**WORLD TRADE ORGANIZATION**

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# KOREA – MEASURES AFFECTING IMPORTS OF FRESH, CHILLED AND FROZEN BEEF

**AB-2000-8**

***Report of the Appellate Body***

WORLD TRADE ORGANIZATION
APPELLATE BODY

**Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef**

Korea, *Appellant*
Australia, *Appellee*
United States, *Appellee*

Canada, *Third Participant*
New Zealand, *Third Participant*

AB-2000-8

Present:

Ehlermann, Presiding Member
Abi-Saab, Member
Feliciano, Member

## I. Introduction

1. Korea appeals certain issues of law and legal interpretations in the Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (the "Panel Report").[1] The Panel was established to consider a complaint by Australia and the United States with respect to Korean measures that affect the importation of certain beef products. The aspects of these measures relevant for this appeal relate to, first, domestic support provided to the beef industry and to the Korean agriculture sector more generally, and, second, the separate retail distribution channels that exist for certain imported and domestic beef products (the so-called "dual retail system") and related measures. The dual retail system is given legal effect by the *Management Guideline for Imported Beef* (the "*Management Guideline*").[2] The factual aspects of this dispute are described in detail in paragraphs 8 through 29 of the Panel Report.

2. The Panel considered claims by Australia that the requirements imposed on the retail sale of imported beef are contrary to Articles III and XI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); that the tendering process adopted by the Livestock Products

[1]WT/DS161/R, WT/DS169/R, 31 July 2000.

[2]The essential features of the Korean dual retail system for beef are found in the *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, (61550-81) 29 January 1990, modified on 15 March 1994; and the *Regulations Concerning Sales of Imported Beef*, (51550-100), modified on 27 March 1993, 7 April 1994, and 29 June 1998. On 1 October 1999, these two instruments were replaced by the *Management Guideline for Imported Beef*, (Ministry of Agriculture Notice 1999-67), which maintained, however, the basic principles of the dual retail system. The *Management Guideline* is an elaboration of Article 25 of the *Livestock Act (Revised)*, as amended by Act No. 5720 on 29 January 1999.

Marketing Organization (the "LPMO") results in quantitative restrictions being applied to grass-fed beef, contrary to Articles II:1, III:4, XI:1 and XVII of the GATT 1994; that discharge procedures for LPMO beef are contrary to Articles III, XI and XVII of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*; that restrictions on sales of beef imported by the LPMO are contrary to Article III:4 of the GATT 1994; that Korea applies a mark-up on beef imported under the "Simultaneous Buy/Sell" ("SBS") system which is inconsistent with Korea's obligations under Articles II or III of the GATT 1994; that the SBS system applies limitations on the import and distribution of imported beef, and imposes labelling, reporting and record-keeping requirements, that are contrary to Articles III and XI of the GATT 1994; and that, in 1997, Korea provided domestic support to its beef industry which resulted in Korea's Current Total Aggregate Measurement of Support ("AMS") for 1997 being in excess of its reduction commitments for that year, contrary to Articles 3, 6 and 7 of the *Agreement on Agriculture*.[3]

3. The Panel also considered claims by the United States that Korea's requirement that imported beef be sold only in specialized imported beef stores, and its laws and regulations restricting the resale and distribution of imported beef by SBS super-groups, retailers, customers, and end-users are inconsistent with its obligations under Article III:4 of the GATT 1994; that Korea's discretionary import regime, as well as the LPMO's establishment of minimum import prices and delay of both invitations to tender as well as quota allocations, are inconsistent with its obligations under Article XI:1 of the GATT 1994, Article 4.2 of the *Agreement on Agriculture*, and Articles 1 and 3 of the *Agreement on Import Licensing Procedures*; that Korea's imposition of other duties or charges in the form of a mark-up not provided for in Korea's Schedule LX is inconsistent with its obligations under Article II:1 of the GATT 1994; and that Korea has failed to fulfill its reduction commitment for domestic support for 1997 and 1998, and has, thus, acted inconsistently with its obligations under Articles 3, 6, and 7 of the *Agreement on Agriculture*.[4]

4. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 31 July 2000.

5. The Panel concluded that certain of the measures at issue are included in "the remaining restrictions" within the meaning of Note 6(e) of Korea's Schedule and thus benefit from a transitional period until 1 January 2001, by which date they shall be eliminated or otherwise brought into conformity with the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"); that the dual retail system for beef (including the obligation for department

[3]Panel Report, para. 49.

[4]*Ibid*., para. 51.

stores and supermarkets authorized to sell imported beef to hold a separate display, and the obligation for foreign beef shops to bear a sign with the words "Specialized Imported Beef Store") is inconsistent with the provisions of Article III:4 of the GATT 1994 in that it treats imported beef less favourably than domestic beef, and cannot be justified pursuant to Article XX(d) of the GATT 1994; that the requirement that the supply of beef from the LPMO's wholesale market be limited to specialized imported beef stores is inconsistent with Article III:4 of the GATT 1994 and cannot be justified pursuant to Article XX(d) of the GATT 1994; that the imposition of more stringent record-keeping requirements on those who purchase foreign beef imported by the LPMO than on those who purchase domestic beef is inconsistent with Article III:4 of the GATT 1994; that the prohibition against cross-trading between end-users of the SBS system is inconsistent with Article III:4 of the GATT 1994; that any additional labelling requirements imposed on foreign beef imported through the SBS system that are not also imposed on domestic beef, such as the requirement that the end-consumer, the contract number and super-group importer be identified and indicated on the imported beef, are inconsistent with Article III:4 of the GATT 1994; that the LPMO's lack of, and delays in, calling for tenders, and its discharge practices between November 1997 and the end of May 1998, constitute import restrictions on foreign beef, inconsistent with Article XI of the GATT 1994, and the same practices are also inconsistent with Article 4.2 of the *Agreement on Agriculture* and its footnote; that even if the LPMO had not had monopoly rights over the import and distribution of its share of Korea's beef import, the LPMO's lack of, and delays in, calling for tenders during the same period constituted an import restriction inconsistent with Article XI of the GATT 1994 through the application of the Ad Note to Articles XI, XII, XIII, XIV and XVIII of the GATT 1994, and that the LPMO's discharge practices during the same period were inconsistent with Article XVII:1(a) of the GATT 1994; that the LPMO's calls for tenders that are made subject to grass-fed or grain-fed distinctions impose import restrictions inconsistent with Article XI of the GATT 1994, and treat imports of grass-fed beef less favourably than is provided for in Korea's Schedule, contrary to Article II:1(a) of the GATT 1994; that Korea's domestic support for beef for 1997 and 1998 was not correctly calculated and exceeded the *de minimis* level, contrary to Article 6 of the *Agreement on Agriculture*, and was not included in Korea's Current Total AMS, contrary to Article 7.2(a) of the *Agreement on Agriculture*; that Korea's total domestic support (Current Total AMS) for 1997 and 1998 exceeded Korea's commitment levels, as specified in Part IV, Section I of its Schedule, contrary to Article 3.2 of the *Agreement on Agriculture.*[5]

[5]Panel Report, para. 845.

6. The Panel recommended that the Dispute Settlement Body ("DSB") request Korea to bring its measures into conformity with its obligations under the *WTO Agreement*.[6]

7. On 11 September 2000, Korea notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures* "). On 21 September 2000, Korea filed its appellant's submission.[7] On 6 October 2000, Australia and the United States[8] each filed an appellee's submission. On the same day, Canada and New Zealand each filed a third participant's submission.[9]

8. The oral hearing in the appeal was held on 23 and 24 October 2000. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

## II. Arguments of the Participants and the Third Participants

### *A. Korea – Appellant*

#### 1. Terms of Reference

9. Korea claims that the Panel erred by making two findings that were outside its terms of reference. First, the Panel erred by ruling on Part IV, Section I of Korea's Schedule LX, in particular by considering which set of numbers in Schedule LX constitutes Korea's commitment levels. Neither the United States nor Australia challenged Korea's Schedule LX in their requests for the establishment of a panel. As Schedule LX is not mentioned in these panel requests, the complaining parties have not met the "minimum prerequisite" established by the Appellate Body for panel requests under Article 6.2 of the DSU, that treaty provisions claimed to have been violated must be identified, and, therefore, Korea should be considered *per se* to have suffered prejudice.

10. Second, neither the United States nor Australia, in their panel requests, identified Annex 3 of the *Agreement on Agriculture* as a treaty provision claimed to have been violated in the context of

[6]Panel Report, para. 847.

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

[8]Pursuant to Rule 22 of the *Working Procedures*.

[9]Pursuant to Rule 24 of the *Working Procedures*.

Korea's calculation methodology for domestic support to the cattle industry. Consequently, the Panel acted outside its terms of reference when it ruled that Annex 3 provided the basis for calculating Korea's current domestic support for beef. Further, the complaining parties have not met the "minimum prerequisite" established by the Appellate Body for panel requests under Article 6.2 of the DSU.

### 2. Domestic Support Under the *Agreement on Agriculture*

11. Korea believes the Panel erred in finding that, by virtue of Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, Korea is bound by the provisions of Annex 3 of that Agreement in its calculation of Current AMS for beef, since it did not have any "constituent data and methodology" for beef in its Schedule. The Panel's interpretation of Articles 1(a)(ii) and 1(h)(ii) leads to an unfair outcome and ignores the object and purpose of the *Agreement on Agriculture.* WTO Members' Schedules on the reduction of subsidies for agricultural products can be understood as multi-year equations. One side of the equation includes the commitment level for a given year, while the other side of the equation includes the actual AMS provided for the same year. Thus, for the equation to be meaningful, both sides of the equation should be based on the same set of data and methodology. Using one methodology for commitment levels and another methodology for actual AMS undermines comparability between the two, and leads to unfair results. All the commitment levels set out in Korea's Schedule and all the actual AMS provided by Korea are calculated on the basis of a consistent methodology, which relies on the base years of 1989-1991 (with an exception for rice) and an "actual purchase" definition of eligible production. However, according to the Panel's ruling, Korea should calculate its Current AMS for beef according to different base years and a different definition of eligible production than was used for calculating commitment levels. Korea argues that this leads to unfair results.

12. Furthermore, Korea contends the Panel's interpretation would frustrate the object and purpose of the *Agreement on Agriculture*, which is, in part, to provide for substantial progressive reduction in agricultural support and protection over an agreed period of time. The Panel's interpretation would make it impossible correctly to determine whether a Member has abided by its reduction commitments or not.

13. Moreover, the Panel's interpretation of Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* would render inutile important parts of these provisions. If the calculation methods of Annex 3 were mandatory, as the Panel suggests, the reference in Articles 1(a)(ii) and 1(h)(ii) to the constituent data and methodology in the tables of supporting material would be reduced to redundancy and inutility. The Panel found that support to Korea's cattle industry should be calculated

solely on the basis of Annex 3, because support to the cattle industry was not included in Korea's Schedule. However, Articles 1(a)(ii) and 1(h)(ii) do not make a distinction between products which are already contained in the Schedule of a Member and those which are not.

14. In addition, in Korea's view, the Panel erred in finding that Korea's annual AMS commitment levels in its Schedule LX were not the figures in brackets, but rather the figures not in brackets. The Panel was fundamentally in error when it found that "Korea did not identify" which of the two sets of figures for annual commitment levels (figures in brackets or figures not in brackets) constitutes Korea's obligation. The Panel failed to apply the general rule of interpretation expressed in Article 31 of the *Vienna Convention on the Law of Treaties*[10] (the "*Vienna Convention*") by not taking into account the context of the terms of Korea's Schedule LX, in particular Note 1 to Korea's Schedule LX, which refers to Note 1 of Supporting Table 6. In addition, the Panel's finding on this point would reduce the figures in brackets, Note 1 to Schedule LX, and Note 1 in Supporting Table 6 to inutility, again contrary to the customary rules of treaty interpretation and previous Appellate Body rulings.

15. Korea also submits that Korea's commitment levels were "public knowledge". Korea's Schedule, including Part IV, Section I, was reviewed by all the negotiating parties during the Uruguay Round. Also, the amount of Korea's subsidy to agricultural products was notified to the Committee on Agriculture every year since 1996. In each notification, Korea used the figures within brackets as Korea's commitment level for the given year. Korea considers that its consistent and amply documented position on this issue has been a matter of public record since 1996 and the very first meeting of the Committee on Agriculture to review Members' notifications under the *Agreement on Agriculture*. Thus, the "subsequent practice" of the parties following the Uruguay Round sustains Korea's position on this point of interpretation. Korea also believes that its position is supported by the manner in which the United States and Australia treated this issue in their first submissions to the Panel.

### 3. Dual Retail System

#### (a) Article III:4 of the GATT 1994

16. To Korea, the Panel fundamentally misinterpreted and misapplied Article III:4 of the GATT 1994 when it concluded that the dual retail system maintained by Korea is inconsistent with that provision. Article III:4 requires that WTO Members provide equal conditions of competition to both domestic and foreign like products. Article III:4 is an "obligation of result": the result that must be achieved is "no less favourable treatment for foreign goods". The particular method of achieving

[10]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

this result is irrelevant. Article III:4 neither imposes nor prohibits any particular means that Members employ to provide equal conditions of competition. According to Korea, its dual retail system does provide "no less favourable treatment to foreign goods", and, therefore, achieves the result required by Article III:4. The Panel erroneously concluded that the dual retail system "constitutes in itself differential treatment."

