

**KOREA – DEFINITIVE SAFEGUARD
MEASURE ON IMPORTS OF CERTAIN
DAIRY PRODUCTS**

Report of the Panel

The report of the Panel on Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 21 June 1999. Pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

I. INTRODUCTION

A. BACKGROUND

1.1 On 12 August 1997, the European Communities requested consultations with Korea regarding a definitive safeguard measure on imports of certain dairy products (WT/DS98/1). The European Communities made their request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the General Agreement.

1.2 On 25 August 1997 Australia, requested to be joined in the consultations (WT/DS98/2). The request was accepted by Korea on 28 August 1997 (WT/DS98/3).

1.3 Pursuant to this request, the European Communities consulted with Korea in Geneva on 10 September 1997 and 16 October 1997. Australia participated in these consultations as a third party. No mutually satisfactory solution was reached.

1.4 On 9 January 1998, the European Communities requested the establishment of a panel with the standard terms of reference provided by Article 7 of the DSU (WT/DS98/4). The European Communities made this request pursuant to Article XXIII:2 of the General Agreement on Tariffs and Trade ("GATT"), Articles 4 and 6.1 of the DSU, and Article 14 of the Agreement on Safeguards. At the Dispute Settlement Body ("DSB") meeting of 22 January 1998, the European Communities informed the DSB that they were for the time being not pursuing its Panel request.

1.5 On 10 June 1998, the European Communities reiterated its request for the establishment of a Panel.

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.6 At its meeting on 22 July 1998, the Dispute Settlement Body ("DSB") established a panel pursuant to the EC's request (WT/DS98/5). The Panel's terms of reference are:

To examine, in the light of the relevant provisions of the covered agreements cited by European Community in document WT/DS98/4 the matter referred to the DSB by the European Community in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.7 The United States reserved its rights as to participate in the Panel proceedings as third party.

1.8 On 20 August 1998, the Panel was constituted with the following composition:

Chairman: Mr. Ole Lundby
Members: Ms. Leora Blumberg
Ms. Luz Elena Reyes

C. PANEL PROCEEDINGS

1.9 The Panel met with the Parties on 10/11 November 1998 and on 16/17 December 1998.

1.10 The Panel submitted its interim report to the parties on 3 March 1999. On 17 March 1999, both parties submitted written requests for the Panel to review precise aspects of the interim report. At the request of the European Communities, the Panel held a further meeting with the parties on

29 March 1999 on the issues identified in the written comments. The Panel submitted its final report to the parties on 8 April 1999.

II. FACTUAL ASPECTS

2.1 This dispute concerns definitive safeguard measures imposed by Korea on imports of skimmed milk powder preparations ("SMPP") classified under tariff headings HS 0404.90.0000 and 1901.90.2000. On 17 May 1998, based on a request by the National Livestock Cooperatives Federation ("NLCF") filed on 2 May 1996, the Korean Trade Commission ("KTC") decided on the initiation of the requested investigation.

2.2 On 11 June 1996, Korea notified the WTO Committee on Safeguards under Article 12.1(a) of the Agreement on Safeguards regarding the KTC's initiation of a safeguards investigation and the reasons supporting initiation.¹

2.3 On 23 October 1996, the KTC completed its Investigation Report on Industrial Injury Caused by the Increase of Certain Dairy Product Imports. A Notice of this fact was published in Korea's Official Gazette dated 11 November 1996. Non-confidential copies of the Investigation Report on Industrial Injury by the Office of Administration and Investigation ("OAI Report") were available on request prior to that date.

2.4 On 2 December 1996, Korea notified the Committee on Safeguards under Article 12.1(b) of the Agreement on Safeguards that the KTC had made a finding of serious injury to the domestic industry caused by the increased imports of dairy products.²

2.5 On 21 January 1997, Korea submitted a notification under Article 12(c) of the Agreement on Safeguards.³ The notification informed the Committee that Korea proposed to apply a safeguard measure on imports of certain dairy products.

2.6 On 31 January 1997, Korea filed a notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards regarding the non-application of safeguard measures to developing countries.⁴

2.7 The final decision by Korea to apply the safeguard measure was made, and went into effect, on 7 March 1997. Notice of the application of the measure was published in Korea's Official Gazette.

2.8 On 24 March 1997, Korea submitted a supplemental notification to the Committee on Safeguards under Article 12(c) of the Agreement on Safeguards.⁵ In its notification, Korea informed the Committee that it had taken a final decision on the application of a safeguard measure on certain dairy products.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

A. EUROPEAN COMMUNITY

3.1 The **European Communities** requested the Panel to find that Korea has violated Article XIX:1(a) of GATT and Articles 2.1, 4.2(a), 4.2(b), 5.1 and 12(1) to (3) of the Agreement on Safeguards.

¹ G/SG/N/6/KOR/2 (1 July 1996).

² G/SG/N/8/KOR/1 (6 December 1996).

³ G/SG/N/10/KOR/1 (27 January 1997).

⁴ G/SG/N/11/KOR/1 (21 February 1997).

⁵ G/SG/N/10/KOR/1/Suppl.1 (1 April 1997)

B. KOREA

3.2 **Korea** requested the Panel to find that the European Communities has not discharged its burden of proving that Korea failed to examine relevant facts or failed to explain adequately the basis for its determination and, therefore, conclude that the safeguard measure on SMPP was imposed by Korea in a manner fully consistent with its obligations under the Agreement on Safeguards.

[Parties' arguments in Sections IV and V deleted from this version]

VI. INTERIM REVIEW

6.1 On 17 March 1999, The European Communities and Korea requested the Panel to review, in accordance with Article 15.2 of the DSU, certain aspects of the interim report that had been transmitted to the parties on 3 March 1999. The European Communities requested the Panel to hold an additional meeting. This additional meeting of the Panel with the parties took place on 22 March 1999.

6.2 We have reviewed the arguments and suggestions presented by the parties, and finalized our report, taking into account those comments by the parties which we considered justified. In doing so we have ensured that no new arguments were introduced at this stage of the panel process. In this context we have made slight modifications to certain paragraphs, including those made to paragraphs 4.325, 4.416 to 4.419, 4.449 and 4.452 of the descriptive part and paragraphs 7.16, 7.18, 7.23, 7.24, 7.30, 7.31, 7.46, 7.49, 7.55, 7.70, 7.72, 7.73, 7.75, 7.77, 7.78, 7.79, 7.86, 7.87, 7.96 and 7.116 of the findings. In addition, we have made other minor modifications including linguistic and typographical corrections.

VII. FINDINGS

A. PROCEDURAL MATTERS

7.1 In the present section, we address two procedural objections raised by Korea in its first submission. We also recall an oral ruling made at the end of the first substantive meeting of the Panel with the parties regarding Korea's request to file the English version of its OAI Report, at a date following the first substantive meeting of the Panel. Finally, we address Korea's challenge of the scope of this dispute, namely the consequences of the absence of any claim by the European Communities under Article 3 of the Agreement on Safeguards.

1. Insufficiency of the EC Request for Establishment of the Panel

7.2 Korea requests the Panel to reject the European Communities' complaint in its entirety on the basis of the insufficiency of its request for establishment of a panel, in violation of Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU"). Korea argues that the EC panel request is in violation of Article 6.2 of the DSU as it simply lists four articles of the Agreement on Safeguards, which, it argues, is insufficient "especially in a request relating to the determination of a domestic authority...". For Korea the panel request must contain a detailed statement of the matter in dispute and the legal basis of the European Communities' claims, in order to permit the defendant to conduct an effective defense and the third parties to assess whether or not to intervene. Korea requests this Panel to refrain from following the interpretation given by the Appellate Body in the *EC - Bananas*⁴⁰⁴ case, where it was stated that it was sufficient under Article 6.2 of the DSU for a panel request to list the articles of the relevant agreements.

7.3 On this issue the European Communities refers the Panel to the conclusions of the Appellate Body in *EC - Bananas*:

"[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

⁴⁰⁴ *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("EC-Bananas"), adopted on 25 September 1997, WT/DS27/AB/R.

detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".⁴⁰⁵ (emphasis added)

7.4 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".

7.5 We consider 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.⁴⁰⁶

7.6 We note that the EC request for establishment of a panel contains the following references:

"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."

7.7 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.

2. Lack of Economic Interest

7.8 Korea also claims that the European Communities admits having little or no commercial interest in bringing this matter before the Panel. For Korea this admission, coupled with the failure to settle the dispute during the consultations, suggests that the current proceeding is merely an attempt by the European Communities to use the DSU to establish a precedent on safeguards by way of an advisory opinion from the Panel. Korea argues that this goes against the spirit of the DSU which provides that formal dispute settlement should be reserved for disputes where Members consider, in good faith, that their interests are being impaired, and that Article 3.7 of the DSU specifically instructs Members to exercise restraint in bringing dispute settlement cases and articulates a preference for mutually agreed solutions over resort to formal dispute settlement.

7.9 The European Communities responds that in the *EC - Bananas* case, the Appellate Body, in reply to a similar objection by the European Communities, held that:

"a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of

⁴⁰⁵ *EC - Bananas*, Appellate Body Report, para. 141.

⁴⁰⁶ See for instance, the Appellate Body statement in *EC - Bananas*, Appellate Body Report, para. 141. In the recent Report on *Guatemala - Antidumping Investigation Regarding Portland Cement from Mexico* (adopted on 25 November 1998, WT/DS60/AB/R) ("*Guatemala - Cement*") the Appellate Body reiterated that these were the two requirements prescribed by Article 6.2 of the DSU. We see no reason to depart from this position.

Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'." ⁴⁰⁷

7.10 Korea also alleges that after intensive consultations the parties appeared to have settled their dispute. For Korea, the fact that the European Communities later withdrew its acceptance of the settlement proposed by Korea is evidence of lack of good faith on the part of the European Communities.

7.11 As to the alleged acceptance of a settlement offered by Korea, the European Communities responds that there never was any formal proposal or acceptance of a mutually agreed settlement. For the European Communities, each side negotiated in good faith in an effort to reach a mutually satisfactory solution in this case, but that solution did not materialise. The European Communities concludes by stating that if Korea wants to challenge the European Communities' good faith in negotiations and in bringing this dispute, it must bear the burden of proving its allegations.

7.12 First, we note that Korea is not clear as to what it wants the Panel to do in response to its argument. Korea does not request the rejection of the complaint for lack of economic interest on the part of the European Communities or for lack of good faith on the part of the European Communities during the negotiations. However, assuming that Korea's position is that there is a requirement for the European Communities to have some economic interest and that the European Communities has failed to meet it, the Panel would have to decide what action is appropriate. We consider therefore that we should rule on this issue.

7.13 Regarding Korea's reference to the lack of economic interest of the European Communities, we consider that under the DSU there is no requirement that parties must have an economic interest. In *EC - Bananas*, the Appellate Body stated that the need for a "legal interest" could not be implied in the DSU or in any other provisions of the WTO Agreement and that Members were expected to be largely self-regulating in deciding whether any DSU procedure would be "fruitful". We cannot read in the DSU any requirement for an "economic interest". We also note the provisions of Article 3.8 of the DSU, pursuant to which nullification and impairment is presumed once violation is established.

7.14 Even assuming that there is some requirement for economic interest, we consider that the European Communities, as an exporter of milk products to Korea, had sufficient interest to initiate and proceed with these dispute settlement proceedings.

7.15 Concerning Korea's reference to the unsuccessful settlement negotiations, we can only note that the European Communities considers that the offers by Korea were not acceptable to it, and both parties admit that no formal settlement of the present dispute was ever reached and approved by the relevant national authorities. The DSU favours the conclusion of mutually acceptable solutions. We note that, for the present dispute, no mutually agreed solution was notified to the DSB. We can only recall that when a WTO Member considers that its rights have been nullified by the actions of another Member it is entitled⁴⁰⁸ (under Article 14 of the Safeguards Agreement and Articles XXII and XXIII of GATT 1994) to initiate the dispute settlement procedures envisaged in the DSU.

⁴⁰⁷ See *EC - Bananas*, Appellate Body Report, para. 135.

⁴⁰⁸ See Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R ("*US - Shirts and Blouses*"), at page 13.

