

REPUBLIC OF KOREA - RESTRICTIONS ON
IMPORTS OF BEEF - COMPLAINT BY THE UNITED STATES

*Report of the Panel adopted on 7 November 1989
(L/6503 - 36S/268)*

Introduction

1. In February and March 1988, the United States 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. The United States therefore requested the Council to establish a panel to examine the matter (L/6316).

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 Australia, 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). Australia, Argentina, Canada, the European Community, New Zealand 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 the United States in document L/6316 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 United States/Korean Panel and the Australian/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 28 November 1988 and on 20 January 1989. It received third country submissions from Australia, Canada and New Zealand. Their views are summarized below in paragraphs 102-110. 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, therefore, the Panel should 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 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 had 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 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."

Factual Aspects

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'".

¹Figures provided by the Republic of Korea.

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

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 Government in this regard".¹ 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 1988.²

(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 tons³ (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 1987.⁴ The decline in cattle prices led to reduced profitability for cattle farmers.

¹The full text of the Balance-of-Payments Committee's conclusions is set out in Annex I on p. 230 (Australia).

²Figures derived from tables in Annex II.

³Korean figure.

⁴Figures derived from National Livestock Cooperatives Federation statistics.

(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 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 of the contract price in the period August to November 1988.

Main Arguments

General

25. The *United States* argued that the quotas, import bans, state-trading monopoly and other restrictions maintained by the Government of Korea were inconsistent with Articles II, X, XI and XIII, and nullified or impaired benefits accruing to the United States within the meaning of Article XXIII of the General Agreement. The United States therefore requested the Panel to find that:

- (i) the Korean import ban and quantitative restrictions on beef imports were inconsistent with GATT Article XI;
- (ii) the LPMO import surcharge violated GATT Articles II:1(b) and II:4;

(iii) the existence of the LPMO was a GATT-inconsistent restriction on trade within the meaning of Article XI;

(iv) the Republic of Korea had failed to satisfy its notification obligations under Articles X and XIII; and

(v) the Korean restrictions constituted *prima facie* impairment of benefits accruing to the United States under the General Agreement.

The United States further invited the Panel to recommend to the CONTRACTING PARTIES that Korea take action immediately to eliminate its restrictions on imports of beef so as to conform with Korea's obligations under the General Agreement.

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 thus permissible under the General Agreement. Furthermore, the United States 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. 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 instituting or maintaining 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 GATT-inconsistent "quantitative restriction".

28. The United States also considered that, unless Korea's quantitative restrictions on beef imports could be justified under an explicit exception, they were in contravention of Korea's obligations under the General Agreement. Under GATT practice, it was up to the party invoking an exception to the General Agreement to demonstrate that it qualified for that exception. Accordingly, it would be incumbent on Korea to demonstrate that its actions fell within some exception to the general GATT prohibition on quotas and that each and every requirement of that exception had been met. The United States believed, however, that Korea could not demonstrate that its quotas met the requirements of Articles XI:2, XII, XVIII:B or any other GATT exception. If so, consistent with the aims of GATT, the issue should be resolved in favour of a recommendation that Korea remove its quotas on the importation of United States beef.

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.

30. The *United States* also argued that the LPMO constituted an import monopoly controlled by domestic producers and was an "import restriction" within the meaning of Article XI. As discussed above, Article XI proscribed the use of "quotas, import or export licences, or other measures". The Interpretative Note ad Articles XI, XII, XIII, XIV, and XVIII stated that: "Throughout Articles XI, XII, XIII, XIV, and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations."

31. Referring to the findings of the Japanese Agricultural Panel¹, the United States argued that the existence of the LPMO, a monopoly controlled by domestic producers, represented a serious barrier to trade. If import monopolies controlled by domestic producers were permitted, any government could destroy the value of tariff concessions by giving control over imports to organizations with an interest in restricting trade. The United States believed that the LPMO represented a separate and independent restriction on beef trade in violation of the General Agreement.

32. The United States considered that a state-trading monopoly had to be set up and implemented in a neutral and objective manner so that decisions were taken in accordance with "commercial considerations", as required by Article XVII. A government could not constitute these monopolies in such a way as to create clear disincentives to trade. In a situation involving a producer-controlled monopoly, "commercial considerations" would be presumed to be secondary to the basic self-interest of the domestic producers in limiting import competition. The United States believed that there was little prospect of increased trade as long as the LPMO remained. The LPMO operated in a manner which violated Article XI. The Panel should recommend to the CONTRACTING PARTIES that Korea eliminate it and refrain from establishing similar producer-controlled import monopolies in the future. Any other decision would create clear incentives for governments to set up such monopolies. The proliferation of such organizations would have disastrous implications for world trade.

33. *Korea* replied that the LPMO was not a state-trading monopoly; it did not decide independently on the quantities of beef which would be imported into Korea. The restriction levels were determined by the Korean Government. Furthermore, the United States reference to the Interpretative Note ad Articles XI, XII, XIII, XIV and XVIII was mistaken. At first glance, it was difficult to see what the Note added to the understanding of a BOP restriction under Article XVIII by including "restrictions made effective through state-trading operations". The Note merely said, according to Korea, that countries with state-trading enterprises could apply import restrictions just as well as market economy countries for, e.g., balance-of-payments reasons, which seemed irrelevant to Korea because of its market economy status. Korea believed that it was important to stress 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 Korean 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.

Article II

34. The *United States* claimed that the LPMO was levying surcharges on imported beef, which averaged 36 per cent, for the purpose of equalizing import prices with high domestic prices. After negotiations with the United States, Korea bound its tariff on meat during the Tokyo Round of Multilateral Trade Negotiations. The concession was set out in Schedule LX. By agreement with the United States, Korea reduced its tariff on meat of bovine animals (0201.01) from 25 per cent to 20 per cent *ad valorem* and bound it at that rate. The imposition of surcharges on imported meat was plainly inconsistent with Article II:1(b).

35. The United States also argued that the LPMO appeared to have as its purpose, and had taken concrete steps to afford, protection for Korean beef farmers. As such, 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. As shown by the Canadian Liquor Boards Panel report, a government-sponsored import monopoly was not permitted to charge differential mark-ups on imported goods, much less generalized import surcharges. The imposition of such mark-ups

¹Japan - Restrictions on Imports of Certain Agricultural Products, L/6253.

constituted additional protection in violation of Article II:4.¹ A state-trading organization was limited by Article II:4 to charging the landed costs, plus transportation, distribution, and other expenses incident to the purchase, sale or further processing, plus a reasonable margin of profit. In particular, the margin of profit charged was limited to a margin that would prevail under normal conditions of competition and had to be the same on average for domestic and imported goods.²

36. The United States believed that the LPMO's practices fell squarely within the rule adopted in the Canadian Liquor Boards case. The LPMO was setting minimum bid prices that involved mark-ups of up to 56 per cent on United States boxed beef and up to 136 per cent for Australian carcass beef. These surcharges were far in excess of the "reasonable profits" permitted by Article II:4 and nullified or impaired the 20 per cent Tokyo Round tariff binding negotiated by the United States. In the view of the United States, the clear purpose and intent of the surcharges imposed by the LPMO was to afford extra protection to Korean beef farmers over and above the GATT-bound tariff in violation of Article II:4.

