WORLD TRADE ORGANIZATION

WT/DS98/AB/R
14 December 1999

(99-5420)

Original: English

KOREA – DEFINITIVE SAFEGUARD MEASURE ON IMPORTS OF CERTAIN DAIRY PRODUCTS

AB-1999-8

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WORLD TRADE ORGANIZATION

APPELLATE BODY

Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products

Korea, *Appellant/Appellee*

European Communities, *Appellant/Appellee*

United States, *Third Participant*

AB-1999-8

Present:

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

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]

[1]WT/DS98/R, 21 June 1999.

[2]Panel Report, paras. 1.1-2.8.

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:

> (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 Organisation* ("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,

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[3]Panel Report, para. 8.1.

[4]*Ibid*., para. 8.2.

[5]*Ibid*., para. 8.4.

[6]WT/DS98/7, 16 September 1999.

Korea filed an appellant's submission.[7] The European Communities filed its own appellant's 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

[7]Pursuant to Rule 21 (1) of the *Working Procedures*.

[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.

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 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

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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.

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 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

[16]Panel Report, para. 7.30.

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 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.

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[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.

[18] Appellate Body Report, *Japan – Agricultural Products*, *supra*, footnote 17.

[19] Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 15.

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.

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

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

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 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.

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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.

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.

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*.

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.

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

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 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.

[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.

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.

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[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:

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[27]European Communities' appellant's submission, para. 14.

[28]*Ibid*., 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.

> … *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 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]

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[32]Panel Report, para. 7.42.

[33]*Ibid*., para. 7.45.

[34]*Ibid*., para. 7.47.

[35]*Ibid*., para. 7.48.

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]

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*:

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[36]Panel Report, para. 7.38.

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

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 added) The ordinary meaning of the language in Article 11.1(a) – "unless such action conforms with the provisions of that Article applied in accordance with this Agreement" – is that any safeguard action *must conform* with the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure[38] imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards* and Article XIX of the GATT 1994.

78. Having found that the provisions of *both* Article XIX:1 of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* apply to any safeguard measure[39] taken under the *WTO Agreement*, we now turn to interpret the meaning of the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – in Article XIX:1(a). The provisions of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* read as follows:

[38]With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

[39]*Supra*, footnote 38.

GATT 1994

Article XIX

Emergency Action on Imports of Particular Products

> 1. (*a*) If, *as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions*, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)

Agreement on Safeguards

Article 2

Conditions

> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted)

79. The task before us in this appeal is *not* to interpret Article 2.1 of the *Agreement on Safeguards*, but *rather* to interpret Article XIX:1(a) of the GATT 1994. This appeal by the European Communities relates to the Panel's rejection of the claim by the European Communities that Korea violated the provisions of Article XIX:1(a) of the GATT 1994 by failing to examine whether the alleged increase in imports was "as a result of unforeseen developments". Therefore, our task in this appeal is to interpret the first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – and to determine whether the Panel erred in rejecting the European Communities' claim under Article XIX:1 of the GATT 1994.

80. Before we commence our analysis of this clause in Article XIX:1(a), it is useful, first, to review certain principles relating to the interpretation of treaties. We note, first, that Article 3.2 of the DSU provides that the dispute settlement system of the WTO serves "to clarify the existing provisions of [the covered] agreements *in accordance with the customary rules of interpretation of public international law*." (emphasis added) The principles of interpretation of treaties set forth in

Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[40] apply to the interpretation of provisions of the *WTO Agreement*.[41] We have also recognized, on several occasions, the principle of effectiveness in the interpretation of treaties (*ut res magis valeat quam pereat*) which requires that a treaty interpreter:

> … must give meaning and effect to all the terms of the treaty. 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.[42]

81. In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."[43] An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.[44] Article II:2 of the *WTO Agreement* expressly manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.

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[40]*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969) 8 International Legal Materials 679.

[41]As we have stipulated in, for example, Appellate Body Report, *United States – Gasoline*, *supra*, footnote 12, p. 17; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 11; Appellate Body Report, *India – Patents*, *supra*, footnote 21, para. 46; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*European Communities – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 84; and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 114.

[42]Appellate Body Report, *United States – Gasoline*, *supra*, footnote 12, p. 23. We also confirmed this principle in Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 41, p. 12; Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, para. 133; and Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, circulated 14 December 1999, para. 88.

[43]We have emphasized this in Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, *United States – Gasoline*, *supra*, footnote 12, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 41, p. 12; and Appellate Body Report, *India – Patents*, *supra*, footnote 21, para. 45.

[44]The duty to interpret a treaty as a whole has been clarified by the Permanent Court of International Justice in *Competence of the I.L.O. to Regulate Agricultural Labour* (1922), PCIJ, Series B, Nos. 2 and 3, p. 23. This approach has been followed by the International Court of Justice in *Ambatielos Case* (1953) *ICJ Reports*, p. 10; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) *ICJ Reports*, p. 15; and *Case Concerning Rights of United States Nationals in Morocco* (1952) *ICJ Reports*, pp. 196-199. See also I. Brownlie, *Principles of Public International Law*, 5th ed. (Clarendon Press, 1998), p. 634; G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points", 33 *British Yearbook of International Law* (1957), p. 211 at p. 220; A. McNair, *The Law of Treaties* (Clarendon Press, 1961), pp. 381-382; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 127-129; M.O. Hudson, *La Cour Permanente de Justice Internationale* (Editions A Pedone, 1936), pp. 654-659; and L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público*, Vol. 2 (Tipográfica, 1985), p. 105.

