24 May 1989

REPUBLIC OF KOREA - RESTRICTIONS ON IMPORTS OF BEEF - COMPLAINT BY NEW ZEALAND

Report of the Panel adopted on 7 November 1989
(L/6505 - 36S/234)

INTRODUCTION

1. In August 1988 New Zealand and the Republic of Korea held Article XXIII:1 consultations concerning Korea's beef import restrictions. These consultations did not lead to a mutually satisfactory solution. New Zealand therefore requested the Council to establish a panel to examine the matter (L/6354).

2. At its meeting on 22 September 1988, the Council agreed to establish a panel and authorized its Chairman to designate the chairman and members of the Panel in consultation with the parties concerned (C/M/224, item 4). Australia, Canada, the European Community and the United States each reserved their right to make a submission to the Panel.

3. The following terms of reference were agreed upon:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by New Zealand in document L/6354 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings as provided for in Article XXIII:2."

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

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

5. The Panel met with the parties on 1 December 1988 and on 16 January 1989. It received third country submissions from Australia, Canada and the United States. Their views are summarized below in paragraphs 94-105. The Panel submitted its report on the dispute to the parties on 25 April 1989.

PROCEDURAL QUESTIONS

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

7. Korea put forward the following arguments for its request: since its accession to the GATT, Korea had applied restrictions on beef, among other products, under Article XVIII:B. Korea had regularly held consultations about these restrictions pursuant to Article XVIII:12(b), under the aegis of the GATT's Balance-of-Payments Committee. The most recent report of this Committee was issued as BOP/R/171 (1987). A new round of consultations was scheduled to take place in June 1989.

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

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

10. The Panel decided to make an immediate ruling on the question of admissibility as requested by Korea, as follows:

> "After deliberation the Panel came to the same conclusion as in the case of the United States/Korean Panel and in the case of Australian/Korean Panel, namely that it clearly has a mandate to examine the merits of the case in accordance with its terms of reference. The Panel also found that it cannot accede to the request of the Republic of Korea. The following considerations were taken into account by the Panel in arriving at its conclusions:
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> (a) At the GATT Council in September 1988, New Zealand requested the establishment of a panel under Article XXIII:2. The Republic of Korea agreed to this request. As is customary, the Panel was set up by the GATT Council by consensus. The Republic of Korea is a party to the consensus to set up the Panel under Article XXIII:2.
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> (b) The terms of reference given to the Panel, and agreed to by the parties as well as the Council, require the Panel to examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by New Zealand in document L/6354, and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.
>
> (c) The terms of reference do not give the Panel authority to rule on the admissibility of the claim."

FACTUAL ASPECTS

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

(a) General

12. Since its accession in 1967, Korea has maintained balance-of-payments (BOP) measures on various products. Since that year, and to date, Korea's BOP restrictions have been subject to regular review by the BOP Committee. During this period, Korea had abandoned or relaxed restrictions on some products. By 1988, restrictions for which Korea claimed BOP cover were still maintained on 358 items,

including beef. In 1979, the Korean tariff on beef was reduced from 25 per cent to 20 per cent and bound at that level. Korean beef imports increased from 694 tons (product weight) in 1976 to 25,316 tons in 1981, 42,329 tons in 1982 and 51,515 tons in 1983.[1] Increased beef supplies, due to rising domestic production and the higher level of beef imports, resulted eventually in falling prices on the Korean domestic market and mounting pressures from Korean beef farmers for protection from the adverse effects of beef imports.

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

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

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

15. Therefore, the BOP Committee "stressed the need to establish a clear timetable for the early, progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes. It welcomed Korea's willingness to undertake another full consultation with the Committee in the first part of 1989. However, the expectation was expressed that Korea would be able in the meantime to establish a timetable for the phasing out of balance-of-payments restrictions, and that Korea would consider alternative GATT justifications for any remaining measures, thus obviating the need for such consultations. The representative of Korea stated that he could not prejudge the policy of the next Government in this regard".[3] Moreover, members of the Committee had stated that "they did not necessarily expect Korea to disinvoke Article XVIII:B immediately …".

16. Economic indicators in Korea since its latest BOP consultations showed a continuation of the favourable economic situation of the recent past. Economic growth for the period January-September 1988 was expected to have reached 12 per cent as compared to the same period in 1987. Terms of trade improved by 2.5 per cent during the first nine months of 1988 while unemployment dropped from 4 per cent in 1985 to 2.6 per cent for the period January-September 1988. As regards BOP, the current account for the first nine months of 1988 showed a favourable balance

[1]Figures provided by the Republic of Korea.

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

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

of US$14.1 billion, compared to US$9.9 billion for the whole year of 1987. Official reserves (gross) passed from US$3.6 billion at the end of 1987 (enough to finance 1.1 months of imports) to US$12.3 billion at the end of 1988 (3 months of imports). Finally, the ratio of external debt to GNP decreased from 30 per cent in 1987 to 20.4 per cent for the period January-September 1988.[4]

(c) Korean beef production and imports

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

18. The success of the Korean programme led to a strong increase in domestic cattle numbers. Official Korean statistics showed that the beef cattle inventory nearly doubled between 1982 and 1986. The total beef inventory increased from 1,312,000 head on 1 January 1982 to 2,553,000 head on 1 January 1986. This build-up in cattle inventories eventually led to falling cattle prices. Livestock market prices for Korean native cattle (400 kg.) rose to a peak of 1.57 million won per head in February 1983 and then began to fall throughout 1984-1986, eventually reaching a low of 0.92 million won per head in February 1987.[6] The decline in cattle prices led to reduced profitability for cattle farmers.

(d) Korean beef import régime

(i) Import system prior to 1 July 1987

19. Prior to 1 July 1987, Korea's beef imports were governed by the Foreign Trade Transaction Act (as amended) which came into force in 1967. The Foreign Trade Transaction Act provided, inter alia, that the Minister of Trade and Industry was obliged to publicly notify the classification of (a) automatic approval import items; (b) restricted approval items; and (c) prohibited items. For restricted items, the Minister was required to lay down procedures controlling their import, including any restrictions on quantity. These arrangements were published in a consolidated public notice (the Export and Import Notice). Meat and edible offals were classified in 1967 as restricted items for the purposes of the Foreign Trade Transaction Act. As restricted products, beef could be imported on the recommendation of the National Livestock Cooperatives Federation (NLCF) subject to the guidelines of the Ministry of Agriculture, Forestry and Fisheries (MAFF), which controlled the quota allocation. If import levels became too high in relation to the level of consumption, imports could be adjusted or suspended.

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[4]Figures derived from tables in Annex II.
[5]Korean figure.
[6]Figures derived from National Livestock Cooperatives Federation statistics.

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

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

(ii) Current import system

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

- stabilize the prices of livestock products through smooth adjustment of supply and demand, supporting thereby, and at the same time, both livestock farmers and consumers; and

- contribute to improving the balance of payments.

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

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

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

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

MAIN ARGUMENTS

General

25. New Zealand argued that the Republic of Korea's restrictions on the import of beef constituted a prima facie breach of Korea's obligations under Articles XI:1 and II:4 of the General Agreement, that such measures nullified or impaired benefits accruing to New Zealand directly or indirectly under the Agreement, and that the Panel would be fully justified in suggesting to the CONTRACTING PARTIES that they recommend that the Republic of Korea bring their import regime relating to the meat of bovine animals into conformity with the General Agreement. New Zealand further argued that these restrictions could be justified neither under the exceptions of Article XI:2 nor under those of Article XVIII:B, nor any other provision of the GATT.

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

Article XI:1

27. New Zealand argued that, according to Article XI:1, Korea was entitled to maintain its bound duty of 20 per cent on imports of the meat of bovine animals. However, Korea retained a web of additional restrictions that severely depressed the level of imports beyond that which would pertain were only the 20 per cent duty to be levied, and also seriously distorted the pattern of trading opportunities within these severely depressed overall levels of imports. These additional restrictions were clearly contrary to the provisions of Article XI:1.

28. New Zealand argued that the suspension of import licences for almost four years from 1984 to 1988 constituted an effective prohibition on imports. This was so even during the early period of the prohibition when, for seven months, Korea allowed some imports to enter the tourist hotel sector. The Panel Report "Japan - Restrictions on Imports of Certain Agricultural Products"[7] established that where imports were confined to a certain segment of the market and not permitted to enter the general commerce of the importing country, a de facto prohibition could be said to exist. When Korea, seven months later, closed even the hotel trade, it was thus simply reinforcing what in GATT terms was already a de facto import prohibition on beef. Such restrictions were contrary to the letter of Article XI:1.

