</sup> Argentina refers to paragraph 4.105 of Chile's first written submission. See paragraph 4.129 of the present report.

<sup>319</sup> Argentina refers to paragraphs 4.106 to 4.108 of Chile's first written submission. See paragraph 4.129 of the present report.

<sup>320</sup> See Argentina's first written submission, paragraphs 128 to 132. See also Argentina's first oral statement, paragraphs 75 to 80.

<sup>321</sup> Chile refers to Argentina's arguments in paragraphs 128 to 132 of its first written submission. See paragraph 4.130 of the present report.

<sup>322</sup> Chile refers to the Appellate Body Report, *US – Line Pipe*, paragraphs 249, 252, 261 and 262.

<sup>323</sup> See Chile's first oral statement, paragraphs 56 to 57.

<sup>324</sup> Argentina refers to paragraphs 17 to 20 and texts quoted therein, of the United States' third party submission. See paragraph 5.27 of the present report.

<sup>325</sup> See Argentina's first oral statement, paragraph 78.

<sup>326</sup> Namely, " *Could Argentina comment on the views of Chile, the United States and the European Communities as to whether a violation of Article 4.2(b) of the Agreement on Safeguards constitutes a prima facie case of a violation of Article 5.1 of the Agreement on Safeguards?* ".

since Chile has not demonstrated that Argentina violated Article 4.2(b) of the Agreement on Safeguards and Argentina has refuted that claim.

4.133 **Chile** insists that the "serious injury" referred to in Article 4.2 and the "serious injury" referred to in the first sentence of Article 5.1 are the same. In its view, the principle of non-attribution established in Article 4.2(b) has two purposes: (i) it seeks to ensure that in situations in which there are various factors causing injury at the same time, the competent authorities do not infer the required "causal link" between alleged increased imports and an alleged threat of serious injury or actual serious injury on the basis of the injurious effects of factors other than the said increased imports; and (ii) it serves as a criterion for ensuring that only an appropriate share of the overall injury is attributed to alleged increased imports. According to Chile, it is precisely this second purpose that determines the circumstances in which it is acceptable to apply a safeguard measure under the first sentence of Article 5.1. Thus, Chile concludes, if the complainant demonstrates that the respondent violated Article 4.2(b) of the Agreement on Safeguards, it establishes a prima facie case of violation of the obligation imposed by the first sentence of Article 5.1.<sup>327</sup>

4.134 **Chile** observes that, in its reply to question No. 9 of the Panel<sup>328</sup>, Argentina points out that at the time of the investigation and the adoption of the safeguard measure, Chile was paying a tariff of 11.5 per cent because it had a preference of 30 per cent under Economic Complementarity Agreement No. 35. Chile contends that this reply is entirely wrong. It explains that on 18 January 2001, when Argentina applied the provisional safeguard measure consisting in a specific duty of US\$0.50 per kg. net imported, Chile did in fact pay a tariff of 11.5 per cent in view of its tariff preference. However, during the investigation that was under way and prior to the imposition of the definitive safeguard measure, the tariff increased from 16.5 per cent to 30 per cent, finally settling at 28 per cent. Thus, the tariff paid by Chile was 19.6 per cent considering the tariff preference. It was only in March 2002 that Argentina restored the tariff to its original level of 16.5 per cent (11.5 per cent for Chile).<sup>329</sup> Thus, Chile concludes, the specific duties applied under the safeguard measure, combined with Chile's tariff situation as described above and the tariff situation of the member States of the European Communities, almost automatically spelled the total elimination of outside competition for preserved peaches in the Argentine market.

4.135 Also in its Rebuttal, **Chile** claims that it has not made any dogmatic statements to demonstrate that the safeguard measure went beyond the extent necessary to prevent the alleged threat of serious injury and facilitate adjustment.<sup>330</sup> Chile submits that it has explained and provided evidence of how the minimum specific import duty applied with the safeguard led to a situation where since its provisional imposition, the flow of exports of the product under investigation to Argentina from the main origins, Chile and Greece, has halted completely.<sup>331</sup> In any case, Chile argues, if Argentina is of the opinion that this statement is dogmatic and not true, it should provide the Panel with official information showing the contrary.<sup>332</sup>

4.136 **Argentina** stresses that the application of the safeguard measure complies with the requirement set forth in Article 5.1 of the Agreement on Safeguards in that it is applied only to the extent necessary to prevent or remedy the serious injury and facilitate adjustment. Indeed, Argentina explains, imports rose from 3,568 tons in 1998 to 7,271 tons in 1999, and then to 12,181 tons in 2000. In relative terms, these volumes represented annual increases of 103.7 per cent and 68 per cent respectively. Furthermore, it adds, if one analyses imports in volume as a percentage of domestic

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<sup>327</sup> See Chile's rebuttal, paragraphs 54 to 55.

<sup>328</sup> See footnote 36 of the present report.

<sup>329</sup> Chile refers to footnotes 52 and 53 to its first written submission.

<sup>330</sup> Chile is refuting Argentina's statements to this end in paragraph 128 of its first written submission.

See paragraph 4.130 of the present report.

<sup>331</sup> Chile refers to paragraphs 4.107 to 4.108 of its first written submission, and Exhibits CHL-9, CHL-10 and CHL-11. See paragraph 4.129 of the present report.

<sup>332</sup> See Chile's rebuttal, paragraph 58.

production, we note a sharp increase of 10 per cent between 1999 and 2000. Likewise, the growth rate for that indicator (imports as a percentage of production) reached 90 per cent for 2000 as compared to 1999. One must also take account of the price of the imported product in relation to the price of the domestic product (US\$1.081). If one bears this factor in mind, one can see that the application of the safeguard measure was appropriate (US\$0.50). If the amount of the specific duty under the safeguard measure had been less, the application of the measure would not have had any effect on imports. The price of Greek peaches, once the safeguard duty is deducted, is US\$0.654. In the light of these circumstances, Argentina claims that it is easy enough to understand the rationality of the measure, which provides for a liberalization period involving a percentage reduction of the measure. The reduction is of 10 per cent for the year following the base year and 20 per cent for the last year. Finally, Argentina notes that pursuant to Article 2.2 of the Agreement on Safeguards, a safeguard measure is applied irrespective of the origin of the product.<sup>333</sup>

## 6. Investigation report. Article 3.1 of the Agreement on Safeguards.

4.137 **Chile** claims that it does not emerge from the file of the investigation "published"<sup>334</sup> by the competent authorities (the Record No. 781 and the technical report) that the CNCE made adequate and sufficient findings on all the pertinent issues of fact and law which, pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards, must be investigated, analysed, established, found and verified, as provided in the final part of Article 3.1 of the Agreement. Consequently, in Chile's view, the safeguarded measure imposed by Argentina violates its obligations under that Article.<sup>335</sup>

4.138 **Argentina** replies that Chile appears to be confusing the obligation to publish a report setting forth the findings and reasoned conclusions reached on issues of fact and law with the substantive elements in Articles 2 and 4 of the Agreement on Safeguards which must be established in order to apply a measure. Argentina understands that the inconsistency of a measure with the substantive requirements of the Agreement on Safeguards cannot also be claimed under Article 3.1 of the Agreement on Safeguards *vis-à-vis* the substantive requirements imposed by the Agreement on Safeguards for the application of a measure. Argentina therefore considers that in accordance with its detailed analysis, the CNCE made adequate and sufficient findings on all pertinent issues of fact and law which, pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards, must be investigated, analysed, established, found and verified, as provided in the final part of Article 3.1 of the Agreement.<sup>336</sup>

4.139 **Argentina** explains that, for example, the CNCE began by addressing the issue of the like or directly competitive product.<sup>337</sup> With equal care, it analysed the domestic industry<sup>338</sup>, the evolution of imports<sup>339</sup> and the conditions under which the imports occurred.<sup>340</sup> As regards the situation of the

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<sup>333</sup> See Argentina's second oral statement, paragraphs 63 to 68.

<sup>334</sup> In footnote 55 of its first written submission, Chile explained that, although it was able to view the file of the investigation (CNCE No. 94/00) containing Record No. 781 and its Annex as well as the technical report and its Annex, and was able to obtain photocopies thereof, Argentina did not publish a report setting forth its findings and reasoned conclusions - i.e. conclusions explained in a reasoned and adequate manner - reached on all pertinent issues of fact and law, and therefore violated the obligation imposed by the last sentence of Article 3.1 of the Agreement on Safeguards. Notwithstanding, for the purposes of this claim, Chile takes that file to be the report "published" by the competent authorities.

<sup>335</sup> See Chile's first written submission, paragraph 4.109.

<sup>336</sup> See Argentina's first written submission, paragraphs 133 to 136. See also Argentina's first oral statement, paragraphs 81 to 84.

<sup>337</sup> Argentina refers to the Annex to Record No. 781, pages 2, 3 and 4, and corresponding analysis in the technical report.

<sup>338</sup> Argentina refers to the Annex to Record No. 781, pages 4 and 5, and corresponding analysis in the technical report.

<sup>339</sup> Argentina refers to the Annex to Record No. 781, pages 6 and 7, and corresponding analysis in the technical report.

industry and serious injury, the CNCE reached its conclusion on threat of serious injury to the domestic industry on the basis of an evaluation of each and every one of the factors listed in Article 4.2(a) of the Agreement on Safeguards as well as all of the other relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry.<sup>341</sup> Similarly, the CNCE evaluated the causal link between the increased imports and the serious injury or threat of serious injury to the domestic industry.<sup>342</sup> Thus, Argentina submits, the report published by the competent authorities, i.e. Record No. 781 of the CNCE and the technical report, clearly reveals that the investigating authority examined all of the pertinent information, including the conclusions reached on increased imports under such conditions, the like product, the domestic industry, the analysis of factors, threat of serious injury, causal link and unforeseen developments.<sup>343</sup>

4.140 **Argentina** notes that Chile appears to disregard the verifications conducted during the proceedings of which, as an interested party in the investigation, it took cognizance at the appropriate procedural stage without the slightest comment. Indeed, Argentina argues, it is untrue that "the CNCE based its conclusions on information supplied by part of the domestic industry without investigating or verifying ... ". Argentina stresses that Chile's involvement in the procedure was in fact very limited. It further adds that both the Record and the technical report contain explanations of the methodologies used by the CNCE.<sup>344</sup>

4.141 In response to question No. 1 of the Panel<sup>345</sup>, **Chile** submits that for a Member to comply with the obligation imposed by the final part of Article 3.1 of the Agreement on Safeguards, it is not enough for the report merely to mention the determinations reached by the competent authority. In Chile's view, it must also explicitly establish, through a reasoned and adequate explanation, how the facts investigated support each one of those determinations. Otherwise, Chile argues, the Agreement on Safeguards would not require the findings to be accompanied by "reasoned conclusions". Moreover, a Member must set forth its findings and reasoned conclusions reached on all pertinent issues of fact and law which, according to Article XIX:1(a) and the Agreement on Safeguards, must be considered, evaluated and demonstrated before that Member has the right to apply a safeguard measure, and must explain why it did not evaluate the factors it failed to consider or analyse. Chile considers that, for the purposes of requesting a finding of inconsistency of the Argentine measure with Article 3.1 of the Agreement on Safeguards, it was enough to submit a claim based exclusively on that Article since it has a principal and general status with respect to Article 4.2(c).

4.142 As regards the documents constituting the "report" that the competent authorities must publish for the purposes of Article 3.1 of the Agreement on Safeguards, **Chile** contends that whatever the documents the said authorities decide to publish, the fact is that they must, one way or another, set forth all of the findings and "*reasoned conclusions*" reached on "*all pertinent issues*" of fact and law. Chile also responds that, on the basis of what appears in the Annex to Record No.781, which is the part in which the CNCE directors record their analysis of the facts investigated and present their findings, it is clear that the investigating authority did not comply with the final part of Article 3.1 of the Agreement on Safeguards, since it does not set forth all of its findings and "*reasoned conclusions*"

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<sup>340</sup> Argentina refers to the Annex to Record No. 781, pages 9 and 10, and corresponding analysis in the technical report.

<sup>341</sup> Argentina refers to the Annex to Record No. 781, pages 7 and 8, and corresponding analysis in the technical report.

<sup>342</sup> Argentina refers to the Annex to Record No. 781, pages 10 and 11, and corresponding analysis in the technical report.

<sup>343</sup> See Argentina's first written submission, paragraphs 137 to 138. See also Argentina's first oral statement, paragraphs 85 to 86.

<sup>344</sup> See Argentina's first written submission, paragraphs 140 to 141. See also Argentina's first oral statement, paragraphs 88 to 89.

<sup>345</sup> Namely, " Which documents constitute the report that the competent authorities must publish for the purposes of Article 3.1 of the Agreement on Safeguards, and the detailed analysis that they must publish for the purposes of Article 4.2(c) of the Agreement on Safeguards? Is there any relevant legislative provision? "

reached on "all pertinent issues" of fact and law. It further contends that, although theoretically, the investigating authority is only supposed to investigate and record facts, while a decision-making authority is supposed to evaluate those facts and make conclusions and findings, in the case at issue, the technical report contains a series of determinations which presuppose a prior analysis of the facts investigated. Chile indicates that it has undertaken to point out these determinations and to show that they are not supported or substantiated by any reasoned and adequate explanation.<sup>346</sup>

4.143 In response to questions Nos. 1 to 3 of the Panel<sup>347</sup>, **Argentina** explains that the publication requirement of Article 3 of the Agreement on Safeguards starts with the initiation of the investigation, when the initiation itself is made public through notification in the Official Bulletin of the Republic of Argentina of the corresponding administrative act of the competent implementing authority introduced by a resolution, in this particular case Resolution ME No. 39 of 12 January 2001, published in the Official Bulletin of 18 January 2001. Consequently, Argentina argues, regardless of the specific communications by the authorities to those that may be interested in the investigation, such as the producers, importers, exporters, etc., the actual publication in the Official Bulletin constitutes an act which is in itself considered to be of general public knowledge in accordance with explicit provisions under Argentine law. Thus, any natural or legal persons who consider that they have a legitimate interest in the investigation may invoke that interest and appear during the investigation with a view to defending such rights as they consider to be theirs. Similarly, Law No. 19,549 (Law on Administrative Procedure of the Republic of Argentina) which, together with Regulatory Decree No. 1059/96, regulates the treatment of applications for safeguard measures, stipulates that interested parties shall have access to all information contained in the file, except such information as may be treated as "confidential", and all parties shall also be supplied information by the implementing authority when the hearings provided for under the same legislation take place.<sup>348</sup>

4.144 **Argentina** explains that, once the investigation has been completed, also in strict compliance with Article 3, the competent implementing authority issues a resolution, which is published in the Official Bulletin, thereby providing public notice of the decision adopted as a result of the investigation. This resolution, which in the case at issue is Ministry of the Economy Resolution No. 348/2001 of 6 August 2001, published in the Official Bulletin of 7 August, considering the different reports or determinations issued by the competent authorities in accordance with the prerogatives granted by the legislation in question, introduces the administrative act containing a summary of the results of the injury investigation conducted and the reasons which led to the decision to adopt a safeguard measure, as well as the modalities of its adoption.<sup>349</sup>

4.145 **Argentina** explains that Record No. 781, with its Annex, constitutes a single instrument, and is the injury determination of the implementing authority – the CNCE – which is based on the technical report. The technical report, as its name suggests, contains all of the objective data and information gathered during the investigation. The CNCE, when it adopts its decision, takes account both of the file of the investigation, made up, in this case, of 2,999 pages, and the technical report, and hence these two documents are integrated.<sup>350</sup> Record No. 781 and its Annex, made up of five parts, constitute the CNCE's determination, added to which, there is the technical report with the scope

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<sup>346</sup> See Chile's response to question No. 1 of the Panel. See footnote 345 of the present report.

<sup>347</sup> For question No. 1, see footnote 345 of the present report. Question No. 2, "How was the investigation carried out by the competent authority? Which documents comprise the file of the competent authority?" and question No. 3, "Can factual information in the technical report and its Annexes, which does not appear in Acta 781 or the Annexed 15 page Expediente, constitute a finding or reasoned conclusion for the purposes of Article 3 of the Agreement on Safeguards? If so, how?".

<sup>348</sup> See Argentina's response to questions Nos. 1 to 3 of the Panel. See also Argentina's second oral statement, paragraphs 69 to 72.

<sup>349</sup> See Argentina's response to questions Nos. 1 to 3 of the Panel. See also Argentina's second oral statement, paragraph 73.

<sup>350</sup> See Argentina's second oral statement, paragraph 74.

described above, plus the 12 sets of documentation and three annexes making up the 2,999 pages covering the proceedings pertaining to the case.<sup>351</sup>

4.146 **Chile** argues that if one examines what it has called the "file of the investigation", particularly Record No. 781 and its Annex, which contain the recommendations, conclusions and findings of the CNCE Board members, one finds that the said decision-making authority fails to establish explicitly, through reasoned and adequate explanations, how the facts investigated support each and every one of its determinations. Similarly, one finds that the said authority failed to set forth its findings and reasoned conclusions reached on all issues of fact and law which, according to Article XIX:1(a) and the SA, must be evaluated and demonstrated before the Member in question has the right to apply a safeguard measure.<sup>352</sup>

4.147 Furthermore, **Chile** argues that Argentina, both in its first written submission and its first oral submission, states that the report of the competent authorities to which the final part of Article 3.1 refers consists of Record No. 781 of the CNCE and the ITDF. Chile notes that notwithstanding these statements Argentina states in its rebuttal submission that the report of the competent authorities to which Article 3.1 of the Agreement on Safeguards refers is not the said file, but Ministry of the Economy Resolution No. 348/2001. For Chile, the Panel need only skim through Resolution No. 348/2001 to see that it violates the obligations laid down in the final part of Article 3.1 even more seriously than the "file of the investigation". According to Chile, the content of that Resolution is even more deficient than the content and tenor of the "file of the investigation", particularly Record No. 781 and its Annex. Chile argues that, with respect to those two documents, throughout these proceedings Chile has produced sufficient arguments and evidence, unrefuted by Argentina, to show a clear violation of Article 3.1 owing to: (i) the failure to explain, in a reasoned and adequate manner, how the facts investigated support each one of the determinations (explicit justification of the determinations); and (ii) failure to set forth the findings and reasoned conclusions reached on all issues of fact and law which, according to Article XIX:1(a) and the Agreement on Safeguards must be considered, evaluated and demonstrated before a Member has the right to apply a safeguard measure.<sup>353</sup> In this regard, Chile insists that its claim has nothing to do with whether or not the Argentine competent authorities published a report in conformity with the obligations laid down in Article 3.1. For Chile, the basis for its claim is the fact that the content of the said report does not comply with the requirements of the final part of that Article.<sup>354</sup>

## 7. Notification. Article 12.2 of the Agreement on Safeguards

4.148 **Chile** submits that if one follows the precedent established in the Appellate Body report in *Korea – Dairy*, Argentina's notifications violate the second paragraph of Article 12 of the Agreement on Safeguards because they fail to provide evidence substantiating the finding of an alleged threat of serious injury caused by alleged increased imports, and they do not provide all of the pertinent information.<sup>355</sup> In response to question No. 59 of the Panel<sup>356</sup>, Chile confirmed that Chile considers that the notification must refer to all factors listed, at a minimum, in Article 4.2(a) of the Agreement on Safeguards.

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<sup>351</sup> See Argentina's response to questions Nos. 1 to 3 of the Panel. See also Argentina's second oral statement, paragraph 75.

<sup>352</sup> See Chile's rebuttal, paragraph 65.

<sup>353</sup> See Chile's second oral statement, paragraphs 6 to 9.

<sup>354</sup> See Chile's second oral statement, paragraph 10.