3. Submission of the OAI Report

7.16 In its first submission Korea refers to a report of the Korean Trade Commission (OAI Report)⁴⁰⁹ of which it submitted only a version in the Korean language. At the outset of the first substantive meeting of the Panel with the parties, the Panel stated that it was disappointed that Korea had filed only a Korean language version of the OAI Report. Although the Panel understood the difficulties involved with the translation of the investigation report, the Panel suggested to Korea that 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. Korea raised doubts as to whether the OAI report was relevant since in Korea's view the EC limited its complaints to the quality and depth of Korea's notification under Article 12. The Panel was not addressing the issue whether it was for Korea to submit such OAI Report but simply that any submission of evidence had to be done in one of the official languages of the WTO.

7.17 At the end of the first meeting of the Panel, Korea informed the Panel that it would need an additional period beyond what was scheduled for answers and rebuttals to submit an English version of the OAI Report.⁴¹⁰

7.18 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. 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.

7.19 We based our ruling on paragraph 5 of the Additional Rules of Procedure, adopted by the Panel pursuant to Article 12.1 of the DSU, which provides that:

"5. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals submissions or answers to questions. ... "

7.20 We also consider that this is in line with the two stage approach advocated by the Appellate Body in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*.⁴¹¹

⁴⁰⁹ In its 2 December 1996 notification, G/SG/N/8/KOR/1, circulated on 6 December 1996 Korea stated that the term "OAI Report" is equivalent to the "KTC Report". Therefore, in our findings we shall refer to the report of the KTC's investigation as the "OAI Report".

⁴¹⁰ In response, the European Communities complained that it appeared to it that Korea had had *ex parte* communications with the Panel during which, according to the European Communities, the Panel had authorized Korea to submit an English version of the OAI Report after the rebuttals. The Panel immediately informed the parties that no members of the Panel (nor any one from the Secretariat) had communicated with Korea on this issue. The only reference to the filing of the OAI Report was contained in the transmission letter that Korea sent to the Panel with its first submission and which was copied to the parties. The latter part of this letter reads as follows: "Given the time constraint, Korea was unable to produce an official English version of the investigation report of the Korea Trade Commission. Only the original version (Korean version) is attached herewith. Korea will submit the English version as expeditiously as possible." Clearly there had been no *ex parte* communication.

⁴¹¹ See Appellate Body Report in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS57/AB/R, adopted on 22 April 1998, para. 79 ("*Argentina – Measures Affecting Apparel*").

4. The absence of a claim by the European Communities under Article 3 of the Agreement on Safeguards

7.21 In its second submission, Korea argues that because the European Communities did not raise any claim under Article 3 or Article 4.2(c), the European Communities must be deemed to accept that the "competent authorities" in Korea have published: "a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" (Article 3.1, final sentence). For Korea, since the European Communities has failed to invoke Article 3 of the Agreement on Safeguards, and has failed to raise claims under Article 4.2(c) of that Agreement, the European Communities is, therefore, only challenging the quality and depth of Korea's notifications under Article 12 of the Agreement on Safeguards. The European Communities agrees with Korea that it is not bringing a complaint under Article 3 of the Agreement on Safeguards, nor is it relying upon Article 4.2(c) thereof. For the European Communities this does not affect its right to challenge the substance of the OAI Report.

7.22 We agree with the European Communities that the absence of a claim under Article 3 of the Agreement on Safeguards means at most that the European Communities agrees that the report is WTO compatible for the purpose of Article 3.1 of the Agreement on Safeguards. The European Communities has the right to raise more specific claims under Article 4 of the Agreement on Safeguards and has done so. We consider that if a Member wants to challenge the WTO compatibility of the manner in which an "injury" determination was performed, or the choice of an appropriate measure to be imposed, this Member does not have to challenge the publication of the final report as such.

B. BURDEN OF PROOF

7.23 Korea alleges that the burden of proof is on the European Communities and adds that this burden "does not shift between the parties during the dispute". The European Communities does not submit any argument on the burden of proof.

7.24 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.⁴¹² We recall in this regard the statement of the Appellate Body in *EC - Hormones*⁴¹³ that "... a *prima facie* case is one which, in the absence of *effective refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case". It is therefore for Korea to provide an "effective refutation" of the European Communities' case. 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.⁴¹⁴ 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

⁴¹² See Appellate Body Report in *Australia - Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, ("*Australia - Salmon*"), paras. 257-261.

⁴¹³ Appellate Body Report on *European Communities - Measures Concerning Meat and Meat Products ("EC - Hormones")*, adopted on 13 February 1998, WT/DS26 and 48/AB/R, para. 104.

⁴¹⁴ We note that this was the conclusion reached by the Panel in *US - Shirts and Blouses* (adopted on 27 May 1997, WT/DS33/R) para. 6.8: "... it was for India to submit a *prima facie* case of violation of the ATC, namely, that the restriction imposed by the United States did not respect the provisions of Articles 2.4 and 6 of the ATC. It was then for the United States to convince the Panel that, at the time of its determination, it had respected the requirements of Article 6 of the ATC." This was confirmed by the Appellate Body.

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.

7.25 In the present case, after considering the extensive submissions of both parties, we must weigh the evidence submitted by each of them and assess the value of their legal arguments in view of the provisions of the Agreement on Safeguards to determine whether the European Communities' claims are well-founded.

C. STANDARD OF REVIEW

7.26 We note there are no specific provisions on standard of review in the Agreement on Safeguards. We consider, therefore, in line with the prescription of the Appellate Body in the *EC - Hormones* dispute, that in the absence of a specific standard of review for the relevant WTO multilateral trade agreement, the provisions of Article 11 of the DSU are applicable⁴¹⁵.

7.27 Article 11 of the DSU provides that "... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...".

7.28 Korea asks the Panel not to enter into a *de novo* review of its national authorities' determination to impose a safeguard measure. For Korea, the standard of review of Article 11 implies that the function of the Panel is to assess whether Korea (i) examined the relevant facts before it at the time of the investigation; and (ii) provided an adequate explanation of how the facts before it as a whole supported the determination made. Korea adds that a certain deference or latitude should be left to the national authorities.

7.29 The European Communities agrees that the standard is that established in Article 11 of the DSU and that the Panel should not perform a *de novo* assessment. In this context, the European Communities claims that it is not contesting the basic economic data produced by Korea but only their completeness and the conclusions drawn from them. The European Communities submits that the "objective assessment of the facts" referred to in Article 11 DSU cannot be satisfied by verifying what conclusions the investigating authority came to but must also include "how" it came to those conclusions, that is to say the national authority must provide a reasoned opinion explaining how such factors and arguments have led to its findings.

7.30 We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue⁴¹⁶. However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last

⁴¹⁵ *EC - Hormones*, Appellate Body Report, para. 116.

⁴¹⁶ We recall that in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear ("US - Underwear")*, (adopted on 25 February 1997, WT/24/R), paras. 7.53-54, a case dealing with a safeguard action under the ATC, the panel reached the conclusions that the standard of review was that established in Article 11 of the DSU and commented on the implications of such standard of review for safeguard measures. See also the Panel Report in *Brazil - Countervailing Duty Proceeding Concerning Imports of Milk Powder from the European Community*, adopted on 28 April 1994, SCM/179: "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding.", para. 286.

sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected. In this case, this evidence is found mainly in the Report by the Office of Administrative Investigation ("OAI Report") and the subsequent determinations by the relevant Korean authorities⁴¹⁷. 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 Minister⁴¹⁸, 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.

7.31 We consider, further, that Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts in their possession or which they should have obtained in accordance with Article 4.2 of the Agreement on Safeguards 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. This is not to say that the Panel interprets the Agreement on Safeguards as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint.⁴¹⁹ Korea remains free to choose an appropriate method of assessing whether the state of its domestic industry was caused by imports of SMPP, or by other factors, but it must be in a position to demonstrate that it did address the relevant issues. We also consider that this standard of review is in line with GATT/WTO practice.

D. GENERAL PRINCIPLES OF INTERPRETATION

7.32 In its examination of the Agreement on Safeguards, the Panel is bound by the principles of interpretation of public international law (Article 3.2 of the DSU) which include Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As provided in these articles and as applied by panels and the Appellate Body, we shall interpret the provisions of the Agreement on Safeguards on the basis of the ordinary meaning of the terms of its provisions in their context, in the light of the object and purpose of the Agreement on Safeguards, the GATT 1994 and the WTO Agreement. We note also Article XVI:1 of the WTO Agreement which provides that "... the WTO shall be guided by the decisions, procedures and customary practices followed by CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

E. CLAIMS UNDER ARTICLE XIX OF GATT

7.33 The European Communities initially makes two claims under Article XIX of GATT 1994. In its first submission it claims that Korea failed to examine whether the import trends of the products under investigation were the result of "unforeseen developments" as provided for in Article XIX:1(a). Korea responds that the text of the Agreement on Safeguards supports the interpretation that the provisions therein established are now the sole articulation of the rules that must be followed in the

⁴¹⁷ Evidence of what the Korean authorities did can also be found in the present case in: The Determination to Initiate an Investigation (17 May 1996, Exhibit Korea-3 and Exhibit Korea-4), Public Notice of Decision on Injury by the KTC (11 November 1996, Exhibit Korea-7), Public Notice of Implementation of Relief Measure by the Ministry of Commerce, Industry and Energy (7 March 1997, Exhibit Korea-9).

⁴¹⁸ See Section IV.B.2(b), *supra*.

⁴¹⁹ We note that a similar conclusion was reached by the Panel in *US – Shirts and Blouses*, para. 7.52.

application of a safeguard measure. In its first submission the European Communities also argues that Korea failed to comply with its obligations under Article XIX:1(a) of GATT and Article 2 of the Agreement on Safeguards, to address whether the "conditions" under which importation of the products being investigated were of such a nature as to cause serious injury to the domestic industry producing like or directly competitive products. In its second submission, the European Communities argues that failing to examine under which conditions these increased imports occurred and in particular the prices at which the products were imported is a violation of the provisions of Article 2.1 of the Agreement on Safeguards (and the European Communities made no further reference to Article XIX:1(a) of GATT). Therefore, we shall examine the European Communities' claim that Korea failed to examine under which conditions these importations occurred only in relation to its claims under Article 2 of the Agreement on Safeguards.

7.34 The claim of the European Communities regarding "unforeseen developments" under Article XIX of GATT, the wording of which is not repeated in the Agreement on Safeguards, necessitates that we examine the relationship between the provisions of Article XIX of GATT and those of the Agreement on Safeguards.

7.35 The parties debated at length whether there is a conflict between the provisions of Article XIX of GATT and those of the Agreement on Safeguards and how the Panel should interpret the relationship between the terms of Article XIX:1 of GATT and the different terms used in Article 2.1 of the Agreement on Safeguards.⁴²⁰

7.36 Essentially, Korea argues that there is such a conflict, which should be resolved in favour of the exclusive application of the Agreement on Safeguards. The European Communities submits that all WTO obligations are generally cumulative. For the European Communities, the provisions of Article XIX of GATT, which are still fully applicable because there is no conflict between the provisions of the first paragraph of Article XIX and Article 2.1 of the Agreement on Safeguards, impose in addition to those of the Agreement on Safeguards, a condition that the increase of imports must be "the result of unforeseen developments".

7.37 We recall that the terms of a treaty must be interpreted with reference to their ordinary meaning taken in their context and in light of the object and purpose of the agreements examined. We also recall the principle of "effective interpretation" whereby all terms must be given their full meaning and must be interpreted with each other to avoid inconsistencies or "inutility"⁴²¹.

7.38 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

⁴²⁰ We refer to the European Communities' arguments and Korea's arguments in Section IV.C of this Panel Report.

⁴²¹ The principle of effective interpretation or "l'effet utile" or in latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty. For a discussion of this principle, see Yearbook of the International Law Commission, 1966, Vol II A/CN.4/SER.A/1966/Add.1 page 219 and following. See also *E.g., Corfu Channel Case* (1949) I.C.J. Reports, p.24 (International Court of Justice); *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)* (1994) I.C.J. Reports, p. 23 (International Court of Justice); Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è ed. (1994) para. 17.2); D. Carreau, Droit International, (1994) para. 369. See for instance the statement of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R : "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"; also the Appellate Body Report on *Japan – Taxes*, page 12; Appellate Body Report on *US - Underwear*, adopted on 25 February 1997, WT/DS24/AB/R, page 16.

simultaneously unless there is a formal "conflict" between them.⁴²² In the absence of conflict, there remain, however, difficult issues of interpretation for the reader to reconcile various provisions of a treaty as extensive as the WTO Agreement.⁴²³

7.39 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 the Article XIX:1 of GATT and those of Article 2.1 of the Agreement on Safeguards. Our conclusion is based on our interpretation of the ordinary meaning of the terms of Article XIX:1 of GATT.

