

REPUBLIC OF KOREA - RESTRICTIONS ON IMPORTS OF BEEF -
COMPLAINT BY AUSTRALIA

Report of the Panel adopted on 7 November 1989
(L/6504 - 36S/202)

INTRODUCTION

1. In March and April 1988, Australia and the Republic of Korea held Article XXIII:1 consultations concerning Korea's beef import restrictions. These consultations did not lead to a mutually satisfactory solution. Australia therefore requested the Council to establish a panel to examine the matter (L/6332).

2. At its meeting on 4 May 1988, the Council agreed to establish a panel and authorized its Chairman to designate the chairman and members of the Panel in consultation with the parties concerned. Furthermore, since at the same Council meeting another panel concerning the same subject matter was set up at the request of the United States, it was decided that the Council Chairman would consult with the parties to the two Panels and with the secretariat concerning the appropriate administrative arrangements (C/M/220, item 3). Argentina, Canada, the European Community, New Zealand, the United States and Uruguay each reserved their right to make a submission to the Panel.

3. The following terms of reference were agreed upon:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Australia in document L/6332 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings as provided for in Article XXIII:2."

4. In consultations among the parties it was agreed that both the Australian/Korean Panel and the United States/Korean Panel would have the same composition*, as follows:

Chairman: Mr. Chew Tai Soo
Members: Ms. Yvonne Choi
 Mr. Piotr Freyberg

5. The Panel met with the parties on 30 November 1988 and on 18 January 1989. It received third country submissions from Canada, New Zealand and the United States. Their views are summarized below in paragraphs 79 to 89. The Panel submitted its report on the dispute to the parties on 25 April 1989.

PROCEDURAL QUESTIONS

6. In its first submission to the Panel, the Republic of Korea argued that the complaint had been improperly brought under Article XXIII of the GATT and that the Panel should therefore declare it inadmissible. Korea requested that the Panel rule on the issue of admissibility prior to considering the merits of the complaint.

* Later it was agreed that the New Zealand/Korean Panel on the same subject matter would also have the same composition.

7. Korea put forward the following arguments for its request: since its accession to the GATT, Korea had applied restrictions on beef, among other products, under Article XVIII:B. Korea had

regularly held consultations about these restrictions pursuant to Article XVIII:12(b), under the aegis of the GATT's Balance-of-Payments Committee. The most recent report of this Committee was issued as BOP/R/171 (1987). A new round of consultations was scheduled to take place in June 1989.

8. Korea also argued that the General Agreement made specific provision for a complaint procedure in Article XVIII:12(d) if, despite the multilateral surveillance exercised pursuant to other provisions of Section B of Article XVIII, a contracting party wanted to challenge the consistency of restrictions that have been applied under this Section.

9. Korea further noted that the complaint procedures of Article XVIII:12(d) and Article XXIII differed in several important respects. For example, under Article XVIII:12(d), the complainant had to make a prima facie showing that the disputed restrictions were inconsistent with the provisions of Article XVIII:B. On the other hand, Article XXIII merely required a showing of nullification or impairment of benefits of the complainant, which was not dependent on a showing of inconsistencies with the General Agreement. There were valid reasons for these differences. When countries applied restrictions under Article XVIII:B and held regular consultations concerning these measures with a qualified GATT Committee that took into account the relevant findings of the International Monetary Fund, they had a legitimate expectation that these measures could not simply be challenged under the relatively loose requirements of Article XXIII regarding nullification or impairment. Otherwise, the exercise of multilateral surveillance pursuant to Article XVIII:B became meaningless.

10. The Panel decided to make an immediate ruling on the question of admissibility as requested by Korea, valid for both the United States Panel and for Australia's Panel, as follows:

"After deliberation the Panels came to the conclusion that they clearly have a mandate to examine the merits of the cases in accordance with their respective terms of reference. The Panels also found that they cannot accede to the request of the Republic of Korea. The following considerations were taken into account by the Panels in arriving at their conclusions:

(a) At the GATT Council in May 1988, the United States and Australia requested the establishment of a panel under Article XXIII:2. The Republic of Korea agreed to these requests and asked for two separate panels to be set up. As is customary, the Panels were set up by the GATT Council by consensus. The Republic of Korea is a party to the consensus to set up the two Panels under Article XXIII:2.

(b) The terms of reference given to the Panels, and agreed to by the parties as well as the Council, require the Panels to examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in document L/6316, and by Australia in document L/6332 respectively, and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.

(c) The terms of reference do not give the Panels authority to rule on the admissibility of the respective claims".

11. The case before the Panel concerned measures maintained by the Republic of Korea on imports of beef (CCCN 02.01).

(a) General

12. Since its accession in 1967, Korea has maintained balance-of-payments (BOP) measures on various products. Since that year, and to date, Korea's BOP restrictions have been subject to regular review by the BOP Committee. During this period, Korea had abandoned or relaxed restrictions on some products. By 1988, restrictions for which Korea claimed BOP cover were still maintained on 358 items, including beef. In 1979, the Korean tariff on beef was reduced from 25 per cent to 20 per cent and bound at that level. Korean beef imports increased from 694 tons (product weight) in 1976 to 25,316 tons in 1981, 42,329 tons in 1982 and 51,515 tons in 1983.¹ Increased beef supplies, due to rising domestic production and the higher level of beef imports, resulted eventually in falling prices on the Korean domestic market and mounting pressures from Korean beef farmers for protection from the adverse effects of beef imports.

13. In October 1984, Korea ceased issuing tenders for commercial imports to the general market, and in May 1985 orders for imports of high-quality beef for the hotel market also ceased, leading to a virtual stop of commercial beef imports. These measures were neither notified to, nor discussed in, the BOP Committee. Between May 1985 and August 1988, no commercial imports of beef took place. Korea partially reopened its market in August 1988, permitting up to 14,500 tons (product weight) of beef to be imported before the end of the year. For 1989, a quota of up to 39,000 tons had been announced.

(b) Korea's balance-of-payments consultations

14. At the last meeting of the BOP Committee in December 1987, "the Committee took note with great satisfaction of the improvement in the Korean trade and payments situation since the last full consultation".² "The prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B. The conditions laid down in paragraph 9 of Article XVIII for the imposition of trade restrictions for balance-of-payments purposes and the statement contained in the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes that 'restrictive trade measures are in general an inefficient means to maintain or restore balance-of-payments equilibrium' were also recalled. It also noted that many of the remaining measures were related to imports of agricultural products or to particular industrial sectors, and recalled the provision of the 1979 Declaration that 'restrictive import measures taken for balance-of-payments purposes should not be taken for the purpose of protecting a particular industry or sector'".

15. Therefore, the BOP Committee "stressed the need to establish a clear timetable for the early, progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes. It welcomed Korea's willingness to undertake another full consultation with the Committee in the first part of 1989. However, the expectation was expressed that Korea would be able in the meantime to establish a timetable for the phasing out of balance-of-payments restrictions, and that Korea would consider alternative GATT justifications for any remaining measures, thus obviating the need for such consultations. The representative of Korea stated that he could not prejudge the policy of the next

¹Figures provided by the Republic of Korea

²The last full consultation before 1987 was held in November 1984.

Government in this regard".³ Moreover, members of the Committee had stated that "they did not necessarily expect Korea to disinvoke Article XVIII:B immediately ...".

16. Economic indicators in Korea since its latest BOP consultations showed a continuation of the favourable economic situation of the recent past. Economic growth for the period January-September 1988 was expected to have reached 12 per cent as compared to the same period in 1987. Terms of trade improved by 2.5 per cent during the first nine months of 1988 while unemployment dropped from 4 per cent in 1985 to 2.6 per cent for the period January-September 1988. As regards BOP, the current account for the first nine months of 1988 showed a favourable balance of US\$14.1 billion, compared to US\$9.9 billion for the whole year of 1987. Official reserves (gross) passed from US\$3.6 billion at the end of 1987 (enough to finance 1.1 months of imports) to US\$12.3 billion at the end of 1988 (3 months of imports). Finally, the ratio of external debt to GNP decreased from 30 per cent in 1987 to 20.4 per cent for the period January-September 1988.⁴

(c) Korean beef production and imports

17. During the late 1970's and early 1980's, Korea adopted a number of policies designed to promote a cattle herd build-up. These measures included banning the slaughter of all bulls under 350 kg. and cows of less than six years of age. In addition, Korea began to import large quantities of beef for domestic consumption. Finally, Korea undertook an expansion of credit to help cattle farmers build up their herds and provided producer incentives (5,000 won per head) for female calves. The credit programme and restrictive slaughter rules led to a sharp increase in imports of live cattle and beef. Korean live beef cattle imports increased from 8,138 head in 1979 to a peak of 67,706 head in 1983. During this period, Korean beef imports averaged 30,330 metric tons⁵ (product weight).

18. The success of the Korean programme led to a strong increase in domestic cattle numbers. Official Korean statistics showed that the beef cattle inventory nearly doubled between 1982 and 1986. The total beef inventory increased from 1,312,000 head on 1 January 1982 to 2,553,000 head on 1 January 1986. This build-up in cattle inventories eventually led to falling cattle prices. Livestock market prices for Korean native cattle (400 kg.) rose to a peak of 1.57 million won per head in February 1983 and then began to fall throughout 1984-1986, eventually reaching a low of 0.92 million won per head in February 1987.⁶ The decline in cattle prices led to reduced profitability for cattle farmers.

(d) Korean beef import régime

(i) Import system prior to 1 July 1987

19. Prior to 1 July 1987, Korea's beef imports were governed by the Foreign Trade Transaction Act (as amended) which came into force in 1967. The Foreign Trade Transaction Act provided, inter alia, that the Minister of Trade and Industry was obliged to publicly notify the classification of (a) automatic approval import items; (b) restricted approval items; and (c) prohibited items. For restricted items, the Minister was required to lay down procedures controlling their import, including any restrictions on

³The full text of the Balance-of-Payments Committee's conclusions is set out in Annex I.