<sup>355</sup> See Chile's first written submission, paragraph 4.116.

<sup>356</sup> Namely, "In paragraph 4.114 of its first written submission, Chile claims that Argentina's notifications did not include three particular factors. Do the parties believe that the notification must refer to all factors listed in Article 4.2(a) of the Agreement on Safeguards? Does document G/SG/N/8/ARG/4, section 1, fifth bullet, refer to employment and productivity? Does it make any reference to capacity utilization?"

4.149 **Argentina** submits that its notifications to the Committee on Safeguards under Article 12.1(b) and 12.1(c) of the Agreement on Safeguards were made in conformity with Article 12.2 and Appellate Body precedent. It argues that the Argentine notification provided "all pertinent information" under Article 12.2, including evidence of threat of serious injury caused by increased imports as well as a precise description of the product involved, with an adequate definition of the like product and the domestic industry, and an analysis of the factors.<sup>357</sup>

4.150 **Chile** contends that, from its notifications to the Committee on Safeguards<sup>358</sup>, it would appear that Argentina merely provided an excerpt from the Annex to the Record containing the remarks of the CNCE directors that voted in favour of imposing the measure. The notifications also included Resolution No. 348/2001 of the Argentine Ministry of the Economy closing the investigation and imposing the safeguard. However, Chile argues, the notifications were not accompanied by any material evidence substantiating the cited remarks or the findings referred to in that Resolution; nor do these notifications contain all of the information pertinent to a determination of threat of injury. Chile specifies that the notifications do not make any reference to all of the relevant factors which, according to Article 4.2(b) of the Agreement on Safeguards must be evaluated, at a minimum, by the competent authorities. According to Chile, the only factors indicated in the notifications, but without any material evidence substantiating them, are "the rate and amount of the increase in imports of the product concerned in absolute and relative terms", "the share of the domestic market taken by increased imports", "changes in the level of sales" and "profits and losses".<sup>359</sup>

4.151 **Argentina** responds that in its notifications to the Committee on Safeguards, by "merely provid[ing] an excerpt from the Annex to the Record containing the remarks of the directors of the CNCE that voted in favour of imposing the measure" as claimed by Chile, it acted in conformity with Article 12.2.<sup>360 361</sup> In Argentina's view if, when it comes to establishing the conformity of the process by which it is decided to apply a safeguard measure, it is not necessary for the required evaluation to be identical to the evaluation conducted by the national authority in assessing and applying Articles 2 and 4 of the Agreement, this threshold or congruity is even less applicable in cases of the kind covered by Article 12, in which a determination of injury or a threat thereof is not even involved. Argentina explains that the notification requirement in Article 12 is the first step in a process of transparency that can continue with a review by the Committee on Safeguards and eventual bilateral consultations with other Members that may have been affected.<sup>362</sup> Argentina submits that, in conformity with Article 12.2 of the Agreement on Safeguards, the Argentine notification includes, in addition to the evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, the expected duration and the timetable for progressive liberalization.<sup>363</sup> In response to question No. 59

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<sup>357</sup> See Argentina's first written submission, paragraphs 144 and 145. See also Argentina's first oral statement, paragraphs 92.

<sup>358</sup> In footnote 56 to its first written submission, Chile refers to Documents G/SG/N/8/ARG/4, G/SG/N/10/ARG/3, G/SG/N/11/ARG/3, G/SG/N/8/ARG/Corr.1, G/SG/N/10/ARG/2/Corr.1, G/SG/N/11/ARG/2/Corr.1, G/SG/N/8/ARG/4/Suppl.1, and G/SG/N/10/ARG/3/Suppl.1. In response to question No. 24 of the Panel ("*Can Chile confirm the document references for the notifications by Argentina to the WTO Safeguard Committee that it challenges?*"), Chile points out a mistake in the listing of documents since the corrigendum identified as G/SG/N/8/ARG/Corr.1, G/SG/N/10/ARG/2/Corr.1, G/SG/N/11/ARG/2/Corr.1 in its first written submission does not refer to the measure challenged in this dispute.

<sup>359</sup> See Chile's first written submission, paragraphs 4.111 to 4.114.

<sup>360</sup> Argentina refers to the interpretation of this obligation in the Appellate Body Report, *Korea – Dairy*.

<sup>361</sup> See Argentina's first written submission, paragraphs 145 to 149. See also Argentina's first oral statement, paragraphs 93 to 97.

<sup>362</sup> See Argentina's first written submission, paragraphs 150 to 152. See also Argentina's first oral statement, paragraphs 98 to 100.

<sup>363</sup> See Argentina's first written submission, paragraph 158. See also Argentina's first oral statement, paragraph 106.

of the Panel<sup>364</sup>, Argentina indicates that it considers that the notification must refer to the injury factors set forth in Article 4.2(a) of the Agreement on Safeguards. However, Argentina adds, this minimum requirement does not imply that the evidence of threat of serious injury must include all of the details of the recommendation and the reasoning applied and set forth in the competent authority's report. According to Argentina, the Argentine notification includes precise data on employment, productivity and capacity utilization.

4.152 Regarding Chile's claims to the effect that the Argentine notifications did not contain all of the pertinent information and that the factors indicated in the notifications were not supported by any material evidence<sup>365</sup>, **Argentina** infers from all of the statements of the various panels and of the Appellate Body that it was only required to refer to the items expressly mentioned in Article 12, and in relation to the item concerning "evidence of injury or threat of injury", to confirm in its notification that in determining injury or threat of injury, the national authority had evaluated all of the factors mentioned in Article 4.2(a). In this connection, Argentina claims that it is possible to show that Argentina not only made the notifications as required, but even went beyond what was required by reporting on the appraisal of the factors other than increased imports referred to in Article 4.2(b). In Argentina's view, one needs only to refer to document G/SG/N/8/ARG/4, G/SG/N/10/ARG/3, G/SG/N/11/ARG/3 of 23 July 2001, which contains a specific section on "Evidence of serious injury or threat thereof caused by increased imports". In accordance with paragraph 4.113 of Chile's submission<sup>366</sup>, that section of the Argentine notification under Article 12.1(b) of the Agreement on Safeguards provides data concerning the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the levels of sales, and profits and losses. Likewise, and contrary to what Chile states in paragraph 4.114 of its submission<sup>367</sup>, the Argentine notification also includes precise data on productivity, capacity utilization and employment.<sup>368</sup>

4.153 At the same time, and contrary to what Chile claims<sup>369</sup>, **Argentina** contends that the following section, entitled "Information on whether there is an absolute increase in imports or an increase in imports relative to domestic production (see also Article 12.1 for the context)", presents in detail, with the support of precise data and figures, the analysis conducted by the competent Argentine authorities of the evolution of imports substantiating the finding of threat of serious injury, and provides all of the pertinent information to that end.<sup>370</sup>

4.154 **Chile** replies that the best evidence that Argentina failed to comply with its obligations under Article 12.2 of the Agreement on Safeguards can be found in the merits of the actual notifications made to the Committee on Safeguards. In Chile's view, the inconsistency of the Argentine measure with that provision emerges from the Argentine defence itself. Chile observes where the Panel asks Argentina where the explicit references to each injury factor in the notifications are, Argentina merely states that they can be found in "Part I (Evidence of serious injury or threat thereof caused by increased imports) of document G/SG/N/8/ARG/4, G/SG/N/10/ARG/3 and G/SG/N/11/ARG/3 of 23 July 2001."<sup>371</sup> However, Chile argues, Argentina does not substantiate its statement in any way, nor

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<sup>364</sup> See footnote 356 to the present report.

<sup>365</sup> Argentina refers to paragraphs 4.112 and 4.113 of Chile's first written submission. See paragraph 4.150 of the present report.

<sup>366</sup> See paragraph 4.150 of the present report.

<sup>367</sup> See paragraph 4.150 of the present report.

<sup>368</sup> See Argentina's first written submission, paragraphs 153 to 156. See also Argentina's first oral statement, paragraphs 101 to 104.

<sup>369</sup> Argentina refers to paragraph 4.116 of its Chile's first written submission. See paragraph 4.148 of the present report.

<sup>370</sup> See Argentina's first written submission, paragraph 157. See also Argentina's first oral statement, paragraph 105.

<sup>371</sup> Chile refers to Argentina's response to question No. 25 of the Panel ("*Where are there explicit references to each injury factor in the notifications?*").

does it identify the serious injury factors allegedly referred to in Part I. Chile further indicates that Argentina's response to Chile's argument that it should have provided, together with its notification or in its notification, evidence to substantiate a finding of serious injury or threat thereof, was that this was not an obligation. However, Chile adds, it is according to Argentina itself that "the Argentine notification provided ... evidence of threat of serious injury caused by increased imports ...".<sup>372 373</sup>

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 From the third parties in these proceedings, i.e. the European Communities, Paraguay and the United States, only the European Communities and the United States filed their comments within the 20 June 2002 deadline and presented Oral Statements during the third party session.

### A. EUROPEAN COMMUNITIES

#### 1. Standard of review and record of investigation

5.2 The European Communities recalls that domestic authorities are under a duty to evaluate all facts before them or that should have been before them in accordance with the WTO safeguards regime.<sup>374</sup> The European Communities submits that this broad obligation of the domestic authorities is paralleled by the review that panels are called upon to exercise with respect to safeguard measures.<sup>375 376</sup> The European Communities considers that parties to a panel proceeding are neither bound by nor limited to the arguments (whether factual or legal) that they may have developed before the competent authorities during domestic proceedings (nor *a fortiori* are such parties foreclosed from bringing arguments if they failed to do so before domestic authorities)<sup>377</sup>, the only limit being evidence that was not in existence at the time the domestic authorities made their decision.<sup>378 379</sup> The European Communities explains that this logically flows from the fact that the respective focus and objectives of the domestic and the panel proceedings may be different and from the fact that the panels' mandate under Article 11 of the DSU is independent of that of domestic authorities. Accordingly, in the European Communities' view, the Panel is not limited in its review by the "record of investigation".<sup>380</sup>

#### 2. Unforeseen developments

5.3 In the European Communities' view, the safeguard mechanism is an "extraordinary remedy"<sup>381</sup> that should only be relied upon in *emergency* situations, as indicated by the title of Article XIX of the GATT 1994. It should only be invoked when all the strict requirements which are

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<sup>372</sup> Chile refers to paragraphs 92 and 101 of Argentina's first oral statement. See paragraphs 4.151 and 4.152 of the present report.

<sup>373</sup> See Chile's rebuttal, paragraphs 67 to 70.

<sup>374</sup> See European Communities' oral statement, paragraph 2 where it refers to the Panel Report, *Korea – Dairy*, paragraphs 7.30 to 7.31 and 7.54.

<sup>375</sup> See European Communities' oral statement, paragraph 2 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 114, referring to the Appellate Body Report, *US – Wheat Gluten*; and Appellate Body Report, *US – Cotton Yarn*, paragraph 73.

<sup>376</sup> See European Communities' oral statement, paragraph 2.

<sup>377</sup> See European Communities' oral statement, paragraph 4 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 113.

<sup>378</sup> See European Communities' oral statement, paragraph 4 where it refers to the Appellate Body Report, *US – Cotton Yarn*, paragraph 77.

<sup>379</sup> See European Communities' oral statement, paragraph 4.

<sup>380</sup> See European Communities' oral statement, paragraph 6.

<sup>381</sup> See European Communities' third party submission, paragraph 4 where it refers to the Appellate Body Reports, *Argentina – Footwear (EC)*, paragraph 93; and *Korea – Dairy*, paragraph 86.

set out in WTO law have been fulfilled, in particular because the reliance on the safeguard mechanism interferes with the fair conduct of trade performed by competitive exporters.<sup>382</sup>

5.4 With regard to the meaning of the term "unforeseen developments", the European Communities recalls the established interpretation of Article XIX:1(a) of the GATT 1994 that "unforeseen developments" are "*circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994"<sup>383</sup>, and that "this demonstration must be made *before* the safeguard measure is applied" and "must also feature in the same report of the competent authorities" in which the conditions for the adoption of a measure are accounted for. The European Communities states that thus, the competent authorities' report must provide an explanation as to why certain changes in circumstances could be regarded as "unforeseen developments".<sup>384</sup>

5.5 In view of the above, the European Communities contends that the safeguard measure taken by Argentina does not include any "demonstration as a matter of fact" that certain circumstances constituted "unforeseen developments" at the time the competent authorities made their decisions. Furthermore, the European Communities submits that no element mentioned in Argentina's Resolution and technical report (or recalled in Argentina's first written submission) can indeed be termed as an "unforeseen development" within the meaning of Article XIX:1(a) of GATT 1994.<sup>385</sup>

5.6 As regards Argentina's reference<sup>386</sup> to an increase in imports of particular magnitude in the most recent period investigated as an element relevant to fulfilling the "unforeseen development" precondition, the European Communities considers that while a surge in imports may "result" from "unforeseen developments", such increase cannot itself *be* an "unforeseen development" within the meaning of Article XIX:1(a) of the GATT 1994.<sup>387</sup>

5.7 The European Communities further points out that assuming *arguendo* that an increase in imports could be a relevant factor in deciding whether the "unforeseen developments" condition is met, it would certainly not be so in the present case.<sup>388</sup> In this regard, the European Communities states that the Argentine authorities themselves acknowledge that prior to the import years considered, imports had decreased dramatically as a result of the climatic conditions in the countries accounting for the majority of the exports.<sup>389</sup> The European Communities argues that the return to normal climate conditions and thus to normal production and international trade flows can only be a "*foreseen*" and "*expected*"<sup>390</sup> development.<sup>391</sup> Lastly, the European Communities declares that more generally, as

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<sup>382</sup> See European Communities' third party submission, paragraph 4.

<sup>383</sup> See European Communities' third party submission, paragraph 5 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 85; and *Argentina – Footwear (EC)*, paragraph 92, as confirmed in the Appellate Body Report, *US – Lamb*, paragraph 71.

<sup>384</sup> See European Communities' third party submission, paragraph 5 where it refers to Appellate Body Report, *US – Lamb*, paragraphs 72 and 73.

<sup>385</sup> See European Communities' third party submission, paragraph 6.

<sup>386</sup> See Argentina's first written submission, paragraphs 38 to 39 and 43.

<sup>387</sup> See European Communities' third party submission, paragraph 8.

<sup>388</sup> See European Communities' third party submission, paragraph 9.

<sup>389</sup> See European Communities' third party submission, paragraph 10 where it refers to the technical report, page 32, 58 and to Chile's first written submission, paragraph 4.13.

<sup>390</sup> See European Communities' third party submission, paragraph 11 where it refers to the Appellate Body Report, *Korea – Dairy*, paragraphs 83 to 86; Appellate Body Report, *Argentina – Footwear (EC)*, paragraphs 91 and 92.

<sup>391</sup> See European Communities' third party submission, paragraph 11.

acknowledged by the Argentine authorities, agricultural imports are in fact characterized by a cyclical character, due to the inherent characteristics of agricultural production.<sup>392</sup>

5.8 As regards the other alleged unforeseen developments accounted for in the documents of the Argentine competent authorities, such as the production and market trends worldwide or in specific parts of the foreign markets<sup>393</sup>, the European Communities argues that there is no account of why these events were "unexpected" nor how they resulted in the imports increase specifically on the Argentine market during the reference period.<sup>394</sup> The European Communities argues that the lack of such analysis and demonstration of "unforeseen developments" is already sufficient to establish that the safeguard measure under review is not consistent with Argentina's WTO obligations, and thus devoid of legal basis.<sup>395</sup>

### 3. Increase in imports

5.9 In fulfilling the requirement relating to "increased imports" set out in Article 2.1 of the Agreement on Safeguards, the European Communities argues that three fundamental aspects must be addressed by the competent domestic authorities, and thus reviewed by panels. The first one is the reference period to be used for analysing import trends; the second is the assessment of whether the rate and amount of imports over the reference period were such as to fulfil Article 2.1 standards; and the third one, is the provision of an overall adequate explanation, in the safeguard measure or underlying report, of how the facts as a whole support a finding of "increased imports" within the meaning of Article 2.1.<sup>396</sup> The European Communities considers that the Argentine authorities' investigation and conclusions are wanting in all three respects.

5.10 As to the reference period, the European Communities recalls that the "data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis".<sup>397</sup> The European Communities submits that the period for observing increased imports must *be* the recent past<sup>398</sup>, so that imports must continue to increase or be very high in the latest period for a measure to be taken in accordance with Article 2.1, and that WTO practice has focused on the last one to three years (calendar years or 12-month periods) to be as close as possible, depending on data availability, to the date of application of the measure.<sup>399</sup>

5.11 Furthermore, the European Communities notes that the increase in imports must be assessed either in absolute or in relative terms, but in each case both through an end-point-to-end-point analysis and by examining the intervening trends between the end points of the reference period.<sup>400</sup> The European Communities argues that the Argentine authorities even failed to set out clearly what period

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<sup>392</sup> See European Communities' third party submission, paragraph 12 where it refers to Record No. 781, page 13 in Exhibit CHL-1 of Chile's first written submission. The European Communities claims that this appears to be confirmed by Argentina's import statistics for 1992-2000 (Jan.-Nov.) produced by Chile (Exhibit CHL-4).

<sup>393</sup> The European Communities refers to Argentina's first written submission, paragraph 39.

<sup>394</sup> See, European Communities' third party submission, paragraph 13.

<sup>395</sup> The European Communities refer to the Appellate Body Reports, *US – Lamb*, paragraph 72; *Argentina – Footwear (EC)*, paragraph 98; and *US – Wheat Gluten*, paragraphs 181 ff.

<sup>396</sup> See European Communities' oral statement, paragraph 10.

<sup>397</sup> See European Communities' oral statement, paragraph 12 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 137.

<sup>398</sup> See European Communities' oral statement, paragraph 12 where it refers to the Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130.

<sup>399</sup> See European Communities' oral statement, paragraph 12 where it refers to the Panel Reports, *Argentina – Footwear (EC)*, paragraphs 8.160 to 8.162; *US – Wheat Gluten*, paragraphs 8.32 to 8.33; and *US – Line Pipe*, paragraph 7.204.

<sup>400</sup> See European Communities' oral statement, paragraph 13.

they actually used for their assessment of the import trends, nor were they consistent in referring to import data periods, as they should have been.<sup>401 402</sup>

5.12 As to the legal standard set out in Article 2.1 of the Agreement on Safeguards, the European Communities recalls the emphasis of the Appellate Body that such provision refers to products "*being imported ... in such increased quantities and under such conditions*". The European Communities takes the view that the competent authorities must show that a recent, sudden, sharp and significant increase in imports, both quantitatively and qualitatively, continues until the very recent past.<sup>403 404</sup>

5.13 The European Communities points out that the Argentine authorities themselves and the Argentine import statistical data confirm that the increase in imports observed in the period 1999/2000 did not bring import levels back to those in the period (1996) preceding the exceptional and disastrous climatic conditions in the main exporting country (1997).<sup>405</sup> In this regard, the European Communities argues that it fails to see how this increase may be qualified as "significant", or "sharp", quantitatively and qualitatively, or anyway "so as to cause or threaten to cause serious injury to the domestic industry".<sup>406</sup>

5.14 The European Communities considers that the most recent data should not be considered in isolation from the data pertaining to the entire period of investigation, if that period was longer. It refers to the Appellate Body Report in *US – Lamb* where it was stated that "[i]f the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading".<sup>407</sup> In view of the European Communities, this *caveat* was added expressly with a view to avoiding that a temporary downturn that may well be a part of the normal cycle of the domestic industry be misunderstood as a situation justifying safeguard action.<sup>408</sup> The European Communities notes that it has to be read in the light of the Appellate Body's characterization of safeguard action as an "extraordinary remedy".<sup>409</sup> In the view of the European Communities, it should by no means be read as a relaxation of the standards of the Agreement on Safeguards.<sup>410</sup>

5.15 With respect to the adequate and reasoned explanation, notwithstanding the fact that there may have been a "recent" import increase, the European Communities asserts that nowhere do the Argentine authorities seem to explain why the fact that this increase simply restored historical import trends after an exceptionally low period still allows to conclude that the increase was "sharp", "significant" or "so as to cause or threaten serious injury", despite the Appellate Body's finding that competent authorities should address the complexities of each case, and in particular respond to other plausible explanation of data.<sup>411</sup>

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<sup>401</sup> For example, the EC refers to the statistics attached to the technical report that include import data on volume from 1996 to 2000 in some parts, or from 1995 to 2000 in other parts. See technical report, Exhibit CHL-1, graphic No. 15.1. and 15.2.