7.40 The first paragraph of Article XIX of GATT reads as follows:

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 contracting party 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."

Article 2.1 of the Agreement on Safeguards provides that

"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."

7.41 We recall that the purpose of Article XIX was (and still is) to allow an importing Member to deviate temporarily from its obligations under Articles II and XI of GATT (i.e. to suspend its concessions or other obligations) in situations of increased imports causing serious injury to the relevant domestic industry. We consider that the first paragraph of Article XIX provides only for that: an importing Member is "free", in situations where "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" to deviate temporarily from Articles II and XI of GATT.

7.42 We consider that the prior section of the sentence, "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..." 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

⁴²² The principle of interpretation against conflict has been confirmed by the Appellate Body in *Canada – Certain Measures Concerning Periodicals*, adopted on 30 July 1997, WT/DS31/AB/R, ("Canada Periodicals"), page 19; in *EC – Bananas*, paras 219-222; in *Guatemala – Cement*, para.65; and by the panel in *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998, WT/DS54, 55, 59 and 64/R (not appealed) ("*Indonesia – Autos*"), para. 14.28. For a definition of conflict, see for instance the Appellate Body statement in *Guatemala – Cement*, para. 65 or the Panel Report on *Indonesia – Autos*, para. 14.28.

⁴²³ See for instance the Panel and Appellate Body Reports in *Brazil – Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/R and WT/DS22/AB/R, ("*Brazil – Desiccated Coconut*") where it was concluded that although there is no strict conflict between them the provisions of Article VI of GATT must be reconciled with those of Article 32.3 and 32.4 of the SCM Agreement.

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.

7.43 For us, the ordinary meaning of the terms "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement" leads us to conclude that this proposition 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). In other words, this sentence could read

"If, notwithstanding this new set of rules that we have just agreed upon... which imply that a contracting party cannot use quotas (XI) or breach its bindings (II), one contracting party is faced with increased imports that are causing serious injury, that contracting party shall be free to suspend the obligation in whole or in part (XI) or to withdraw or modify the concession (II)."

7.44 The reference to "unforeseen developments" was probably considered necessary as negotiators had just ended a negotiating exercise which was based on expectations of trade increases (therefore foreseen developments) and where some quantitative restrictions were grand-fathered. We think that this reference to "unforeseen circumstances" must be interpreted within its context, namely in view of the rest of this proposition which provides that "... the effect of the obligations incurred by a contracting party under this Agreement". These latter terms can only refer to the binding nature of the GATT prohibitions against breach of tariff concessions and the prohibition against quotas, as it would not be logical to conclude that a Trade Minister would have negotiated a particular concession if it could have been foreseen that such a concession would result in increased imports, that, in turn, would seriously injure an industry in the country granting the concession.

7.45 In other words, 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.

7.46 This interpretation is compatible with the object and purpose of GATT which was to ensure some certainty and predictability in tariff bindings and other GATT obligations. Our interpretation of these provisions of Article XIX:1 of GATT is confirmed by the practice of the contracting parties⁴²⁴ over some 48 years and the adoption of the new Agreement on Safeguards.⁴²⁵

7.47 The adoption of the Agreement on Safeguards without this phrase "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement" is logical. It was not necessary to refer to this context which had by then evolved. Members had since understood the GATT system of binding obligations. In support of this interpretation, we recall

⁴²⁴ Article XVI:1 of the Marrakesh Agreement Establishing the WTO.

⁴²⁵ In 1951, the Working Party on *"Withdrawal by the United States of a Tariff Concession under Article XIX"*, (except for the United States), agreed that unforeseen developments referred to events occurring after the negotiation of the relevant tariffs and, although the Working Party considered that this phrase contained a criterion to be respected, it rendered satisfaction of this criterion automatic, since it would not be reasonable to expect a contracting party to foresee that imports would cause serious injury to its domestic industry. Working Party on *Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement ("Fur Felt Hat")*, GATT/CP.6/SR 19 (adopted 22.10.51).

that in *Brazil – Deseccated Coconut* the Appellate Body made clear that some of the Annex 1A agreements represent an elaboration or evolution of the provisions of GATT 1994. Because Members had understood that this reference to "unforeseen developments" did not add to the rest of the paragraph (but rather described its context), there was no need to insert it explicitly in the Agreement on Safeguards.

7.48 Consequently, 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.

F. VIOLATION OF ARTICLE 2.1 OF THE AGREEMENT ON SAFEGUARDS - FAILURE TO ANALYZE "UNDER SUCH CONDITIONS"

7.49 In its first submission, the European Communities argues that Korea violated Article 2.1 of the Agreement on Safeguards and Article XIX:1 of GATT because Korea failed to examine under which conditions the imports occurred and in particular Korea failed to consider the prices at which the product was imported. In its second submission, the European Communities limits that specific argument (failure to examine under which conditions the imports occurred) to its claim of violation of Article 2.1 of the Agreement on Safeguards only. Korea responds that there is no requirement to examine the prices of the imports with reference to those of the like or directly competitive products as such. Korea adds that it did consider, in its overall determination under Article 2 of the Agreement on Safeguards, whether the SMPP were imported into Korea in such increased quantities and under such conditions as to cause serious injury to the domestic industry that produces like or directly competitive products to SMPP. We shall examine this EC argument only with reference to its claim under Article 2 of the Agreement on Safeguards.

7.50 Article 2 of the Agreement on Safeguards reads:

"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." (emphasis added).

7.51 Although the prices of the imported products will most often be a relevant factor indicating how the imports do, in fact, cause serious injury to the domestic industry, we note that there is no explicit requirement in Article 2⁴²⁶, that the importing Member perform a price analysis of the imported products and the prices of the like or directly competitive products in the market of the importing country.

7.52 We consider that the phrase "and under such conditions" does not provide for an additional criterion or analytical requirement to be performed before an importing Member may impose a safeguard measure. We are of the view that the phrase "and under such conditions" qualifies and relates both to the circumstances under which the products under investigation are imported and to the circumstances of the market into which products are imported, both of which must be addressed by the importing country when performing its assessment as to whether the increased imports are causing serious injury to the domestic industry producing the like or directly competitive products. In this sense, we consider that the phrase "under such conditions" refers more generally to the obligation

⁴²⁶ Contrary to the explicit references to prices in Article 3 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement") and Article 15 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

imposed on the importing country to perform an adequate assessment of the impact of the increased imports at issue and the specific market under investigation.

7.53 The European Communities raised various other arguments in support of its claims that Korea violated Article 4, and consequently Article 2, of the Agreement on Safeguards, namely that Korea did not adequately demonstrate the existence of serious injury and a causal link with the increased imports.⁴²⁷ We shall address the EC argument that Korea did not perform an adequate assessment of whether the products under investigation were being imported into its territory in such increased quantities and under such conditions as to cause serious injury to the domestic industry when we examine the European Communities' more specific claims of inadequate serious injury and causation assessments made pursuant to Article 4.2 of the Agreement on Safeguards. We note that a violation of Article 4.2 would constitute a violation of Article 2 of the Agreement on Safeguards.

G. CLAIMS UNDER ARTICLE 4.2 OF THE AGREEMENT ON SAFEGUARDS

1. Korea's examination of serious injury to the domestic industry

7.54 The European Communities claims that in its evaluation of serious injury to the domestic industry Korea failed to examine correctly all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry. We note that the parties are in agreement that the appropriate definition of the domestic industry in this case comprises the producers of both raw milk and milk powder, as these two products are directly competitive with SMPP when used as input for the manufacturing of downstream dairy products such as flavoured milk, fermented milk and ice cream. Thus, the parties' disagreement regards the correct examination of the relevant factors of an objective and quantifiable nature having a bearing on the situation of this industry. We also note that the complex definition of the domestic industry as including producers of both a raw material and one of its downstream products has repercussions for how the serious injury assessment on the whole domestic industry as defined has to be performed.

7.55 In conducting our review of Korea's serious injury determination we are mindful of the obligations contained in Article 4.2 of the Agreement on Safeguards. This provision mandates that competent authorities when performing a serious injury investigation:

"...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."

This provision sets out the general principle regarding the economic factors which need to be considered in a serious injury investigation, and provides a list of factors that are *a priori* considered to be especially relevant and informative of the situation of the domestic industry. The use of the wording "in particular" makes it clear to us that, among "all relevant factors" that the investigating authorities "shall evaluate", the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry. Under the applicable standard of review, our function is to assess whether Korea (i) examined all relevant facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards at the time of the investigation; and (ii) provided an adequate explanation of how those facts as a whole supported the determination made. Thus, we shall examine whether at the time of the determination all factors listed in Article 4.2 were appropriately considered; whether the Korean authorities explained how each factor considered supports (or detracts from) a finding of

⁴²⁷ In its request for a panel the European Communities claimed that the Korean determinations violated Articles 2, 4, 5 and 12 of the Agreement on Safeguards.

serious injury; and whether valid reasons have been put forward for dismissing a considered factor as not being relevant to the serious injury determination in this case.

7.56 We note that previous panel decisions have applied similar tests in reviewing determinations by investigating authorities on the existence of serious damage in the context of a transitional safeguard under the Agreement on Textiles and Clothing, and of material injury under the Tokyo Round Agreement on the Implementation of Article VI (the Anti-Dumping Code). In *United States – Shirts and Blouses*, the panel stated that:

"The wording of the first sentence of Article 6.3 of the ATC imposes on the importing Member the obligation to examine, at the time of its determination, at least all of the factors listed in that paragraph. The importing Member may decide -- in its assessment of whether or not serious damage or actual threat thereof has been caused to the domestic industry -- that some of these factors carry more or less weight. At a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed in Article 6.3 of the ATC."⁴²⁸

7.57 Even more to the point the panel in *United States – Salmon*, set out the following test when reviewing a material injury determination:

"[A] review of whether a determination of material injury was in conformity with this requirement necessitated an examination of whether the investigating authorities had examined all relevant facts before them (including facts which might detract from an affirmative determination) and whether a reasonable explanation had been provided of how the facts as a whole supported the determination made by the investigating authorities."⁴²⁹

While the concepts of serious damage and material injury are not entirely analogous to the requirement of serious injury in the Agreement on Safeguards, we believe that the general considerations expressed by both panels on issues similar to those before us offer useful guidance as to how a panel should evaluate fulfilment of the serious injury requirement.

7.58 In our evaluation of Korea's serious injury determination there are three issues that we find particularly troublesome. First, we find that there is a lack of consideration in the OAI Report of some of the factors listed in Article 4.2. This is the case for instance for capacity utilization and productivity. In both cases Korea offers explanations in its submissions to the Panel of why it considered these factors not to bear on the situation of the domestic industry. While these explanations seem plausible, there is nothing in the OAI Report which would indicate to the Panel that these factors were taken into consideration in the serious injury finding of the Korean authorities. Second, as we noted above, the definition of the domestic industry in this case as comprising two different segments of the dairy products market has consequences for the evaluation of the situation of the industry. In assessing the serious injury to the whole domestic industry, we find that it is acceptable to analyze distinct market segments but, as stated above, all factors listed in Article 4.2 must be addressed. In considering each of the factors listed in Article 4.2, and any others found to be relevant by the authority, the investigating authority has two options: for each factor, the investigating authority can consider it either for all segments, or if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are) objectively representative of the whole industry. A lack of consideration of all segments, without any explanation, is a flaw that we find present in Korea's analysis of the domestic industries' profits and losses, prices, debt to equity ratio, capital depletion and production cost. How Korea relates

⁴²⁸ *US – Shirts and Blouses*, para. 7.26.

⁴²⁹ *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, ADP/87, para. 492 ("*US – Salmon*").

developments in one segment to its determination regarding the industry as a whole is for Korea to decide in the first instance. Our point here is that an analysis of only a segment of the domestic industry, without any explanation of its significance for the whole industry, will not satisfy the requirements of the Agreement on Safeguards. Third, we find that for certain factors considered by Korea it has failed to provide sufficient reasoning on some of the choices made in the analysis of such factors which may have affected the result of the consideration. Also, there is a lack of reasoning in some cases on how the factor considered supports (or detracts from) a finding of serious injury. This lack of explanation or reasoning is perceived in Korea's consideration of market share, production, profits and losses, employment and inventory.