⁴Figures derived from tables in Annex II

⁵Korean figure

⁶Figures derived from National Livestock Cooperatives Federation

quantity. These arrangements were published in a consolidated public notice (the Export and Import Notice). Meat and edible offals were classified in 1967 as restricted items for the purposes of the Foreign Trade Transaction Act. As restricted products, beef could be imported on the recommendation of the National Livestock Cooperatives Federation (NLCF) subject to the guidelines of the Ministry of Agriculture, Forestry and Fisheries (MAFF), which controlled the quota allocation. If import levels became too high in relation to the level of consumption, imports could be adjusted or suspended.

20. Under the Foreign Trade Transaction Act, the Republic of Korea handled beef imports via two separate mechanisms. One mechanism was concerned with imports of beef for general domestic consumption and generally covered more than 90 per cent of beef imports. These were administered by the NLCF which was established in 1981 by the Livestock Cooperative Law. It had the following functions: (a) administration of a Livestock Development Fund (funded by import levies and direct government contributions) with a prime responsibility of providing concessional loans to livestock farmers; (b) establishment of livestock markets; (c) intervention in the domestic market to stabilize prices through the purchase or sale of stocks; (d) import operations; (e) supply of farming material; (f) marketing of livestock products; (g) general banking business; and (h) extension services. The NLCF imported beef for the general market through a tender system, according to the MAFF's guidelines. Some of the imported beef was processed by the NLCF into packed beef, and some was released to a private entity called Korea Cold Storage Co., at prices lower than those of the domestic wholesale market in order for the latter to produce packed beef. The margin between the wholesale release price and the NLCF's costs, including the purchase price of imported beef, duty and handling charges, was allocated to the Livestock Development Fund.

21. The second mechanism was concerned with imports of high-quality beef for hotels and was handled by the Korean Tourist Hotel Supply Centre (KTHSC) between 1981 and 1985. The KTHSC, an organization representing Korea's major tourist hotels, was established in 1972, under the jurisdiction of the Ministry of Transportation, to import goods solely for tourist hotels. After application from the KTHSC, the Ministry of Transportation would forward the demand for beef imports to the MAFF. The KTHSC paid a levy of 2 per cent of the c.i.f. price of the imported beef to the NLCF for the Livestock Development Fund. The import operations of the NLCF were virtually suspended in October 1984 and those of the KTHSC in May 1985.

(ii) Current import system

22. On 1 July 1987 the Foreign Trade Transaction Act was superseded by the Foreign Trade Act (Law No. 3895 of 31 December 1986). A new organization was established by the Korean Government, the Livestock Products Marketing Organization (LPMO), with effect from 1 August 1988. This organization administered on an exclusive basis the importation of beef within the framework of quantitative restrictions set by the Korean Government. According to its current by-laws, as amended on 29 December 1988, the LPMO was to:

- stabilize the prices of livestock products through smooth adjustment of supply and demand, supporting thereby, and at the same time, both livestock farmers and consumers; and
- contribute to improving the balance of payments.

The main function of the LPMO was the administration of the quota restrictions set by the government. The LPMO's board of fifteen directors included the following representatives:

President, NLCF
Director-General, Livestock Bureau, MAFF
Chairman, Pusan Livestock Cooperative

Vice-President for Marketing, National Agricultural Cooperative Federation
Chairman, Baekam Agricultural Cooperative
President, National Headquarters for Korea Dietary and Life Improvement Campaign
Chairman, Korea Dairy and Beef Farmers Association
Professor, Livestock College, Kunkook University
Research Director for Agricultural Development, Korea Rural Economic Institute
Professor, College of Agriculture, Seoul National University
President, LPMO
Chairman, Tourist Hotel Subcommittee, Korea Tourism Association
Chairman, Korea Restaurant Association
Chairwoman, Korea Federation of Housewives Club
Senior Vice-President, Korea Consumers Protection Association

23. Under the current import arrangements, the MAFF sets a maximum import level on the basis of various criteria such as estimated domestic beef production and estimated domestic consumption. In 1988, the LPMO imported the beef through a system of open tenders and resold a major part of it by auction to the domestic market.

24. Before reselling the imported beef either through the wholesale auction system (61.2 per cent of total volume) or directly (38.8 per cent), for instance to hotels, the LPMO added its costs and a profit margin. Between August and October 1988 the LPMO imposed an announced base price under which the meat was not sold at the wholesale auction. Since October, no explicit base price had been announced on the understanding that a certain base price level had to be respected. After having deducted its overhead, the difference between the import contract price and the auction price (or derived direct sale price) was paid into the Livestock Development Fund. This difference varied from one month to another, and also for different types of beef, but was on average approximately 44 per cent in the period August to November 1988.

MAIN ARGUMENTS

General

25. Australia considered that the prohibition of beef imports from end- 1984 until August 1988 and the subsequent import ceiling restrictions maintained by the Republic of Korea were contrary to the provisions of Article XI:1 and could not be justified under Article XI:2, Article XVIII:B or under any other article of the General Agreement. The restrictions were also in contravention of Article II:4 of the General Agreement. Australia further questioned the conformity of the measures with the provisions of Articles II:1(b), X and XIII. It referred to the arguments made in third party submissions concerning these Articles and requested that the Panel include these arguments in its consideration. The relevant arguments are summarized in paragraphs 84 and 85 below. It concluded therefore that Korea's beef import restrictions had resulted in nullification and impairment of benefits accruing to Australia within the meaning of Article XXIII:2 of the General Agreement, and had caused serious damage to Australia's trade interests.

26. The Republic of Korea argued that its restrictions on beef imports were covered by the balance-of-payments provisions of Article XVIII:B and were thus permissible under the General Agreement. Furthermore, Australia's complaint could not be reviewed under the standards of Article XXIII in view of the standards and procedures in Article XVIII:12(d).

Article XI:1

27. Australia argued that the Korean Government's decisions regarding beef imports had been based solely on the domestic supply and demand situation and industry protection considerations. Therefore, the restrictions had to be judged under the provisions of Article XI. Australia also argued that the quantitative restrictions and import ban maintained by Korea since 1984/85 on imports of beef were prima facie inconsistent with the GATT under the provisions of Article XI:1 which proscribed "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures". Australia maintained that the restrictions could not be justified under the exemption provisions of Article XI:2 since they were not measures necessary to the enforcement of government efforts to restrict the amount of domestic beef permitted to be marketed or produced, or to the removal of a temporary surplus by making this available to certain groups of consumers at less than market prices.

28. Although the Korean Government had often referred to its import regime covering the period from end-1984 until the second half of 1988 as a "suspension of imports", this, Australia argued, did not alter the fact that no commercial imports of beef were permitted by Korea during that period, i.e., the measures had the effect of an import prohibition. Korean official import statistics supported this contention. Australia also noted that although there had been a very limited easing of the ban on beef imports in the second half of 1988, the fundamental import control mechanisms remained basically unchanged. Australia had been advised by the Korean Government that the 14,500 tons access for 1988 announced on 26 July was not a definite quota as such but an anticipated amount that might need to be imported to make up an expected shortfall in supply. It might be contended that the partial (and possibly temporary) easing by the Korean Government of its ban on beef imports in the second half of 1988 meant that the continuing controls on access to the market now constituted restrictions rather than the prohibition that previously existed. However, Australia would argue that Korea was still clearly in breach of its obligations under Article XI:1.

29. Korea did not deny that the beef restrictions maintained by Korea were contrary to the provisions of Article XI but claimed that they were justified under Article XVIII:B.

Article II

30. Australia noted that the beef import arrangements introduced in August 1988 included the establishment of the Livestock Products Marketing Organisation (LPMO). The LPMO was the sole channel for beef imports both for general consumption and for tourist hotels and facilities. Under the new beef import arrangements which, Australia contended, represented no effective change from the previous system, the Korean Ministry of Agriculture, Forestry and Fisheries (MAFF) determined the maximum import level on the recommendation of the LPMO. The LPMO then imported beef through open tender and sold it in a manner consistent with the Korean Government's objective of beef price stabilization. In so doing, the LPMO controlled the frequency of tenders, tender specifications, quantity of particular types of beef imported, the import price, distribution of imports and the release price. Participation in tenders was open to countries which met the Korean health and veterinary requirements. The first LPMO tender was called on 9 August 1988 and four tenders had been held to the beginning of December 1988.

31. Imported beef was released on a wholesale basis by the LPMO at prices equivalent to the average wholesale price of Korean beef obtained at auction in Seoul during the ten days preceding that release. Thus, Australia argued, the LPMO applied a price equalization mechanism to bring the price of imported beef up to domestic wholesale prices. The resulting difference between the wholesale release price and the LPMO's buy-in price was then paid to the Livestock Development Fund. Australia understood that this mechanism currently applied to beef imported for both the general and hotel

markets, although the Korean authorities had still to take a decision on the arrangements to apply in the future to beef imports for hotel use. The price equalization mechanism resulted in an excessive monopoly return which effectively increased protection beyond that provided by the bound duty. Australia also pointed out that the impact of such a mechanism was uneven in that the percentage mark-up was generally lower on the more expensive cuts/types of beef and on beef imported from higher-priced sources and conversely higher on beef in the categories traditionally imported from Australia.

32. In conclusion, Australia considered that the LPMO was an authorized import monopoly in terms of Article II:4 and that the application of the price mark-up on imports by the LPMO was in contravention of Article II:4 and in excess of Korea's import tariff on beef which was bound at 20 per cent ad valorem.

33. Korea replied that it was important to stress at the outset that the LPMO mechanism did not represent a separate import restriction. The LPMO simply had no authority to set or modify quantitative limitations on beef imports. Nor was the LPMO charged with making recommendations to the Korean Government on the appropriate level of imports. Rather, the LPMO administered the importation of beef within the framework of quantitative restrictions set by the Government. Since the LPMO was just an implementing mechanism, the LPMO's objectives did not affect the justification of the Government's restrictions on beef imports. As concerned the Livestock Development Fund, the NLCF administered expenditures from this Fund under instructions from the MAFF.

