

Settlement of Disputes ("DSU") and Article 14 of the Agreement on Safeguards with regard to provisional and definitive safeguard measures imposed by Argentina on imports of footwear.

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

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

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

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

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS121/3, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

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

Chairman: Mr. John McNab

Members: Ms. Claudia Orozco

Ms. Laurence Wiedmer

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

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

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

## II. FACTUAL ASPECTS

2.1 This dispute concerns the application of provisional and definitive safeguard measures on imports of footwear by Argentina. Following a request made on 26 October 1996 by the Argentine Chamber of the Footwear Industry (CIC) for the application of a safeguard measure on footwear, and pursuant to Resolution MEYOSP No. 226/97<sup>1</sup>, a safeguard investigation on footwear was initiated. At the same time, a provisional measure was imposed. The opening of the safeguard investigation and the implementation of a provisional safeguard measure were notified to the Committee on Safeguards in a communication dated 21 February 1997.<sup>2</sup> In a communica-

<sup>1</sup> Published in the *Boletín Oficial* of 24 February 1997. The Resolution was adopted on 14 February 1997 and became effective on 25 February 1997.

<sup>2</sup> G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, 25 February 1997, Exhibit EC-11.

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tion dated 5 March 1997, a copy of Resolution 226/97 was transmitted to the Committee on Safeguards.<sup>3</sup>

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

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

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

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

<sup>4</sup> G/SG/N/8/ARG/1, Exhibit EC-16.

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

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

<sup>7</sup> *Boletín Oficial*, No. 28,729, 12 September 1997.

<sup>8</sup> G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, 10 October 1997, Exhibit EC-20.

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

<sup>10</sup> G/SG/N/10/ARG/1/Suppl.2, G/SG/N/11/ARG/1/Suppl.2, G/SG/14/Suppl.1 and G/L/195/Suppl.1, 22 October 1997.

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

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

<sup>13</sup> Exhibit EC-3.

<sup>14</sup> Exhibit EC-4.

<sup>15</sup> Similar minimum specific duties also applied to textiles and clothing. The minimum specific duties on textiles and clothing were the subject of WTO complaints by the United States (WT/DS56) and the European Communities (WT/DS77). The Panel in those disputes excluded minimum specific

the minimum specific duties on imports of footwear<sup>16</sup> on 14 February 1997, the same day that Argentina adopted Resolution MEYOSP 226/97<sup>17</sup>, referred to above, initiating the safeguard proceedings and imposing provisional measures in the form of minimum specific duties on imports of footwear.

2.5 On 28 April 1998, Argentina published Resolution 512/98<sup>18</sup> modifying Resolution 987/97.

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

### III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

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

3.2 The European Communities argues that:

"All of the above violations, except for the violation of Article 5:1, relate to the way in which the investigation was conducted or the way in which procedural obligations were carried out by Argentina. Accordingly, any change to the measure which Argentina may introduce will only affect the violation of Article 5:1 (necessity of the measure and adequacy of the adjustment plan) and not the remaining violations."

"Accordingly, the EC submits that Argentina's safeguard measures on imported footwear, however they may be adapted or adjusted in the meantime, should be removed."

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

3.4 Argentina requests the Panel:

(a) "to give consideration to the issues of procedure raised in its first written submission" (section IV.A). First, Argentina "[does] not consider that the DIEMs applied to footwear and now revoked should be discussed by the Panel. [Argentina] therefore respectfully request the Panel not to take into account any of the claims made by the EC in this respect". Second, "Argentina respectfully requests the Panel not to make any ruling on Resolution 512/98, which was never the subject of

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duties on footwear from its examination because these had been eliminated before the panel was formed.

<sup>16</sup> Resolution 225/97, Exhibit EC-5.

<sup>17</sup> Exhibit EC-6.

<sup>18</sup> Exhibit EC-28.

<sup>19</sup> Exhibit EC-32.

<sup>20</sup> Exhibit EC-35.

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- consultations between the European Communities and Argentina and is not included in the terms of reference which the DSB adopted for the Panel's proceedings, although these were the subject of detailed discussions at two consecutive meetings of the DSB";
- (b) "to reject the EC's request for a preventive ruling by the Panel on any change that Argentina might make to the measure";
  - (c) "to reject the request that the panel "find" that Argentina, in conducting its investigation, has failed to comply with the different provisions that the EC claims to have been violated, in particular its obligations under Articles 2.1, 4.2(a), 4.2(b), 4.2(c), 6, 12.1 and 12.2 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994";
  - (d) "to reject the EC's request that any change to the measure which Argentina may introduce only affect the alleged violation of Article 5.1 and not the remaining alleged violations";
  - (e) "to reject the EC's request that the Panel "recommend" that however the measure may be adjusted, it should be removed."