82. Having said that *all of the provisions* of a treaty must be given meaning and legal effect, we believe that the clause in Article XIX:1(a) – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – must have meaning. We do not agree with the Panel's conclusion that it "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".[45] We also do not agree with the Panel that this clause "only describes generally the situations where the binding nature of the obligations contained in Articles II and XI of GATT may need to be set aside (for a certain period)."[46]

83. Having determined that this clause must have meaning, we now turn to examine what that meaning is. We refer again to the language of Article XIX:1(a), in its entirety:

> If, *as a result of unforeseen developments* and *of the effect of the obligations incurred* by a Member under this Agreement, including tariff concessions, *any product is being imported* into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)

84. To determine the meaning of the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – in sub-paragraph (a) of Article XIX:1, we must examine these words in their ordinary meaning, in their context and in light of the object and purpose of Article XIX. We look first to the ordinary meaning of these words. As to the meaning of "unforeseen developments", we note that the dictionary definition of "unforeseen", particularly as it relates to the word "developments", is synonymous with "unexpected".[47] "Unforeseeable", on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated".[48] Thus, it seems to us that the ordinary meaning of the phrase "as a result of unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected". With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions", we believe

[45]Panel Report, para. 7.42.

[46]*Ibid*., para. 7.43.

[47]See *Webster's Third New International Dictionary* (Encyclopaedia Britannica Inc., 1966), Vol. 3, p. 2496; and *Black's Law Dictionary*, 6th ed. (West Publishing Company, 1990), p. 1530.

[48]*Ibid*.

that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.

85. When we examine this clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – in its immediate context in Article XIX:1(a), we see that it relates directly to the second clause in that paragraph – "If, … , any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products …". The latter, or second, clause in Article XIX:1(a) contains the three *conditions* for the application of safeguard measures. These *conditions*, which are reiterated in Article 2.1 of the *Agreement on Safeguards*[49], are that: (1) a product is being imported "in such quantities and under such conditions"; (2) "as to cause"; (3) serious injury or the threat of serious injury to domestic producers. The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions …" – is a dependent clause which, in our view, is linked grammatically to the verb phrase "is being imported" in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.

86. Our reading is supported by the context of these provisions. As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: "*Emergency Action on Imports of Particular Products*". The words "emergency action" also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported "*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers … ". (emphasis added) In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures

[49]We note that the title of Article 2 of the *Agreement on Safeguards* is: "*Conditions*".

were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, "emergency actions." And, such "emergency actions" are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend the obligation in whole or in part or to withdraw or modify the concession". Thus, Article XIX is clearly an extraordinary remedy.

87. This reading of these clauses is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to a product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers … of like or directly competitive products". This allows an importing Member to give the domestic industry in question enough time to adjust to the new competitive conditions caused by the increased imports. We should not lose sight of the fact that taking safeguard action results in restrictions on imports arising from "fair" trade. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures.

88. Our reading of these prerequisites makes certain that *all* the relevant provisions of Article XIX of the GATT 1994 and the *Agreement on Safeguards* relating to safeguard measures are given their full meaning and their full legal effect. Our reading, too, is consistent with the desire expressed by the Uruguay Round negotiators in the Preamble to the *Agreement on Safeguards* "to clarify and *reinforce* the disciplines of GATT 1994, and *specifically those of its Article XIX* …, to re-establish *multilateral control* over safeguards and eliminate measures that escape such control …".[50] In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of treaty concessions or the temporary withdrawal of treaty obligations, which are fundamental to the *WTO Agreement*, such as those in Article II and Article XI of the GATT 1994.

89. In addition, we note that our reading of the clause "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" in Article XIX:1(a) is also consistent with the one GATT 1947 case that involved

[50] *Agreement on Safeguards*, Preamble.

Article XIX, the so-called "*Hatters' Fur*" case.[51] Members of the Working Party in that case, in 1951, stated:

> … "unforeseen developments" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[52]

90. On the basis of the above reasoning, we do not agree with the Panel that the clause – "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 specify anything additional as to the conditions under which measures pursuant to Article XIX may be applied."[53] We, therefore, reverse the Panel's conclusion that "Article XIX of GATT does not contain such a requirement."[54]

91. The European Communities further requests that we complete the Panel's reasoning and find "on the basis of the found or uncontested facts" that by imposing a safeguard measure in circumstances where the alleged increase in imports was not "as a result of unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994, Korea also violated its obligations under Article XIX of the GATT 1994.[55]

92. The Panel did not make any factual findings on whether the alleged increase in imports of skimmed milk powder preparations was "a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …". The facts were also contested by the parties. While Korea argues that the increase in imports was "a result of unforeseen developments", the European Communities disagrees with this view of the facts. In the absence of any factual findings by the Panel or undisputed facts in the Panel record relating to whether the alleged increase in imports was, indeed, "a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …", we are not in a position, within the scope of our mandate set forth in Article 17 of the DSU, to complete the analysis and make a determination as to whether Korea acted inconsistently

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[51]*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.

[52]*Ibid*., para. 9. This interpretation was proposed by the representative of Czechoslovakia, and was accepted by all the Members of the Working Party, with the exception of the United States.

[53]Panel Report, para. 7.45.

[54]*Ibid*., para. 7.48.

[55]European Communities' appellant's submission, para. 137. See also para. 17.

with its obligations under Article XIX:1(a). Accordingly, we are unable to come to a conclusion on whether or not Korea violated its obligations under Article XIX:1(a) of the GATT 1994.