7.59 Having laid out our overall concerns with Korea's compliance with its obligations under Article 4.2, we turn to the specifics of Korea's consideration of each of the factors listed in Article 4.2, as well as additional factors Korea considered in determining the existence of injury to the domestic industry. 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. We would also like to make it clear that even if we examine each one of the factors listed in Article 4.2 and others used by Korea, it is not our task to question the weight accorded to each factor for purposes of the final determination of serious injury. In this regard we concur with what the panel in *US – Shirts and Blouses* stated in examining the imposition of a safeguard measure under the ATC:

"This is not to say that the Panel interprets the ATC as imposing on the importing Member any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. The relative importance of particular factors including those listed in Article 6.3 of the ATC is for each Member to assess in the light of the circumstances of each case."⁴³⁰

(a) Increased imports

7.60 The European Communities argues that Korea excluded certain products (mixed products)⁴³¹ from the scope of application of the measure which were nevertheless included in the calculation of the increase in imports. Korea pointed out that the import volume of these products, found on page 7 of the OAI Report,⁴³² shows that the excluded mixed products accounted for just 0.7, 0.8, 1.5 and 1.3 per cent of SMPP imports for the years 1993, 1994, 1995, and the first semester of 1996 respectively. After examining the figures pointed out by Korea, we consider that the excluded mixed product imports are a very minor portion of the SMPP imports. Thus, there is no basis for finding that Korea's decision not to exclude those products from the import increase calculation is inadequate for the purpose of Article 4.2 of the Agreement on Safeguards.

7.61 Based on the relevant sections in the OAI Report, we find that the Korean authorities' consideration of increased imports was adequate for the purposes of Article 4.2. Korea's assessment of the increased imports can be found from pages 32 through 35 of the OAI Report, where the progression of SMPP imports for the period under investigation both in absolute terms and relative to domestic production is detailed.

⁴³⁰ *US – Shirts and Blouses*, para. 7.52.

⁴³¹ The excluded products are: milk mineral (calcium), concentrated product, Chilean special products and raw material for the production of Nestlé's Cerelac.

⁴³² See para. 4.370, *supra*.

(b) Market share captured by imports

7.62 Korea's consideration of this factor can be found on page 35 of the OAI Report, where it states: "The market share of SMPP against the total demand was 1.6 per cent in 1993, 7.0 per cent in 1994, 12.2 per cent in 1995, and 14.1 per cent in Jan.-June in 1996, showing an upward trend." On its face this consideration of the total dairy market share captured by the increased imports of SMPP would seem to be correct and in compliance with the provisions of Article 4.2. However, we note that on page 16 of the OAI Report Korea defines the total market of basic materials for the production of dairy products in Korea as being composed of: raw milk produced by domestic dairy farms; milk powder produced from raw milk by processing companies, imported milk powder, imported basic materials for cheese, and other imports including SMPP. In a footnote on page 16 of the OAI Report the investigating authorities state:

"Considering the characteristics of the analysis, data on cheese import was excluded but import of cheese, which has direct influence on consumption of domestic raw milk, also has largely been increasing since import liberalization in 1995. Including the cheese import volume, the total demand comes to 2,027,713 tons in 1993, 2,249,958 tons in 1994, 2,414,525 tons in 1995, and 1,222,804 tons in Jan.-June 1996, showing the increase rates of 11.0 per cent in 1994, 7.3 per cent in 1995 and -1.4 per cent in Jan.-June 1996."

7.63 The Panel can only assume that this footnote actually refers to an exclusion of data on imported basic materials for cheese, since it would be these kinds of imports which would have a direct influence on consumption of raw milk. Also, the text that is being expanded upon in the footnote does not mention cheese as a finished product but imported basic materials for cheese. We find that this exclusion has not been sufficiently explained by Korea, even though it admits in the footnote quoted above, that these imports are part of the total market of basic materials for dairy products, that they affect consumption of raw milk and that they have increased significantly during the period of investigation. Such exclusion is not inconsequential as it may result in a decrease of the relevant market size, and a corresponding overestimation of the share of the market being captured by SMPP imports. We would like to make it clear that our view is not that this exclusion of imported basic materials for cheese from the total volume of the dairy market was necessarily incorrect. Rather, since Korea did not provide any reasoning as to why it chose to exclude this portion of the relevant market, we find that Korea's analysis of the market share captured by imports of SMPP was not adequately performed for the purpose of Article 4.2.

(c) Sales

7.64 The Korean authorities' consideration of changes in the level of sales for the domestic industry was performed separately for raw milk and milk powder and can be found respectively at pages 38 and 45 of the OAI Report. Regarding raw milk consumption for the period of investigation the report states:

"The amount of domestic raw milk consumed was 1,844,463 tons in 1993, 1,947,128 tons in 1994, 1,947,965 tons in 1995, and 984,934 tons in the January-June period of 1996. The consumption increase rate was 5.6 per cent for 1994, 0.0 per cent for 1995, and -2.0 per cent for the January-June period of 1996."⁴³³

7.65 Regarding milk powder consumption the Korean authorities found:

"The amount of domestic milk powder consumed was 12,191 tons for 1993, 12,468 tons for 1994, 10,690 tons for 1995 and 2,741 tons for the January-April period of 1996. In

⁴³³ OAI Report, page 38.

terms of increase rate, it was 2.3 per cent in 1994, -14.3 per cent in 1995 and -40.9 per cent in the January-April period of 1996."⁴³⁴

7.66 We note that in the case of domestic raw milk and milk powder sales in Korea there is a decline in consumption. This decline could support the Korean authorities' finding of serious injury to the domestic industry. Thus, we find that this factor was adequately considered for the purpose of Article 4.2.

(d) Production

7.67 This factor was considered in the OAI Report for both the raw milk and the milk powder segments of the industry respectively at pages 38 and 45 of the OAI Report, where it is stated:

"The production amount of domestic raw milk was 1,857,873 tons in 1993, 1,917,398 tons in 1994, 1,998,445 tons in 1995, and 1,069,224 tons in the January-to-June period of 1996. The increase rate was 3.2 per cent for 1994, 4.2 per cent for 1995, and 4.4 per cent for the January-June period of 1996."⁴³⁵

"The amount of domestic milk powder produced was 13,512 tons for 1993, 9,495 tons for 1994, 15,719 tons for 1995, and 10,401 tons for the January-April period of 1996. In terms of the production increase rate, it was -29.7 per cent in 1994, 65.6 per cent in 1995 and 52.6 per cent in the January- to-April period of 1996."⁴³⁶

Korea later explains that it does not consider this factor to be relevant as "it was not an appropriate measure for determining the state of the domestic industry".⁴³⁷ However, this explanatory statement is made in the first submission of Korea to the Panel. We fail to find any analysis by the Korean authorities at the time of the investigation, as to how these figures on production are relevant (or not) to a finding of serious injury to the domestic production. Lacking this explanation it is not possible for us to discern whether the Korean authorities' dismissal of this factor as an indicator of serious injury to the domestic industry was appropriate. Thus, we find that this factor was not adequately considered for the purpose of Article 4.2.

(e) Productivity

7.68 As described above the first task of the Panel is to examine whether all factors listed in Article 4.2 have been appropriately considered. We find that there is no mention of this factor in the OAI Report. While Korea in its submissions argues that "changes in productivity were not appropriate indicators of serious injury" and gives reasoning for this conclusion, this reasoning is not found in the OAI Report. There is no indication that Korea considered the productivity of the domestic industry when making a finding of serious injury. Thus, we find that this factor was not adequately considered for the purpose of Article 4.2.

(f) Capacity utilization

7.69 Just as in the case of productivity we fail to find any discussion in the OAI Report of the changes in capacity utilization of the domestic industry. Although this factor is mentioned in the Interim Draft Investigation Report⁴³⁸ it is not brought forward in the final OAI Report on which Korea

⁴³⁴ Id. at 45.

⁴³⁵ Id. at 38.

⁴³⁶ Id. at 45.

⁴³⁷ See para. 4.364, *supra*.

⁴³⁸ An extract of this draft report was submitted as Exhibit Korea-5.

based the adoption of its safeguard measure. Thus, we find this factor was not adequately considered for the purpose of Article 4.2.

(g) Profits and losses

7.70 The Korean authorities' consideration of this factor appears at page 41 of the OAI Report for the raw milk segment of the industry and page 49 for the milk powder segment of the industry. Regarding the raw milk segment the Korean authorities found that various livestock cooperatives had declining profits during the period, to the point where by the first semester of 1996 they were reporting losses of 17,546 million Won. Korea explained in the OAI Report that this analysis was carried out on the livestock cooperatives with the following reasoning: "since the livestock cooperatives, which are comprised of dairy households producing raw milk, distribute their profits to their members, the livestock cooperatives' profits and losses are directly linked to the raw milk producers' income."⁴³⁹

7.71 First, we note that the livestock cooperatives' business is not only the collection, distribution and sale of raw milk but also the processing of this raw milk into downstream dairy products for subsequent sale. Thus, the profits or losses of the livestock cooperatives do not reflect exclusively their activities in the raw milk sector but also other activities.

7.72 Second, the raw milk producers' profits or losses do not derive only from their investment in the livestock cooperatives, but also from the sale of raw milk to the livestock cooperatives. In its first submission⁴⁴⁰ Korea presents data on the profit margins for raw milk producers based on the difference between the reference sale prices and the production cost of raw milk. However, as admitted by Korea,⁴⁴¹ this analysis was not performed at the time of the investigation.

7.73 Third, we also gather from Korea's description of its analysis that it examined only some of the livestock cooperatives. However, there is no explanation of why this was done. Lacking any such explanation it is not possible for us to assess whether the selection of the livestock cooperatives rendered an objective picture of the situation of the whole domestic industry.

7.74 Taken together the flaws in Korea's consideration of profits and losses in the raw milk segment of the industry outlined above lead us to find that this factor was not adequately considered for the purpose of Article 4.2.

7.75 Regarding the milk powder sector of the industry, we again find flaws in Korea's consideration of profits and losses. In examining the profits and losses of the milk powder sector the Korean authorities examined only two livestock cooperatives and four milk processing companies. Again, there is no explanation of why the an examination of only these companies would constitute an objective and representative picture of the situation of the whole domestic industry. Footnote 15 of the OAI Report contains a reference to the proportion of annual production by the chosen cooperatives and companies where the data have been deleted. Without any such explanation Korea has not demonstrated that it had considered the objectivity and representativeness of the sample. Thus, we find that for the purpose of Article 4.2 Korea has not adequately considered the profits and losses of the whole domestic industry.

⁴³⁹ OAI Report, page 41

⁴⁴⁰ See para. 4.343, *supra*.

⁴⁴¹ In its request for interim review, Korea submits that it "has never made any attempt to argue that [an analysis of the profits and losses of the raw milk producers] was conducted during the investigation".

(h) Employment

7.76 The analysis of changes in the levels of employment for the domestic industry was also performed by the Korean authorities first for the raw milk producers and then for the milk powder producers. Regarding the analysis of the employment in the raw milk sector, the Korean authorities chose to analyse whether there was a decrease in the number of dairy households. The reasons for this choice were explained to the Panel as follows:

"Korean dairy farms are on the whole small scale family businesses, and represent one part of the economic activity of some members of that family. It is not possible to determine how much time each person spends working on that business, and what proportion of that time is devoted to dairy production ... and so the Korean authorities used changes in the number of dairy households as a surrogate"⁴⁴²

This explanation was made in the oral statement at the second meeting of the Panel with the parties, and not in the OAI Report. We commend Korea for devising a surrogate methodology to measure the employment in the raw milk industry and not simply dismissing this factor as irrelevant or not quantifiable. Nevertheless, this deviation from normal practice should have been explained at the time of the decision in the OAI Report. Lacking this explanation in the OAI Report we find that this factor was not adequately considered for the purpose of Article 4.2.

7.77 Regarding the analysis of employment for the milk powder producers, the Korean authorities, explained in the OAI Report, that:

"As the milk powder production became automated, the number of workers employed in milk powder production decreased over the years. Currently, very few people are fully employed for the exclusive purpose of engaging in milk powder production. Workers producing other dairy products are used temporarily, when needs arise, to engage in milk powder production. Accordingly, employment and wage are insignificant factors in operating milk powder business"⁴⁴³

In the light of this explanation in the OAI Report, we find that, for the purpose of Article 4.2, Korea has adequately considered this factor for milk powder production.