37. *Korea* replied that the United States reliance on the Canadian Liquor Board Panel case was misplaced. In that case, the panel was not concerned with the administration of a GATT-consistent import restriction. Rather the panel reviewed the import, distribution and sales practices of a state-trading monopoly that operated independently from any restriction. Canada did not impose any quantitative restrictions which its liquor boards were supposed to administer. In respect of beef products, the operation of the LPMO in no way resulted in surcharges that were far in excess of the "reasonable profits" permitted by Article II:4.

38. *Korea* argued that as long as it maintained quantitative restrictions, justified under Article XVIII:B, these had to be administered. That was to say, these restrictions had to be allocated among the different suppliers. With respect to administering restrictions, Article XVIII:B referred to Article XIII principles to avoid discrimination among foreign suppliers. Article XIII was not the only standard that a country had to observe when it imported products which it had subjected to restrictions. 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 1971.³

39. Furthermore, *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. *Korea* argued that the real grievance of the United States was that the auction-based system operated by the LPMO in buying and reselling imported beef allowed *Korea* to capture the "quota rents". Quota rents were the price increases produced by the quantitative restrictions on imported beef. The United States mistakenly referred to these price increases as mark-ups or surcharges. Yet, quota rents simply represented the economic impact of quantitative restrictions. They did not constitute additional trade restraints such as surcharges or mark-ups that were impermissible under Article II. Nothing in the GATT, particularly Article XIII, prevented the importers (or the foreign suppliers, as the case might be) from collecting these price increases. Moreover, it had long been recognized that the auction method was superior to any other in achieving a non-discriminatory allocation of quota shares, consistent with Article XIII

¹Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, L/6304, pp. 45-47.

²*Idem*, page 46.

³United States Temporary Import Surcharge, BISD 18S/213, 223.

40. 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, according to Korea, 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. When the successful bidder then exported the beef to Korea, it was subject to the bound customs duty of 20 per cent. In addition, 2.5 per cent was 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. Thus, in Korea's view, the LPMO's operation was also consistent with Article II. In conclusion, because it met the requirements of both Article II and Article XIII, the LPMO's operation was consistent with the General Agreement.

Articles X and XIII

41. The *United States* argued 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 failed in its obligations under Articles X and XIII by not providing proper public notice of the import restrictions.

42. *Korea* submitted that the withdrawal of the intensification measures in 1988, and the import levels established for 1988 and 1989 had been widely publicized, both in Korea and abroad. Furthermore, the LPMO's tenders, implementing the quota shares, had been easily filled and no complaint had been raised by traders about the LPMO's import formalities.

Article XVIII:B

(a) Procedural aspects

43. The *Republic of Korea* argued that the United States 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 Committee. Korea referred to a recent panel case¹ 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. In Korea's opinion, even a "non-violation" nullification or impairment review of the present United States complaint by the Panel was not appropriate because contrary to Article XXIV, Article XXIII:B contained a specific complaint and compensation mechanism in Article XVIII:12(d). If anything, Article XXIV:7 could only be compared to the consultation mechanism of Article XVIII:12(b).

¹European 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.

44. Referring to the above-mentioned 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"¹, 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. This 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 or less stringent than the standards applied to the special review procedures, review under Article XXIII negated the latter.

45. The *United States* replied that the 1950 GATT Report on "The Use of Quantitative Restrictions for Protective and Other Purposes" published in July 1950 showed unambiguously that the "misuse" of BOP restrictions could be challenged under the dispute settlement provisions of Article XXIII. While the consultation provisions of Article XVIII:12(d) duplicated to an extent the consultation and dispute settlement provisions of Article XXIII:2, this was not unusual, since the GATT frequently provided multiple avenues for consultations and dispute settlement.

46. The United States considered that the draft Citrus Panel report was not relevant to the present case and in any case, as interpreted by Korea, provided an erroneous description of GATT practice. First, the report had never been adopted and therefore had no legal status in GATT. Second, the draft report related only to Article XXIV and could not be regarded as an authoritative interpretation of Articles XII or XVIII:B. Indeed, the Panel had no authority to go beyond the Citrus dispute and interpret other provisions of GATT. Third, Korea's reading of the report was directly at odds with the clear statement in the 1950 Report on "The Use of Quantitative Restrictions for Protective and Other Purposes" that misuse of BOP measures could be brought to dispute settlement "under the procedures laid in the Agreement for the settlement of disputes". Korea's reading of the draft Panel report also contradicted a long series of decisions by the CONTRACTING PARTIES that actions covered by waivers granted under the "special review procedures" of Article XXV could be challenged under Article XXIII.

47. In response, *Korea* argued that logic supported the Citrus Panel's finding. If the United States complaint were to be reviewed under the standards of Article XXIII, this would negate the standards and procedures of Article XVIII:12(d), and amount to an improper amendment of the General Agreement.

48. Because Article XXIV contained no specific complaint and compensation mechanism, Korea argued, it was understandable that the Citrus Panel saw some role for Article XXIII. On the other hand, since Article XVIII:B did contain a specific complaint and compensation mechanism in Article XVIII:12(d) in addition to the consultation mechanism of paragraph 12(b), it was possible to distinguish the present case from the Citrus case. Thus this Panel would be entirely justified to conclude in the present case that Article XVIII:12(d) not only precluded review of the GATT compatibility of Korea's restrictions under Article XXIII:1(a), but also review under the "non-violation" nullification or impairment standards of Article XXIII:1(b) or (c). In this way, the Panel would respect the choice made by the drafters of Article XVIII:12(d), who - with good reason - subjected complaints about BOP reasons to higher standards than the standards of Article XXIII, and who did not include "non-violation" nullification or impairment standards, comparable to those of Article XXIII:1(b) or (c), in Article XVIII:12(d). Consequently, in accordance with the long-standing practice of the CONTRACTING PARTIES, the United States 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).

¹*Idem*, paragraph 4.16.

49. The *United States* argued that despite citing BOP as the ostensible GATT justification for its beef ban, quotas, and surcharges, Korea appeared surprisingly reluctant to discuss the merits of the BOP issue and had put forward a number of procedural obstacles to prevent the Panel from examining the BOP issue and the GATT consistency of the trade restrictions. This reluctance appeared to rest on a (not unfounded) concern about the credibility of claiming BOP cover in Korea's current situation and the fact that these measures were taken for protectionist reasons wholly unrelated to Korea's strong BOP position. Notwithstanding Korea's current contention that the provisions of Articles XII and XVIII could not be challenged in Article XXIII proceedings, the United States believed that the Panel was required under the agreed terms of reference and GATT precedent to decide this issue. Korea had taken the position that the Panel could not examine the BOP issue. It contended that such matters were the exclusive business of the BOP Committee and that the "BOP Committee had continued to authorize Korea's restrictions on beef imports under Article XVIII:B". Under the agreed terms of reference, the Panel had a mandate to examine the beef import restrictions "in the light of the relevant GATT provisions". The agreed terms of reference were straightforward and unambiguous. They said nothing about excluding certain provisions of GATT, nor did they make any exception for BOP. Since Articles XII and XVIII were integral parts of the General Agreement and BOP had been put forward by Korea as a defence, it necessarily followed that the Panel had clear authority to examine the application of the BOP provisions to this case. Otherwise, the Panel could not fulfil its mandate to provide appropriate "recommendations" to the CONTRACTING PARTIES.