V. Article 5.1 of the *Agreement on Safeguards*

93. Korea appeals from the Panel's interpretation and application of Article 5.1 of the *Agreement on Safeguards*. Article 5.1 provides:

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

94. In paragraph 7.101 of its Report, the Panel stated:

> In our view a measure is defined by the following elements: product coverage, form, duration and level. Thus, in order to comply with Article 5.1 a Member must apply *a measure which in its totality is no more restrictive than is necessary* to prevent or remedy the serious injury and facilitate adjustment. In addition, it must be possible for a Panel to evaluate, in accordance with the applicable standard of review, whether a Member has acted in compliance with Article 5.1. Therefore, the Member applying *the measure must provide a reasoned explanation* as to how the authorities reached the conclusion that the particular measure in question satisfies all the requirements of Article 5.1. We consider that the obligations of the first sentence of Article 5.1 apply to all safeguard measures in their entirety. (emphasis added)

95. Korea argues that the Panel erred in interpreting Article 5.1 as imposing on a Member applying a safeguard measure two "new" obligations which are not contained in that provision. In the view of Korea, the first sentence of Article 5.1 "does not impose a clearly-defined obligation on an importing Member … applying a safeguard measure".[56] Rather, it articulates a principle or an objective. Nor does Article 5.1 contain an obligation to provide "a reasoned explanation as to how the authorities reached the conclusion that the particular measure in question satisfies all the requirements of Article 5.1."[57]

[56]Korea's appellant's submission, p. 38.

[57]*Ibid.*, p. 41.

96. The first sentence of Article 5.1 provides:

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

We agree with the Panel that the wording of this provision leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.[58] We also agree that this obligation applies regardless of the particular form that a safeguard measure might take. Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1.[59]

97. In paragraph 7.109 of its Report, the Panel stated:

> Members are required, *in their recommendations or determinations on the application* of a safeguard measure, *to explain* how they considered the facts before them and why they concluded, *at the time of the decision*, that the measure to be applied was necessary to remedy the serious injury and facilitate the adjustment of the industry. It is such reasoning and explanation concerning the measure adopted, essential to evaluate Korea's compliance with Article 5.1, which we cannot discern in Korea's determination to apply a safeguard measure in the present case. (emphasis added)

98. The second sentence of Article 5.1 provides:

> If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

This sentence requires a "clear justification" if a Member takes a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available. We agree with the Panel that this "clear justification" has to be given by a Member applying a safeguard measure *at the time of the decision, in its recommendations or determinations on the application of the safeguard measure*.

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[58]Panel Report, paras. 7.100 and 7.101.

[59]*Ibid*., para. 7.101.

99. However, we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is *not* obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with "the average of imports in the last three representative years for which statistics are available".

100. For these reasons, we do not agree with the Panel's broad finding in paragraph 7.109 that:

> Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment of the industry.

101. On the basis of this interpretation, the Panel came to the conclusion that "Korea's determination of the measure did not meet the requirements of Article 5 of the Agreement on Safeguards".[60] Moreover, the Panel did not find it necessary to rule on whether the quantitative restriction applied by Korea reduced the quantity of imports below the average of imports in the last three representative years for which statistics are available. According to the Panel:

> Since we have already found that Korea's application of a measure was not consistent with the provisions of the first sentence of Article 5.1 which we consider to be generally applicable, also when a quantitative restriction based on the average import levels for the last three representative years is used, we do not address the question of whether the quota level was calculated consistently with the second sentence of Article 5.1.[61]

102. In deciding whether Korea has acted inconsistently with the second sentence of Article 5.1, we must determine whether the quantitative restriction imposed by Korea was below the average level of imports in the last three representative years for which statistics are available, and if so, whether Korea gave a reasoned explanation as required by the second sentence of Article 5.1. The Panel did not make any factual findings on the average level of imports of skimmed milk powder preparations in the last three representative years. The average level of imports in that period was also contested by the parties.[62] Accordingly, we are not in a position, within the scope of our mandate under Article 17 of the DSU, to complete the analysis in this case and make a determination as to the consistency of Korea's safeguard measure with the second sentence of Article 5.1.

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[60]Panel Report, para. 7.110.

[61]*Ibid*., para. 7.111.

[62]*Ibid*., paras. 4.613-4.626.

103. For these reasons, we uphold the Panel's finding, in paragraph 7.101 of its Report, that the first sentence of Article 5.1 imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment. However, we reverse the Panel's broad finding, in paragraph 7.109 of its Report, that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is *not* a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. As to the question whether Korea's safeguard measure is consistent with the second sentence of Article 5.1, we are unable to come to a conclusion in the absence of relevant factual findings in the Panel Report or undisputed facts in the Panel record.

VI. Article 12.2 of the *Agreement on Safeguards*

104. The European Communities appeals from the Panel's interpretation of the phrase "all pertinent information" in Article 12.2 of the *Agreement on Safeguards*. According to the European Communities, the Panel effectively replaced the appropriate standard of "all pertinent information" with a lower and subjective standard ("sufficient information to enable consultations") without any sound reasoning in support thereof.[63] The European Communities also requests the Appellate Body to complete the analysis and find on the basis of found and uncontested facts that Korea did not comply with the requirement to provide "all pertinent information" laid down in Article 12.2 of the *Agreement on Safeguards*.[64]

105. Article 12.2 of the *Agreement on Safeguards* provides:

> In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

[63] European Communities' appellant's submission, paras. 154-155.