**IV. PROCEDURAL ISSUES AND REQUESTS FOR PRELIMINARY RULINGS<sup>21</sup>**

*A. Argentina's Requests Regarding the Panel's Terms of Reference*

*1. Minimum Specific Import Duties (DIEMS)*

- (a) The European Communities' Account of the "Factual and Procedural History" of the Dispute

4.1 As part of its description of the "factual and procedural history" of this dispute, the European Communities asserts the following:

On 31 December 1993 Resolution n° 1696/93 of the Argentine Ministry of Economy, Public Works and Public Services introduced minimum specific duties on certain footwear imported into Argentina<sup>22</sup>. The text of this Resolution is annexed as Exhibit EC-1. The justification given for this measure in the first Preamble was the low price of certain imports and the resulting injury caused to the Argentine industry. It was stated to be of a temporary nature and to be linked to an investment plan for the adjustment and specialization of the industry. Indeed, Article 6 of the measure specified that the minimum specific duties were to expire on 31 December 1994 and that there was a "possibility of a single non-renewable extension of six months" provided that the injury persisted and the adjustment justified it.

<sup>21</sup> Except as otherwise noted, the footnotes and citations, and the emphasis in the text are as contained in the parties' submissions.

<sup>22</sup> The Resolution is dated 28 December 1993 and published in the Official Journal of the Argentine Republic of 30 December 1993, to enter into force the next day.

However, the protection proved easier to introduce than to remove and the duties have in effect been in force ever since. On the date of their original intended expiry and on the eve of the entry into force of the WTO Agreements, they were extended for one year by Article 15 and Annex XII of Decree 2275/94<sup>23</sup> (Exhibit EC-2). They were again prolonged until 31 December 1996 by Article 9 of Decree 998/95 (Exhibit EC-3) and then again prolonged until 31 August 1997 by Resolution 23/97 of 7 January 1997 (Exhibit EC-4). Various amendments were also made to the duties over the period.

Similar minimum specific duties also applied to textiles and apparel. They were all in principle calculated by multiplying a "representative international price" by the applicable *ad valorem* customs duty<sup>24</sup>. A minimum specific duty became payable where its application resulted in a duty higher than would have resulted from the application of the applicable *ad valorem* customs duty (in principle for all goods priced below the "representative international price"). The levels of specific duties which were reached, surpassed in certain cases 200 per cent *ad valorem* equivalent, clearly breaching Argentina's bound rate of 35 per cent *ad valorem*, provided in Argentina's Schedule LXIV. In effect, Argentina was applying a safeguard measure without following any of the required procedures laid down in the WTO Agreement applicable after 1 January 1995.

The regime of minimum specific duties applied by Argentina did not fail to provoke international protests and both the EC and the US commenced dispute settlement proceedings. The US requested consultations on 4 October 1996 (WT/DS56) which gave rise to the Panel and Appellate Body Reports *Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*<sup>25</sup>. The European Communities, which was a third party in the US proceeding, requested its own Panel under Article 10.4 Dispute Settlement Understanding (DSU) on 10 September 1997 (WT/DS77). This gave rise to a Panel proceeding *Argentina - Measures Affecting Textiles and Clothing*, which is currently suspended.

When it became clear that the Panel requested by the US would be established, Argentina repealed the minimum specific duties on imports of footwear while maintaining such duties on imports of clothing and textiles (Resolution 225/97 –Exhibit EC-5) and simultaneously initiated safeguard proceedings and imposed provisional meas-

<sup>23</sup> Published in the Official Journal of the Argentine Republic of 30 December 1994, to enter into force on 1 January 1995.

<sup>24</sup> See the description of the system given at paragraph 6.18 of the Report of the Panel and 49 of the Appellate Body Report in *Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* referred to below.

<sup>25</sup> WT/DS56/R, adopted 22 April 1998, DSR 1998:III, 1033, confirmed and partially modified on Appeal - WT/DS56/AB/R and WT/DS56/AB/R Corr.1 of adopted 22 April 1998, (AB-1998-1), DSR 1998:III, 1003.

