WORLD TRADE ORGANIZATION

Dispute Settlement Reports

2000
Volume I

Pages 1-572

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011–4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2002

Printed in the United Kingdom at the University Press, Cambridge

French edition and Spanish edition paperbacks of this title are both available directly from WTO Publications, World Trade Organization, Centre William Rappard, 154 rue de Lausanne, CH-1211 Geneva 21, Switzerland http://www.wto.org

ISBN 0 521 81375 1 hardback

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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*	Present:
European Communities, *Appellant/Appellee*	El-Naggar, Presiding Member
United States, *Third Participant*	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

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[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.

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[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.

C. Claims of Error by the European Communities - Appellant

1. Article XIX of the GATT 1994

36. The European Communities requests that the Appellate Body reverse the Panel's conclusion that the phrase "unforeseen developments" does not add conditions for any measure to be applied pursuant to Article XIX of the GATT 1994. The European Communities also requests that the Appellate Body complete the Panel's reasoning and find that, by applying a safeguard measure in a situation where increased imports were not the result of "unforeseen developments", Korea did not comply with the requirement contained in Article XIX:1(a) of the GATT 1994.

37. The European Communities considers that the Panel erred in law in interpreting Article XIX:1(a) contrary to the clear wording of that provision, and according to the Panel's own speculation about the intent of the Contracting Parties to the GATT 1947. The effect of the Panel's interpretation is to effectively write the "as a result of unforeseen developments" requirement out of Article XIX. As confirmed by Article 3.2 of the DSU, panels cannot diminish the rights of the European Communities by deleting one of the requirements which should be fulfilled before a safeguard action can be taken. As previously stated by the Appellate Body, "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". [23]

38. The European Communities argues that the Panel interprets "unforeseen developments" contrary to the ordinary meaning of that term. The Panel ignores the fact that the word "if" in Article XIX:1(a) introduces a list of conditions under which safeguard measures may be imposed. The ordinary meaning of the term "as a result of unforeseen developments" is "as a consequence of a sudden change in a course of action or events or in conditions that has not been foreseen".

39. The European Communities considers that in addition to the ordinary meaning, the terms of a treaty should be read in their context. The context which sheds light on the interpretation of the "as a result of unforeseen developments" requirement is the rest of Article XIX:1(a) of the GATT 1994. The opening phrase of Article XIX:1(a) of the GATT 1994 is relevant context as it makes clear that, in fact, there are two pre-conditions which need to be present before a safeguard action can be taken. Imports should increase both as a result of unforeseen developments and the effect of tariff concessions or any other obligations under the GATT 1994.

40. The European Communities submits that the Appellate Body has confirmed that provisions of the GATT 1994 and the relevant Agreements in Annex 1A of the *WTO Agreement* represent a package of rights and obligations that must be considered in conjunction.[24] Article XIX:1(a) of the GATT 1994 explains what safeguard measures are and lays down basic principles, while the *Agreement on Safeguards* lays down rules for applying them. The requirement that increased imports must result from "unforeseen developments" and the other fundamental

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[23] Appellate Body Report, *United States - Gasoline*, *supra*, footnote 12, p. 23.

[24] Appellate Body Report, *Brazil - Desiccated Coconut*, *supra*, footnote 21; and Appellate Body Report, *Guatemala - Cement*, *supra*, footnote 21.

requirements of safeguard measures were not expressly repeated in the *Agreement on Safeguards* because they did not need to be clarified, added to or modified.

41. The European Communities requests that the Appellate Body find that the "as a result of unforeseen developments" requirement should be applied cumulatively with the requirements set out in the *Agreement on Safeguards*. The *Agreement on Safeguards* does not supersede or replace Article XIX:1(a) of the GATT 1994. Since there is no formal conflict between the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, Members must comply with all obligations set out in Article XIX:1(a) of the GATT 1994 and the *Agreement on Safeguards*. The omission of "unforeseen developments" in the *Agreement on Safeguards* does not support the "logic" of the interpretation advanced by the Panel.