17. Korea submits that a proper analysis of Korea's obligation under Article III:4 requires review of both *de jure* and *de facto* discrimination. The dual retail system does not amount to either *de jure* or *de facto* discrimination. With regard to *de jure* discrimination, Korea's dual retail system assures perfect regulatory symmetry between imports and domestic products. Imported beef is sold only in stores that choose to sell imported beef, and domestic beef is sold only in stores choosing to sell domestic beef. In addition, there is total freedom on the part of retailers to switch from one category of shops to the other. Thus, the Panel failed to demonstrate that there is any discrimination "demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument," the standard for a finding of *de jure* discrimination.

18. To demonstrate the presence or absence of *de facto* discrimination, the Panel should have undertaken an analysis of the market as part of an examination of the "total configuration of the facts". Instead, the Panel resorted to "speculation". An examination of the facts of the Korean beef market demonstrates that imported and domestic goods experience equal competitive conditions. The absence of such a factual analysis means that the Panel's finding on the dual retail system under Article III:4 is in error.

19. Korea also argues that the Panel erred in finding the display sign requirement to be inconsistent with Article III:4. The first ground offered by the Panel is that the display sign requirement would necessarily be inconsistent with Article III:4 since the dual retail system had already been found to be inconsistent. However, the Panel itself stated that the display sign requirement is a related measure "which the Panel addresses separately in Section 3 thereinafter." In other words, the Panel did not include the display sign requirement in its review of the dual retail system.

20. The second ground cited by the Panel is that the display sign requirement goes beyond the indication of origin of goods. Quoting from a 1956 Working Party Report, the Panel argues that such requirements are inconsistent with Article III:4 of the GATT. To Korea, the legal status of this report is unclear. The language of the report suggests that it was not intended to be binding or to provide an authoritative interpretation of the GATT.

(b) Article XX(d) of the GATT 1994

21. Should the Appellate Body disagree with Korea's claim that the dual retail system is consistent with Article III:4, then Korea submits that the Panel erred in ruling that the dual retail system was not justified under Article XX(d) of the GATT 1994.

22. The Panel found that Korea did not apply a dual retail system for other products in respect of which fraudulent sales have occurred. According to the Panel, such failure was evidence that the dual retail system was not "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" under Article XX(d). Korea submits that to decide whether a particular measure is necessary under Article XX(d), panels must simply examine whether another means exists which is less restrictive than the one used, and which can reach the objective sought. Consistency among regulations applicable to different products is irrelevant for establishing whether the means chosen by a WTO Member is necessary to achieve the objective of the regulation.

23. Furthermore, the Panel, in analyzing alternative, less restrictive means, did not take into account the level of enforcement sought. Korea's goal is not simply the "reduction or limitation" of deceptive practices, but their "elimination". The Panel considered four less trade-restrictive alternatives, which are investigations, fines, record-keeping and policing. In view of the fact that all four alternatives already comprise a package of policy tools used by Korea, along with the dual retail system, the Panel should have examined the facts to see whether, if the dual retail system were withdrawn, Korea's regulatory goal of the *elimination* of deceptive practices would be satisfied. Instead, the Panel narrowly focused its review on whether the less restrictive option is reasonably available. The Panel failed to link the means of implementation used to the objective sought.

24. Korea's dual retail system satisfies the requirements of the introductory clause of Article XX of the GATT 1994 as well. As the Appellate Body has held, the introductory clause of Article XX is concerned with the "even-handedness" underlying the application of national legislation. In other words, national legislation must be applied "even-handedly" between and among trading partners. Korea's dual retail system does not differentiate between Korea's trading partners. In fact, the dual retail system imposes, in practice, a much heavier burden on domestic beef producers.

25. Furthermore, in Korea's view, the display sign requirement is justified under Article XX(d) of the GATT 1994 as it is "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement". To require shop-owners to display a sign that

their store engages in selling imported beef imposes a "proportional burden" in view of the objective sought. Korea considered an alternative measure, but it would not have achieved Korea's objective.

26. Finally, Korea argues that the Panel failed to examine whether the display sign requirement was justified under Article XX(d) of the GATT 1994. The Panel did not explain its failure to examine the display sign requirement under Article XX(d), despite the fact that Korea had made clear that its Article XX defense extended to the display sign requirement as well. Korea submits that, were the Appellate Body to complete the analysis left undone by the Panel, the Appellate Body will find that the display sign requirement is fully justified under Article XX.

B. *Australia – Appellee*

1. Terms of Reference

27. Australia considers that Korea's claim that the Panel ruled outside its terms of reference in making findings as to the commitment levels and the AMS calculation methodology used by Korea to calculate the Current AMS, is unfounded. In Australia's view, the Panel correctly ruled that Australia's panel request meets the requirements of Article 6.2 of the DSU because Australia identified the specific measures at issue and provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

28. In respect of the commitment levels, Australia argues that as Articles 3, 6 and 7 of the *Agreement on Agriculture* specifically refer to a Member's Schedule, consideration of Korea's commitment levels contained in Part IV, Section I of Korea's Schedule was within the Panel's terms of reference. A determination as to which of Korea's two sets of commitment levels constituted the figures against which its Current Total AMS should be compared was necessary to the Panel's legal examination of claims under Articles 3, 6 and 7 of the *Agreement on Agriculture.*

29. With regard to the AMS calculation methodology, Australia submits that the Panel took into account the linkages between the obligations contained in Articles 3, 6 and 7 of the *Agreement on Agriculture* and the relevant definitions contained in Article 1 of that Agreement, which include specific reference to methodologies contained in Annex 3. The Panel correctly concluded that it could not assess whether Korea had met its obligations under Articles 3, 6 and 7 without examining the calculation prescriptions for AMS contained in Annex 3.

30. Furthermore, Australia contends that Korea has failed to show any prejudice arising from a deficiency in Australia's request for a panel. Korea appears to have been informed sufficiently well of the claims being made to prepare a defence. Korea seems to have understood the nature of the legal

claims sufficiently well for the purposes of its first submission, in which it argued at length that its calculation methodology was in fact consistent with the *Agreement on Agriculture*. It was not until the final meeting with the Panel that Korea claimed that its ability to defend itself had been prejudiced. Korea has also not shown that third parties were prejudiced.

### 2. Domestic Support Under the *Agreement on Agriculture*

31. Australia submits that Korea's argument, that the Panel's interpretation of Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* is unfair, illogical and results in inappropriate comparisons between a WTO Member's reduction commitments and support provided, is without substance. Korea's arguments evidence a misunderstanding of the concepts of Current AMS, Current Total AMS and Annual and Final Bound Reduction Commitments, as defined in the *Agreement on Agriculture*. Australia states that the two figures involved in the comparison will not necessarily be based on the same product mix, as the categories of products that are subsidized may change from year to year.

32. Australia considers that Korea's interpretation that Current AMS should be calculated based on the constituent data and methodology in Korea's Schedule would render the reference to Annex 3 in Articles 1(a)(ii) and 1(h)(ii) inutile. The Panel correctly found that for products where no support was included in the base period, there is no relevant "constituent data or methodology" in the tables of supporting material. Calculations based on Annex 3 are, therefore, mandatory.

33. With regard to the two sets of commitment levels in Korea's Schedule, Australia argues that a treaty interpreter is not required to give effect to treaty terms which are invalid. The Panel noted that Korea is the only WTO Member whose Part IV domestic support Schedule contains two sets of annual commitment levels, and that no provision of the *Agreement on Agriculture* authorizes such a departure from the norm or practice. For this reason, the Panel was under no obligation to give effect to the commitment level figures in brackets.

34. Australia also contends that the question of whether Korea's commitment levels were "public knowledge" is beyond the Appellate Body's mandate under Article 17.6 of the DSU to address "issues of law covered in the panel report and legal interpretations developed by the panel", as Korea did not present any such evidence to the Panel. In any case, public knowledge of a WTO-inconsistent Schedule commitment does not validate that commitment. Finally, Korea did not meet its burden of demonstrating that "subsequent practice" of WTO Members establishes the agreement of Members regarding the interpretation of Korea's Schedule.

3. Dual Retail System

(a) Article III:4 of the GATT 1994

35. In Australia's view, Korea's claim that proper analysis of its obligation under Article III:4 requires a two-step review of whether *de jure* or *de facto* discrimination is at issue is legally flawed and should be rejected. According to Australia, the legal standard imposed by the phrase "less favourable treatment" has long been settled: a panel must consider whether imported products are being accorded effective equality of competitive opportunities.

36. Australia contends that the Panel was correct when it found that the design and architecture of the dual retail system and related measures clearly provide less favourable treatment for imported beef. Australia states that stores selling imported beef face restrictions on volumes, price and types of beef available for sale, additional record-keeping, recording and signage requirements, and the commercial disadvantage of having to dismantle their current business in domestic beef if they wish to test the market for imported beef. Fundamentally, imported beef is prevented from being sold in the same stores, under the same conditions, as domestic beef. Thus, the claim by Korea that "regulatory symmetry" exists cannot be sustained.

37. In Australia's view, the Panel correctly concluded that the dual retail system constitutes, in and of itself, differential treatment. This differential treatment unavoidably results in imported beef being less favourably treated on the Korean market than like domestic products, and the segregation of imported beef provides the domestic product with a competitive advantage over the imported product.

(b) Article XX(d) of the GATT 1994

38. Australia claims the Panel was correct in finding that, even if the dual retail system had been instituted to prevent the fraudulent misrepresentation of imported beef as domestic beef, the measure was not "necessary" to accomplish that purpose, within the meaning of Article XX(d). The Panel explored the alternatives available to Korea, including alternatives currently applied to situations of alleged country of origin fraud involving other foodstuffs where price differentials prevail. This approach reflects the ordinary meaning of the term "necessary" that no reasonable alternative exists, as well as past GATT and WTO practice.

39. Australia submits that the burden is on Korea to demonstrate a *prima facie* case that the dual retail system falls within one of the exceptions of Article XX, and that it meets the requirements of the introductory clause. Korea has to demonstrate that there was no other alternative measure it could

reasonably employ, which was WTO-consistent or less WTO-inconsistent, to secure compliance with the *Unfair Competition Act.* In the particular circumstances of the Korean market for imported beef, where it is otherwise impossible to distinguish between domestic and imported beef, where there is no dual wholesale system and where no record-keeping by stores selling domestic beef is required, it is impossible to conclude that the dual retail system has any serious impact on the prevention or elimination of fraud.

40. Even if the Panel erred in law in finding that the dual retail system did not qualify for the exception provided by Article XX(d), the Appellate Body has sufficient facts and legal argument to complete the Panel's inquiry. In doing so, the Appellate Body should find that the dual retail system does not meet the requirements of the introductory clause of Article XX. Australia considers relevant the fact that Korea only applies the dual retail system to imported beef, despite the fact that the problem of fraud also exists in relation to different types of beef and to a range of other agricultural products where a price differential exists between imported and domestic products. Furthermore, the dual retail system is not an isolated measure in an otherwise non-discriminatory environment for imported beef. Rather, the dual retail system is part of the regulatory framework for imported beef under which the importation, distribution and sale of imported beef is tightly regulated and heavily restricted by the Korean government, and substantial subsidies are provided to domestic producers, consistent with the government's stabilisation policies for domestic beef. Consideration of the dual retail system in this context reveals its protective purpose.

41. According to Australia, Korea is incorrect when it asserts that the Panel did not consider the display sign requirement in its review of the dual retail system. The Panel agreed with Korea that the sign requirement was "essentially ancillary to the dual retail system", and considered the two requirements together under Article XX(d). Thus, the Panel subsumed its findings related to the display sign requirement within its findings related to the dual retail system as a whole.

### C. *United States – Appellee*

#### 1. Terms of Reference

42. According to the United States, its panel request clearly states its claim that Korea has increased the level of domestic support for its cattle industry to the point that the total domestic support provided by Korea exceeds its AMS commitment levels. Based on Articles 3, 6 and 7 of the *Agreement on Agriculture*, Korea's current total domestic support is greater than the AMS commitment levels set out in the *Agreement on Agriculture*. All of the pertinent provisions of the *Agreement on Agriculture*, including Annex 3, had to be examined. The determination of the level of

Current Total AMS, requires the application of the provisions of Annex 3, as Annex 3 is "intrinsic" to the calculation of the Current Total AMS.

43. Similarly, the commitment levels in Korea's Schedule also had to be examined. As the Current Total AMS was to be compared to Korea's commitment levels, it was first necessary to determine which set of figures in Korea's Schedule constituted Korea's commitment levels.

44. The United States notes that the Appellate Body has previously stated that a panel is obliged to consider provisions that are "directly linked" to the provisions cited in the panel request. In this case, Annex 3 and the commitment levels in Korea's Schedule are "directly linked" to the claim set out in the panel request, and therefore must be considered.

45. Furthermore, Korea suffered no prejudice on this issue as a result of the complaining parties' panel requests. In fact, Korea, in its first submission, submitted detailed explanations on how it had calculated its AMS for beef. Thus, Korea clearly understood the matter at issue.

2. Domestic Support Under the *Agreement on Agriculture*

46. According to the United States, the Panel was correct in its finding that Korea's Current AMS for beef must be calculated in accordance with the requirements of Annex 3 of the *Agreement on Agriculture*. The specific language of Article 1(a)(ii) makes clear that the Current AMS calculation must be made in accordance with the provisions of Annex 3. While additional guidance is provided in this provision, to the effect that the "constituent data and methodology" in Korea's Schedule must be taken into account, this cannot be construed to nullify the express requirement that the Current AMS calculation be performed in accordance with Annex 3.

