Legal Opinion on the implications of the *US-Lamb*[1] case

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Executive Summary

The Productivity Commission has raised a question as to whether the Panel and Appellate Body decisions in *US – Lamb* provide any binding rulings as to the scope of the "domestic industry" that may be considered under the current inquiry. In particular, the key question is whether that jurisprudence prevents the Productivity Commission from holding that producers of live pigs and pig carcases can be considered as part of the relevant industry.

Nothing in the jurisprudence of that or any other WTO case leads to that result. The case was a challenge to a USITC decision imposing safeguards. The USITC only made a determination in relation to "like products". It did not address itself to the alternative criterion for inclusion of a producer within the relevant industry, namely, that pertaining to producers of "directly competitive" products. Comments by the Panel and the Appellate Body about the "like product" test have no relevance to a determination of the "directly competitive" standard.

That was made abundantly clear by the Panel in *US – Lamb* (paragraph 7.115) in a passage that received no critical comment from the Appellate Body:

> "We recall, and wish to emphasise, that our analysis of the industry definition adopted by the USITC, and of the methodology applied by the USITC in arriving at that definition, have to do only with that part of SG Article 4.1(c) that pertains to the 'like product' and the domestic industry producing it. That is, our analysis does not address the issue of 'directly competitive' products and the industry producing them. Because the USITC explicitly did not make any determination concerning 'directly competitive' products, this issue is not before us and we do not speculate as to whether live lambs conceivably could be considered 'directly competitive' with imported lamb meat."

The proper interpretation of the "directly competitive" standard should be that it constitutes a test of substitutability that is proximate rather than remote. Only a robust analysis of the true market situation in Australia can lead to a valid determination as to which products compete with, and are substitutable for, each other in this manner. To prevent such an analysis based on some misreading of WTO jurisprudence, would itself be a violation of the standards and would be a failure by the Productivity Commission to comply with its legislative mandate.

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[1] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R WT/DS178/AB/R 1, May 2001.

In addition, in the context of its "like product" analysis, the Panel in *US-Lamb* made very specific factual findings that lamb production in the United States was not highly vertically integrated at that time. The Panel's conclusions that identified violation of the "like products" standard by the USITC, based in part on such factual findings, cannot *a priori* have anything to say about a different industry in a different country at a different time. Consequently, the case should not even be seen as any kind of limiting authority as to a "like product" analysis, although comments as to likeness would be relevant if a safeguard action could not be separately mandated under the "directly competitive" standard. Because the latter standard must be broader, it should not be necessary to rely on a "like product" analysis.

Australia's legislative framework

The Productivity Commissions' mandate and governing legal regime is in part the Productivity Commission Act 1998 and a Gazetted administrative regime notified to the WTO on 2 July 1998 (G/SG/N/1/AUS/2) and 16 December 2005 (G/SG/N/1/AUS/Suppl.1).

Turning to the facts of this case and the question as to the ambit of the relevant "domestic industry", little guidance is provided in the domestic regime over and above language drawn from the WTO provisions. The general procedure for safeguard inquiries issued by the Australian Government defines "domestic industry" to mean "the producers as a whole of the like or directly competitive products operating in Australia, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products."

Where "like products" are concerned, the general procedure utilises a similar definition to the anti-dumping definition of "like product," but no definition of the key phrase "directly competitive." "Like product" is defined to mean "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

WTO provisions

Article XIX of GATT 1994 allows for emergency safeguard action in certain circumstances. The Uruguay Round of Multilateral Trade Negotiations also led to a new Agreement on Safeguards.

The Preamble to the 1994 Agreement on Safeguards indicates that it aims to interpret and elaborate upon Article XIX. While the Preamble suggests that it is not intended to alter Article XIX, there are in fact some differences in wording between the two sets of provisions. While not directly relevant to my brief, the most significant difference is that the Agreement on Safeguards does not repeat the requirement that the increase in imports be due to "unforeseen developments", although WTO jurisprudence has indicated that a measure must satisfy both Article XIX and the Agreement, hence the "unforeseen developments" standard must still be met.