50. In response, *Korea* contested, first of all, that it had been reluctant to discuss the merits of the BOP issue. Korea had fully participated in the consultations before the BOP Committee over the years and was preparing for a new round of consultations in June 1989. Korea maintained that these consultations pursuant to Article XVIII:12(b), or a complaint pursuant to Article XVIII:12(d), remained the proper venue to discuss the BOP issue. Furthermore, Korea argued that the United States wrongly suggested that the Panel's terms of reference allowed the Panel to ignore the implications of Article XVIII:12(b) and (d). The CONTRACTING PARTIES did not exclude any GATT provisions or sub-provision when they adopted the standard terms of reference.

51. The *United States* also argued that having introduced BOP to this case, Korea could not object to the Panel's examination of the BOP issue on its merits, or object to a request for relevant IMF advice pursuant to paragraph (iv) of the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (28 November 1979).¹

52. According to *Korea*, the United States was asking for more than it bargained for. Following the request of the United States, the CONTRACTING PARTIES limited the Panel's terms of reference to reviewing Korea's restrictions on beef imports. The United States fully realized all along that Korea invoked the cover of Article XVIII for these restrictions, which continued to be reviewed by the BOP Committee. Yet it was not possible for the Panel or the IMF to review Korea's balance-of-payments position in respect of the restrictions on beef imports in isolation. Any review of Korea's balance of payments would also affect the restrictions on 357 other products for which Korea claimed BOP cover as well.

¹BISD 26S/210.

53. The *United States* argued that the CONTRACTING PARTIES had stated unambiguously that the misuse of BOP measures was actionable under Article XXIII. In 1950, shortly after GATT entered into force, the CONTRACTING PARTIES had occasion to examine carefully the application of the BOP provisions of the General Agreement to Article XXIII. At that time, there was serious concern about the misuse of quotas and other trade-restrictive measures. These concerns were equally relevant today. The conclusions of the CONTRACTING PARTIES were set out in the 1950 Report "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes". This report was drafted in the knowledge that quantitative restrictions had been widely applied by most countries since World War II and that many countries had used such measures in order to redress their external financial position and strengthen their monetary reserves. As noted in the preface to the report, many quantitative restrictions had "remained in force after the need for them has passed away, and some of the quantitative restrictions applied for financial reasons may have been retained to protect domestic producers against foreign competition". The report specifically pointed out that quotas had been maintained which gave "priority to imports of particular products upon the basis of the competitiveness or non-competitiveness of such imports with a domestic industry". In other cases, the quotas were "unreasonably small having regard to the exchange availability of the country concerned and to other relevant factors".

54. The United States further argued that the problems examined by the CONTRACTING PARTIES in 1950 were closely analogous to those involved in the present case. The legal conclusions of the report were therefore highly relevant. The CONTRACTING PARTIES summed up as follows:

"It appeared to the CONTRACTING PARTIES that insofar as these types of practices were in fact carried on for the purposes indicated above and were not justified under the provisions of Article XII and XIV relating to the use of import restrictions to protect the balance of payments or under other provisions of the Agreement specifically permitting the use of import restrictions, they were inconsistent with the provisions of the Agreement and *such misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes*" (emphasis added).¹

By their choice of the word "inconsistent", the CONTRACTING PARTIES clearly contemplated that such measures could be challenged under Article XXIII:2 as violations of the General Agreement pursuant to Article XXIII:1(a). Thus, the report directly refuted Korea's claims that purported BOP measures could not be challenged in dispute settlement.

55. As concerned the 1950 Working Party report, *Korea* argued that it reflected the economic position of the European countries in the years just after World War II. For various reasons, these developed countries, which had been heavily affected by the war, maintained import or export quotas. The report disapproved of the use of quantitative restrictions for protective and other commercial reasons, that is for reasons not justified under the GATT. The preface of the report indicated that some quantitative restrictions remained in force after the need for them had disappeared, and that some of those originally applied for financial reasons were retained to protect domestic producers against foreign competition. Any individual contracting party which considered that such a situation existed and that its trade was harmed thereby should have recourse to the complaint procedure of the General Agreement, according to the working party. The 1950 Report, according to *Korea*, did not examine carefully the application of the BOP provisions of the General Agreement to Article XXIII. It merely said, in the passage highlighted by the United States, that if an import restriction was not justified under Article XII-XIV or under any other GATT provision, then it should be reviewed under the dispute settlement "procedures" of the General Agreement. There were arguably over thirty such procedures in the GATT. The report

¹The Use of Quantitative Restrictions for Protective and Other Purposes, 1950, paragraph 22.

did not single out Article XXIII; nor did it consider the relationship between Article XXIII and Article XVIII:12(d) (or rather Article XII:4(d), its corresponding provision at the time). Korea pointed out as well that the 1950 Report did not even cite these provisions or any other procedural provisions, while citing many of the GATT's substantive rules. This report was the first signal of the problems which the GATT was beginning to experience with so-called "residual" restrictions. In 1955, the CONTRACTING PARTIES tried to solve this problem by providing in advance for a type of waiver (the "hard-core waiver"), which would establish a transitional period for the adjustment of domestic firms to the competitive impact caused by the elimination of quantitative restrictions. These restrictions, which were no longer justified as BOP measures, became known as "residual" restrictions.

56. Korea further argued that the problems caused by residual restrictions grew more serious during the 1950's, and in 1960 the CONTRACTING PARTIES decided to initiate a thorough inventory of such restrictions maintained by GATT members. It was then explicitly agreed that the consultation provisions of Article XXII and the nullification or impairment procedures of Article XXIII might be invoked by contracting parties affected by residual restrictions.¹ The GATT report in which this was established was entitled "Procedures for Dealing with New Import Restrictions Applied for Balance-of-Payments Reasons and Residual Import Restrictions".² This report confirmed that residual restrictions could be challenged under Article XXIII. Residual restrictions were restrictions which a country applied to protect its own market without invoking a GATT justification. Most residual restrictions were once maintained under the BOP cover of Articles XII or XVIII, but were retained after this cover was abandoned. The conclusions reached in 1950 and 1960 made perfect sense according to Korea. No longer subject to the special review procedures of Articles XII and XVIII, the residual restrictions should be open to challenge under Article XXIII. Otherwise, they would become sacrosanct. Yet, however sensible these conclusions were, they did not concern the present case. Korea's restrictions on beef imports were clearly not residual restrictions. They had been and were still subject to multilateral review under Article XVIII:B.