47. If Korea's Current AMS for beef is calculated correctly, it is more than *de minimis* under Article 6.4 of the *Agreement on Agriculture*, and must therefore be included in the calculations for Current Total AMS. When Current AMS for beef is included in Current Total AMS, Current Total AMS exceeds Korea's AMS commitment levels set out in its Schedule.

48. The United States contends that Korea, by including an alternative set of commitment levels in its Schedule, is trying to modify unilaterally the terms of the *Agreement on Agriculture* to substitute a domestic support commitment that is not in accordance with Annex 3. In effect, by claiming that the figures in brackets represent its commitment levels, Korea is attempting to inflate the amount of its annual AMS commitment level. The methodology used by Korea is not consistent with the obligations under the *Agreement on Agriculture*. The United States notes that a

WTO Member may not, in its Schedule, act inconsistently with its WTO obligations. WTO Members may yield rights and grant benefits in their Schedules, but may not diminish their obligations.

49. Korea has argued that WTO Members knew of the contents of Korea's Schedule, and, therefore, they implicitly accepted the figures in the Schedule. The United States contends that this argument is untenable, for two reasons. First, in making this argument, Korea raises new factual allegations, which may not be addressed by the Appellate Body on appeal. Second, WTO Members did not waive their rights to dispute settlement with regard to other Members' Schedules as a result of the signing of the *WTO Agreement.*

### 3. Dual Retail System

#### (a) Article III:4 of the GATT 1994

50. According to the United States, the Panel correctly found that the dual retail system in itself constituted "less favourable treatment" inconsistent with Article III:4. Article III:4 is concerned with preserving the "effective equality of opportunities" for imported products. With regard to the dual retail system, the notion of effective equality of opportunities means that there must be a possibility for imported beef to be physically present with "like" domestic beef at the point of sale to the consumer. By excluding imported beef from the existing retail system for domestic beef, the dual retail system limits the potential market opportunities for imported beef. Since imported beef does not enjoy the same competitive opportunity to be sold in the same manner and in the same stores in which Korean beef is sold, it is treated less favourably than domestic beef.

51. The United States argues that Korea's defense of the dual retail system as providing "regulatory symmetry" between imported and domestic beef must fail. The Panel found that, in fact, the dual retail system, in conjunction with certain restrictions on imports, more onerous record-keeping requirements for imported beef sellers, and the display sign requirement imposed on imported beef sellers, resulted in less favourable treatment for imported beef.

52. Furthermore, the United States contends, the Panel's additional conclusion that the dual retail system involves *de facto* discrimination against imported beef was also correct. The Panel noted the following factors as relevant: the separate store requirement limits the ability of consumers to make side-by-side comparisons of imported and domestic beef and to make purchasing decisions based on differences in quality, characteristics and prices of the respective products; imported beef is segregated due to the obstacles confronted by a store owner who wishes to sell imported beef; and there are fewer imported than domestic beef stores. The Panel found that the segregation of domestic

and imported beef provides domestic beef with a competitive advantage over the imported product. In the view of the United States, this finding of the Panel should be upheld.

53. Article 9 of the *Management Guideline* requires that imported beef stores display a sign indicating that the beef sold in the store is imported. According to the United States, given the undisputed difference in treatment resulting from Article 9 of the Guidelines, Korea bears the burden of demonstrating that the dual retail system does not result in less favourable treatment, and Korea has failed to meet its burden. The Panel's finding that the display sign requirement was "ancillary" to the dual retail system was accurate. The 1956 Working Party Report was simply invoked to "reinforce" the Panel's view, not as a basis for its finding.

(b) Article XX(d) of the GATT 1994

54. The United States argues that the Panel correctly concluded that Korea failed to sustain its burden of justifying its dual retail system under Article XX(d) of the GATT 1994. The Panel determined that in order to benefit from the Article XX(d) exception, Korea had to demonstrate that its dual retail regime: (1) was in place in order to "secure compliance" with laws or regulations that are themselves not inconsistent with the GATT 1994; (2) was "necessary" to secure compliance with those laws or regulations; and (3) was applied in conformity with the requirements of the introductory clause of Article XX. The Panel found that the dual retail system was in place in order to "secure compliance" with laws or regulations that are themselves not inconsistent with the GATT 1994, in particular, the *Unfair Competition Act*. However, the Panel found that Korea did not demonstrate that the dual retail system is "necessary" to secure compliance with Korea's *Unfair Competition Act*.

55. In particular, Korea failed to demonstrate that the WTO-consistent alternatives shown by the complaining parties to be available were inadequate to secure compliance with the *Unfair Competition Act* with regard to imported beef. The Panel found that Korea employed traditional and WTO-consistent means, such as inspections, investigations and prosecutions, to enforce the *Unfair Competition Act* with respect to other imported food products. The Panel regarded this as evidence that Korea could eliminate any fraud involving beef with the same measures.

56. The United States contends that, contrary to Korea's claims, the Panel did not establish a "consistency" standard requiring that uniform measures be used to secure compliance. Rather, the Panel properly examined the enforcement practices used generally by Korea to obtain compliance with the *Unfair Competition Act* to determine whether means other than the dual retail system were

reasonably available. Korea's practice with regard to other products was simply one factor to be taken into account as part of this analysis.

57. In addition, the United States argues that if the Appellate Body finds Korea's dual retail system to be "necessary" in terms of Article XX(d), Korea still cannot benefit from the Article XX exception, as Korea has failed to demonstrate that the dual retail system was designed to "secure compliance" with the *Unfair Competition Act*. The dual retail system does not prevent actions that would be illegal under the provisions of the *Unfair Competition Act* relating to fair trade practices. At most, the dual retail system serves the same objectives as the *Unfair Competition Act*.

58. The United States also submits that the dual retail system does not satisfy the requirements of the introductory clause of Article XX. For reasons of judicial economy, the Panel did not consider this issue. However, if the Appellate Body were to reverse the Panel's finding regarding whether the dual retail system is "necessary" to secure compliance with the *Unfair Competition Act*, the Appellate Body should then complete the legal analysis and find that the dual retail system does not satisfy the requirements of the introductory clause, as that system constitutes "unjustifiable discrimination" within the meaning of the introductory clause.

59. Korea criticizes the Panel for not separately addressing Korea's assertion that the display sign requirement is entitled to an exception under Article XX(d). However, the Panel concluded that the display sign requirement is ancillary to the separate store requirement, and therefore is subject to the same analysis and legal conclusions. Thus, in the view of the United States, the Panel's examination of the dual retail system under Article XX(d) is pertinent to both the separate store requirement and to the display sign requirement.

60. Finally, the United States argues, it was for Korea to demonstrate that the display sign requirement was justified under Article XX(d). However, Korea offered no evidence or reasoning to support a finding that the display sign requirement is independently necessary to secure compliance with the *Unfair Competition Act*.

D. *Arguments of the Third Participants*

1. Canada

(a) Dual Retail System

(i) Article III:4 of the GATT 1994

61. Canada agrees with the Panel's finding that the dual retail system constitutes in itself differential treatment which leads to "less favourable treatment" for imported products under the terms of Article III:4 of the GATT 1994. The dual retail system reduces "direct competition" between imported and domestic beef. In effect, only domestic beef can compete directly against other domestic beef. In these circumstances, imported beef does not benefit from "equal conditions of competition" as compared to domestic beef.

62. Canada supports the Panel's finding that the display sign requirement is "ancillary" to the dual retail system, and thus is also inconsistent with Article III:4 of the GATT 1994. The measure would be inconsistent even if it existed independently of the dual retail system, as it treats imported beef differently than domestic beef, in contravention of Article III:4.

(ii) Article XX(d) of the GATT 1994

63. Canada also agrees with the Panel's finding with regard to Article XX(d).

2. New Zealand

(a) Terms of Reference

64. In New Zealand's view, it is within the Panel's terms of reference to examine the calculation methodology of AMS in order to determine whether Korea's Current Total AMS exceeds its commitment levels, in violation of Articles 3, 6 and 7 of the *Agreement on Agriculture.* Although Annex 3 of the *Agreement on Agriculture* is not specifically referred to in the complaining parties' panel requests in this dispute, Article 6 of the *Agreement on Agriculture*, which is referred to in the panel requests, defines AMS by reference to Article 1. Article 1, in turn, refers to the calculation of AMS in terms of Annex 3. Thus, the provisions of Annex 3 are necessary to determine whether Korea has met its domestic support commitments under Articles 3, 6 and 7.

65. Furthermore, the complaining parties have not made a separate claim regarding Annex 3. Rather, the claim they have made is under Articles 3, 6 and 7 of the *Agreement on Agriculture*, and the references to Annex 3 are simply arguments in support of this claim. Since the claim under

Articles 3, 6 and 7 of the *Agreement on Agriculture* is within the Panel's terms of reference, arguments in support of that claim are within the terms of reference as well.

66. New Zealand also argues that Korea has failed to demonstrate that it has been prejudiced by the omission of a reference to Annex 3 in the panel request. The calculation methods set out in Annex 3 are linked to Articles 3, 6 and 7 of the *Agreement on Agriculture.* New Zealand, as a third party to the dispute, was able to determine the measure and claims at issue and respond accordingly based on the reference in the panel request to "domestic support". Korea has not demonstrated that it could not do the same.

67. Finally, New Zealand contends that Korea failed to bring its procedural objections before the Panel in a timely manner.

(b) Domestic Support Under the *Agreement on Agriculture*

68. New Zealand notes that, according to Article 1(a)(ii) of the *Agreement on Agriculture*, the AMS is to be calculated "in accordance with" Annex 3, but "taking into account" the constituent data and methodology in the supporting tables in a Member's Schedule. Thus, a Member is to calculate the AMS according to Annex 3, but may also use the relevant and applicable constituent data and methodology set out in the supporting tables of its Schedule. However, resort to such data and methodology does not absolve a Member of the obligation of correctly calculating the AMS in a manner consistent with Annex 3.

69. New Zealand further submits that a Member can only take into account the constituent data and methodology where it exists. As there was no data or methodology for beef set out in the supporting tables of Part IV of Korea's Schedule, the Panel was correct to calculate AMS by relying on Annex 3 exclusively.

70. Finally, New Zealand argues that AMS calculations under Annex 3 are based on "eligible" production, as required by that provision. Thus, the argument of Korea that "actual" purchases are properly the basis of its AMS calculation should be rejected.

(c) Dual Retail system

(i) Article III:4 of the GATT 1994

71. New Zealand submits that the term "less favourable treatment" under Article III:4 requires that imported and domestic goods receive "effective equality of opportunities". New Zealand supports the Panel's finding that, in the circumstances of this case, Korea's dual retail system for beef

results in competitive disadvantages for imported beef, as imported beef is denied the opportunity to compete in the framework of an integrated market. As the Panel concluded, the existence of a dual retail system, in circumstances where there is an extensive existing retail system, in itself constitutes a violation of Article III:4.

72. Furthermore, New Zealand agrees with the Panel's finding that the display sign requirement, being ancillary to the dual retail system, is also inconsistent with Article III:4. While the Panel chose to consider this aspect of the dual retail system separately, it is nevertheless one of the components of the dual retail system.

(ii) Article XX(d) of the GATT 1994

73. New Zealand supports the Panel's finding that Korea failed to show that the dual retail system was "necessary" within the meaning of Article XX(d) to accomplish Korea's desired level of fraud prevention. As stated by the Panel, practices used in other sectors to address deceptive practices are relevant for a determination of whether certain practices are "necessary" in the beef sector.

74. New Zealand also contends that the dual retail system is not consistent with the requirements of the introductory clause of Article XX. The dual retail system enables the Korean Government to protect Korea's domestic beef producers from import competition by limiting the terms on which imported products may be sold in the market, and therefore constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, within the meaning of the introductory clause of Article XX.

## III. Issues Raised in this Appeal

75. The issues raised in this appeal are the following:

(a) whether examination of Korea's Schedule LX and Annex 3 of the *Agreement on Agriculture* was within the Panel's terms of reference;

(b) whether the Panel erred in calculating Korea's Current AMS for beef based on Annex 3 of the *Agreement on Agriculture*, and whether the resulting Current Total AMS exceeded Korea's AMS commitment levels for 1997 and 1998;

(c) whether the "dual retail system", which requires the sale of imported beef in specialized stores, was inconsistent with Article III:4 of the GATT 1994; and

(d) whether the "dual retail system", if inconsistent with Article III:4 of the GATT 1994, can nevertheless be justified under Article XX(d).

## IV. Terms of Reference

76. Before the Panel, Korea argued that its Schedule LX is not mentioned in the complaining parties' panel requests and, therefore, no violation can be claimed with regard to the Schedule.[11] Korea further contended that the panel requests were insufficiently detailed and specific to encompass the complaining parties' claims based on Annex 3 of the *Agreement on Agriculture*.[12]

77. The Panel held that, when examining claims regarding Articles 3, 6 and 7 of the *Agreement on Agriculture*, "its terms of reference require it to examine Korea's Schedule LX to assess whether its domestic support in 1997 and 1998 exceeded the reduction commitments contained in its Schedule"[13], and that "its assessment of the compatibility of Korea's domestic support with Articles 3, 6 and 7 requires that the Panel compares the effective support provided by Korea as determined using the calculation parameters of Annex 3."[14] Therefore, an examination of Korea's Schedule LX and Annex 3 of the *Agreement on Agriculture* for this purpose was not outside the Panel's terms of reference.