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ures in the form of minimum specific duties on imports of footwear (Resolution 226/97 – Exhibit EC-6). These decisions were both adopted on 14 February 1997 and both entered into force the day after their publication in the Official Journal of the Argentine Republic, that is on 25 February 1997, the very day the panel was established by the DSB in case WT/DS56. The minimum specific duties, which were imposed as a provisional safeguard measure were virtually identical to the minimum specific duties which had just been repealed.

This was a manoeuvre that proved successful for Argentina, in the sense that footwear was excluded from the WTO Panel in case WT/DS56<sup>26</sup>, which therefore only considered the illegality of the minimum specific duties for textiles and apparel, as well as an Argentine statistical tax. The minimum specific duties in that case were held to violate Article II:1(b) GATT 1994 in so far as they exceeded the bound rate of 35 per cent *ad valorem*. These minimum specific duties were identical in form and nature to the minimum specific duties on footwear.

The opening of the safeguard investigation and the implementation of a provisional safeguard measure were notified to the Committee on Safeguards on 21 February 1997 (document G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, Exhibit EC-11).<sup>27</sup>

On 25 July 1997 Argentina notified (document G/SG/N/8/ARG/1, Exhibit EC-16) the Committee on Safeguards, pursuant to Article 12:1(b) Agreement on Safeguards, of the determination of serious injury made by the NFTC (National Foreign Trade Commission).

On 1 September 1997 Argentina notified the Committee on Safeguards of the intention of the Argentine authorities to impose a final safeguard measure under Article 12:1(c) and Article 9 (footnote 2) Agreement on Safeguards (see document G/SG/N/10/ARG/1, G/SG/N/10/ARG/1, dated 15 September 1997, Exhibit EC-17, with corrigendum dated 18 September 1998, Exhibit EC-18).

On 12 September 1997 Argentina published in the Official Journal of the Argentine Republic No. 28,729 a definitive safeguard measure in the form of minimum specific duties on imports of footwear, effective as of 13 September 1997, under Resolution 987/97.

On 26 September 1997 Argentina transmitted to the Committee on Safeguards (see document G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1 dated 10 October 1997, Exhibit EC-20) a copy of Resolution 987/97. The resolution imposed as from 13 September 1997 a definitive safeguard measure on certain imports of

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<sup>26</sup> See paragraph 6.15 of the Panel Report in *Argentina - Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, *supra*, footnote 25.

<sup>27</sup> On 5 March 1997 Argentina informed the Committee on Safeguards of the content of Resolution 226/97 (document G/SG/N/6/ARG/1/Suppl.1, G/SG/N/6/ARG/1/Suppl. 1 dated 18 March 1997, Exhibit EC-12) in an additional notification.

footwear, listed in Annex I of the Resolution. This definitive safeguard measure was in the form of minimum specific duties, in many cases identical to the provisional duties and the former Article II GATT-illegal duties.

(b) Argument of Argentina

4.2 Referring to the European Communities' account of the "factual and procedural history" of this dispute in paragraph 4.1, *supra* Argentina states that the European Communities endeavours to introduce the question of the DIEMs applied to footwear, which were revoked almost two years before, calling them "Article II GATT-illegal duties", indicating that they were "clearly breaching Argentina's bound rate of 35 per cent *ad valorem*...", and suggesting that in practice they constituted a safeguard measure.

4.3 In this connection, Argentina notes that discussion of the DIEMs that applied to footwear in the past and have now been revoked is not covered by the terms of reference of this Panel. These DIEMs cannot be the subject of review under the WTO's dispute settlement system because the measure is not in force and discussing it would not meet the objective of securing "a positive solution to a dispute" (Article 3.7 of the DSU).

4.4 Argentina asserts that the EC qualification of the DIEMs applied to footwear as "GATT-illegal duties" should clearly be rejected. The DIEMs in question have now been revoked and were not the subject of any recommendation by the DSB concerning their consistency or inconsistency with the rules of the WTO, the only body authorized to declare the illegality of a measure within the multilateral trading system.