42. The European Communities considers that the term "unforeseen developments" should be interpreted in light of the object and purpose of both the *Agreement on Safeguards* and Article XIX of the GATT 1994. In the view of the European Communities, the object and purpose of the *Agreement on Safeguards* is inherently linked with Article XIX of the GATT 1994, which is entitled "*Emergency Action* on Imports of Particular Products". Safeguard measures are by definition a mechanism based on "emergencies". The aim of the safeguard mechanism lies in the unpredictability of an event and the possibility to take swift measures which safeguard the relevant domestic industry. The term "unforeseen developments" is meant to prevent the safeguard mechanism from being used to withdraw from liberalization obligations due to developments which were foreseeable and to avoid it being used to restrict trade in the case of developments that had no connection at all with trade liberalization.

43. The European Communities considers that the Panel incorrectly asserted that its interpretation of "unforeseen developments" is confirmed by the subsequent practice of the parties to the GATT. The *Hatters' Fur* case contradicts the Panel's thesis that the "unforeseen developments" condition is mere explanatory verbiage. [25] The European Communities submits that the members of the Working Party in the *Hatters' Fur* case found that the United States could not have reasonably been expected to foresee, at the time when it negotiated tariff reductions in 1947, that a style change of hats would take place on such a massive scale as to cause serious injury.

44. The argument that the "as a result of unforeseen developments" requirement is still valid as a requirement for the safeguard mechanism is supported by recent texts of national legislation which have been notified by a number of WTO Members under Article 12.6 of the *Agreement on Safeguards*. Korea, Costa Rica, Norway, Panama and Japan have all incorporated the phrase in their safeguards legislation.

[25] *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT* ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951.

2. Article 12.2 of the Agreement on Safeguards

45. The European Communities submits that the Panel erred in its interpretation of the phrase "all pertinent information." In finding that Korea's notifications under Article 12.1(b)-(c) of the *Agreement on Safeguards* satisfied the requirement of "all pertinent information", the Panel set a new standard unsupported by the relevant provisions. The European Communities also requests that the Appellate Body complete the Panel's reasoning and find that Korea did not comply with the requirement to provide "all pertinent information" laid down in Article 12.2 of the *Agreement on Safeguards*.

46. The European Communities argues that the Panel developed and applied a new and less stringent standard of information, contrary to the wording, context and the object and purpose of Article 12.2. The requirement to provide "all pertinent information" in Article 12.2 cannot be replaced by a requirement to submit "the amount of information ... sufficient to be useful to Members with a substantial interest in the proposed measure". Had the Panel applied the correct test, it would have found that the evidence provided was not complete and, therefore, that Korea's notifications were inconsistent with that provision.

47. According to the European Communities, Article 12.2 sets a generally defined but broad standard of notification of "all pertinent information". That general and overall standard is immediately clarified by the express mention of a series of elements forming part of "all pertinent information". The expression "which *shall* include" makes it clear that, although the elements listed may not exhaust the notion of "all pertinent information", all of them must be provided in order to meet the "all pertinent information" standard.

48. In light of the context of Article 12.2, the "evidence of serious injury" to which that provision refers is the evidence concerning the matters mentioned in Article 4 of the *Agreement on Safeguards* which is the provision in that Agreement specifying the elements of "serious injury". As serious injury determination in a domestic safeguard procedure must rely on "evidence", it is clear that the information which must be notified pursuant to Article 12.2 includes evidence on the injury factors set out in Article 4.2(a). Furthermore, to enable review of whether the serious injury was caused by imports, evidence of a casual link, as required by Article 4.2(b), must also be included in the notification as part of the "pertinent information."

49. The European Communities argues that, while it is true that the Committee on Safeguards is vested with the power to request information, Article 12.2 expressly qualifies the information that the Committee on Safeguards may request as *additional* to that already required for the notifications under Article 12.1(b)-(c). This power cannot replace the unconditional, binding and enforceable obligation incumbent on the notifying Member.