57. The *United States* replied that the 1950 Report was determinative in the present case. The report was adopted by the CONTRACTING PARTIES as a binding legal interpretation of the relevant provisions of the GATT. While the GATT had been amended since 1950, the BOP review and consultation procedures and the dispute settlement provisions of Article XXIII had remained essentially unchanged. Indeed, the BOP review and consultation provisions of Article XVIII:B that were added in 1955 were virtually identical to those of Article XII and were drawn directly from that Article. There was nothing in the 1955 negotiating record to suggest that the CONTRACTING PARTIES intended to limit existing rights to challenge the misuse of BOP measures under Article XXIII. Consequently, the legal interpretations set out in the report applied equally to Articles XII and XVIII:B.

58. *Korea* argued that this conclusion of the United States rested on a mistaken assumption. It assumed that the CONTRACTING PARTIES first established the principle that measures with BOP cover under Article XII and subject to the special complaint procedure of Article XII:4(d) could nevertheless be challenged under Article XXIII, when they adopted the 1950 Report. According to Korea, the 1950 Report did not establish such a principle.

¹Dam, *The GATT: Law and International Economic Organization*, page 165 (1970).

²BISD 9S/18.

59. The *United States* asserted that Korea distinguished the 1950 Report by arguing that it related to "residual" restrictions involving countries which had disinvoked Article XII. Accordingly, Korea contended that the report did not apply to Korea which still claimed BOP cover. However, this argument rested on a major factual error. It was true that the "residuals" issue involved European countries which had disinvoked Article XII, but continued to maintain "residual" import restrictions. In 1950, however, when the CONTRACTING PARTIES made their report, these countries were still invoking Article XII, just as Korea continued to seek to invoke Article XVIII:B today. Consequently, the 1950 Report showed that Article XXIII could be applied against a country which was invoking BOP, but misusing alleged BOP measures, e.g., Korea. In short, the United States believed that the Panel had clear authority to review the merits of Korea's BOP defence.

60. In response, *Korea* recalled it had not argued that the 1950 Report dealt with residual restrictions, because no country obviously had yet formally abandoned its BOP cover at that time. Korea had merely indicated that the 1950 Report signalled the problem which later came to be known as residual restrictions, e.g., restrictions which were retained by countries after BOP cover was no longer available to them. These restrictions could well be challenged under Article XXIII, because there was no other remedy in GATT to do so. Korea reiterated, however, that its beef restrictions were not "residuals" because it still claimed BOP cover for them, and because these restrictions were still under review by the BOP Committee. Furthermore, a specific remedy was available to complainants like the United States that wanted to challenge the GATT justification of these restrictions: Article XVIII:12(d). In addition, Korea argued that the United States made a very important concession: by conceding that Korea's restrictions were not "residual restrictions", the United States agreed unambiguously that Korea still had BOP cover. Korea reiterated that the 1950 Report provided no support for the unprecedented initiative of the United States to remove Korea's BOP cover in an action under Article XXIII, rather than Article XVIII:12(b) or (d).

61. The *United States* provided additional arguments as to why Korea's reliance on an alleged rule regarding the special review procedures was misplaced. The CONTRACTING PARTIES had said repeatedly that practices covered by special review procedures could be examined under Article XXIII. Indeed, they made this point specifically with respect to BOP procedures in the 1950 Report. They had made the same point with respect to other GATT special review procedures, including those of Article XVIII. Article XVIII:C, for example, provided a procedure whereby a developing country could seek to deviate from its GATT obligations in order to assist the establishment of an industry. Such measures could only be implemented after notice to, and in some cases, the concurrence of, the CONTRACTING PARTIES. The 1955 Working Party report on Quantitative Restrictions stated:

"The Working Party agreed on the following interpretation which would apply to paragraph 21 of Article XVIII, but would not in any way prejudice the interpretation of Article XXIII in other cases; although it is understood that the concurrence of the CONTRACTING PARTIES in a measure under paragraphs 16, 19, or 22, or the fact that the CONTRACTING PARTIES, as envisaged in paragraph 15 did not request a contracting party to consult, would not deprive a contracting party affected by the measure in question of its right to lodge a complaint under Article XXIII, the CONTRACTING PARTIES in assessing the extent of the impairment of benefit would have to take into consideration all the facts of the case and, in particular, the terms under which the benefit was obtained, including the provisions embodied in Article XVIII."¹

Thus, in Article XVIII:C, which was drafted at the same time as the provisions of Section B, the CONTRACTING PARTIES did not foreclose Article XXIII rights for practices concurred in by the CONTRACTING PARTIES. It followed that the draft Citrus Panel report was irrelevant here and that Korea's reliance on its alleged description of GATT practice was wrong.

¹BISD 3S/188, paragraph 63.

62. Referring to the above-mentioned language in the 1955 report, *Korea* argued that, at first glance, this language might seem supportive of the United States position. *Korea* maintained, however, that on closer analysis, it was damaging. First of all, when read in full, the paragraph was quite ambiguous, if not self-contradictory.¹ It could just as well be read to say that Article XXIII could only be invoked against Section C measures in which the CONTRACTING PARTIES had not concurred. Following that reading, *Korea's* beef restrictions could not be challenged under Article XXIII, because the BOP Committee did recently review *Korea's* beef restrictions, among others, and stated, according to *Korea*, that it did not expect *Korea* to disinvoke Article XVIII:B.²

63. Secondly, *Korea* argued, assuming nevertheless that this language in the 1955 Working Party report did envisage the application of Article XXIII to measures in which the CONTRACTING PARTIES had concurred, the Working Party still restricted the use of Article XXIII. It held that Article XXIII could not be used simply to challenge the consistency of the measures in question. Rather, the complaining party could only prevail in an Article XXIII proceeding (and be entitled to compensatory concessions) if the effects of the measure in which the CONTRACTING PARTIES concurred proved to be "substantially different" from what could have reasonably been foreseen at the time the measure was considered by the CONTRACTING PARTIES.³ Following this reasoning in the present case, the United States complaints under Article XXIII that *Korea's* beef restrictions were GATT incompatible were irrelevant. It would be incumbent on the United States to show that the effects of the restrictions on beef were "substantially different" than what could have been foreseen when the GATT's BOP Committee last reviewed them. *Korea* submitted that it was obvious that the United States would never be able to make such a showing, if only because the United States had never challenged the beef restrictions before the BOP Committee.

64. *Korea* also argued that the statement in the 1955 Report on the relationship between Article XXIII and Section C of Article XVIII could not be transposed to Section B of Article XVIII. The reason was that Section C did not contain a complaint procedure similar to Article XVIII:12(d) in Section B. With respect to the 1955 Report, *Korea* argued finally that this Report actually supported its position. While not explicitly saying so, the Report made quite clear that Article XVIII:12(d), rather than Article XXIII, was the proper remedy to complain about the GATT-compatibility of BOP restrictions. *Korea* referred to the following statement in the Report:

"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 Article XXII and XXIII of the Agreement" (BISD 3S/160, 191, paragraph 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. Accordingly, 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.