78. On appeal, Korea argues that the Panel erred by ruling on two claims that were outside of its terms of reference. In particular, Korea refers to the Panel's finding as to which set of numbers in its Schedule LX constitutes Korea's levels of commitment[15]; and to the Panel's finding that Korea's methodology for calculating Current Aggregate Measurement of Support ("AMS") for beef was not consistent with the methodology provided in Annex 3 of the *Agreement on Agriculture*.[16]

79. In this dispute, the Panel's terms of reference were defined as follows:

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[11]Panel Report, para. 787.

[12]*Ibid*.

[13]*Ibid*., para. 803.

[14]*Ibid*., para. 815.

[15]Korea's appellant's submission, paras. 15-25.

[16]*Ibid*., paras. 65-70.

> To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS/161/5 and by Australia in document WT/DS/169/5, the matter referred to the DSB by the United States and Australia in those documents and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[17]

Thus, the Panel's terms of reference required it to examine the "matter" referred to the DSB by the complaining parties in the requests for the establishment of a panel by the United States and Australia, respectively.[18] The "matter" referred to the DSB is the set of claims made in these requests..[19]

80. In its panel request, Australia stated, in respect of Korea's agricultural domestic support, that:

> Korea has also increased the level of domestic support for its cattle industry in amounts which result in the total domestic support provided by Korea exceeding its Aggregate Measurement of Support (AMS) under the Agreement on Agriculture.

Australia went on to state that Korea was acting inconsistently with obligations under, *inter alia*, Articles 3, 6 and 7 of the *Agreement on Agriculture*.

81. The United States, in its panel request, stated, in very similar terms:

> At the same time, Korea has increased the level of domestic support for its cattle industry to the point that the total domestic support provided by Korea exceeds its Aggregate Measurement of Support (AMS) under the Agreement on Agriculture.

The United States also referred to Korea's measures as being inconsistent with, *inter alia*, Articles 3, 6, and 7 of the *Agreement on Agriculture*.

82. Thus, the claim made by both complaining parties was that Korea's domestic support for its cattle industry had increased to the point that Korea exceeded its AMS commitment levels for certain years, in contravention of Articles 3, 6 and 7 of the *Agreement on Agriculture*.

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[17]WT/DS161/6, WT/DS169/6; see also Article 7.1 of the DSU.

[18]WT/DS161/5, WT/DS169/5.

[19]See Appellate Body Report, *Brazil – Measures Affecting Dessicated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, p. 22; Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 72.

83. With respect to Korea's claim that the Panel acted outside its terms of reference in examining the "commitment levels" in Korea's Schedule, the following paragraphs of Articles 3 and 6 of the *Agreement on Agriculture* are of particular importance. Article 3.2 obligates Members not to exceed the support levels they had specified in their Schedules:

> Subject to the provisions of Article 6, a *Member shall not provide support* in favour of domestic producers in excess of the *commitment levels specified in Section I of Part IV of its Schedule*. (emphasis added)

Article 6.3 in turn states:

> A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which *its domestic support* in favour of agricultural producers expressed in terms of Current Total AMS *does not exceed* the corresponding *annual or final bound commitment level specified in Part IV of the Member's Schedule*. (emphasis added)

Articles 3.2 and 6.3 both refer explicitly to the "commitment level" specified in Part IV of a Member's Schedule. In order to make a finding on the complaining parties' claim, the Panel had no choice but to determine the appropriate "commitment levels" in Korea's Schedule.

84. With respect to Korea's claim[20] that the Panel acted outside its terms of reference in examining Annex 3 of the *Agreement on Agriculture*, we note that Article 6.4 provides:

> (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:
>
> (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year;
>
> …
>
> (b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent.

Article 7.2(a) states:

[20] *Supra*, para. 78.

> Any domestic support measure in favour of agricultural producers, including any modification to such measure, and any measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement or to be exempt from reduction by reason of any other provision of this Agreement shall be included in the Member's calculation of its Current Total AMS.

Both Articles 6 and 7, claimed by the complaining parties to have been violated by Korea, refer explicitly to Current AMS and/or Current Total AMS.

85. AMS and Total AMS are defined in Article 1 of the *Agreement on Agriculture*, entitled "Definition of Terms". According to Article 1(a)

> "*Aggregate Measurement of Support*" and "*AMS*" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product … which is:
>
> …
>
> (ii) with respect to support provided during any year of the implementation period and thereafter, *calculated in accordance with the provisions of Annex 3 of this Agreement* and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; (emphasis added)

According to Article 1(h)

> "*Total Aggregate Measurement of Support*" and "*Total AMS*" mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, … which is:
>
> …
>
> (ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), *calculated in accordance with the provisions of this Agreement*, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; (emphasis added)

86. While Article 1(h)(ii) uses the terms "provisions of this Agreement", Article 1(a)(ii) is more specific and refers precisely to "*the provisions of Annex 3 of this Agreement*". Annex 3 is entitled "Domestic Support: Calculation of Aggregate Measurement of Support". Through the definitions set

out in Article 1, Annex 3 thus becomes part of Articles 6 and 7. In examining the claims under Articles 3, 6 and 7, the Panel, therefore, had to examine the terms of Annex 3 as well. The Panel had to calculate Current AMS for beef "*in accordance with the provisions of Annex 3* … and taking into account the constituent data and methodology …" to determine whether Current AMS for beef was to be included in Current Total AMS. Thus, in order to reach a finding on the complaining parties' claim, the Panel in this case had to ascertain the appropriate "commitment levels" in Korea's Schedule, and had to calculate Current AMS for beef "in accordance with the provisions of Annex 3 … " to determine whether Current AMS for beef was to be included in Current Total AMS.

87. It is true that, as Korea states, the panel requests in this dispute do not explicitly refer to the "commitment levels" in Korea's Schedule or to "Annex 3" of the *Agreement on Agriculture.* In *Argentina – Safeguard Measures on Imports of Footwear*, however, we held that the "terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3" of that Agreement.[21] In that case, we stated that "we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*."[22] We believe the same approach appropriately applies here. Although the "commitment levels" in Korea's Schedule and "Annex 3" of the *Agreement on Agriculture* were *not explicitly* referred to in the panel requests in this dispute, it is clear that Articles 3 and 6 of the *Agreement on Agriculture*, which *were referred* to in the panel requests, incorporate those terms, either directly through Articles 3.2 and 6.3, in the case of the "commitment levels", or indirectly through Article 1(a)(ii), in the case of "Annex 3". In our view, the commitment levels in Korea's Schedule and the provisions of Annex 3 were in effect referred to in the complaining parties' panel requests, and were, therefore, within the Panel's terms of reference.

88. It is useful to add that, in deciding which set of figures in Korea's Schedule constituted the true and effective commitment levels of Korea and in determining how Current AMS should be calculated under Annex 3, the Panel did not rule on a separate "claim".[23] Rather, it examined specific arguments related to the claim that Korea's domestic support exceeded its AMS commitment levels.

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[21]Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 74.

[22]*Ibid*.

[23]We note that in paragraph 800 of its Report, the Panel addressed the United States' "claim" that the Base Total AMS specified in Part IV, Section I of Korea's Schedule was initially miscalculated. The Panel considered that this "claim" was not properly before it. It concluded "that the only measure at issue is Korea's current domestic support for its beef industry in the context of Korea's scheduled commitment levels on domestic support under the *Agreement on Agriculture*". This conclusion of the Panel has not been appealed and is not before us.

In this context, it seems useful to recall our statement in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* that:

> … there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[24]

The claim of the complaining parties was that Korea's domestic support for beef had increased to the point that this support exceeded Korea's commitment levels for certain specified years. This claim was made under Articles 3, 6 and 7 of the *Agreement on Agriculture*, as stated in both panel requests, and was clearly within the Panel's terms of reference. The Panel's examination of the commitment levels in Korea's Schedule and the calculation methodology in Annex 3 was carried out in the course of assessing arguments related to the complaining parties' claim.

89. For these reasons, we conclude that the Panel did not err in finding that the issue of which set of figures constituted Korea's commitment levels and the issue of whether Current AMS for beef must be calculated in accordance with Annex 3 were within its terms of reference.

## V. Domestic Support under the *Agreement on Agriculture*

90. In the Panel proceedings, the complaining parties claimed that Korea provided domestic support to its beef industry, measured by Current AMS, in amounts which exceeded *de minimis* levels in 1997 and 1998 and which, therefore, were required to be included in Korea's calculation of Current Total AMS for those years. When domestic support for beef was included in Current Total AMS, they contended, Korea's Current Total AMS exceeded its commitment levels set out in Part IV of its Schedule for those years, contrary to Articles 3 and 6 of the *Agreement on Agriculture*.[25]

91. In addressing the above claim, the Panel ascertained both Korea's commitment levels for 1997 and 1998 and Korea's Current Total AMS for those years. With regard to Korea's commitment levels, the Panel noted that there were two sets of figures in Korea's Schedule in the column entitled "Annual

[24]WT/DS27/AB/R, adopted 25 September 1997, para. 141.

[25]See Panel Report, paras. 49, 51 and 818. Australia argued that Korea exceeded its commitment levels only for 1997, whereas the United States argued that Korea exceeded its commitment levels for both 1997 and 1998.

and final bound commitments level 1995-2004", with one set in brackets and the other set not in brackets. The Panel concluded that the figures *not* in brackets constituted Korea's commitment levels.[26] With regard to Current Total AMS for 1997 and 1998, the Panel first examined whether Current AMS for beef exceeded the 10 per cent *de minimis* level set out in Article 6.4 of the *Agreement on Agriculture*. The Panel found that Current AMS for beef exceeded the *de minimis* level, and, therefore, was required to be included in Current Total AMS, and that Korea's failure to include Current AMS for beef in Current Total AMS was inconsistent with Article 7.2(a) of the *Agreement on Agriculture*.[27] The Panel then compared Current Total AMS for 1997 and 1998 with Korea's commitment levels for those years, and concluded that Current Total AMS exceeded the commitment levels, contrary to Article 3.2 of the *Agreement on Agriculture*.[28]

92. On appeal, Korea argues that the Panel's conclusion that Korea exceeded its commitment levels for 1997 and 1998 was in error, for two reasons. First, Korea's view is that the Panel's finding that Korea's commitment levels, as set out in its Schedule, comprise the figures not in brackets is wrong. According to Korea, the commitment levels are, in fact, embodied in the figures in brackets, as Note 1 of Supporting Table 6 of Korea's Schedule makes clear.[29] Second, Korea contends that the Panel's conclusion that Current AMS for beef must be included in Current Total AMS was also wrong. According to Korea, the Panel mistakenly looked to Annex 3 of the *Agreement on Agriculture* in order to calculate the Current AMS for beef, failing to rely instead on the "constituent data and methodology" provided in Korea's Schedule, as required by Articles 1(a)(ii) and 1(h)(ii). Korea claims that its Current AMS for beef was properly calculated, on the basis of "constituent data and methodology" in its Schedule, and is less than the *de minimis* level established in Article 6.4 of the *Agreement on Agriculture*. Therefore, Korea argues, Current AMS for beef need not be included in Current Total AMS.[30]

93. The issue before us on appeal has two parts: did the Panel err in finding, firstly, that Korea failed to include Current AMS for beef in Current Total AMS, contrary to Article 7.2(a) of the *Agreement on Agriculture*, and in finding, secondly, that, contrary to Article 3.2 of the *Agreement on Agriculture*, Korea's Current Total AMS exceeds the commitment levels in Part IV of its Schedule for 1997 and 1998? In examining the component parts of this issue, it is necessary for us to ascertain two sets of figures: the figures which constitute Korea's commitment levels for 1997 and 1998, and

[26]Panel Report, para. 821.

[27]*Ibid*., para. 841.

[28]*Ibid*., para. 843.

[29]Korea's appellant's submission, paras. 26-54.

[30]*Ibid*., paras. 79-90.

the figures for Korea's Current Total AMS for 1997 and 1998. We turn first to an examination of Korea's commitment levels for 1997 and 1998.

A. *Korea's Commitment Levels for 1997 and 1998*

94. In Korea's Schedule LX, Part IV, Section I, entitled "Domestic Support: Total AMS Commitments", Korea has provided annual bound commitment levels for domestic support for agriculture for the period 1995-2004. The Schedule contains three columns, as follows:

₩ = Korean Won

| **Base Total AMS** | **Annual and final bound commitments level 1995 - 2004** | | | **Relevant Supporting Tables and document reference** |
|---|---|---|---|---|
| 1 | 2 | | | 3 |
| bil. ₩ | | | bil. ₩ | |
| 1,718.6 | 1995: | 1,695.74 | (2,182.55) *Note 1 | AGST/KOR (Supporting Table 4, 5, 6, 7, 8 and 10) |
| | 1996: | 1,672.90 | (2,105.60) | |
| | 1997: | 1,650.03 | (2,028.65) | |
| | 1998: | 1,627.17 | (1,951.70) | |
| | 1999: | 1,604.32 | (1,874.75) | |
| | 2000: | 1,581.46 | (1,797.80) | |
| | 2001: | 1,558.60 | (1,720.85) | |
| | 2002: | 1,535.74 | (1,643.90) | |
| | 2003: | 1,512.89 | (1,566.95) | |
| | 2004: | 1,490.00 | (1,490.00) | |

*Note 1 : Refer to Note 1 of Supporting Table 6 about the numbers in parentheses.

Korea's commitment levels are in Column 2, entitled "Annual and final bound commitments level 1995-2004". This column contains two sets of figures pertaining to the years 1995-2004: one set in brackets, and one set not in brackets.