50. The European Communities considers that it is clear from the provisions of Article 12.2 that the notification obligation pursues two main objectives. The first, which the Panel identified, is to allow the Members with trade interests to request consultations and defend their interests. The second is to ensure consistency and effective control of safeguards measures. In view of the "limitative and deprivational" character of safeguard measures, their inclusion in the WTO system is accompanied by limits to their use, so that the interests of all the parties are protected.

D. Arguments of Korea - Appellee

1. Article XIX of the GATT 1994

51. Korea argues that the Panel correctly considered that the reference to "unforeseen developments" in Article XIX:1(a) of the GATT 1994 does not impose an additional obligation for the imposition of safeguard measures. The drafters of the *Agreement on Safeguards* intended to strike a new balance and move beyond Article XIX of the GATT, which had proved to be difficult to apply in practice. Korea argues further that Article 2 of the *Agreement on Safeguards*, which lays out the "conditions" for taking safeguard measures and is titled accordingly, removes both the "unforeseen developments" language and the requirement to show that the difficulties were "the effect of the obligations incurred by the contracting party under this Agreement, including tariff concessions".

52. It is Korea's contention that, contrary to the European Communities' assertions, the removal of any pre-existing obligation regarding "unforeseen developments" was intended to *strengthen* the multilateral safeguard regime by ensuring the resort by Members to emergency action under the *Agreement on Safeguards*, rather than the use of trade-disruptive and non-transparent "grey area" measures.

53. While Korea concedes that nowhere in the *Agreement on Safeguards* is there an express derogation from Article XIX, Korea notes that the drafters did not need to expressly signal every derogation. Any doubt as to the precedence of those provisions of the *Agreement on Safeguards* over the provisions of Article XIX of the GATT is resolved by the General Interpretative Note to Annex 1A of the *WTO Agreement*. Further, to the extent that any condition regarding "unforeseen developments" applies, the traditional interpretative principles of *lex specialis* and *lex generalis* indicate that the more specific conditions under the *Agreement on Safeguards* apply over the more general conditions expressed in Article XIX.

54. With respect to the argument of the European Communities that "if" at the beginning of the provision introduces a list of conditions under which safeguard measures may be imposed, Korea contends that, while this may be true in the absence of the comma after "if", it is not true where the relevant phrase is set off by commas as a dependent clause. As the Panel found, the introductory phrase simply highlights the general situation where negotiated concessions may need to be set aside because of an emergency situation.

55. Korea argues that there is nothing in the context of the opening phrase to contradict the Panel's interpretation that a Member does not have to demonstrate the existence of "unforeseen developments" before it can impose safeguard measures. The arguments of the European Communities are irrelevant because they presume that the "unforeseen developments" clause established a condition in the first place. An analysis of the context of the relevant language in Article XIX supports the Panel's interpretation. As context, Articles 1, 2, and 11.1(a) of the *Agreement on Safeguards* demonstrate that the rules and conditions for applying safeguard measures are found in that Agreement.

56. Korea submits that the Panel's interpretation was also consistent with the object and purpose of the relevant provision in Article XIX. The European Communities attempts to bolster its interpretation by reference to the title of Article

XIX: "Emergency Action on Imports of a Particular Product", arguing that the safeguard measures are inherently linked to the existence of an emergency situation. A more appropriate interpretation is that the title and the provision relating to "unforeseen developments" simply set forth the general situation in which tariff concessions may be temporarily suspended, as the Panel correctly found. Korea considers that the object and purpose of the provision is fully consistent with the Panel's interpretation.

57. With respect to the argument of the European Communities regarding subsequent practice, Korea argues that the Panel properly viewed the *Hatters' Fur* case as reinforcing the proposition that the unforeseen developments "requirement" is not at all a condition as the Working Party considered that increased imports of fur felt hats were *ipso facto* an unforeseen development.

58. On national legislation, Korea submits that practice under Article XIX confirms that the contracting parties to the GATT did not consider that the condition of "unforeseen developments" was required. The legislation of Members cited by the European Communities as requiring "unforeseen developments" is also consistent with the Panel's interpretation, given that these Members simply copied, either verbatim or in a similar form, the language from Article XIX:1(a).