34. Korea further responded that as long as it maintained quantitative restrictions justified under Article XVIII:B, these had to be administered, i.e., be allocated among the different suppliers. With respect to administering restrictions, Article XVIII:B referred to Article XIII, which laid down principles to avoid discrimination among foreign suppliers who wanted to export to the country that applied quantitative restrictions. However, Article XIII was not the only standard that a country had to observe when it imported products which it had subjected to restriction. The importing country had to continue to observe its tariff bindings as well, even if it had GATT justification to subject the products concerned to quantitative restrictions. Thus, while Article XVIII permitted a country to impose quantitative restrictions for BOP reasons, it did not make allowance for surcharges that increased import duties above the level bound in GATT. This was clearly established by the working party that reviewed the tariff surcharge imposed by the United States for BOP reasons in 1971.⁷

35. Consequently, assuming that Korea was entitled to maintain quantitative restrictions under Article XVIII:B, then the LPMO's administration of these restrictions was subject to two GATT requirements: first, the LPMO had to administer these consistent with Article XIII; second, the LPMO could not impose surcharges on beef imports that exceeded Korea's tariff on beef which had been bound pursuant to Article II. These were the relevant standards for this Panel's review of the LPMO's operation. Korea explained that quota shares were allocated to the foreign suppliers who submitted the lowest bid to the tender which the LPMO had issued. Beef from the successful bidder would be subject to the bound customs duty of 20 per cent. In addition, 2.5 per cent would be levied pursuant to the National Defence Tax Law. This extra levy was not inconsistent with the GATT because the levy applied across the board, to foreign and domestic goods alike and even to the income of wage earners. No other taxes, levies or charges were applied on imports of beef. Furthermore, Korea denied that the LPMO, when reselling imported beef on the domestic market, equalized prices of imported beef to the price level of domestic beef. Korea recalled that virtually all imported beef was resold through wholesale market auctions or at prices that were equivalent to or lower than an auction-based price average for imported beef. Thus, in Korea's view, the LPMO's operation was consistent with Article II.

⁷United States Temporary Import Surcharge, BISD 18S/213, 223.

Article XVIII:B

(a) Procedural aspects

36. The Republic of Korea argued that Australia could not challenge the GATT compatibility of Korea's restrictions under Article XXIII because of the existence of special review procedures in Article XVIII:B as well as the actual results of Article XVIII:B reviews by the Balance-of-Payments (BOP) Committee. Korea referred to a recent panel case⁸ in which the United States had challenged tariff preferences on citrus fruit granted by the European Community to certain Mediterranean countries with whom it had concluded free trade agreements. The Community argued in that case that the United States complaint was inadmissible under Article XXIII. It referred to Article XXIV:7 which, in the Community's view, represented the exclusive mechanism to review the consistency of the tariff preferences and the underlying free trade agreements with the GATT. The panel admitted the United States complaint, but refused to consider its merits under Article XXIII:1(a). Instead, the panel reviewed the merits of the United States complaint exclusively under Article XXIII:1(b), thus limiting its review to the issue of "non-violation" nullification or impairment.

37. Korea therefore argued that Australia would have to make a showing of "non-violation" nullification or impairment. Referring to the above-mentioned Citrus Panel case in which the panel considered that "the practice, so far followed by the CONTRACTING PARTIES never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT compatibility of measures subject to special review procedures was sound"⁹, thus ruling out the consideration of the United States complaint under paragraph 1(a) of Article XXIII, Korea argued that if Article XXIV:7 was deemed a special review procedure as in the above-mentioned case, Article XVIII paragraph 12 a fortiori set forward such procedures.

38. The above-mentioned principle was self-evident, according to Korea. If measures were subject to GATT review pursuant to special procedures, it made no sense to allow them to be challenged under Article XXIII as well. Such duplication wasted the resources of all concerned, in particular those of the GATT bodies charged with the special review, and of the country whose measures were being examined. Moreover, to the extent the standards of review under Article XXIII were different from the standards applied to the special review procedures, review under Article XXIII might negate the latter.

39. Australia replied that the particular finding in the Citrus Panel report quoted by Korea in paragraph 37 above was an especially contentious issue and that this report had not been adopted by the Council. The findings of the Citrus Panel were therefore not binding in any way. An examination of the Council's consideration of the report revealed that many contracting parties, whether or not they supported the recommended "economic solution" to the dispute, had reservations about individual findings. Australia's view was made clear in its third party submission to the Citrus Panel.¹⁰ The United States held the same position and, in the first Council discussion of the panel's report (document C/M/186), had noted that the EEC's support of the panel's approach "was a reversal of that taken in working party reviews of its preferential arrangements, i.e., that contracting parties retained their rights under Articles XXII and XXIII". The finding drew a conclusion which was not self-evident, i.e.,

⁸European Community - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, L/5776, 7 February 1985. This report was not adopted by the GATT Council.

⁹Idem, paragraph 4.16

¹⁰Op. cit., page 72, paragraph 3.102

because something had never been done, there was some de facto "agreement" that this represented an accepted practice that it could not or should not be done. An alternative, and more plausible, conclusion was that a situation had not yet arisen in which recourse to the procedures of Article XXIII was considered to be necessary. Indeed, Australia was not aware of any agreement, whether implicit or explicit, in support of the so-called practice found by the Citrus Panel. Australia would argue that because such a practice would involve a ceding of basic rights under the General Agreement, any such agreement would require an explicit decision by the CONTRACTING PARTIES.

40. To this, Korea responded that Australia ignored its right to challenge, at any time, the compatibility with the GATT of BOP restrictions pursuant to the proper standards and procedure of Article XVIII:12(d). Thus, there was no question of ceding basic rights under the General Agreement, nor had Australia cited any argument or precedent that defeated the logic of the Citrus Panel rule, which was self-evident. Moreover, Korea made reference to the following statement in a 1955 Working Party report from which it could be clearly deduced that the proper remedy to complain about the compatibility with the GATT of BOP restrictions was Article XVIII:12(d) rather than Article XXIII:

"The Working Party agreed that it would not be desirable to write into Article XI a procedure for dealing with cases of deviations from the provisions of that Article as the remedy for such cases was already contained in the provisions of Articles XXII and XXIII of the Agreement" (BISD 3S/160, 191 at para. 74).

The Working Party decided not to include a multilateral review mechanism to supervise the justification of quantitative restrictions imposed pursuant to paragraph 2 of Article XI because it felt comfortable with a challenge of these restrictions under the general procedure of Article XXIII. On the other hand, the same Working Party incorporated a multilateral review mechanism (Article XVIII:12(b)) to supervise the justification of quantitative restrictions imposed pursuant to Article XVIII:B. And while consciously avoiding duplication of dispute settlement procedures, the Working Party established a separate complaint procedure to challenge these restrictions, with more difficult standards, in Article XVIII:12(d). Obviously, the Working Party did not envisage that the restrictions reviewed by the BOP Committee under Article XVIII:12(b) could be challenged under the relatively loose standards of Article XXIII as well.

41. Australia responded that Article XXIII provided for the settlement of disputes concerning failure to carry out obligations under any and all provisions of the General Agreement. Logically, Article XVIII:12(d) consultation procedures would be utilized in situations where both parties agreed that the import restrictions in question were restrictions applied for BOP reasons and both parties considered that such a process was appropriate and useful. Korea had made unilateral declarations that its import restrictions on beef had been and were being taken for BOP reasons. However, Australia had demonstrated that the measures and their implementation and administration had and were being applied for industry protection reasons and should be judged against the obligations in Articles XI:1 and II:4.

42. Korea replied that Australia committed an analytical error. The mere fact that Australia disagreed that Korea's restrictions on beef imports were justified for BOP reasons did not mean that these restrictions were unjustified, or that Australia could ignore the procedures of Article XVIII:B to express its disagreement. According to Korea, Australia could challenge the BOP justification of Korea's restrictions in the regular consultations before the BOP Committee pursuant to Article XVIII:12(b), or at any time pursuant to the special complaint procedure of Article XVIII:12(d). If the Panel reviewed Australia's complaint under the standards of Article XXIII, Korea argued, it agreed that Australia and any other country which wanted to challenge a BOP measure could choose to ignore Article XVIII:12(d). By doing so, the Panel would render the latter provisions obsolete. The general procedure of Article XXIII would supersede the special review procedure of Article XVIII:12(d), thus amounting to an improper amendment of the GATT in violation of Article XXX.

43. Consequently, Korea argued, in accordance with the long-standing practice of the CONTRACTING PARTIES, Australia was not entitled to complain about the possible inconsistencies of the disputed beef restrictions with provisions of the General Agreement pursuant to Article XXIII:1(a). Instead, Australia would have to show that Korea's restrictions on beef imports constituted "non-violation" nullification or impairment under Article XXIII:1(b) or (c). In Korea's view, there was no hard and fast rule as to how a showing of "non-violation" nullification or impairment was to be made. What was clear was that the complaining party had to provide a "detailed justification".¹¹ To date, Australia had not provided any such justification.

44. Referring again to the Citrus case mentioned above, Korea argued that the panel arrived at its conclusion of "non-violation" nullification or impairment by inquiring whether, *inter alia*, the disputed restrictions could have been reasonably anticipated by the United States, the complaining party. This panel did not find that the disputed measures could not have been reasonably anticipated by the United States.¹² Likewise, in the present case, Australia could not claim that it could not have reasonably anticipated Korea's restrictions on beef imports since Korea had maintained these restrictions since its accession to the GATT, and had regularly consulted about them under Article XVIII:B.

45. Australia rejected the argument that the merits of the case could only be reviewed under Article XXIII:1(b) or (c), an argument which was based entirely on acceptance of the validity of the finding in paragraph 4.16 of the Citrus Panel report. The flawed character of this finding and its lack of persuasive force had already been addressed. It was Australia's view that Korea's import restrictions on beef and their administration contravened and had contravened its obligations under the GATT. This was the position taken by Australia in its request for the establishment of this Panel and as such formed an integral part of the Panel's terms of reference. Therefore, the Panel was charged with making findings on whether the measures had and did contravene GATT obligations.

46. Korea replied that the Panel's terms of reference did not exclude reviewing Article XVIII:12(d) in relation to Article XXIII.

47. Australia argued that the right of recourse to Article XXIII for the examination of an alleged breach of GATT obligations where the defending party claimed Article XVIII:B coverage had been addressed by the GATT Council in a recent case. At its meeting on 10-11 November 1987¹³, the Council established a panel to examine India's import restrictions on almonds although India had argued in earlier Council meetings that the procedures of Article XVIII:B:12(d) should be followed instead. Korea was a party to the consensus which led to the establishment of this panel.