95. In its findings, the Panel referred to part of Korea's Schedule. In particular, the Panel referred to the figures in Column 1 and Column 2. However, the Panel did not refer to "* Note 1" in Column 2, nor to the explanatory information set out in Note 1, and did not reprint Column 3.[31] The Panel concluded that the set of figures not in brackets constitutes Korea's commitment levels. In support of its conclusion, the Panel noted that "the unbracketed figures in Korea's Schedule are derived from, and directly linked to, the 'Base Total AMS'". By contrast, the figures in the column with brackets "bear no such relationship to the specified 'Base Total AMS' of 1,718.60 billion won."[32] Therefore, Korea's commitment level for 1997 is 1,650.03 billion won, while the commitment level

[31]Panel Report, para. 820.

[32]*Ibid*., para. 822.

for 1998 is 1,627.17 billion won.[33] On appeal, Korea argues that the Panel's conclusion was in error.[34]

96. Examining this issue requires us to interpret Korea's Schedule. At the outset, we note, as we have previously stated in *European Communities – Customs Classification of Certain Computer Equipment*, that:

> A Schedule is … an integral part of the GATT 1994 … . Therefore, the concessions provided for in that schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*.[35]

Thus, we now examine Korea's Schedule in light of the rules of treaty interpretation. We begin with the ordinary meaning of the terms of the Schedule, in their context and in the light of the object and purpose of the treaty, in accordance with Article 31(1) of the *Vienna Convention*.

97. The Panel examined the two sets of figures provided by Korea, as well as the figure for "Base Total AMS". However, as is clear from the table in Korea's Schedule LX, Part IV, Section I, which has been reprinted in paragraph 94 above, the two sets of figures do not exist in isolation. Rather, to the right of the two sets of figures is the notation "* Note 1". At the bottom of Korea's Schedule, there is "* Note 1" which states: "Refer to Note 1 of Supporting Table 6 about the numbers in parentheses." The Panel, in its reasoning, referred to the set of figures in Column 1 and Column 2, but did *not* refer to "* Note 1", nor did it consider the terms of "* Note 1".[36] An examination of the ordinary meaning of the terms of a treaty must take into account *all* of those terms, and, accordingly, we proceed with an examination of Korea's Schedule, including Note 1 of Supporting Table 6. In our view, the Panel's examination of the "ordinary meaning" of Korea's Schedule was not done in accordance with the rules of interpretation of general international law as codified in the *Vienna Convention*.

98. Supporting Table 6 is entitled "Aggregate Measurements of Support: Market Price Support". This table provides the supporting figures for the commitment levels set out in Part IV, Section I of Korea's Schedule LX, that is, the figures used to calculate the commitment levels. Supporting figures are provided for rice, barley, soybean, maize (corn) and rape seeds. In respect of each product, the AMS for each of the years 1989-1991 is provided, along with an average AMS level for the years

[33]See Panel Report, para. 843.

[34]Korea's appellant's submission, paras. 26-54.

[35]Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 84.

[36]See Panel Report, paras. 820-823.

1989-1991. For rice, AMS figures for 1993 are given as well. The figures for each product were combined in order to obtain a Base Total AMS figure which could then be used to determine commitment levels for the years 1995-2004.

99. Note 1 of Supporting Table 6 reads as follows:

> The AMS for rice has been calculated based on 1993 market price support instead of 1989-1991 average. The Final Bound Commitment level in 2004, however, is the level reduced by 13.3% from the 1989-1991 average Base Total AMS.[37]

As the Panel did not consider Note 1 at the bottom of Korea's Schedule LX, Part IV, Section I, it did not consider Note 1 of Supporting Table 6 either.

100. In interpreting Note 1 of Supporting Table 6, we look again at its ordinary meaning. The first sentence of this Note indicates that the AMS calculations for *rice* are based on 1993 figures, whereas for products other than rice, the AMS figures are based on the 1989-1991 average amounts.

101. The second sentence of Note 1 of Supporting Table 6 makes clear that the final bound commitment level for 2004 has been determined by reducing the 1989-1991 average Base Total AMS by 13.3 per cent.

102. We note that the use of the term "however" ordinarily indicates a contrast between two things, and lends support to Korea's position. The contrast here is the following: whereas the starting AMS amount is calculated using the 1989-1991 figures for products other than rice and the 1993 figures for rice, the Final Bound Commitment level for 2004 is calculated based on the 1989-1991 average Base Total AMS, which relies on 1989-1991 figures for *all* products, including rice. It appears to us that what Korea stated in Note 1 of Supporting Table 6 was this: the starting AMS commitment level for 1995 is determined by using AMS calculations relying on base years of 1989-1991 for all products except rice, and 1993 for rice; "however", the final target commitment level for 2004 is based on the Base Total AMS figure which was derived by using the base years 1989-1991 for *all* products. The starting AMS commitment level figure for 1995 (2182.55 billion won) was reduced in equal annual amounts over the period from 1995 to 2004 in order to reach the final target commitment level for 2004 (1490.00 billion won). The reduced commitment levels for each year over the period 1995-2004, the calculation of which has been described by Korea in Note 1 of Supporting Table 6, are set

[37] G/AG/AGST/KOR, p. 8.

out in the figures in brackets. It follows from the wording of Korea's Schedule LX, Part IV, Section I, read together with Note 1 of the Supporting Table 6, that Korea's AMS commitment levels for 1995-2004 are not represented, as the Panel concluded, by the figures not in brackets, but, rather, as Korea contends, by the figures in brackets.

103. The above view is reflected in Korea's subsequent statements before the Committee on Agriculture. At a November 1996 Committee on Agriculture meeting, New Zealand asked Korea this question: "Noted that Korea's Schedule contains two sets of figures regarding annual and final bound commitment levels. Which set is accurate?" Korea responded as follows:

> *The figures in brackets correspond to Korea's real annual commitment level, using the 1993 base period for rice and the 1989-1991 base period for other products*, as indicated in the footnote of Korea's Schedule LX. The said calculation and annual commitment level of AMS were already reviewed and agreed upon by Member countries in March 1994. *The other set of figures corresponds to the annual commitment using the base period of 1989-1991 for all the products*.[38] (emphasis added)

104. Furthermore, in its official annual Notifications to the Committee on Agriculture concerning domestic support commitments for 1995 to 1998, Korea made reference to its commitment level for the period in question. In each Notification, the figure Korea provided was the relevant commitment level from Korea's Schedule set out in the figures in brackets. Next to the AMS figure in each Notification is a note which says "See Note 1 of Supporting Table 6 in G/AG/AGST/KOR".[39]

105. For these reasons, we conclude that Korea's commitment levels in Part IV, Section I of its Schedule LX are denoted by the figures in the Column entitled "Annual and final bound commitments level 1995-2004" which are in brackets. Thus, Korea's commitment level is 2,028.65 billion won for the year 1997, and 1,951.70 billion won for the year 1998.

106. We turn next to an examination of Korea's Current Total AMS for 1997 and 1998, to determine whether Korea's Current Total AMS for these years exceeded its commitment levels for those same years.

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[38]G/AG/R/9, 17 January 1997.

[39]See G/AG/N/KOR/24, 25 August 1999; G/AG/N/KOR/18, 16 September 1998; G/AG/N/KOR/14, 15 September 1997; G/AG/N/KOR/7, 18 November 1996.

B. *Korea's Current Total AMS for 1997 and 1998*

107. In its Notifications to the Committee on Agriculture for 1997 and 1998, Korea provided figures for the Current Total AMS for those years. Korea claimed that for 1997 it provided Current Total AMS of 1,936.95 billion won, and for 1998 it provided 1,562.77 billion won.[40] The complaining parties argue that Korea's Current Total AMS as provided in its Notifications was calculated improperly, as Korea did not include Current AMS for beef in its Current Total AMS. The United States contends that when Current AMS for beef is included in Current Total AMS, as required, Current Total AMS for both 1997 and 1998 exceeded Korea's commitment levels for 1997 and 1998, whereas Australia limits its contention to 1997.[41]

108. The Panel found that Korea's Current AMS for beef did exceed the *de minimis* level for 1997 and 1998, and, therefore, was required to be included in Current Total AMS, under Article 7.2(a) of the *Agreement on Agriculture.*[42] The Panel then compared Korea's Current Total AMS to Korea's commitment levels for 1997 and 1998, and concluded that Current Total AMS exceeded the commitment levels, contrary to Article 3.2 of the *Agreement on Agriculture*.[43]

109. On appeal, Korea contends that the Panel's conclusion that Current AMS for beef must be included in Current Total AMS is incorrect. According to Korea, the Panel mistakenly looked to Annex 3 of the *Agreement on Agriculture* in order to calculate the Current AMS for beef, while failing to take into account the "constituent data and methodology" provided in Korea's Schedule, as required by Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*. Korea claims that its Current AMS for beef was properly calculated in its Notifications to the Committee on Agriculture, based on the "constituent data and methodology" in its Schedule, and that consequently this Current AMS fell below the *de minimis* level established in Article 6.4 of the *Agreement on Agriculture*. Therefore, Korea argues, the Current AMS for beef need not be included in the Current Total AMS, and Current Total AMS was properly calculated in its Notifications.[44]

110. In examining this issue, we need to determine first whether Current AMS for beef for 1997 and 1998 must be included in Korea's Current Total AMS for those years. We recall that Article 6.4 of the *Agreement on Agriculture* states that:

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[40]See G/AG/N/KOR/24, 25 August 1999; G/AG/N/KOR/18, 16 September 1998.

[41]See *supra*, footnote 25.

[42]Panel Report, para. 841.

[43]*Ibid*., para. 843.

[44]Korea's appellant's submission, paras. 79-90.

> A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:
>
> (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5per cent of that Member's total value of production of a basic agricultural product during the relevant year;
>
> …

For developing country Members the *de minimis* percentage level under this paragraph is 10 per cent.[45] Thus, Korea's Current AMS for beef must be included in Current Total AMS only if the Current AMS for beef exceeds the 10 per cent *de minimis* requirement applicable in respect of developing country Members.

111. To determine whether Korea's Current AMS for beef exceeds 10 per cent of total value of beef production, we refer again to Article 1(a)(ii) of the *Agreement on Agriculture*, which defines Current AMS. Under this provision, Current AMS is to be

> calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; … (emphasis added)

Article 1(a)(ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be "calculated *in accordance with* the provisions of Annex 3 of this Agreement". The ordinary meaning of "accordance" is "agreement, conformity, harmony".[46] Thus, Current AMS must be calculated in "conformity" with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while "taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." "Take into account" is defined as "take into consideration, notice".[47] Thus, when Current AMS is calculated, the "constituent data and methodology" in a Member's Schedule must be "taken into account", that is, it must be "considered".[48]

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[45]Article 6.4(b) of the *Agreement on Agriculture*.

[46]*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15.

[47]*Ibid*.

[48]We note that this difference is not reflected in the wording of the definition of Current Total AMS in Article 1(h). Article 1(h)(ii) provides that Current Total AMS is to be calculated "in accordance with the provisions of this Agreement, including Article 6, *and* with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". (emphasis added)

112. Looking at the wording of Article 1(a)(ii) itself, it seems to us that this provision attributes higher priority to "the provisions of Annex 3" than to the "constituent data and methodology". From the viewpoint of ordinary meaning, the term "in accordance with" reflects a more rigorous standard than the term "taking into account".

113. We note, however, that the Panel did not base its reasoning on this apparent hierarchy as between "the provisions of Annex 3" and the "constituent data and methodology".[49] Instead, the Panel considered that where no support was included in the base period calculation for a given product, there is no "constituent data or methodology" to refer to, so that the only means available for calculating domestic support is that provided in Annex 3.[50] As beef had not been included in Supporting Table 6 of Korea's Schedule LX, Part IV, Section I, the Panel concluded that Annex 3 alone is applicable for the purposes of calculating current non-exempt support in respect of Korean beef.[51]

114. In the circumstances of the present case, it is not necessary to decide how a conflict between "the provisions of Annex 3" and the "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule" would have to be resolved in principle. As the Panel has found, in this case, there simply are no constituent data and methodology for beef.[52] Assuming *arguendo* that one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3, for products entering into the calculation of the Base Total AMS, such a step would seem to us to be unwarranted in calculating Current AMS for a product which did *not* enter into the Base Total AMS calculation. We do not believe that the *Agreement on Agriculture* would sustain such an extrapolation. We, therefore, agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with the provisions of Annex 3, and with these provisions alone.

115. Korea has argued that:

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[49]On the contrary, the Panel opines that the "constituent data and methodology" has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period. Panel Report, para. 811.

[50]*Ibid*.

[51]*Ibid*., para. 812.

[52]*Ibid*. In other words, there is no *data* (product) in respect of which the *methodology* of Schedule LX of Korea (that is, the use of figures for the years 1989-1991) could be applied, in so far as beef is concerned.

> National schedules on the reduction of subsidies in favour of agricultural products … can be understood as multi-year equations. One side of the equation includes the commitment level for a given year, while the other side of the equation includes the actual AMS for the same year. Thus, for the equation to be meaningful, both sides of the equation should be based on the same sets of data and methodology. … Using one methodology for commitment levels and another methodology for actual AMS undermines comparability between the two, and leads to unfair results.[53]

We believe that it is not necessary or appropriate to conceive of the pertinent provisions of the *Agreement on Agriculture* as establishing "multi-year equations". The treaty definitions of both AMS and Total AMS, set out in Articles 1(a) and 1(h) respectively, do provide a specific methodology for calculating Current AMS and Current Total AMS in respect of a particular year during the implementation period. However, with respect to the other side of a hypothetical equation, the relevant treaty provisions do *not* provide for any particular mode of calculation of the "Base Total AMS", from which figure the commitment levels for particular years of the implementation period are arithmetically derived. Article 1(a)(i) of the *Agreement on Agriculture* dealing with AMS states that "with respect to support provided during the base period", a treaty interpreter needs only to go to "the relevant tables of supporting material incorporated by reference *in Part IV of a Member's Schedule* … ". (emphasis added) Similarly, Article 1(h)(i) dealing with Total AMS, states that "with respect to support provided during the base period (i.e., the 'Base Total AMS') and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e., the 'Annual and Final Bound Commitment Levels')", a treaty interpreter needs only to go to what is "*specified in Part IV of a Member's Schedule* … ". (emphasis added) Thus, for purposes of determining whether a Member has exceeded its commitment levels, Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned. As a result, Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member's Schedule.