The Agreement on Safeguards reiterates the key test of "domestic industry" as contained in Article XIX of GATT 1994. Article 4.1(c) of the Agreement on Safeguards states:

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

The domestic guidelines are thus completely consistent with this language.

The phrase "like or directly competitive products" also frames the injury analysis under Article 2.1. A safeguard measure can only be applied to a product if imports of such products, inter alia, "cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

The key question is therefore what products constitute "directly competitive products" to the imported products that are being considered in the Commission's enquiry. That is a matter of treaty interpretation.

Interpretation of the "directly competitive" standard

Article 3.2 of the Dispute Settlement Understanding refers to dispute settlement "in accordance with customary rules of interpretation of public international law." The Appellate Body has regularly noted that this requirement allows for resort to be made to the *Vienna Convention on the Law of Treaties* ((1959) 8 ILM 679 in force 27 January 1980). The two key provisions of that Convention are Articles 31 and 32. Article 31 indicates that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 32 allows for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous, or obscure or leads to a result which is manifestly absurd or unreasonable.

I will address each aspect in turn, although it is ultimately a question of considering all aspects together to finally determine the appropriate meaning.

Plain meaning

Dictionaries such as the Macquarie define "competitive" as meaning "of, relating to, involving, or decided by competition" and define "competition" as "the rivalry between two or more business enterprises to secure the patronage of prospective buyers." I note that the Productivity Commission, in its 1998 reference, found there to be such competition between live pig and pig carcass producers on the one hand and imports of pork products on the other. It would of course be a matter of current evidence whether that conclusion still pertains.

The requirement of a competitive relationship is qualified by the term "directly." The Macquarie dictionary defines that term as meaning "in a direct …way, or manner.." It would seem that in circumstances where purchasers would substitute one for the other for the same end-use, or demand price reductions of one where there are price reductions of the other, this meaning would be satisfied.

Conversely, an example of an indirect competitive relationship that would not satisfy this test would be between scanners and photocopy paper. As a scanner becomes cheaper and easier to use to store data, consumers may turn away from photocopying and hence lead to reduced sales of photocopy paper, but this would not be a direct form of competition. Furthermore, photocopy paper and photocopiers are not directly substitutable, although changes in demand for one will lead to changes in demand for the other.

Context

Context may also act as an aid to understanding the intended meaning of the phrase. That requires consideration of the phrase "directly competitive" and also its relation to the notion of "like products." Both phrases would then need to be examined in the places they appear in the WTO Agreements. For example, the term "like product" occurs in a number of other GATT Articles, including Articles I, IIII, VI, VIII and XVI.

As noted below, that term itself may have differing meanings depending on context and the purpose of the provision within which it is found. In some cases a particular and distinct meaning has been expressed in the language of agreements. For example, the WTO Agreement on Anti-Dumping and Countervailing Duties defines like product in Article 2.6 "to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.".

As noted above, Australia's safeguards regime has adopted this definition in the procedures. As an aside, even where the definition of "like product" is concerned, it is at least arguable that the adoption of such a narrow definition in the safeguards arena could itself be a violation of WTO obligations, given the Appellate Body's observations as noted below that this phrase may vary in meaning from Article to Article. In a practical sense where this reference is concerned, it does not matter if the Australian Government adopted an unduly narrow interpretation of "like product" if this is counterbalanced by an appropriately applied "directly competitive" test.

The important contextual enquiry is therefore that pertaining to the "directly competitive" standard. The Anti-Dumping Agreement limits investigation to domestic producers of the like products and does not encompass "directly competitive" products. Bronckers and McNelis suggest that "(t)he fact that the drafters have chosen not to include the 'directly competitive or substitutable' language in Article VI but prefer the 'like' language (and have defined that term as 'identical' or with 'closely resembling') is an indication that their intention was to very strictly limit the category of competitive products in the anti-dumping context." (Bronckers and McNelis, 2000:358) The converse contextual observation must follow equally, that is, the fact that the drafters *added* the phrase "directly competitive" to the Agreement on

Safeguards, shows a clear intent to broaden the ambit of producers that may seek temporary assistance to those seeking anti-dumping or countervailing relief.