[64] *Ibid*., para. 142.

106. In paragraph 7.127 of its Report, the Panel found:

> … the ordinary meaning of the word "information" implies that the other Members must gain knowledge of the actions undertaken by the notifying Member. In this sense, the amount of information notified must be sufficient to be useful to Members with a substantial interest in the proposed safeguard measure.

107. In order to determine the appropriate meaning of "all pertinent information", we must examine this phrase in the light of the text and the context of Article 12 as well as the object and purpose of that Article. The text of Article 12.2 makes it clear that a Member proposing to apply a safeguard measure is required to provide the Committee on Safeguards with *all* pertinent, not just *any* pertinent, information. Moreover, it provides that such information *shall* include certain items listed immediately after the phrase "all pertinent information", namely, evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, the expected duration of the measure and a timetable for progressive liberalization. These items, which are listed as mandatory components of "all pertinent information", constitute a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12.

108. We do not agree with the Panel that "evidence of serious injury" in Article 12.2 is determined by what the notifying Member considers to be sufficient information.[65] What constitutes "evidence of serious injury" is spelled out in Article 4.2(a) of the *Agreement on Safeguards* which provides:

> … the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

We believe that "evidence of serious injury" in the sense of Article 12.2 should refer, at a minimum, to the injury factors required to be evaluated under Article 4.2(a).[66] In other words, according to the text and the context of Article 12.2, a Member must, *at a minimum*, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting "all pertinent information", as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation. We believe that the standard set by Article 12 with respect

[65]Panel Report, para. 7.136.

[66]See Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, circulated 14 December 1999, para. 136.

to the content of "all pertinent information" to be notified to the Committee on Safeguards is an objective standard independent of the subjective assessment of the notifying Member.

109. In concluding that there is a minimum objective standard, we do not mean to suggest that "evidence of serious injury" should include all the details of the recommendations and reasoning to be found in the report of the competent authorities. We agree with the Panel that, if such had been the intention of the drafters of the *Agreement on Safeguards*, they would have simply referred back to Articles 3 and 4 when requiring "evidence of serious injury" in Article 12.2.[67] There is, however, an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification. To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 must, *at a minimum*, address all the items specified in Article 12.2 as constituting "all pertinent information", as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation.

110. We are aware that the last sentence of Article 12.2 provides that the Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply a safeguard measure. In our view, the request for additional information is meant to enable the Council for Trade in Goods or the Committee on Safeguards to seek information on elements of information not covered by Article 12.2 or Article 4.2, or to elicit further details on "evidence of serious injury". We note that the listing of elements is not exhaustive as they are cited following the words "including" or "in particular". Contrary to what Korea argued and the Panel reasoned, such a request is not meant to fill in gaps created by omitting elements required under "all relevant information" or "evidence of serious injury".

111. With respect to the object and purpose of Article 12, we agree with the Panel that:

> … the notification serves essentially a transparency and information purpose. In ensuring transparency, Article 12 allows Members through the Committee on Safeguards to review the measures. Another purpose of the notification of the finding of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions. This allows any interested Member to decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation.[68]

[67] Panel Report, para. 7.127.

[68] *Ibid*., para. 7.126.

We believe that the purpose of notification is better served if it includes all the elements of information specified in Articles 12.2 and 4.2. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3, than they would otherwise be if the notification did not include all such elements. And, the Committee on Safeguards can more effectively carry out its surveillance function set out in Article 13 of the *Agreement on Safeguards*. At the same time, providing the requisite information to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it.

112. Whether Korea has acted consistently with the provisions of Article 12.2 depends on the content and extent of the information it has made available to the Committee on Safeguards in its notifications. According to the Panel:

> Korea's notification of the finding of serious injury caused by increased imports stated that imports had grown, that the domestic industry's share of domestic consumption had decreased and domestic stocks had increased. There is no explicit reference to any analysis of the level of sales, production, productivity, and employment as such, nor is there any reference to any causation element. …[69]

The Panel went on to state:

> We consider, however, that this notification contains sufficient information on what Korea considered to be evidence of injury caused by increased imports as well as on the other listed items in Article 12.2. … Consequently, we consider that the content of that Korean notification made pursuant to Article 12.1(b) meets the requirements of Article 12.2 of the Agreement on Safeguards.[70]

113. In light of the preceding analysis, we do not agree with the Panel that the content of Korea's notification in this case satisfies the requirement to provide "all pertinent information" to the Committee on Safeguards, since Korea failed to address all the factors that must be covered as "evidence of serious injury". Therefore, we reverse the Panel's finding in paragraph 7.136 of its Report, and conclude that Korea has acted inconsistently with its obligations under Article 12.2 of the *Agreement on Safeguards*.

[69]Panel Report, para. 7.135.

[70]*Ibid*., para. 7.136.

VII. Article 6.2 of the DSU

114. We turn now to certain procedural issues raised by Korea in the present appeal. The first of these procedural issues is whether the Panel erred in finding that the European Communities' request for the establishment of a panel met the requirements of Article 6.2 of the DSU.