116. We examine next Annex 3, entitled: "Domestic Support: Calculation of Aggregate Measurement of Support". Paragraphs 8 and 9 of Annex 3 provide the following definition of "market price support", the particular form of domestic support at issue here:

[53]Korea's appellant's submission, para. 63.

> … *market price support* shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the *quantity of production eligible to receive* the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.
>
> The *fixed external reference price shall be based on the years 1986 to 1988* and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary. (emphasis added)

Thus, under Annex 3, "market price support" is calculated by taking the difference between a fixed external reference price and the applied administered price, and multiplying that difference by "the quantity of *production eligible* to receive the applied administered price". (emphasis added) The fixed external reference price "shall be *based on the years 1986 to 1988*". (emphasis added)

117. The Panel found that in both 1997 and 1998 Korea miscalculated its fixed external reference price, contrary to Article 6 and paragraph 9 of Annex 3, by using a fixed external reference price based on data for 1989-1991.[54] Korea justifies this choice by invoking the "constituent data and methodology" used in its Supporting Table 6 for all products other than rice, i.e., for barley, soybean, maize (corn) and rape seeds. In Supporting Table 6, all these products use the period 1989-1991 for the fixed external reference price.[55]

118. We have already explained above that we share the Panel's view with respect to Korea's argument on "constituent data and methodology" used in the table of supporting material. We agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with Annex 3. According to Annex 3, "[t]he fixed external reference price shall be based on the years 1986 to 1988". We, therefore, also agree with the Panel that in calculating the product specific AMS for beef for the years 1997 and 1998, Korea should have used an external reference price based on data for 1986-1988, instead of data for 1989-1991.

119. The Panel found that, in calculating the Current AMS for beef for the years 1997 and 1998, Korea made a further mistake. In determining its market price support for beef, Korea used the quantity of Hanwoo cattle actually purchased. The Panel found that "[t]he actual quantity of purchases is not relevant in the calculation of market price support. Korea, by indicating its intent to

[54]Panel Report, para. 830.

[55]Korea's appellant's submission, paras. 79-80.

purchase specified quantities, made them eligible to receive the applied administered price, and consequently affected and supported the price of all such products".[56]

120. We share the Panel's view that the words "production *eligible* to receive the applied administered price" in paragraph 8 of Annex 3 have a different meaning in ordinary usage from "production *actually purchased* ". The ordinary meaning of "eligible" is "fit or *entitled* to be chosen".[57] Thus, "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit "eligible" production. Production actually purchased may often be less than eligible production.

121. In the present case, Korea, in effect, declared the quantity of "eligible production" when it announced in January, 1997, that it would purchase 500 head per day of Hanwoo cattle above 500 kg within the 27 January to 31 December 1997 period, which would be 170,000 head of cattle for the 1997 calendar year.[58] That figure, under paragraph 8 of Annex 3, accordingly constitutes the quantity of "eligible production". While there may be nothing under the *Agreement on Agriculture* to prevent Korea from changing the quantity of "eligible production", Korea did not do so, so far as the record of this case shows. Korea instead simply purchased a lesser number of cattle by ceasing its purchases.

122. Korea argues that it is entitled to calculate market price support in 1997 and 1998 by using actual purchases, because it used actual purchases in its calculations in the tables of supporting material in its Schedule. We recall that we share the Panel's view that for beef, "constituent data and methodology" do not exist in the Schedule, as beef did not enter into the calculation of Korea's initial Base Total AMS. We, therefore, agree with the Panel's finding that Korea erred in calculating market price support in 1997 and 1998 by using the amount of production actually purchased, instead of production declared eligible to receive the applied administered price, according to the provisions of paragraph 8 of Annex 3.

123. Having reached the conclusion that Korea had miscalculated its market price support in 1997 and 1998, the Panel attempted to evaluate correctly Korea's Current AMS for beef. In doing so, the Panel stated that "[f]or reasons of clarity and simplicity", it would rely on market price support

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[56]Panel Report, para. 831.

[57]*The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 438.

[58]Panel Report, para. 834.

calculations submitted by New Zealand for Korea's Current AMS for beef.[59] Based on these calculations, the Panel found that Korea's AMS for beef had exceeded the 10 per cent *de minimis* threshold referred to in Article 6.4(b) of the *Agreement on Agriculture* in 1997 and 1998.[60]

124. We note that in calculating Korea's Current AMS for beef, New Zealand uses – like Korea – a fixed external reference price based on 1989-1991 data. As we have found above, the use of such an external reference price is incompatible with paragraph 9 of Annex 3, which requires an external reference price based on the years 1986-1988.

125. The Panel was aware of this incompatibility, but seemed to assume that New Zealand's reference to 1989-1991 data benefitted, rather than harmed, Korea.[61] This could be the case if the 1989-1991 data would result in a higher external reference price than the one prescribed by paragraph 9 of Annex 3, i.e., the external reference price based on the years 1986-1988. There is, however, no indication in the Panel Report of the level of the external reference price for the years 1986-1988. Furthermore, neither the Panel Report nor the Panel record contain any elements which might allow us to determine the level of such an external reference price.[62]

126. We, therefore, must reverse the Panel's finding that Korea exceeded the 10 per cent *de minimis* threshold of Current AMS for beef in 1997 and 1998, and the consequent finding that the failure to include Current AMS for beef in Current Total AMS in these years is inconsistent with Articles 6 and 7.2(a) of the *Agreement on Agriculture*.

127. As a consequence, we must also reverse the Panel's finding that, in 1997 and 1998, Korea's Current Total AMS exceeded Korea's commitment levels, as specified in Part IV, Section I of its Schedule, in violation of Article 3.2 of the *Agreement on Agriculture*.

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[59]Panel Report, para. 838.

[60]*Ibid*., para. 840.

[61]This seems to be the meaning of the words "inflating Korea's legitimate level of domestic support" in footnote 442 of the Panel Report which reads as follows:

> The Panel notes that for this recalculation of Korea's FERP, New Zealand even used 1989-1991 data (inflating Korea's legitimate level of domestic support), contrary to the Panel's conclusion that pursuant to Annex 3 a 1986-1988 FERP should have been employed.

[62]In *Australia – Measures Affecting the Importation of Salmon* we stated that where we have reversed a finding of a panel, we should attempt to complete a panel's legal analysis "to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record". Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1998, para. 118. See also, Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 133.

128. We should, however, stress that, as there is insufficient information in the Panel record to allow determination of whether Current AMS for beef exceeded the *de minimis* threshold in 1997 and 1998, and, therefore, had to be included in Current Total AMS, we reach no conclusion as to whether or not Korea acted inconsistently with Articles 6 and 7.2(a) of the *Agreement on Agriculture*.

129. Furthermore, as a determination of Current Total AMS cannot be made without first ascertaining Current AMS for beef, no Current Total AMS can be calculated for 1997 and 1998. As a result, there is no basis on which we can reach a conclusion on the issue of whether or not Korea exceeded its commitment levels in Part IV of its Schedule for 1997 and 1998, contrary to Article 3.2 of the *Agreement on Agriculture.*

## VI. Dual Retail System

### A. *Article III:4 of the GATT 1994*

130. The Panel found that Korea's dual retail system for beef accords treatment less favourable to imported beef than to like Korean beef, and is, thus, inconsistent with Article III:4 of the GATT 1994. This finding was based on the Panel's view that any measure based exclusively on criteria relating to the origin of a product is inconsistent with Article III:4.[63] The finding was also based on the Panel's assessment of how the dual retail system modifies the conditions of competition between imported and like domestic beef in the Korean market.[64]

131. Korea argues on appeal that the dual retail system does not accord treatment less favourable to imported beef than to like domestic beef. For Korea, the dual retail system does not *on its face* violate Article III:4, since there is "perfect regulatory symmetry" in the separation of imported and domestic beef at the retail level, and there is "no regulatory barrier" which prevents traders from converting from one type of retail store to another.[65] Nor, Korea argues, does the dual retail system violate Article III:4 *de facto*, and the Panel's conclusion to the contrary was not based on a proper empirical analysis of the Korean beef market.[66]

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[63]Panel Report, para. 627.

[64]*Ibid*., paras. 631-637.

[65]Korea's appellant's submission, paras. 119-126.

[66]*Ibid*., paras. 127-156.

132. Article III:4 of the GATT 1994 reads in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded *treatment no less favourable* than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. (emphasis added)

133. For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are "like products"; that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and that the imported products are accorded "less favourable" treatment than that accorded to like domestic products. Only the last element – "less favourable" treatment – is disputed by the parties and is at issue in this appeal.

134. The Panel began its analysis of the phrase "treatment no less favourable" by reviewing past GATT and WTO cases. It found that "treatment no less favourable" under Article III:4 requires that a Member accord to imported products "effective equality of opportunities" with like domestic products in respect of the application of laws, regulations and requirements.[67] The Panel concluded its review of the case law by stating:

> Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III. The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products.[68]

135. The Panel stated that "any regulatory distinction that is based exclusively on criteria relating to the nationality or origin" of products is incompatible with Article III:4. We observe, however, that

[67]Panel Report, para. 624.

[68]*Ibid.*, para. 627. (footnotes omitted)

Article III:4 requires only that a measure accord treatment to imported products that is "no less favourable" than that accorded to like domestic products. A measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is "no less favourable". According "treatment no less favourable" means, as we have previously said, according *conditions of competition* no less favourable to the imported product than to the like domestic product. In *Japan – Taxes on Alcoholic Beverages*, we described the legal standard in Article III as follows:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products. "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".[69] (emphasis added)

136. This interpretation, which focuses on the *conditions of competition* between imported and domestic like products, implies that a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4. In *United States – Section 337*, this point was persuasively made. In that case, the panel had to determine whether United States patent enforcement procedures, which were formally different for imported and for domestic products, violated Article III:4. That panel said:

[69] Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 16-17. The original passage contains footnotes. The second sentence is footnoted to *United States - Section 337 of the Tariff Act of 1930* ("*United States – Section 337*"), BISD 36S/345, para. 5.10. The third sentence is footnoted to *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; and *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b). The fifth sentence is footnoted to *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, para. 11.

> On the one hand, contracting parties may apply to imported products *different* formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where the application of formally *identical* legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4.[70] (emphasis added)

137. A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.

138. We conclude that the Panel erred in its general interpretation that "[a]ny regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III."[71]

139. The Panel went on, however, to examine the conditions of competition between imported and like domestic beef in the Korean market. The Panel gave several reasons why it believed that the dual retail system alters the conditions of competition in the Korean market in favour of domestic beef. First, it found that the dual retail system would "limit the possibility for consumers to compare imported and domestic products", and thereby "reduce opportunities for imported products to compete directly with domestic products".[72] Second, the Panel found that, under the dual retail system, "the only way an imported product can get on the shelves is if the retailer agrees to substitute it, not only for one but for all existing like domestic products." This disadvantage would be more serious when the market share of imports (as is the case with imported beef) is small.[73] Third, the Panel found that the dual retail system, by excluding imported beef from "the vast majority of sales outlets", limits the potential market opportunities for imported beef. This would apply particularly to products

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[70] *United States – Section 337*, *supra*, footnote 69, paragraph 5.11.

[71] Panel Report, para. 627.

[72] *Ibid.*, para. 631.

[73] *Ibid.*, para. 632.

"consumed on a daily basis", like beef, where consumers may not be willing to "shop around".[74] Fourth, the Panel found that the dual retail system imposes more costs on the imported product, since the domestic product will tend to continue to be sold from existing retail stores, whereas imported beef will require new stores to be established.[75] Fifth, the Panel found that the dual retail system "encourages the perception that imported and domestic beef are different, when they are in fact like products belonging to the same market", which gives a competitive advantage to domestic beef, "based on criteria not related to the products themselves".[76] Sixth, the Panel found that the dual retail system "facilitates the maintenance of a price differential" to the advantage of domestic beef.[77]

140. On appeal, Korea argues that the Panel's analysis of the conditions of competition in the Korean market is seriously flawed, relying largely on speculation rather than on factual analysis. Korea maintains that the dual retail system does not deny consumers the possibility to make comparisons, and the numbers of outlets selling imported beef, as compared with outlets selling domestic beef, does not support the Panel's findings. Korea argues, furthermore, that the dual retail system neither adds to the costs of, nor shelters high prices for, domestic beef.[78]

141. It will be seen below that we share the ultimate conclusion of the Panel in respect of the consistency of the dual retail system for beef with Article III:4 of the GATT 1994. Portions, however, of the Panel's analysis *en route* to that conclusion appear to us problematic. For instance, while limitation of the ability to compare visually two products, local and imported, at the point of sale may have resulted from the dual retail system, such limitation does not, in our view, necessarily reduce the opportunity for the imported product to compete "directly" or on "an equal footing" with the domestic product.[79] Again, even if we were to accept that the dual retail system "encourages" the perception of consumers that imported and domestic beef are "different", we do not think it has been demonstrated that such encouragement necessarily implies a competitive advantage for domestic beef.[80] Circumstances like limitation of "side-by-side" comparison and "encouragement" of consumer perceptions of "differences" may be simply incidental effects of the dual retail system without decisive implications for the issue of consistency with Article III:4.