(i) Inventory

7.78 Regarding this factor, Korea considered inventories of domestic milk powder only, since raw milk is not susceptible of stockage.⁴⁴⁴ There are two references to the inventory levels throughout the OAI Report (pages 38-39, and 46). We note that the figures at pages 38-39 are slightly different from those at page 46. Nevertheless, they both show an accumulation of stock for the period under investigation.⁴⁴⁵ We find, however, that there is no reasoning as to why such levels of inventory are indicative of serious injury or why they are negative for the domestic dairy industry. Again this explanation is made in the second submission of Korea, where it is stated:

"Increase of milk powder inventory is clear evidence of serious injury in this case not only to the milk powder industry, but also to the entire domestic industry. As explained above, raw milk that is not consumed has to be converted into, *inter alia*, milk powder. Conversion only increases supply and inventory of milk powder. Therefore, increased milk powder inventory not only indicates oversupply of milk powder but also

⁴⁴² See para.4.513, *supra*.

⁴⁴³ OAI Report, page 48

⁴⁴⁴ OAI Report, page 38

⁴⁴⁵ See para. 4.323, *supra*.

demonstrates displacement of domestic raw milk by cheap imported SMPP, thus signifying serious injury to the entire domestic industry.⁴⁴⁶

The increased inventory incurred a significant amount of costs. Even if depreciation is disregarded, the cost of inventory amounted to 17.3 billion Won (approximately US \$21.6 million) during the investigation period. The inventory costs during the first six months of 1996 alone were 5.8 billion Won (approximately US \$7.3 million), and the domestic producers were compelled to incur the full inventory cost...⁴⁴⁷

Thus, it is clear from the statement made in Korea's second submission that the level of inventories of milk powder found by the Korean authorities has negative consequences for the milk powder sector of the industry and could indicate that the domestic industry is injured. However, this reasoning provided in Korea's second submission is not discernible in the OAI Report, and it is only after it has been explained in the second submission that the precariousness of the situation of the domestic industry regarding this factor becomes evident. Thus, we find that this factor was not adequately considered for the purpose of Article 4.2.

(j) Price

7.79 This factor is not explicitly mentioned in the list of factors included in Article 4.2, however, Korea considered it in its investigation. The Korean authorities examined prices for milk powder and found that they were lower in the first half of 1996 than they were in 1993 at the beginning of the period of investigation.⁴⁴⁸ We note that milk powder prices had risen to a high level as recently as 1995. Taking into account the entire OAI Report, we consider that Korea has established that lower prices for milk powder are indicative of serious injury for the milk powder industry⁴⁴⁹. However, while there is an analysis of prices for the milk powder industry, we note that there is no explanation of the relationship between the price levels for milk powder and the serious injury alleged to be suffered by the whole domestic industry.

7.80 Indeed, Korea did not examine prices of raw milk in its investigation. In this regard Korea stated in its submissions that "there is no reliable way of arriving at an accurate or appropriate transaction price for raw milk in Korea"⁴⁵⁰ and "that any impact of declining domestic milk powder prices adversely affected the entire domestic industry, since raw milk producers own the livestock cooperatives."⁴⁵¹

7.81 We are of the view that conclusions about the prices of milk powder only, do not constitute a consideration of prices to the whole domestic industry which was defined as producers of raw milk and milk powder. The fact that it is the producers of raw milk who own the cooperatives does not exempt the Korean authorities from examining the particular conditions of the raw milk producers as this is a different segment of the industry from milk powder production. For this reason we find that Korea's consideration of the prices was incomplete as it only took into account one segment of the domestic industry. Thus, we find that this factor was not adequately considered for the purpose of Article 4.2.

7.82 Moreover, we note that even if actual transaction prices for raw milk in Korea were unavailable or it was not feasible to collect them given the large number of producers, there were several other avenues available to the Korean authorities that would have allowed them to calculate or

⁴⁴⁶ See para.4.460, *supra*.

⁴⁴⁷ See para.4.462, *supra*.

⁴⁴⁸ OAI Report, page 47.

⁴⁴⁹ This reasoning can be found in the causation section of the OAI Report at page 62.

⁴⁵⁰ See para.4.504, *supra*.

⁴⁵¹ See para.4.449, *supra*.

construct an approximation of raw milk prices.⁴⁵² Such indicators, even if not one hundred per cent accurate could have enabled the Korean authorities to identify the existence of trends, either positive or negative, in the prices for raw milk. The choice of methodology to determine prices rests with the investigating authorities, but given that there were various options available in this case we find that the Korean authorities should have made an effort to determine the prices for raw milk, instead of dismissing this factor as not being quantifiable.

(k) Debt to equity ratio and capital depletion

7.83 These are two additional economic indicators that do not appear in the illustrative list of Article 4.2, which were considered by the Korean authorities. These factors were evaluated exclusively with regard to the livestock cooperatives. The results, presented at pages 43 and 44 of the OAI Report, only give information on a portion of the livestock cooperatives. It is impossible for us to assess if the data presented reflect the position of the whole domestic industry. Thus, we fail to see in the OAI Report any explanation as to why these two factors reflect serious injury, especially serious injury to the whole Korean domestic industry producing raw milk and milk powder. Thus, we find that this factor was not adequately considered for the purpose of Article 4.2.

(l) Production cost

7.84 The Korean authorities only examined the production cost of livestock cooperatives in the production of milk powder. In this examination the Korean authorities found:

"The manufacturing cost increased from 5,158 won/kg in 1993 to 5,426 won/kg in 1994, 5,860 won/kg in 1995 and 6,178 won/kg in the January-April period of 1996.

The difference between the sales price and the manufacturing cost was 196 won in 1993. However, it recorded -132 won in 1994 and the negative margin grew larger to -472 won in 1995 and further to -1,184 won in the January-to-April period of 1996."⁴⁵³

The Korean authorities concluded that there was a widening negative gap between the cost of manufacturing milk powder and its sale price. These sales below cost would indicate that livestock cooperatives were going through a difficult period. However, as this factor was only evaluated for a portion of the domestic industry (livestock cooperatives producing milk powder) it is not possible for us to assess the situation with regard to the whole domestic industry. We do not consider this factor to provide adequate support for the conclusion that there is serious injury to the domestic industry as defined by the Korean authorities. Thus, we find that this factor was not adequately considered for the purpose of Article 4.2.

(m) Conclusion

7.85 For the reasons described above, we find that Korea's determination of serious injury to the domestic production of raw milk and milk powder does not meet the requirements of Article 4.2 of the Agreement on Safeguards.

7.86 Article 2.1 permits the application of a safeguard measure only if, *inter alia*, there has been a determination of serious injury pursuant to Article 4.2. Since we find that Korea's determination of

⁴⁵² For example, Korea could have performed: (1) an analysis based on sampling of the raw milk producers, a methodology which was used by Korea elsewhere in its analysis; (2) a construction of the prices for raw milk based on the cost of production of raw milk producers, for which data appear to be on the record; on (3) a construction of the prices by making adjustments to the cost of raw materials reported by the milk powder producers.

⁴⁵³ OAI Report, page 53.

serious injury does not meet the requirements of Article 4.2, the application of the safeguard measure at issue would necessarily also violate Article 2.1 of the Agreement on Safeguards. We note that in its request for establishment of a panel, the European Communities claims generally that Korea violated Articles 2.1, 4.2(a), 4.2(b), 5.1 and 12.1 to 12.3 of the Agreement on Safeguards. However, in its submissions, the European Communities did not argue specifically, nor did it submit any evidence, in support of its claim under Article 2.1, other than those relating to "under such conditions" (as discussed in Section F *supra*.⁴⁵⁴ Therefore, we do not reach any conclusion on the issue of whether Korea's determination of serious injury violates the provisions of Article 2.1 of the Agreement on Safeguards.

2. Korea's examination of the causal link between increased imports and serious injury

7.87 We have already determined above that Korea's injury determination did not meet the requirements of Article 4.2 of the Agreement on Safeguards. We concluded that Korea did not address all injury factors listed in Article 4.2 of the Agreement on Safeguards. In addition, we concluded that when addressing factors listed in Article 4.2 of the Agreement on Safeguards, the OAI Report did not contain any reasoning, analysis or evidence in support of its findings and sometimes it limited its analysis to only one segment of the relevant domestic industry. Having reached these conclusions with regard to Korea's assessment of the injury factors, it is not necessary for us to reach any findings on whether Korea demonstrated that increased imports "caused" serious injury to the domestic industry producing like or directly competitive products. However, keeping in mind the conclusions of the Appellate Body in *Australia – Salmon*⁴⁵⁵, we would like to offer some general comments relevant to an analysis of a causal link between increased imports and injury, in the context of the Korean investigation.

7.88 We recall the provisions of Articles 2 and 4.2 of the Agreement on Safeguards:

"2.1 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...

4.2. (a) In the investigation to determine *whether increased imports have caused or are threatening to cause serious injury* to a domestic industry under the terms of this Agreement, 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.

(b) The determination referred to in subparagraph (a) shall not be made *unless* this investigation demonstrates, on the *basis of objective evidence*, the existence of the *causal link between increased imports of the product concerned and serious injury or threat thereof*. When *factors other than increased imports are causing injury* to the domestic industry at the same time, *such injury shall not be attributed to increased imports.*" (emphasis added)

⁴⁵⁴ See the Appellate Body report on *Japan – Measures Affecting Agricultural Products* (WT/DS/76/AB/R), paras. 118 to 131.

⁴⁵⁵ *Australia – Salmon*, para. 223.

7.89 In performing its causal link assessment, it is our view that the national authority needs to analyze and determine whether developments in the industry, considered by the national authority to demonstrate serious injury, have been caused by the increased imports. In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports.

7.90 To establish a causal link, Korea has to demonstrate that the injury to its domestic industry results from increased imports. In other words, Korea has to demonstrate that the imports of SMPP cause injury to the domestic industry producing milk powder and raw milk. In addition, having analyzed the situation of the domestic industry, the Korean authority has the obligation not to attribute to the increased imports any injury caused by other factors.

7.91 For instance, the KTC needs to explain how the developments with respect to factors considered by the KTC to demonstrate serious injury, were caused by the imports of SMPP. This is to say that the KTC, in its analysis of the increased market share of SMPP for example, should have tried to explain how the imports of SMPP effectively displaced the domestic production of like or directly competitive products.

7.92 To take one example using only one factor for only one year we note that the OAI Report⁴⁵⁶ states that the most important increase of import of SMPP occurred from 1993 to 1994 (384 per cent). However, we know that during the first year under investigation (1994), domestic demand for raw milk and milk powder increased significantly. The OAI Report⁴⁵⁷ indicates: "... the large increase of dairy production in 1994 resulted from the drastically increased demand for market milk and fermented milk due to the quite warm winter". The Korean authorities found⁴⁵⁸ that from 1993 to 1994, total demand of raw milk increased by 9.6 per cent while domestic production only increased by 3.2 per cent. We consider, therefore, that in 1994, to meet the increased demand in raw milk it was necessary to increase imports of raw milk substitutes. The reasons for this are: first, raw milk supply (in the short term) is very rigid, as it depends upon the number of milk cows (head) which cannot be increased rapidly and; second, the import tariff on milk powder had been increased to a very high level (220 per cent) which constrained imports of milk powder. This situation therefore implied that the only way for Korea to respond to the increased demand was to import more of the low-tariff SMPP (39 to 40 per cent). In other words, in 1994 domestic demand for raw milk in Korea was larger than domestic production of raw milk. This had the effect of decreasing the production of milk powder (which is made from raw milk)⁴⁵⁹ and decreasing milk powder inventories⁴⁶⁰. It seems clear to us, that at least for 1994, the imports of SMPP cannot have caused injury to the domestic industry producing like or directly competitive products in Korea. On the contrary the increasing imports of SMPP were the result of the increasing needs for raw milk and milk powder substitutes by the Korean industry faced with the incapacity of the domestic production to fulfill the increasing demand for such products. In the OAI Report there is no analysis of the interaction of these various elements. However, any adequate causation assessment had to be performed for the overall injury determination.

7.93 As to other factors that may have caused injury to the domestic industry producing like or directly competitive products, we know, from the OAI Report, that domestic demand for raw milk was affected by other factors. For example, it is said in the footnote to page 16 of the OAI Report: "Considering ..., data on cheese import was excluded *but imports of cheese, which has direct*

⁴⁵⁶ OAI Report, page 32.

⁴⁵⁷ OAI Report, page 14.

⁴⁵⁸ OAI Report, page 39.

⁴⁵⁹ OAI Report, pages 58-60.