29. It was not necessary in terms of Article XI:1, New Zealand asserted, to consider whether the recent authorization of imports had in fact terminated the de facto import prohibition maintained for four years. Such was the complexity of current Korean restrictions operated by the LPMO that it was extremely doubtful whether it could be said that all imports of the meat of bovine animals could currently enter the general customs tariff territory of Korea. However, Article XI:1 referred not simply to prohibitions but also to "restrictions" other than bound duties. In considering events since limited imports were resumed in August 1988, the questions were thus: (a) did Korea continue to adopt measures, additional to the 20 per cent tariff rate, which restricted imports? and (b) were such measures inconsistent with accepted interpretations of Article XI:1?

30. The answer to both questions, New Zealand believed, was affirmative and flowed directly from the description of the Korean import regime, the essential features of which had remained the same before the import prohibition, during the prohibition and under the present import regime. First, the fact that imports were restricted by administrative/political decisions to a ceiling - any ceiling - beyond which import licences would not be issued in 1988 indicated the existence of a restriction in addition to the bound tariff. This was a prima facie breach of Article XI:1. The restrictions not only depressed the level of imports, they also restricted the types of beef imports. The binding on item 0201.10 in the Korean schedule related to all imports of the meat of bovine animals. There was no distinction in this tariff item between so-called "high-quality" and other beef, or between "grain-fed" and "grass-fed", or between different cuts or specifications of meat. The obligation to apply only the restriction of a 20 per cent tariff applied to all imports of the meat of bovine animals. Yet, there was a morass of additional restrictions drawing such distinctions, imposing prices at which the product could be sold onto the domestic market, and dictating when imports could take place. These were all made effective through the LPMO, which had a monopoly over beef imports.

31. These restrictions conflicted directly with Korea's obligations under Article XI:1 because the LPMO was clearly a state-trading enterprise within the meaning of Article XVII, and the Interpretative Note to Article XI:1 stated that: "… the terms "import restrictions" … include restrictions made effective through state-trading operations". In brief, such restrictions were prohibited.

[7] L/6253, page 68.

32. New Zealand argued that the LPMO, established under the legislative authority of the Foreign Trade Act 1986, had a monopoly on the import of beef. Although the LPMO was not a state-owned enterprise it was covered by the provisions of Article XVII since in 1960 a Panel on State-Owned Enterprises concluded that "[n]ot only State enterprises are covered by the provisions of Article XVII, but all enterprises which enjoy "exclusive or special privileges".[8] Since an import monopoly was an "exclusive or special privilege", the LPMO was an enterprise of the type covered by Article XVII. Restrictions made effective through its operations were thus of the type captured by the Interpretative Note to Article XI:1. The current restrictions which were made effective by the operations of the LPMO since August 1988 therefore meant that Korea remained as much in conflict with its obligations under Article XI:1 as when all imports were suspended.

33. Korea did not deny that the beef restrictions maintained by Korea were contrary to the provisions of Article XI but claimed that they were justified under Article XVIII:B. Moreover, Korea argued that it was important to stress that the LPMO mechanism did not represent a separate import restriction. The LPMO simply had no authority to set or modify quantitative limitations on beef imports. Nor was the LPMO charged with making recommendations to the government on the appropriate level of imports. Rather, the LPMO administered the importation of beef within the framework of quantitative restrictions set by the Korean Government. Since the LPMO was just an implementing mechanism, the LPMO's objectives did not affect the justification of the Government's restrictions on beef imports.

Article II

34. New Zealand argued that the relevant legal consideration, as far as Article II:4 was concerned, was the size of the mark-up on imported beef and whether this mark-up was "in excess of the amount of protection provided for in (Korea's) schedule". That latter protection was 20 per cent. The fact that (for a certain percentage of sales of product for which LPMO had monopoly import rights) onward selling occurred via an auction system did not modify the obligation to limit the margin of protection to 20 per cent (with due allowance for costs, etc.). This was the inescapable consequence of having accepted a GATT binding. It was no defence to argue that there was an "auction" system involved. In any case, the auction system at wholesale level was not operating in a free market. There was a monopolistic supplier exercising its market power by means of the auction system. Where the right to import was in the hands of a single seller, an auction arrangement was in fact a highly potent device to maximize returns from a monopolistic market power. Apart from this, 63 per cent of grass fed beef was sold directly quite outside the auction system, and the attempted "defence" of an "auction system" could not even be resorted to for these sales.

35. As the Canadian Liquor Panel[9] had made clear, New Zealand further argued, the defence that "revenue maximization" was a "normal commercial consideration" was rejected. The panel there considered that a "monopoly profit margin on imports resulting from policies of revenue maximization (by provincial liquor boards) could not normally be considered as a "reasonable margin of profit" in the sense of Article II:4". Based on a reading of Article II:4 and Article 31 of the Havana Charter, the Canadian Liquor Panel considered that "a reasonable margin of profit was a margin of profit that would be obtained under normal conditions of competition (in the absence of a monopoly)".

[8]BISD, 9S/180 paragraph 8.

[9]Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, L/6304.

36. New Zealand considered that the protection afforded by the LPMO clearly restricted trade in the bound item. More specifically, while New Zealand had not won any of the first few tenders from the LPMO[10], New Zealand understood that the LPMO applied a type of surcharge to all imported beef leaving its storage facilities to ensure that the price on imported beef was the same as the domestic price. Reportedly, such mark-ups had, on occasion, been very substantial. According to Korean end-users, the LPMO imposed a surcharge of 20-200 per cent of c.i.f. value on top of the 22.5 per cent tariff and tax. Estimates made by New Zealand for the period August-November 1988 indicated mark-ups on grass fed beef in the order of 47.1 per cent to 133.6 per cent. For instance, beef which had an average November tender price of 1,589.9 won/kg was, New Zealand estimated, released to the NLCF at a price as high as 5,384 won/kg. The margin between the landed cost (even allowing for relevant charges, etc.) and the wholesale price was considerable. New Zealand was aware of at least one example where an import shipment with a tender price of US$4,000/ton was auctioned through the LPMO at US$10,000 in mid-1988. That which was not auctioned was released to the trade at US$7,953 by late 1988. Even the very selective information produced by Korea indicated that the 11 November auction prices for two of the three categories reflected a 41.7 per cent and 30.9 per cent mark-up. The application of mark-ups over and above the amount of protection provided in the Korean Schedule constituted a clear violation of Article II:4.

37. Korea replied that as long as it maintained quantitative restrictions justified under Article XVIII:B, these had to be administered. That was to say, these restrictions had to be allocated among the different suppliers. Article XVIII:B referred to Article XIII, which laid down principles to avoid discrimination among foreign suppliers who wanted to export beef to the country that applied quantitative restrictions. Article XIII was not the only standard that a country had to observe when it imported products which it had subjected to restriction. The importing country had to continue to observe its tariff bindings as well, even if it had GATT justification to subject the products concerned to quantitative restrictions. Thus, while Article XVIII permitted a country to impose quantitative restrictions for BOP reasons, it did not make allowance for surcharges that increased import duties above the level bound in GATT. This was clearly established by the working party that reviewed the tariff surcharge imposed by the United States for BOP reasons in 1971.[11]

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

[10]Some tenders had, subsequently, been awarded to New Zealand.

[11]United States Temporary Import Surcharge, BISD 18S/213, 223.

Article X

39. New Zealand alleged that Korea's administration of beef import restrictions violated the provisions of Article X, which required contracting parties to publish promptly all rulings and requirements pertaining to restrictions on imports "… to enable governments and traders to become acquainted with them". New Zealand considered that there had been a noticeable lack of transparency in the administration of Korean measures affecting beef imports.

Article XIII

40. New Zealand argued that the Interpretative Note to Article XI referred to above applied also to Article XIII, i.e., the LPMO and its predecessors (NLCF, KTHSC) had to be operated in a way consistent with Article XIII. This meant, inter alia, that the restrictions imposed by such state-trading enterprises had to conform to the requirement in paragraph 3(b) to give "… public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period …". For the same reasons as discussed above in relation to Article X, New Zealand considered that Korea had been in breach of its obligations under this provision of the General Agreement.