59. According to Korea, should the Appellate Body accept the European Communities' interpretation of Article XIX, it would be inappropriate for the Appellate Body to engage in a factual analysis as to whether unforeseen developments existed. Article 17.6 of the DSU expressly limits the Appellate Body's authority to the review of issues of law and legal interpretations. Although the Appellate Body has previously engaged in factual analysis in some cases, it has also refused to perform such analysis in other cases either because there were not enough uncontested facts in the record of the case, or because it was not necessary for the resolution of the dispute. As the parties in this case provided only very limited factual information regarding whether unforeseen developments in fact existed, the Appellate Body would need to engage in a renewed factual investigation in order to assess whether such developments existed at the time of the safeguards investigation.

60. Korea argues further, that if the Appellate Body accepts the European Communities' interpretation of Article XIX of GATT 1994 and decides to engage in a factual analysis, the Appellate Body should find that unforeseen developments existed at the time of the safeguards investigation and that, therefore, Korea acted in accordance with Article XIX. Korea liberalized imports of skimmed milk powder preparations and milk powder and applied a tariff rate of 40 percent and 220 percent on these products respectively. At that time and subsequent to the Uruguay Round, Korea had no reason to foresee that European Communities' milk powder exporters would change their product to skimmed milk powder preparations in order to circumvent the high tariff on milk powder. Korea could not have foreseen that the European Communities would circumvent Korea's good faith commitments.

2. Article 12.2 of the Agreement on Safeguards

61. Korea argues that the Appellate Body should reject the appeal of the European Communities relating to Article 12.2 of the *Agreement on Safeguards*. In the view of Korea, the Panel was correct in drawing a distinction between the

obligation in Article 12.2 to provide "all pertinent information", and that in Article 3 to address "all pertinent issues of fact and law". Accepting the interpretation of the European Communities would lead to the conclusion that a Member imposing a safeguard measure is required to provide the Committee on Safeguards with a broader or a more varied range of matters than such Member is required to include in its underlying investigation.

62. In the view of Korea, the Panel established a clear and comprehensible test as to what Members have to do, in that the amount of information notified must be sufficient to be useful to Members with a substantial interest in the proposed safeguard measure. The Panel reviewed the claims of the European Communities, and, after construing Article 12 in accordance with the object and purpose of that provision, concluded that the information provided by Korea was sufficient. The statement of the Panel relating to "what Korea considered to be evidence of injury" is a reference to the circumstances under which information was provided by Korea and should not to be taken as the standard applied by the Panel.

63. Korea submits that the European Communities' view that the purpose of Article 12 is to impose some additional and unspecified burden on a Member imposing a measure is contrary to the intention of the drafters for two reasons. First, had the drafters intended this, they would not have referred to the standard of "all pertinent information", but would have provided for a precise mechanism by which the analysis required under Articles 3 and 4 was made available to the Committee on Safeguards. Second, if an investigation fulfilled the requirements of Articles 2.1, 3.1 and 4 and had been notified *verbatim* to the Committee on Safeguards, the final sentence of Article 12.2 would be redundant. The obligation under Article 12 to provide "all pertinent information" is different from, and not as stringent as, the requirements under Articles 2, 3 and 4.

E. Arguments of the United States - Third Participant

1. Article XIX of the GATT 1994

64. In the view of the United States, the *Agreement on Safeguards* now completely occupies the field of regulation of safeguard measures in the WTO system. If it were possible for Members to pick and choose between the rights and obligations in the original package of Article XIX of the GATT 1994, and the rights and obligations in the revised package in the *Agreement on Safeguards*, and to bring claims under both agreements, the entire project represented by the *Agreement on Safeguards* would be revised *post hoc*. The text of Article XIX cannot be read outside the context of the *Agreement on Safeguards*. The omission of "unforeseen developments" from that Agreement was intentional, and this express omission must be given meaning.