<sup>402</sup> The European Communities refers to the technical report, Exhibit CHL-1, graphic No. 3.

<sup>403</sup> See European Communities' oral statement, paragraph 17 where it refers to the Appellate Body Report, *Argentina – Footwear*, paragraphs 130-131.

<sup>404</sup> See European Communities' oral statement, paragraph 17.

<sup>405</sup> The European Communities refers to the technical report, Exhibit CHL-1, page 57 and Table 15.1.

<sup>406</sup> See European Communities' oral statement, paragraph 19.

<sup>407</sup> See European Communities' oral statement, paragraph 19 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 137.

<sup>408</sup> See European Communities' oral statement, paragraph 20 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 138.

<sup>409</sup> See European Communities' oral statement, paragraph 20 where it refers to the Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 93; and to the Appellate Body Report, *Korea – Dairy*, paragraph 86.

<sup>410</sup> See European Communities' oral statement, paragraph 20.

<sup>411</sup> See European Communities' oral statement, paragraph 22 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 106.

#### 4. Threat of serious injury

5.16 The European Communities contends that the domestic authorities' independent duty to investigate casts doubts on the United States' suggestion that such authorities can simply consider "current facts", coupled with no indication on the record that such facts will change in the imminent future - as valuable *ex post* support for a finding of threat of serious injury.<sup>412</sup> In its view, this would not be a demonstration "on the basis of objective evidence," as required by Article 4.2(b) of the Agreement on Safeguards, but an "allegation and conjecture" within the meaning of Article 4.1(b).<sup>413</sup>

5.17 According to the European Communities, the Appellate Body has clarified that the domestic authorities have a duty to demonstrate, at the time they take a safeguard measure, and through a reasoned and adequate explanation (that is, in their report or equivalent), that the legal conditions for the adoption of such measure are met. Additionally, it argues, in *US – Lamb* the Appellate Body pointed out that the materialization of the threat of serious injury must be imminent and highly likely.<sup>414</sup> This imminence and likelihood must also be positively demonstrated by the domestic authorities. The European Communities argues that, in reviewing the competent authorities' findings, panels must be mindful of the definition of "threat of serious injury" in the Agreement on Safeguards and of the very high standard implied by the relevant terms.<sup>415 416</sup>

#### 5. Permissible extent of application of the measure

5.18 With regard to Article 5.1 of the Agreement on Safeguards, the European Communities takes the view that, if a WTO Member fails to comply with the "non-attribution" obligation set out in Article 4.2(b) of the Agreement on Safeguards, there is a presumption that it has also failed to comply with its obligation under Article 5.1 not to apply a measure beyond the permissible extent. The European Communities recalls the finding of the Appellate Body in *US – Line Pipe*<sup>417</sup> where it concluded that, by establishing that the respondent had violated Article 4.2(b) of the Agreement on Safeguards, the claimant had made a *prima facie* case that the application of the measure at issue was not limited to the extent permissible under Article 5.1.<sup>418</sup>

### B. UNITED STATES

#### 1. Unforeseen developments

5.19 The United States submits that Article XIX of the GATT 1994 does not require a competent authority to demonstrate a "cause-effect" relationship between unforeseen developments and increased imports. Following what the Panel found in *US – Lamb*, the United States contends that there is no textual basis in Article XIX for a "two-step causation approach" that would require a Member to demonstrate that unforeseen developments caused an increase in imports that in turn caused serious injury or threat.<sup>419 420</sup>

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<sup>412</sup> The European Communities refers to paragraph 16 of the United States' third party submission. See paragraph 5.26 of the present report.

<sup>413</sup> See European Communities' oral statement, paragraph 7.

<sup>414</sup> The European Communities refers to the Appellate Body Report, *US – Lamb*, paragraph 125.

<sup>415</sup> The European Communities refers to the Appellate Body Report, *US – Lamb*, paragraph 126.

<sup>416</sup> See European Communities' oral statement, paragraph 8.

<sup>417</sup> See European Communities' oral statement, paragraph 23 where it refers to the Appellate Body Report, *US – Line Pipe*, WT/DS202/AB/R, 15 February 2002, paragraph 261.

<sup>418</sup> See European Communities' oral statement, paragraph 23.

<sup>419</sup> See United States' oral statement, paragraph 4 where it refers to the Panel Report, *US – Lamb*, paragraph 7.16.

<sup>420</sup> See United States' oral statement, paragraph 4.

5.20 The United States considers that rather, as the *US – Lamb* Panel stated, the term "unforeseen developments" in Article XIX is grammatically linked to both the terms, "in such increased quantities" and "under such conditions".<sup>421</sup> Therefore, in view of the United States, unforeseen developments can result in increased imports, or in a change in the "conditions" that apply to such imports, or both. Indeed, as the phrasing of Article XIX suggests, there may be an interplay between the conditions under which increased imports affect a domestic industry and the quantity of the increase that will cause serious injury.<sup>422</sup>

5.21 Thus, the United States concludes that Article XIX does not require a competent authority to demonstrate that unforeseen developments "caused" an increase in imports. Rather, the United States considers that it may be enough for the authority simply to demonstrate that unforeseen developments have resulted in increased imports entering "under such conditions" so as to cause serious injury or threat thereof.<sup>423</sup>

## 2. Increase in imports

5.22 The United States submits that a contracting party should generally examine relevant data from its entire standard review period to provide objectivity in its analyses of import volume. The United States contends that the Agreement on Safeguards does not establish any particular methodology or analytic framework for evaluating increased imports. It takes the view that Article 2.1 merely states that a competent authority must determine "pursuant to" the other provisions of the Agreement on Safeguards that imports are taking place "in such increased quantities, absolute or relative to domestic production . . . as to cause or threaten to cause serious injury to the domestic industry". The United States adds that Article 4.2(a), in turn, simply states that competent authorities shall evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms".<sup>424</sup>

5.23 However, the United States recalls the Appellate Body Report on *US – Lamb*, where it was stated that a competent authority "should not consider [the most recent] data in isolation from the data pertaining to the entire period of investigation", and that "in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period".<sup>425</sup> Thus, the United States concludes that these statements support the conclusion that a competent authority should generally examine *all* of the data that it has collected for the *entire* investigative period, provided that the data is reliable and useable and that there are no circumstances indicating that examination of a different time-period would be appropriate.<sup>426</sup>

5.24 The United States submits that the Panel should decline to consider extra-record evidence that was not before the competent authority. In challenging Argentina's analysis of increased imports, the United States notes that Chile cites tables containing data on apparent consumption of preserved peaches for the years 1994 to 1996 drawn from a study that CNCE prepared in 1998, apparently for a different investigation.<sup>427</sup>

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<sup>421</sup> See United States' oral statement, paragraph 5 where it refers to the Panel Report, *US – Lamb*, paragraph 7.16.

<sup>422</sup> See United States' oral statement, paragraph 6.

<sup>423</sup> See United States' oral statement, paragraph 7.

<sup>424</sup> See United States' third party submission, paragraph 3.

<sup>425</sup> See United States' third party submission, paragraph 4 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 138.

<sup>426</sup> See United States' third party submission, paragraph 4.

<sup>427</sup> See United States' third party submission, paragraph 6.

5.25 The United States argues that if the study was not part of the record in the challenged investigation, the Panel should disregard it. The United States considers that a fundamental aspect of the standard of review of competent authorities' determinations in safeguard investigations is that the review of those determinations be based on the record that was before the competent authorities, and not on extra-record evidence. The United States recalls the Panel decision in *US – Wheat Gluten*, where it was concluded that "it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations of serious injury and causation." That Panel stressed that "[i]t is not our role to collect new data, or to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not."<sup>428</sup> The United States also recalls the conclusion of the Panel in *US – Hot-Rolled Steel* concerning extra-record information based on its analysis of Article 11 of the DSU. The United States submits that if a panel considers new information that was not before the competent authority, it would be weighing these new facts against the evidence already on the record. The United States submits that the Appellate Body has found that panels are not entitled to conduct such *de novo* reviews.<sup>429</sup>

### 3. Threat of serious injury

5.26 The United States submits that current facts may support threat of serious injury determinations. The United States notes that Chile argues that the CNCE impermissibly based its finding of threat of serious injury on the fact that there were no indications that current international market conditions would change in the imminent future, and that the CNCE's threat analysis was based on conjecture or remote possibility and not on facts.<sup>430</sup> The United States recalls the Appellate Body has analysed threat of serious injury as encompassing a lower threshold than serious injury and has found that there is often "a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury,'" since "[s]erious injury does not generally occur suddenly."<sup>431</sup> The United States points out that the Appellate Body concluded that, in drafting the Agreement on Safeguards, Members defined threat of serious injury separately from serious injury so that an importing Member could act sooner to take preventive action when increased imports posed a threat of serious injury.<sup>432 433</sup> The United States submits that nothing in the Agreement on Safeguards prohibits a competent authority from basing a threat of serious injury determination on current facts which, if continued, will result in serious injury, coupled with a finding that nothing in the record indicates that such facts will change in the imminent future.<sup>434</sup>

5.27 The United States is of the view that there is no basis for "presuming" a breach of Article 5.1. The United States disagrees with Chile's argument that a Member that establishes an inconsistency with Article 4.2(b) of the Agreement on Safeguards also establishes a presumption of inconsistency with Article 5.1 of the Agreement on Safeguards. In the view of the United States, there is no reference to such a presumption in Article 4.2(b) or Article 5.1, and there is no basis for reading one into the text.<sup>435</sup> The United States points out that the Appellate Body has made it clear on numerous occasions that the rights and obligations of WTO Members are to be found in the actual text of the WTO Agreement, and not in layers of interpretation that are read into that text.<sup>436 437</sup> In the United

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<sup>428</sup> See United States' third party submission, paragraph 7 where it refers to Panel Report on *US – Wheat Gluten*, paragraph 8.6.

<sup>429</sup> See United States' third party submission, paragraph 7.

<sup>430</sup> See United States' third party submission, paragraph 14.

<sup>431</sup> See United States' third party submission, paragraph 15 where it refers to the Appellate Body Report, *US – Line Pipe*, paragraphs 168 and 169.

<sup>432</sup> See United States' third party submission, paragraph 15 where it refers to the Appellate Body Report, *US – Line Pipe*, paragraph 169.

<sup>433</sup> See United States' third party submission, paragraph 15.

<sup>434</sup> See United States' third party submission, paragraph 16.

<sup>435</sup> See United States' third party submission, paragraph 17.

<sup>436</sup> See United States' third party submission, paragraph 18 where it refers to the Appellate Body Report, *India – Patents (US)*, paragraph 45 (stating that principles of interpretation "neither require nor condone

States' view, the Appellate Body's guidance is particularly apt in this case, because other provisions of the WTO Agreements do contain provisions that establish presumptions.<sup>438</sup> According to the United States, these excerpts demonstrate that when the WTO drafters intended to create presumptions in the agreements, they did so explicitly.<sup>439</sup>

5.28 The United States observes that Chile's challenge to the extent of application of the measure in its first written submission is limited to just two paragraphs. The United States notes that Chile asserts that the measure imposed an extra 70 percent on the customs duties applicable to Chilean imports, and then asserts that the duty amounted to an import prohibition.<sup>440</sup>

5.29 The United States questions whether Chile's arguments are sufficient to meet its initial burden of making a prima facie case. For example, the United States contends that merely noting that imports stopped after the safeguard measure was imposed does not necessarily prove that the safeguard measure was responsible.<sup>441</sup> In the view of the United States, Chile's arguments fail to address the central issue, which is whether a prohibitive tariff (assuming the tariff was prohibitive) went beyond what was necessary under the facts of this particular case. The United States further adds that depending on the facts underlying a particular safeguard action, it is possible that such an approach would be appropriate. The United States argues that Chile has not addressed this issue.<sup>442</sup>

5.30 With regard to increased imports and serious injury or threat, the United States refers to Chile's first written submission where it stated that there can be no threat of serious injury if there is no increase in imports.<sup>443</sup> The United States considers that under Article 2.1 of the Agreement on Safeguards, a Member may apply a safeguard measure only if increased imports are causing or threatening to cause serious injury to a domestic industry. Thus, the United States concludes that there must be a causal link between increased imports on the one hand, and serious injury or threat on the other, before a Member would be justified in applying a safeguard measure; and that both conditions must be present.<sup>444</sup>

5.31 However, the United States argues it does not mean, that there must be increased imports for there to be serious injury or threat. As a factual matter, the United States finds it is possible for an industry to encounter serious injury or a threat of serious injury even in the absence of increased imports. It adds that the latter is not a necessary component of the former.<sup>445</sup> Finally, the United States concludes that a Member would not, however, be justified in applying a safeguard measure in such a case.<sup>446</sup>

#### 4. Causal link

5.32 The United States takes the view that the Agreement on Safeguards does not mandate a three-stage approach to non-attribution. It notes that Chile argues that "[f]or an analysis of causal link to be consistent with Articles 2 and 4.2(b) of the [Agreement], the methodology adopted by the investigating authorities must consist of a three-stage approach that complies with the so-called

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the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.").

<sup>437</sup> See United States' third party submission, paragraph 18.

<sup>438</sup> See United States' third party submission, paragraph 19.

<sup>439</sup> See United States' third party submission, paragraph 20.

<sup>440</sup> See United States' third party submission, paragraph 21.

<sup>441</sup> See United States' third party submission, paragraph 22.

<sup>442</sup> See United States' third party submission, paragraph 23.

<sup>443</sup> See United States' oral statement, paragraph 8.

<sup>444</sup> See United States' oral statement, paragraph 9.

<sup>445</sup> See United States' oral statement, paragraph 10.

<sup>446</sup> See United States' oral statement, paragraph 11.

principle of non-attribution of injurious effects of other factors."<sup>447</sup> According to the United States, the Appellate Body stated that the three steps describe "a logical process for complying with the obligations relating to causation" in Article 4.2(b), not legal "tests" mandated by Agreement on Safeguards. The United States further notes that the Appellate Body stated that it was not imperative that each step "be the subject of a separate finding or a reasoned conclusion by the competent authorities."<sup>448</sup> The United States recalls that the Appellate Body has also noted that the Agreement on Safeguards does not specify any particular method for separating the effects of increased imports and the effects of other causal factors.<sup>449</sup>

5.33 The United States contends that the Agreement on Safeguards does not require competent authorities to demonstrate that imports alone caused a degree of injury that is "serious". The United States notes that Chile argues that Argentina failed to demonstrate that the threat of injury from increased imports alone reached the threshold of "serious" injury. In the United States' opinion, Article 4.2(b) does not require a competent authority to demonstrate that imports, standing alone, caused serious injury.<sup>450</sup>

5.34 In this regard, the United States recalls *US – Wheat Gluten*, where the Appellate Body made clear that increased imports need not be the sole cause of the injury.<sup>451</sup> The United States explains that similarly, in *US – Lamb*, the Appellate Body stated that the Agreement on Safeguards "does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does the Agreement require that increased imports 'alone' be capable of causing, or threatening to cause, serious injury."<sup>452</sup> Finally, the United States notes that in *US – Line Pipe*, the Appellate Body explained that "to meet the causation requirement in Article 4.2(b), it is not necessary to show the increased imports alone – on their own – must be capable of causing serious injury".<sup>453 454</sup>

## VI. INTERIM REVIEW

6.1 The Panel issued the draft descriptive (factual and argument) sections of its report to the parties on 24 October 2002 in accordance with Article 15.1 of the DSU. Both parties offered written comments on the draft descriptive sections on 7 November 2002. The Panel noted all these comments and amended the draft descriptive part where appropriate. The Panel issued its interim report to the parties on 21 November 2002 in accordance with Article 15.2 of the DSU. In a letter dated 28 November 2002, Argentina requested that the Panel review precise aspects of the interim report. Chile did not have any comments on the interim report. Neither of the parties requested an interim review meeting. On 5 December 2002, Chile provided written comments on Argentina's comments on the interim report, as permitted by the Panel's working procedures, in which it asked the Panel to reject all Argentina's comments and not to modify its findings. The Panel carefully reviewed the arguments made, and addresses them below, in accordance with Article 15.3 of the DSU.<sup>455</sup>

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<sup>447</sup> See United States' third party submission, paragraph 8.

<sup>448</sup> See United States' third party submission, paragraph 9.

<sup>449</sup> Appellate Body Report, *US – Lamb*, paragraphs 178 and 181.

<sup>450</sup> See United States' third party submission, paragraph 11.

<sup>451</sup> See United States' third party submission, paragraph 12 where it refers to the Appellate Body Report, *US – Wheat Gluten*, paragraph 67.

<sup>452</sup> See United States' third party submission, paragraph 12 where it refers to the Appellate Body Report, *US – Lamb*, paragraph 170.

<sup>453</sup> See United States' third party submission, paragraph 12 where it refers to the Appellate Body Report, *US – Line Pipe*, paragraph 209.

<sup>454</sup> See United States' third party submission, paragraph 12.

<sup>455</sup> Section VI of this Report entitled "Interim Review" therefore forms part of the findings of the final panel report, in accordance with Article 15.3 of the DSU.

6.2 Argentina commented on paragraphs 7.44 to 7.82 of the interim report<sup>456</sup> and requested that the Panel amend its finding regarding the increase in imports in paragraph 7.82. Argentina argued that the most significant analysis of the trend in imports should be the analysis covering the most recent period. It cited in support passages from Appellate Body reports which we quoted at paragraphs 7.51, 7.62 and 7.64 of our report. Chile replied that Argentina had not rebutted the Panel's findings in paragraphs 7.54, 7.55 and 7.64, and that the passage quoted at paragraph 7.62 of this report had to be read in conjunction with the passage quoted at paragraph 7.64. The Panel considers that it has dealt sufficiently with Argentina's argument in paragraphs 7.52 to 7.54. Moreover, the passage quoted in paragraph 7.64 itself explains that the most recent data should not be considered in isolation. The Panel has explained in paragraphs 7.65 to 7.67 why it believes that the competent authorities isolated the most recent data.

6.3 Argentina argued that the competent authorities could not have acted wrongly when they found an increase in absolute terms and acknowledged the earlier decrease in imports and sensitivity of the figures for the base year, as noted by the Panel in paragraphs 7.56, 7.58 and 7.61, given that the investigating authority was empowered to evaluate all this information within its sphere of competence. Chile replied that it was insufficient to acknowledge facts without explaining them adequately. The Panel considers that it explained in paragraph 7.61 why it was insufficient for the competent authorities merely to acknowledge these facts.

6.4 Argentina and Chile applied their respective comments above to the analysis of imports in relative terms. The Panel considers that, to the extent that some of the referenced paragraphs in the report apply to that analysis, the Panel's above discussion also applies to these comments. For all of the above reasons, the Panel declines to amend the paragraphs on which Argentina commented or its finding in paragraph 7.82.