¹BISD 3S/170, 188 paragraph 63.

²BOP/R/171, paragraph 9 (1987).

³See the closing sentence of paragraph 63 of the 1955 Working Party's report, BISD 3S/188.

65. Korea further argued that none of the GATT precedents addressed the fundamental issue in this case. If the complaint of the United States were to be reviewed under Article XXIII, no country would ever 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. Moreover, if the Panel reviewed the United States complaint under Article XXIII, it agreed that the United States and any country that wanted to challenge a BOP measure could choose to ignore Article XVIII:12(d). This would negate the procedure of Article XVIII:12(d), and amount to an improper amendment of the GATT, in violation of Article XXX.

66. 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 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.

67. The *United States* disagreed with Korea's claim that the 1987 review by the BOP Committee foreclosed a dispute settlement challenge under Article XXIII. Review in the BOP Committee under paragraph 12(b) and dispute settlement under Article XXIII served two separate functions. Review in the BOP Committee was a prerequisite for the imposition of otherwise GATT-inconsistent trade restrictions. This review necessarily focused on broad macroeconomic and trade policy issues and on the underlying justification for the BOP measures. The BOP Committee did not examine each and every product subject to restrictions, nor did it engage in the close and detailed scrutiny available in the dispute settlement process. Although the United States accepted that the BOP Committee could choose to examine individual measures in the semi-annual reviews, detailed review of each restricted item would mean that BOP consultations would take years. This protracted review would be a waste of time and would undercut the functions of the semi-annual review. The United States disagreed with Korea's argument that use of Article XXIII to review the GATT-consistency of a purported BOP measures was inconsistent with BOP Committee review under Articles XII and XVIII:B, since both decisions required approval of the CONTRACTING PARTIES.

68. The United States argued that the BOP Committee generally met every two years, so problems like this one, that arose in the interim, could not be addressed. While no procedures had ever been developed for Article XVIII:12(d) or Article XII:4(d), it appeared that the review would take place before the full BOP Committee and should be finished within sixty days. In addition, the Committee's ability to examine certain key non-BOP issues, like the transparency and LPMO profit issues in this case, was wholly unclear, since these issues fell outside the Committee's jurisdiction. Finally, the consensus requirement allowed the country imposing the restrictions to block or otherwise limit an adverse Committee recommendation. The fact that the review was in the full Committee, took place within short time limits, and focused broadly on the macroeconomic justification for the BOP "restrictions" or on inconsistencies of a "serious nature" meant that the BOP consultation and review procedures were not well-suited for a narrow challenge to an individual measure of interest to a single party. These matters could be efficiently dealt with in dispute settlement. Accordingly, in the United States view, the BOP Committee and dispute settlement processes were complementary. The BOP Committee provided broad review of the overall justification for the restrictions and ensured that

appropriate trade and macroeconomic policies were adhered to. Dispute settlement allowed a country, whose trade was damaged by the misuse of alleged BOP measures, to establish its GATT rights.

69. The United States also did not agree with Korea's argument that Article XVIII:12(d) was the only means for challenging the misuse of BOP rights. First, as the 1955 Working Party which drafted the provision emphasized, paragraph 12(d) "takes the form of a request for consultations, rather than of a challenge".¹ Accordingly, it was not a substitute for the dispute settlement procedures of Article XXIII:2. Second, the Korean interpretation was inconsistent with the 1950 Report on "The Use of Quantitative Restrictions for Protective and Other Purposes", which clearly indicated that misuse of BOP measures could be brought to dispute settlement "under the procedures laid down in the Agreement for the settlement of disputes". Third, paragraph 12(d) appeared to provide a means only for challenging the GATT-consistency of an entire BOP régime. It authorized the CONTRACTING PARTIES to determine whether "the restrictions are inconsistent with this Section" and to recommend "the withdrawal or modification of those restrictions". Accordingly, it appeared to contemplate a consultation with respect to the underlying economic and trade policy justification for the entire BOP régime. Thus, the provision was both too broad and too narrow for the purposes of United States concerns in this case. It was too broad because the United States initially had only challenged the Korean restrictions on beef trade, rather than on all 358 of Korea's alleged BOP restrictions. While the Korean decision to rely on a BOP defence required the Panel to decide issues that could have broader indirect implications for other Korean restrictions, this was Korea's decision and a ruling with respect to the other quotas had not been sought initially by the United States. Second, paragraph 12(d) was too narrow because the United States concerns went beyond BOP. The United States position was that even if Korea had a right to impose BOP measures (which the United States did not think it did), the Korean beef restrictions were GATT-inconsistent because they were not BOP measures and were not imposed for BOP reasons. The United States concerns also included issues that could not be dealt with under Article XVIII:12(d), such as Article X and the consistency of the LPMO with Articles II, XI and XVII.

70. Korea argued in response that this analysis of the United States was erroneous, in that it did not distinguish between the consultations before the BOP Committee pursuant to Article XVIII:12(b) and the special complaint procedure of Article XVIII:12(d), which had not been implemented to date. The latter was comparable to the dispute settlement procedure of Article XXIII.

(b) Justification for restrictions

71. 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 the United States 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 argued that the GATT 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 imports 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

¹BISD 3S/173, paragraph 11.

Article XVIII:B. The justification of its restrictions had never been called into question, until the last round of full consultations in December 1987.¹ According to the "prevailing" view expressed therein, import restrictions "could" no longer be justified under Article XVIII:B.² 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.

72. The *United States* replied that, in December 1987, the members of the BOP Committee "emphasized that, in their view, the present situation and outlook did not justify the maintenance of balance-of-payments restrictions".³ The Committee stated that Korea's external debt was not a justification for continued restrictions: "The debt burden, while still large had been substantially reduced, and was not high in per capita terms. Moreover, it could be expected that the goals for reduction of the debt burden mentioned in the IMF statement could be achieved ahead of time". Accordingly, the Committee reported that "[t]he prevailing view expressed in the Committee was that the current situation and outlook for balance of payments was such that import restrictions could no longer be justified under Article XVIII:B".⁴ Under these circumstances, the United States saw no GATT BOP justification for Korean trade restrictions, and considered that the findings of the IMF and the GATT BOP Committee should be given substantial weight in this regard.

73. *Korea* replied that the Committee's language was more guarded than the United States suggested. Furthermore, if the Committee had established any inconsistency regarding Korean BOP restrictions, it would have made explicit recommendations to that effect to the Council.⁵ 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".⁶ 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 which were scheduled for June 1989. These would be meaningless if Article XVIII:B was no longer available to Korea, as the United States claimed. In addition, Korea pointed out that the IMF had made no finding pursuant to Article XV:2 that Korea's trade restrictions could no longer be justified under Article XVIII:B.

