KOREA - DEFINITIVE SAFEGUARD MEASURE ON IMPORTS OF CERTAIN DAIRY PRODUCTS

Report of the Appellate Body
WT/DS98/AB/R

Adopted by the Dispute Settlement Body
on 12 January 2000

Korea, *Appellant/Appellee*
European Communities, *Appellant/Appellee*
United States, *Third Participant*

Present:
El-Naggar, Presiding Member
Ehlermann, Member
Feliciano, Member

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I. INTRODUCTION

1. Korea and the European Communities appeal from certain issues of law and legal interpretations developed in the Panel Report, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* ("the Panel Report").[1] The Panel was established to consider a complaint by the European Communities relating to a definitive safeguard measure imposed by Korea on imports of certain dairy products.

2. On 17 May 1996, the Korean Trade Commission initiated an investigation of injury to the domestic industry by imports of skimmed milk powder preparations. The results of this investigation were published by the Korean Trade Commission in the *Investigation Report on Industrial Injury by the Office of Administration and Investigation* (the "OAI Report"). On 7 March 1997, Korea published in its Government Gazette its decision to apply a definitive safeguard measure in the form of a quantitative restriction on imports of the dairy products at issue. Korea notified the initiation and results of its investigation, as well as its decision to apply a safeguard measure, to the Committee on Safeguards. On 12 August 1997, following consultations in the Committee on Safeguards, the European Communities requested consultations with Korea under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") regarding the consistency of Korea's safeguard measure with its WTO obligations. The European Communities subsequently requested the establishment of a panel to examine the consistency of Korea's safeguard measure with its obligations under Articles 2, 4, 5 and 12 of the *Agreement on Safeguards* and Article XIX of the GATT 1994. The United States participated as a third party in the proceedings before the Panel. The factual aspects of this dispute are set out in greater detail in the Panel Report.[2]

3. In its Report circulated to Members of the World Trade Organization ("the WTO") on 21 June 1999, the Panel concluded that Korea's definitive safeguard measure was imposed inconsistently with its WTO obligations in that:

[1] WT/DS98/R, 21 June 1999.
[2] Panel Report, paras. 1.1-2.8.

(a) Korea's serious injury determination is not consistent with the provisions of Article 4.2(a) of the Agreement on Safeguards;

(b) Korea's determination of the appropriate safeguard measure is not consistent with the provisions of Article 5 of the Agreement on Safeguards; and

(c) Korea's notifications to the Committee on Safeguards (G/SG/N/6/KOR/2, G/SG/N/8/KOR/1, G/SG/N/10/KOR/1, G/SG/N/10/KOR/1. Suppl) were not timely and therefore are not consistent with the provisions of Article 12.1 of the Agreement on Safeguards.[3]

The Panel rejected:

(a) the European Communities' claim that Korea violated the provisions of Article XIX:1 of GATT by failing to examine the "unforeseen developments";

(b) the European Communities' claim that Korea violated the provisions of Article 2.1 of the Agreement on Safeguards by failing to examine, as a separate and additional requirement, the "conditions" under which increased imports caused serious injury to the relevant domestic industry; and

(c) the European Communities' claims that the content of Korea's notifications to the Committee on Safeguards (G/SG/N/6/KOR/2, G/SG/N/8/KOR/1, G/SG/N/10/KOR/1, G/SG/N/10/KOR/1. Suppl) did not meet the requirements of Article 12.1, 12.2 and 12.3 of the *Agreement on Safeguards*.[4]

The Panel recommended that the Dispute Settlement Body (the "DSB") request Korea to bring the measures at issue into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* ("the *WTO Agreement*").[5]

4. On 15 September 1999, Korea notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[6] On 27 September 1999, Korea filed an appellant's submission.[7] The European Communities filed its own appellant's

[3] Panel Report, para. 8.1.
[4] *Ibid*., para. 8.2.
[5] *Ibid*., para. 8.4.
[6] WT/DS98/7, 16 September 1999.
[7] Pursuant to Rule 21 (1) of the *Working Procedures*.

submission on 30 September 1999.[8] Both Korea and the European Communities filed appellee's submissions on 11 October 1999.[9] On the same day, the United States filed a third participant's submission.[10]

5. The oral hearing in the appeal was held on 3 November 1999.[11] The participants and the third participant presented oral arguments and responded to questions put to them by Members of the Appellate Body Division hearing the appeal.

II. ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANT

A. Claims of Error by Korea - Appellant

1. Article 6.2 of the DSU

6. Korea requests that the Appellate Body find that the Panel erred in its interpretation of Article 6.2 of the DSU and erred in finding that the European Communities' request for establishment of a panel satisfied the requirements of Article 6.2 of the DSU. According to Korea, the Panel erred as a matter of law in finding that, by merely listing four articles of the *Agreement on Safeguards* and Article XIX of the GATT 1994, the European Communities' request for establishment of a panel satisfied its obligations under Article 6.2 of the DSU. The mere listing of articles allegedly breached does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. By limiting the requirement under Article 6.2 of the DSU to a mere description of the claims, the Panel reduces the clause "sufficient to present the problem clearly" to inutility, contrary to the injunction given by the Appellate Body.[12]

7. In Korea's view, the failure of the European Communities to comply with its obligations under Article 6.2 of the DSU led to the adoption of imprecise terms of reference and failed to provide notice to Korea. This is contrary to the universally accepted principle in civil litigation, also applicable to the DSU, that the defendant must be able to understand, and be in a position to respond to, the claims brought by the applicant. The inadequacy of the request for the establishment of a panel also meant that third parties were prejudiced because they could not exercise fully their rights under the DSU.

8. Korea considers that it is self-evident that if the standard of "sufficient precision" can be satisfied in every case by the mere listing of the articles of the relevant agreements, a panel would never be required, as directed by the Appellate Body, to examine the request for the establishment of the panel "very carefully to

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8 Pursuant to Rule 23 (1) of the *Working Procedures*.
9 Pursuant to Rule 22 (1) and Rule 23(3) of the *Working Procedures*.
10 Pursuant to Rule 24 of the *Working Procedures*.
11 Pursuant to Rule 27 of the *Working Procedures*.
12 Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* ("*United States - Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, p. 23.

ensure its compliance with the letter and the spirit of Article 6.2 of the DSU".[13] The Panel made its finding in only two sentences, which cannot be considered a "very careful" examination of the European Communities' request. Further, the Panel Report lacks any discussion of the rationale for these findings, contrary to the requirements of Article 12.7 of the DSU.

9. Korea notes that the European Communities took a different approach in requesting the establishment of a panel challenging safeguard measures imposed by Argentina. On 10 June 1998, the European Communities submitted a request for establishment of a panel in the Argentina case, which included a more detailed description of the claims at issue.[14] Korea views this difference as evidence that the European Communities was fully aware of its obligations under Article 6.2 of the DSU, but, for its own reasons, failed to meet those obligations in the present case.

2. The OAI Report

10. Korea argues that the Panel erred in its characterization of the submission of the OAI Report. Korea submitted the OAI Report at the request of the Panel as background information, and did not rely on this Report in its defence. The submission of the OAI Report to the Panel should not have been viewed as a desire to place that report before the Panel either as the subject of dispute between the parties, or as evidence of Korea's compliance or noncompliance with the *Agreement on Safeguards*.

11. Korea notes that the Appellate Body has found that Members are under a duty and an obligation to respond promptly and fully to requests made by panels for information under Article 13.1 of the DSU, and that this duty is a specific manifestation of Members' engagement in dispute settlement proceedings in good faith as required by Article 3.10 of the DSU.[15] The Panel's reliance on the OAI Report can only discourage parties to future disputes from providing information to panels that might be useful in explaining the context of and background to disputes, and can only encourage parties to refuse to cooperate in the fact-finding process of panels.