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

Article XVIII:B

(a) Procedural aspects

42. The Republic of Korea argued that New Zealand could not challenge the compatibility with the GATT of Korea's restrictions under Article XXIII because of the existence of special review procedures in Article XVIII:B as well as the actual results of these review procedures. Korea referred to a recent panel case[12] in which the United States had challenged tariff preferences on citrus fruit granted by the European Community to certain Mediterranean countries with whom it had concluded free trade agreements. The Community argued in that case that the United States complaint was inadmissible under Article XXIII. It referred to Article XXIV:7 which in the Community's view represented the exclusive mechanism to review the consistency of the tariff preferences and the underlying free trade agreements with the GATT. The panel admitted the United States complaint, but refused to consider its merits under Article XXIII:1(a). Instead, the panel reviewed the merits of the United States complaint exclusively under Article XXIII:1(b), limiting its review to the issue of "non-violation" nullification or impairment.

43. Korea therefore argued that New Zealand would have to make a showing of "non-violation" nullification or impairment. Referring to the above-mentioned panel case in which the panel considered that "the practice, so far followed by the CONTRACTING PARTIES never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT compatibility of measures subject to special review procedures was sound"[13], thus ruling out the consideration of the United States complaint under paragraph 1(a) of Article XXIII, Korea argued that if Article XXIV:7 was deemed a special review procedure as in the above-mentioned case, Article XVIII:12 a fortiori set forward such procedures.

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

[13]Idem, paragraph 4.16.

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

45. New Zealand replied that Korea was attempting to use some of the isolated judgments of the Citrus Panel report - which was never adopted and thus had no standing in the GATT - out of context and was seeking to apply such judgments to a very different matter involving the relationship of the BOP Articles with Article XXIII. The Citrus Panel report concerned a wide-ranging complaint by the United States that a series of tariff preferences extended by the European Community to a number of Mediterranean developing countries were contrary to Article I:1. It involved a consideration of the relationship of Article I:1 to Article XXIV:7. The United States put its primary emphasis on a prima facie breach, in terms of Article XXIII:1(a). But the United States also agreed the panel could make findings of a non-violation type under Article XXIII:1(b) or (c). The European Community, the defending country, objected to the panel considering the matter under Article XXIII:1(b). The Citrus Panel chose to make its findings under Article XXIII:1(b) and concluded that "… the benefit accruing to the United States directly or indirectly under Article I:1 has been impaired as a result of the EEC's application of tariff preferences".

46. In New Zealand's view, the relationship between the European Community's preferential arrangements entered into under Article XXIV:7 and Article I was extremely complex. Faced with the dilemma, the panel chose to find in favour of the complaining party (the United States) by avoiding the issue as to whether the European Community's preferential arrangements were or were not in conformity with the European Community's obligations under Article I. The panel's stated reason was "… the practice never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT conformity of measures subject to special review procedures …".[14] The "practice" to which paragraph 4.16 referred reflected nothing so much as that contracting parties had not - for whatever reason - actually had occasion to take a case under Article XXIII where a so-called "special review" procedure existed. There were no logical or legal grounds upon which to elevate that fact into a "principle" that this should not occur. It was not hard to see what the logical consequences of such an approach would be. Any case brought on a demonstrably novel issue could be claimed not to have a precedent to warrant its coverage under Article XXIII and avoid dispute settlement. Any claim that Article XXIII did not apply could not be based on conjecture or an unsubstantiated assertion concerning what lay behind the fact that there were no precedents. It was necessary to adduce specific evidence that Article XXIII did not apply, and that the Article was drafted to exclude it. New Zealand observed also that the Citrus Panel report was not adopted. It thus had no GATT standing. Even if this matter concerned an Article XXIV:7 complaint, rather than BOP, the Citrus Panel reasoning would be without legal standing.

47. Korea replied that the Citrus Panel report highlighted the rule at issue in the present case in general terms. The report then went on to consider the specific relationship between Articles XXIV:7 and XXIII. Korea considered it was significant that New Zealand declined to take issue with the general rule, but rather confined itself to a discussion of the rule's application to the specific relationship between Article XXIV:7 and XXIII.

48. New Zealand argued that the Panel would no doubt be conscious of the implications for the General Agreement of applying Korea's reasoning to measures reviewed by the BOP Committee as notified under Articles XII and XVIII. To uphold the application of this reasoning would be to assert the primacy of review procedures open to the BOP Committee over GATT's central dispute settlement provision

[14]Citrus Panel Report, L/5776, paragraph 4.16

of Article XXIII. The practical consequences could be all too easily sketched. In short, acceptance of the Korean logic would lead to the absurd position where contracting parties wishing to use the exemption provided by GATT's BOP provisions could ensure that the GATT consistency of the measures could never be challenged provided the purely formal requirement of a review were met.

49. In response, Korea took issue with New Zealand's claim that the BOP Committee process could be abused this easily by a country claiming BOP cover for a trade restriction. Korea also rejected any suggestion that it had abused the BOP Committee process. Furthermore, New Zealand failed to make a clear distinction, according to Korea, between the BOP Committee's review procedures under Article XVIII:12(b) and the as yet uncharted involvement of the BOP Committee in the implementation of Article XVIII:12(d). Finally, Korea argued, that the possibility of abuse could never be a justification for not applying a binding rule, in this case Article XVIII:12(d).

50. Referring to the Indian Almonds case[15], New Zealand argued that there could be no doubt that the decision by the Council to establish a panel at the request of the United States, after a long debate, reflected a consensus by the CONTRACTING PARTIES that the provisions of Article XXIII, including paragraph 1(a), applied in all respects to matters which had been considered in the BOP Committee under Article XVIII:B and where the complaining party had made it clear it was alleging a prima facie breach of GATT rules, specifically Article XI:1. Other third parties took positions on both sides of this issue while New Zealand stated that "… there were no grounds for the view that Article XXIII:2 did not apply to all GATT provisions".[16] The fact that the Indian Almonds panel did not run its course, did not alter the conclusion that the argument which Korea was presenting had already been considered in the fullest way by the CONTRACTING PARTIES and settled once and (hopefully) for all. Were the Panel to accept the Korean argumentation it would be directly contrary to this decision. The Council had established the present panel to consider New Zealand's complaint on Korea's beef restrictions under Article XXIII. There were no qualifications attached by any contracting party, including Korea. New Zealand therefore urged the Panel to uphold the primacy of GATT's dispute settlement provisions over the review provisions of the BOP Committee. New Zealand considered it had every right to request the Panel to consider the matter pursuant to Article XXIII:1(a) and make a ruling on the GATT conformity of the Korean measures.

51. Korea replied that it did not agree with New Zealand's claim that the Council had settled the relationship between Articles XVIII:12(d) and XXIII once and for all in favour of Article XXIII when it established a panel in the recent Indian Almonds case. While the issue was raised when the United States requested a panel to review import restrictions on almonds maintained by India, the Council drew no conclusion at the time. The discussions in the Council did reveal that the relationship between Articles XVIII:12(d) and XXIII was controversial. Thus, the Indian Almonds panel was set up with standard terms of reference. And, as in the present case, these terms did not exclude review of Article XVIII:12(d) in relation to Article XXIII. Accordingly, the Council at that time gave no guidance as to how the issue should be resolved, and certainly did not decide the issue. And because the dispute between the United States and India appeared to have been subsequently settled, there was no panel report that shed any light on the issue.

[15]India - Import Restrictions on Almonds, C/M/215, pages 5-7.
[16]C/M/213, page 16.

52. If the Panel were to review New Zealand's complaint under the standards of Article XXIII, Korea argued, the Panel would be agreeing that New Zealand and any other country that wanted to challenge a BOP measure could choose to ignore Article XVIII:12(d). By doing so, the Panel would render these provisions obsolete. The general procedure of Article XXIII would thus supersede the special review procedure of Article XVIII:12(d). Accordingly, by reviewing New Zealand's complaint under the standards of Article XXIII, the Panel would effectively amend the General Agreement.