48. Korea replied that, in its opinion, the Council did not settle anything when it established the above-mentioned Almond Panel. While the issue of the relationship between Articles XVIII:B and XXIII was raised when the United States requested a panel to review import restrictions on almonds maintained by India, the Council drew no conclusion at the time. The discussions in the Council did however reveal that the relationship between Articles XVIII:12(d) and XXIII was controversial. When agreement was reached on the panel's standard terms of reference, several countries reserved the right to make submissions to the panel on this issue. And as in the present case, these terms did not exclude

¹¹Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2), BISD 26S/215, 216, paragraph 5.

¹²L/5776, paragraphs 4.32 and 4.33

¹³See document C/M/215.

review of Article XVIII:12(d) in relation to Article XXIII. Accordingly, the fact that Korea was a party to the consensus establishing the terms of reference in the Indian Almonds case in no way prevented Korea from raising the relationship between Article XVIII:12(d) and Article XXIII as the fundamental issue which it was. The same argument was made with respect to Korea's agreement with the terms of reference of the present Panel.

49. Korea argued that none of the GATT precedents addressed the fundamental issue in this case. If the complaint of Australia were to be reviewed under Article XXIII, no country would even consider invoking Article XVIII:12(d). Korea had pointed out that Article XVIII:12(d) made it rather difficult for a country to complain about a BOP measure that had been reviewed by the BOP Committee. In fact, the requirements of this provision were rather more difficult to satisfy for a complaining country than the requirements of Article XXIII. There were good reasons for these differences. When countries applied restrictions under Article XVIII:B and held regular consultations concerning these measures with a qualified GATT Committee that took into account the relevant findings of the International Monetary Fund, they had a legitimate expectation that these measures could not simply be challenged under the relatively loose requirements of Article XXIII regarding nullification or impairment. Otherwise, the exercise of multilateral surveillance became meaningless.

50. Korea could conceive of only one approach that would not necessarily put the relationship between Article XXIII and Article XVIII:12(d) at issue in this case. For that, the Panel would have to distinguish the 1984/1985 intensification measures (which were not imposed for BOP reasons but for beef industry protection reasons) from the original BOP restrictions on beef imports. Korea, however, did not favour this approach, because it believed that BOP concerns continued to underlie and characterize the restrictions as a whole. Yet, Korea was of the view that an alternative approach was possible, which emphasized that the 1984/1985 intensification measures themselves were not motivated by BOP concerns.

(b) Justification for restrictions

51. Korea argued that it could be that the present Panel, notwithstanding the Citrus Panel report and Korea's procedural arguments, believed that the mere existence of special review procedures in Article XVIII:B would not prevent Australia from challenging the GATT compatibility of Korea's restrictions under Article XXIII. In that event, Korea submitted that the actual results of the regular consultations under Article XVIII:B still blocked a challenge of the GATT compatibility of its restrictions. Korea further argued that the CONTRACTING PARTIES had authorized its restrictions on beef imports under Article XVIII:B and explained that Korea had maintained BOP restrictions on various products since its accession to the GATT. The number of the restricted imported products had however gradually been reduced in recent years, and currently some 358, mainly agricultural, products remained subject to restriction, including beef. Over the years Korea had regularly consulted about these restrictions under Article XVIII:B. The justification of its restrictions had not been called into question until the last round of full consultations in December 1987.¹⁴ In the report of the BOP Committee from these latter consultations, the "prevailing" view expressed was that import restrictions "could" no longer be justified under Article XVIII:B.¹⁵ It was clear that, for the first time, the BOP Committee thereby expressed doubts about the future justification of Korea's BOP restrictions. Yet, it was equally clear that the GATT's BOP Committee did not make a finding that the present or past application of Korea's BOP restrictions was inconsistent with Article XVIII:B.

52. Australia replied that Korea's BOP situation had been subject to only two full consultations with

¹⁴See, e.g., BOP/R/163 (23 October 1986); BOP/R/146 (15 November 1984).

¹⁵BOP/R/171, paragraph 7 (10 December 1987)

the BOP Committee in the period 1984-88. On neither occasion did the Committee "authorize" all or any measures claimed by Korea to be applied for balance-of-payments reasons. In fact, the Committee did not reach a consensus on any recommendations or findings.¹⁶ The position of Korea was instrumental in preventing any consensus recommendations within the BOP Committee in the 1987 consultations. It could not, however, prevent the insertion in the report of the following statement: "The prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B." There was also a view that no further Article XVIII:B:12(b) consultations would be necessary.

53. In response, Korea firmly rejected any suggestion that it had abused or frustrated the BOP process in the GATT. Furthermore, Korea asserted that the Committee's language was more guarded than Australia suggested. And if the Committee had established any inconsistency, it would have made explicit recommendations to that effect to the Council.¹⁷ Perhaps even more significantly, the BOP Committee report stated that the Committee "did not necessarily expect Korea to disinvoke Article XVIII:B immediately, but to establish a clear timetable for the phasing out of remaining restrictions maintained for balance-of-payments purposes".¹⁸ In other words, the BOP Committee accepted that Korea could still benefit from the cover of Article XVIII:B for some limited time to come. Indeed, Korea was currently preparing for further consultations under Article XVIII:B in June 1989. These would be meaningless if Article XVIII:B was no longer available to Korea, as Australia claimed. The BOP Committee reviewed restrictions under Article XVIII:B on behalf of the CONTRACTING PARTIES.¹⁹ Since Korea's accession to the GATT, its restrictions under Article XVIII:B had been regularly examined, and the application of Article XVIII:B had never been disapproved. Korea respectfully submitted that the Panel could not, with retroactive effect, substitute its own judgment for that of the CONTRACTING PARTIES.

54. Korea argued that in recent years Australia had several times raised objections bilaterally about Korea's restrictions on beef imports. If these bilateral exchanges did not lead to the desired result for Australia, as they apparently did not, one would have expected Australia to take this matter up multilaterally, at the consultations before the GATT BOP Committee. Yet, even as late as the last BOP consultations, in December 1987, Australia remained silent on the matter.

55. Australia replied that the fact that Australia had not previously opposed in the GATT Korea's import restrictions on beef in no way prejudiced the right to have the restrictions examined under Article XXIII. At least two adopted panel reports had made findings that a breach of GATT provisions did not become legitimate because of a lack of challenge or because of the expiration of time.²⁰ Australia had been forced to resort to GATT action in this case after pursuing extensive, but unproductive, bilateral

¹⁶See BOP/R/146 of 15 November 1984, and BOP/R/171 of 10 December 1987.

¹⁷See Declaration on Trade Measures Taken for Balance-of-Payment Purposes, BISD 26S/205, 209, paragraph 13 (1980).

¹⁸BOP/R/171, paragraph 9

¹⁹Note by the Chairman of the Committee on Balance-of-Payments Restrictions, BISD 18S/48, 51, Paragraph 10 (1972).

²⁰See Report on EEC Quantitative Restrictions on Imports of Certain Products from Hong Kong, BISD 30S/138, paragraph 28. See also the Report on Japanese Measures on Imports of Leather, BISD 31S/111, paragraph 4.

discussions. The Government of Korea had consistently urged that the issue be kept at the bilateral level in recognition of the domestic political sensitivity of the beef access issue, particularly in 1987.

56. Korea then argued that when the CONTRACTING PARTIES agreed to establish a panel, they limited its terms of reference to examining Korea's import restrictions on beef. Yet, these restrictions were part of a series of restrictions that remained to protect Korea's balance of payments. Accordingly, findings on the justification of Korea's restrictions on beef imports under Article XVIII:B were likely to reflect on the justification of these other restrictions as well. These latter, however, fell outside this Panel's terms of reference. And Korea could not agree to the challenge of all its BOP restrictions on the basis of the present Australian complaint. Assuming, nevertheless, that the Panel were to feel it could distinguish the restrictions on beef imports and thus limit its own analysis, Korea submitted that it was inconceivable that the International Monetary Fund could do likewise.

57. Australia replied that the Panel's terms of reference were agreed by a consensus which included Korea. Australia considered that the terms of reference clearly established that a finding had to be made on the GATT compatibility of Korea's beef import restrictions. Any possible wider implications of a finding against the compatibility of other import restrictions for which BOP cover was also claimed were not pertinent to the Panel's task. Certainly, Australia could not accept the argument that one breach of GATT provisions could not be examined by a panel because the findings might have implications for other measures imposed by the defending party or, indeed, any other contracting party. This approach would preclude virtually any findings at all by any panel on the meaning and application of GATT provisions and would therefore be a nonsense.

58. To this, Korea responded that this Panel's terms of reference, to which it had agreed, did not exclude review of Article XVIII:12(d) in relation to Article XXIII. Furthermore, Australia's assertion that Korea's position amounted to a nonsense was not substantiated. Nothing in the GATT, or in Korea's interpretation thereof, prevented a GATT contracting party from challenging restrictions across the board. Yet, it was impermissible for Australia to limit its request for a panel proceeding to Korea's restrictions on beef imports, and then to broaden its attack before the Panel by involving Korea's other BOP restrictions as well.

59. Korea submitted that without further advice from the IMF pursuant to Article XV:2, the Panel could not make any recommendations on the justification of Korea's restrictions on imports of beef under Article XVIII:B. Yet, it was open to question whether the Panel would be competent, without specific authorization from the Council, to consult with the IMF. To Korea's knowledge, panels had received no such authorization to date.

60. Australia responded that it did not insist that a report by the IMF was necessary to a finding in this case because, Australia contended, the import restrictions on beef had not and were not being applied for BOP reasons. However, Australia recognized the right of the Panel, as provided for in paragraph 15 of the 1979 "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance"²¹, to seek any information and advice from the IMF or any other body or individual that the Panel deemed appropriate. Australia believed that it was for the Panel to decide whether and from whom to seek advice and on the nature of advice to be sought. How any advice was applied to the making of findings was also a matter for the Panel which was acting on behalf of the CONTRACTING PARTIES.