⁴⁶⁰ OAI Report, page 17.

influence on consumption of domestic raw milk, also has largely been increasing since import liberalization in 1995...". As we mentioned before (see paragraphs 7.62 and 7.63 *supra*), this footnote must refer to an exclusion of data on imported basic material for cheese, as the text that is expanded upon does not mention cheese as a finished product but rather imported basic materials for cheese. In other words, it would be these imports of basic materials for cheese that would have a direct influence on consumption (demand) for raw milk.

7.94 Korea recognizes that the domestic production of cheese has decreased.⁴⁶¹ This decrease of cheese production directly affected the consumption of and demand for raw milk. However, the OAI Report does not contain any evaluation or analysis of the impact of this factor (i.e. increased imports of cheese or increased imports of basic material for cheese, and their impact on the reduced demand for cheese and consequently the reduced demand for domestic raw milk in making cheese).

7.95 The same line of reasoning holds for the other dairy products that use raw milk or milk powder as inputs which, according to Korea, also decreased. Therefore, the demand for raw milk and milk powder should have decreased as well. On page 14 of the OAI Report, the KTC notes that the domestic production of white milk, condensed milk, cheese and lactic-acid-producing beverages went down during the period of investigation. We know from Korea's domestic regulation⁴⁶² that SMPP cannot substitute for raw milk in the production of white milk, condensed milk, cheese, and lactic-acid-producing beverages. If the domestic production of these products went down as well, factors other than imports of SMPP must have caused the reduction of domestic production of these products which, in turn also must have had an impact on the reduced consumption of raw milk and milk powder. In compliance with the provisions of Article 4.2 of the Agreement on Safeguards, the causal link between increased imports of SMPP and the factors it found to demonstrate injury must also be assessed by the national authority.

7.96 This should not be construed to mean that the Panel interprets the Agreement on Safeguards as imposing on the importing Member any appropriate method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. The relative importance of particular factors including those listed in Article 4 of the Agreement on Safeguards is for each Member to assess in the light of the circumstances of each case. Korea remains free to determine an appropriate method of assessing whether the state of its domestic industry was caused by imports of SMPP and how this analysis was performed. Korea also remains free to choose the method of assessing whether any serious injury to its domestic industry was caused by such other factors.

H. CLAIMS UNDER ARTICLE 5.1 OF THE AGREEMENT ON SAFEGUARDS

7.97 The European Communities argues that when a WTO Member takes a safeguard measure, it needs to prove that such measure was necessary and therefore should justify its "adequacy" in remedying injury and facilitating adjustment. The European Communities claims that (i) by omitting to give any consideration to adjustment plans, Korea violated Article 5.1, first sentence; (ii) by failing to consider whether types of measure other than a quota would be the most suitable to remedy serious injury or facilitate adjustment, Korea violated Article 5.1, first sentence; and (iii) by failing to show that the level of the quota itself was necessary to remedy serious injury or facilitate adjustment remedy, Korea violated its obligations under Article 5.1, first and second sentences. The European Communities also claims that by not choosing the appropriate three representative years (which should start as of the date of the imposition of the measure), without submitting a "clear justification that a different level was necessary to prevent or remedy the serious injury", Korea violated the provision of Article 5.1, second sentence.

⁴⁶¹ See the negative data in the OAI Report, page 14.

⁴⁶² See Food Industry Handbook, referred to in the OAI Report, page 26.

7.98 Korea responds that since Article 5.1 states that "Members should choose measures most suitable for the achievement of these objectives," it complied with this provision, as it considered that the quotas at these levels for that period of 4 years, were the most suitable for remedying the serious injury and facilitating adjustment to the domestic industry in Korea. For Korea, there is no obligation to demonstrate that the type of measure is the most suitable measure to achieve these objectives. Korea adds that the Korean competent authorities did examine whether other types of measures, including tariff-quota, would be more appropriate. For Korea, there is no obligation to demonstrate that the level of such tariff is necessary or appropriate to achieve these objectives. In its view, the wording of the second sentence of Article 5.1 makes it clear that Members must only justify the level of quotas if it is different (*i.e.*, lower) than the average imports during the three most recent representative years. It based its quota level on the average of imports for the three years from July 1993 to June 1996, as it initiated its safeguards investigation in May 1996. The requirement for consideration of three "representative" years was intended to prevent foreign exporters from manipulating quota levels by flooding the market with imports just prior to the decision to impose a safeguard measure. Therefore, Korea considered that the second half of 1996 was not "representative", and it excluded imports from this period in calculating the quota level. Since it chose the appropriate three representative years, Korea argues that it did not have to provide any justification.

7.99 We are of the view that Article 5 of the Agreement on Safeguards establishes certain rules on the application of safeguard measures. In the view of the Panel these rules on the application of a measure come into play only after a decision has been taken to adopt a safeguard measure. The first sentence of Article 5.1 reads: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." We believe that this provision is not concerned with the decision or even the right of a Member to adopt a safeguard measure. The general authorization for a Member to apply a safeguard measure is found in Article 2.1 of the Agreement on Safeguards, which provides that "[a] Member may apply a safeguard measure" (emphasis added) after that Member has made the injury and causation determination referred to in that article. The use of the verb "may" indicates that the decision whether to apply a measure or not, after the above-mentioned conditions have been evidenced, rests with the Member conducting the investigation. We find that in the context of the discretion authorized by Article 2.1 we cannot conclude that Article 5.1 requires a Member to further justify the necessity of applying a safeguard measure. In consequence the decision by a Member to adopt a safeguard measure once all the required conditions have been determined to exist can not be challenged by another Member under Article 5.1.

7.100 The fact that the Panel finds that, after full compliance with the provisions of Articles 2 and 4 of the Agreement on Safeguards, there is no obligation under Article 5.1 to justify the decision to adopt a safeguard measure does not mean, however, that the first sentence of Article 5.1 only "states a basic principle"⁴⁶³ or "does not impose a general obligation".⁴⁶⁴ The first sentence of Article 5.1 does contain a very specific obligation. This obligation is to apply a measure that is commensurate with the goals of preventing or remedying the serious injury suffered by the domestic industry and of facilitating the adjustment of the domestic industry. Our interpretation of this obligation is bolstered by the last sentence of Article 5.1, which provides that Members "should choose measures most suitable for the achievement" of the objectives of preventing or remedying the serious injury and facilitating adjustment.

7.101 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

⁴⁶³ See para. 4.629, *supra*.

⁴⁶⁴ See para. 4.628, *supra*.

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.

7.102 In the present case the European Communities argues that Korea has not fulfilled its obligations under Article 5.1 with respect to the justification of type and level of the measure at issue. In considering whether Korea has complied with its obligations under Article 5.1, we apply the standard of review set out in paragraphs 1.25 to 1.30. Thus, we need to consider whether the Korean authorities examined all relevant facts before them, whether adequate explanation was provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. In other words, 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. Our task is not to determine for ourselves whether the measure applied by Korea is at a level that is no more restrictive than necessary to remedy the serious injury and facilitate adjustment. Rather, we must evaluate whether in deciding on the type and level of the measure to be applied, the Korean authorities considered relevant information and explained their decision that the measure chosen was no more restrictive than necessary to prevent or remedy serious injury to the Korean dairy industry and to facilitate the industry's adjustment.

7.103 In examining Korea's compliance with Article 5.1 we consider the Determination of Relief Measure, by the Korean Trade Commission dated 2 December 1996⁴⁶⁵ to be most relevant, as this document describes the measure adopted by the Korean authorities.⁴⁶⁶ It is this document which should, in our view, reflect the Korean authorities' considerations underlying the measure adopted.

7.104 Looking at the Determination of Relief Measure, we find a bare description of the elements of the measure. We note the absence of any discussion or analysis indicating the considerations underlying the choice of the measure adopted and any explanation as to why the Korean authorities concluded that the measure adopted was necessary to remedy the serious injury and facilitate adjustment. There is no reference to the measure, in any of the other determinations before or after the Determination of Relief Measure.

7.105 It appears from the evidence presented by Korea that the Korean authorities were aware of, and may even have considered, measures other than the quantitative restriction adopted.⁴⁶⁷ However, these potential measures are merely described in the determination. In our view mere description of the alternative measures considered is insufficient. There must be some discernible reasoning as to why the measure recommended or adopted is preferable to the others, specifically with respect to achieving the objectives of remedying the serious injury and facilitating adjustment.

7.106 Korea's Determination of Relief Measure lists different factors that appear to have been considered in deciding on the adoption of the measure to be applied. However, this is again merely descriptive, as is evident from the following paragraph:

⁴⁶⁵ Exhibit Korea-8.

⁴⁶⁶ We recognize that there was a later decision to adjust the level of the measure. However, as this affected only one of the defining elements of the measure, we nonetheless focus on the 2 December 1996 Determination.

⁴⁶⁷ Other measures that may have been considered include those measures which were proposed by the petitioner (*see*, Exhibit Korea-8 at pg. 3) and the application of a tariff quota as recommended by Commissioner Jeong Mun-Su in his minority opinion (*id.* at pg. 4).

"[b]efore recommending the relief measures, the KTC commissioners agreed that close considerations should be made beforehand for each relief measure on its impacts on the domestic dairy industry, national economy, and bilateral/multilateral trade. In this regard, the KTC examined the information investigated by the OAI, the relevant articles of the multilateral regulations, the opinions of authorities concerned, and the relief measures stipulated in the Foreign Trade Act and the Enforcement Decree of the Act. Based on all these examinations, the KTC reviewed the petitioner's request for relief measures."⁴⁶⁸

We do not see any explanation as to whether or how each of these factors shaped the Korean authorities' recommendation on the type, level and duration of the applied measure.

7.107 Indeed the Determination of Relief Measure simply continues:

"The KTC decided to recommend to the Minister of Agriculture and Forestry (MAF) that he permit the following in connection with the import restrictions on the products under investigation[:]

The import restriction on the products under investigation should be implemented for 4 years.

The restricted volume should amount to 15,595 tons (average import volume during the year of 1993 – 1995) in the first year of the total 4 years of relief measures period. From the second year, the yearly 5.7 per cent increase rate (average increase rate of total domestic demand during 1993 – 1995) over the preceding year's restricted volume should be applied."

This recommendation does not contain any consideration or explanation of why the Korean authorities concluded that the recommended measure was necessary to prevent or remedy serious injury and facilitate the adjustment of the domestic industry.

7.108 We wish to make it clear that we do not interpret Article 5.1 as requiring the consideration of an adjustment plan by the authorities, as the European Communities asserts.⁴⁶⁹ The Panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the Agreement on Safeguards. Although there are references to industry adjustment in two of its provisions,⁴⁷⁰ nothing in the text of the Agreement on Safeguards suggests that consideration of a specific adjustment plan is required before a measure can be adopted. Rather, we believe that the question of adjustment, along with the question of preventing or remedying serious injury, must be a part of the authorities' reasoned explanation of the measure it has chosen to apply. Nonetheless, we note that examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that the authorities considered whether the measure was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment.

7.109 In response to a question by the Panel,⁴⁷¹ Korea states that Article 5 "does not impose a general obligation on Members to demonstrate that the specific level of quota that they decided to impose as a safeguard measure is necessary to prevent or remedy serious injury and to facilitate adjustment". In our interpretation, Article 5.1 does not require a Member to demonstrate *ex posteriori* to the Panel that the measure adopted is effectively the most appropriate one. We consider rather, as

⁴⁶⁸ *Id.* at pg. 3.

⁴⁶⁹ See para. 4.611, *supra*.

⁴⁷⁰ Articles 5 and 7 of the Agreement on Safeguards.

⁴⁷¹ See para. 4.628, *supra*.

we mentioned before, 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 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.

7.110 Korea argues that "provided the level of quota was equivalent to or not less than the average of the import levels for the three most recent representative years for which statistics were available, the Korean authorities were not required to show that the nature of the measure, or its level, were [*sic*] 'necessary'".⁴⁷² However, as explained above, we consider that the first sentence of Article 5.1 applies to all elements of a safeguard measure, including the level of any quota. In consequence, even assuming Korea based its quota level on the average imports levels for the last three representative years, this would not suffice to meet the requirements of Article 5.1, as the scope of that Article is greater than just the level of the applied quota. We conclude therefore that Korea's determination of the measure did not meet the requirements of Article 5 of the Agreement on Safeguards.

7.111 The European Communities also claims that Korea violates Article 5.1 because it applied a quota whose level was lower than the average of imports in the last representative three-year period preceding the application of the measure for which statistics were available. 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.