53. Consequently, Korea argued, in accordance with the long-standing practice of the CONTRACTING PARTIES, New Zealand was not entitled to complain about the possible inconsistencies of the disputed beef restrictions with provisions of the General Agreement pursuant to Article XXIII:1(a). Instead, New Zealand would have to show that Korea's restrictions on beef imports constituted "non-violation" nullification or impairment under Article XXIII:1(b) or (c). Korea asserted that there was no hard and fast rule as to how a showing of "non-violation" nullification or impairment was to be made. What was clear was that the complaining party had to provide a "detailed justification".[17] To date, New Zealand had not provided any such justification.

54. Korea also argued that, in the Citrus case, the panel arrived at its conclusion of "non-violation" nullification or impairment by inquiring whether, inter alia, the disputed restrictions could have been reasonably anticipated by the United States, the complaining party. This panel did not find that the disputed measures could not have been reasonably anticipated by the United States.[18] Likewise, in the present case, New Zealand could not claim that it could not have reasonably anticipated Korea's restrictions on beef imports since Korea had maintained these restrictions since its accession to the GATT, and had regularly consulted about them under Article XVIII:B.

55. New Zealand replied that the assertion that to allow Article XXIII to be used would be to "negate" the procedure of Article XVIII:12(d) was logically and legally incorrect. A case taken or a finding made under XXIII would simply mean nothing more nor less than that the GATT provisions on nullification and impairment applied. It would involve no legal finding to the effect that it would have been improper for any contracting party to have resorted to Article XVIII:12(d) on any issue as and when it saw fit. On the contrary, it was Korea that was insisting that Article XVIII:12(d) was exclusive, and that Article XXIII could not apply. It could find no provision in the General Agreement or agreed interpretation of the contracting parties to support such a view.

56. New Zealand further recalled that the 1950 Working Party report, "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes", stated in paragraph 23 that the "… misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes". Article XVIII:B was modelled closely on Article XII, with certain changes made to take account of the special needs of developing countries. In the absence of specific language or understandings to the contrary, it had to be presumed that the above 1950 requirement, which was not qualified so as to exclude any part of the GATT dispute settlement procedures (i.e. it did not state - "except for Article XXIII:1(a)"), applied equally to Article XVIII:B.

57. Korea replied that the 1950 Working Party report reflected the economic position of the European countries in the years just after World War II. For various reasons these developed countries, which had been heavily affected by the war, maintained import or export quotas. The report disapproved of the use of quantitative restrictions for protective and other commercial reasons, that is, for reasons not justified under the GATT. The preface of the report indicated that some quantitative restrictions

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

[18]L/5776, paragraphs 4.32 and 4.33.

remained in force after the need for them had disappeared, and that some of the quantitative restrictions originally applied for financial reasons were retained to protect domestic producers against foreign competition. Any individual contracting party which considered that such a situation existed and that its trade was harmed thereby could have recourse to the complaint procedure of the General Agreement, according to the Working Party. This report was the first signal of the problems which the GATT was beginning to experience with so-called "residual" restrictions.

58. Korea then argued that none of the GATT precedents addressed the fundamental issue in this case. If the complaint of New Zealand were reviewed under Article XXIII, no country would ever consider invoking Article XVIII:12(d). Korea had pointed out that Article XVIII:12(d) made it rather difficult for a country to complain about a BOP measure that had been reviewed by the BOP Committee. In fact, the requirements of this provision were rather more difficult to satisfy for a complaining country than the requirements of Article XXIII. There were good reasons for these differences. When countries applied restrictions under Article XVIII:B and held regular consultations concerning these measures with a qualified GATT Committee that took into account the relevant findings of the International Monetary Fund, they had a legitimate expectation that these measures could not simply be challenged under the relatively loose requirements of Article XXIII regarding nullification or impairment. Otherwise, the exercise of multilateral surveillance would become meaningless. Moreover, if the Panel reviewed New Zealand's complaint under Article XXIII it agreed that New Zealand and any country that wanted to challenge a BOP measure could choose to ignore Article XVIII:12(d). This would negate the procedure of Article XVIII:12(d), and amount to an improper amendment of the GATT, in violation of Article XXX.

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

60. New Zealand replied that Article XXIII was worded in a general manner and clearly applied to all areas of the Agreement. Nowhere did Article XXIII state that it did not apply to Article XVIII. Nor was it stated in Article XVIII that that Article overrode Article XXIII. Against this background, it was not at all surprising to see that paragraph 1 of the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes[19] stated:

> "The application of restrictive import measures taken for balance-of-payments purposes shall be subject to the following conditions in addition to those provided for in Articles XII, XIII, XV and XVIII without prejudice to other provisions of the General Agreement …"

61. This self-explanatory section received further emphasis by the additional statement in paragraph 1 that "[t]he provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement". To uphold the view that the Panel could not consider New Zealand's complaint under the key provision of Article XXIII:1(a) would be precisely to modify the substantive provisions of the General Agreement. It would be tantamount to saying that the key substantive provision of Article XXIII:1 did not apply to Article XVIII:B. Moreover, New Zealand said, the drafters clearly envisaged that there would be cases where Article XVIII was claimed but did not apply. No complainant should be prohibited from invoking Article XXIII to pursue this and be obliged a priori to concede Article XVIII cover in the first place. Korea itself had, in New Zealand's view, provided vindication for the approach of New Zealand in stating that "[i]t (i.e. Korea) did not pretend that the intensification

[19] BISD 26S/205, 206.

of its BOP restrictions was motivated by a worsening of its BOP situation and hence did not notify the measures pursuant to Article XVIII:12(a)". Thus, even in the eyes of Korea, it did not have clear Article XVIII:12 cover for its measures. Korea could hardly now expect that New Zealand should have taken any different view and utilized Article XVIII:12(d), thereby granting a status to the measures that not even the imposing contracting party itself was prepared to claim.

62. Korea replied that it failed to see any discussion of, let alone decision on, the relationship between Articles XVIII:12(d) and Articles XXIII in the passage cited from the 1979 BOP Declaration. Korea also expressed doubts that where paragraph 1 referred to "substantive provisions", the drafters had in mind the procedural dispute settlement provisions of Article XXIII. Moreover, Korea disagreed with New Zealand's claim that, in the event the Panel would not consider the GATT compatibility of Korea's beef restrictions, this would modify any provision of the General Agreement. On the contrary, if the Panel were to review New Zealand's complaint under the standards of Article XXIII, this would render Article XVIII:12(d) obsolete.

(b) Justification for restrictions

63. Korea argued that it could be that the present Panel, notwithstanding the Citrus Panel report and Korea's arguments, believed that the mere existence of special review procedures in Article XVIII:B would not prevent New Zealand from challenging the GATT compatibility of Korea's restrictions under Article XXIII. In that event, Korea submitted that the actual results of the regular consultations under Article XVIII:B still blocked a challenge of the GATT compatibility of its restrictions. Korea further argued that the GATT CONTRACTING PARTIES had authorized its restrictions on beef imports under Article XVIII:B. Korea had maintained BOP restrictions on various products since its accession to the GATT. The number of restricted imports had, however, gradually been reduced in recent years, and currently some 358 mainly agricultural products remained subject to restriction, including beef. Over the years, Korea had regularly consulted about these restrictions under Article XVIII:B. The justification of its restrictions had not been called into question until the last round of full consultations in December 1987.[20] In those consultations, the "prevailing view" as reported by the BOP Committee, was that import restrictions "could" no longer be justified under Article XVIII:B.[21] It was clear that, for the first time, the BOP Committee thereby expressed doubts about the future justification of Korea's BOP restrictions. Yet, it was equally clear that the BOP Committee did not make a finding that the present or past application of Korea's BOP restrictions was inconsistent with Article XVIII:B.

64. New Zealand recalled that in 1987, the BOP Committee concluded as follows:

> "The prevailing view expressed in the Committee was that the current situation and outlook for the balance-of-payments was such that import restrictions could no longer be justified under Article XVIII:B."

Events since then had, in New Zealand's opinion, served only to reinforce the Committee's prevailing view. There was no justification under Article XVIII:B for any GATT-inconsistent import restrictions and New Zealand was confident that the Panel could only uphold the Committee's prevailing view in its findings. In order to uphold the Korean case, the Panel would have to disagree with that "prevailing view". The Panel, of course, had every right to do so for the precise reason that New Zealand had asked for a ruling on the GATT consistency of restrictions maintained on beef imports. The very fact that New Zealand had asked for a panel to make a finding was evidence that the issue was not settled in a strict legal sense. New Zealand was confident that the Panel would conclude what

[20]See, e.g., BOP/R/163 (23 October 1986); BOP/R/146 (15 November 1984).
[21]BOP/R/171, paragraph 7 (10 December 1987).

clearly a "number" (it must, by definition, have ranged from a majority of committee members to all but Korea) of committee members had already concluded. But until the Panel did so on behalf of the CONTRACTING PARTIES, the legal consistency of Korean measures on beef with respect to Article XVIII:B remained open.