61. In response, Korea expressed doubts that this passage in the 1979 Understanding addressed the Panel's authority to initiate consultations with the IMF under Article XV:2. When panels consulted an

²¹BISD 26S/213

expert in the past they were not bound to accept the expert's advice, and neither were the CONTRACTING PARTIES. Advice rendered by the IMF under Article XV:2 on the BOP of a contracting party did bind the CONTRACTING PARTIES, however. Korea submitted there was no evidence that the CONTRACTING PARTIES, through the 1979 Understanding, intended to authorize a panel to request advice from the IMF which would bind them.

62. Korea argued that the question of whether the disputed restrictions were justified under Article XVIII:B essentially turned on whether Korea had cause to be concerned about the level of foreign reserves that were necessary for the implementation of its programme of economic development. Korea asserted that the restrictions which it currently maintained, including its restrictions on beef imports, were indeed necessary to secure an adequate level of reserves. Firstly, its present reserves provided no more than one month's import cover. Secondly, Korea's huge foreign debt, though declining, still posed a serious threat to Korea's balance of payments.

63. Furthermore, according to Korea, the beneficial effect of Korea's current account surpluses on its BOP position should not be overestimated. Korea's current account had only been in surplus since 1986. Its surplus, moreover, was very vulnerable because of its structure. There were several reasons for this, and by way of illustration, Korea mentioned two of them: first of all, the share of trade in total GNP was as high as 72 per cent in 1987. A worsening of the world market situation would therefore immediately affect Korea's balance of payments. Secondly, Korea had a population of 42 million people and more than 70 per cent of its land was non-arable. Moreover, Korea was poor in natural resources and did not produce any petroleum. Indeed, Korea had been able to run a surplus in its current account since 1986 mainly due to the decline in oil prices.

64. Australia replied that Korea's external economic situation had improved dramatically in parallel with the high growth rates being achieved by the economy overall. Its first ever trade surplus, of US\$4.2 billion, was achieved in 1986, producing a current account surplus of US\$4.6 billion. It was equal to 4.9 per cent of GNP compared to 4.4 per cent for Japan and the Federal Republic of Germany. Real GNP growth amounted to 12 per cent in 1987. The current account surplus increased to US\$9.9 billion in that year, equivalent to 8.3 per cent of GNP, more than double the corresponding ratios for the Federal Republic of Germany and Japan. The current account surpluses had enabled Korea to make significant reductions in its foreign debt. Between the end of 1985 and May 1988 Korea's gross foreign debt was reduced from US\$46.8 billion to US\$34.3 billion and its net foreign debt from US\$35.5 billion to US\$16.2 billion. The most recent figures available to Australia confirmed that this strong economic performance was continuing in 1988. Revised estimates by the Korean Economic Planning Board in August 1988 projected a current account surplus in 1988 of US\$9.5 billion and gross foreign debt of US\$31 billion. Net foreign debt was expected to decline to US\$13 billion in 1988 (8.4 per cent of GNP). Korea expected to register a net foreign credit of US\$3.5 billion by 1991. Korean foreign exchange reserves were valued at US\$9.6 billion in July 1988 and were under no pressure due to the continuing current account surpluses. In sum, Korea's current account surplus was the fourth largest amongst GATT contracting parties and its reserves were not being presented with any difficulties, threatened or actual.

65. Korea argued that it was certainly true that Korea's BOP position had improved since 1984/1985. Yet, without involving all other remaining BOP restrictions, this Panel could not decide whether and to what extent such improvement ought to translate into a further relaxation of the BOP restrictions on beef beyond the 51,500-ton (product weight) level existing in 1983. Thus, it would make no sense to find that Korea's restrictions on beef imports were no longer justified under Article XVIII:B, while maintaining that the other 357 restrictions continued to be justified as they were. Obviously, improvements in Korea's BOP position did not affect the restrictions on beef imports exclusively. Prescriptions for change required a global assessment. Yet, an across-the-board review of all of Korea's remaining BOP restrictions clearly fell outside this Panel's terms of reference.

66. Australia argued that Korea did not meet the appropriate requirements for coverage of its beef import measures under Article XVIII:B. Recognizing that recourse to Article XVIII:B was a legitimate right of developing countries in times of BOP difficulties, Australia considered, however, that the Korean beef import regime contravened both the spirit and the letter of Article XVIII:B, paragraphs 9, 10, 11 and 12(a), as well as the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes.²² Firstly, Australia maintained that Korea had implemented an effective prohibition rather than a restriction on beef imports from 1984 to 1988. The wording of paragraph 9 of Article XVIII:B made it quite clear that the right of a contracting party to impose import restrictions consistent with the provisions of this paragraph was not an unqualified right, but was dependent on the restrictions not exceeding those necessary to achieve the objectives specified. Furthermore, such restrictions had to conform to paragraphs 10, 11 and 12 of Article XVIII. The nature of Korea's beef import regime from at least 1984 onwards was demonstrably not necessary to achieve the specified objectives. In 1984, the year in which Korea ceased to hold tenders for beef to be imported through the NLCF, it met none of the requirements of paragraph 9. The effective prohibition on beef imports took place at the same time as import controls on a wide range of other products, which had been imposed earlier for BOP purposes, were being removed. The statement of the IMF representative at the December 1987 BOP Committee consultations with Korea²³ confirmed that Korea's actions with respect to beef since 1984 had been contrary to its actions with respect to other sectors of its economy. Korea had been pursuing a programme of import liberalization in other economic sectors which reflected an implicit recognition that it was no longer necessary for Korea to restrict the "general level of its imports" for BOP reasons.

67. There were, in Australia's view, clear indications that the Korean measures with respect to beef imports were not taken or maintained for BOP reasons, but to protect the domestic industry. Firstly, by admitting that its beef import restrictions over the 1984-1988 period were maintained for industry protection rather than BOP reasons, Korea had in fact conceded that its measures were not eligible for cover under Article XVIII:B. Korea could not now claim that measures, which it conceded it had maintained from 1984 until August 1988 for other than BOP reasons, had now somehow again become eligible for BOP cover merely on the basis of a unilateral declaration to this effect. Article XVIII:B simply did not allow for two primary simultaneous motivations for import restrictions, i.e., BOP and industry protection. Secondly, one of the key objectives of the LPMO was the protection of the domestic cattle industry. Thirdly, the Minister of Trade and Industry announced in January 1988 that "agricultural products are the only areas in which rapid import liberalization is not foreseeable due to the fact that approximately 20 per cent of the population still depends on farming for its livelihood". Fourthly, Korea's economic situation was certainly not such, in 1984 or since, as to justify the intensification of import restrictions under the provisions of Article XVIII:9. In fact, even when commercial beef imports were first suspended, Korea's current account deficit was rapidly declining, to which the report of the BOP Committee consultations with Korea in 1984 bore witness.²⁴ Substantial BOP surpluses were then achieved in 1986 and 1987 and were forecast for 1988 and beyond. In conclusion, no grounds existed for invoking BOP problems as a justification for Korea's closing beef access between 1984 and 1988, nor did justification exist now for continuation of import restrictions, in view of the persisting improvements and current very healthy BOP situation in Korea.

68. Korea replied that the fact that its restrictions on beef imports had protected its cattle farmers did not render Article XVIII:B inapplicable. Trade restrictions imposed for BOP reasons had protective side effects, and tended to favour specific industries. The point remained, however, that the GATT as it

²²BISD 26S/205-210

²³BOP/R/171/Add.1, page 3

²⁴BOP/R/146, paragraphs 39 and 40

was originally drafted, and as it stood today, did permit the use of trade restrictions for BOP purposes and thereby accepted such protective side effects.

69. Korea had never concealed that the BOP restrictions on beef imports protected its cattle farmers. Indeed, had they not, then Korea would have been forced to resort to other measures to protect its vulnerable and underdeveloped cattle farming industry. Accordingly, Australia's reference to the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, which reaffirmed that "restrictive import measures taken for BOP reasons should not be taken for the purpose of protecting a particular industry or sector" was misplaced. Whatever this statement meant, it could not mean that restrictions which were legitimately taken for BOP purposes, as were Korea's restrictions on beef imports, could not have protective side effects. As was indicated above, such side effects were inherent in trade restrictions imposed for BOP purposes.

70. Korea further submitted that when it acceded to the GATT in 1967, the restrictions which it imposed for BOP reasons, including on imports of beef, were justified under Article XVIII:B. This had never been contested, and to do so now would amount to a retroactive withdrawal of the Article XVIII:B cover from all its BOP restrictions. However, Australia had pointed out that Korea tightened its beef restrictions at a time when Korea's BOP position was improving. That might indeed seem contradictory. But one had to appreciate that Korea was then faced with an unprecedented situation. In conjunction with its general liberalization efforts, Korea relaxed its restrictions on beef imports in the early 1980's. There were differences between products in this process. Some BOP restrictions were removed altogether. Some, like those on beef imports, were not eliminated but relaxed. This was consistent with the GATT, which did not require that all BOP restrictions be terminated at once. In deciding which BOP restrictions could be eliminated and which should be maintained or relaxed, so as to ensure an adequate BOP position overall, Korea obviously took into account the state of the various domestic industries that would be affected by these liberalization measures.

71. Thus, in deciding to relax the BOP restrictions on beef imports in the early 1980's, Korea not only assessed the effects on its overall BOP position, but also considered the impact on its cattle farmers. Now, with the benefit of hindsight, some might have said that the Korean Government miscalculated the level of imports to which its cattle farmers could adjust because, by mid-1984, many small cattle farmers were going bankrupt or incurring very heavy losses. That was when the Korean Government decided to intervene and intensify the Article XVIII:B restrictions on beef imports. It was a situation which the GATT regime, including its BOP provisions, did not envisage.

72. Korea explained further that, faced with an unprecedented situation in 1984-85, it nevertheless sought to stay close to the letter of the GATT. It did not pretend that the intensification of its BOP restrictions was motivated by a worsening of its BOP situation, and hence did not notify this measure pursuant to Article XVIII:12(a). Furthermore, Korea made an attempt to act within the spirit of Article XVIII:10, in that it sought to avoid unnecessary damage to the interests of its trading partners. Now that the domestic market situation had stabilized, Korea was retracting the intensification of its BOP restrictions.