Further contextual assistance can be gained from analysing other GATT provisions that refer to a "directly competitive" standard, although it is again important to remember the caution that context and purpose may lead to the phrase having differing shades of meaning in different provisions.

Article III:2 of GATT 1994 provides, inter alia, prohibitions on tax discrimination. The first sentence is limited to prohibitions on discrimination between imported products and "like domestic products." The second sentence broadens this and provides that "no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1." Paragraph 1 states that "contracting parties recognize that internal taxes" and other internal measures "should not be applied to imported or domestic products so as to afford protection to domestic production."

The notion of "domestic production" is by itself very broad but is limited by an ad Note. Ad Note to Article III:2 indicates that a measure that is not inconsistent with the first sentence of Article III:2, would only be considered inconsistent with the second sentence "in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed".

The second sentence of Article III:2 as elaborated upon by the ad Note shows clearly that "directly competitive products" include products that are not "like products".

While that much is clear, nevertheless, the ad Note phrase is problematic as a definitive guide to understanding the meaning of "directly competitive" in the Safeguards Agreement. Because the latter does not repeat the word "substitutable," it is not clear whether "directly competitive" has a different or more restricted meaning to that term, or whether it is synonymous with the notion of substitutability. The leading WTO scholar Robert Hudec took the latter view:

> "Notwithstanding the rule that every word of a treaty must have a meaning and purpose, the author views the two terms as essentially synonymous …" (Hudec 2000:122 footnote 5)

I agree with that view, in part because of the purpose behind the relevant provisions as discussed in the next section and because of the relationship between the concept of competition and notion of substitutability as a measure of competition.

At the very least, what is clear from a contextual analysis of the drafting is that there are two distinct types of producers being considered, namely, producers of "like products" and producers of "directly competitive products". The latter category is, of necessity, broader than the concept of like product, otherwise it would be otiose. Whether it should be seen as synonymous with "substitutability" is open to debate but as indicated above, that is the preferred view on plain meaning and context does not negate that position.

Purposive interpretation

In its 1998 inquiry, the Productivity Commission rightly noted the "explicitly broader phrase – like or directly competitive" citing the leading WTO scholar Professor John Jackson. (Jackson (1969: 261) The Commission cited approvingly from Jackson (1997) where the author noted that "this inclusion is clearly appropriate, because the objective in the escape clause is to ascertain when the imports are harming domestic industry, and obviously competitive products can so harm." (p 189)

This is consistent with the view adopted by the Productivity Commission in its 1998 report:

> "In the context of safeguard action … the objective is to permit action against imports which cause serious injury to a domestic industry. In this context, a narrow interpretation of the term *directly competitive,* which resulted in a large group of producers who were experiencing injury as the result of imports, being excluded from the safeguard action, would appear to run counter to the objectives of the article." (Productivity Commission 1998:21-2)

Robert Hudec agreed with the market orientation in WTO jurisprudence, when talking about Article III:

> "Since GATT is a commercial agreement, it seems reasonable to start with the assumption that 'likeness' is (or should be) a commercial concept meant to describe one or more market phenomena. The central commercial concept that comes to mind is competitiveness." (Hudec 2000:104)

In discussing whether it would make more sense to speak of *competitive* products rather than *like* products, Hudec observed:

> "… one would realise that the word 'competitive' would probably need to be narrowed a bit, for political rather than economic reasons. The range of foreign products that would feel at least some negative competitive impact from being taxed or regulated more heavily than a particular domestic product could be fairly wide. To avoid undue interference with the tax and regulatory policy of the importing country, one would probably want to draw a line that separates those foreign products that suffer a major competitive disadvantage from those upon whom the negative effect will be milder.
>
> Looking for a way to narrow the concept of 'competitive,' we would see that GATT itself usually frequently uses the term 'directly competitive' when it wishes to narrow the scope of the word 'competitive' to some extent."