6.5 Argentina commented on paragraphs 7.97 to 7.99 on evaluation of capacity utilization and requested that the Panel amend its finding in paragraph 7.99. Argentina argued that the Panel established an artificial distinction between what is considered in an investigation and the concept of evaluation under Article 4.2(a). It argued that the investigation of installed capacity was sufficient to constitute an evaluation as a formal matter, even if it was not specifically mentioned in the joint opinion of the CNCE directors who voted in favour of the measure. It argued that the outcome of the investigation may have led the CNCE to give more or less weight to capacity utilization in its evaluation of the situation of the domestic industry and that, in making an adverse finding, the Panel was substituting itself for the CNCE. Furthermore, the technical report was available to the CNCE directors when they reached their decision regarding the situation of the industry. Chile replied that Article 4.2(a) requires that the competent authorities do more than conduct an investigation and record the results, but rather evaluate and analyze the results as well as provide a reasoned and adequate explanation as to how they support their determination. Chile said that there was no evaluation of capacity utilization at all by the CNCE directors nor any explicit establishment of this factor so as to support the determination of threat of serious injury. Chile argued that Argentina had indicated in its first written submission and its answer to a question posed by the Panel that the ones that should evaluate and analyse the information compiled in a technical report were not the investigating authorities but the CNCE Directors, that is to say, the ones making the various determinations.

6.6 The Panel observes that in paragraph 7.4 of its report it noted Argentina's own explanation of the technical report, which it had provided in response to questions 1 to 3 posed by the Panel. That explanation was that the "technical report contains all of the objective data and information gathered during the investigation". The Panel noted in paragraph 7.5 that the competent authorities' operative conclusion and the supporting reasoning appeared in the joint opinion. For this reason, in accordance with its approach set out in paragraph 7.6, the Panel looked first at the joint opinion for evaluation of all relevant factors, as supplemented by the data contained in the technical report. The Panel noted in

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<sup>456</sup> Paragraph numbers in the interim report were identical to those in this final report.

paragraph 7.96 that the competent authorities have a duty under Article 4.2(a) to evaluate, at a minimum, each of the factors listed in that paragraph, and in paragraph 7.93 it recalled the appropriate standard of review. The Panel explained in paragraph 7.98 that it saw nothing on the record that showed that the competent authorities conducted an evaluation of this factor as a formal matter. The Panel agrees with Argentina, in principle, that the outcome of the investigation may have led the CNCE to give more or less weight to capacity utilization in its evaluation of the situation of the domestic industry. However, in this case, the CNCE directors made no comment on the rate of capacity utilization itself, not even to say that they considered it irrelevant. The technical team made no comment on its own account, but only reported what the applicant had said – which was not borne out by the 2000 figure estimated by the technical team itself. As a result, the Panel cannot glean any idea as to what weight the competent authorities gave to the data which had been collected on capacity utilization nor, in fact, whether they turned their minds to it at all. If the Panel cannot be sure that the competent authorities even thought about the meaning of the data, it cannot find that there was an evaluation of this factor. If there was no evaluation, there is no need to continue and ask whether the competent authorities evaluated the bearing of capacity utilization on the situation of the domestic industry, nor whether the competent authorities provided a reasoned and adequate explanation as to how the facts relating to capacity utilization supported their determination of a threat of serious injury. Therefore, the Panel declines to amend its finding in paragraph 7.99. However, the Panel has added a footnote to paragraph 7.4 to show that the description of the contents of the technical report was provided by Argentina. The Panel does accept that its reference in paragraph 7.98, fourth sentence, to the investigation under Article 3.1 would be clearer if it were as specific as the parts of the investigation which it describes in the preceding three sentences, and it has therefore amended the fourth sentence of paragraph 7.98 accordingly. The Panel has also corrected the tense of the verb "refer" in paragraph 7.99 to be consistent with the rest of the section, and made a grammatical change in paragraph 7.101.

6.7 Argentina commented on paragraphs 7.102 to 7.117 and requested that the Panel amend its finding in paragraph 7.117 relating to a reasoned and adequate conclusion as to the existence of a threat of serious injury. Argentina argued that the nature of the competent authorities' explanation was not affected by any failure on their part to take into consideration the bad Greek harvest. It argued that, in making an adverse finding on this ground, the Panel had assumed the function of the investigating authority, since the latter was empowered to consider all the relevant data before it and to take a decision on the basis of an evaluation of the information, within its sphere of competence. Chile replied that neither it nor the Panel had disputed the powers of the CNCE but rather the question had been whether the CNCE had exercised its powers in a manner consistent with Article 4.2(a). Chile argued that the Panel had properly applied the appropriate standard of review, which it quoted at paragraph 7.103, and had not conducted a *de novo* examination of the evidence nor substituted its own conclusions for those of the CNCE.

6.8 The Panel stated the appropriate standard of review in paragraph 7.103 which prohibits it from substituting its own conclusions for those of the competent authorities but, at the same time, obliges it to examine critically the competent authorities' explanation, in depth, and in the light of the facts before it. The Panel explained throughout paragraphs 7.103 to 7.117 why it considered that the competent authorities' explanation was not reasoned or adequate. The Panel noted that an alternative explanation was plausible, but never adopted that explanation, as it specifically noted in paragraph 7.117. The Panel therefore declines to amend the paragraphs on which Argentina commented or its finding in paragraph 7.117.

6.9 Argentina commented on paragraphs 7.118 to 7.124 and requested that the Panel amend its finding in paragraph 7.124 concerning the requirement that a threat of serious injury be "clearly imminent". Argentina concurred with the statement of the Appellate Body cited by the Panel in paragraph 7.120 regarding what should be understood by the words "clearly imminent" in defining a threat of serious injury. However, it recalled that, according to the same statement, a threat of serious injury necessarily implies that serious injury has not yet occurred, that it is an event which will

materialize in the future and that its materialization "cannot, in fact, be assured with certainty". Argentina argued that the competent authorities satisfied this test based on the capacity of imports to cause serious injury, taking into account the specific characteristics of the threat. Argentina argued that the Panel did not properly take into account the competent authorities' findings regarding the capacity of the imports in the final stage of the period of analysis. Argentina argued that failure to take account of those circumstances would restrict the very notion of threat to such an extent that it would become almost impossible in practice to ascertain the existence of such a threat. Chile replied that Argentina's reliance on the Appellate Body statement was partial and omitted essential elements in the definition and concept of a threat of serious injury, which the Panel has quoted in paragraph 7.120.

6.10 The Panel agrees with Argentina that a threat of serious injury cannot be assured with certainty. However, it has quoted in paragraph 7.120 considerations relevant to the requisite degree of likelihood and imminence of serious injury, as a factual matter, in order for it to constitute a threat in accordance with Article 4.1(b). The Panel has explained in paragraphs 7.121 and 7.122 why it finds that the competent authorities did not show that serious injury was likely or imminent as required as a factual matter, and why it was insufficient to rely only on the behaviour of imports at the final stage of the period of analysis. The Panel has clarified the language in paragraph 7.122 slightly but, for the reasons given, declines to amend its finding in paragraph 7.124.

6.11 Argentina disagreed with the Panel's comment in paragraph 7.123 that a statement which Argentina had quoted was at odds with the definition of threat of serious injury in Article 4.1(b). Argentina argued that the statement which it had quoted did, in fact, refer to a threat of serious injury, and it pointed out that this view was supported by the heading of the section of the report from which the quote was taken, and a reference in a footnote. Chile replied that the Panel had not referred to the whole section of that report but only to one statement which did not refer to a threat of serious injury. The analysis in the rest of that section showed that the minimum requirement for a safeguard measure was the existence of a threat that complied with the definition in Article 4.1(b), which Argentina had failed to satisfy by not showing that serious injury to the domestic industry was clearly imminent.

6.12 The Panel accepts that the statement raised by Argentina which is quoted in paragraph 7.123 could refer to threat of serious injury, as defined, but only to the extent explained in the following sentence of the report from which Argentina quoted, i.e. only to the extent that the serious injury is clearly imminent. This does not alter the Panel's dismissal of its relevance to this case. If one were to argue that the statement meant that serious injury which had not yet occurred constituted a threat of serious injury even if it were not clearly imminent, that would be at odds with the definition in Article 4.1(b). If one were to argue that it somehow purported to lower the standard established by the words "clearly imminent", this would be unsupported by the terms and context of that statement. The Panel has therefore amended the second and third sentences of paragraph 7.123 without modifying its dismissal of the argument, nor its finding in the following paragraph. The Panel has also made a grammatical change in paragraph 7.122.

## **VII. FINDINGS**

### **A. PRELIMINARY MATTERS**

#### **1. Measure at issue**

7.1 The measure at issue in these proceedings is Resolution No. 348/2001 of the Argentine Ministry of Economy, dated 6 August 2001, by which Argentina imposed a definitive safeguard measure on imports of peaches, preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water, coming under MCN tariff codes 2008.70.10 and 2008.70.90 ("preserved peaches"), in the form of minimum specific duties for three years effective as

of 19 January 2001 (the "preserved peaches measure").<sup>457</sup> The minimum specific duty per kilogram net was set at US\$0.50 in the first year, US\$0.45 in the second year and is US\$0.40 in the third year. The preserved peaches measure applies to imports from all countries, including Members of the World Trade Organization (the "WTO"), other than MERCOSUR States Parties and South Africa.

## 2. Relevant documents

7.2 The preserved peaches measure recites the conclusion of the National Foreign Trade Commission (the "CNCE") set out in Record No. 781 of 2 July 2001. That Record of two pages contains the minutes of a meeting of the Board of Directors of the CNCE which was convened to rule on an application for a safeguard measure on preserved peaches. It contains the conclusions of each of the directors on whether the conditions justifying the application of a safeguard measure had been met. It shows that two directors, including the Chairperson, concluded that they had been met, whilst the other two directors concluded that they had not. In the case of a tied vote, the Chairperson's vote is decisive and, accordingly, the conclusion of the Board of Directors was that the conditions justifying the application of a safeguard measure had been met. This was the conclusion forwarded to the Ministry of Economy, which is recited in the preserved peaches measure.

7.3 The Annex to Record No. 781 sets out the written opinions or votes of the CNCE directors. There is a joint opinion by the two directors who voted in favour of the measure (the "joint opinion") and a separate opinion by each of the directors who voted against. The joint opinion explains the reasoning of the two directors who voted in favour and contains their conclusion, which became the conclusion of the Board of Directors.

7.4 The directors had prior access to the investigation file and to the technical report prepared by the technical team prior to the final determination (ITDF No. 08/01). The technical report of 95 pages plus three annexes including methodological notes and statistical tables (the "technical report"), is in turn attached to the Annex to Record No. 781. The technical report contains all of the objective data and information gathered during the investigation.<sup>458</sup>

7.5 In order to examine this matter, the Panel must consider the competent authorities' findings and reasoned conclusions on pertinent issues of fact and law, which must appear in a published report.<sup>459</sup> Argentina argues that the report published in the Annex to Record No. 781 and the technical report contain the relevant findings and conclusions of fact and law.<sup>460</sup> Chile does not agree that Argentina "published" a report in accordance with Article 3.1 of the Safeguards Agreement but, for the purposes of this case, it takes the file of the investigation to correspond to that published report.<sup>461</sup> It is clear from the record that the operative conclusion – that the requirements justifying the application of the preserved peaches measure had been met – and the supporting reasoning, appear in the joint opinion, which can be found in the Annex to Record No. 781. All directors, including those who wrote the joint opinion, had prior access to the technical report and the file of the investigation. Their opinions are based on the technical report.

7.6 Therefore, the Panel will assess the consistency of the preserved peaches measure and the preceding investigation with Article XIX of GATT 1994 and the Agreement on Safeguards on the basis, in the first instance, of the joint opinion in Annex to Record No. 781, as supplemented by the information in the technical report, to which we shall collectively refer as "the competent authorities'

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<sup>457</sup> Reproduced in full in Exhibit CHL-2.

<sup>458</sup> See Argentina's response to questions Nos. 1 to 3 of the Panel.

<sup>459</sup> Article 3.1 of the Agreement on Safeguards.

<sup>460</sup> See Argentina's first written submission, paragraph 139.

<sup>461</sup> See Chile's first written submission, footnote 55.

report".<sup>462</sup> We also note that the file of the investigation was available to the directors when they made their determination and can, in principle, be relevant to our assessment.<sup>463</sup>

### 3. Standard of review

7.7 The Panel's function, as established by Article 11 of the DSU, dictates the appropriate standard of review by the Panel. Article 11 requires the Panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. The Panel's duty to make an objective assessment of the facts prohibits it from engaging in a *de novo* review of the preserved peaches investigation but also from showing total deference to the findings of the Argentine authorities.

### 4. Burden of proof

7.8 The Panel will follow consistent practice in relation to the burden of proof, according to which the party who asserts a fact, or the affirmative of a particular claim or defence, whether the complainant or the respondent, bears the burden of proof of that fact, or the affirmative of that claim or defence. If that party adduces evidence sufficient to raise a presumption that what is asserted is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.<sup>464</sup>

### 5. Order of the Panel's analysis

7.9 Chile makes seven principal claims. It begins with the circumstance of unforeseen developments and continues with the three conditions that make up the legal basis of a safeguard measure, namely increase in imports, threat of serious injury and causation. It makes other claims under Articles 3, 5.1 and 12.2 of the Agreement on Safeguards as well. This is an appropriate order which both parties' submissions have basically followed. The Panel will therefore analyse the claims in this order.

## B. CLAIMS

### 1. Unforeseen developments

7.10 Chile claims that the preserved peaches measure is inconsistent with Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards because the competent authorities did not make a prior finding nor demonstrate in their report, as a preliminary matter of fact, the existence of unforeseen developments.<sup>465</sup> Argentina replies that the competent authorities' report did establish and demonstrate the existence of unforeseen developments, in accordance with these obligations.<sup>466</sup>

7.11 We will begin by considering Article XIX:1(a), which provides as follows:

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for

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<sup>462</sup> The competent authorities' report is reproduced in Exhibit CHL-1.

<sup>463</sup> See Argentina's first written submission, paragraph 138 and its first oral statement, paragraph 87 and Chile's response to question No. 1 of the Panel for the parties' views on the relevant documentation.

<sup>464</sup> See Appellate Body Report in *US – Wool Shirts and Blouses*, p. 14; DSR 1997:I, at p. 337.

<sup>465</sup> See Chile's first written submission, paragraph 4.1.

<sup>466</sup> See Argentina's first written submission, paragraphs 30 and 31.

such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

7.12 This provision and the Agreement on Safeguards are to be applied cumulatively, in view of the fact that Article 1 of the Agreement on Safeguards states that the purpose of that agreement is to establish "rules for the application of safeguard measures which shall be understood to mean 'those measures provided for in Article XIX of GATT 1994'", and Article 11.1(a) prohibits certain action "unless such action conforms with the provisions of that Article applied in accordance with this Agreement". This interpretation is confirmed by various reports of panels and the Appellate Body.<sup>467</sup> The parties to this dispute have proceeded on the basis of that interpretation. Therefore, in order to apply a safeguard measure, Members' competent authorities must, among other things, demonstrate as a matter of fact the existence of unforeseen developments.<sup>468</sup>

7.13 The Panel must assess whether Argentina's competent authorities "demonstrated as a matter of fact" the existence of unforeseen developments. The question arises as to when and where that demonstration must take place. Given that this is a prerequisite for the application of a safeguard measure, its existence cannot be demonstrated after the measure is applied. This was the approach of the Appellate Body in *US – Lamb*:

"[W]e note that the text of Article XIX provides no express guidance on this issue. However, as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied'<sup>469</sup> consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed. (...) In our view, the logical connection between the 'conditions' identified in the second clause of Article XIX:1(a) and the 'circumstances' outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the 'logical connection' between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled."<sup>470</sup>

7.14 We will therefore look for the demonstration of the existence of unforeseen developments in the competent authorities' report which the CNCE made before the application of the preserved peaches measure.

7.15 Chile alleges that there is no mention, even indirectly, of Article XIX:1(a) of GATT 1994 or its prior requirement of unforeseen developments in the competent authorities' report, including the technical report.<sup>471</sup> Argentina denies this claim, although it does not dispute that the report makes no express reference to "the result of unforeseen developments".

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<sup>467</sup> Appellate Body Reports in *Argentina – Footwear (EC)*, paragraph 92; *Korea – Dairy*, paragraph 85; *US – Lamb*, paragraph 71; and Panel Reports in *US – Line Pipe*, paragraph 7.295 and *Chile – Price Band System*, paragraph 7.134.

<sup>468</sup> The parties' arguments as to whether the competent authorities' published report contained a finding and a reasoned and adequate explanation of how the facts investigated support the conclusion relate to the claim under Article 3.1 of the Agreement on Safeguards. Without expressing a view on whether Article XIX:1(a) itself requires a reasoned and adequate explanation of the existence of unforeseen developments, the Panel understands that the substance of many of those arguments relates to the demonstration required under Article XIX:1(a) of GATT 1994 as well, so that they should also be considered here.

<sup>469</sup> Appellate Body Report in *Korea – Dairy*, paragraph 85; see also, Appellate Body Report, *Argentina – Footwear (EC)*, paragraph 92.

<sup>470</sup> See Appellate Body Report in *US – Lamb*, paragraph 72.

<sup>471</sup> See Chile's first written submission, paragraph 4.1.

7.16 Both parties presented argument in their first written submissions which proceeded on the basis that the unforeseen developments in this case, if there had been any, comprised or included an increase in imports.<sup>472</sup> Chile argued that the competent authorities identified the unforeseen developments with the increase in imports.<sup>473</sup>

7.17 It is important to note that Article XIX:1(a) refers to "imports in such increased quantities and under such conditions" as to cause or threaten serious injury as a result of "unforeseen developments" and the effect of obligations. The link between these elements, according to which one has certain effects "as a result" of the other, means that they must be two distinct things. This is consistent with the approach of the Appellate Body in its reports in *Argentina – Footwear (EC)* and *Korea – Dairy* where it referred to a "logical connection" between these elements:

"In this sense, we believe that there is a logical connection between the circumstances described in the first clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...' – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure."<sup>474</sup>

7.18 The text of Article XIX:1(a) cannot support an interpretation that would equate increased quantities of imports with unforeseen developments.

7.19 Argentina argued that three factors constituted unforeseen developments: (a) increased production as a result of an exceptional Greek harvest; (b) substantial increase in world stocks; and (c) a downward price trend.<sup>475</sup> Argentina argues that the competent authorities' report contains a finding and demonstration of the existence of unforeseen developments in the following passages:<sup>476</sup>

– In the joint opinion, in the section headed "Conditions of competition":

"... the significant increase in world production in 1998, 1999 and 2000 (more than 16 per cent) was concentrated in the northern hemisphere, and was essentially due to the sharp increase in production in the EU during the 1999-2000 season (50 per cent higher than in the previous year), which, in its turn, had a definitive effect on its share in world trade (16 per cent). Similarly, there was a declining trend in prices for products from producers located in both hemispheres, but the trend was more marked in the case of the northern hemisphere ..."<sup>477</sup>

– In Part V of the technical report, in a section on the international market for preserved peaches, under the heading "Industry and international trade in the main producer countries" and the subheading "The overall framework":

"...[s]ubstantial increases in the European harvest of peaches for industrial use, due to favourable climatic conditions, enabled the European Union's output of preserved peaches to reach a record of 678,000 tons in the

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<sup>472</sup> See, for example, Chile's first written submission, paragraphs 4.13, 4.16 and 4.85 and its first oral statement, paragraphs 10, 13 and 14, and Argentina's first written submission, paragraph 33.

<sup>473</sup> See Chile's rebuttal, paragraph 7.