73. Australia argued that the prohibition of commercial imports of beef by Korea between 1984 and 1988 clearly did not meet the objective of the drafters and was thus contrary to the requirements of Article XVIII:B, paragraph 10. Neither did the requirements of Article XVIII:B, paragraph 11, offer any scope for Korea to claim BOP grounds for its import controls on beef since Korea had strengthened its reserves and repaid external debt ahead of schedule. Also the current restrictions on beef imports were sectoral restrictions designed to protect a relatively high-cost domestic industry rather than "assuring an economic employment of productive resources".

74. Korea submitted that the 1984/1985 intensification measures could not be isolated and divorced

from their BOP context. One should look at the whole picture. Ever since its accession to the GATT, Korea had maintained BOP restrictions on beef imports (among other products). Korea had BOP problems in 1984/1985 and was still recognized to have them at present by the BOP Committee. That was why Korea maintained that Article XVIII and its procedures were still relevant, even if one recognized that the intensification measures were not taken for BOP reasons but because of an unprecedented situation arising from the disruption of Korea's cattle industry. That was also why Korea maintained that, even if the 1984/1985 intensification measures were incompatible with the GATT, Korea should be allowed to restore the level of BOP restrictions on beef imports prevailing prior to the 1984/1985 intensification measures. In 1983, Korea imported a total of 51,500 tons (product weight) of beef. This would now again be the appropriate level of BOP restrictions on beef imports, until these restrictions could be further relaxed or removed depending on the development of Korea's overall BOP position. Australia could not reach above and beyond the total 1983 import level, because to do so required findings on Korea's past and present BOP justification. And any such findings would involve the BOP restrictions maintained on 357 other products.

75. In the event the Panel were to find that Korea's beef restrictions were not consistent with the provisions of Article XVIII:B, Korea argued that a novel situation would arise. There was no precedent in GATT addressing the proper course of action if a measure, which had otherwise been authorized under the review procedures of Article XVIII:B, was deemed incompatible with the GATT in an action under Article XXIII. Korea submitted that in such a case the defendant country would be entitled to a grace period, in which it could consider which GATT consistent measures it could and should take. As indicated, Korea's cattle farmers had derived protection from the BOP restrictions on beef imports. In case that protection were no longer available, the farmers would in principle be exposed to unbridled competition from abroad. The effects were bound to be disastrous. Accordingly, the Korean Government would need a grace period to implement another mechanism, consistent with GATT, that would offer some protection to its cattle farmers. To allow the Panel to appreciate this, Korea described the underdeveloped state of its agricultural sector, and of its cattle farming industry in particular. Korea aimed for controlled liberalization of imports of beef. It did not want a repetition of the early 1980's, when an explosive import growth ultimately necessitated a near-suspension of imports in 1984/85. Korea submitted that the avoidance of similar shocks in the future was also in the interest of foreign industries, including the Australian beef industry.

76. Australia contended that the Panel should give no cognizance to arguments which appealed to difficulties in achieving compliance with the General Agreement as the Panel could not give such reasons for supporting a continuing breach. This was the position taken by the Panel which examined Japanese measures on imports of leather.²⁵ It found that the probable effects on the domestic industry of the removal of a restriction inconsistent with the GATT could not justify the retention of that measure. The Panel on EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong made similar findings.²⁶ It should also be clearly understood that, in Australia's view, there was no dishonour in a country being found in breach of the GATT as long as measures were put in place to rectify the breach to the satisfaction of the parties to the dispute. After a breach had been established, the avenues for its removal were matters for agreement between the parties.

77. Korea replied that the two above-mentioned cases involved residual restrictions, which had been in existence for a long time without GATT justification. To be precise, France's restrictions on quartz watches had not been covered under Article XII since 1960, and thus had remained without GATT justification for more than two decades until the panel invalidated them at Hong Kong's request.

²⁵BISD 31S/111, paragraph 44

²⁶BISD 30S/138, paragraph 27

Similarly, Japan had already abandoned BOP cover in 1962 for its restrictions on leather, more than two decades before the United States brought the complaint. Korea, on the other hand, had not abandoned BOP cover for its beef restrictions; nor had the IMF or the BOP Committee to date obliged Korea to disinvoke Article XVIII:B. In other words, the present case did not concern residual restrictions at all. Moreover, neither the Hong Kong Quartz Watches nor the Japanese Leather cases concerned a grace period to retract intensification measures to the level of the BOP restrictions that continued to be justified under Article XVIII:B.

Article XXIII

78. Australia argued that the violation by Korea of provisions of Articles XI and II of the General Agreement constituted a prima facie case of nullification or impairment of benefits accruing to Australia under the General Agreement.

SUBMISSIONS BY OTHER CONTRACTING PARTIES

79. The Panel received submissions from Canada, New Zealand and the United States as interested third countries. New Zealand and the United States both stated that their interests as exporters of bovine meat to the Republic of Korea had been affected by the Korean beef import measures. They considered, together with Canada, that these restrictions contravened the provisions of the General Agreement, in particular the provisions of Article XI:1, and nullified or impaired benefits accruing to them within the meaning of Article XXIII:2 of the General Agreement.

80. New Zealand argued that the Korean measures contravened the provisions of Article XI:1 since between 1984 and 1988 a de facto prohibition of beef imports existed; prohibitions were proscribed under this Article. New Zealand also considered that the import ceiling beyond which import licences would not be issued in 1988 indicated the existence of a restriction on the level of imports in addition to the bound tariff. Therefore, this was a prima facie breach of Article XI:1. New Zealand further considered that the restrictions made effective through the LPMO, which had a monopoly over beef imports, were covered by the interpretative note to Article XI:1. The protection afforded by the LPMO, moreover, restricted trade in the bound item. In particular, the LPMO applied a mark-up on the imported beef over and above the amount of protection provided in the Korean Schedule, thus contravening the provisions of Article II:4. In New Zealand's view, Korea could not justify its import measures under any provision of the General Agreement, in particular Articles XI:2(c)(i), XI:2(c)(ii) and XVIII:B. Article XVIII:B was not applicable since Korea was no longer experiencing BOP problems.

81. The United States considered that the Korean import ban and quantitative restrictions on beef imports violated GATT Article XI:1 since that Article prohibited any contracting party from imposing quotas, import or export licences or other measures to restrict trade. To the extent that Korea had banned imports of beef through MAFF's refusal to issue import licences, the Korean action was a "prohibition" in violation of Article XI:1. To the extent that Korea had in the past or might in the future restrict imports of beef entering under quota, its actions constituted a "quantitative restriction" inconsistent with the GATT.

82. The United States argued that the LPMO was an "import restriction" within the meaning of Article XI, and, as a monopoly, it operated in a manner which violated the provisions of that Article. The United States asserted moreover that Korea could not justify its beef import measures under Articles XI:2(c)(i), XI:2(c)(ii), XVIII:B or under any other provision of the GATT.

83. The United States considered that the Korean measures could not be justified under Article XVIII:B since Korea did not have a BOP problem as defined by the GATT. If, however, it was

considered that Korea could restrict imports for BOP reasons, the United States argued that the restrictions on beef imports did not qualify as BOP measures since, *inter alia*, these measures were taken for domestic, political purposes, i.e., for the purposes of protecting a Korean industry, rather than for BOP reasons.

84. The United States further asserted that the LPMO was levying surcharges on imported beef which averaged 36 per cent for the purpose of equalizing import prices with high Korean domestic prices in excess of its bound tariff of 20 per cent ad valorem. The imposition of surcharges on imported meat was plainly inconsistent with Article II:1(b). Also, the LPMO appeared to have as its purpose, and had taken concrete steps to afford, protection to Korean beef farmers. As such, the United States argued that it was fundamentally inconsistent with Article II:4. Article II:4 barred a contracting party from using import monopolies to restrict trade or afford protection in excess of a bound tariff concession.

85. The United States also considered that the general lack of transparency of the Korean beef import system violated the provisions of Articles X:1 and XIII:3(b). In short, under Articles X:1 and XIII:3(b), any contracting party that introduced import restrictions had to give public notice of the total value or quantity of the restrictions and publish them promptly so as to enable governments and traders to become acquainted with them. Korea did not meet its obligations under Articles X and XIII since it did not provide proper public notice of the import restrictions.

86. Canada considered the Korean measures to be in contravention of Korea's GATT obligations under Article XI:1 which prohibited the maintenance of quantitative restrictions through quotas, import licences or other means. The import regime protected Korean beef and discriminated against imported beef. By granting licences only for amounts which represented the shortfall in domestic production, the import regime had been established with the clear intent to ensure Korean beef primary access to the market. Canada further argued that these measures could not be justified under the provisions of Article XI:2, Article XVIII:B, or under any other exception of the General Agreement.

87. It was also Canada's view that the practices of the LPMO represented a barrier to trade with respect to the variable surcharge it added when reselling imported beef in the domestic market. As the MAFF only approved import licence requests from the LPMO, this latter organization was in effect a monopoly within the meaning of Article II:4. Article II:4 prohibited such monopolies from operating "so as to afford protection on the average in excess of the amount of protection provided for in that schedule". The interpretative note to Article II:4 indicated that the provisions of this paragraph should be applied in the light of the provisions of the Havana Charter (Article 31.4). This permitted differential mark-ups to offset additional costs of transportation, distribution, and other expenses incident to the purchase, sale, or further processing, and a reasonable margin of profit. This had been interpreted as meaning a margin of profit that would be obtained under normal conditions of competition.

88. It was moreover Canada's understanding that the variable surcharge administered by the LPMO was designed to increase prices of imported beef to the level of domestic beef which resulted in surcharges from 30-200 per cent over the landed duty price paid. Such surcharges could not be justified under Article II:4 as the value of the tariff concession was thereby nullified or impaired. In the event the LPMO were not considered to be in a monopoly position, the surcharge imposed above the 20 per cent bound rate would be in violation of Article II:1(b).