65. Korea asserted that the Committee's language was more guarded than New Zealand suggested. Also, if the Committee had established any inconsistency regarding Korean BOP restrictions, it would have made explicit recommendations to that effect to the Council.[22] Perhaps even more significantly, the BOP Committee report stated that the Committee "did not necessarily expect Korea to disinvoke Article XVIII:B immediately, but to establish a clear timetable for the phasing out of remaining restrictions maintained for balance-of-payments purposes".[23] In other words, the BOP Committee accepted that Korea could still benefit from the cover of Article XVIII:B for some limited time to come. Indeed, Korea was currently preparing for further consultations under Article XVIII:B in June 1989. These would be meaningless if Article XVIII:B was no longer available to Korea, as New Zealand claimed. The BOP Committee reviewed restrictions under Article XVIII:B on behalf of the CONTRACTING PARTIES.[24] Since Korea's accession to the GATT, its restrictions under Article XVIII:B had been regularly examined and the application of Article XVIII:B had never been disapproved. Korea respectfully submitted that the Panel could not, with retroactive effect, substitute its own judgment for that of the CONTRACTING PARTIES.

66. As concerned the claim by Korea that its beef measures had been authorized by the BOP Committee, New Zealand replied that this view was quite without legal foundation. New Zealand subscribed firmly to the view, made explicit recently by Canada and recorded in the extensive background note prepared on Articles XII and XVIII:B by the secretariat for the Negotiating Group on GATT Articles, that: "… review of such restrictions by the Balance-of-Payments Committee, and adoption by the Council of the Committee's Report, [does] not constitute acceptance that they [are] consistent with GATT".[25] The word "adopted" was a carefully chosen one. It was not intended to settle, one way or the other, the GATT legality of each and every aspect of a BOP Committee report. Thus, the Korean claim that the CONTRACTING PARTIES had "authorized" these restrictions through the BOP Committee was a misinterpretation of the word "adopted".

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

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[22]See Declaration on Trade Measures Taken for Balance-of-Payment Purposes, BISD 26S/205, 209, paragraph 13.

[23]BOP/R/171, paragraph 9.

[24]See Note by the Chairman of the Committee on Balance-of-Payments Restrictions, BISD 18S/48, 51, paragraph 10.

[25]MTN/GNG/NG7/W/46, page 22.

68. New Zealand replied that it was claiming that the measures under the terms of reference were not consistent with the GATT. Korea had chosen to defend the measures under consideration on grounds of Article XVIII:B. New Zealand for its part did not consider that Article XVIII:B applied, both because the measures were not for BOP purposes and because Korea did not have a BOP problem as claimed. Furthermore, if a panel was to refrain from examining or finding on a particular case on grounds that this might have implications for other products or other contracting parties, the GATT dispute settlement process would not operate and would be rendered meaningless.

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

70. New Zealand replied that before the Panel could take a view on a particular measure's consistency with the various specific conditions of Article XVIII:B, it would need to be convinced that the country had a BOP problem in the first place. But the GATT was very precise in defining what constituted a BOP problem. It was defined in Article XVIII:9 by reference to "monetary reserves". GATT panellists, when they were drawn from CONTRACTING PARTIES, tended to be trade policy experts, not international monetary experts. Thus, a panel asked to make a finding on the basis of Article XVIII:9 was fully entitled to seek the advice of such experts through the explicit link between Articles XVIII:9 and XV:2. Seeking an updated view from the IMF was not, as Korea suggested, a mandatory requirement. The provision of Article XV:2 could be considered already met by the 1987 consultations with the IMF. But a good deal had happened to Korea's foreign exchange position in the last two years. New Zealand would thus consider it advisable to seek renewed advice. But that was for the Panel to determine and would indeed be unnecessary if the Panel had already concluded that Korean measures on beef were not being maintained for BOP reasons.

71. In response, Korea argued that the determination rendered by the IMF in 1987 plainly did not hold that Korea's BOP restrictions were unjustifiable under Article XVIII:B. Even assuming therefore that "updates" fell outside the purview of Article XV:2 (which Korea contested), New Zealand was not seeking an update in this case. In order to rule against Korea on the GATT compatibility of its restrictions under Article XVIII:B, the Panel would need a binding determination from the IMF pursuant to Article XV:2 that Korea's BOP position no longer justified restrictions. That would not be an "update". That would require the IMF to reach a very different conclusion from the one which it had reached in the past. Furthermore, Article XXIII:2 was not dispositive regarding the powers of a panel to initiate consultations independently with the IMF. The determinations of the IMF under Article XV:2 bound the CONTRACTING PARTIES. Thus, if this Panel were to obtain determinations from the IMF, these determinations would bind, among others, the BOP Committee. Yet, Korea expressed doubts whether the GATT and the IMF really envisaged that various GATT bodies could independently request binding determinations on BOP issues. In this connection, Korea recalled that the CONTRACTING PARTIES had specifically authorized the BOP Committee, in its work under Article XVIII:12(b), to consult with the IMF pursuant to Article XV:2.[26] Furthermore, Korea referred to the Working Party which had examined the BOP surcharge imposed by the United States in 1971. This Working Party was also specifically authorized by the CONTRACTING PARTIES to consult with the IMF.[27]

[26]BISD 26S/205 and BISD 18S/48, 51 (1972).
[27]BISD 18S/212, 213.

72. Should the Panel wish to proceed with a request for such consultations with the IMF, New Zealand asserted that there were no grounds for the Korean suggestions that it would have to seek authorization from the CONTRACTING PARTIES before doing so. The Panel had been established pursuant to Article XXIII:2. This Article stated that "the CONTRACTING PARTIES may consult … with any appropriate intergovernmental organization in cases where they consider such consultation necessary". CONTRACTING PARTIES in the context of the second and third sentences of Article XXIII:2 meant a panel or working party; they clearly had the authority as the non-mandatory language above implied.

73. New Zealand also argued that Article XVIII:4(a) allowed a temporary departure from the provisions of the other articles of the General Agreement. Further, Korea had been subject to the consultation provisions of Article XVIII:B for a number of years and had sought to justify import restrictions under the provisions of this Article. However, it should be noted that there were three general tests (and additional specific criteria) that had to be met, if these measures were to be justified in terms of Article XVIII:B:

(a) Korea would have to establish that it was a country "which can only support low standards of living", in terms of the language in Article XVIII:4(a);

(b) Korea would have to establish that it was still experiencing balance of payments difficulties; and

(c) Korea would have to prove that its restrictions were currently necessary to prevent a serious decline in Korea's monetary reserves, in terms of the language in Article XVIII:9.

Were the Panel to consider that any one of these conditions were not fulfilled, Korea could not justify its GATT-inconsistent restrictions by reference to Article XVIII:B.

74. New Zealand further contended that Korea was no longer experiencing BOP difficulties. In recent BOP consultations Korea had acknowledged its current account surpluses but had suggested that the CONTRACTING PARTIES should not read too much into the results of one or two years. New Zealand considered this to be most misleading: the strengthening of Korea's BOP position was now approaching a decade in duration, and macroeconomic analysis by the IMF[28] indicated that this secular improvement was based not on some short-term cyclical upturn in Korea's terms of trade, but on fundamental structural factors, principally sound macroeconomic management by the Korean authorities, and an extremely high savings rate. The charts prepared for the 1987 BOP consultation with Korea showed that there had been an uninterrupted improvement in Korea's current account position every year since 1980. Since then, this pattern had consolidated further. The Bank of Korea had provided a provisional estimate of a current account surplus of US$10 billion for 1987.[29] The Financial Times of 29 October 1988 quoted the Bank of Korea Governor estimating a surplus of US$9.4 billion for the nine months to date - implying an annual surplus of US$12 billion. This had permitted an accelerated programme of debt repayment such that the Bank of Korea expected Korea to become a net creditor nation in the fourth quarter of 1989 at the earliest, or in the first half of 1990 at the latest.[30]

[28]BOP/R/171, paragraph 22.
[29]Korea Times, 18 August 1988.
[30]Idem.