12. Korea argues that the Panel erred in assessing Korea's actions solely on the basis of the OAI Report. Each of the claims of the European Communities was based on Korea's notifications to the Committee on Safeguards, and the Panel confirmed that the European Communities "initially relied on the notifications to the Committee on Safeguards to establish its claims".[16] The European Communities raised the issue of the OAI Report only in its rebuttal submissions. Following questioning from the Panel as to the precise nature of the European Communities' case, the European

[13] Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities - Bananas*"), WT/DS27/AB/R, adopted 25 September 1997, para. 142.
[14] Request for the establishment of a panel by the European Communities, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/3, 11 June 1998.
[15] Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft* ("*Canada -Aircraft*"), WT/DS70/AB/R, adopted 20 August 1999.
[16] Panel Report, para. 7.30.

Communities made claims alleging violations of Article 4 based on the OAI Report in its Rebuttal Submission and at the Second Meeting with the Panel. Since it had obtained an English translation of the OAI Report 17 months prior to the establishment of the Panel, the European Communities could have raised claims with respect to the OAI Report in its First Submission.

13. The Panel also erred by failing to consider Korea's argument that parties to a dispute settlement procedure cannot introduce new claims at, or subsequent to, the rebuttal stage. While arguments can be made at any stage of the proceedings, the fundamental claims of the complainant must be raised in the request for establishment of a panel or, at the latest, in the complaining Member's First Submission. To permit claims to be raised after that point denies both the respondent and third parties any effective right to address or rebut those claims. As the OAI Report was never raised by the European Communities until the rebuttal stage, any claim by the European Communities based on that Report was raised too late in the proceedings to allow Korea to fully defend itself, or to allow the United States as a third party to present any response to such claims.

14. In the view of Korea, the Panel also erred in establishing the claims, arguments and evidence that the European Communities itself should have established. The Panel's "inquisitorial" approach denied Korea and the United States their rights under the DSU, and established an inappropriate precedent on how complaining Members can manipulate panel proceedings to avoid full evaluation and response to their claims.

3. Burden of Proof

15. Korea submits that as a threshold matter, a panel must make a finding regarding whether the Member with the burden of proof has established a *prima facie* case of violation. As the Panel admitted, the requirement that the panel first make this threshold determination is supported by past Appellate Body practice.[17] The Panel, however, ignored this step and stated only that it would simply weigh the evidence at the end of the proceedings.

16. Korea argues that as a matter of law, the Panel erred in presuming that the European Communities satisfied its burden of proof, and in proceeding to find that Korea violated Article 4 of the *Agreement on Safeguards* based solely on the OAI Report. Had the Panel properly applied the requisite burden of proof, it could not, as a matter of law, have found that the European Communities made a *prima facie* case. The Panel based all of its findings regarding Article 4 of the *Agreement on Safeguards* exclusively on the OAI Report. However, as noted earlier, the European Communities conceded that this Report was not at issue between the parties. Therefore, the European Communities did not properly establish claims of violation

[17] Appellate Body Report, *Japan - Measures Affecting Agricultural Products* ("*Japan - Agricultural Products*"), WT/DS76/AB/R, adopted 19 March 1999, paras. 136-138; Appellate Body Report, *Korea - Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, paras. 155-157.

of Article 4 of the *Agreement on Safeguards* based on the OAI Report, and, as a result, failed to establish a *prima facie* case.

17. The interpretation that the Panel cannot make claims for the parties finds support in the conclusions of the Appellate Body.[18] The Appellate Body has reaffirmed its view that a panel does not have the authority to take over the complainant's role in presenting its case.[19] The present case presents an even more compelling example of a panel improperly relieving a complaining Member of the task of presenting its case.

4. Article 5.1 of the Agreement on Safeguards

18. Korea argues that the Panel erred in interpreting Article 5.1 of the *Agreement on Safeguards* as imposing an obligation to apply a measure which in its totality is no more restrictive than is necessary to prevent or remedy serious injury and facilitate adjustment. Article 5.1 does not impose a clearly defined obligation on an importing Member applying a safeguard measure. The first sentence simply articulates a principle or objective, and imposes no binding obligation. If preventing or remedying serious injury and facilitating adjustment are merely goals or objectives, as the Panel concedes, then they are not requirements to be met by a Member applying a particular safeguard measure. A reasonable interpretation of the second sentence of Article 5.1 is that an importing Member may apply a safeguard measure consisting of a quantitative restriction at the level specified in that provision and need only provide clear justification if it deviates from such level. As to the third sentence of Article 5.1, the term "should" in that sentence is an exhortation to Members to meet the objectives in the first sentence.