4.5 Argentina asserts that in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, the United States requested the Panel to rule on the legality of the footwear DIEMs. The panel, however decided not to accede to the United States request, considering that:

"...in the absence of clear evidence to the contrary, we cannot assume that Argentina will withdraw the safeguard measure and reintroduce the specific duties measure in an attempt to evade Panel consideration of its measures. We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law. We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced.... Consequently, we will not review the WTO compatibility of the specific duties which used to be imposed on footwear and which have, since the establishment of this Panel, been revoked..."<sup>28</sup>

4.6 Argentina contends that the European Communities also tried to discuss the legality of the DIEMs within the dispute settlement system when it requested the establishment of a panel on *Argentina – Measures Affecting Imports of Textiles and Clothing*. The original document (WT/DS77/3) indicated that the European Communities requested the DSB to establish a panel to find that the imposition of DIEMs on

<sup>28</sup> Document WT/DS56/R, *supra*, footnote 25, paragraphs 6.14 and 6.15, page 86.

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footwear violated Article II.1(b) of GATT. As reflected in the Minutes of the DSB meeting on 25 September 1997<sup>29</sup>, however, Argentina rejected the inclusion of this measure in the Panel's terms of reference because the measure did not exist and consequently this was a moot point that could not be dealt with in the framework of the DSU. As a result, the European Communities withdrew its objection to the DIEMs on footwear and submitted a revised version of its request for the establishment of a panel.<sup>30</sup> At the same meeting, other Members of the DSB expressed their concern that the European Communities' request was equivalent to setting up a "preventive panel" by trying to include in the terms of reference any other measure that might be adopted in the future.

4.7 Therefore, Argentina does not consider that the DIEMs applied to footwear and now revoked should be discussed by this Panel, and requests the Panel not to take into account any of the claims made by the European Communities in this respect.

(c) Argument of the European Communities

4.8 The European Communities observes that Argentina began the implementation of a comprehensive liberalization programme by the beginning of this decade. It signed in 1991 the Treaty of Asuncion, with the aim of creating a customs union with Brazil, Paraguay and Uruguay. However, in 1993 Argentina decided to introduce restrictive trade measures to protect its industry from the liberalization measures: it introduced minimum specific duties for a number of products, including footwear, as well as textiles and apparel. The duties of the latter two, which are not within the terms of reference of the present case, have already been declared WTO-illegal by a previous Panel and the Appellate Body earlier this year.

4.9 The European Communities asserts that Argentina realized as early as 14 February 1997 that these minimum specific duties could not be in conformity with its international obligations under the WTO and decided to abolish them for footwear<sup>31</sup> and replace them with the present safeguard measure.

4.10 The European Communities clarifies that it is *not* asking the Panel to declare the former minimum specific duties on footwear - which have been abolished since February 1997 - WTO-illegal. The European Communities has no intention of opening up a debate on whether those duties for footwear violated Article II:1(b) GATT or not. These duties were revoked just before the panel in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* was established. Consequently, that panel, and no other panel afterwards, was in a position to review the WTO compatibility of the minimum specific duties for footwear, even though those duties were identical to those applied at that time by Argentina for textiles. This is expressly recognized in paragraph 6.15 of that panel report where it stated that, "when reviewing the import regime applied to textiles and apparel, [we may] refer to some examples of transactions involving footwear because *the type of duties* used at the time by Argentina for textiles, apparel and footwear *was the same*".

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<sup>29</sup> Document WT/DSB/M/37.

<sup>30</sup> Document WT/DS77/3/Rev.1/Corr.1.

<sup>31</sup> Resolution 225/97, see Exhibit EC-5.

2. *Resolution MEYOSP 512/98, Resolution MEYOSP 1506/98, and Resolution SICyM 837/98, and Panel Recommendations on "Hypothetical Future Measures"*

(a) Arguments of Argentina

(i) Resolution MEYOSP 512/98 and Resolution MEYOSP 1506/98

4.11 In connection with the European Communities' claims concerning Resolution MEYOSP 512/98 and 1506/98, Argentina maintains that these regulations are not covered by the terms of reference of this Panel (document WT/DS121/3). These terms of reference only cite and include the measures contained in Resolution MEYOSP 226/97 and Resolution MEYOSP 987/97. Resolutions 512/98 and 1506/98 are foreseen modifications to the measure adopted by Resolution MEYOSP 987/97. Argentina recalls the decision of the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, which states that: "its [Mexico's] panel request did not identify the final anti-dumping duty as the 'specific measure at issue', as is required by Article 6.2 of the DSU". Likewise, Argentina argues, in this case the European Communities failed to identify and could not identify Resolution 512/98 or 1506/98 as the "specific measures at issue".