89. Canada argued that the quantitative restrictions on beef had no justification under the BOP exceptions of the GATT. In its report on the 1987 consultation with Korea, the BOP Committee stressed the need to establish a clear timetable for the progressive removal of Korea's trade measures maintained for BOP purposes. In Canada's view, adoption of the BOP Committee report by the GATT Council did not mean that all trade practices of a contracting party were in conformity with the GATT. At the 10-11 November 1987 GATT Council meeting, Canada indicated that it did "not accept the position put forward by some contracting parties that review - including full review of trade restrictions - by the BOP Committee constituted acceptance of such measures as being GATT consistent". The

change from a ban on beef imports during the period 1984-1988 to import restrictions which were in any case contrary to the GATT, was not in keeping with the decision of the BOP Committee following the 1987 consultation with Korea.

FINDINGS AND CONCLUSIONS

90. The Panel noted that Australia claimed that the Republic of Korea had banned imports of beef between 1984/85 and 1988, and since August 1988 maintained quantitative restrictions and other measures on beef imports, in violation of the provisions of Article XI:1. Australia further claimed that the LPMO was an import monopoly that applied mark-ups on imported beef in contravention of the provisions of Article II. The Panel noted that while Korea had claimed the provisions of Article XVIII:B as a general justification for its beef import restrictions, it had also stated that the measures introduced in 1984/85 had not been taken for balance-of-payments reasons. Furthermore, Korea claimed that the operations of the LPMO were consistent with the provisions of Articles II and XIII.

Article XI

91. The Panel considered that there were essentially two sets of restrictions on beef imports maintained by Korea:

- (a) measures amounting to a virtual suspension of imports introduced in November 1984 and May 1985 and subsequently amended in August 1988. These measures were neither notified to, nor reviewed by, the Balance-of-Payments Committee;
- (b) restrictions on beef existing since Korea's accession to the General Agreement in 1967, which were notified to, and reviewed by, the Balance-of-Payments Committee.

92. Article XI:1 did not permit the use of either import restrictions or import prohibitions; exemptions from this general proscription had to be specifically justified under other provisions of the General Agreement. Korea claimed such justification under Article XVIII:B for the restrictions referred to in paragraph 91(b) above; this issue is examined in paragraphs 98-101 below.

93. In examining the measures in paragraph 91(a) above, the Panel noted that Korea's beef import measures introduced in 1984-1985 were taken for the purpose of protecting Korea's domestic cattle industry and not for balance-of-payments reasons, and were therefore not notified to the Balance-of-Payments Committee. Korea also had not notified the amended restrictions maintained since August 1988 to the Balance-of-Payments Committee. Korea did not contest that these measures were contrary to the provisions of Article XI:1. Moreover, Korea did not offer any justification for these measures under Article XI:2. The Panel concluded that the import measures and restrictions, introduced in 1984/85 and amended in 1988, were not consistent with the provisions of Article XI and were not taken for balance-of-payments reasons.

Article XVIII

- (a) Procedural aspects

94. The Panel examined Korea's contention that its import restrictions, referred to under paragraph 91(b) above, were justified under the provisions of Article XVIII:B. The Panel noted Korea's view that the compatibility with the General Agreement of Korea's import restrictions could not be challenged under Article XXIII because of the existence of special review procedures in

paragraphs 12(b) and 12(d) of Article XVIII:B, and the adoption by the CONTRACTING PARTIES of the results of the paragraph 12(b) reviews in the Balance-of-Payments Committee. The Panel decided first to consider whether the consistency of restrictive measures with Article XVIII:B could be examined within the framework of Article XXIII.

95. The Panel considered the various arguments of the parties to the dispute concerning past deliberations by the CONTRACTING PARTIES on the exclusivity of special review procedures under the General Agreement. However, the Panel was not persuaded that any of these earlier deliberations in the GATT were directly applicable to the present dispute. Moreover, the Panel had a clear mandate to examine Korea's beef import restrictions under Article XXIII. The Panel's terms of reference, as agreed by Korea and Australia, and approved by the Council, required the Panel, however, to examine the beef import restrictions "in the light of the relevant GATT provisions", which included Article XVIII:B.

96. The Panel examined the drafting history of Article XXIII and Article XVIII, and noted that nothing was said about priority or exclusivity of procedures of either Article. The Panel observed that Article XVIII:12(b) provided for regular review of balance-of-payments restrictions by the CONTRACTING PARTIES. Article XVIII:12(d) specifically provided for consultations of balance-of-payments restrictions at the request of a contracting party where that party established a prima facie case that the restrictions were inconsistent with the provisions of Article XVIII:B or those of Article XIII, but the Article XVIII:12(d) provision had hitherto not been resorted to. In comparison, the wording of Article XXIII was all-embracing; it provided for dispute settlement procedures applicable to all relevant articles of the General Agreement, including Article XVIII:B in this case. Recourse to Article XXIII procedures could be had by all contracting parties. However, the Panel noted that in GATT practice there were differences with respect to the procedures of Article XXIII and Article XVIII:B. The former provided for the detailed examination of individual measures by a panel of independent experts²⁷ whereas the latter provided for a general review of the country's balance-of-payments situation by a committee of government representatives.

97. It was the view of the Panel that excluding the possibility of bringing a complaint under Article XXIII against measures for which there was claimed balance-of-payments cover would unnecessarily restrict the application of the General Agreement. This did not preclude, however, resort to special review procedures under Article XVIII:B. Indeed, either procedure, that of Article XVIII:12(d) or Article XXIII, could have been pursued by the parties in this dispute. But as far as this Panel was concerned, the parties had chosen to proceed under Article XXIII.

(b) Justification for restrictions

98. The Panel proceeded to examine Korea's Article XVIII:B justification for its import restrictions referred to in paragraph 91(b) above. Australia contended that the import restrictions on beef imposed for balance-of-payments reasons were not justified because Korea no longer had balance-of-payments problems. The Panel noted that Korea had maintained import restrictions on beef on balance-of-payments grounds since 1967. The Panel noted the condition in paragraph 9 of Article XVIII that "import restrictions instituted, maintained or intensified shall not exceed those necessary: (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its

²⁷See paragraph 10 of 1979 Understanding on Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/212):

"It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice."

reserves". The Panel noted further that paragraph 11 required the progressive relaxation of such restrictions "as conditions improve" and their elimination "when conditions no longer justify such maintenance".

99. Article XV:2 of the General Agreement provided that "[i]n all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund." The latest full consultation concerning Korea's balance-of-payments situation in the Balance-of-Payments Committee had taken place in November 1987, the report of which had been adopted by the CONTRACTING PARTIES in February 1988. The next full consultation was scheduled for June 1989. The Panel considered that it should take into account the conclusions reached by the Balance-of-Payments Committee in 1987.

100. At the full consultation in the Balance-of-Payments Committee with Korea in November 1987, "[t]he prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B".²⁸ Moreover, the full Balance-of-Payments Committee had "stressed the need to establish a clear timetable for the early, progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes" and had expressed the expectation that "Korea would be able in the meantime to establish a timetable for the phasing-out of balance-of-payments restrictions, and that Korea would consider alternative GATT justification for any remaining measures, thus obviating the need for such consultations".²⁹

101. The Panel noted that all available information, including figures published by the Korean authorities and advice provided to it in February 1989 by the International Monetary Fund, had shown that the reserve holdings of Korea had increased in 1988, that Korea's balance-of-payments situation had continued to improve at a good pace since the November 1987 consultations, and that the current economic indicators of Korea were very favourable. According to information provided to the Panel by the International Monetary Fund, the Korean gross official reserves had increased by 9 billion dollars to 12 billion dollars (equivalent to three months of imports) by end 1988. The Panel concluded that in the light of the continued improvement of the Korean balance-of-payments situation, and having regard to the provisions of Article XVIII:11, there was a need for the prompt establishment of a timetable for the phasing-out of Korea's balance-of-payments restrictions on beef, as called for by the CONTRACTING PARTIES in adopting the 1987 Balance-of-Payments Committee report.

Article II

102. The Panel noted that the LPMO was a beef import monopoly established in July 1988, with exclusive privileges for the administration of both the beef import quota set by the Korean Government and the resale of the imported beef to wholesalers or in certain cases directly to end users such as hotels. The Panel examined whether the mark-ups imposed on imported beef, in combination with the import duties collected at the bound rate, afforded "protection on the average in excess of the amount of protection provided for" in the Korean Schedule in violation of the provisions of paragraph 4 of Article II, as claimed by Australia. The Panel noted Korea's view that the operation of the LPMO was consistent with the provisions of Article II:4.

²⁸BOP/R/171, paragraph 22

²⁹Idem, paragraph 23. The full text of the Balance-of-Payments Committee's conclusions is contained in Annex I.

103. The LPMO bought imported beef at world market prices through a tender system and resold it either by auction to wholesalers or directly to end users. A minimum bid price at wholesale auction, or derived price for direct sale, was set by the LPMO with reference to the wholesale price for domestic beef.

104. In examining Article II:4, the Panel noted that, according to the interpretative note to Article II:4, the paragraph was to be applied "in the light of the provisions of Article 31 of the Havana Charter".³⁰ Two provisions of the Havana Charter, Articles 31:4 and 31:5, were relevant. Article 31:4 called for an analysis of the import costs and profit margins of the import monopoly. However, Article 31:5 stated that import monopolies would "import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product ..." (emphasis added). In the view of the Panel, Article 31:5 clearly implied that Article 31:4 of the Havana Charter and by implication Article II:4 of the General Agreement were intended to cover import monopolies operating in markets not subject to quantitative restrictions.

105. Bearing in mind Article 31:5 of the Havana Charter, the Panel considered that, in view of the existence of quantitative restrictions, it would be inappropriate to apply Article II:4 of the General Agreement in the present case. The price premium obtained by the LPMO through the setting of a minimum bid price or derived sale price was directly afforded by the situation of market scarcity arising from the quantitative restrictions on beef. The Panel concluded that because of the presence of the quantitative restrictions, the level of the LPMO's mark-up of the price for imported beef to achieve the minimum bid price or other derived price was not relevant in the present case. Furthermore, once these quantitative restrictions were phased out, as recommended by the Panel in paragraph 109 below, this price premium would disappear.

106. The Panel stressed, however, that in the absence of quantitative restrictions, an import monopoly was not to afford protection, on the average, in excess of the amount of protection provided for in the relevant schedule, as set out in Article II:4 of the General Agreement. Furthermore, in the absence of quantitative restrictions, an import monopoly was not to charge on the average a profit margin which was higher than that "which would be obtained under normal conditions of competition (in the absence of the monopoly)". See paragraph 4.16 of the report of the Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies (L/6304) adopted by the CONTRACTING PARTIES in March 1988. The Panel therefore expected that once Korea's quantitative restrictions on beef were removed, the operation of the LPMO would conform to these requirements.