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

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

77. New Zealand considered that the restrictions on beef imports were for the purpose of protecting Korea's cattle farmers. Yet, Article XVIII:2 specified that the application of quantitative restrictions should be for BOP purposes (emphasis added). The 1955 Review[31] clarified that this "purpose" was the relevant criterion "by which the contracting parties would be considered to be entitled to the facilities of this Article". The 1979 Declaration on Trade Measures[32] also stated that restrictive import measures "should not be taken for the purpose of protecting a particular industry or sector". It was thus clear that contracting parties did not have to accept a simple claim of Article XVIII:B justification for particular measures as determinative. Rather, there was a means to distinguish legitimate and illegitimate claims. In New Zealand's view, the standard of "purpose" was an essential test for whether particular measures could be justified under Article XVIII:B.

78. New Zealand submitted documentation indicating the purpose of the Korean measures as revealed in:

(a) Government statements which specified that the purpose of the imposition and maintenance of restrictions within the period under review was to protect the industry and not to meet BOP objectives (e.g. "it has been consistent Korean policy that the Korean Government will resume the importation of HQB [high-quality beef] once the domestic situation improves e.g. after domestic prices recover" and "the Republic of Korea Government plans to resume the importation of beef by May 1988 as domestic cattle prices appear to be stabilizing";

(b) The organizational structure and procedures relating to the application of import measures revealed no evidence that the grounds for application of import restrictions were fundamentally linked to BOP factors but rather to the protection of the beef sector, e.g. import tenders being called "in light of the supply and demand situation" and made in consultation with MAFF (not e.g. Finance Ministry) and the revealing terms of Korea's 1984 subsidies notification, L/5603/Add.13);

[31]Working Party Report on Quantitative Restrictions, BISD 3S/188 (1955).
[32]BISD 26S/205.

(c) The objective circumstances, which showed a clear correlation of restrictive import measures with trends affecting industry protection rather than BOPs (e.g. positive correlation of increased protection against imports with downward domestic prices and negative correlation with evolution of the BOP situation).

79. Korea argued that the fact that the restrictions on beef imports had protected Korea's cattle farmers did not render Article XVIII:B inapplicable. Trade restrictions imposed for BOP reasons had protective side effects and tended to favour specific industries. The point remained, however, that the GATT as it was originally drafted, and as it stood today, did permit the use of trade restrictions for BOP purposes and thereby accepted such protective side effects. Referring to New Zealand's claimed that "the suspension of imports is thus clearly explained by agricultural policy decisions, not by foreign exchange developments" Korea contended that such an assertion ignored the fact that restrictions imposed for BOP reasons could and did have side effects. Indeed, Korea had never concealed that the BOP measures on beef protected its cattler farmers.

80. New Zealand replied that it was indeed true that trade restrictions taken for legitimate BOP reasons had protective side-effects. It was also true that a contracting party imposing trade restrictions for protective reasons could claim, after the event, that they were taken for BOP reasons. In terms of the GATT, the first was legal, the second was not. The Panel had to decide which was the case here. It involved a judgment about intentions. Moreover, as mentioned above it was clear from the documents submitted to the Panel that the reason for restrictions on beef was not BOP difficulties, but the protection of domestic cattle prices.

81. Korea submitted that when it acceded to the GATT in 1967, the restrictions which it imposed for BOP reasons (on imports of beef, among numerous other products) were justified under Article XVIII:B. This had never been contested, and to do so now would amount to a retroactive withdrawal of the Article XVIII:B cover from all its BOP restrictions. On the other hand, New Zealand could be making a different and more modest claim. It could be saying that the restrictions on beef imports as such were justified under Article XVIII:B, but that the intensification of these BOP measures in 1984/85 was not. In this connection, New Zealand had pointed out that Korea's BOP position was improving. That might indeed seem contradictory. But one had to appreciate that Korea was then faced with an unprecedented situation. In conjunction with its general liberalization efforts, Korea relaxed its restrictions on beef imports in the early 1980's. There were differences between products in this process. Some BOP restrictions were eliminated altogether. Some, like those on beef imports, were not removed but relaxed. This was consistent with the GATT which did not require that all BOP restrictions be terminated at once. In deciding which BOP restrictions could be eliminated and which should be maintained or relaxed, so as to ensure an adequate BOP position overall, Korea obviously took into account the state of the various domestic industries that would be affected by these liberalization measures. Thus, Korea argued that in deciding to relax the BOP restrictions on beef imports in the early 1980's, Korea not only assessed the effects on its overall BOP position, but also considered the impact on its cattle farmers. Now, with the benefit of hindsight, some might say that the Korean Government miscalculated the level of imports to which its cattle farmers could adjust because by mid-1984, many small cattle farmers were going bankrupt or incurring very heavy losses. That was when the Korean Government decided to intervene and intensified the Article XVIII:B restrictions on beef imports. It was a situation which the GATT regime, including its BOP provisions, did not envisage.

82. As concerned the "retroactivity" aspects of the Korean arguments, New Zealand replied that the retroactivity issue involved two matters. One related to the point that the Korean argument misrepresented the legal standing conferred by the adoption of a BOP Committee report. The second related to a view that misconstrued significantly the nature and purpose of GATT's BOP provisions. There was every possibility that a panel, if asked, say in 1976 to rule on the consistency of Korean restrictions with Article XVIII:B might have upheld the consistency of such measures. The reason

was that in 1976 "… the Committee agreed with the IMF that Korea's balance-of-payments position justified import restrictions under Article XVIII:B".[33] In 1979, the wording of the BOP Committee was less dogmatic, reflecting the improving BOP position: "The Committee agreed with the IMF that the overall level of the remaining import restrictions maintained by Korea did not go beyond that necessary to prevent a decline in Korea's monetary reserves but that the current level of these reserves did not constitute a constraint on the continuation of further import liberalization".[34]

83. In 1984, New Zealand continued, the balance shifted further in the direction of a finding that, if put to a legal test at that time, might have found that the general requirement of Article XVIII:B had not been met. The Committee, after all, "… urged Korea to pursue its trade liberalization programme as vigorously and speedily as possible and expressed the hope that the rapid improvement in the balance of payments would soon obviate the need for trade-restrictive measures".[35] By 1987, as New Zealand had stressed, the position had shifted again in the direction of a "prevailing view" that restrictions could not be justified, and that Korea "… would consider alternative GATT justifications for any remaining measures" - i.e. the implication being that most members of the Committee did not consider that Korea had any longer a BOP problem.

84. New Zealand said that the purpose of surveying past BOP Committee recommendations was not so much to hypothesize what a panel might have concluded at different times in the past. Rather, it was to demonstrate that the judgment might well have differed, depending on when a challenge to a particular measure, justified by Korea on Article XVIII:B grounds, was made. There was no inconsistency here. It was central to the purpose of Article XVIII:B that the Article was there for use on a temporary basis. This implied that a wholesale finding based on a "retroactive" view was not required or appropriate. Literally, of course, this Panel - any panel - made findings relating to the past. Logically, there was no alternative. Furthermore, were this not to be the case, any contracting party could invalidate any panel's work on any matter by the simple device of making a small adjustment to policy and claiming that the complaint had been overtaken by events. It was, moreover, quite acceptable in the GATT to ask for a panel finding on measures no longer being applied. But New Zealand was not seeking a retroactive finding of a sweeping nature. This was not necessary. Rather, New Zealand's difficulties with the Korean measures on beef dated from October 1984 and it was this period until the most recent possible period on which the Panel could make judgments.

85. Korea replied that much of this discussion was speculation on what a panel might have done in the past, in 1987, in 1984, in 1979 and even in 1976. In Korea's view, that was not relevant to the issue of retroactivity. The relevant question was whether a panel in 1989 could hold that Korea's BOP restrictions were not justified in, say, 1979, despite the BOP Committee's undisputed findings to the contrary. Korea argued that that was unprecedented. The issue of retroactivity raised another fundamental concern. How could the present Panel decide that Korea's beef restrictions were not justified under Article XVIII:B in, say, 1983 (prior to the taking of the 1984/1985 intensification measures), without holding that all the other BOP restrictions which Korea maintained at the time were not justified either?