Drafting history

There is nothing in the drafting history that suggests that "directly competitive" should be given anything other than its plain meaning.

The negotiating history behind the Safeguards Agreement was alluded to by the Panel in *US – Lamb* paras 7.110-114, but not in the context of interpreting this phrase. The Panel's observations need to be seen in the context of it being a case limited to a

consideration of the "like product" test. As the Panel noted in paragraph 7.113, the negotiating proposals were in large part aimed at responses to the findings of earlier GATT Panels on *Canada – Beef* and *US – Wine and Grapes* which dealt with anti-dumping and subsidy issues. The Panel noted that the issue was briefly considered in the negotiations on safeguards as well. The Panel's conclusion in relation to negotiating history was simply that in the Uruguay Round, the negotiating groups did not agree to any broadening of the industry definitions in the text of the Anti-Dumping, SCM and Safeguards Agreements. (Panel Report para 7.114) It is just as relevant to observe that the Members did not seek to *restrict* the meaning of "directly competitive" as long found within the GATT Agreement Article XIX and which has been interpreted to allow upstream producers to be considered in a number of domestic jurisdictions such as the US and Canada.

Thus, just as the Panel's own report did not in any way address the meaning of "directly competitive", nothing in the negotiating history addressing concerns with malleable concepts of like product in anti-dumping and countervailing cases has anything to say about the proper interpretation of the phrase "directly competitive", which must to some degree go beyond the concept of like product.

Is there an obligation to adopt a restrictive interpretation of Article XIX and entitlements under the Agreement on Safeguards?

I have already cited with approval certain purposive observations that suggest that a restrictive approach to interpretation of those producers potentially supportable under adjustment regimes would not be appropriate. Nothing in the jurisprudence supports such an approach, although certain comments might be casuistically misused in that way. For example, in *Argentina – Footwear*, the Appellate Body stated:

> "The text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and its context, demonstrates that safeguards 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' … The remedy that Article XIX:1(a) allows in this situation is temporary to 'suspend the obligation in whole or in part or to withdraw or modify the concession.' Thus Article XIX is clearly, and in every way, an extraordinary remedy. …
>
> … And when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account." (AB Report paras 93 and 94)

The Appellate Body should be simply taken to mean that the purpose of allowing adjustment assistance in the face of fair foreign competition should be noted as part of the purposive and contextual analysis mandated under customary rules of interpretation. The extraordinary nature of the provisions explains the many unique hurdles that are expressly included. There need to be unforeseen circumstances, adequate evidence of the seriousness of the injury as opposed to merely material injury as required under anti-dumping and countervailing duty assessments and a demonstrated causal link. In addition, measures must be temporary, non-discriminatory and must allow for compensation or retaliation in lieu of compensation.

The Appellate Body comments should not mean that an unduly restrictive interpretation of "like product" or "directly competitive" is additionally mandated. That would only be valid if such an approach could be determined under Vienna Convention principles of interpretation. Where the "domestic industry" standard under the safeguards regime is concerned, such a restrictive approach would make no sense given that the drafters of Article XIX and the Safeguards Agreement added the concept of "directly competitive" to the concept of "like product," thus allowing for a broader category of protected producers against presumptively *fair* foreign trade, than applies against supposedly *unfair* foreign trade in the fields of anti-dumping and subsidies.

Conclusions as to interpretation under the Vienna Convention

For the foregoing reasons, the phrase "directly competitive" is synonymous with a test of substitutability under plain meaning, context and purpose and is not affected by anything within the drafting history, given that the phrase was not amended in the Uruguay Round.

WTO and GATT jurisprudence

The Productivity Commission has raised the question as to whether the Panel and Appellate Body decisions in *US – Lamb* provide any binding rulings as to the scope of the domestic industry for the current inquiry. While there is no doctrine of precedent applicable in the WTO, past cases can nevertheless be considered as aids to interpretation.