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[74]Panel Report, para. 633.

[75]*Ibid*., para. 634.

[76]*Ibid*.

[77]*Ibid*.

[78]Korea's appellant's submission, paras. 101, 127-156.

[79]See Panel Report, para. 633.

[80]*Ibid*., para. 634.

142. We believe that a more direct, and perhaps simpler, approach to the dual retail system of Korea may be usefully followed in the present case. In the following paragraphs, we seek to focus on what appears to us to be the fundamental thrust and effect of the measure itself.

143. Korean law in effect requires the existence of two distinct retail distribution systems so far as beef is concerned: one system for the retail sale of domestic beef and another system for the retail sale of imported beef.[81] A small retailer (that is, a non-supermarket or non-department store) which is a "Specialized Imported Beef Store" may sell any meat *except domestic beef*; any other small retailer may sell any meat *except imported beef*.[82] A large retailer (that is, a supermarket or department store) may sell both imported and domestic beef, as long as the imported beef and domestic beef are sold in separate sales areas.[83] A retailer selling imported beef is required to display a sign reading "Specialized Imported Beef Store".[84]

144. Thus, the Korean measure formally separates the selling of imported beef and domestic beef. However, that formal separation, *in and of itself*, does not necessarily compel the conclusion that the treatment thus accorded to imported beef is less favourable than the treatment accorded to domestic beef.[85] To determine whether the treatment given to imported beef is less favourable than that given to domestic beef, we must, as earlier indicated, inquire into whether or not the Korean dual retail system for beef modifies the *conditions of competition* in the Korean beef market to the disadvantage of the imported product.

145. When beef was first imported into Korea in 1988, the new product simply entered into the pre-existing distribution system that had been handling domestic beef. The beef retail system was a unitary one, and the conditions of competition affecting the sale of beef were the same for both the domestic and the imported product. In 1990, Korea promulgated its dual retail system for beef.[86]

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[81]The essential features of the Korean dual retail system for beef are found in the *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, (61550-81) 29 January 1990, modified on 15 March 1994; and the *Regulations Concerning Sales of Imported Beef*, (51550-100), modified on 27 March 1993, 7 April 1994, and 29 June 1998. On 1 October 1999, these two instruments were replaced by the *Management Guideline for Imported Beef*, (Ministry of Agriculture Notice 1999-67), which maintained, however, the basic principles of the dual retail system.

[82]*Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores* Art. 5(C); *Regulations Concerning Sales of Imported Beef*, Art. 14(5); *Management Guideline for Imported Beef*, Art. 15.

[83]*Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, Art. 3(A); *Management Guideline for Imported Beef*, Art. 9(5).

[84]*Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, Art. 5(A); *Regulations Concerning Sales of Imported Beef*, Art. 14(5); *Management Guideline for Imported Beef*, Art. 9(6).

[85]Apart from the display sign requirement, dealt with in para. 151.

[86]See Panel Report, para. 630.

Accordingly, the existing small retailers had to choose between, on the one hand, continuing to sell domestic beef and renouncing the sale of imported beef or, on the other hand, ceasing to sell domestic beef in order to be allowed to sell the imported product. Apparently, the vast majority of the small meat retailers chose the first option.[87] The result was the virtual exclusion of imported beef from the retail distribution channels through which domestic beef (and until then, imported beef, too) was distributed to Korean households and other consumers throughout the country. Accordingly, a new and separate retail system had to be established and gradually built from the ground up for bringing the imported product to the same households and other consumers if the imported product was to compete at all with the domestic product. Put in slightly different terms, the putting into legal effect of the dual retail system for beef meant, in direct practical effect, so far as imported beef was concerned, the sudden cutting off of access to the normal, that is, the previously existing, distribution outlets through which the domestic product continued to flow to consumers in the urban centers and countryside that make up the Korean national territory. The central consequence of the dual retail system can only be reasonably construed, in our view, as the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef. In 1998, when this case began, eight years after the dual retail system was first prescribed, the consequent reduction of commercial opportunity was reflected in the much smaller number of specialized imported beef shops (approximately 5,000 shops) as compared with the number of retailers (approximately 45,000 shops) selling domestic beef.[88]

146. We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.

[87]Panel Report, para. 633.

[88]The number of imported beef shops is noted by the Panel in footnote 347 of the Panel Report; the number of domestic beef shops has been provided by the United States in para. 175 of the Panel Report, and has not been contested by Korea.

147. We also note that the reduction of competitive opportunity through the restriction of access to consumers results from the imposition of the dual retail system for beef, notwithstanding the "perfect regulatory symmetry" of that system[89], and is not a function of the limited volume of foreign beef actually imported into Korea. The fact that the WTO-consistent quota for beef has, save for two years, been fully utilized does not detract from the lack of equality of competitive conditions entailed by the dual retail system.

148. We believe, and so hold, that the treatment accorded to imported beef, as a consequence of the dual retail system established for beef by Korean law and regulation, is less favourable than the treatment given to like domestic beef and is, accordingly, not consistent with the requirements of Article III:4 of the GATT 1994.

149. It may finally be useful to indicate, however broadly, what we are *not* saying in reaching our above conclusion. We are *not* holding that a dual or parallel distribution system that is *not* imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.

150. Finally, we note that Korea requires that imported beef be sold in a store displaying a sign declaring "Specialized Imported Beef Store". The Panel found that the sign requirement was "essentially ancillary to the dual retail system", and, since the dual retail system was inconsistent with Article III:4, the Panel found that the sign requirement was as well.[90] The Panel found also that, since the sign requirement went beyond an obligation to indicate origin, it was inconsistent with statements contained in a 1956 GATT Working Party Report.[91] On appeal, Korea claims that the Panel used "erroneous logic" in its conclusion based on the ancillary character of the sign requirement, and that the statement in the Working Party Report did not apply to the sign requirement.[92]

151. Without a system of specialized imported beef stores, the sign requirement would have no meaning and would not be required. When considered independently from a dual retail system, a sign

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[89]The notion of "perfect regulatory symmetry" is set out in Korea's appellant's submission, para. 95. See also *supra*, para. 17.

[90]Panel Report, para. 641.

[91]Working Party Report, *Certificates of Origin, Marks of Origin, Consular Formalities*, adopted 17 November 1956, BISD 5S/102, para. 13.

[92]Korea's appellant's submission, paras. 206-213.

requirement might or might not be characterized legally as consistent with Article III:4 of the GATT 1994. On the other hand, when considered simply as a detail of the dual retail system, the sign requirement partakes of the legal characterization given to that system itself. We believe it unnecessary to pass upon separately the consistency of the display sign requirement with Article III:4 of the GATT 1994.

### B. *Article XX(d) of the GATT 1994*

152. The Panel went on to conclude that the dual retail system, which it found to be inconsistent with Article III:4, could *not* be justified pursuant to Article XX(d) of the GATT 1994. The Panel found that the dual retail system is a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices.[93]

153. The Panel began its examination of Korea's dual retail system under Article XX(d) by finding that the dual retail system was designed to "secure compliance" with the *Unfair Competition Act,* a law consistent on its face with WTO provisions.[94] The Panel then focused on whether the dual retail system is "necessary" to secure compliance with that law. It examined enforcement measures taken by Korea for related products where fraudulent misrepresentation or passing of one product for another has occurred, and found that in these areas a dual retail system was not used. Instead, in respect of such product areas, Korea uses traditional enforcement measures, consistent with WTO rules, which include record-keeping, investigations, policing and fines. The Panel next inquired into whether these alternative, WTO-consistent measures were "reasonably available" to Korea to meet Korea's desired level of enforcement of laws against fraudulent misrepresentation in the retail beef sector. The Panel concluded that these measures are "reasonably available" alternative measures, and that Korea therefore cannot justify the dual retail system as "necessary" under Article XX(d).[95]

154. Korea appeals the Panel's conclusion. Korea argues that the Panel incorrectly interpreted the term "necessary" in Article XX(d) as requiring *consistency* among enforcement measures taken in related product areas.[96] Further, according to Korea, the Panel neglected to take into account the *level of enforcement* that Korea sought with respect to preventing the fraudulent sale of imported beef.[97]

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[93]Panel Report, para. 675.

[94]*Ibid*., para. 658.

[95]*Ibid*., paras. 660-674.

[96]Korea's appellant's submission, paras. 166-180.

[97]*Ibid*., paras. 181-193.

155. Article XX(d), together with the introductory clause of Article XX, reads as follows:

> *Article XX*
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> …
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

156. We note that in examining the Korean dual retail system under Article XX, the Panel followed the appropriate sequence of steps outlined in *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"). There we said:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*[98] (emphasis added)

The Panel concentrated its analysis on paragraph (d), that is, the first-tier analysis. Having found that the dual retail system did not fulfill the requirements of paragraph (d), the Panel correctly considered that it did not need to proceed to the second-tier analysis, that is, to examine the application in this case of the requirements of the introductory clause of Article XX.

157. For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some

[98] Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, p. 22. See also, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, paras. 119-121.

provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.[99]

158. The Panel examined these two aspects one after the other. The Panel found, "despite … troublesome aspects, … that the dual retail system was put in place, at least in part, in order to secure compliance with the Korean legislation against deceptive practices to the extent that it serves to prevent acts inconsistent with the *Unfair Competition Act.*"[100] It recognized that the system was established at a time when acts of misrepresentation of origin were widespread in the beef sector. It also acknowledged that the dual retail system "does appear to reduce the opportunities and thus the temptations for butchers to misrepresent [less expensive] foreign beef for [more expensive] domestic beef ".[101] The parties did not appeal these findings of the Panel.

159. We turn, therefore, to the question of whether the dual retail system is "necessary" to secure compliance with the *Unfair Competition Act.* Once again, we look first to the ordinary meaning of the word "necessary", in its context and in the light of the object and purpose of Article XX, in accordance with Article 31(1) of the *Vienna Convention.*

160. The word "necessary" normally denotes something "that cannot be dispensed with or done without, requisite, essential, needful".[102] We note, however, that a standard law dictionary cautions that:

> [t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity".[103]

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[99]Appellate Body Report, *United States – Gasoline*, *supra*, footnote 98, pp. 22-23; Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, pp. 14-16; Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.27.

[100]Panel Report, para. 658.

[101]*Ibid*.

[102]*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 1895.

[103]*Black's Law Dictionary*, (West Publishing, 1995), p. 1029.

161. We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". [104]

162. In appraising the "necessity" of a measure in these terms, it is useful to bear in mind the context in which "necessary" is found in Article XX(d). The measure at stake has to be "necessary to ensure compliance with laws and regulations … , *including* those relating to customs enforcement, the enforcement of [lawful] monopolies … , the protection of patents, trade marks and copyrights, and the prevention of deceptive practices". (emphasis added) Clearly, Article XX(d) is susceptible of application in respect of a wide variety of "laws and regulations" to be enforced. It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

163. There are other aspects of the enforcement measure to be considered in evaluating that measure as "necessary". One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be "necessary". Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce[105], that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*.

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[104]We recall that we have twice interpreted Article XX(g), which requires a measure "*relating* to the conservation of exhaustible natural resources". (emphasis added). This requirement is more flexible textually than the "necessity" requirement found in Article XX(d). We note that, under the more flexible "*relating to*" standard of Article XX(g), we accepted in *United States – Gasoline* a measure because it presented a "*substantial* relationship", (emphasis added) i.e., *a close and genuine* relationship of ends and means, with the conservation of clean air. *Supra*, footnote 98, p.19. In *United States – Shrimp* we accepted a measure because it was "*reasonably related*" to the protection and conservation of sea turtles. *Supra*, footnote 98, at para. 141.

[105]We recall that the last paragraph of the Preamble of the GATT of 1994 reads as follows: "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade *and to the elimination of discriminatory treatment in international commerce*". (emphasis added)

A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.

164. In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

165. The panel in *United States – Section 337* described the applicable standard for evaluating whether a measure is "necessary" under Article XX(d) in the following terms:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[106]

166. The standard described by the panel in *United States – Section 337* encapsulates the general considerations we have adverted to above. In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".

167. The Panel followed the standard identified by the panel in *United States – Section 337*. It started scrutinizing whether the dual retail system is "necessary" under paragraph (d) of Article XX by stating:

> Korea has to convince the Panel that, contrary to what was alleged by Australia and the United States, no alternative measure consistent with the WTO Agreement is reasonably available at present in order to deal with misrepresentation in the retail market as to the origin of beef.[107]

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[106]Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

[107]Panel Report, para. 659.