4.12 Moreover, Argentina asserts, Resolution MEYOSP 512/98 is part of a context in which private individuals have brought legal proceedings contesting the safeguard before the Argentine courts. The existence of these legal proceedings was not notified to the WTO either, because they are not covered by the obligations under Article 12, although this did in fact modify the safeguard measure by limiting its scope through the granting of an exception for the largest importers. To recap, Resolution MEYOSP 512/98 was adopted in order to preserve a situation that was considered necessary in terms of imports at the time the measure was imposed so as to allow the industry to adjust and the liberalization calendar to be pursued in accordance with the original notification.

4.13 Argentina therefore requests the Panel not to make any ruling on Resolution 512/98, which was never the subject of any consultations between the European Communities and Argentina and is not included in the terms of reference which the DSB adopted for the Panel's proceedings, although the terms of reference were the subject of detailed discussions at two consecutive meetings of the DSB.

4.14 In the hypothetical case of the Panel rejecting the special preliminary ruling requested by Argentina, Argentina states that, in compliance with Article 9 of Resolution MEYOSP 987/97, Argentina duly notified to the WTO, and with a view to advancing the review, issued Resolution 512/98. The result of this review showed that the objective of limiting imports in order to "remedy the injury and facilitate adjustment" was not being achieved. Rather, according to the conclusions of the report prepared by the Secretary of Industry, Trade and Mining, the status of the safeguard measure, after 15 months in force, was unusual in that there had been an increase in footwear imports during that period as compared to the previous period. Imports increased rather than slowing down, maintaining their level or decreasing and enabling the measure to fulfil its objectives of remedying the injury and facilitating adjustment in the meaning of Article 5 of the AS. Thus, the adjustment plan presented by the domestic industry could neither be implemented, nor could it

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achieve its planned objectives. Consequently, Argentina states, it found itself in a situation that was not covered by the hypothesis set forth in Article 7.4 of the Agreement on Safeguards. That Article, which provides for reviews and progressive liberalization of the safeguard measure, presupposes that the measure in force is achieving its objective. In the case of Argentine footwear imports, the objective of the safeguard measure was *not* being achieved, and it was necessary to amend it in order to comply with the provisions of Article 5.1 of the Agreement. This led to the decision to adopt Resolution 1506/98, which currently regulates the safeguards situation, and does not come under the terms of reference contained in document WT/DS121/3.

4.15 In response to a Panel question regarding how Argentina reconciles its arguments that resolutions 512/98 and 1506/98 are based on and flow out of Article 9 of Resolution 987/97 on the one hand, and that these resolutions are outside the Panel's terms of reference because they are new measures, Argentina indicated that it does not refer to two new measures. Rather, these are foreseen modifications to the measure adopted by Resolution MeyOySP 987/97. These modifications do not, in Argentina's opinion, come within the terms of reference of the Panel, which cite only Resolution 987/97 (see para. 4.11, *supra*).

(ii) Panel Recommendations on "Hypothetical Future Measures"

4.16 Argentina notes that the European Communities requests the Panel "... to find all Argentine measures based on the safeguard investigation subject of this dispute to be contrary to Argentine WTO obligations".<sup>32</sup> Argentina further notes that the European Communities, states that "... *any change to the measure which Argentina may introduce* will only affect the violation of Article 5.1 (necessity of the measure and adequacy of the adjustment plan) and not the remaining violations"<sup>33</sup> and that "... the European Communities submits that Argentina's safeguard measures on imported footwear, *however they may be adapted or adjusted* in the meantime, should be removed".<sup>34</sup> Argentina considers that these claims are hypotheses regarding future measures that have no place in the WTO dispute settlement system.

4.17 Argentina argues, first, that the Panel's terms of reference set out in document WT/DS121/3 do not contain the words "all Argentine measures based on the safeguard investigation subject of this dispute". Second, as stated in the Appellate Body's Report on the case of *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*:

"... Article 6.2 of the DSU requires that *both* the 'measure at issue' and the 'legal basis for the complaint' (or the 'claims') be identified in a request for the establishment of a panel. As we understand the Panel, it would, in effect, suffice, under Article 6.2 of the DSU, for a panel request to identify only the 'legal basis for the complaint', without identifying the '*specific* meas-

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<sup>32</sup> *Supra*, para. 3.3.

<sup>33</sup> *Supra*, para. 3.2.

<sup>34</sup> *Ibid.*