As the Appellate Body has noted, Article 59 of the Statute of the International Court of Justice has an explicit provision denying any doctrine of precedent. (AB Report *Japan – Alcoholic Beverages* p 15 footnote 30) Article 38 of the Statute indicates that judicial decisions may nevertheless be a source of law. Article 3.2 of the DSU indicates that recommendations and rulings of the DSB "cannot add to or diminish the rights and obligations provided in the covered agreements." On the other hand, adopted reports should always be taken into account where they are relevant to any dispute. (Appellate Body Report *Japan – Taxes on Alcoholic Beverages* p 15)

With these cautions in mind, I turn to the relevant jurisprudence. The most appropriate observation is that the *Lamb* case simply did not address the question of what constitutes "directly competitive products" in the context of safeguards provisions. This alone should be the end of the matter, but for completeness, I will address the case in some detail, if for no other reason than to pre-empt the assertion that it somehow mandates a particular approach by the Commission, a proposition alluded to in the submission of Minter Ellison Lawyers, of 9 November 2007.

The *Lamb* cases were a challenge to a USITC decision imposing safeguards. The USITC only made a determination in relation to "like products". It did not address itself to the alternative criterion for inclusion, namely that pertaining to producers of "directly competitive" products. Comments by the Panel and the Appellate Body about the "like product" test have no relevance to a determination of the "directly competitive" standard.

The crucial observation of the Panel in *US – Lamb* is contained in paragraph 7.115:

> "We recall, and wish to emphasise, that our analysis of the industry definition adopted by the USITC, and of the methodology applied by the USITC in arriving at that definition, have to do only with that part of SG Article 4.1(c) that pertains to the 'like product' and the domestic industry producing it. That is, our analysis does not address the issue of 'directly competitive' products and the industry producing them. Because the USITC explicitly did not make any determination concerning 'directly competitive' products, this issue is not before us and we do not speculate as to whether live lambs conceivably could be considered 'directly competitive' with imported lamb meat."

Most crucially, the Appellate Body decision also does not address the key question of the interpretation of "directly competitive products". It simply could not do so as it also noted that the USITC did not find that there were any such products. It expressly stated that '(t)he term "directly competitive products" is not, however, at issue in this dispute as the USITC did not find that there were any such products in this case." (Appellate Body Report para 88) No doubt the USITC may have made such a finding if necessary, as it took a broad interpretation of "like product" to include growers and feeders of live lambs as producers of a like product being lamb meat.

The comment in paragraph 88 must colour the rest of the Appellate Body's observations. For example in paragraph 95 of the Appellate Body's report, it notes the USITC's determination of what the like product was, notes that the USITC did not make a finding that live lambs or any other products were directly competitive with lamb meat and went on to say that "(o)n the basis of this finding of the USITC, we consider that the 'domestic industry' could *only* include the 'producers' of lamb *meat*." The next sentence, which states that "(b)y expanding the "domestic industry" to include producers of other products, namely, *live lambs*, the USITC defined the "domestic industry" inconsistently with Article 4.1(c) of the *Agreement on Safeguard,"* must be read in the context of this earlier comment, namely that the Appellate Body noted that the USITC was simply not addressing the alternative "directly competitive" element of the definition. Paragraph 88 also provides the context for the Appellate Body's finding and conclusions in paragraph 197(b) in upholding the Panel's finding that the US acted inconsistently because the USITC defined the relevant domestic industry to include growers and feeders of live lambs.

Consequently, all that can be concluded from the Appellate Body report is that it agreed with the Panel that live lambs and lamb meat were not like products on the facts as found by the Panel.