65. The United States argues that the European Communities has provided no basis for suggesting that the phrase "unforeseeable developments" remains binding while other parts of Article XIX have ceased to be so. The suggestion that other provisions of Article XIX remain fully in effect is untenable. If the "unforeseen developments" condition in Article XIX:1(a) can still be independently read and enforced, divorced from its context in the *Agreement on Safeguards*, this might suggest that a Member could take compensatory measures whenever they would be

permissible under Article XIX:3, notwithstanding the limits on such measures in Article 8.3 of the *Agreement on Safeguards*.

66. The United States notes that legal scholars agree that under the *WTO Agreement*, "unforeseen developments" are no longer a prerequisite for a safeguard action.[26] State practice has also treated the question of "unforeseen developments" as marginal, legally non-binding or subsumed by other aspects of the safeguards process. The great majority of safeguards legislation, including that of the European Communities, notified to the WTO does not refer to "unforeseen developments," and thus does not require that the relevant domestic authorities investigate or make a determination in this respect. Thus, nearly all Members have demonstrated their belief that the existence of "unforeseen developments" is not required as a condition for taking safeguard measures.

III. ISSUES RAISED IN THIS APPEAL

67. This appeal raises the following issues:

(a) Whether the Panel erred in its conclusion that the clause in Article XIX:1(a) of the GATT 1994 - "if, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" - does not add conditions for any safeguard measure to be applied pursuant to Article XIX of the GATT 1994;

(b) Whether the Panel erred in its interpretation and application of Article 5.1 of the *Agreement on Safeguards*;

(c) Whether the Panel erred in its interpretation and application of Article 12.2 of the *Agreement on Safeguards*;

(d) Whether the Panel erred in finding that the request for the establishment of a panel submitted by the European Communities met the requirements of Article 6.2 of the DSU;

(e) Whether the Panel improperly based its findings of inconsistency with Article 4.2 of *Agreement on Safeguards* on the OAI Report; and

(f) Whether the Panel erred in its application of the burden of proof in respect of its findings under Article 4 of the *Agreement on Safeguards*.

[26] *See* M. Bronckers, "Voluntary Export Restraints and the GATT 1994 Agreement on Safeguards", in J.H.J. Bourgeois, F. Berrod and E. Fournier (eds.), *The Uruguay Round Results: A European Lawyers' Perspective* (European University Press, 1995), p. 275; and M. Trebilcock and R. Howse, *The Regulation of International Trade*, 2nd ed. (Routledge, 1999), p. 228.

IV. CLAIMS UNDER ARTICLE XIX OF THE GATT 1994

68. The European Communities appeals the Panel's rejection of the claim by the European Communities that Korea violated the provisions of Article XIX:1 of the GATT 1994 by failing to examine whether the alleged increase in imports was "as a result of unforeseen developments".[27] The European Communities requests that the Appellate Body reverse the legal interpretations and findings made by the Panel in paragraphs 7.42 to 7.48 of the Panel Report, and, most notably, the "fundamental error"[28] made by the Panel in finding that:

> … the prior section of the sentence, "If, as a result of unforeseen developments and of the effect of obligations incurred by a contracting party under this Agreement, including tariff concessions…" *does not add conditions* for any measure to be applied pursuant to Article XIX … [29] (emphasis added)

The European Communities also asks that the Appellate Body complete the Panel's reasoning and find on the basis of uncontested facts on the record that Korea did not comply with the "requirement" contained in Article XIX:1(a) of the GATT 1994 to apply safeguard measures only where the alleged increase in imports is "as a result of unforeseen developments".[30]

69. In its examination of the claim of the European Communities under Article XIX:1 of the GATT 1994, the Panel stated that:

> We consider that the terms and prescriptions of Article XIX:1 of GATT are still generally applicable, as we are of the view that there is no conflict between the provisions of Article XIX:1 of GATT and those of Article 2.1 of the Agreement on Safeguards.[31]

70. Having decided that Article XIX:1 of the GATT 1994 is still applicable under the *WTO Agreement*, the Panel proceeded to examine the meaning of the clause in Article XIX:1(a) - "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions …". The Panel stated that, in its view, this clause:

> … *does not add conditions* for any measure to be applied pursuant to Article XIX but *rather serves as an explanation* of why an Article XIX measure may be needed, taking into account the fact that at the time (1947) the CONTRACTING PARTIES had just agreed (for the first time) on multilateral

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27 European Communities' appellant's submission, para. 14.
28 European Communities' appellant's submission, para. 15.
29 Panel Report, para. 7.42.
30 European Communities' appellant's submission, para. 17. *See* also para. 137.
31 Panel Report, para. 7.39.