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

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[33]MTN/GNG/NG7/W/46.
[34]Idem, paragraph 113.
[35]Idem, paragraph 116.

87. New Zealand replied that the measures under consideration by the Panel were not justified by Article XVIII:B at all. As admitted by Korea, they were measures imposed, not to achieve BOP objectives, but to protect the Korean beef industry. The statements and structures referred to earlier were related to the totality of the restrictions - not some portion of them. Moreover, New Zealand had noted the Korean statement that "the intensification measures were not motivated by BOP concerns, but instituted in order to remedy the disruption of Korea's cattle farming industry". Of course, Korea fell short of unequivocally conceding the point by use of the term "intensification". But it could be shown that the implied distinction between "intensified" and "underlying" restrictions had no foundation and that the measures as a whole were not eligible for justification under Article XVIII:B. The purpose of the measures was the relevant consideration. The Korean distinction seemed to rest on the false assumption that protective purpose and varying import levels at the border were somehow incompatible. On the contrary, the actual levels of import restraint would be varied from period to period precisely in order to meet the basic purpose of domestic protection. If import prices were, in a given year, at a higher level, and/or producer prices were also higher, a regime based on protective purpose could well be prepared to allow more imports than before. But the basic purpose - which was the relevant consideration here - was identical in both circumstances. It was precisely such a system that Korea operated.

88. Korea argued that the 1984/1985 intensification measures could not be isolated and divorced from their BOP context. One should look at the whole picture. Ever since its accession to the GATT, Korea maintained BOP restrictions on beef imports (among other products). Korea had BOP problems in 1984/1985 and was still recognized to have them at present by the BOP Committee. That was why Korea maintained that Article XVIII and its procedures were still relevant, even if one recognized that the intensification measures were not taken for BOP reasons, but because of an unprecedented situation arising from the disruption of Korea's cattle industry. That was also why Korea maintained that, even if the 1984/1985 intensification measures were incompatible with the GATT, Korea should be allowed to restore the level of BOP restrictions on beef imports prevailing prior to the 1984/85 intensification measures. In 1983, Korea imported a total of 51,500 tons (product weight) of beef. This would now again be the appropriate level of BOP restrictions on beef imports, until these restrictions could be further relaxed or removed depending on the development of Korea's overall BOP position. New Zealand could not reach above and beyond the total 1983 import level because to do so required findings on Korea's past and present BOP justification. Any such findings would involve the BOP restrictions maintained on 357 other products.

89. New Zealand replied that there could be no basis whatsoever for this new appeal that Korea "be allowed to restore the level of BOP restrictions on beef imports prevailing prior to the 1984/85 intensification measures". First, there was the question of the purpose of the restrictions. As had been argued previously, New Zealand considered that a single protective purpose applied. Second, an appeal to a past level of imports would, in any case, require a finding that the pre-1984 regime was - among other things - not for a protective purpose. That matter had not been addressed directly in this Panel. Korea had certainly made no case to sustain it - merely asserted it. Third, the Panel, indeed, could not make such a finding as it was outside the terms of reference. New Zealand was seeking a finding on measures post 1984/85. Fourth, even were the terms of reference different, New Zealand argued, and a case sustained that measures on beef pre-1984 were indeed for BOP purposes, that would imply nothing for this case. Neither the nature of the import/domestic regime nor the BOP situation pre- and post-1984 could be assumed to be the same. The post-1984 measures would still have to be judged on their own terms.

90. Korea argued that it was certainly true that Korea's BOP position had improved since 1984/85. Yet, without involving all other remaining BOP restrictions, this Panel could not decide whether and to what extent such improvement ought to translate into a further relaxation of the BOP restrictions on beef beyond the 51,500-ton level existing in 1983. Thus, it would make no sense to find that Korea's

restrictions on beef imports were no longer justified under Article XVIII:B, while maintaining that the other 357 restrictions continued to be justified as they were. Obviously, improvements in Korea's BOP position did not affect the restrictions on beef imports exclusively. Prescriptions for change required a global assessment. Yet, an across-the-board review of all of Korea's remaining BOP restrictions clearly fell outside this Panel's terms of reference.

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

92. New Zealand replied that Korea's request for a grace period was not a "defence" as such against the charges New Zealand was making. Nor was it relevant to any GATT panel finding. The Panel was invited to give a ruling on the GATT consistency of the measures under dispute, not to recommend an adjustment path to the Korean trade and agriculture authorities. The Korean authorities would be well aware of New Zealand's understanding of the political and economic sensitivities in Korea and in New Zealand. However, such considerations belonged to a subsequent stage in the course of this long dispute between New Zealand and Korea, should the Panel uphold New Zealand's claim. New Zealand assumed the Panel would, if it supported New Zealand's case, make its recommendations to the CONTRACTING PARTIES along standard lines.

Article XXIII:2

93. New Zealand considered that the Republic of Korea's beef import restriction measures constituted a prima facie breach of Korea's obligations under the General Agreement and that these nullified or impaired benefits accruing to New Zealand.

SUBMISSIONS BY OTHER CONTRACTING PARTIES

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

95. Australia considered that the prohibition of beef imports from mid-1985 until August 1988 and the subsequent import ceiling restrictions maintained by the Republic of Korea were contrary to the provisions of Article XI:1. These measures were prima facie inconsistent with the GATT under

Article XI:1 which proscribed "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures". Australia also considered that the mark-up practised by the LPMO on imports of beef, the sole Korean importer of beef from August 1988 and an authorized monopoly in the sense of Article II:4, contravened the provisions of that Article. Australia further argued that the Korean measures could not be justified under Article XI:2, Article XVIII:B or under any other Article of the General Agreement.

96. Australia argued that Korea did not meet the appropriate requirements for coverage of its beef import measures under Article XVIII:B: The Korean beef import regime contravened both the spirit and the letter of Article XVIII:B, paragraphs 9, 10, 11 and 12(a), as well as the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes. Korea had implemented an effective prohibition rather than a restriction on beef imports from 1984 to 1988. The nature of Korea's beef import regime from at least 1984 onwards was demonstrably not necessary to achieve the objectives specified in paragraph 9 and could not, therefore, be deemed consistent with its provisions. Moreover, Korea's economic situation was certainly not such in 1984 as to justify the intensification of import restrictions under the provisions of paragraph 9. Also, there were clear indications that the Korean measures with respect to beef imports were not taken for BOP reasons, but to protect the domestic industry.

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

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

99. The United States also considered that the Korean measures could not be justified under Article XVIII:B since Korea did not have a BOP problem as defined by the GATT. If, however, it was considered that Korea could restrict imports for BOP reasons, the United States argued that the restrictions on beef imports did not qualify as BOP measures since, inter alia, these measures were taken for domestic, political purposes, i.e., for the purposes of protecting a Korean industry, rather than for BOP reasons.

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

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

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

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

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

105. Canada argued that the quantitative restrictions on beef had no justification under the BOP exceptions of the GATT. In its report on the 1987 consultation with Korea, the BOP Committee stressed the need to establish a clear timetable for the progressive removal of Korea's trade measures maintained for BOP purposes. In Canada's view, adoption of the BOP Committee report by the GATT Council did not mean that all trade practices of a contracting party were in conformity with the GATT. At the 10-11 November 1987 GATT Council meeting, Canada indicated that it did "not accept the position put forward by some contracting parties that review - including full review of trade restrictions - by the BOP Committee constituted acceptance of such measures as being GATT consistent".[36] The change from a ban on beef imports during the period 1984-1988 to import restrictions, which were in any case contrary to the GATT, was not in keeping with the decision of the BOP Committee following the 1987 consultation with Korea.

FINDINGS AND CONCLUSIONS

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

[36] C/M/215, item 2(c), page 5.

Article XI

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

(a) measures amounting to a virtual suspension of imports introduced in November 1984 and May 1985 and subsequently amended in August 1988. These measures were neither notified to, nor reviewed by, the Balance-of-Payments Committee;

(b) restrictions on beef existing since Korea's accession to the General Agreement in 1967, which were notified to, and reviewed, by the Balance-of-Payments Committee.

108. Article XI:1 did not permit the use of either import restrictions or import prohibitions; exemptions from this general proscription had to be specifically justified under other provisions of the General Agreement. Korea claimed such justification under Article XVIII:B for the restrictions referred to in paragraph 107(b) above; this issue is examined in paragraphs 114-117 below.