115. Article 6.2 of the DSU reads as follows:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

116. In its examination of whether the European Communities' request for a panel met the requirements of Article 6.2 of the DSU, the Panel referred to a portion of a finding in our Report in *European Communities – Bananas*, in which we stated:

> "[we] accept the Panel's view that it was sufficient for the Complaining Parties to *list the provisions of the specific agreements alleged to have been violated* without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".[71] (emphasis added by the Panel)

117. The Panel also quoted from the European Communities' request for a panel in the instant case in the following terms:

> The contested safeguard measure was imposed in the form of an import quota on imports of certain dairy products (Korean CN codes 0404.90.0000, 0404.10.2190, 0404.10.2900 and 1901.90.2000) effective as of 7 March 1997 and made public through notification in the revision of "Separated Notice of Export-Import" and in "Detailed Principle of Import Licence on Imitation Milk Powder. …
>
> Therefore, the EC requests that the panel consider and find that this measure is in breach of Korea's obligations under the provisions of the Agreement on Safeguards, in particular of Articles 2, 4, 5 and 12 of the said Agreement and in violation of Article XIX of GATT 1994.[72]

[71]Panel Report, para. 7.3. See Appellate Body Report, *supra*, footnote 13, para. 141.

[72]Panel Report, para. 7.6.

118. Without further discussion, the Panel arrived at two conclusions. The first is the general statement that "a request for establishment of a panel is sufficiently detailed if it contains a description of the measures at issue and the claims, i.e. the violations alleged."[73] The second conclusion of the Panel purports to be an application of this general statement to the case before it:

> We consider, therefore, that the EC request for establishment of a panel is sufficiently detailed as it contains a description of the measures at issue and the claims, i.e. the violations alleged.[74]

119. Korea appeals both from the Panel's general statement regarding sufficiency under Article 6.2 of the DSU, and from the application of that statement to the European Communities' request for a panel in the present case. Korea asks us to set aside the entirety of the panel proceedings because the Panel erred in law in interpreting and applying Article 6.2 of the DSU.

120. We start our analysis of the Panel's ruling by examining the text of Article 6.2 of the DSU. It is convenient to quote the pertinent part of Article 6.2, once more:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. …

When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is "sufficient to present the problem clearly". It is not enough, in other words, that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly".

[73]Panel Report., para. 7.5.

[74]*Ibid*., para. 7.7.

121. As the Panel noted[75], we said in *European Communities – Bananas*, that:

> [we] accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.[76]

It appears to us that the Panel read this portion of our findings in *European Communities – Bananas* as establishing a litmus test for determining the sufficiency of the statement of the legal basis of the complaint.

122. The Panel, however, failed to note that in *European Communities - Bananas*, we went on to say that:

> As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel 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.* It is important that a panel request be sufficiently precise for two reasons: *first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.*[77] (emphasis added)

123. Thus, we did not purport in *European Communities – Bananas* to establish the mere listing of the articles of an agreement alleged to have been breached as a standard of precision, observance of which would *always* constitute sufficient compliance with the requirements of Article 6.2, *in each and every case*, without regard to the particular circumstances of such cases. If we were in fact attempting to construct such a rule in that case, there would have been little point to our enjoining panels to examine a request for a panel "*very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU*". Close scrutiny of what we in fact said in *European Communities – Bananas* shows that we, firstly, restated the reasons why precision is necessary in a request for a panel; secondly, we stressed that claims, not detailed arguments, are what need to be set out with sufficient clarity; and thirdly, we agreed with the conclusion of the panel that, in that case, the listing of the articles of the agreements claimed to have been violated satisfied the *minimum* requirements of Article 6.2 of the DSU. In view of all the circumstances surrounding that case, we concurred with the panel that the European Communities had not been misled as to what claims were in fact being asserted against it as respondent.

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[75]Panel Report, para. 7.3.

[76]Appellate Body Report, *European Communities – Bananas*, *supra*, footnote 13, para. 141.

[77]*Ibid*., para. 142.

124. Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[78] But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.

125. In *European Communities – Bananas*, we stated:

> Article 6.2 of the DSU requires that the *claims*, and not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint.[79]

126. In *European Communities – Computer Equipment*, we explored the due process objective of the request for the establishment of a panel with respect to the identification of the measure at issue, and concluded that:

> …We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel.[80]

127. Along the same lines, we consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated.

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[78]See Appellate Body Report, *Brazil – Desiccated Coconut*, *supra*, footnote 21, p. 22; Appellate Body Report, *European Communities – Bananas*, *supra*, footnote 13, paras. 145 and 147; and Appellate Body Report, *India – Patents*, *supra*, footnote 21, paras. 89, 92 and 93.

[79]Appellate Body Report, *European Communities – Bananas*, *supra*, footnote 13, para. 143.

[80]Appellate Body Report, *European Communities – Computer Equipment*, *supra*, footnote 41, para. 70.

128. For the foregoing reasons, we do not agree with the position, implicitly taken by the Panel, that the simple listing of articles of an agreement asserted to have been violated meets, always and in every case, the requirements of Article 6.2 of the DSU.

129. In the present case, we note that the European Communities' request for a panel, after identifying the Korean safeguard measure at issue, listed Articles 2, 4, 5 and 12 of the *Agreement on Safeguards* and Article XIX of the GATT 1994. Article XIX of the GATT 1994 has three sections and a total of five paragraphs, each of which has at least one distinct obligation. Articles 2, 4, 5 and 12 of the *Agreement on Safeguards* also have multiple paragraphs, most of which have at least one distinct obligation. The *Agreement on Safeguards* in fact addresses a complex multi-phased process from the initiation of an investigation, through evaluation of a number of factors, determination of serious injury and causation thereof, to the adoption of a definitive safeguard measure. Every phase must meet with certain legal requirements and comply with the legal standards set out in that Agreement.