<sup>474</sup> See Appellate Body Reports in *Argentina – Footwear (EC)*, paragraph 92 and *Korea – Dairy*, paragraph 85, quoted with approval in *US – Lamb*, paragraph 72.

<sup>475</sup> See Argentina's rebuttal, paragraph 9.

<sup>476</sup> See Argentina's response to questions Nos. 5 and 28 of the Panel and its rebuttal, paragraphs 10 to 12.

<sup>477</sup> See Annex to Record No. 781, Section V.A.4 headed "Conditions of competition", penultimate paragraph.

marketing year 1999/2000, signifying an increase of nearly 50 per cent compared with the previous year ... ", and

" ... European exports of preserved peaches amounted to 428,500 tons in 1999/2000, representing a 16 per cent increase over the previous marketing year."<sup>478</sup>

- In Part VI of the technical report, devoted to arguments put forward in the file in relation to injury and the application of a safeguard measure, statements made by the Chamber of Industrial Fruit Production of Mendoza (CAFIM) in its application for a provisional safeguard measure:

" ... world production for 1999/2000 is estimated at a world record of 1,242,616 tons, a 14 per cent increase over the previous period and nearly 8,000 tons more than the previous record for the period 1992/1993. World exports are expected to set a record of 617,900 tons, 15 per cent up on the previous year and 34,353 tons higher than the 1995/1996 record. Closing inventories will stand at 191,843 tons, 51 per cent more than at the end of the previous period".<sup>479</sup>

7.20 The Panel observes that the only mention in these passages of the alleged development concerning an increase in world stocks<sup>480</sup> is taken from Part VI of the technical report, which begins with the following disclaimer:

"This part of the report is based on the various lines of argument presented by each of the parties. Its contents do not therefore in any way constitute the opinion of the CNCE technical team."

7.21 Argentina indicated that the information and data revealed by the investigation was evaluated and taken into account by the investigating authority in its determination<sup>481</sup>, but the Panel could not find any place in the joint opinion where the competent authorities showed how they evaluated or took account of the statement regarding world stocks. Therefore, this statement regarding world stocks in Part VI of the Technical Report cannot constitute by itself a demonstration by the competent authorities. The Panel finds that there is no demonstration that world stocks were an unforeseen development as required by Article XIX:1(a) of GATT 1994.

7.22 As regards the other alleged developments, namely an increase in world production and a declining trend in world prices, these both appear in the first passage, taken from the joint opinion, which contains the conclusions and reasoning of the CNCE directors who voted in favour of the preserved peaches measure. We understand that the references in that passage to increases in world and European production are based to some extent on the other three passages, taken from the technical report, but observe that there is no reference to a downward price trend in the other passages on which Argentina relies, although it may be based on other information in the technical report. The Panel will therefore consider whether the competent authorities demonstrated in their report as a matter of fact that these two developments constituted unforeseen developments in the sense required by Article XIX:1(a) of GATT 1994.

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<sup>478</sup> See the technical report, page 47.

<sup>479</sup> See the technical report, Section VI, paragraphs 7 and 8 on pages 73 and 74.

<sup>480</sup> See Argentina's response to Panel Question No. 5.

<sup>481</sup> See Argentina's rebuttal, paragraph 13.

7.23 Following the approach of the Appellate Body in *US – Lamb*<sup>482</sup>, we will first consider whether the competent authorities discussed or offered any explanation as to why the changes mentioned in these alleged developments could be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994. In the Panel's view, this requires, as a minimum, some discussion by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions in the second clause of Article XIX:1(a) occurred "as a result" of circumstances in the first clause.

7.24 The passage in the joint opinion and the supporting passages in Part V of the technical report on which Argentina relies, and which are quoted above, make no mention of either of these issues. Nevertheless, the Panel has noted that the following paragraph of the joint opinion states that these developments had resulted ("*se han materializado*") in the entry of the investigated product from different origins in an unforeseen and unexpected way.<sup>483</sup> It indicates that the entry of the imports, or the way in which they were being imported, was unforeseen, but there is no mention that the alleged developments themselves were unforeseen. We have already observed in paragraph 7.18 that an increase in imports and the unforeseen developments must be two distinct elements. A statement that the increase in imports, or the way in which they were being imported, was unforeseen, does not constitute a demonstration as a matter of fact of the existence of unforeseen *developments*. We do not agree with the statement by the Appellate Body in *Argentina – Footwear (EC)* that "the increased quantities of imports should have been 'unforeseen' or 'unexpected'."<sup>484</sup> The text of Article XIX:1(a), together with the Appellate Body's own discussion of it and earlier conclusion regarding the logical connection between the circumstances in the first clause of Article XIX:1(a) – including unforeseen developments – and the conditions in the second clause – including an increase in imports – show that this is not a requirement for the imposition of a safeguard measure.

7.25 There is the issue of the point in time at which Article XIX:1(a) requires that developments should have been unforeseen. Chile stated that the developments should have been unforeseen by a Member at the time it incurred the relevant obligation.<sup>485</sup> In response to questions posed by the Panel, both parties submitted basically that developments should have been unforeseen by the negotiators at the time at which they granted the relevant concession.<sup>486</sup>

7.26 We recall that the Appellate Body in both *Argentina – Footwear (EC)* and *Korea – Dairy* quoted the following statement in the *US – Fur Felt Hats* GATT Working Party report of 1951:

"... 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."<sup>487</sup>

7.27 In its report in *Korea – Dairy*, the Appellate Body made the following finding:

"In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'. And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an

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<sup>482</sup> Appellate Body Report, paragraph 73.

<sup>483</sup> See Annex to Record No. 781, Section V.A.3 headed "Conditions of competition".

<sup>484</sup> See Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 131 referring to paragraphs 91 to 98 of the same report.

<sup>485</sup> See Chile's first written submission, paragraph 4.11.

<sup>486</sup> See Chile's and Argentina's respective responses to question No. 7 of the Panel.

<sup>487</sup> See Appellate Body Reports in *Argentina – Footwear (EC)*, paragraph 96, and *Korea – Dairy*, paragraph 89, citing *US – Fur Felt Hats*, adopted 22 October 1951.

importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation.<sup>488</sup>

7.28 We will apply this interpretation and determine whether the competent authorities assessed whether the developments which they identified were unforeseen as at the time the relevant obligation was negotiated. We emphasize that we are not now discussing the time at which the competent authorities must demonstrate the existence of unforeseen developments in order to adopt a safeguard measure.

7.29 In this case, the relevant obligations are Argentina's current tariff concessions on preserved peaches.<sup>489</sup> The parties agree that those concessions were negotiated during the Uruguay Round<sup>490</sup> but there is no mention of those negotiations in the competent authorities' report.<sup>491</sup> Neither the joint opinion nor the technical report discusses or offers any explanation why Argentina did not foresee the later developments in world production or world prices at the time of the Uruguay Round. It appears that the CNCE directors who voted in favour of the preserved peaches measure believed that the "way in which imports were entering" was "unforeseen and unexpected" from 1998, the earliest date mentioned in this section of the joint opinion, when the increases in world production and the decline in world prices began. Even if the CNCE directors had mentioned that the developments in world production and prices in 1999/2000 were unforeseen as at 1998, which they did not, this would have been four years later than the end of the Uruguay Round, which was the appropriate time as of which to assess whether developments were unforeseen in the sense of Article XIX:1(a) of GATT 1994.

7.30 The only evidence which the Panel has seen in the competent authorities' report that could be relevant to what Argentina foresaw during the Uruguay Round tends to show that these developments were not unforeseen. The supporting passage from Part VI of the technical report, on which Argentina relies, is a statement of an interested party about the volume of world production of preserved peaches in 1999/2000. It compares the volume with the volume of world production in 1992/1993 – which was a season during the Uruguay Round – and shows that the volume in 1999/2000 was less than one per cent higher.<sup>492</sup> This would normally indicate that a level of production such as the one that occurred in 1999/2000 could and should have been foreseen by the Argentine negotiators at least before the end of the Uruguay Round. Argentina argued that its negotiators could not reasonably have been expected to foresee that abnormal circumstances, such as the record world production in 1992/1993, would become the rule rather than the exception.<sup>493</sup> The competent authorities' report contains no finding or evidence that these abnormal circumstances did become the rule. The Panel asked Argentina why its negotiators in the Uruguay Round did not expect such fluctuations in the future. Argentina replied that the Agreement on Safeguards applies specifically to situations of injury under fair trading conditions which, owing to their exceptional nature, are difficult to predict.<sup>494</sup> Whilst this may be true, given that in this case the alleged unforeseen

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<sup>488</sup> See Appellate Body Report in *Korea – Dairy*, paragraph 86.

<sup>489</sup> Argentina's binding of 35 per cent on preserved peaches appears in the first note to Section I-A of its GATT Schedule of Concessions, dated 15 April 1994.

<sup>490</sup> See Chile response to question No. 7 of the Panel; Argentina's second oral statement, paragraphs 15, 18 and 19; Argentina's response to questions Nos. 7 and 31 of the Panel and question No. 2 of Chile.

<sup>491</sup> There is only a mention of the bound tariff rate in the Annex to Record No. 781, Section V.A.1 headed "Evolution of imports". There is no mention of the market access expectations of the Argentine negotiators or the particular content surrounding the Uruguay Round, to which Argentina referred in paragraphs 15 to 19 of its second oral statement.

<sup>492</sup> See Argentina's response to question No. 6 of the Panel, citing information submitted by an interested party and contained in the technical report that estimated world production in 1999/2000 at a record 1,242,616 tons. According to Argentina, this represented a 14 per cent increase over the previous period and almost 8,000 tons more than the previous record in 1992/1993. From this we can calculate that the increase of the 1999/2000 estimate over 1992/1993 was approximately 0.64 per cent.

<sup>493</sup> See Argentina's response to questions Nos. 7 and 8 of the Panel.

<sup>494</sup> See Argentina's response to question No. 31 of the Panel.

developments are fluctuations in production, stocks and prices of a commodity, we would not expect that tariff negotiators could not and should not foresee them.

7.31 Argentina drew the Panel's attention to the incorporation in Argentine law of WTO rules and stressed that the competent authorities stated from the very beginning of their analysis that the investigation would be conducted in accordance with the regulations laid down in the framework of Article XIX of GATT 1994.<sup>495</sup> The Panel notes that the former refers to the creation of legal obligations in Argentina's domestic legal order and the latter is a statement of principle. Neither amounts to a demonstration of the existence of unforeseen developments in the preserved peaches case.

7.32 The joint opinion does refer to "unforeseen developments" as such in its final conclusion, which is basically reproduced in Record No. 781 and Resolution No. 348/2001. It reads as follows:

"Having concluded that the domestic industry is facing a threat of serious injury within the meaning of Article 4 of the Agreement on Safeguards and that *this is occurring in a context of unforeseen developments*, Dr Lidia Elena M. de Di Vico and Dr Héctor F. Arese find that the requirements under that Agreement justifying the application of a safeguard measure have been met. [emphasis added]"

7.33 A mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact. The failure of the competent authorities to demonstrate that certain alleged developments were unforeseen in the foregoing section of their report is not cured by the concluding phrase.

7.34 The Panel has observed that this phrase refers to a "context" ("*contexto*") of unforeseen developments unlike Article XIX:1(a) of GATT 1994 which refers to their "result" ("*consecuencia*"). Argentina argues that the introductory reference to the Agreement on Safeguards and Article XIX of GATT 1994 on page 1 of the Annex to Record No. 781 shows that, when the directors wrote "context", they meant the same thing as "result".<sup>496</sup> Chile does not agree, and argues that the use of the word "context" shows that the competent authorities' conclusion is inconsistent with Article XIX:1(a).<sup>497</sup> We note that the words "context" and "result" have different meanings in the original Spanish (and in English and French), the key difference being that the word "result" denotes a causal relationship, which the word "context" does not. However, in view of our reasoning in the previous paragraphs, it is unnecessary to form a final view on this argument.

7.35 For all these reasons, the Panel finds that the competent authorities' report does not demonstrate as a matter of fact the existence of unforeseen developments as required by Article XIX:1(a) of GATT 1994.

7.36 Chile also claimed in its first written submission that the facts before the competent authorities showed that the alleged unforeseen developments were not unforeseen.<sup>498</sup> The basis of that claim was that the increase in imports (not the unforeseen developments) was a recovery that was expected after the "interruption" in 1997 and 1998. In view of the Panel's finding<sup>499</sup>, and Chile's own later argument<sup>500</sup>, that increased quantities of imports cannot be equated with unforeseen developments, it is unnecessary for the Panel to consider this claim.

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<sup>495</sup> See Argentina's first written submission, paragraph 34, Argentina's first oral statement, paragraph 4.

<sup>496</sup> See Argentina's second oral statement, paragraphs 8 and 9.

<sup>497</sup> See Chile's rebuttal, paragraph 10.

<sup>498</sup> See Chile's first written submission, paragraphs 4.10 to 4.13.

<sup>499</sup> See paragraph 7.18 above.

<sup>500</sup> See Chile's rebuttal, paragraph 7.

## 2. Increase in imports

7.37 Chile claims that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the competent authorities did not demonstrate during the period of investigation (1996-2000) that preserved peaches were being imported in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.<sup>501</sup> It argues that the increases in imports in both absolute and relative terms correspond to a foreseen and expected recovery by those imports of their historical levels that were severely disrupted in 1997 and 1998 by an isolated and unexpected climatic situation which affected the production and export capacity of Greece, the leading world producer and exporter of preserved peaches.<sup>502</sup> Argentina denies the claim and submits that the increase was both absolute and relative.<sup>503</sup> It further argues that what the Argentine industry was facing was not a hypothetical recovery of imports to their historical levels but "unforeseen developments".<sup>504</sup>

### (a) Periods of analysis

7.38 The competent authorities' report does not identify an "investigation period" as such.<sup>505</sup> When asked by the Panel to confirm the dates of the investigation period, Argentina replied that "The gathering of import data covers the period 1996-2000."<sup>506</sup> The Panel asked Argentina to explain which were the criteria that the competent authorities used in order to select the period of time for their analysis of increased imports in absolute and relative terms. Argentina did not respond to this part of that question.<sup>507</sup>

7.39 The technical report and joint opinion show that data was collected and considered on volume of imports in *absolute* terms for *five* years from 1996 to 2000, and in some respects six years, from 1995. Data was collected and considered on volume of imports *relative* to domestic production for *four* years from 1997 to 2000. Argentina explained that, under its legislation, one of the requirements for applications to initiate investigations into safeguard measures is the submission of import data "for the last five full years to substantiate the significant increase in absolute or relative terms of the product being imported".<sup>508</sup> Argentina emphasizes that this obligation binds applicants but not the competent authority.<sup>509</sup>

7.40 The technical report and joint opinion show that data was collected and considered for the domestic industry for four years from 1997 to 2000, although there is also mention of certain features of the industry during prior years.

7.41 We note that Argentina has used the term "period of analysis" in its rebuttal submission. For the purposes of our examination, we will use that term as well and simply note that the period for which the competent authorities analysed data was the five year period 1996-2000 in absolute terms, and 1997-2000 in relative terms.

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<sup>501</sup> See Chile's first written submission, paragraph 4.15.

<sup>502</sup> See Chile's rebuttal, paragraph 23.

<sup>503</sup> See Argentina's first written submission, paragraph 61

<sup>504</sup> See Argentina's rebuttal, paragraphs 18 and 19.

<sup>505</sup> See, for example, the absence of a reference to this period in the information summary on page (i) of the technical report. However, on two occasions the investigating authorities refer to the "period considered" and the "period investigated" as 1997-2000 in the section on the domestic market (see page 34 of the technical report).

<sup>506</sup> See Argentina's response to question No. 12 of the Panel.

<sup>507</sup> See Argentina's response to question No. 14 of the Panel.

<sup>508</sup> See Decree No. 1059/96, Annex 1, paragraph (e) reproduced in full in Exhibit CHL-5, explained by Argentina in its first written submission, paragraph 58.

<sup>509</sup> See Argentina's first written submission, paragraph 58.

(b) Competent authorities' determination

7.42 The relevant section of the joint opinion reads as follows:

"Evolution of imports

...

In the period 1996/2000, Argentine imports of preserved peaches evolved in a way that needs to be analysed against a background of various factors, including climatic conditions, countervailing measures in force in Argentina, and the structural patterns of world production.<sup>510</sup> Thus, a comparison of the beginning and end of the period in question, without prejudice to the analysis of the years in between, shows that imports in tons in 2000 represented 85 per cent of the volume imported in 1996, but measured in dollars f.o.b. they only came to 64 per cent of the value for that year.

The year 1996 shows the greatest volume of imports with a figure of over 14,000 tons, equivalent to 10 million dollars f.o.b, which gives us a general average price for all origins of 0.699 dollars per kilogram. Greece was the leading exporter to Argentina during this period, representing 42 per cent of the total volume and approximately 36 per cent of the value, with an average price of 0.596 dollars f.o.b. per kilogram, within a range of 0.70 to 0.46 US\$/kg.

In 1997 and 1998 total Argentine imports<sup>511</sup> fell by 55 per cent and 45 per cent respectively, owing to severe climatic conditions that affected world production and, consequently, trade in the product in question. An examination of average f.o.b. prices shows that they increased in 1997, as did the price of the main exporter, Greece. In 1998 these prices continued to rise on average, though to a lesser extent. In the case of Greece, however, they fell by some 15 per cent to a level of 0.594US\$/kg.

An analysis of the most recent period shows that in 1999, total imports grew sharply (by more than 100 per cent), a situation which recurred in 2000 with a growth of 68 per cent. Imports for 2000 exceeded 12,000 tons for an f.o.b. dollar value of approximately 6,400,000. In this last year imports from Greece, the leading exporter, came to 60 per cent of the total imports.

In 1999 the average price fell to 0.625 US\$/kg. and in 2000 to US\$0.525/kg. f.o.b. The determining factor of this fall was the prices of the main exporters, that is to say, the European Union and, more specifically, Greece, whose average f.o.b. price in 2000 was 0.412 US\$/kg.

The prices of the imports in the domestic market have generally remained below the domestic price, despite the existence of tariffs equivalent to Argentina's bound ceiling of 35 per cent and of countervailing duties for Greece.

According to the figures supplied by CAFIM for the ratio of imports to domestic production for the most recent period, imports represented 11 per cent in 1999 and 19 per cent in 2000.

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<sup>510</sup> [Original footnote] Imports for the period 1996/2000 were also analysed in the light of Decree 1059/96.

<sup>511</sup> [Original footnote] Not including MERCOSUR.