> tariff bindings and on a general prohibition against quotas.[32] (emphasis added)

71. The Panel reasoned further:

> … the proposition "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement" *does not address the conditions for Article XIX measures to be applied but rather explains why a provision such as Article XIX may be needed*. For us, the object of this section of the first sentence of paragraph 1 of Article XIX cannot be anything else but a statement (of what we would now consider to be obvious) that because of the binding nature of the GATT obligations and concessions, tariffs and other obligations negotiated on the basis of trade expectations may need to be changed temporarily in light of actual unforeseen developments. *Thus, the phrase "unforeseen circumstances" does not specify anything additional as to the conditions under which measures pursuant to Article XIX may be applied*.[33] (emphasis added)

72. In the view of the Panel, the adoption of the *Agreement on Safeguards* without this "unforeseen developments" clause was "logical". Because Uruguay Round negotiators "understood that this reference to 'unforeseen developments' did not add to the rest of the paragraph (but rather describes its context), there was no need to insert it explicitly in the Agreement on Safeguards."[34]

73. On the basis of this reasoning, the Panel concluded:

> … we reject the specific claim of the European Communities that Korea was wrong in failing to examine whether the import trends of the products under investigation were the result of "unforeseen developments" contrary to Article XIX:1(a), as we consider that Article XIX of GATT does not contain such a requirement.[35]

74. We agree with the statement of the Panel that:

> It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously … .[36]

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[32] Panel Report, para. 7.42.
[33] Panel Report, para. 7.45.
[34] *Ibid*., para. 7.47.
[35] *Ibid*., para. 7.48.
[36] Panel Report, para. 7.38.

In this context, we note that Article II:2 of the *WTO Agreement* provides that:

> The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are *integral parts* of this Agreement, *binding on all Members*. (emphasis added)

75. We note, furthermore, that the GATT 1994 was incorporated into the *WTO Agreement* as one of the Multilateral Agreements on Trade in Goods contained in Annex 1A to the *WTO Agreement*. The GATT 1994 consists of: (a) the provisions of the GATT 1947, as rectified, amended or modified before the entry into force of the *WTO Agreement*; (b) provisions of certain other legal instruments which entered into force under the GATT 1947 and before the date of entry into force of the *WTO Agreement*; (c) a number of Uruguay Round Understandings on the interpretation of certain GATT articles; and (d) the Marrakesh Protocol to GATT 1994.[37] The *Agreement on Safeguards* is one of the thirteen Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*. It is important to understand that the *WTO Agreement* is *one* treaty. The GATT 1994 and the *Agreement on Safeguards* are both Multilateral Agreements on Trade in Goods contained in Annex 1A, which are integral parts of that treaty and are equally binding on all Members pursuant to Article II:2 of the *WTO Agreement*.

76. The specific relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the *WTO Agreement* is set forth in Articles 1 and 11.1(a) of the *Agreement on Safeguards*:

> Article 1
>
> *General Provision*
>
> This Agreement establishes rules for the application of *safeguard measures* which shall be understood to mean *those measures provided for in* Article XIX of GATT 1994. (emphasis added)

> Article 11
>
> *Prohibition and Elimination of Certain Measures*
>
> 1. *(a)* A Member shall not take or seek any *emergency action* on imports of particular products *as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement*. (emphasis added)

77. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish "rules for the application of safeguard measures which shall be understood to mean *those measures provided for in* Article XIX of GATT 1994." (emphasis

[37] *See* paragraph 1 of the language incorporating the GATT 1994 into Annex 1A of the *WTO Agreement.*