74. *Korea* argued that the BOP Committee reviewed restrictions under Article XVIII:B on behalf of the GATT CONTRACTING PARTIES.⁷ Since Korea's accession to the GATT, its restrictions under Article XVIII:B had been examined regularly, 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. In recent years, the United States

¹See, e.g. BOP/R/163 (23 October 1986); BOP/R/146 (15 November 1984).

²BOP/R/171, page 7 (10 December 1987).

³BOP/R/171, page 3.

⁴*Idem*, paragraph 22.

⁵See Declaration on Trade Measures Taken for Balance-of-Payment Purposes, BISD 26S/205, 209, paragraph 13 (1980).

⁶BOP/R/171, paragraph 9.

⁷See Note by the Chairman of the Committee on Balance-of-Payments Restrictions, BISD 18S/48, 51, paragraph 10 (1972).

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 the United States, as they apparently did not, one would have expected the United States 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, the United States remained silent on the matter.

75. Citing the "prevailing view"¹ of the BOP Committee report, the *United States* argued that the BOP Committee had made it very clear that the Korean measures were not justified. This was particularly true for agriculture, since the report stated:

"[The Committee] also noted that many of the remaining measures were related to imports of agricultural products or to particular industrial sectors, and recalled the provisions of the 1979 Declaration that "restrictive import measures taken for balance-of-payments reasons should not be taken for the purpose of protecting a particular industry or sector".²

These statements did not imply any BOP Committee endorsement of the Korean restrictions. Far from endorsing the measures, the Committee urged Korea to set a definite timetable for rapidly removing the remaining restrictions. The United States agreed with the prevailing view that Korea had no BOP justification for its import restrictions and that certain Korean restrictions, including the beef import measures, were taken for protectionist reasons having nothing to do with BOP. The United States would have preferred a much stronger statement, but GATT operated on the basis of consensus. The United States believed that the report provided a sufficient basis for the Panel to reject Korea's BOP claim.

76. *Korea* replied that the statement in the BOP Committee Report quoted here by the United States, 'noting' and 'recalling' certain facts and issues, did not represent a specific conclusion on the compatibility of Korea's BOP restrictions on agricultural products with Article XVIII:B. Furthermore, Korea did not agree with the suggestion of the United States that the BOP Committee's conclusions reflected an unfortunate compromise because it was the result of consensus. Read in full, the Committee's Report made good sense. Only a selective reading, as proposed by the United States, made the Committee's conclusions look weak. Furthermore, Korea expressed concern about the implications of the United States critical appraisal of the consensus principle, which had been the cornerstone of the GATT to date.

77. The *United States* responded that the matter had not been raised in the BOP Committee, *inter alia*, because the United States had been requested bilaterally not to push the issue at a politically delicate time in Korea that preceded national elections. The United States further considered that Korea could not rely on the 1987 BOP Committee review as a basis for maintaining its beef trade restrictions. Korea had admitted in its submissions that the 1985-1988 prohibition on beef imports was not imposed for BOP reasons, but was taken outside the GATT in order to protect Korean beef farmers from imports. Indeed, Korea had stated that: "[i]t did not pretend that the intensification of its BOP restrictions was motivated by a worsening of its balance-of-payments situation ...". The prohibition was in effect at the time of the 1987 BOP Committee review. Accordingly, the beef restriction could not have been authorized by the BOP Committee or the CONTRACTING PARTIES, since it was not a BOP measure in the first place.

¹BOP/R/171, paragraph 22.

²*Idem.*

78. *Korea* argued that when the CONTRACTING PARTIES agreed to establish this 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, 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 United States complaint. Korea submitted that its remaining BOP restrictions, taken as a whole, served to protect the Korean economy, consistent with Article XVIII:B. A proper evaluation of the justification of the beef restrictions would involve a review of all of Korea's BOP restrictions. Yet, the United States did not request such a broad-scale review from the Council, and this Panel could not engage in such a review now. 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.

79. 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.

80. The *United States* replied that panels were clearly authorized to consult with the IMF since the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance¹ provided that "each panel should have the right to seek information and technical advice from any individual or body which it deems appropriate". The United States considered that, if there was any remaining doubt on whether Korea could impose BOP restrictions under the criteria of Articles XII:2(a) or XVIII:9, the Panel should request IMF advice as soon as possible in order to resolve it. The United States did not agree with Korea's contention that the Panel should refrain from ruling on the justification under Article XVIII:B for Korea's beef quotas because any ruling could have broader implications for other Korean trade restrictions that were allegedly justified on BOP grounds. The United States noted that it was Korea, not the United States, which had introduced BOP to the case by choosing to rely on BOP as its GATT defence. Having done so, Korea could not object to consideration of the BOP issue or the necessary implications of the resolution of certain BOP issues for other Korean trade restrictions. The United States did not agree with Korea's claim that the Panel could not rule on an issue if the implications of its ruling could be interpreted to go beyond beef, since GATT panel decisions frequently had broader implications. Indeed, one of the primary benefits of the GATT dispute settlement process had been to create a series of precedents as to permissible and impermissible actions under GATT. Preventing a panel from making decisions with implications going beyond the immediate case would have the perverse effect of insulating major trade barriers from dispute settlement, since it would be impossible for panels to issue rulings on one product or one exporting country's concerns without creating implications for other products or other exporting countries.

81. In response, *Korea* expressed doubts that the passage from the 1979 Understanding quoted by the United States addressed the Panel's authority to initiate consultations with the IMF under Article XV:2. When panels had consulted an expert in the past they were not bound to accept the expert's advice, and neither were the GATT contracting parties. Advice rendered by the IMF under Article XV:2 on the balance of payments of a contracting party did bind the GATT 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.

¹L/4907, paragraph 15.

82. If, despite the foregoing, the Panel were to evaluate its balance-of-payments position, Korea argued, referring to Article XVIII:9, 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.

83. Furthermore, according to Korea, the beneficial effect of Korea's current account surpluses on its balance-of-payments 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.

84. The *United States* argued that under Article XV:2, GATT accepted as dispositive the findings of the International Monetary Fund as to what constituted a serious decline in monetary reserves or a reasonable rate of increase. The IMF reviewed Korea in the IMF publication "Recent Economic Developments" of May 1988. It reported that: "The external current account registered surpluses of \$5 billion in 1986 (5 per cent of GNP) and \$10 billion (8 per cent of GNP) in 1987. Export volume rose by an average of 25 per cent annually, mainly due to increased competitiveness brought about by a large real effective depreciation of the won between 1985 and mid-1986 and by the emergence of new exports". With respect to Korea's external debt, the IMF reported that: "[t]he current account surpluses in 1986-87 provided the first opportunity to reduce the external debt since the rapid build-up in the late 1970's. Mainly through prepayments of debt with unfavourable terms, the external debt declined from \$47 billion (56 per cent of GNP) to \$36 billion (30 per cent of GNP)".¹ According to the World Bank², Korean GNP growth had averaged 8 per cent per year since 1960. This had raised Korean per capita income from \$180 in 1960 to over \$2,800 in 1987. In 1987, Korean GNP grew at the exceedingly high rate of 12 per cent, and during the first quarter of 1988 the same strong expansion continued, stimulated by exports which were up 28.5 per cent from a year earlier. Korea was now the world's thirteenth largest trading nation. It had a highly sophisticated industrial base, and its leading exports included automobiles, consumer electronics, televisions and computers.