On the basis of the survey, the Commission concludes that imports satisfy the provisions of Article 2 of the Agreement on Safeguards, insofar as there was an increase in imports in the most recent period, both in absolute terms and in relation to domestic production, at prices which justify proceeding with the analysis provided for in Article 4 of the Agreement on Safeguards."<sup>512</sup>

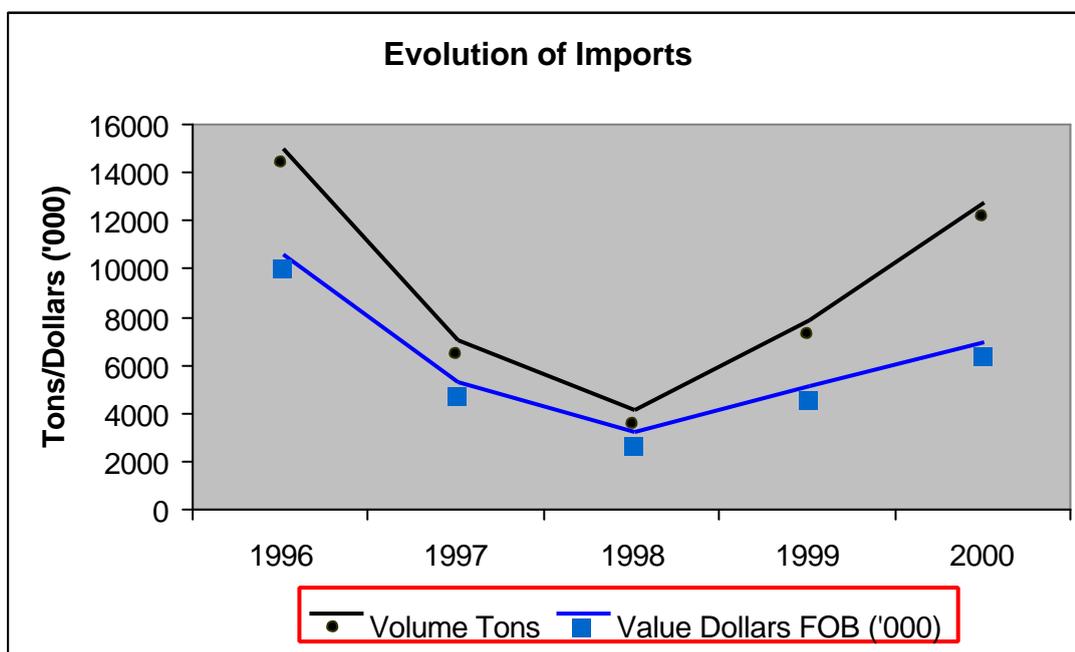
(c) Evaluation of the determination

7.43 The Panel will consider this passage in the context of the rest of the joint opinion and the technical report, in its assessment of Chile's claims. We recall the standard of review of the factual aspects of a determination of an increase in imports as formulated by the Panel in *US – Line Pipe*, following the Panel in *US – Wheat Gluten*, which we will also apply:

"[W]hether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports."<sup>513</sup>

(i) Increase in imports in absolute terms

7.44 Chile claims that Argentina acted inconsistently with its obligations in respect of the finding of an increase in imports both in absolute terms *and* in relative terms. The Panel will first consider the finding regarding absolute quantities, and consider separately the finding regarding relative quantities. The data on imports in absolute terms referred to in the above passage is presented in the following graph.<sup>514</sup>



<sup>512</sup> See Annex to Record No. 781, Section V.A.1 headed "Evolution of imports".

<sup>513</sup> See Panel Report in *US – Line Pipe*, paragraph 7.194.

<sup>514</sup> This data is taken from Table 15 and accompanying graphics in the technical report. The graph includes the 1999 figure for imports in absolute terms in terms of value, which was not quoted by the directors.

7.45 The parties agree that the competent authorities used 1998 as the base year for the determination of an increase in imports.<sup>515</sup> This was the case both in terms of volume and value of imports. In making their finding, the directors took account of decreases in prices over the same period.

7.46 Accordingly, the issue for the Panel to decide is whether the competent authorities determined that there was an increase in imports in absolute terms as required by Article XIX:1(a) of GATT 1994 and Articles 2 and 4.2(a) of the Agreement on Safeguards based on the period 1998-2000.

7.47 Article XIX:1(a) GATT 1994 provides, relevantly, as follows:

"If ... any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products ..."

7.48 Article 2.1 of the Agreement on Safeguards provides:

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

7.49 These two provisions contain the three basic conditions making up the legal basis for a safeguard measure. The first of these is an increase in imports. Article 2.1 provides that it may be in either absolute or relative terms. Article 4.2(a) of the Agreement on Safeguards explains how the investigation should be conducted to determine whether the conditions in Article 2.1 and the second clause of Article XIX:1(a) are satisfied. It provides, relevantly:

"... the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, ..."

7.50 We begin by agreeing with Argentina that none of these provisions establish a minimum period for the investigation, nor any so-called "base period" within the investigation period on which to base a determination of an increase in imports.<sup>516</sup>

7.51 We recall that an increase in imports, in the sense required by Article 2.1 and Article XIX:1(a), was interpreted by the Appellate Body in *Argentina – Footwear (EC)* as follows:

"(...) In our view, the determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be '*such* increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports

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<sup>515</sup> See Chile's rebuttal, paragraph 13(b) and Argentina's response to question No. 34 of the Panel.

<sup>516</sup> See Argentina's first written submission, paragraph 57.

must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".<sup>517</sup>

7.52 The Panel agrees with Argentina that it is not required to show that imports have increased over five years and we have seen no evidence of such a requirement under Argentine law either. However, the point is that there is no fixed period of five years or any other length of time over which figures can simply be subtracted to yield an increase in imports in the sense of Article 2.1 and Article XIX:1(a). Accordingly, neither the mathematical increase in imports of preserved peaches in the last two years, nor the mathematical decrease over the whole five year period of analysis, is determinative.

7.53 Argentina refers to the passage quoted above from *Argentina – Footwear (EC)* and argues that the increase in imports identified by the directors was recent.<sup>518</sup> The directors noted that they based their analysis on "the most recent period", i.e. the last two years of the period for which data was collected and considered. We agree that the last two years of the period of analysis was the most recent period. However, we concur with the Panel in *US – Line Pipe* that the word "recent" does not imply that the analysis must focus exclusively on conditions at the very end of the period of analysis.<sup>519</sup> The directors also qualified the increase in imports in the last two years of the period of analysis as "sharp".<sup>520</sup> We do not disagree. We see no evidence that they considered whether the increase was sudden or significant.

7.54 We believe that a recent and sharp increase in imports is a necessary, but not a sufficient, condition to satisfy Article 2.1 and Article XIX:1(a). The increase is not merely the product of a quantitative analysis, it must also be qualitative. This was the approach of the Appellate Body in the passage quoted above from *Argentina – Footwear (EC)*, where it found that an increase in imports as required by Article 2.1 and Article XIX:1(a) must be recent, sudden, sharp and significant enough, both quantitatively and qualitatively. It is therefore not sufficient to find that an increase in imports is only recent, sudden, sharp and significant mathematically.

7.55 The qualitative analysis required was illustrated by the Appellate Body in *Argentina – Footwear (EC)* when it interpreted the requirement in Article 4.2(a) that the competent authorities evaluate the "rate and amount" of the increase in imports. They found that it meant that the competent authorities in that case should have considered the trends in imports over the period of investigation, rather than just comparing the end points, and to consider the sensitivity of their analysis to the particular end points of the investigation period used.<sup>521</sup>

7.56 In the competent authorities' report in the present dispute, the CNCE directors who voted in favour of the measure considered the rate of the increase in imports in the last two years of the period of analysis. They cited increases of 100 per cent and 68 per cent in 1999 and 2000 respectively over the previous years. They also considered the amount of the increase in imports, in both volume and value.<sup>522</sup> They noted the trends in imports over the period of analysis, and also compared the end points. The data available in the technical report, which they did not quote, shows that the end points of the period of analysis 1996-2000 revealed a decrease in imports in absolute terms by volume of 2,217 tons or 15 per cent and a decrease by f.o.b. value of US\$3,661,306 or 36 per cent.

7.57 The directors recognized the sensitivity of 1998 as their choice of base year for their determination of an increase in imports. They expressly acknowledged that an unusual factor – the

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<sup>517</sup> See Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 131.

<sup>518</sup> See Argentina's first written submission, paragraphs 57 to 59.

<sup>519</sup> See Panel Report in *US – Line Pipe*, paragraph 7.204.

<sup>520</sup> See Annex to Record No. 781, Section V.A.1 headed "Evolution of imports". A dissenting director wrote that the increase was not "sharp": see Annex to Record No. 781, Section V.B.

<sup>521</sup> See Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 129.

<sup>522</sup> In fact, the amounts for 1999 were omitted, but they appear in the technical report, table 15.

bad harvest in the major exporting country – affected that year, which was 1998. They acknowledged that over the whole period for which they considered data there was a decrease in imports, so that they were aware that their choice of the base year decisively affected their determination as to whether there was an increase in imports at all.

7.58 However, the Panel finds no record in the joint opinion that the directors related these considerations to their determination of an increase in imports. Indeed, the report indicates that once they had acknowledged the decrease from 1996 to 2000, the trend from 1996 to 1997 and the sensitivity of the figures for 1998, they disregarded these considerations in reaching their conclusion. By contrast, the investigating authority qualified the increase in imports as a "recovery", which shows how it took account of the trends. This explanation of the qualitative significance of the increase from 1998 to 2000 does not appear in the joint opinion, and hence is lacking from the reasoning of the competent authorities that led to the imposition of the preserved peaches measure.<sup>523</sup>

7.59 The Panel asked Argentina whether it believed that the statistics for 1997 and 1998 were representative of imports or were influenced by any unusual factors and, if the latter, how the competent authorities took account of this in their determination. Argentina replied by providing statistics for 1997 and 1998 that appear in the joint opinion reproduced above.<sup>524</sup> The Panel posed a follow up question to Argentina to ask how the competent authorities took account of these statistics in their determination of an increase in imports. Argentina replied that they did so in the sense that appears in Part V of the Annex to Record No. 781, which contains the respective opinions of the directors (reproduced in relevant part above).<sup>525</sup>

7.60 The Panel finds it highly significant that the volume of imports in absolute terms declined over the period of analysis – by a seventh in terms of volume and over a third in terms of price. It is highly significant that the volume of imports in absolute terms declined over the period 1996 to 1998 by more than the increase which the competent authorities identified from 1998 to 2000, and that this was due to an unusual factor which is acknowledged on the record. This decrease and the reason for it affected the significance of the later increase, so that it was qualitatively different from an increase of the same quantity under other circumstances. Its significance may have been that of a recovery and not an increase that was significant enough for the purposes of Article 2.1 and Article XIX:1(a).

7.61 We find that the competent authorities did at least acknowledge all the facts. Having done so, they then took no further account of any of them for the purposes of their determination other than those in the last two years of the period of analysis. They did not consider how this affected qualitatively the increase in the last two years of the period of analysis. Therefore, the Panel considers that their explanation was not adequately reasoned.

7.62 Argentina referred to a statement in the Appellate Body report in *US – Lamb* that:

"[D]ata relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation as a whole, evidence from the

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<sup>523</sup> After the determination of an increase in imports, the joint opinion does address some qualitative issues regarding world production, which it links to imports, in the paragraphs dealing with the alleged unforeseen developments. This only relates to the period 1998-2000 and does not add anything qualitative to the analysis of the increase of imports, which the directors had already qualified as recent and sharp. *See* Annex to Record No. 781, Section V.A.3 headed "Conditions of competition".

<sup>524</sup> *See* Argentina's response to question No. 15 of the Panel.

<sup>525</sup> *See* Argentina's response to question No. 35 of the Panel.

most recent past will provide the strongest indication of the likely future state of the domestic industry."<sup>526</sup>

7.63 We agree with Argentina that these considerations regarding the period relevant to a threat of serious injury determination also apply to an increased imports determination, for the same reasons expressed by the Panel in *US – Line Pipe*:

"In a safeguard investigation, the period of investigation for examination of the increased imports tends to be the same as that for the examination of the serious injury to the domestic industry. This contrasts with the situation in an anti-dumping or countervailing duty investigation where the period for evaluating the existence of dumping or subsidization is usually shorter than the period of investigation for a finding of material injury. We are of the view that one of the reasons behind this difference is that, as found by the Appellate Body in *Argentina – Footwear Safeguard*, "the determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination." The Appellate Body noted that when it comes to a determination of increased imports 'the competent authorities are required to consider the *trends* [emphasis in original] in imports over the period of investigation'. The evaluation of trends in imports, as with the evaluation of trends in the factors relevant for determination of serious injury to the domestic industry, can only be carried out over a period of time. Therefore, we conclude that the considerations that the Appellate Body has expressed with respect to the period relevant to an injury determination also apply to an increased imports determination." [original footnotes omitted]<sup>527</sup>

7.64 We do not believe that the statement to which Argentina refers in the Appellate Body report in *US – Lamb* is authority for the proposition that the most recent data alone is sufficient for a determination. The most recent past should not be considered separately from the overall trends during the period of analysis, as the succeeding paragraph of that report explains:

"However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. For instance, although the most recent data may indicate a decline in the domestic industry, that decline may well be a part of the normal cycle of the domestic industry rather than a precursor to clearly imminent serious injury. Likewise, a recent decline in economic performance could simply indicate that the domestic industry is returning to its normal situation after an unusually favourable period, rather than that the industry is on the verge of a precipitous decline into serious injury. Thus, we believe that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period." [original footnote omitted]<sup>528</sup>

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<sup>526</sup> See Appellate Body Report in *US – Lamb*, paragraph 137. We note that the Panel in *Chile – Price Band System*, paragraph 7.153, fn. 714, also considered this statement relevant to the analysis of actual import trends.

<sup>527</sup> See Panel Report in *US – Line Pipe*, paragraph 7.209.

<sup>528</sup> See Appellate Body Report in *US – Lamb*, paragraph 138.

7.65 The Appellate Body acknowledged that by evaluating the most recent data in isolation, the resulting picture of the domestic industry may be quite misleading. We believe that the same is true of the resulting picture of an increase in imports. In the present case, we believe that the analysis of the 1998-2000 data should not be considered in isolation. However, the record shows that the directors acknowledged the decrease from 1996 to 2000, the trend from 1996 to 1997, and the sensitivity of the figures for 1998, but did not evaluate the increase from 1998 to 2000 in light of those facts.

7.66 Argentina argues that the investigating authority did not isolate the data for the last two years from the whole period of investigation because:

"... the investigating authority took an investigation period (1996/2000) and detected the increased imports in a period within the investigation period (1999/2000). In other words, the investigating authority, when evaluating the data corresponding to the most recent past, clearly did not isolate that data from the data corresponding to the entire investigation period."<sup>529</sup>

7.67 In the Panel's view, the first sentence does not rebut the argument that the competent authorities isolated the data for the end of the period for which they had data from the entire period. Indeed, detecting an increase in only part of the period is synonymous with isolating the data for that part from the data corresponding to the entire period. Merely commenting on the data for the first two years without relating it to the mathematical increase in the last two does not amount to a determination of a qualitative increase either.

7.68 Argentina also mentioned that in 1996 countervailing duties were applied to peaches from the European Union which affected the flow of imports from that origin.<sup>530</sup> In the Panel's view, this cannot justify the competent authorities disregarding the imports in 1996 for three reasons. First, countervailing duties could be expected to reduce the level of imports, which would not explain why the 1996 figures were so much higher than the 1997 and 1998 figures. Second, the competent authorities had an explanation as to why the 1997 and 1998 figures were lower than 1996 – namely, because there had been a bad harvest in Greece. Third, the countervailing measure was in place at the same rates for the entire period of analysis, excepting only the first nine days of 1996.<sup>531</sup> However, there is no reason on the record that justified the competent authorities disregarding the effects of the statistics for a whole year because of the effect of those nine days. The Panel also notes that Argentina does not argue that the countervailing measure was insufficient to offset the effect of the subsidies.<sup>532</sup>

7.69 For all of the above reasons, the Panel finds that the competent authorities' determination of an increase in imports in *absolute* terms is inconsistent with Article 4.2(a) of the Agreement on Safeguards, and that they failed to determine an increase in imports in absolute terms as required by Article 2.1.

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<sup>529</sup> See Argentina's rebuttal, paragraph 22. The Panel observes that Argentina does not confirm that the period 1996 – 2000 was *the* investigation period in this case, but the Panel does not believe that this alters the situation. The period for which the competent authorities had import data in absolute terms available and which they considered was the five year period from 1996 to 2000. The competent authorities isolated the data for 1998 from the data for that entire five-year period.

<sup>530</sup> See Argentina's rebuttal, paragraph 20.

<sup>531</sup> See Argentina's response to question No. 33 of the Panel.

<sup>532</sup> See Argentina's response to question No. 55 of the Panel.

(ii) *Increase in imports in relative terms*

7.70 Our finding at paragraph 7.69 does not of itself prove that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards, as the first condition for the application of a safeguard measure is an increase in imports in absolute *or* relative terms. In order to succeed on this claim, Chile must also show that the competent authorities failed to show an increase in imports in relative terms.

7.71 The meaning of an increase in imports in relative terms is clear from Article 2.1 of the Agreement on Safeguards which refers to "increased quantities, (...) relative to domestic production." It is clear from the joint opinion that the data cited by the competent authorities refers to relative quantities in this sense, calculated by reference to volume.

7.72 The treatment of imports relative to domestic production is particularly sparse in the competent authorities' report.<sup>533</sup> The only relevant statement in the joint opinion – apart from the conclusion that the increase satisfied Article 2 – reads as follows:

"According to the figures supplied by CAFIM for the ratio of imports to domestic production for the most recent period, imports represented 11 per cent in 1999 and 19 per cent in 2000."<sup>534</sup>

7.73 The technical report contains data on quantities of imports relative to domestic production, with sub-totals by hemisphere, for the years 1997 to 2000. There is no data on relative quantities for 1996. Argentina informed the Panel that the gathering of import data covers the period 1996-2000<sup>535</sup>, but we take it that it meant the period for which applicants had to supply data, which was five years on quantities of imports in absolute *or* relative terms and, in this case, import data was collected for five years in absolute terms only.<sup>536</sup> There are alternative figures for 2000: 18.57 per cent according to CAFIM and 21.05 per cent according to the CNCE, due to their different figures for domestic production in that year.<sup>537</sup> This explains why the directors introduced the figures with the qualification "According to the figures supplied by CAFIM".

7.74 We recall that there is no statement as to what was the investigation period. For our purposes, we need only find that the period of analysis of import quantities in relative terms was the four-year period from 1997 to 2000.

7.75 The Panel asked Argentina over what periods of time the competent authorities found an increase in imports in absolute and relative terms. Argentina replied that the period is 1999-2000.<sup>538</sup> In response to a follow-up question, Argentina indicated that the base year for the determination of an increase in imports was 1998.<sup>539</sup> Chile has proceeded on the premise that the base year was 1998.<sup>540</sup>

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<sup>533</sup> Although the competent authorities cited relative rates of increase in imports of 100 per cent in 1999 and 68 per cent in 2000, those statistics refer to the absolute quantity for one year relative to the absolute quantity for the previous year, but not quantities relative to domestic production. Before the Panel, Argentina cited a statistic for the quantity relative to domestic production for one year relative to the quantity relative to domestic production for the previous year. That is not a quantity relative to domestic production either, nor does it appear in the competent authorities' report. We do not consider those statistics in relation to the determination of an increase in imports in relative terms for these reasons. See Argentina's first written submission, paragraph 61 and its rebuttal, paragraph 62.

<sup>534</sup> See Annex to Record No. 781, Section V.A.1 headed "Evolution of imports".

<sup>535</sup> See Argentina's response to question No. 12 of the Panel.

<sup>536</sup> This appears to indicate that the applicants substantiated their application on the basis of an increase in absolute terms only.

<sup>537</sup> See Table 20 in the technical report.

<sup>538</sup> See Argentina's response to question No. 14 of the Panel.

<sup>539</sup> See Argentina's response to question No. 34 of the Panel.

It appears that these approaches focus on absolute quantities. Given that there is no reference in the joint opinion to figures for relative quantities for 1998, and no reference to figures for relative quantity for one year over another, the notion of "base year" refers, at best, to 1999, the figure for which can be subtracted from that for 2000.

7.76 There is no reasoning in the competent authorities' report as to why they determined that respective volumes of imports in relative terms of 11 per cent in 1999 and 19 per cent in 2000 constituted an increase in imports in relative terms in the sense of Article 2.1 and Article XIX:1(a). In fact, there is not an express determination of an increase in relative terms at all, although it can be deduced from the quantities for two years which are given (7.49 per cent, based on the figures supplied by CAFIM).<sup>541</sup> The only facts which the competent authorities appear to have considered are the statistics in table 20 of the technical report on imports relative to domestic production for four years, which show annual increases.