109. In examining the measures in paragraph 107(a) above, the Panel noted that Korea's beef import measures introduced in 1984-1985 were taken for the purpose of protecting Korea's domestic cattle industry and not for balance-of-payments reasons, and were therefore not notified to the Balance-of-Payments Committee. Korea also had not notified the amended restrictions maintained since August 1988 to the Balance-of-Payments Committee. Korea did not contest that these measures were contrary to the provisions of Article XI:1. Moreover, Korea did not offer any justification for these measures under Article XI:2. The Panel concluded that the import measures and restrictions, introduced in 1984/85 and amended in 1988, were not consistent with the provisions of Article XI and were not taken for balance-of-payments reasons.

Article XVIII

(a) Procedural aspects

110. The Panel examined Korea's contention that its import restrictions, referred to under paragraph 107(b) above, were justified under the provisions of Article XVIII:B. The Panel noted Korea's view that the compatibility with the General Agreement of Korea's import restrictions could not be challenged under Article XXIII because of the existence of special review procedures in paragraphs 12(b) and 12(d) of Article XVIII:B, and the adoption by the CONTRACTING PARTIES of the results of the paragraph 12(b) reviews in the Balance-of-Payments Committee. The Panel decided first to consider whether the consistency of restrictive measures with Article XVIII:B could be examined within the framework of Article XXIII.

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

112. The Panel examined the drafting history of Article XXIII and Article XVIII, and noted that nothing was said about priority or exclusivity of procedures of either Article. The Panel observed that Article XVIII:12(b) provided for regular review of balance-of-payments restrictions by the

CONTRACTING PARTIES. Article XVIII:12(d) specifically provided for consultations of balance-of-payments restrictions at the request of a contracting party where that party established a prima facie case that the restrictions were inconsistent with the provisions of Article XVIII:B or those of Article XIII, but the Article XVIII:12(d) provision had hitherto not been resorted to. In comparison, the wording of Article XXIII was all-embracing; it provided for dispute settlement procedures applicable to all relevant articles of the General Agreement, including Article XVIII:B in this case. Recourse to Article XXIII procedures could be had by all contracting parties. However, the Panel noted that in GATT practice there were differences with respect to the procedures of Article XXIII and Article XVIII:B. The former provided for the detailed examination of individual measures by a panel of independent experts[37] whereas the latter provided for a general review of the country's balance-of-payments situation by a committee of government representatives.

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

(b) Justification for restrictions

114. The Panel proceeded to examine Korea's Article XVIII:B justification for its import restrictions referred to in paragraph 107(b) above. New Zealand contended that the import restrictions on beef imposed for balance-of-payments reasons were not justified because Korea no longer had balance-of-payments problems. The Panel noted that Korea had maintained import restrictions on beef on balance-of-payments grounds since 1967. The Panel noted the condition in paragraph 9 of Article XVIII that "import restrictions instituted, maintained or intensified shall not exceed those necessary: (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves". The Panel noted further that paragraph 11 required the progressive relaxation of such restrictions "as conditions improve" and their elimination "when conditions no longer justify such maintenance".

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

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

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

116. At the full consultation in the Balance-of-Payments Committee with Korea in November 1987, "[t]he prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B".[38] Moreover, the full Balance-of-Payments Committee had "stressed the need to establish a clear timetable for the early, progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes" and had expressed the expectation that "Korea would be able in the meantime to establish a timetable for the phasing-out of balance-of-payments restrictions, and that Korea would consider alternative GATT justification for any remaining measures, thus obviating the need for such consultations".[39]

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

Article II

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

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

120. In examining Article II:4, the Panel noted that, according to the interpretative note to Article II:4, the paragraph was to be applied "in the light of the provisions of Article 31 of the Havana Charter".[40] Two provisions of the Havana Charter, Articles 31:4 and 31:5, were relevant. Article 31:4 called for an analysis of the import costs and profit margins of the import monopoly. However, Article 31:5 stated that import monopolies would "import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product …" (emphasis added). In the view of the Panel, Article 31:5 clearly implied that Article 31:4 of the Havana Charter and by implication Article II:4 of the General Agreement were intended to cover import monopolies operating in markets not subject to quantitative restrictions.

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[38]BOP/R/171, paragraph 22.

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

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

121. Bearing in mind Article 31:5 of the Havana Charter, the Panel considered that, in view of the existence of quantitative restrictions, it would be inappropriate to apply Article II:4 of the General Agreement in the present case. The price premium obtained by the LPMO through the setting of a minimum bid price or derived sale price was directly afforded by the situation of market scarcity arising from the quantitative restrictions on beef. The Panel concluded that because of the presence of the quantitative restrictions, the level of the LPMO's mark-up of the price for imported beef to achieve the minimum bid price or other derived price was not relevant in the present case. Furthermore, once these quantitative restrictions were phased out, as recommended by the Panel in paragraph 125 below, this price premium would disappear.

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

123. The Panel then examined New Zealand contention that Korea imposed surcharges on imported beef in violation of the provisions of paragraph 1(b) of Article II and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be examined under Article II:4 since it was the more specific provision applicable to the restriction at issue. In this regard, the Panel recalled its findings in paragraph 121 above. It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).

Articles X and XIII

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

RECOMMENDATIONS

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

(a) Korea eliminate or otherwise bring into conformity with the provisions of the General Agreement the import measures on beef introduced in 1984/85 and amended in 1988; and,

(b) Korea hold consultations with New Zealand and other interested contracting parties to work out a timetable for the removal of import restrictions on beef justified since 1967 by Korea for balance-of-payments reasons and report on the result of such consultations within a period of three months following the adoption of the Panel report by the Council.

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ANNEX 1

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

"Conclusions

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

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

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

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

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

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

ANNEX II

KOREA: SUMMARY OF ECONOMIC INDICATORS

	1985	1986	1987	Jan-Sept 1988	1985/84	1986/85	1987/86	Jan-Sept 1988/87
	(Billion won)				(Percent changes)			
GNP (1980 constant prices)	52,705.4	59,187.8	66,319.6	51,369.6	5.4%	12.3%	12.0%	12.0%
Real Domestic Demand	54,960.7	59,540.6	65,590.3	50,184.9	4.0%	8.3%	10.2%	11.0%
Consumption	37,191.6	39,888.6	42,976.2	33,654.5	5.1%	7.3%	7.7%	8.1%
Gross capital formation	17,769.1	19,652.0	22,614.1	16,530.4	1.6%	10.6%	15.1%	17.4%
Export of goods and non factor services	20,279.5	25,648.1	31,809.0	26,117.3	2.1%	26.5%	24.0%	12.3%
Imports of goods and non factor services	20,124.1	23,852.7	28,899.6	24,140.9	- 1.7%	18.5%	21.2%	14.9%
					(Average, twelve month percent change)			
Prices, Wages and Employment								
Consumer prices	100.0	102.8	105.9	112.7	2.5%	2.8%	3.0%	7.1%
Terms of Trade	100.0	108.8	111.5	114.3	0.5%	8.8%	2.5%	2.5%
Nominal earnings in manufacturing 1)	269.7	294.5	328.7	364.8	9.9%	9.2%	11.6%	21.1%
Unemployment rate	4.0	3.8	3.1	2.6	4.0%	- 5.0%	- 18.4%	- 23.5%
	(Billion won)				(Percent of GNP)			
Public Sector								
Revenue	14,223.5	16,278.6	19,270.5	18,007.6	27.0%	27.5%	29.1%	35.1%
Expenditure	13,585.0	15,310.5	18,364.6	14,375.9	25.8%	25.9%	27.7%	28.0%
	(Billion won)				(Twelve month percent change)			
Money and Credit								
Money and quasi-money	28,565.2	33,833.1	40,279.5	42,714.6	16.8%	18.4%	19.1%	18.3%

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

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

KOREA: SUMMARY OF ECONOMIC INDICATORS (Cont'd)

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

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

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

ANNEX III

Article 31 of the Havana Charter

Expansion of Trade

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

(a) in the case of an export monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic users of the monopolized product, or designed to assure exports of the monopolized product in adequate quantities at reasonable prices;

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

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

(a) for the establishment of the maximum import duty that may be applied in respect of the product concerned; or

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

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

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

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

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

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

ad Article 31

Paragraphs 2 and 4

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

Paragraph 4

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