Even that finding might be wholly or partially dependent on the facts as found. The Panel made very specific factual findings that lamb production in the United States was not highly vertically integrated. In its submissions to the Appellate Body, Australia's alternative argument was that even if factors such as vertical integration, continuous lines of production, economic interdependence or substantial coincidence of economic interests were relevant, the Panel had already made findings of fact that these criteria were not present in the US lamb meat industry. (Appellate Body Report para 25)

Conclusions as to violation of the "like products" standard by the USITC based on the factual findings of the Panel as to a lack of integration, cannot *a priori* have anything to say about a *different* industry in a *different* country at a *different* time, even under

the “like products” standard. Only a robust analysis of the true market situation in Australia can lead to a valid determination as to which products are “like” and which directly compete with each other. To seek to prevent such an analysis based on some misreading of WTO jurisprudence would itself be a violation of the standards and would, if accepted, be a failure by the Productivity Commission to comply with its legislative mandate.

Again that should be the end of the matter but I will address two other observations form the cases. The Panel rejected the US argument that the phrase “producers as a whole” supports a broader approach as adopted by the USITC. The Appellate Body agreed. I agree that this phrase does not fundamentally change the meaning of “like product” or “directly competitive,” as it is simply part of a provision that indicates what amount of support is required from different producers to constitute a domestic *industry*, as opposed to an individual complainant.

The second observation relates to the fact that in its appeal, the US sought to argue generally that the test of which producers make up the domestic industry under the “like product” standard, should look at criteria of a “continuous line of production” and a “coincidence of economic interest”. (Appellate Body Report para 81) While such factors may well be determinative in many or most cases, I can understand why the Appellate Body would have rejected such a uniform gloss on the plain meaning of the treaty provisions. An interpretation that seeks to uniformly broaden the category absent careful consideration of the facts in any individual case, is as dangerous as one that seeks to narrow it.

One could debate whether the Panel and Appellate Body were right to reject this broad interpretation of a “like product”on the facts as found, and debate as to which comments they made which would be relevant to other “like product” scenarios. For example, at one extreme, a product such as iron ore might be said to be too distinct from a finished product such as steel to be seen as a “like product.” At the other extreme, one might have a different predisposition in comparing raw and refined sugar or raw and refined flour. Perhaps live lambs and lamb meat fell somewhere in between, given the Panel’s factual findings.

Whatever one’s view on the facts in a case looking to interpret the phrase “like product”, no jurisprudence on that question should have any relevance for the distinct interpretation of the phrase “directly competitive products”. While my observations suggest that it should also be open to consider the “like product” test in this enquiry, because the “directly competitive” test is broader, that should not be necessary.

In view of the foregoing, the proper approach is simply to allow for evidence on a case by case basis as to what is directly competitive. The only important question of interpretation is first what is meant by “competitive” and secondly what limitations on that concept are sought to be imposed by the qualifier “directly”. A test of substitutability as argued for above is supported by plain meaning, context and purpose. It would require careful consideration of all aspects of the market and industry before drawing conclusions as to which producers meet the language of the Agreement. In my view, the only way to conduct this first step is to look at the evidence of what may or may not be directly competitive, and not foreclose the analysis by some supposed interpretation that upstream producers can never be taken to produce directly competitive products.

The fact that the Appellate Body was not seeking to make a definitive legal ruling that would always preclude input products is shown in paragraph 90 of its report.

> "In our view, under Article 4.1(c) input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products."

This is also supported by comments at paragraph 94 that the focus must "be on the identification of the *products*, and their 'like or directly competitive' relationship …" On a case by case basis, the facts will either show that there is such a like or directly competitive relationship or there is not. An analysis of the facts should not be barred by any reading of the Appellate Body's conclusion as somehow adding statutory language that an input producer could never satisfy this factual relationship test.