7.77 The only evidence on the record that shows how the facts supported the determination of an increase in imports in relative terms is the statement in the conclusion on evolution of imports that the increase, in both absolute and relative terms, was "in the most recent period". We refer to our findings above at paragraphs 7.53 and 7.54 that this alone does not necessarily constitute an increase in the sense of Article 2.1 and Article XIX:1(a), nor can it on the facts of this case without some additional explanation. We see no evidence that the directors considered this sudden, sharp or significant. There is no qualitative analysis and almost no quantitative analysis.

7.78 In addition, our findings above in paragraphs 7.63 to 7.68 are applicable to the determination of an increase in imports in relative terms. The data for the most recent period, 1999 and 2000, was isolated from the rest of the data, and the resulting picture of the increase in imports was quite misleading.

7.79 For these reasons, the Panel finds that the competent authorities failed to determine an increase in imports in *relative* terms as required by Article 2.1 of the Agreement on Safeguards.

7.80 Chile urged the Panel to consider data on apparent consumption of preserved peaches for the period 1994-1996 drawn from a "Sectoral Study of Canned Peaches" prepared by the CNCE in 1998 for an earlier investigation into peaches in syrup from the European Union (the "subsidies investigation").<sup>542</sup> Chile alleges that the safeguard investigators referred to the file of the subsidies investigation because it is mentioned in some statistical charts in the safeguards technical report.<sup>543</sup> Argentina does not deny that the file of the subsidies investigation may be quoted as a source in the file of the safeguard investigation and says that it was publicly available on the website of the CNCE before the safeguards investigation began. However, it denies that the safeguard investigation technical report takes account of the data from the sectoral study.<sup>544</sup>

7.81 We do not find that sectoral study relevant to our examination. It contains figures on apparent consumption and shows import quantities relative to domestic sales, not relative to domestic production. There are no figures for exports in 1996 which would allow a calculation of the quantity

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<sup>540</sup> See Chile's first written submission, paragraph 4.36.

<sup>541</sup> Argentina asserted before the Panel that the increase was in the order of 10 per cent (*see* Argentina's second oral statement, paragraph 29). The difference in the figures quoted by the directors is 8 per cent (*see* Annex to Record No. 781, Section V.A.1 headed "Evolution of imports"). These figures were rounded up from those in the technical report which show a difference of 7.49 per cent (*see* Table 20 in the technical report). The percentage can be subtracted because, according to the figures supplied by CAFIM, domestic production volume was identical in 1999 and 2000.

<sup>542</sup> See Chile's first written submission, paragraphs 4.24 to 4.26. The Sectoral Study is reproduced in Exhibit CHL-6.

<sup>543</sup> See Chile's rebuttal, paragraph 34.

<sup>544</sup> See Argentina's response to question No. 11 of the Panel.

of imports relative to domestic production for that year. Argentina has argued that the product under consideration in the sectoral study is peaches in syrup which is not the same as preserved peaches<sup>545</sup>, despite the cross-reference in two statistical charts. It also argues that its statistics cannot be compared with the preserved peaches data because they are measured in units of cans, not tons, and that differences in apparent consumption and market and marketing structures between the period 1994-1996 and 1999-2000 make the study unreliable. Chile has not dispelled the doubts raised by these arguments.

7.82 In view of our findings at paragraphs 7.69 and 7.79, we find that Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards, because the competent authorities failed to make a determination of an increase in imports, in absolute or relative terms, as required.

### 3. Threat of serious injury

7.83 Chile claims that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2, 4.1(b) and 4.2(a) of the Agreement on Safeguards because, in making their determination of a threat of serious injury:

- (a) the competent authorities did not properly evaluate all of the factors having a bearing on the situation of the domestic industry;
- (b) the competent authorities evaluated factors in terms of the most recent past without considering them in the context of the entire period investigated. As part of this claim, Chile alleges other deficiencies in the competent authorities' methodology; and
- (c) the competent authorities' findings and conclusions with respect to the factors that they investigated neither proved nor justified the claim that serious injury was clearly imminent and they based their finding of "threat of serious injury" merely on conjecture or remote possibility.<sup>546</sup>

7.84 Argentina denies this claim and submits that the competent authorities conducted an analysis that was consistent with the provisions of Article XIX:1(a) and Article 4.2(a), (b) and (c) of the Agreement on Safeguards.<sup>547</sup> The Panel notes that there is no claim made under Article 4.2(c).

7.85 The Panel will consider these claims in the order set out above, as consideration of the evaluation of the serious injury factors will assist in making findings on the competent authorities' final conclusion that a threat of serious injury existed.

- (a) Period of analysis

7.86 The competent authorities collected and considered data concerning the situation of the domestic industry for the four-year period 1997-2000. This was the period considered by the directors in the joint opinion. Import data was collected and considered for the five-year period 1996-2000, although the quantity of imports relative to domestic production was not calculated for 1996.

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<sup>545</sup> See Argentina's first written submission, paragraphs 64 to 66 and its response to question No. 11 of the Panel. Contrast the references to "peaches in syrup" with "canned peaches" in the Sectoral Study in Exhibit CHL-6 with the product description in the technical report in the preserved peaches safeguard investigation, pages 11 and 12.

<sup>546</sup> See Chile's first written submission, paragraph 4.32.

<sup>547</sup> See Argentina's second oral statement, paragraphs 36 and 46.

## (b) Competent authorities' determination

7.87 The joint opinion contains a section headed "Situation of the domestic industry" which summarizes findings on a series of injury factors, discussed below. The conclusion of that section reads as follows:

"On the basis of the considerations set forth above, of the Technical Report and of the evidence contained in the file, Dr Lidia Elena M. de Di Vico and Dr Héctor Arese conclude that the domestic preserved peaches industry shows indications of injury that grew worse during the last year considered (2000), but that they do not qualify as serious injury. Nevertheless, these indicators reflect a high degree of sensitivity to the change that is taking place in the market as a result of the imports."

7.88 The final phrase links the situation of the domestic industry and imports. The analysis of the evolution of imports in the joint opinion was reproduced in paragraph 7.42 above. The conclusion reached in the joint opinion on the existence of a threat of serious injury, which appears in the section headed "Causality", reads as follows:

"As concluded in the relevant section, there are signs of injury in the domestic industry which, while they do not yet qualify as serious injury within the meaning of Article 4.1(a) of the Agreement on Safeguards, show a high degree of sensitivity to the change taking place in the market as a result of imports. The behaviour of imports observed towards the end of 2000 shows that they have the capacity, in terms of price and volume, to cause serious injury.

"The lack of any indicators in the international market showing that the volume and price of world production and exports, both in the current year and in future years, would not equal or even exceed the levels for the year 2000, leads to the conclusion of threat of serious injury within the meaning of Article 4.1(b)."<sup>548</sup>

7.89 This passage shows that the directors identified imports as the threat to the domestic industry due to their price and volume, and the situation of the domestic industry. The period of time on which they based this determination was "towards the end of 2000". That description of the period of time is not sufficiently precise to know what it was, nor what were the changes in prices and quantities during that period.

7.90 The only injury factor which the directors expressly linked to imports in the section headed "Situation of the domestic industry" was the level of stocks. Otherwise, in their view, the relationship between the injury factors and imports was that the former showed signs of a high degree of sensitivity and the imports had the capacity to cause serious injury.

7.91 The other injury factors which were considered to demonstrate the high degree of sensitivity are reviewed in the joint opinion. Although the joint opinion states that its review of the situation of the domestic industry is an analysis of the situation of the industry during the period 1997-2000, most of the negative variations which it mentions consist of variations in 2000 as compared with 1999. This is the case of reported and estimated domestic production, value of overall domestic market sales, domestic market share, employment, labour productivity, wage bill, exports, selling prices and cost/price ratios. It mentions falls in sales data from the accounting statements of surveyed companies without limiting them to a particular year.

7.92 Most of the factors analysed showed deterioration. Apparent consumption was growing and the volume of sales by the domestic industry was steady. The joint opinion mentioned the former in

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<sup>548</sup> See Annex to Record No. 781, Section V.A.4 headed "Causality".

relation to falling domestic market share but did not mention the latter. It mentioned growth in production reported by the surveyed companies in 1998 and 1999. The statistics for domestic production supplied by CAFIM, which represented 100 per cent of the domestic industry, showed that production was steady in 2000, but the competent authorities gave an explanation why they chose to make their own estimates.<sup>549</sup>

(c) Evaluation of the determination

7.93 Chile's first two claims concern the competent authorities' evaluation, under Article 4.2(a), in making a determination of a threat of serious injury under Article XIX:1(a) of GATT 1994 and Article 2.1 of the Safeguards Agreement. We will apply the standard of review to two aspects of the evaluation in accordance with the following statement of the Appellate Body in *US – Lamb*:

"... in examining a claim under Article 4.2 of the *Agreement on Safeguards*, a panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated *all relevant factors* and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a *reasoned and adequate explanation* of how the facts support their determinations."<sup>550</sup>

7.94 We understand Chile's first two claims to correspond to these two aspects of the competent authorities' determination. We will begin with our review of the formal aspect first and review whether the competent authorities evaluated, as a formal matter, *all relevant factors*.

(i) *All relevant factors*

7.95 Chile claims that the CNCE did not evaluate and investigate all the relevant factors having a bearing on the situation of the domestic industry in particular and at a minimum those explicitly mentioned in Article 4.2(a) of the Agreement on Safeguards. It argues that the competent authorities omitted three of the factors listed in Article 4.2(a), namely productivity, capacity utilization and employment.<sup>551</sup> It made a separate claim regarding an alleged unlisted factor: relating to the domestic industry's "expansive readjustment".<sup>552</sup> Argentina cites parts of the competent authorities' report that purport to show these factors were investigated and evaluated.<sup>553</sup>

7.96 Article 4.2(a) requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned.<sup>554</sup> We will therefore assess first whether the competent authorities' determination, as a formal matter, evaluated the three listed relevant factors which Chile claims were omitted.

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<sup>549</sup> The competent authorities could not explain why the domestic production figure for 2000 was identical to 1999 when the production of the companies surveyed had decreased, so the technical team made two estimations for 2000 using two alternative methods. See the methodological notes in the technical report, Annex I, pages 2 and 3.

<sup>550</sup> See the Appellate Body Report in *US – Lamb*, paragraph 141.

<sup>551</sup> See Chile's first written submission, paragraphs 4.61 and 4.64.

<sup>552</sup> See Chile's first written submission, paragraph 4.63 and response to question No. 17 of the Panel.

<sup>553</sup> See Argentina's first written submission, paragraphs 91 to 94 and 104 to 106.

<sup>554</sup> See the Appellate Body Report in *Argentina – Footwear (EC)*, paragraph 136.

### Capacity utilization

7.97 Table 6 of the technical report contains data for capacity utilization, which shows that among those companies surveyed this factor improved in 1999 and declined in 2000 to its 1998 level of 73 per cent. It also shows that the technical team calculated an industry-wide figure based on the figures supplied by CAFIM which showed that this factor improved in 1999 and remained steady in 2000. A statement by CAFIM to this effect is noted in the body of the technical report.<sup>555</sup> All of this shows merely that data on capacity utilization was collected and tabulated. However, in terms of what the competent authorities *evaluated*, in accordance with Article 4.2(a), the joint opinion does not mention "capacity utilization" as such. It does refer to the methodology for calculation of production and installed capacity but does not mention any statistic or result for installed capacity.

7.98 Argentina argued that the competent authorities considered both the fall in production and the increase in capacity.<sup>556</sup> However, it did not direct us to any place on the record that shows that they conducted any *evaluation* of capacity utilization nor, for that matter, installed capacity. The only indirect reference to capacity utilization which the Panel could see in the joint opinion is a statement that the directors reached the conclusion that the industry showed a high degree of sensitivity (which was a prelude to the determination of a threat of serious injury) based on the consideration of injury factors in the joint opinion (which did not include capacity utilization), the technical report (which did include capacity utilization) and the evidence contained in the file. A catch-all phrase of this kind does not demonstrate an evaluation of a factor.

7.99 The most that the Panel can say is that the CNCE directors who voted in favour of the measure may have read the table of statistics which showed that capacity utilization either declined to 1998 levels or remained steady but there is nothing on the record that shows that they evaluated the factor. It is not even clear which figure they might have referred to for 2000, or whether they might have referred to both. Therefore, the Panel finds that the competent authorities did not, as a formal matter, evaluate this factor as required by Article 4.2(a).

### Productivity

7.100 Table 7e of the technical report contains statistics on "*producto medio físico del empleo*".<sup>557</sup> When asked to clarify, Argentina explained that this term was a measure of "own production divided by the number of employees in the preserved peaches production sector".<sup>558</sup> The body of the technical report does not discuss this term. However, unlike capacity utilization, the joint opinion mentions this factor and notes falls, i.e. a deterioration, which it relates to falls in sales and production. This indicates some evaluation, even if it represents the bare minimum. Without prejudice to the question whether labour productivity was a sufficient measure of productivity in the preserved peaches industry, the Panel finds that productivity was evaluated, as a formal matter, as required by Article 4.2(a).

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<sup>555</sup> See the technical report, page 42 for the statement by CAFIM. See page 87 for a statement by the European Commission which appears in Part VI and therefore "does not in any way constitute the opinion of the CNCE technical team" (page 73).

<sup>556</sup> See Argentina's first written submission, paragraphs 93 and 94, its rebuttal, paragraph 27 and its response to question No. 48 of the Panel.

<sup>557</sup> We provisionally translated this term as "labour productivity". We asked Argentina to explain this term and drew attention to the translation. It did not object to our translation.

<sup>558</sup> See Argentina's response to question No. 49 of the Panel. Chile was non-committal on the meaning of this term: see Chile's response to question No. 51 of the Panel.

## Employment

7.101 Tables 7a and 8 of the technical report contain data on the level of employment and the total production wage bill. The body of the technical report refers to the level of employment in primary production.<sup>559</sup> The joint opinion, in the same sentence in which it notes falls in labour productivity, mentions employment, noting falls in 2000 which it relates to falls in sales and production. The Panel therefore finds that employment was evaluated, as a formal matter, as required by Article 4.2(a).

### (ii) *Reasoned and adequate explanation*

7.102 Turning to Chile's claim concerning the substantive aspects of the competent authorities' findings and conclusions of a threat of serious injury, the Panel must review whether the competent authorities provided a reasoned and adequate explanation of how the facts supported their determination that a threat of serious injury existed. The temporal focus of the competent authorities' evaluation of the data, and the alternative explanation that the rate and amount of the increase in imports reflected a recovery to historical levels, are among the various methodological issues which Chile has raised.<sup>560</sup>

7.103 We recall certain statements of the Appellate Body in *US – Lamb* concerning the appropriate standard of review. We have already quoted those statements concerning the value of the most recent data in making a determination of the existence of a threat of serious injury, but also the danger of evaluating the most recent data in isolation and the need to evaluate the short-term trends in the light of the longer term trends.<sup>561</sup> We also bear in mind another statement in that report concerning the standard of review of a determination of a threat of serious injury:

"We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an 'objective assessment' of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate."<sup>562</sup>

7.104 The Panel will consider the temporal focus of the competent authorities' evaluation of the data in making their determination of a threat of serious injury, and whether their explanation was adequate in the light of any plausible alternative explanation of the facts.

7.105 The determination of a threat of serious injury in this case rests on two findings: one regarding the capacity of imports to cause injury and the other regarding the "sensitivity" of the domestic market. Argentina argues that the determination was based on the overall weighing of all of

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<sup>559</sup> See the technical report, page 25.

<sup>560</sup> See Chile's first written submission, paragraphs 4.35-4.58.

<sup>561</sup> See Appellate Body Report in *US – Lamb*, paragraphs 137 and 138, quoted in this Report at paragraphs 7.62 and 7.64 above.

<sup>562</sup> See Appellate Body Report in *US – Lamb*, paragraph 106.

the factors having a bearing on the industry as set forth in the technical report and as illustrated in a chart.<sup>563</sup> However, the joint opinion makes it clear that the directors relied, with respect to imports, on the last part of 2000 and, with respect to the situation of the domestic industry, mainly on the variation from 1999 to 2000. The joint opinion makes no mention of the rest of the period of analysis which, in the case of import data, was 1996-2000 and, in the case of the situation of the domestic industry, was 1997-2000.

7.106 Although the directors did not explain why they chose to rely on data from the very end of the period of analysis, it is clear that in a case of a determination of a *threat* of serious injury, such as this, the data relating to the most recent past provided them with an essential basis for a projection of future conditions.<sup>564</sup> However, once again we recall the balancing consideration that if the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading.<sup>565</sup>

7.107 In the preserved peaches investigation, the data for the most recent period was quite different from that for the rest of the period of analysis. Of the nine injury factors cited, in almost all cases the figure for 2000 showed a modest deterioration compared to the improvement during the previous years. The most significant decrease was in the production figure reported by the surveyed companies which showed a 14 per cent decline in the last year of the analysis, but this came after increases of 20 per cent and 39 per cent in the previous years of the period of analysis.<sup>566</sup> The production figure generated by the competent authorities showed a 12 per cent decline in the last year of the period of analysis after a decrease of 4 per cent and an increase of 21 per cent. Most of the injury factors considered in reaching the conclusion that the domestic industry displayed a high degree of sensitivity showed that the condition of that industry in 2000 was better than in 1998, which itself was an improvement on 1997. These factors appeared to be returning to their pre-1998 levels after an unusually favourable period.

7.108 The impact of the longer term trends in the data could have been decisive on the competent authorities' conclusion that the industry displayed a high degree of sensitivity, which was an essential part of the determination of a threat of serious injury, as formulated in the joint opinion. This importance of the longer term trends is illustrated by the fact that the only directors who explained the impact of the favourable longer term trends reached the conclusion that the preserved peaches measure was not justified.

7.109 The joint opinion offers no explanation of the impact of the improvements throughout the period of analysis on their determination of a threat of serious injury. It offers no explanation of the choice of 1999, or late 2000, as a benchmark for evaluation of these factors. Instead, it assumes that those years were an appropriate benchmark for its evaluation of the situation of the domestic industry. In view of these trends over the period of analysis, these explanations are essential to provide a reasoned and adequate explanation of the conclusion that the domestic industry showed a high degree of sensitivity, which was an essential step in the way the joint opinion made its determination of a threat of serious injury.

7.110 There was no improvement in 2000 over 1998 in the volume and value of imports, selling prices for the domestic industry and sales value data of the surveyed companies. However, the increase in imports in 2000 over 1998 was less than the decrease in 1998 over 1996, so that the

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<sup>563</sup> See Argentina's rebuttal, paragraph 104, referring to charts in the technical report at pages 26, 27, 47 and 49.

<sup>564</sup> See Appellate Body Report in *US – Lamb*, paragraph 137, raised by Argentina in relation to the determination of an increase in imports and quoted above.

<sup>565</sup> See Appellate Body Report in *US – Lamb*, paragraph 138, quoted above.

<sup>566</sup> See Table 1 of the technical report. CAFIM indicated that production was identical in 1999 and 2000.

volume of imports in absolute terms actually declined over the entire period of analysis (1996-2000) by a seventh in terms of volume and over a third in terms of value. The average prices of imports showed modest increases to 1998 and then a steep decline to 2000 which was inversely proportional to the volume of imports. These factors formed the basis of the finding that imports had the capacity to threaten serious injury. The average selling prices for the domestic industry showed a slight decline to 1998 and then followed the same trend of a steeper decline to 2000. Sales value data of the surveyed companies showed an improvement to 1998 or 1999 and then a steep decline to 2000.