130. In *European Communities – Bananas*, we called upon panels to examine the request for a panel "very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU". We note that the Panel in the present case treated this important issue in a perfunctory manner.[81] As discussed above, the Panel merely quoted a passage from our Report in *European Communities – Bananas* and the relevant part of the request for a panel. We consider that the Panel's treatment of this issue is not satisfactory.

131. In assessing whether the European Communities' request met the requirements of Article 6.2 of the DSU, we consider that, in view of the particular circumstances of this case and in line with the letter and spirit of Article 6.2, the European Communities' request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing. We, therefore, deny Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU.

[81]In our Report in *European Communities – Bananas*, we adverted to the possibility of dealing with Article 6.2 problems of the kind addressed there "without causing prejudice or unfairness to any party or third party" through standard, detailed working procedures for panels that provide for, *inter alia*, preliminary rulings (Appellate Body Report, *European Communities – Bananas*, *supra*, footnote 13, para. 144). We note that there appears to be no legal obstacle to the inclusion, in additional working procedures which panels adopt *ad hoc* after consultation with the parties, of provisions for preliminary rulings on, *inter alia*, questions concerning compliance with the requirements of Article 6.2.

VIII. The OAI Report

132. We come to the second procedural issue raised in this appeal, namely whether the Panel had improperly based its findings concerning the consistency of Korea's serious injury determination with Article 4.2 of the *Agreement on Safeguards* on the OAI Report.

133. In the course of reaching its conclusion that Korea's serious injury determination is not consistent with Article 4.2(a) of the *Agreement on Safeguards*[82], the Panel made the following statements:

> 7.30 … We note that the European Communities has initially relied on the notifications to the Committee on Safeguards to establish its claims. We are of the view that such notifications are not necessarily complete evidence of what the Korean national authorities actually did. Rather, the full reflection of the Korean investigation can only be found in the investigation report or the final determination by the Minister, and not (as argued by the European Communities at the first meeting of the Panel) in the notifications to the Committee on Safeguards. In its rebuttals and at the second meeting of the Panel with the parties, the European Communities, in support of its allegations, made reference to the OAI Report as well.
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> …
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> 7.59 … Since our task is to make an objective assessment of the factual considerations and reasoning of the Korean authorities in arriving at a finding of serious injury at the time of the determination, our analysis of Korea's compliance with the provisions in Article 4.2 will be on the basis of the OAI Report. …

134. Korea appeals from the above statements of the Panel and ascribes three errors in law to the Panel. Korea claims that the Panel erred, firstly, in characterizing Korea's submission of the OAI Report to the Panel[83]; secondly, in assessing Korea's action solely on the basis of the OAI Report[84]; and thirdly, in failing to consider Korea's argument that parties to a dispute settlement procedure cannot introduce new claims at or subsequent to the rebuttal stage.[85]

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[82]Panel Report, para. 8.1(a). This conclusion by the Panel is not appealed by Korea.

[83]Korea's appellant's submission, p. 27.

[84]*Ibid*., p. 23.

[85]*Ibid*., pp. 25-26.

135. In respect of Korea's first claim of error, we note that Korea submitted the OAI Report, in the Korean language, to the Panel as an attachment to its first written submission. The Panel said that if Korea wished to rely upon the OAI Report and to use it "in support of its allegations", Korea should submit that Report in one of the official languages of the WTO.[86] Korea did submit an English translation of the OAI Report after the first meeting of the Panel with the parties.[87] Korea now states that it did not place the OAI Report before the Panel "as a subject of dispute between the parties, or as evidence of compliance or non-compliance with the *Agreement on Safeguards*", but rather as "information that might be useful in explaining the context of and background to the dispute."[88] In addition to the OAI Report, Korea submitted other documentation that related to the actions taken by the Korean Government in the process leading to its safeguard measure.[89]

136. Whatever may have been Korea's specific purpose in submitting the OAI Report to the Panel, Korea must have believed that it was useful, in respect of its case as respondent, to do so. The Report clearly became part of the record of the Panel proceedings. We believe that the Panel was entitled to examine the Report and to consider its import for the whole case since Korea had presented it with its first written submission, even though Korea might not have submitted the OAI Report as evidence in its own defence.

137. In its second claim of error, Korea appears to suggest that the Panel, in evaluating Korea's actions leading up to the adoption of its safeguard measure, should have looked solely to the evidence submitted by the European Communities as complaining party. We do not agree with Korea in this respect. It is, of course, true that the European Communities has the *onus* of establishing its claim that Korea's safeguard measure is inconsistent with the requirements of Article 4.2 of the *Agreement on Safeguards*. However, under Article 11 of the DSU, a panel is charged with the mandate to determine

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[86]In para. 7.16 of its Report, the Panel stated:

> "*… should it wish to refer to the OAI Report in support of its allegations,* Korea should file a version of the report in one of the official languages of the WTO." (emphasis added)

In para. 7.18, of its Report, the Panel also stated:

> The Panel informed Korea that *if it intended to submit any piece of evidence, including the OAI Report*, it should do so by 20 November 1998, that is, the deadline given to the parties to answer the questions posed to them during the first substantive meeting of the Panel. In this way parties would be able to submit full and useful rebuttals before the second meeting of the Panel. (emphasis added)

[87]On 20 November 1998, Korea submitted, together with its answers to the questions submitted to it, an English version of the OAI Report, as Exhibit Korea-6. See Panel Report, para. 7.18.