I. CLAIMS UNDER ARTICLE 12

1. Incomplete and Untimely Notifications

(a) Arguments of the parties

7.112 The European Communities claims that Korea failed to notify its measure in a timely fashion and with sufficient detail contrary to Article 12.1 and 12.2 of the Safeguards Agreement. The European Communities argues that in view of the limitative 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 may be protected. As regards notifications under Article 12.1(b) and (c), one specific purpose is to offer the Members concerned an opportunity for adequate consultations. Effective exercise of these rights by WTO Members calls for a minimum guaranteed level of information officially transmitted in one of the working languages of the WTO.

7.113 Korea responds that its notifications are consistent with the guidance issued by the Committee on Safeguards and with the Technical Cooperation Handbook on Notification Requirements. For Korea, its notifications provided the European Communities with all pertinent information. In its view, the purpose of the notification pursuant to Article 12 is to provide the Committee on Safeguards with information which is to be disseminated to Members to facilitate meaningful prior consultations under Article 12.3 and, where appropriate, consultations under Article XXII of GATT 1994. This function is implied both by the structure of Article 12, which includes both notification and consultation, and by the final sentence of Article 12.2 which 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 or extend the measure." For Korea, if the purpose of

⁴⁷² See para. 4.671, *supra*.

Article 12 were to replicate the exacting standards of Article 3 and 4.2(c), the final sentence of Article 12.2 would be redundant.

(b) The notifications under examination

7.114 We asked Korea to clarify for us the sequence of its WTO notifications. In light of its response, we understand that the following notifications were made:

- (a) 11 June 1996, G/SG/N/6/KOR/2, circulated on 1 July 1996. Notification of the KTC's decision to initiate an investigation on 17 May 1996. (Circulated as an Article 12.1(a) notification, of the initiation of an investigatory process relating to serious injury or threat thereof and the reasons for it). (See Exhibit EC-1).
- (b) 2 December 1996, G/SG/N/8/KOR/1, circulated on 6 December 1996. Notification of the completion of the report by the Office of Administration and Investigation (OAI) that provided the basis for the KTC's determination of injury (on 23 October 1996). This notification stated: "The Korean Trade Commission has not made a decision to apply a safeguard measure yet. Therefore, there is no information on such a measure at this time. The KTC will recommend to the relevant Minister an appropriate remedial measure within 45 days of the injury determination." This document was circulated as an Article 12.1(b) notification of a finding of serious injury or threat thereof caused by increased imports. (See Exhibit EC-2)

In this case, the KTC decided on the relief measure, namely the quota, on 2 December 1996, and recommended it on 6 December 1996 to the Minister for Agriculture and Forestry for his consideration.⁴⁷³ Korea stated that the KTC's recommendation on relief measures is not made public because it is only a recommendation that has no legal effect and that is subject to change by the relevant Minister.

- (c) 21 January 1997, G/SG/N/10/KOR/1, circulated on 27 January 1997, as an Article 12.1(c) notification of a decision to apply or extend a safeguard measure. In the notification Korea invited interested Members for consultations during the week of 3 February 1997, "before it makes a final decision on the measure by the week beginning 24 February 1997." (See Exhibit EC-5)
- (d) 31 January 1997, G/SG/N/11/KOR/1 circulated on 21 February 1997. Notification of non-application of the proposed safeguard measure to developing countries. (Footnote 2 of Article 9 of the Agreement on Safeguards). (See Exhibit EC-6)
- (e) 24 March 1997, G/SG/N/10/KOR/1/Suppl.1, circulated on 1 April 1997 as a supplemental notification under Article 12.1(c). Notification of the Minister of Agriculture and Forestry's decision of 1 March 1997 to impose a measure. This notification contained an attachment with further detailed information following the 6 February 1997 consultations and the special Committee on Safeguards meeting. (See Exhibit EC-10)

(c) Analysis of Article 12 of the Agreement on Safeguards

7.115 We shall proceed in the following way: First, we will examine the provisions of Article 12 generally in order to determine which WTO Members' actions or measures ought to be notified, the

⁴⁷³ See para. 4.113, *supra*.

content of these notifications and their timing; Second, we shall examine each of Korea's notifications and assess their compatibility with the requirements of Article 12 of the Agreement on Safeguards.

(i) *What actions must be notified*

7.116 It is clear that the provisions of Article 12 of the Agreement on Safeguards prevail over the Guidance issued by the Committee on Safeguards⁴⁷⁴ (which contains a disclaimer to that effect) and the Technical Cooperation Handbook on Notification Requirements (prepared by the Secretariat but which explicitly states that it "does not constitute a legal interpretation of the notification obligations under the respective agreement(s)"). At issue in this case are the notifications required under Articles 12.1(a), (b) and (c).

7.117 The wording of Article 12 provides that a number of types of actions must be notified to the WTO Committee on Safeguards by Members proposing to use the provisions of the Agreement on Safeguards. Article 12.1 refers to three such actions, by inference Article 12.2-3 refers to a fourth item and Article 12.6 to a fifth item.

7.118 Article 12.1 requires notification to the Committee on Safeguards of (a) the initiation of an "investigatory process relating to serious injury or threat thereof and the reasons for it"; (b) any "findings of serious injury or threat thereof caused by increased imports"; and (c) any "decision to apply or extend a safeguard measure".

7.119 Articles 12.2 and 12.3 set forth the required content of such notifications, and provide as well certain guidance as to the sequence of events to be followed in the notifications and related consultations. These Articles read as follows:

"2. 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...."

"3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8."

7.120 Although not explicitly listed in Article 12.1, the wording of Article 12.2 and 12.3 make it clear that any proposed measure must also be notified to the Committee on Safeguards. Article 12.2 provides that the notifications under Article 12.1(b) and 12.1(c) must contain information as to the basis for the serious injury finding, as well as information as to the "proposed" measure to be applied. Article 12.3 requires that the notifying Member provide an adequate opportunity for "prior consultations" with interested Members, that is, consultations prior to the actual application of the measure. Article 12.3 further requires that among the information to be discussed in the consultations is the information already notified under Article 12.1(b) and 12.1(c), i.e., the basis for the serious injury finding, and the details of the measure that the notifying Member proposes to apply. Thus, Article 12.1, 12.2 and 12.3 taken together makes it clear that before a definitive safeguard measure may be applied, the Member proposing to apply it must notify all the pertinent information regarding the proposed measure and the factual basis (the injury finding) for applying it, and must provide an opportunity for consultations with Members whose trade will be affected by the proposed measure. In

⁴⁷⁴ See document G/SG/1.

other words, details of the measure proposed must be notified before it is applied, so that affected Members may consult about it before it takes effect. Therefore, we reject Korea's argument that it was not obliged to notify its proposed measure, but we note that Korea did do so.

7.121 Finally, pursuant to Article 12.6, a provisional measure shall also be notified to the Committee on Safeguards.

(ii) *The content of such notifications*

(1) 12.1(a)

7.122 Regarding the "content" of notifications under Article 12.1, we note that with regard to the notification of the initiation of an investigation, the terms of Article 12.1(a) only refer to the obligation to notify "initiating an investigatory process relating to serious injury or threat thereof and the reasons for it".

7.123 We also note that the notification under Article 12.1(a) does not have to take place before the investigation is initiated, but rather immediately upon its initiation. In this context, we recall that there is no individual country notification (as there exists for instance for antidumping actions) under the Agreement on Safeguards, presumably because in principle the safeguard measure is to be applied on an MFN basis. The purpose of the notification under paragraph 1(a) of Article 12 is to inform all WTO Members of the initiation of an investigation so that Members having a substantial interest may exercise their rights to participate in the investigation (provided for under Article 3.1) in the first instance and possibly to request consultations under Article 12.3.

(2) 12.1(b) and (c)

7.124 For the notifications envisaged under paragraphs 1(b) and (c) of Article 12, i.e. the finding of serious injury caused by imports, the proposed measure and the decision to apply a measure, we note that the terms of Article 12.2 provide for a standard expressed in terms of an overall and a specific requirement as to the content of these notifications. First, there is a reference to "all pertinent information" (the overall criterion) and then there is a list of factors (the specific criteria) presumed to be pertinent information for which information must be provided.

"12.2 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." (emphasis added)

Article 12.2 refers thereby to six more specific items which must be covered by such notifications. Thus it is necessary to notify: (1) evidence of serious injury or threat thereof that was caused by increased imports, (2) the precise description of the product involved, (3) the proposed measure, (4) the proposed date of introduction, (5) the expected duration and (6) the timetable for progressive liberalization.

7.125 In our examination of the context of the expression "all pertinent information" in Article 12.2, we note that the same word "pertinent" is also used in Article 3, with reference to the domestic publication of the overall report. But Article 12 refers to "all pertinent information", while Article 3 refers to "all pertinent issues of fact and law". The term "information" differs from "issues of fact and law", the former being more general. Based on the ordinary meaning of the terms and their context, a distinction may be made between the less stringent requirement of "all pertinent information" for the purpose of the WTO notification (Article 12), and "all pertinent issues of fact and law" for the purpose

of the final report (Article 3) which must be published domestically. "Information" (Article 12) on a matter is certainly less comprehensive than a "report setting forth ... reasoned conclusions" (Article 3) on the same matter.

7.126 The term "pertinent information" ought to be interpreted taking into account the context of Article 12 and the object and purpose of the Agreement on Safeguards and its notification requirements. We think that the notification serves essentially a transparency and information purpose. In ensuring transparency⁴⁷⁵, 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.⁴⁷⁶

7.127 We understand the European Communities to argue that, although in a summary form, Members should notify to the WTO (pursuant to Article 12 of the Agreement on Safeguards) everything they are required to publish domestically pursuant to Articles 3 and 4 of the Agreement on Safeguards. We consider that the standards of what must be published domestically and what ought to be notified to the WTO are different. If Members, when they negotiated the Agreement on Safeguards, intended that what was to be published domestically also had to be notified to the WTO, they could have made such a requirement clear by simply referring in Article 12 to the publication requirements mentioned in Articles 3 and 4. However, 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. We note that while not required by the Agreement on Safeguards, and not included as an element of information in the agreed notification formats adopted by the Committee, it may be desirable for the notification to include a reference to the published report on the case referred to in Articles 3.1 and 4.2. Such reference would, however, not replace the requirements of Article 12. We note finally that the Committee has the power to

“request such additional information as they may consider necessary from the Member proposing to apply or extend the measure”.⁴⁷⁷

(iii) *The timing of such notifications*

7.128 Article 12.1 provides that "A Member shall immediately notify the Committee on Safeguard upon ..." (emphasis added). The ordinary meaning of the term "immediately"⁴⁷⁸ introduces a certain notion of urgency. As discussed above, we believe that the text of Article 12.1, 12.2 and 12.3 makes clear that the notifications on the finding of serious injury and on the proposed measure shall in all cases precede the consultations referred to in Article 12.3. We note finally that no specific number of days is mentioned in Article 12. For us this implies that there is a need under the agreement to balance the requirement for some minimum level of information in a notification against the requirement for "immediate" notification. The more detail that is required, the less "instantly" Members will be able to notify. In this context we are also aware that Members whose official

⁴⁷⁵ We recall the need for transparency of Members' actions as emphasized in the Marrakesh Decision on Notification Procedures.

⁴⁷⁶ Article 12.3 explicitly provides that among the topics to be discussed are the objective of Article 8.1, i.e. endeavouring to maintain a substantially equivalent level of concession and other obligations to that existing under GATT.

⁴⁷⁷ Article 12.2 of the Agreement on Safeguards.

⁴⁷⁸ The New Webster Encyclopedic Dictionary defines immediately as "without delay, straightaway"; the New Shorter Oxford Dictionary defines it as "without delay, at once, instantly".

language is not a WTO working language, may encounter further delay in preparing their notifications.

7.129 We shall now proceed to examine the European Communities' claims with regard to the notifications made by Korea, and determine whether such notifications respect the requirements of Article 12 as to their content and timing.

(d) Examination of the specific notifications by Korea

(i) Notification pursuant to Article 12.1(a): The initiation of the investigation - 1 July 1996, G/SG/N/6/KOR/2

7.130 Korea's notification states the date of the initiation of the investigation, the products covered and then refers to two reasons for the initiation of the investigation: a petition was filed and the level of imports had increased. There is no explicit reference to any serious injury to the domestic industry, but Korea does refer to an initiation pursuant to Article 12.1(a) of the Agreement on Safeguards.