7.111 The directors viewed the most recent data for the volume and price of imports, in fact, the period "toward the end of 2000" at the very end of the period of analysis. They did not relate it to data for the rest of the period of analysis but isolated it. The joint opinion offers no explanation of the impact of the decrease in imports over the entire period of analysis. We have already dealt with Argentina's arguments that they did not isolate the recent import data from the rest of the period of analysis at paragraphs 7.66 to 7.68. We do not accept them in relation to the threat of serious injury determination for the same reasons.

7.112 An alternative plausible explanation of the variations in import prices and volumes, and the average selling prices for the domestic industry, was open on the facts. This was that the volume of imports represented a return to pre-1998 levels, after the effects of an unusual climatic factor. The increase in imports at the end of the period of analysis continued a trend which began in 1998 but, when viewed in the light of all the data analysed from 1996, was open to this alternative explanation. The deceleration in the increase in imports in the last year of the period of analysis also supported this alternative explanation. Even if the import data for 1996 was excluded, the directors acknowledged that the low volume of imports in 1997 was due to a bad harvest in Greece. The data showed that the relative quantity of imports from Greece in 1997 represented almost zero and that it had recovered more or less in line with the total increase in imports since then.

7.113 The Panel sees nothing in the joint opinion that addresses this alternative plausible explanation. During the investigation, it was suggested that the increase in imports was merely a recovery.<sup>567</sup> The technical team observed that imports "recovered" in 1999 and 2000, and described the increase in supply of peaches in Greece in 1999 and the increase in exports from Greece in 1998 and 1999 as a "recovery".<sup>568</sup> They also described a "recovery" in production in Chile in 1999 followed by a decline. The directors who voted in favour of the preserved peaches measure did not address it.

7.114 Viewed as a recovery after the bad Greek harvest, the behaviour of imports and domestic prices was consistent with the pattern of the other injury factors which appeared to be returning to their pre-1998 levels after an unusually favourable period. The plausibility of this alternative explanation is illustrated by the fact it was accepted by the other CNCE directors.<sup>569</sup> We cite their opinion only to show that the explanation was plausible, not that it was correct.

7.115 Argentina argued before the Panel that the increase was not a recovery, but it has not directed our attention to any passage in the competent authorities' report that addressed such an explanation and gave a reason for rejecting it.<sup>570</sup> Argentina drew attention to the fact that the growth rate in imports from 1998 onwards "grew at a faster rate than in 1996" but it has not shown where this contrast was drawn by the competent authorities nor explained how that would exclude the possibility that the later increase was nonetheless a recovery.<sup>571</sup> Argentina argued that the volume of stocks in

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<sup>567</sup> See the submission of the Chilean representation to the investigation, reflected in the technical report, page 84.

<sup>568</sup> See the technical report, pages 32, 58, 59 and 71.

<sup>569</sup> See the separate opinions of Dra. Diana Tussie and Lic. Elías A. Baracat, in the Annex to Record No. 781, Sections V.B and V.C, respectively.

<sup>570</sup> See Argentina's first written submission, paragraph 115.

<sup>571</sup> See Argentina's second oral statement, paragraph 49.

Greece, and the ease with which they could have been poured onto the Argentine market, were essential variables in the evaluation of the threat of serious injury.<sup>572</sup> However, an explanation was required as to why these levels of stocks were not part of a recovery, and none was given. Argentina argued that it was the overall weighing of all of the factors having a bearing on the industry that ultimately supported the determination of threat of serious and imminent injury<sup>573</sup> but it has not directed our attention to any passage in the competent authorities' report that addressed the possibility that the injury factors analysed in relation to the situation of the domestic industry were simply returning to their pre-1998 levels.

7.116 The directors who voted in favour of the preserved peaches measure viewed the data for the most recent period in isolation and did not acknowledge the alternative plausible explanation. The considerable increase in imports in 2000 and deterioration in certain injury factors – viewed in isolation – led them to a potentially very different conclusion from an evaluation in the light of all data before the competent authorities. They explained their finding on the basis of the most recent period and did not offer any explanation of that data in light of the longer term data which was before them. They did not seek to deal with the alternative plausible explanation, even though it was disclosed in the technical report.

7.117 The Panel is not substituting its own opinion for that of the competent authorities. In fact, the Panel has not formed its own opinion on either the situation of the domestic industry or the capacity of imports to cause serious injury in 2001. Rather, the Panel finds that for the reasons given above, the explanation of the determination of a threat of serious injury was not reasoned or adequate as required by Article 4.2(a).

(iii) *Clearly imminent*

7.118 Chile also argues that the purported determination of threat of serious injury did not satisfy the definition of a "threat of serious injury" in Article 4.1(b).<sup>574</sup> That definition reads as follows:

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

7.119 This definition refers to "serious injury" which is defined in Article 4.1(a) as follows:

"serious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry."

7.120 Chile claims that the finding of a threat of serious injury did not demonstrate that the threat was "clearly imminent". That phrase has been interpreted by the Appellate Body as follows:

"(...) The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize. The use of this word implies that the anticipated "serious injury" must be on the very verge of occurring. Moreover, we see the word 'clearly', which qualifies the word 'imminent', as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury 'shall be based on facts and not merely on allegation, conjecture or *remote possibility*.' (emphasis added) To us, the word 'clearly' relates also to the *factual* demonstration of

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<sup>572</sup> See Argentina's first written submission, paragraph 82.

<sup>573</sup> See Argentina's first written submission, paragraph 107.

<sup>574</sup> See Chile's first written submission, paragraph 4.32 and its rebuttal, paragraph 35(d).

the existence of the 'threat'. Thus, the phrase 'clearly imminent' indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury.<sup>575</sup>

7.121 In the present case, the directors' conclusion was that that the industry showed a "high degree of sensitivity" in circumstances which did not constitute serious injury. Sensitivity of any degree does not show that serious injury is about to occur – it depends on the likelihood and imminence of the threat. In this case, the threat was described as the "capacity" of imports to cause serious injury.<sup>576</sup>

7.122 The "capacity" of imports is a reference to the *possibility* of causing serious injury, not a threat. The directors purported to identify the threat in the following paragraph of their conclusion, but they did not indicate any degree of likelihood that serious injury would occur, let alone a high degree of likelihood. There was a statement that the increase in imports in the most recent period was "sharp" but the conclusion was not drawn that this indicated that the imports that would cause serious injury were about to occur. There was just an acknowledgement of the possibility. There was no attempt to make a projection of what was about to occur, nor a fact-based assessment of the likelihood of the imports increasing. In the light of the flawed temporal focus of the analysis of the data, the use of the most recent data did not necessarily indicate the future state of imports. In the light of the alternative explanation that the imports were recovering to their historical levels, the most recent increase did not necessarily indicate that they would continue to increase either at all or at the same rate.

7.123 Argentina reminded us of another statement by the Appellate Body in *US – Line Pipe* that "serious injury does not generally occur suddenly".<sup>577</sup> However, this does not affect the definition of threat of serious injury in Article 4.1(b) which requires that the serious injury be "clearly imminent". Indeed, this requirement was recalled by the Appellate Body in the passage from which Argentina quoted.

7.124 Consequently, we find that this determination does not purport to find that there is a high degree of likelihood that the threat would materialize in the very near future. Therefore, we find that the determination does not contain a finding that serious injury is clearly imminent as required by Article 4.1(b).

(iv) *Remote possibility*

7.125 Chile argues that the determination of threat of serious injury was not based on facts but merely on "conjecture or remote possibility", which is inconsistent with the definition in Article 4.1(b).<sup>578</sup> The relevant conclusion (in the section headed "Causality") in the joint opinion is reproduced at paragraph 7.88 above.

7.126 Chile describes this assertion as a "prediction" based not on supporting analysis or empirical evidence but rather on an assumption based, in turn, on a lack of indicators.<sup>579</sup> Argentina asserts that it was the overall weighing of all of the factors having a bearing on the industry as set forth in the technical report that ultimately supported the determination of threat of serious and imminent injury.<sup>580</sup>

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<sup>575</sup> See Appellate Body Report in *US – Lamb*, paragraph 125.

<sup>576</sup> See Annex to Record No. 781, Section V.4 headed "Causality".

<sup>577</sup> See Argentina's First Oral Statement, paragraph 53, citing the Appellate Body Report in *US – Line Pipe*, paragraph 168.

<sup>578</sup> See Chile's first written submission, paragraphs 4.32 and 4.69 and its rebuttal, paragraph 35(d).

<sup>579</sup> See Chile's first written submission, paragraph 4.68; its rebuttal, paragraph 35(d).

<sup>580</sup> See Argentina's first written submission, paragraph 107.

7.127 In their conclusion, the directors acknowledge that in 2000 the domestic industry was not suffering serious injury. In the second paragraph, they admit the possibility that, in the future, world production and exports might equal or be even greater than in 2000. For this reason, they purported to determine the existence of a threat of serious injury.

7.128 Article 4.1(b) requires a determination of threat of serious injury to be based on facts. The directors based their determination on the possibility that the volume and prices of future world production and exports would be at the same or higher levels than in 2000. They state that it is based on "the lack of any indicators" that this would *not* occur.

7.129 Article 4.1(b) prohibits a determination of threat of serious injury based on remote possibility. The directors partly based their determination on a possibility that volumes and prices would be at the same levels as in 2000, which they acknowledged did not present a threat of serious injury. On its own terms, this is not a determination of a threat of serious injury. The directors do not mention any change that they expected in the coming year which would alter the effect of production and exports, so that they must have thought that, at the same levels, they would not present a threat of serious injury. They could not determine a threat of serious injury on the basis of that possibility, even if it did materialize. We note that this was only part of the basis of their determination.

7.130 The directors partly based their determination on the possibility that the volume and prices of future world production and exports would be worse for the domestic industry than in 2000. They recognized that this possibility might not occur at all, since they entertained the possibility that volume and prices might be at the same levels as in 2000, which they had already determined did not present a threat of serious injury.

7.131 In order to succeed on this claim, Chile needs to show that the possibility on which the directors based their claim was "remote" or that it was not based on facts at all. The record shows that it was based on a possibility of the injury caused by future imports, but there is insufficient evidence to conclude that that possibility was remote. The evidence shows that the determination of the threat was at least partly based on the existing quantities and prices of imports, and the evaluation of the injury factors – even if this was inconsistent with Article 4.2(a). There was no real projection from that evidence – which could, for example, have been based on the trends in the data – but that does not indicate a finding not based on facts. For these reasons, we do not find that the determination of threat of serious injury was based not on facts but merely on "remote possibility".

7.132 In view of the above findings, we do not need to consider Chile's claims regarding other alleged deficiencies in the methodology used by the competent authorities in their evaluation of various injury factors, nor its claim regarding the domestic industry's "expansive readjustment" as another factor required to be evaluated under Article 4.2(a).

7.133 In view of our findings at paragraphs 7.99, 7.117 and 7.124, the Panel finds that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards because the competent authorities, in making their determination of the existence of a threat of serious injury:

- (a) did not evaluate, as a formal matter, all of the relevant factors having a bearing on the situation of the domestic industry, in particular, capacity utilization;
- (b) did not provide a reasoned and adequate explanation of how the facts supported their determination; and
- (c) did not find that serious injury was clearly imminent.

7.134 The Panel does not find that the competent authorities' determination of threat of serious injury was based not on facts but on remote possibility.

#### 4. Causal link

7.135 Chile claims that Argentina acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the Agreement on Safeguards in making its determination of a causal link between the increased imports and the threat of serious injury. Given that the Panel has found that the competent authorities did not demonstrate the existence of an increase in imports nor a threat of serious injury, there is no need for the Panel to make an assessment of the determination of the existence of a causal link. In view of those findings, it would be impossible for us to continue and find that the competent authorities demonstrated a causal link between increased imports that did not occur and a threat of serious injury that did not exist.<sup>581</sup> However, the Panel can expeditiously produce a record of the competent authorities' evaluation of the causal link, which is consistent with its role as the sole trier of fact in this proceeding under the DSU. That record is set out below.

7.136 The section headed "Causality" in the joint opinion, in its entirety, reads as follows:

"Paragraph 4.2(b) of the WTO Agreement on Safeguards stipulates that the serious injury determination for the purposes of applying a safeguard measure shall not be made "unless [the] investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof". It also states that the injury caused by factors other than increased imports shall not be attributed to increased imports.

As concluded in the relevant section, there are signs of injury in the domestic industry which, while it does not yet qualify as serious injury within the meaning of Article 4.1(a) of the Agreement on Safeguards, show a high degree of sensitivity to the change taking place in the market as a result of imports. The behaviour of imports observed towards the end of 2000 shows that they have the capacity, in terms of price and volume, to cause serious injury.

The lack of any indicators in the international market showing that the volume and prices of world production and exports, both in the current year and in future years, would not equal or even exceed the levels for the year 2000, leads to the conclusion of threat of serious injury within the meaning of Article 4.1(b).

The import situation and the degree of variation and sensitivity of the indicators listed and described in Section V.2 prove the existence of a causal link between the investigated imports and the threat of serious injury."<sup>582</sup>

7.137 The joint opinion does not contain any other references to the causal link condition. The body of the technical report contains no discussion of the causal link, except statements in Part VI which are statements of interested parties during the safeguard investigation. One is a statement by the applicant, CAFIM, that:

"... if imports, irrespective of their origin, continue in the conditions which prevailed prior to the application of the safeguard clause with provisional duties, in particular in relation to the prices of imports from the northern hemisphere, they will cause injury which will prove impossible to remedy and lead to the virtual destruction of domestic

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<sup>581</sup> This was the approach favoured by the Appellate Body in *Argentina – Footwear (EC)*, paragraph 145.

<sup>582</sup> See Annex to Record No. 781, Section V.A.4 headed "Causality".

production of peaches for processing, as well as of the processing industry itself. It is for this reason that we are requesting the application of definitive safeguard measures ... since we feel that the grounds established in the Agreement on Safeguards have all been fully satisfied."<sup>583</sup>

7.138 Two domestic producers also made statements which could be interpreted as listing a variety of factors causing injury.<sup>584</sup> The other relevant statements in Part VI of the technical report were made by the European Commission. It said that:

"... with regard to the causal link between increased imports and the threat of serious injury, Argentina has not provided any evidence of a link between the possible injury and the said imports"; and

"... the key sectoral indicators, such as the level of domestic producer profits, increase in production levels, use of installed capacity, exports, average labour productivity indicators and actual and planned investment volumes, discount any form of actual injury or threat of future injury caused by the entry into the country of imported products."<sup>585</sup>

7.139 Neither party has directed the Panel's attention to any additional passages in the competent authorities' report which could show how they made their determination of a causal link.

## 5. Judicial economy

7.140 Article 11 of the DSU provides that the Panel's function is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. It does not require us to examine all the legal claims made by Chile. Our findings should assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. We are mindful of the approach of the Appellate Body in *US – Wool Shirts and Blouses* that we need only address those claims which we consider necessary for the resolution of the matter between the parties.<sup>586</sup> At the same time, we are mindful of the balancing consideration expressed by the same body in *Australia – Salmon* that a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members.<sup>587</sup>

7.141 In view of our findings at paragraphs 7.35, 7.82 and 7.133 that Argentina acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards, we can conclude that the preserved peaches measure lacks a legal basis under the relevant covered agreements. Further findings on Chile's other claims cannot alter that conclusion and would not further assist the DSB in making sufficiently precise recommendations to allow for prompt compliance by Argentina with those recommendations. Accordingly, the Panel chooses to exercise judicial economy and declines to rule on the claims made under Articles 2.1 and 4.2(b) of the Agreement on Safeguards regarding the causal link, and under Articles 3, 5.1 and 12.2 of the Agreement on Safeguards, regarding the published report, the permissible extent of application of the measure, and notification, respectively.

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<sup>583</sup> See the technical report, Part VI.1, page 91.

<sup>584</sup> See the technical report, pages 77 and 78.

<sup>585</sup> See the technical report, pages 88 and 93.

<sup>586</sup> See Appellate Body Report in *US – Wool Shirts and Blouses*, page 19; DSR 1997:I, at p. 340.

<sup>587</sup> See Appellate Body Report in *Australia – Salmon*, paragraph 223.

7.142 Chile requests the Panel to rule on all of the claims presented "in order to ensure that Argentina does not continue to violate these agreements as it has done".<sup>588</sup> Chile did not offer any explanation as to why ruling on *all* claims would achieve this objective. Furthermore, we must presume that all Members will comply with their obligations under the covered agreements in good faith, and we have seen no evidence that Argentina will continue to violate the agreements at issue in this dispute. The Panel therefore declines to agree to Chile's request.

## VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In the light of our findings, we conclude that the Argentine preserved peaches measure was imposed inconsistently with certain provisions of the Agreement on Safeguards and GATT 1994. In particular:

- (a) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 by failing to demonstrate the existence of unforeseen developments as required;
- (b) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards by failing to make a determination of an increase in imports, in absolute or relative terms, as required;
- (c) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards because the competent authorities, in their determination of the existence of a threat of serious injury:
  - (i) did not evaluate all of the relevant factors having a bearing on the situation of the domestic industry;
  - (ii) did not provide a reasoned and adequate explanation of how the facts supported their determination; and
  - (iii) did not find that serious injury was clearly imminent.

8.2 The Panel does not find that Argentina acted inconsistently with its obligations under Articles 2.1 and 4.1(b) of the Agreement on Safeguards by basing a finding of the existence of a threat of serious injury on an allegation, conjecture or remote possibility.

8.3 In light of these conclusions, we decline to rule on Chile's claims that:

- (a) Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 because the facts before the competent authorities showed that the alleged unforeseen developments were not unforeseen;
- (b) Argentina acted inconsistently with its obligations under Article 3 of the Agreement on Safeguards by failing to include in its published report adequate and sufficient findings on all pertinent issues of fact and law;
- (c) Argentina acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards in its analysis of a possible causal link between the alleged increased imports and the alleged threat of serious injury;

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<sup>588</sup> See Chile's first written submission, final paragraph and its rebuttal, paragraph 72.

- (d) the level and formulation of the definitive preserved peaches measure are inconsistent with Article 5.1 of the Agreement on Safeguards because they exceed the extent necessary to prevent or remedy the alleged threat of serious injury and to facilitate adjustment; and
- (e) Argentina acted inconsistently with Article 12.2 of the Agreement on Safeguards because its notification to the Committee on Safeguards of its finding of alleged threat of serious injury as a result of alleged increased imports failed to include evidence substantiating that finding.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement by a Member of its obligations assumed under a covered agreement, such action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. We have seen no evidence in these proceedings that would rebut Chile's *prima facie* case against Argentina. Accordingly, we conclude that to the extent that Argentina has acted inconsistently with the provisions of the Agreement on Safeguards and GATT 1994, as described in paragraph 8.1, it has nullified or impaired the benefits accruing to Chile under those two agreements.

8.5 We therefore recommend that the Dispute Settlement Body request Argentina to bring its preserved peaches measure into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

## IX. ANNEX

## A. ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES REFERRED TO IN THE REPORT

SHORT TITLE	FULL TITLE
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575.
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515.
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, 3 May 2002, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207AB/R.
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9.
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49.
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3.
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001.
<i>US – Fur Felt Hats</i>	Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, <i>GATT/CP/106</i> , adopted 22 October 1951.
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R.
<i>US – Lamb</i>	Panel Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R.
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001.
<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R.

<b>SHORT TITLE</b>	<b>FULL TITLE</b>
<b><i>US – Line Pipe</i></b>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002.
<b><i>US – Wheat Gluten</i></b>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R.
<b><i>US – Wheat Gluten</i></b>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001.
<b><i>US – Wool Shirts and Blouses</i></b>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.