19. Korea argues that the object and purpose of Article 5.1 of the *Agreement on Safeguards* similarly support Korea's interpretation that the first sentence of Article 5.1 simply articulates an objective. Article 5 is triggered after an importing Member has found that increased imports are causing serious injury or threat thereof to its domestic industry. If the requisite findings are properly made under Article 4 of the *Agreement of Safeguards*, Article 5 is not intended to unduly restrict the right of a Member to redress the emergency situation.

20. Korea submits that the Panel also erred in imposing on Korea an additional obligation to provide a detailed explanation of its decision relating to the application of a particular safeguard measure. There is no reference in Article 5 of the *Agreement on Safeguards* to any requirement for a detailed discussion of the decision to apply a safeguard measure, and no requirement to set forth analysis and reasoning regarding the factors considered. Article 4.2(c) states that the competent authority must publish, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examined. Article 5, however, contains no similar provision. The drafters must have intended to exclude the requirement to give a reasoned explanation, and such intention must be given effect.

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[18] Appellate Body Report, *Japan - Agricultural Products*, *supra*, footnote 17.
[19] Appellate Body Report, *Canada - Aircraft*, *supra*, footnote 15.

B. Arguments of the European Communities - Appellee

1. Article 6.2 of the DSU

21. The European Communities argues that the Appellate Body in *European Communities - Bananas* illustrated what can be sufficient to satisfy the requirements of Article 6.2 of the DSU.[20] The request for establishment of the Panel in the present dispute does not differ from that in *European Communities - Bananas* and should, *a fortiori*, meet the "sufficiency" standard.

22. Korea's contention that if the "sufficient precision" standard in Article 6.2 of the DSU can be satisfied in every case by listing the provisions relied upon, panels would never need to "examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU" as required by the Appellate Body assumes an inherent conflict between the listing of articles and the careful examination of compliance with Article 6.2 of the DSU. The Appellate Body simply said that the listing of articles is one way to achieve the objectives of Article 6.2 with respect to the Panel's terms of reference and the opportunity for parties to effectively defend their interests. The standard set by the Appellate Body means that the listing of the provisions relied upon is sufficient, although it does not rule out that other means may be chosen to accomplish the objectives of Article 6.2 of the DSU. This standard is aimed at attaining the objectives of Article 6.2, which are the definition of the Panel's jurisdiction and the effective exercise of procedural rights by the parties. In the present case, the European Communities' request for the establishment of a Panel did not prevent Korea from effectively defending itself.

2. The OAI Report

23. The European Communities argues that Korea's appeal relating to the OAI Report should be rejected. The Panel did not consider the OAI Report as the sole relevant basis for its review of compliance with Article 4 of the *Agreement on Safeguards*. In addition, although it mostly relied on Korea's notifications to the Committee on Safeguards, the European Communities also addressed the OAI Report and showed that Korea's investigation was defective on any basis.

24. The European Communities argues that it did not rely only on Korea's notification to assert its claim under Article 4 of the *Agreement on Safeguards.* Even in its First Written Submission, the European Communities referred to the OAI Report. The European Communities initially referred to the best and latest evidence available, which was primarily that summarized in Korea's notification of 24 March 1997. The OAI Report was not the latest statement of what Korea actually did.

25. Korea confuses the notions of "claim" or "matter" within the meaning of Article 11 of the DSU, and that of "argument" and "evidence" in support of a claim. The Appellate Body has clarified the different meaning of all these terms and the

[20] Appellate Body Report, *European Communities - Bananas*, *supra*, footnote 13, paras. 142-143.

different stages of the dispute settlement procedure when they may be invoked.[21] As the European Communities' request for the establishment of a panel included a claim under Article 4 of the *Agreement on Safeguards*, it is irrelevant that the supporting evidence considered by the Panel in reviewing the European Communities' claim was mentioned only at the rebuttal stage of the proceedings.

