

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

Notification of an Appeal by Korea under
paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 15 September 1999, sent by Korea to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the Understanding on Rules of Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, Korea hereby notifies its decision to appeal to the Appellate Body certain findings and conclusions of the Panel on *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products* (WT/DS98/R).

Korea requests the Appellate Body to review the following issues of law covered in the Panel Report and legal interpretations developed by the Panel.

(A) The Panel's Findings with Respect to Article 6.2 of the DSU

(i) The Panel erred in its legal interpretation of DSU Article 6.2

DSU Article 6.2 establishes the specificity requirement for requests for establishment of a panel. It states:

"[the request for the establishment of a panel] shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."
(emphasis added)

In paragraph 7.5 of its Report, the Panel interpreted DSU Article 6.2 as follows: "[w]e 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., violations alleged." Korea appeals this interpretation by the Panel.

(ii) The Panel erred as a matter of law in applying an erroneous interpretation of DSU Article 6.2

The Panel erred as a matter of law in finding that the EC's request for establishment of a panel satisfied its obligations under DSU Article 6.2 by merely listing four articles of the Agreement on Safeguards and Article XIX of GATT 1994. In paragraph 7.7 of its report, the Panel stated: "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." In this case, such listing, in Korea's view, does not satisfy the requirement under DSU Article 6.2 that the request include "a summary of the legal basis of the complaint sufficient to present the problem clearly."

(iii) The Panel erred as a matter of law in the application of its own interpretation

The Panel interpreted DSU Article 6.2 as requiring that a request for establishment of a panel include a "description of ... the claims." However, the mere listing of articles that have allegedly been breached does not provide any "description" whatsoever.

The EC's failure to comply with its obligations under DSU Article 6.2 led to the adoption of imprecise terms of reference and failed to provide notice to Korea and to third parties sufficient for them to exercise fully their rights under the DSU. Based on the above, Korea respectfully requests that the Appellate Body find that the Panel erred in its interpretation of DSU Article 6.2 and erred in finding that the EC's request for establishment of a panel satisfied the requirements of DSU Article 6.2. As a result, Korea requests the Appellate Body reject the EC's complaint in its entirety.

(B) The Panel's Findings with Respect to Proceeding with an Examination of the OAI Report

(i) The Panel erred in using the OAI Report as the sole basis for finding that Korea violated Article 4 of the Agreement on Safeguards

During the course of the proceedings, Korea argued that the OAI Report was irrelevant because the EC failed to present any claims based on it. In addition, the EC expressly conceded that the OAI Report was not at issue between the parties. Consequently, Korea requested that the Panel only address the EC's claims regarding Korea's notification under Article 12 of the Agreement on Safeguards. The Panel, however, proceeded to make findings regarding Article 4 based solely on the OAI Report.

Korea appeals the Panel's findings as to Article 4, noting that the Panel relied on the OAI Report exclusively when making its determination, without addressing Korea's arguments that the OAI Report was never at issue and after conceding that the EC's claims were based exclusively on Korea's notifications under Article 12 of the Agreement on Safeguards.

(ii) The Panel violated Article 11 by failing to objectively assess the "matter before it"

Article 11 of the DSU requires the Panel to "make an objective assessment of the matter before it." According to the Appellate Body, a "matter" consists of the specific measures at issue as well as the legal basis of the complaint. The EC did not base its "claims" on the OAI Report, but on Korea's notifications. Accordingly, the "matter" before the Panel consisted of the safeguard measure and the claims based on the notifications. The Panel, however, evaluated claims based on the OAI Report, thereby failing to objectively assess the "matter before it" in violation of DSU Article 11.

(iii) The Panel erred by failing to consider Korea's argument that parties to a dispute settlement procedure cannot introduce new claims at or subsequent to the rebuttal stage

The Panel erred in failing to address whether the EC permissibly introduced any new claims relating to the consistency of the OAI Report. The Panel also erred in basing its findings on claims improperly raised by the EC or unilaterally established by the Panel based on the OAI Report, a document not at issue between the parties prior to the rebuttal stage. The EC's actions (and those of the Panel) denied Korea and third parties the opportunity to respond to such claims.

(iv) The Panel erred in its characterization of the submission of the OAI Report by Korea

The Panel erred in its characterization of the OAI Report. As it expressly stated to the Panel, Korea submitted the Report at the request of the Panel as background for the dispute and did not rely on the Report in defending against the EC's claims. To characterize the submission in any other manner or to use the Report against the submitting party as the Panel did in this case creates a disincentive for future parties to a dispute to submit information that may be useful in providing background or context to the dispute.

(C) The Panel's Findings with Respect to the Burden of Proof

(i) The Panel failed to apply the requisite burden of proof

The Panel erred in its application of the burden of proof in paragraphs 7.24 and 7.25 and its subsequent findings relating to Article 4 by failing to determine first whether the EC had established a *prima facie* case of a violation of the Agreement on Safeguards. In Korea's view, the Panel ignored the burden of proof and evidentiary steps set forth in the first part of paragraph 7.24 and simply weighed the evidence of both sides at the end of the proceeding. The Panel's application of the burden of proof in these paragraphs and the failure to make any findings regarding whether the EC had presented a *prima facie* case is, according to Korea, inconsistent with past Appellate Body practice.

(ii) The Panel erred, as a matter of law, in presuming that the EC satisfied its burden of proof and immediately proceeding to find that Korea violated Article 4 of the Agreement on Safeguards based solely on the OAI Report

If the Panel had properly applied the requisite burden of proof, it could not, as a matter of law, have found that the EC presented a *prima facie* case. In assessing whether the EC presented a *prima facie* case, the Panel was required to limit its evaluation to whether the evidence before it establishes a presumption that the EC's claims are true. The Panel does not have the authority to make a party's claims for it or otherwise relieve a party of its task of presenting a *prima facie* case. Thus, the Panel erred in presuming that the EC had established a *prima facie* case based on its own claims and in otherwise relieving the EC of its obligation to show that Korea's measure was inconsistent with Article 4 of the Agreement on Safeguards.

(D) The Panel's Interpretation of Article 5 of the Agreement on Safeguards

Korea appeals the Panel's findings in paragraphs 7.31, 7.101, 7.102, 7.104, 7.105, and 7.106 and the conclusion in paragraph 7.110 of its report. Although the Panel's findings in these sections of the report are interrelated, they essentially impose two new obligations on an importing Member that are not contained in Article 5 of the Agreement on Safeguards. These two obligations are set out generally in paragraph 7.101:

- (a) "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" (emphasis added); and
- (b) "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."

In Korea's view, the Panel erred in its interpretation of Article 5.1 as obligating Korea to demonstrate and explain in more detail the basis for the particular safeguard measure imposed. In so doing, Korea requests that the Appellate Body find that the Panel improperly imposed additional obligations on Korea not contained in a covered agreement in violation of DSU Article 19.2.