[88]Korea's appellant's submission, p. 27. We note that in its appellee's submission, para. 51, the European Communities stated that Korea cited the OAI Report in para. 94 of its first written submission to refute the European Communities' claims.

[89]Panel Report, para. 7.30, footnote 417.

the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof. In *European Communities – Hormones*, we had occasion to stress that:

> The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts.[90]

The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.

138. We note that in examining the OAI Report, the Panel did not do anything out of the ordinary. The European Communities' claim was that Korea had disregarded certain requirements of Article 4.2 of the *Agreement on Safeguards* in its actions preceding and accompanying the adoption of its safeguard measure. The OAI Report was issued by the Korean authorities which, *inter alia*, investigated and evaluated the assertions of serious injury to the domestic industry involved. Thus, that Report was clearly relevant to the task of the Panel to determine the facts, and the Panel was within its discretionary authority in deciding whether or not, or to what extent, it should rely upon the Report in ascertaining the facts relating to Korea's injury determination.

139. Turning to Korea's third claim of error, we agree with Korea that a party to a dispute settlement proceeding may not introduce a new claim during or after the rebuttal stage. Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request.[91] By "*claim*" we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision.[92] Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions

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[90]Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 133.

[91]Appellate Body Report, *European Communities – Bananas*, *supra*, footnote 13, para. 143.

[92]*Ibid*., para. 141. See also Appellate Body Report, *India – Patents*, *supra*, footnote 21, para. 88; and Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 90, para. 156.

and the first and second panel meetings with the parties.[93] In *European Communities – Hormones*, we emphasized the substantial latitude enjoyed by panels in treating the *arguments* presented by either of the parties and said:

> … Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration.[94]

Both "claims" and "arguments" are distinct from the "evidence" which the complainant or respondent presents to support its assertions of fact and arguments.

140. Having carefully examined the Panel Report, we find no indication that the European Communities asserted a *new claim of violation* against Korea at or subsequent to the rebuttal stage of the proceedings. True enough, the European Communities in its first written submission relied mainly on Korea's notifications to the Committee on Safeguards to prove its claim that Korea had acted inconsistently with the requirements of Article 4.2 of the *Agreement on Safeguards*.[95] Subsequently, in its rebuttal submission and at the second meeting of the Panel with the parties, the European Communities explicitly referred to the OAI Report. The European Communities' reference to the OAI Report did not, however, constitute a new claim of violation. To the contrary, the European Communities referred to the OAI Report as *evidence or supplemental evidence* to substantiate the allegation of a violation of Article 4 already made in the request for the establishment of a panel.

141. We, therefore, conclude that the Panel did not err in law in basing its findings of inconsistency with Article 4.2 of the *Agreement on Safeguards* on the OAI Report.

IX. Burden of Proof

142. The third and last procedural issue raised in this appeal is 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*.

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[93]Appellate Body Report, *India – Patents*, *supra*, footnote 21, para. 88.

[94]Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 90, para. 156.

[95]The European Communities stated in para. 33 of its appellee's submission that the OAI Report is the same as the "KTC Report" and that in its first written submission it had already referred to the "KTC Report".

143. The Panel said in respect of the burden of proof:

> In the context of the present dispute, which is concerned with the assessment of the WTO compatibility of a safeguard measure imposed by a national authority, we consider that it is for the European Communities to submit a *prima facie* case of violation of the Agreement on Safeguards, namely, to demonstrate that the Korean safeguard measures are not justified by reference to Articles 2, 4, 5 and 12 of the Agreement on Safeguards. … In the present case, it is for Korea to effectively refute the European Communities' evidence and arguments, by submitting its own evidence and arguments in support of its assertions that, at the time of its determination, Korea did respect the requirements of the Agreement on Safeguards. As a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process. As a matter of process before the Panel, the European Communities will submit its arguments and evidence and Korea will respond to rebut the EC claims. At the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions as to whether the EC claims are well-founded.[96]

144. In its appeal, Korea contends that "as a threshold matter", "a panel must evaluate and make a finding on whether the complaining Member (i.e., the Member with the burden of proof) has established a *prima facie* case of a violation", before requiring the respondent to submit evidence of its own case or defence. The Panel, in Korea's view, "ignored this step in describing how it would apply the burden of proof and stated that it would simply weigh the evidence at the end of the proceedings."[97] Thus, the Panel "did not consider and *a fortiori* did not find that the European Communities made a *prima facie* case that justified its proceeding to examine the evidence and arguments" of Korea.[98]

145. We find no provision in the DSU or in the *Agreement on Safeguards* that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence. In our Report in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, we stated:

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[96]Panel Report, para. 7.24.

[97]Korea's appellant's submission, p. 30.

[98]*Ibid*., p. 31.

> [W]e do not find it objectionable that the Panel took into account, in assessing whether the United States had made a *prima facie* case, the responses of India to the arguments of the United States. This way of proceeding does not imply, in our view, that the Panel shifted the burden of proof to India. We, therefore, are not of the opinion that the Panel erred in law in proceeding as it did.[99]

146. Korea next argues that 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." According to Korea, "the Panel does not have the authority to make a party's claims for it or otherwise relieve a party of its task of presenting a *prima facie* case."[100] Korea submits that it is the *complainant*, not the Panel, that must establish a *prima facie* case. Since the conclusions of the Panel in respect of Article 4 of the *Agreement on Safeguards* were not based on any claims raised before the Panel by the complainant, Korea contends that the Panel could not have properly concluded "that the European Communities had discharged its burden of proof in respect of Article 4."[101] The Panel, hence, according to Korea, should have dismissed the European Communities' case without proceeding to consideration of Korea's own arguments and evidence.