168. The Panel first considered a range of possible alternative measures, by examining measures taken by Korea with respect to situations involving, or which could involve, deceptive practices similar to those which in 1989-1990 had affected the retail sale of foreign beef. The Panel found that Korea does not require a dual retail system in *related product areas*, but relies instead on traditional enforcement procedures. There is no requirement, for example, for a dual retail system separating domestic Hanwoo beef from domestic dairy cattle beef.[108] Nor is there a requirement for a dual retail system for any other meat or food product, such as pork or seafood.[109] Finally, there is no requirement for a system of separate restaurants, depending on whether they serve domestic or imported beef, even though approximately 45 per cent of the beef imported into Korea is sold in restaurants.[110] Yet, in all of these cases, the Panel found that there were numerous cases of fraudulent misrepresentation.[111] For the Panel, these examples indicated that misrepresentation of origin could, in principle, be dealt with "on the basis of basic methods … such as normal policing under the Korean *Unfair Competition Act*."[112]

169. Korea argues, on appeal, that the Panel, by drawing conclusions from the absence of any requirement for a dual retail system in related product areas, introduces an illegitimate "consistency test" into Article XX(d). For Korea, the proper test for "necessary" under Article XX(d):

> … is to see whether another means exists which is less restrictive than the one used and which can reach the objective sought. Whether such means will be applied *consistently* to other products or not is not a matter of concern for the necessity requirement under Article XX(d).[113]

170. Examining enforcement measures applicable to the same illegal behaviour relating to like, or at least similar, products does not necessarily imply the introduction of a "consistency" requirement into the "necessary" concept of Article XX(d). Examining such enforcement measures may provide useful input in the course of determining whether an alternative measure which could "reasonably be expected" to be utilized, is available or not.

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[108]In 1998, domestic dairy cattle beef amounted to 12 percent of total beef consumption in Korea. Panel Report, para. 661.

[109]*Ibid*., para. 662.

[110]*Ibid*., para. 663.

[111]*Ibid*., paras. 661-663, including footnote 366, in which the Panel noted "that the Livestock Times reported that the deceptive beef marketing practice was widespread in restaurants (where price differential was 58 per cent)".

[112]*Ibid*., para. 664.

[113]Korea's appellant's submission, para. 167.

171. The enforcement measures that the Panel examined were measures taken to enforce the same law, the *Unfair Competition Act*.[114] This law provides for penal and other sanctions[115] against any "unfair competitive act", which includes any:

> *Act misleading the public to understand the place of origin of any goods* either by falsely marking that place on any commercial document or communication, in said goods or any advertisement thereof *or in any manner of misleading the general public*, or by selling, distributing, importing or exporting goods bearing such mark;[116] (emphasis added)

The language used in this law to define an "unfair competitive act" – "any manner of misleading the general public" – is broad. It applies to all the examples raised by the Panel – domestic dairy beef sold as Hanwoo beef, foreign pork or seafood sold as domestic product, as well as to imported beef served as domestic beef in restaurants.

172. The application by a Member of WTO-*compatible* enforcement measures to the same kind of illegal behaviour – the passing off of one product for another – for like or at least similar products, provides a suggestive indication that an alternative measure which could "reasonably be expected" to be employed may well be available. The application of such measures for the control of the same illegal behaviour for like, or at least similar, products raises doubts with respect to the objective *necessity* of a different, much stricter, and WTO-inconsistent enforcement measure. The Panel was, in our opinion, entitled to consider that the "examples taken from outside as well as within the beef sector indicate that misrepresentation of origin can indeed be dealt with on the basis of basic methods, consistent with the *WTO Agreement*, and thus less trade restrictive and less market intrusive, such as normal policing under the Korean *Unfair Competition Act*."[117]

173. Having found that possible alternative enforcement measures, consistent with the *WTO Agreement*, existed in other related product areas, the Panel went on to state that:

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[114]In GATT case law, comparisons have been made between enforcement measures taken in different *jurisdictions*. In the *United States – Measures Affecting Alcoholic and Malt Beverages* case, the panel said that "[t]he fact that not all fifty states maintain discriminatory distribution systems indicates to the Panel that alternative measure for enforcement of state excise tax laws do indeed exist." Adopted 19 June 1992, BISD 39S/206, para. 5.43. In the *United States – Section 337* case, the panel "did not consider that a different scheme for imports alleged to infringe process patents is necessary, since many countries grant to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country". *Supra*, footnote 69, para. 5.28.

[115]*Unfair Competition Prevention and Business Secret Protection Act*, Article 2(1)(c), Article 8.

[116]*Unfair Competition Prevention and Business Secret Protection Act*, Article 2(1)(c) (from translation provided by Korea as Exhibit 28 of its second submission to the Panel.

[117]Panel Report, para. 664.

> … it is for Korea to demonstrate that such an alternative measure is not reasonably available or is unreasonably burdensome, financially or technically, taking into account a variety of factors including the domestic costs of such alternative measure, to ensure that consumers are not misled as to the origin of beef.[118]

174. The Panel proceeded to examine whether the alternative measures or "basic methods" – investigations, prosecutions, fines, and record-keeping – which were used in related product areas, were "reasonably available" to Korea to secure compliance with the *Unfair Competition Act.* The Panel concluded "that Korea has not demonstrated to the satisfaction of the Panel that alternative measures consistent with the WTO Agreement were not reasonably available".[119] Thus, as noted at the outset, the Panel found that the dual retail system was "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices".[120] The dual retail system was, therefore, not justified under Article XX(d).[121]

175. Korea also argues on appeal that the Panel erred in applying Article XX(d) because it did not "pay due attention to the level of enforcement sought."[122] For Korea, under Article XX(d), a panel must:

> … examine whether a means reasonably available to the WTO Member could have been used in order to reach the objective sought without putting into question the level of enforcement sought.[123]

For Korea, alternative measures must not only be reasonably available, but must also *guarantee* the level of enforcement sought which, in the case of the dual retail system, is the *elimination* of fraud in the beef retail market.[124] With respect to investigations, Korea argues that this tool can only reveal fraud *ex post*, whereas the dual retail system can combat fraudulent practices *ex ante.*[125] Korea contends that *ex post* investigations do not *guarantee* the level of enforcement that Korea has chosen, and therefore should not be considered. With respect to policing, Korea believes that this option is not "reasonably available", because Korea lacks the resources to police thousands of shops on a round-the-clock basis.

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[118]Panel Report, para. 665.

[119]*Ibid*., para. 674.

[120]*Ibid*., para 675.

[121]*Ibid*.

[122]Korea's appellant's submission, para. 182.

[123]*Ibid*., para. 181.

[124]*Ibid*., paras. 181, 185.

[125]*Ibid*., para. 192.

176. It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations. We note that this has also been recognized by the panel in *United States – Section 337*, where it said: "The Panel wished to make it clear that this [the obligation to choose a reasonably available GATT-consistent or less inconsistent measure] does not mean that a contracting party could be asked to change its substantive patent law or its desired *level of enforcement* of that law …. ". (emphasis added) The panel added, however, the caveat that "provided that such law and such *level of enforcement* are the same for imported and domestically-produced products".[126]

177. We recognize that, in establishing the dual retail system, Korea could well have intended to secure a higher level of enforcement of the prohibition, provided by the *Unfair Competition Act*, of acts misleading the public *about the origin of beef* (domestic or imported) *sold by retailers*, than the level of enforcement of the same prohibition of the *Unfair Competition Act* with respect to *beef served in restaurants*, or the sale by *retailers* of *other meat or food products*, such as *pork or seafood*.

178. We think it unlikely that Korea intended to establish a level of protection that *totally eliminates* fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently, we assume that in effect Korea intended to *reduce considerably* the number of cases of fraud occurring with respect to the origin of beef sold by retailers. The Panel did find that the dual retail system "does appear to reduce the opportunities and thus the temptations for butchers to misrepresent foreign beef for domestic beef".[127] And we accept Korea's argument that the dual retail system *facilitates* control and permits combatting fraudulent practices *ex ante*. Nevertheless, it must be noted that the dual retail system is only an *instrument* to achieve a significant reduction of violations of the *Unfair Competition Act*. Therefore, the question remains whether other, conventional and WTO-consistent instruments can not reasonably be expected to be employed to achieve the same result.

179. Turning to investigations, the Panel found that Korea, in the past, had been able to distinguish imported beef from domestic beef, and had, in fact, published figures on the amount of imported beef fraudulently sold as domestic beef. This meant that Korea was able, in fact, to detect fraud.[128] On fines, the Panel found that these could be an effective deterrent, as long as they outweighed the

[126]Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

[127]Panel Report, para. 658.

[128]*Ibid*., para. 668.

potential profits from fraud.[129] On record-keeping, the Panel felt that if beef traders at all levels were required to keep records of their transactions, then effective investigations could be carried out.[130] Finally, on policing, the Panel noted that Korea had not demonstrated that the costs would be too high.[131] For all these reasons, the Panel considered "that Korea has not demonstrated to the satisfaction of the Panel that alternative measures consistent with the WTO Agreement were not reasonably available".[132] Thus, as already noted, the Panel found that the dual retail system was "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices".[133]

180. We share the Panel's conclusion. We are not persuaded that Korea could not achieve its desired level of enforcement of the *Unfair Competition Act* with respect to the origin of beef sold by retailers by using conventional WTO-consistent enforcement measures, if Korea would devote more resources to its enforcement efforts on the beef sector. It might also be added that Korea's argument about the lack of resources to police thousands of shops on a round-the-clock basis is, in the end, not sufficiently persuasive. Violations of laws and regulations like the Korean *Unfair Competition Act* can be expected to be routinely investigated and detected through selective, but well-targeted, controls of potential wrongdoers. The control of records will assist in selecting the shops to which the police could pay particular attention.

181. There is still another aspect that should be noted relating to both the method actually chosen by Korea – its dual retail system for beef – and alternative traditional enforcement measures. Securing through conventional, WTO-consistent measures a higher level of enforcement of the *Unfair Competition Act* with respect to the retail sale of beef, could well entail higher enforcement costs for the national budget. It is pertinent to observe that, through its dual retail system, Korea has in effect shifted all, or the great bulk, of these potential costs of enforcement (translated into a drastic reduction of competitive access to consumers) to imported goods and retailers of imported goods, instead of evenly distributing such costs between the domestic and imported products. In contrast, the more conventional, WTO-consistent measures of enforcement do not involve such onerous shifting of enforcement costs which ordinarily are borne by the Member's public purse.

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[129]Panel Report, para. 669

[130]*Ibid*., para. 672.

[131]*Ibid*., para. 673.

[132]*Ibid*., para. 674.

[133]*Ibid*., para. 675.

182. For these reasons, we uphold the conclusion of the Panel that Korea has not discharged its burden of demonstrating under Article XX(d) that alternative WTO-consistent measures were not "reasonably available" in order to detect and suppress deceptive practices in the beef retail sector[134], and that the dual retail system is therefore not justified by Article XX(d).[135]

183. Korea further argues, on appeal, that the Panel did not make a separate finding on whether the display sign requirement was justified by Article XX(d), and requests that, should the Appellate Body uphold the Panel's finding that the sign requirement was inconsistent with Article III:4, it should proceed to consider the issue of its justification under Article XX(d).[136]

184. We recall that Korean law requires an imported beef retailer to display a sign reading "Specialized Imported Beef Store".[137] Since the Panel correctly regarded the sign requirement as merely ancillary to the dual retail system, we consider that it is unnecessary to examine separately whether the display sign requirement can be justified under Article XX(d).

185. In sum, we uphold the Panel's conclusion that the dual retail system, which is inconsistent with Article III:4, is not justified under Article XX(d) of the GATT 1994.

## VII. Findings and Conclusions

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

(a) upholds the Panel's conclusion that, under the Panel's terms of reference, the Panel was required to examine, pursuant to the complaining parties' claims, the commitment levels in Korea's Schedule and Annex 3 of the *Agreement on Agriculture;*

(b) upholds the Panel's conclusion that Korea's domestic support for beef for 1997 and 1998 was not correctly calculated pursuant to Article 1(a)(ii) and Annex 3 of the *Agreement on Agriculture*;

(c) reverses the Panel's finding on recalculated amounts of Korea's domestic support for beef in 1997 and 1998, as the Panel used, for these recalculations, a methodology inconsistent with Article 1(a)(ii) and Annex 3 of the *Agreement on Agriculture*; and

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[134]Panel Report, para. 674.

[135]*Ibid*., para. 675.

[136]Korea's appellant's submission, paras. 217-223.

[137]Panel Report, paras. 642-643.

reverses, therefore, the Panel's following conclusions, based on these recalculated amounts: (i) that Korea's domestic support for beef in 1997 and 1998 exceeded the *de minimis* level contrary to Article 6 of the *Agreement on Agriculture*; (ii) that Korea's failure to include Current AMS for beef in Korea's Current Total AMS was contrary to Article 7.2(a) of that Agreement; and (iii) that Korea's total domestic support for 1997 and 1998 exceeded Korea's commitment levels contrary to Article 3.2 of the *Agreement on Agriculture*;

(d) is unable, in view of the insufficient factual findings made by the Panel, to complete the legal analysis of: (i) whether Korea's domestic support for beef exceeds the *de minimis* level contrary to Article 6 of the *Agreement on Agriculture*; (ii) whether the failure to include Current AMS for beef in Korea's Current Total AMS was contrary to Article 7.2(a) of that Agreement; and (iii) whether Korea's total domestic support for 1997 and 1998 exceeded Korea's commitment levels contrary to Article 3.2 of the *Agreement on Agriculture*;

(e) upholds the Panel's ultimate conclusion that Korea's dual retail system for beef is inconsistent with Article III:4 of the GATT 1994;

(f) upholds the Panel's conclusion that Korea's dual retail system for beef is not justified under Article XX(d) of the GATT 1994; and

(g) finds it unnecessary to pass upon separately whether the ancillary sign requirement is consistent with Article III:4 or justified under Article XX(d) of the GATT 1994.

187. The Appellate Body recommends that the DSB request that Korea bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Korea's obligations under the GATT 1994 and the *Agreement on Agriculture* into conformity with its obligations under those Agreements.

Signed in the original at Geneva this 2nd day of December 2000 by:

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Claus-Dieter Ehlermann
Presiding Member

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Georges-Michel Abi-Saab
Member

Florentino P. Feliciano
Member