85. *Korea* recalled the nature of its current account surplus and pointed out that the findings in the 1988 IMF publication referred to by the United States were not made pursuant to a request from the GATT under Article XV:2. Nor did this publication address the justification of Korea's invocation of Article XVIII:B. On the other hand, in the most recent advice which the IMF did render on Korea's BOP restrictions to the BOP Committee pursuant to Article XV:2, there was no finding that Korea's restrictions were unjustifiable under Article XVIII:B.

¹IMF, Korea - Recent Economic Developments (SM/88/101), 4 May 1988, page 2.

²International Bank for Reconstruction and Development, International Development Association, Country Briefs (as of 16 May 1988), Vol. II (Asia Region) (Sec. M88-571).

86. The *United States* strongly disagreed with the Korean claim that Korean beef import restrictions were justified under Article XVIII:B. The United States considered, on the contrary, that the Republic of Korea was in the strong position of running large trade and current account surpluses, a competitively undervalued currency, growing foreign exchange reserves, and had substantially reduced its external debt. Korea did not, in the United States view, qualify under Articles XII or XVIII:B since it did not have a balance-of-payments problem as defined by GATT. Under Article XII, a contracting party could impose quantitative restrictions for BOP purposes only "in order to safeguard its external financial position and its balance of payments". The requirements of Article XVIII:B were similar, but covered also restrictions "to ensure a level of reserves adequate for the implementation of its programme of economic development". Under either Article, these restrictions could not exceed those necessary: "(i) to forestall the threat of, or to stop, a serious decline in its monetary reserves", or "(ii) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves".

87. Even if it were determined that Korea was justified in restricting imports from the United States and other GATT contracting parties for BOP reasons, the United States argued that the Korean restrictions on beef imports did not qualify as BOP measures. Korea's alleged BOP restrictions were almost entirely concentrated in the agricultural sector. They were not general and across-the-board measures as contemplated by the GATT. In the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, the CONTRACTING PARTIES reaffirmed that "restrictive import measures taken for balance-of-payments reasons should not be taken for the purpose of protecting a particular industry or sector".¹ Accordingly, assuming for the sake of argument that Korea was entitled to restrict imports, the reasons behind the special restrictions in the beef sector had to be examined, since it had to be determined that the restrictions were in fact imposed for BOP reasons. In this respect, it was noted that the Korean import restrictions were related almost entirely to agriculture, a sector which had complained repeatedly about import competition in general and beef imports in particular.

88. *Korea* maintained that the United States operated under a misunderstanding by making much of the fact that Korea's currently remaining BOP restrictions were concentrated in the agricultural sector. Surely, *Korea* argued, the GATT did not contemplate that a country, which had legitimately imposed BOP restrictions, should wait until its BOP position had improved to such an extent that it could remove all its BOP restrictions at once. On the contrary, as late as December 1987, during the last consultations before the BOP Committee, *Korea* was commended for "phasing out" its import restrictions. Furthermore, the Committee approvingly noted *Korea's* commitment "to maintaining the pace of the adjustment and liberalization process".²

89. It had been said by the United States that the restrictions on beef imports had protected *Korea's* cattle farmers, but, *Korea* argued, this 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 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.

90. *Korea* argued that it 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, the United States reference to the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, which reaffirmed that "restrictive import measures taken for balance-of-payments reasons should not be taken

¹BISD, 26S/205, 206.

²BOP/R/171, paragraph 20 (10 December 1987).

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 could not have protective side effects. As was indicated above, such side effects were inherent in trade restrictions imposed for BOP purposes.

91. The *United States* argued that the Korean beef restrictions appeared to bear an inverse relationship to Korea's balance-of-payments situation. That is, during a period when it was running current account deficits, Korea imported approximately 70,000 tons of beef per year. In contrast, when it began running record balance-of-payments surpluses, Korea closed off imports of beef. This course of action was inconsistent at best with a purported BOP justification. It was also at odds with the GATT rule that a contracting party applying BOP restrictions must progressively relax them as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of Article XVIII and shall eliminate them when conditions no longer justified such maintenance (Article XVIII:11). The lack of any correlation with Korea's international financial situation suggested that these measures were taken for domestic political purposes, i.e., protection of a Korean industry, rather than for BOP reasons. The Korean beef measures bore no relationship to Korea's external financial situation, but appeared to be driven instead by declining cattle prices, protectionism and domestic political pressure. Furthermore, this was admitted by Korea itself which had stated that the 1984-1985 measures were not motivated by BOP concerns, but imposed in order to remedy the disruption of Korea's cattle farming industry. Korea was required to notify the BOP Committee in 1985 that it was "raising the general level of its existing restrictions by a substantial intensification of the measures" when it banned or "suspended" beef imports for three years. This was not done and showed that these steps were not taken for BOP reasons. Under the circumstances, the United States did not believe that the beef restrictions were legitimate BOP measures, and therefore believed that they were inconsistent with the 1979 Declaration.

92. *Korea* submitted that when it acceded to the GATT in 1967, the restrictions which it imposed for BOP reasons (on imports of beef, among numerous other products) 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, the United States had pointed out that Korea tightened its beef restrictions at a time when Korea's BOP position was improving. That, indeed, seemed contradictory. But one must 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 situation overall, Korea obviously took into account the state of the various domestic industries that would be affected by these liberalization measures.

93. Thus, Korea argued, 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 say 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 incurred very heavy losses. That was when the Korean Government decided to intervene and intensified the Article XVIII:B restrictions on beef imports. It was a situation which the GATT regime, including its BOP provisions, did not envisage.

94. 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). Moreover, 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.

95. Korea further argued that it was certainly true that Korea's BOP position had improved since 1984/1985. Yet, without involving all the 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 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.

96. The *United States* submitted that Korea's financial position had strengthened dramatically since 1984. It saw no justification for reimposing balance-of-payments restrictions in Korea's present situation. It was essential to keep in mind that BOP was not a permanent entitlement to restrict imports to protect sensitive domestic industries. While BOP measures could have "incidental" protective effects, the only legitimate purpose of BOP was financial. Under Articles XII:2(b) and XVIII:B(11), the measures had to be temporary and had to be eliminated as soon as a country's financial position improved. Accordingly, in the *United States* view, it followed that Korea did not have a right to reimpose quotas as it pleased after a period of GATT inconsistency. On the contrary, it was incumbent on Korea to show that, in its present external financial situation, with its growing current account surpluses and accelerated repayment of debt, the situation in beef trade posed a real and imminent threat to its BOP position. Otherwise, the Panel would be setting up a rule that if a country had in the past experienced BOP problems, it had a permanent and ongoing right to reimpose quota restrictions at past levels. This would undercut the whole GATT notion that BOP was a temporary measure which had to be adjusted to fit improvements in a country's reserve position.