26. The European Communities disagrees with Korea's argument that the OAI Report was not mentioned by the European Communities in its First Written Submission so that no claim concerning inconsistency with Article 4.2 based on the Report could have been raised at that stage. This argument is flawed because a claim can never be established or even inferred from evidence supplied in the course of proceedings. Further, Korea's position implies that the Panel could have considered the OAI Report in its assessment of Korea's defending arguments, but not in assessing the claim of the European Communities under Article 4.2 of the *Agreement on Safeguards*. This is contrary to the duty of a panel under Article 11 of the DSU to make an objective assessment of the matter before it.

3. Burden of Proof

27. The European Communities accepts that it had the burden of proof to establish its claims under Article 4 of the *Agreement on Safeguards*. Korea's argument that the European Communities should have used different sources for its evidence instead of Korea's notification to the Committee on Safeguards should be dismissed. There is, in the view of the European Communities, no burden of proof issue in this case.

28. The European Communities considers that there is no basis for Korea's argument that the European Communities did not make a *prima facie* case in its First Written Submission, even if this were necessary. Korea's argument assumes that the OAI Report constitutes the only correct basis for establishing claims under Article 4 of the *Agreement on Safeguards*.

29. According to the European Communities, the DSU requires a panel to make an objective assessment of the matter before it. A panel must weigh up all facts regardless of where they came from. The question of burden of proof only arises where there is insufficient evidence for a panel to conclude that a claim or affirmative defence is well-founded. In such a case, a panel needs to apply the rules concerning burden of proof in order to be able to decide on what basis it should proceed to consider any remaining questions before it. A panel does not have to make a finding that a complaining party has itself produced evidence sufficient to establish a *prima facie* case before considering evidence produced by the other party.

[21] Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil - Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997; Appellate Body Report, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala - Cement*"), WT/DS60/AB/R, adopted 25 November 1998; Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India - Patents*"), WT/DS50/AB/R, adopted 16 January 1998, para. 88.

30. The European Communities argues that Korea misunderstands *Japan - Agricultural Products*. In that case, the complaining party had not even *claimed* that the alternative measure approved by the panel satisfied the relevant requirements under Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*. This is a case of a panel "deciding *extra petitum*", and not a case of a party failing to satisfy the burden of proof.

4. Article 5.1 of the Agreement on Safeguards

31. The European Communities requests that the Appellate Body reject Korea's attempt to reverse the ordinary meaning of the terms used in Article 5.1 of the *Agreement on Safeguards* and designate clear obligations as "not mandatory". The words "a Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" clearly create a mandatory obligation.

32. The European Communities disagrees with Korea's view that a "reasonable interpretation" of the second sentence is that a Member need only provide a "clear justification" if it deviates from the average level of imports in the last three respresentative years; otherwise the importing Member is under no obligation to give a reasoned explanation. The plain and ordinary meaning of the words in the first sentence is that a Member applying a safeguard measure must in all cases provide an explanation that the measure at issue is not more restrictive than necessary.

33. With respect to Korea's argument that the use of the words "should" and "objectives" in the third sentence of Article 5.1 suggest that both the first and third sentences are setting out objectives and not "requirements", the European Communities notes that the word "should" has a number of ordinary meanings, including the expression of an obligation. The Appellate Body has itself come to this conclusion.[22]

34. The European Communities contends that, even assuming that an obligation which is not accompanied by criteria is not "mandatory", Article 5.1 does contain criteria for deciding what is necessary. The first sentence contains two express criteria which are: the extent necessary to prevent or remedy serious injury, and the extent necessary to facilitate adjustment. Further guidance on the application of Article 5.1 can be found in the context of that provision, in particular the other provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994, and in the object and purpose of safeguard measures.

35. The European Communities submits that, even if a Member is not required to explain why it concluded that the measure it takes is necessary to remedy the serious injury and facilitate the adjustment at the time the decision to apply a safeguard measure is taken, such Member must at the least be able to give an explanation when its measure is challenged in dispute settlement proceedings. As the Panel has demonstrated, Korea has not been able to, or even attempted to, justify its measure according to the criteria set out in the first sentence of Article 5.1 of the *Agreement on Safeguards*.

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[22] Appellate Body Report, *Canada - Aircraft*, *supra*, footnote 15.