7.131 We disagree with the European Communities that such notification should necessarily include a discussion of all of the legal requirements for a safeguard action to be taken such as a discussion of the conditions of the markets, etc. We note that initiation is the beginning of the process, and the Agreement on Safeguards does not establish specific standards for the decision to initiate, as do Article 5 of the Agreement on the Implementation of Article VI of GATT 1994 and Article 11 of the Agreement on Subsidies and Countervailing Measures. Thus, to require a discussion in the notification of initiation of evidence regarding the elements that must be found to exist to impose a measure at the end of the investigation would impose a requirement at the initiation stage that is not required by the Agreement on Safeguards itself. We note in the first instance that whatever the relationship between the requirements of Article 12.2 regarding the contents of notifications and the contents of the investigation reports published pursuant to Articles 3.1 and 4.2, this question is not relevant to Article 12.1(a) notifications, as Article 12.2 specifically and exclusively addresses "notifications referred to in paragraphs [12.1(b) and [12.1(c)]."

7.132 The format agreed by the Committee for notifications under Article 12.1(a) is not legally binding, although helpful. The guidance in the format is general as to the kind of information to be provided, referring simply to examples of information on the reasons for initiation, and saying nothing about the level of detail of that information.

7.133 Although Korea's notification could usefully have included a reference to allegations of serious injury and a cross-reference to any domestic publication(s) in Korea, we think that this notification was sufficient to inform WTO Members adequately of Korea's initiation of an investigation concerning a particular product, so that Members having an interest in the product could avail themselves of their right to participate in the domestic investigation process.

7.134 As to the timing of this notification, we note a delay of 14 days (28 May 1996 to 11 June 1996) between the publication of the initiation decision and its notification to the WTO.⁴⁷⁹ We recall that Members are required to notify the initiation of any investigation "immediately", although no specific time-period is identified. We note, moreover, that the content of the Article 12.1(a) notification is minimal. Recalling again the reasons for the requirement of a notification without delay, we believe that any delay in Article 12.1(a) notifications can be problematic. We therefore disagree with Korea that it satisfied the requirement for an immediate notification because it did so "as soon as practically possible". There is no basis in the wording of Article 12.1 to interpret the term "immediately" to mean "as soon as practically possible". In light of

⁴⁷⁹ We note, however, a period of 34 days between the domestic publication of the initiation decision, 28 May 1996, and the date of the circulation of the said notification to all WTO Members, i.e. 1 July 1996.

all of the foregoing considerations, we find that the 14-day period between Korea's initiation of the investigation and its presentation of the notification related thereto, does not respect the requirements for "immediate" notification and is in violation of Article 12.1 of the Agreement on Safeguards.

(ii) Notification Pursuant to Article 12.1(b) and 12.2 : Determination of serious injury caused by increased imports - 2 December 1996, G/SG/N/8/KOR/1

7.135 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. We note that there is no cross-reference to the domestic publication of this finding of serious injury where the reader would find further information.

7.136 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. We note that there is no explicit requirement to explain how such injury has been caused by increased imports. Rather the requirement is to notify "evidence of injury caused". We note that the last sentence of Article 12.2 allows for the possibility to request additional information. We find that Korea's notification would permit the effective exercise of the right of other Members to request consultations. 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.

7.137 As to the timing of such notification, we note that, although it was made two months prior to the consultations, a delay of 40 days (23 October 1996 to 2 December 1996) between the domestic publication of the injury finding and the date of that notification to the Committee on Safeguards took place. We find that this delay does not satisfy the requirements for an immediate notification and therefore is in violation of Article 12.1 of the Agreement on Safeguards.

(iii) Notification Pursuant to Article 12.1(c) and 12.2 : Proposed measure – 21 January 1997, G/SG/N/10/KOR/1

7.138 As we mentioned before, we are of the view that Members are obliged under Article 12.1(c) to notify any decision with regard to the proposed imposition of a safeguard measure. Korea did so on 21 January 1997.

7.139 Considering that an important purpose of the notifications of the serious injury determination and the proposed measure is to provide other Members with an effective possibility to request consultations, we examine only the notifications of 2 December 1996 and 21 January 1997 which are the only notifications which were circulated before the consultations of 6 February 1997. The notification of 2 December 1996 is discussed above. We consider 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. We note that there is no explicit requirement to explain how such injury had been caused. Rather one of the listed factors is "evidence of injury caused by increased imports". We note again that the last sentence of Article 12.2 allows for the possibility to request additional information. Consequently, we consider that the content of that Korean notification of its proposed measure, made pursuant to Article 12.1(c), meets the requirements of Article 12.2 of the Agreement on Safeguards as it contains sufficient information on the proposed measure, e.g. its nature, scope and duration, to provide Members with a substantial interests with adequate information to request consultations.

7.140 As to its timing, we note that this notification took place more than 6 weeks after the decision on the proposed measure was taken (6 December 1996 to 21 January 1997). For us, this is not an

"immediate" notification. We consider that this delay does not meet the requirements for an "immediate" notification and therefore is in violation of Article 12.1 of the Agreement on Safeguards.

(iv) *Notification Pursuant to Article 12.1(c) : The taking of the safeguard measure – 24 March 1997, G/SG/N/10/KOR/1. Suppl.*

7.141 Following the consultations with interested Members and the special meeting of the Committee on Safeguards, Korea notified a revised description of its investigation process and the measure it had by then imposed. This notification is, in the present case, the more complete one.

7.142 We consider that provision of additional notifications following consultations may be helpful in furthering multilateral transparency, that it may be evidence of adequate consultations and may also constitute a rectification of prior, incomplete notifications.⁴⁸⁰ In this context, we recall that one of the purposes of consultations is to review the Article 12.1(b) and (c) notifications, logically implying that such consultations may lead to revision and rectification of those notifications. The wording of Article 12.2 and 12.3 seems to confirm this possibility.

7.143 In our view notifications can always be revised. However, we cannot accept Korea's argument that the fact that the European Communities and Korea almost "settled" this case is evidence that the notification was sufficient. Parties may settle a case on the basis of additional information provided during the consultation and not contained in the prior notification.

7.144 As far as it covers Korea's final decision to take a safeguard measure⁴⁸¹, we find that the content of the Korean notification of 24 March 1997 meets the requirements of Article 12.1(c) and 12.2 of the Agreement on Safeguards.

7.145 As to the timing of this notification (as far as it covers Korea's final decision to take a safeguard measure), we note that Korea notified on 24 March 1997 that on 1 March 1997 a final decision had been taken to impose a quota as a safeguard measure. We fail to see how this can be viewed as an immediate notification. As far as it covers Korea's final decision to take a safeguard measure, we find that the timing of the Korean notification of 24 March 1997 does not meet the requirements of Article 12.1 of the Agreement on Safeguards.

2. Claim of inadequate consultations

7.146 The European Communities first claim that since Korea's notifications, which serve as the basis for the consultations, were incomplete and untimely, the consultations were therefore inadequate. For the European Communities, in order for the opportunity to consult to be adequate pursuant to Article 12.3, consultations must take place on all the pertinent information to be provided under Article 12.2 in advance of the consultations, including the evidence to be supplied in the notifications of injury findings and of the results of the investigation.

7.147 The European Communities further argue that Article 12.3, when specifying that it is for the Member "proposing to apply a safeguard measure" to offer to consult, *inter alia*, on the "proposed measure", implies that consultations must take place before the measure is applied (i.e. when it is still

⁴⁸⁰ In our view, in the event that a Member considers that it has to revise or to correct its notification, that Member may, but is not obligated to, offer further consultations on this revised notification before any definitive measure is imposed, in an attempt to prevent any eventual dispute settlement proceedings based on an alleged violation of Article 12.

⁴⁸¹ This notification can only be viewed as a notification of the final decision taken since it was notified and circulated only after the final decision was put into force; this notification cannot be taken into account for the purpose of assessing whether Korea complied with its obligation to notify its proposed measure since this notification took place after the consultations, and therefore cannot remedy the flaws in the previous notification.

a "proposal"). We agree with the European Communities on this issue. Notification of the proposed measure must take place before the consultations.

7.148 In the present case, a special meeting of the Committee on Safeguards took place on 21 February 1997 and Korea held bilateral consultations with the European Communities, Australia and New Zealand on 4 and 5 February 1997 in Geneva. By failing to provide all pertinent information in its notifications in advance of consultations (and specifically those notifications made pursuant to Article 12.1(b) and (c)), the European Communities argues that Korea prevented WTO Members having a substantial interest as exporters from engaging in meaningful consultations, thus failing to provide them with an adequate opportunity in this respect. As a consequence, it also frustrated the further objective of those consultations, namely to reach an agreement or to ensure the maintenance of the balance of concessions as foreseen in Article 8.1 of the Agreement on Safeguards.

7.149 Korea responds that after receiving two requests for consultations under Article 12.3 of the Agreement on Safeguards, it provided (although, according to Korea, this was not required) a preliminary notification of the proposed measure, under Article 12.1(c) on 21 January 1997. We have already mentioned that we consider that Members are under an obligation to notify any proposed measures and must also invite any interested party to consult on this issue. Korea adds that consultations were certainly fruitful as they almost resulted in a mutually agreed solution. The European Communities responds that the case was never settled but that in any case the information and responses submitted by Korea never provided it with all pertinent information.

7.150 We have found above that the content of Korea's notifications was in conformity with the provisions of Article 12. Moreover, we consider that consultations may be adequate even in circumstances where prior notifications of a finding of serious injury or of any proposed measure are incomplete. In fact one of the purposes of the consultations is to review the content of such notifications (and thereby augment it if necessary). During consultations parties usually exchange further information, exchange questions and answers and proceed to a thorough discussion of the national authority's determinations.

7.151 The parties have explicitly requested us to assess the compatibility of their consultations with the requirements of the Agreement on Safeguards, based on the chronology of events that they submitted to us.⁴⁸² We note that no formal mutually agreed solution was reached by the parties in this dispute, but we do not consider that the only criterion for assessing the adequacy of consultations is whether parties through such consultations settle their dispute. Many formal dispute settlement proceedings take place following consultations which are WTO compatible and which do not lead to a mutually agreed settlement of the dispute.

7.152 In the present case we note that parties exchanged questions and answers. The European Communities claims that it has always been unsatisfied with the Korean's answers and notifications (together with Korea's determination). This may be the case and would explain why it decided to pursue dispute settlement proceedings, but it does not prove that Korea did not consult in good faith for the purpose of informing interested Members of its investigation, its conclusion and its proposed actions. We note also that Korea did impose a measure at a level and for a duration different, and less restrictive, than initially proposed. Consultations were certainly fruitful in this respect, albeit not sufficient to satisfy the European Communities.

7.153 We reject therefore the EC claim that Korea failed to provide adequate opportunity to consult. Moreover, it seems to us that such consultations have led to an important revision of the initial notification and that parties, at some point, entered into very serious negotiations and considered serious elements of a mutually agreed solution. The fact that this proposed settlement was not formalized through the acceptance by the relevant internal authorities of the European Communities is

⁴⁸² See paras.4.730 and 4.762 *supra*.

immaterial. What is relevant for the purpose of this EC claim, is the fact that the parties to these consultations were able to negotiate quite effectively, which, in our view, demonstrates that the consultations were adequate. For us, this is the purpose of any consultation process and the scope of the obligation contained in Article 12.3 of the Agreement on Safeguards, i.e. to favour efforts by the parties to reach a mutually agreed solution of their disagreement. In our view Korea has very well respected its obligation during the consultation process in this case. We therefore reject this EC claim made pursuant to Article 12.3 of the Agreement on Safeguards.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In the light of the findings above, we conclude that the definitive safeguard measure was imposed inconsistently with the provisions of the Agreement on Safeguards in that

- (a) Korea's serious injury determination is not consistent with the provisions of Articles 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;
- (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.

8.2 In the light of the findings above, we reject

- (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.
- (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.
- (d) the European Communities' claim that Korea violated the provisions of Article 12.3 of the Agreement on Safeguards in refusing to offer appropriate consultations to the European Communities.

8.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that Korea has acted inconsistently with the provisions of the Agreement on Safeguards, as described in paragraph 8.1 *supra*, it has nullified or impaired the benefits accruing to the European Communities under that agreement.

8.4 The Panel *recommends* that the Dispute Settlement Body request Korea to bring its measures into conformity with its obligations under the WTO Agreement.