97. *Korea* replied 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 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 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. The *United States* 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 the 357 other products.

98. 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 the 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 GATT incompatible 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, retracting the measures according to a reasonable timetable. As indicated, Korea's cattle farmers had derived protection from the BOP restrictions on beef imports. In the event that such 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 the 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, in short, 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 United States beef industry.

Article XXIII:2

99. The *United States* argued that the import prohibitions, restrictions, surcharges, and import monopolies on beef maintained by Korea violated Articles II, X, XI and XIII. There was no justification for these restrictions under any provision of the GATT. There existed, therefore, a *prima facie* nullification and impairment of the United States rights under the General Agreement.

100. The 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance in paragraph 5 of the Annex provided that:

"in cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment ... [t]here is normally a presumption that a breach of the rules has an adverse impact on other contracting parties".

This presumption, the United States argued, was, and should be, particularly strong in the case of quotas. Korea maintained these beef quotas for the purpose of restricting imports. To overcome this presumption, Korea had the burden of proving that the United States suffered no trade harm from the beef quota. As these had damaged the United States trading interests, Korea was not able to meet this burden. These quotas had damaged United States exports to the extent of the trade lost. However, import quotas caused *prima facie* nullification or impairment, regardless of lost trade. This legal conclusion comported with previous panel decisions.¹ Thus, the import restrictions on beef nullified or impaired the rights of the United States under the General Agreement. Although it was difficult to measure the precise trade loss, since the measures had been in effect for so long and because the Korean market had been so distorted by the quotas, prohibitions, and other restrictions on imports, it was clear that the Korean measures had restricted trade since at least 1967 when Korea joined GATT, were now restricting trade, and would continue to cause adverse effects on United States beef exports, unless and until Korea brought itself into conformity with its obligations under the General Agreement.

¹The United States referred the Panel to the following reports: Japan - Restrictions on Imports of Certain Agricultural Products, L/6253, page 79; and the Panel on Japanese Measures on Imports of Leather, BISD 31S/113, paragraph 55. See also the report of the Group on Quantitative Restrictions and Other Non-Tariff Measures (NTM/W/13).

101. In response, *Korea* argued, *inter alia*, that it was inappropriate for the United States to challenge the restrictions on beef imports retroactively, as far back as 1967. Furthermore, *Korea* argued that the complaint of the United States was not reviewable under the standard of *prima facie* nullification or impairment (which was connected with Article XXIII:1(a)), in view of the standards and procedures of Article XVIII:12(d).

Submissions by Other Contracting Parties

102. The Panel received submissions from Australia, New Zealand and Canada as interested third countries. Australia and New Zealand 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.

103. *Australia* considered that the prohibition of beef imports from the end of 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. These were *prima facie* inconsistent with the GATT under 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* also considered that the mark-up practised by the LPMO on imports of beef, the sole Korean importer of beef from August 1988 and an authorized monopoly in the sense of Article II:4, contravened the provisions of that Article. *Australia* further argued that the Korean measures could not be justified under Article XI:2, Article XVIII:B or under any other Article of the GATT.

104. *Australia* argued that the Republic of Korea did not meet the appropriate requirements for coverage of its beef import measures under Article XVIII:B. 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. Firstly, *Australia* maintained, *Korea* had implemented an effective prohibition rather than a restriction on beef imports from 1984 to 1988. The nature of *Korea's* beef import regime from at least 1984 onwards was demonstrably not necessary to achieve the objectives specified in paragraph 9 and could not, therefore, be deemed consistent with its provisions. Moreover, *Korea's* economic situation was certainly not such in 1984 as to justify the intensification of import restrictions under the provisions of paragraph 9. Also, there were clear indications that the Korean measures with respect to beef imports were not taken for BOP reasons, but to protect the domestic industry.

105. *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 other provision of the GATT, in particular under Articles XI:2(c)(i), XI:2(c)(ii) and XVIII:B. Article XVIII:B was not applicable since *Korea* was no longer experiencing balance-of-payments problems.

106. *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, either under the provisions of Article XI:2 or Article XVIII:B, or under any other exception of the General Agreement.

107. 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 were to 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.

108. 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).

109. *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

110. The Panel noted that the United States 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. The United States 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

111. 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.

112. 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 111(b) above; this issue is examined in paragraphs 120-123 below.

113. In examining the measures in paragraph 111(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.

114. The Panel then examined the further claim by the United States that the existence, or use, of producer-controlled import monopolies to restrict imports was inconsistent with the provisions of Articles XI:1 and XVII. Korea contested that the existence of a producer-controlled import monopoly in itself constituted an additional barrier to trade. The Panel noted that the LPMO had been granted exclusive privileges as the sole importer of beef. As such, the LPMO had to comply with the provisions of the General Agreement applicable to state-trading enterprises, including those of Articles XI:1 and XVII.

115. Article XI:1 proscribed the use of "prohibitions or restrictions other than duties, taxes or other charges", including restrictions made effective through state-trading activities, but Article XVII permitted the establishment or maintenance of state-trading enterprises, including enterprises which had been granted exclusive or special privileges. The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1. The Panel had already found that the import restrictions presently administered by the LPMO violated the provisions of Article XI:1. As the rules of the General Agreement did not concern the organization or management of import monopolies but only their operations and effects on trade, the Panel concluded that the existence of a producer-controlled monopoly could not in itself be in violation of the General Agreement.

Article XVIII

(a) Procedural aspects

116. The Panel examined Korea's contention that its import restrictions, referred to under paragraph 111(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.

117. 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 the United States, 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.

118. 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 experts¹ whereas the latter provided for a general review of the country's balance-of-payments situation by a committee of government representatives.

119. 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.

¹See 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."

(b) Justification for restrictions

120. The Panel proceeded to examine Korea's Article XVIII:B justification for its import restrictions referred to in paragraph 111(b) above. The United States 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 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".

121. 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.

122. 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".¹ 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".²

123. 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.

¹BOP/R/171, paragraph 22.

²*Idem*, paragraph 23. The full text of the Balance-of-Payments Committee's conclusions is contained in Annex I on page 230 (Australia).

Article II

124. 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 the United States. The Panel noted Korea's view that the operation of the LPMO was consistent with the provisions of Article II:4.

125. 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.

126. 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".¹ 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.

127. 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 131 below, this price premium would disappear.

128. 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.

¹The text of Article 31, and its interpretative note, is contained in Annex III.

129. The Panel then examined the United States 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 127 above. It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).

Articles X and XIII

130. The Panel noted that the United States 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

131. 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 the United States 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

Extract from the Report on the 1987
with the Republic of Korea¹

Consultations

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."

¹BOP/R/171 (10 December 1987).

¹Reflects changes in the net foreign assets of the banking system.

Source: Monthly Statistical Bulletin, November 1988, The Bank of Korea.
International Financial Statistics, December 1988, IMF.

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).