A relevant case is *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (WT/DS207/R). While a Panel found a violation by Chile in failing to properly identify the products that were like or directly competitive, it crucially only did so based on a lack of reasoned conclusions by Chile at the time of the safeguards investigation. The Panel noted, inter alia, that Chile had included rape-seed producers in its definition of the domestic industry, without indicating how they might be regarded as like or directly competitive with imported vegetable oils. If rape-seed could never be directly competitive with a vegetable oil, then the Panel should simply have concluded accordingly and not restricted its conclusions to the lack of reasoning provided by Chile. Forcing Chile to go back and have a better reasoned articulation which could never ultimately be satisfied under a restrictive test, would have been a complete waste of everybody's time and money. The better implication from the Panel report is that it would be an open question on a case by case basis whether rape-seed and vegetable oils could truly be directly competitive.

Article III and other jurisprudence

As noted above, an ad Note to Article III:2 limits the second sentence of that Article to "directly competitive or substitutable" products. Thus jurisprudence on this phrase might be an aid to interpretation of the similar phrase in the safeguards provisions. Comments about "like product" in that Article might also be illuminating. Before dealing with various cases, the Appellate Body observation should be noted to the effect that the concept of "like product" may vary from article to article depending on the policy behind it. The same could thus be said about the "directly competitive" concept. In *Japan – Alcohol*, the Appellate Body made the observation that:

> "The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and circumstances that prevail in any given case to which the provisions may apply." (At 21)

With that caution in mind, there seems nothing in the Article III:2 jurisprudence that would alter the interpretative conclusions under the Vienna Convention as outlined

above. In the Panel report on *Japan – Taxes on Alcoholic Beverages* paragraph 6.22, the Panel stated that:

> "Normally, the term 'directly competitive' invites, in the first instance, a comparison of the commercial uses of the products and not their characteristics …"

In that context, in construing Article III:2 of GATT 1994, the Panel looked to common end uses to find whether products were directly competitive. That should support the Commissions approach in the 1998 enquiry.

The Appellate Body in *Korea-Alcoholic Beverages* (para116) considered that the word "directly" suggests a degree of proximity in the competitive relationship between the domestic and imported product. The Panel had also considered that the term meant a competitive relationship that was other than remote. (para 7.50) This would be satisfied when the two products provided alternative ways of satisfying a particular need. (para 7.52).

In *US-Cotton,* the Appellate Body considered that to be "directly" competitive, there needed to be more than "a remote or tenuous competitive relationship." (para 98)

A market based approach to the "like product" standard should further support a market based approach to the "directly competitive" standard.

As Hudec has observed, one cannot understand the meaning of likeness without identifying the criteria by which likeness is to be measured. (Hudec 2000:103) Thus some interpretation is necessary. The Appellate Body has promoted a more market orientation in Article III jurisprudence, even when dealing with the "like product" standard. In *Japanese Liquor Taxes II* the Appellate Body report reviewed the Panel's observation that "the wording makes it clear that the appropriate test to define whether two products are 'like' or 'directly competitive or substitutable products' is the market place. The Panel recalled in this respect the words used in the Interpretative Note ad Article III paragraph 2, namely 'where competition exists': competition exists by definition in markets." (*Japanese Liquor Taxes II* Panel Report para 6.22)

The Appellate Body (at 25) stated:

> "The Panel emphasised the need to look not only at such matters as physical characteristics, common end uses and tariff classifications, but also at the 'market place'. This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets."

The Appellate Body in *Japan-Alcoholic Beverages* (p25) has accepted that cross-price elasticity is one means of examining a market.

In the *Korean Liquor Taxes* case, the Appellate Body went further saying "(t)he context of the competitive relationship is necessarily the market place since this is the forum where consumers choose between different products." (AB Report para 114)

In commenting on the market oriented interpretation, Bronckers and McNelis (2000) stated that "we consider that a market-place based analysis of the competitive relationships between products should be a central feature of any inquiry into GATT provisions that use the 'like product' language, where it can be said that the purpose is to protect or improve competitive conditions." (345-6)

If the proper approach in each case is to look at the market place to determine the presence and ambit of competition, there seems no reason in legal interpretation or economic logic to deny access to some market information simply based on presumptions that upstream producers cannot satisfy such requirements.

Would a market based analysis lead to uncertainty?