147. As we understand it, the thrust of Korea's appeal in this respect is that the Panel had in effect made the European Communities' case for the European Communities. In *Japan – Agricultural Products*, we said:

> We consider that it was for the United States to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6. Since the United States *did not even claim* before the Panel that the "determination of sorption levels" is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the "determination of sorption levels" is an alternative measure within the meaning of Article 5.6.[102] (emphasis added)

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[99]Appellate Body Report, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, para. 143. See also Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 15, para. 192.

[100]Korea's appellant's submission, p. 32.

[101]*Ibid*., p. 33.

[102]Appellate Body Report, *Japan – Agricultural Products*, *supra*, footnote 17, para. 126.

We went on to state:

> Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency *based on specific legal claims asserted by it*. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but *not to make the case for a complaining party*. [103] (emphasis added)

148. In the present case, as we have already noted, the Panel stated that initially, i.e., in its first written submission, the European Communities had relied mostly upon Korea's notifications to the Committee on Safeguards to support its claims.[104] The Panel record shows that at the first meeting of the Panel with the parties, the Panel posed the following questions to the European Communities:

> Does the EC believe that the obligation in Articles 3 and 4 of [the *Agreement on Safeguards*] are evidenced in the WTO Notifications? Why does the EC concentrate its argumentation only [on] what was reflected [in] these WTO notifications?

The European Communities responded that all information relating to Korea's safeguards investigation "should be found, or at least referred to, in the notification".[105] However, in its rebuttal submission and at the second meeting of the Panel with the parties, the European Communities made references to the OAI Report and relied on this Report as evidence or supplemental evidence to support its claim of violation of Article 4 of the *Agreement on Safeguards*.

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[103]Appellate Body Report, *Japan – Agricultural Products*, *supra*, footnote 17, para. 129. We acknowledged this ruling in Appellate Body Report, *Canada – Aircraft*, *supra*, footnote 15, para. 194.

[104]Panel Report, para. 7.24.

[105]See the European Communities' answers to the Panel's questions presented at the first meeting with the Panel (10-11 November 1998). We also note that as part of its response to the Panel's question: "Where should the information used and analysis performed by the national authority of Korea in its determination of its safeguard measures be found?", Korea stated:

> Although it may be possible to conclude that the OAI Report forms the fundamental basis of the Government of Korea's determination, it should be clear that the [Korean Trade Commission] and the Minister together comprise the "competent authorities" and that … *any information used at any time subsequent to the issuance of the OAI Report and prior to the Minister's final decisions to implement relief measures is also relevant* and needs to be considered as part of that decision. (See Korea's answer to the Panel's questions presented at the first meeting with the Panel (10-11 November 1998); emphasis added)

In para. 33 of its appellee's submission, the European Communities stated that the notification by Korea of the adoption of its safeguard measure contained information more recent than that in the OAI Report and that the European Communities wanted to give Korea the "benefit of the doubt".

149. On the basis of the questions posed by the Panel and the reactions of the European Communities, we see no ground to conclude that the Panel relieved the European Communities of its task of showing the inconsistency of Korea's safeguards investigation with Article 4.2 of the *Agreement on Safeguards*. The Panel did not overstep the bounds of legitimate management or guidance of the proceedings before it in the interest of efficiency and dispatch.

150. We, therefore, conclude that the Panel did not err in law in its application of the burden of proof in respect of its findings under Article 4 of the *Agreement on Safeguards*.

X. Findings and Conclusions

151. For the reasons set out in this Report, the Appellate Body:

(a) does not agree with the Panel that the clause – "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 specify anything additional as to the conditions under which measures pursuant to Article XIX may be applied", and, therefore, reverses the Panel's conclusion in paragraph 7.48 of its Report that "Article XIX of GATT does not contain such a requirement";

(b) is unable to come to a conclusion on whether or not Korea violated its obligations under Article XIX:1(a) of the GATT 1994 in the absence of relevant factual findings in the Panel Report or undisputed facts in the Panel record;

(c) upholds the Panel's finding in paragraph 7.101 of its Report that the first sentence of Article 5.1 of the *Agreement on Safeguards* imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment;

(d) reverses the Panel's broad finding in paragraph 7.109 of its Report that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is *not* a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years;

(e) is unable to come to a conclusion on whether or not Korea's safeguard measure is consistent with the second sentence of Article 5.1 of the *Agreement on Safeguards* in the absence of relevant factual findings in the Panel Report or undisputed facts in the Panel record;

(f) reverses the Panel's finding in paragraph 7.136 of its Report and concludes that Korea has acted inconsistently with its obligation to notify "all pertinent information" under Article 12.2 of the *Agreement on Safeguards*;

(g) denies Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU;

(h) concludes that the Panel did not err in law in basing its findings of inconsistency with Article 4.2 of the *Agreement on Safeguards* on the OAI Report; and

(i) concludes that the Panel did not err in law in its application of the burden of proof in respect of its findings under Article 4 of the *Agreement on Safeguards*.

152. The Appellate Body *recommends* that the DSB request that Korea bring its safeguard measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Safeguards* into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 29th day of November 1999 by:

Said El-Naggar
Presiding Member

Claus-Dieter Ehlermann
Member

Florentino Feliciano
Member