107. The Panel then examined Australia's contention that Korea imposed surcharges on imported beef in violation of the provisions of paragraph 1(b) of Article II and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be examined under Article II:4 since it was the more specific provision applicable to the restriction at issue. In this regard, the Panel recalled its findings in paragraph 105 above. It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).

Articles X and XIII

³⁰The text of Article 31, and its interpretative note, is contained in Annex III.

108. The Panel noted that Australia had, as a subsidiary matter, claimed that Korea had not met its obligations under Articles X and XIII by not providing proper public notice of the import restrictions. It also noted that Korea had stated that the withdrawal of the measures imposed in 1984/85 and the import levels in 1988 had been widely publicized. In view of the Panel's determinations as concerned the consistency of the Korean measures with Articles II and XI, the Panel did not find it necessary to address these subsidiary issues. The Panel noted, however, the requirement in Article X:1 that "laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports ..., shall be published promptly in such a manner as to enable governments and traders to become acquainted with them". It also noted the provision in Article XIII:3(b) that "[i]n the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value".

RECOMMENDATIONS

109. In the light of the findings above, the Panel suggests that the CONTRACTING PARTIES recommend that:

- (a) Korea eliminate or otherwise bring into conformity with the provisions of the General Agreement the import measures on beef introduced in 1984/85 and amended in 1988; and,
- (b) Korea hold consultations with Australia and other interested contracting parties to work out a timetable for the removal of import restrictions on beef justified since 1967 by Korea for balance-of-payments reasons and report on the result of such consultations within a period of three months following the adoption of the Panel report by the Council.

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ANNEX I

Consultations

Extract from the Report on the 1987
with the Republic of Korea*

"Conclusions

19. The Committee took note with great satisfaction of the improvement in the Korean trade and payments situation since the last full consultation, which had been fully reflected in the documentation presented to the meeting.

20. It commended the Korean authorities for the policies of internal adjustment and external liberalization which had been pursued consistently in the past few years, including phasing out of import restrictions, a programme of tariff reductions and a reduction in the number of goods subject to import surveillance. The Committee took note of Korea's commitment to maintaining the pace of the adjustment and liberalization process.

21. In assessing Korea's current economic situation, the Committee noted that the principal economic variables such as GDP growth, investment, savings, and the trade and payments accounts were very favourable. It also noted that, although the foreign debt was still substantial, the positive evolution of the external accounts had permitted considerable advance repayment of debt and that reserves had improved despite the outflows that this had implied. While noting the uncertainties persisting with respect to developments in the fields of wage costs, interest rates, oil prices and the possible effects of these on Korea, the Committee was nevertheless of the view that the present basically favourable situation of the Korean economy was likely to continue.

22. The prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B. The conditions laid down in paragraph 9 of Article XVIII for the imposition of trade restrictions for balance-of-payments purposes and the statement contained in the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes that "restrictive trade measures are in general an inefficient means to maintain or restore balance-of-payments equilibrium" were also recalled. It also noted that many of the remaining measures were related to imports of agricultural products or to particular industrial sectors, and recalled the provision of the 1979 Declaration that "restrictive import measures taken for balance-of-payments purposes should not be taken for the purpose of protecting a particular industry or sector".

23. The Committee therefore stressed the need to establish a clear timetable for the early, progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes. It welcomed Korea's willingness to undertake another full consultation with the Committee in the first part of 1989. However, the expectation was expressed that Korea would be able in the meantime to establish a timetable for the phasing out of balance-of-payments restrictions, and that Korea would consider alternative GATT justifications for any remaining measures, thus obviating the need for such consultations. The representative of Korea stated that he could not prejudge the policy of the next Government in this regard."

*BOP/R/171 (10 December 1987).

ANNEX II

KOREA: SUMMARY OF ECONOMIC INDICATORS

	1985	1986	1987	Jan-Sept 1988	1985/84	1986/85	1987/86	Jan-Sept 1988/87
	(Billion won)				(Percent changes)			
GNP (1980 constant prices)	52,705.4	59,187.8	66,319.6	51,369.6	5.4%	12.3%		1
Real Domestic Demand	54,960.7	59,540.6	65,590.3	50,184.9	4.0%	8.3%	12.0%	2.0%
Consumption	37,191.6	39,888.6	42,976.2	33,654.5	5.1%	7.3%		1
Gross capital formation	17,769.1	19,652.0	22,614.1	16,530.4	1.6%	10.6%	10.2%	1.0%
Export of goods and non factor services	20,279.5	25,648.1	31,809.0	26,117.3	2.1%	26.5%		8.
Imports of goods and non factor services	20,124.1	23,852.7	28,899.6	24,140.9	- 1.7%	18.5%	7.7%	1%
							15.1%	7.4%
							24.0%	2.3%
							21.2%	4.9%
	(Billion won)				(Percent of GNP)			
Public Sector								
Revenue	14,223.5	16,278.6	19,270.5	18,007.6	27.0%	27.5%	29.1%	35.1%
Expenditure	13,585.0	15,310.5	18,364.6	14,375.9	25.8%	25.9%	27.7%	28.0%
	(Billion won)				(Twelve month percent change)			
Money and Credit								
Money and quasi-money	28,565.2	33,833.1	40,279.5	42,714.6	16.8%	18.4%	19.1%	18.3%

Source: Monthly Statistical Bulletin, November 1988, The Bank of Korea.

International Financial Statistics, December 1988, IMF.

- 1) In '000 won. 1988: January-July.
- 2) Reflects changes in the net foreign assets of the banking system.

KOREA: SUMMARY OF ECONOMIC INDICATORS (Cont'd)

	1985	1986	1987	Jan-Sept. 1988
	(Billion US\$)			
Current account	(0.9)	4.6	9.9	14.1
Trade balance (f.o.b.)	-	4.2	7.7	11.1
Exports	26.4	33.9	46.2	59.7
Imports	(26.5)	(29.7)	(38.6)	(48.6)
Services and transfers (net)	(0.9)	0.4	2.2	3.0
Capital account (net)	(0.7)	(1.5)	(4.3)	(0.5)
Errors and omissions	(0.8)	(0.5)	1.2	-
Overall balance ²⁾	(2.5)	2.6	6.8	13.6
	(Billion US\$)			
Gross Official Reserves (end of period)				
In months of imports	2.9	3.3	3.6	12.3
	1.3	1.3	1.1	(actual)
				3.0
	(Billion US\$)			
Outstanding external debt (end of period)	46.8	44.5	35.6	31.9
Medium- and long-term	36.0	35.3	26.3	22.0
Short term	10.7	9.2	9.3	9.9
Various				
Ratio of current account to GNP	(1.1)	4.9	8.3	9.0
Ratio of external debt to GNP	55.8	46.8	30.0	20.4
Won per US\$ (average)	870.0	881.5	822.6	731.5

Source: Monthly Statistical Bulletin, November 1988, The Bank of Korea.

International Financial Statistics, December 1988, IMF.

1) In '000 won. 1988: January-July.

2) Reflects changes in the net foreign assets of the banking system.

ANNEX III

Article 31 of the Havana Charter

Expansion of Trade

1. If a Member establishes, maintains or authorizes, formally or in effect, a monopoly of the importation or exportation of any product, the Member shall, upon the request of any other Member or Members having a substantial interest in trade with it in the product concerned, negotiate with such other Member or Members in the manner provided for under Article 17 in respect of tariffs, and subject to all the provisions of this Charter with respect to such tariff negotiations, with the object of achieving:

- (a) in the case of an export monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic users of the monopolized product, or designed to assure exports of the monopolized product in adequate quantities at reasonable prices;
- (b) in the case of an import monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic producers of the monopolized product, or designed to relax any limitation on imports which is comparable with a limitation made subject to negotiation under other provisions of this Chapter.

2. In order to satisfy the requirements of paragraph 1(b), the Member establishing, maintaining or authorizing a monopoly shall negotiate:

- (a) for the establishment of the maximum import duty that may be applied in respect of the product concerned; or
- (b) for any other mutually satisfactory arrangement consistent with the provisions of this Charter, if it is evident to the negotiating parties that to negotiate a maximum import duty under sub-paragraph (a) of this paragraph is impracticable or would be ineffective for the achievement of the objectives of paragraph 1; any Member entering into negotiations under this sub-paragraph shall afford to other interested Members an opportunity for consultation.

3. In any case in which a maximum import duty is not negotiated under paragraph 2(a), the Member establishing, maintaining or authorizing the import monopoly shall make public, or notify the Organization of, the maximum import duty which it will apply in respect of the product concerned.

4. The import duty negotiated under paragraph 2, or made public or notified to the Organization under paragraph 3, shall represent the maximum margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes conforming to the provisions of Article 18, transportation, distribution and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) may exceed the landed cost; Provided that regard may be had to average landed costs and selling prices over recent periods; and Provided further that, where the product concerned is a primary commodity which is the subject of a domestic price stabilization arrangement, provision may be made for adjustment to take account of wide fluctuations or variations in world prices, subject where a maximum duty has been negotiated to agreement between the countries parties to the negotiations.

5. With regard to any product to which the provisions of this Article apply, the monopoly shall, wherever this principle can be effectively applied and subject to the other provisions of this Charter, import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product, account being taken of any rationing to consumers of the imported

and like domestic product which may be in force at that time.

6. In applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes.

7. This Article shall not limit the use by Members of any form of assistance to domestic producers permitted by other provisions of this Charter.

ad Article 31

Paragraphs 2 and 4

The maximum import duty referred to in paragraphs 2 and 4 would cover the margin which has been negotiated or which has been published or notified to the Organization, whether or not collected, wholly or in part, at the custom house as an ordinary customs duty.

Paragraph 4

With reference to the second proviso, the method and degree of adjustment to be permitted in the case of a primary commodity which is the subject of a domestic price stabilization arrangement should normally be a matter for agreement at the time of the negotiations under paragraph 2(a).