When responding to the US defence of the the USITC interpretation of "like product" in the *Lamb* case, Australia argued, inter alia, that a broader standard would simply leave it to the discretion of importing members how far upstream or downstream to go to define domestic industries. That is not a tenable argument. In all cases there needs to be some analysis of just what constitutes a like product or a domestic industry. A standard that in some circumstances allows for upstream or downstream inclusion, does not make it any more arbitrary as to how questions of serious injury and causation are to be determined.

Simply permitting parties on a case by case basis to argue as to which elements of which industries constitute producers of directly competitive products, does not lead to open-ended and unchallengeable behaviour by safeguards authorities. It is important to consider the structure of the standard of review by both the Panel and the Appellate Body. As was reiterated by the Panel in the *Lamb* case, the Appellate Body's comments in its report on *Argentina – Footwear* safeguards identify the key standard for a Panel:

> "… The standard of review that applies in safeguard disputes, as set out above, requires us to refrain from a *de novo* review of the evidence reflected in the report published by the competent national authority. Our task is limited to a review of the determination made by the USITC and to examine whether the published report provides an adequate explanation of how the facts as a whole support the US ITC's threat determination." (*US – Lamb* Panel Report para 7.3)

The Appellate Body in *Argentina – Footwear* safeguards had noted that the Safeguard Agreement is silent as to standard of review. It referred to Article 11 of the DSU, in particular its requirements that "… a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements …" The Appellate Body saw this as setting forth the appropriate standard of review under the Agreement on Safeguards. (AB Report para 120) The Appellate Body went on to say that in applying this standard of review, the Panel is obliged "to assess whether the … authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination …" (AB Report para 121)

Allowing for consideration of upstream producers would not give rise to an unchallengeable and unworkable discretion. It would be a question of fact and

economic evidence on a case by case basis. At the domestic analysis stage, the question would be whether there is a sufficient correlation or not. At the review stage the question would be whether the domestic adjudicator made a comprehensive and informed determination. If a safeguards investigation found salient factors showing direct competition between products that are not alike, if the facts were adequately analysed and tested and contrary facts appropriately addressed, then under this standard of review, no challenge should be maintainable.

It would also not *a priori* lead to significantly more safeguard actions. The more upstream producers might be included, the harder it might be to show overall serious injury and causation, although that would depend on the facts of each case.

Conclusion

In the 1998 Productivity Commission Safeguard Action Report on Pig and Pig Meat Industries the Commission formed the view that "imports of boneless pork can be expected to affect the demand for (and prices of) carcasses supplied by pig growers to local processors in much the same way as would imports of live swine or carcasses. The Commission therefore has concluded that pig producers, as well as primary processors of pig meat (that is, pig abattoirs, boning and primary cutting operations) constitute the domestic industry producing like or directly competitive products for the purposes of the inquiry." (p xxi) The Commission also found that "carcases sold by pig farmers are directly competitive with imported cuts." While that factual conclusion in 1998 does not bind the current inquiry, Appellate Body comments on the phrase "like product" and not related to the "directly competitive" concept should not be seen as precluding the Commission from undertaking a similar inquiry about the current nature of the market to determine once again whether carcasses are "directly competitive" with imported cuts.

The Commission also considered direct substitutability as the test in its 1998 enquiry. This approach is sensible from the perspective of plain meaning, from the perspective of economically robust policy and from the perspective of the likely purpose of the safeguards provisions. The *Lamb* case does not preclude a similar approach and finding as it was limited to the question of "like products" in the context of particular facts and did not address the "directly competitive" standard.

Another important distinction between the *Lamb* case and the present case is based on factual findings. The Panel in *US – Lamb* found that there was little vertical integration of growing and feeding operations with packing and breaking operations. That is contrary to the conclusion of the Productivity Commission in its 1998 Pork Safeguards Inquiry. Whatever the reality of the current situation in the Australian pork industry, negative factual conclusions about a different product in a different country at a different time cannot possibly preclude the question at least being asked by the Commission in its current inquiry.

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