

KOREA - ANTI-DUMPING DUTIES ON IMPORTS OF
POLYACETAL RESINS FROM THE UNITED STATES

*Report of the Panel
(ADP/92, and Corr.1*)*

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I. INTRODUCTION

1. In a letter dated 21 June 1991, the United States requested consultations with Korea under Article 15:2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as "the Agreement"), regarding the imposition of anti-dumping duties by Korea on imports of polyacetal resins¹ from the United States. The two parties first consulted on this matter on 24 July 1991, and a second consultation meeting was held on 30 September 1991. The parties did not reach a mutually satisfactory solution. On 12 September 1991, i.e. prior to the second consultation meeting, the United States referred the matter to the Committee on Anti-Dumping Practices (hereinafter referred to as the "Committee") for conciliation under Article 15:3 of the Agreement (ADP/64 and Add. 1). A special meeting of the Committee was held for this purpose on 4 October 1991 (ADP/M/34). The conciliation process did not lead to a resolution of this dispute and on 21 January 1992, the United States requested the establishment of a panel under Article 15:5 of the Agreement (ADP/72 and Add.1; see ANNEX 1).

2. At its meeting of 17 February 1992, the Committee agreed to establish a panel on the matter (ADP/M/36). The representatives of Canada, the European Communities and Japan reserved their rights to present their views to the panel.

3. On 29 April 1992, the Committee was informed by its Chairman in document ADP/76 that the terms of reference and composition of the Panel were as follows:

Terms of Reference:

"To examine, in light of the relevant provisions of the Agreement on Implementation of Article VI of the General Agreement, the matter referred to the Committee by the United States in documents ADP/72 and Add.1 and to make such findings as will assist the Committee in making recommendations or in giving rulings."

Composition:

Chairman: Mr. Maamoun Abdel-Fattah

Members: Mr. Paul O'Connor
Ms. Barbara Schneeberger

4. The Panel met with the parties on 10 July, 30 September and 1 October 1992. On 10 July 1992, the delegations of Canada, the European Communities and Japan appeared before the Panel and presented their views on the dispute. The Panel submitted its findings and conclusions to the parties to the dispute on 10 March 1992.

II. FACTUAL ASPECTS

5. The dispute before the Panel concerned the imposition by Korea of an anti-dumping duty on imports of polyacetal resins (hereinafter referred to as "PAR") from the United States and Japan. This duty was imposed by Presidential Decree 13,467 (dated 14 September 1991), and the effective date of this Decree was 30 September 1991.

¹Polyacetal resin is a form of plastic with a number of applications, including in audio or video tape machines, automotive parts, zippers and buckles, and parts and components for electronic machinery.

6. The following are the factual aspects of this dispute.²

7. Until late 1988, the Korean market for PAR was served entirely by imports. Korea Engineering Plastics (hereinafter referred to as "KEP")³ completed a 10,000 tons annual production facility in September 1988 and began producing PAR mainly for the domestic market.⁴ In about a year, KEP increased production to nearly full capacity and its domestic market share for PAR increased from below 1 per cent in 1988 to 47.7 per cent in 1989, and to 60.8 per cent in first-quarter 1990. There was a concomitant decrease in the share of imports in the Korean PAR market, with the share of imports from three companies subject to the anti-dumping investigation (see below) falling from about 60 per cent in 1988, to about one-third in 1989, and then to about one-fifth in first-quarter of 1990. The prices of imported and domestically produced PAR declined in the Korean market during this time period.

8. In June 1990, KEP established another plant with an annual production capacity of 10,000 tons and thus increased its total annual production capacity to 20,000 tons.

9. On 8 May 1990, KEP filed an anti-dumping petition against two producers from the United States⁵ and one producer from Japan⁶, alleging that these producers were exporting PAR at less than normal value to Korea and causing material injury to the domestic industry. The Government of Korea formally initiated an investigation on 25 August 1990. The period of investigation was from 1 January 1989 through 31 March 1990⁷ and the scope of the investigation was limited to middle viscosity, low viscosity and audio/video grade resins, thus excluding from the investigation high viscosity and special grade resins which were not manufactured by the domestic industry. On 20 February 1991, Korea's Office of Customs Administration found dumping margins ranging from 20.6 to 107.6 per cent for the three respondents. On 24 April 1991, the Korean Trade Commission (hereinafter referred to as "KTC") determined that "dumped imports of polyacetal resin of middle viscosity, low viscosity and audio/video grade (HSK, 3907-10-0000) from Asahi Chemical Industry Co. Ltd. of Japan, and E.I. du Pont de Nemours, Inc. and Hoechst Celanese Corp. of the United States, caused material injury to the domestic industry as set forth in Article 10-1 of the Customs Act."⁸ On page 8 of the Determination, the KTC had concluded that "[h]aving examined various economic factors and indicators which are relevant to the evaluation of the domestic industry's condition, the Commission hereby determines that the domestic industry has suffered material injury, etc. as defined in Article 10-1 of the Customs Act." Article 10-1 of the Customs Act was as follows: "In cases where the importation of foreign goods for sale at a price lower than the normal value causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry (hereinafter in this Article referred to as "material injury, etc."), if deemed necessary to protect the domestic industry concerned, a duty may be imposed ...".

²The data submitted to the Panel by Korea included business proprietary information. The Panel clarified which data was confidential and thus should not be presented in its report. The factual data given in this report is the data for which Korea specifically stated that it had no objection to inclusion of that data in the Panel's report.

³KEP was a joint venture company established by a Korean company, Dong Yang Nylon, and a Japanese company, Mitsubishi Gas Chemical, Inc. Dong Yang had previously imported PAR into Korea, and Mitsubishi had previously exported PAR from Japan to Korea.

⁴The total production capacity was listed as 11,000 tons annually, with the "optimal production capacity" listed as 10,000 tons annually. See Determination of the Korean Trade Commission (hereinafter referred to as the "Determination"), Investigation No. Taemu 40-6-90-2, dated 24 April 1991, page 3

⁵These were E.I. Du Pont de Nemours, Inc. (hereinafter referred to as "DuPont") and Hoechst Celanese Corporation (hereinafter referred to as "DuPont") and Hoechst Celanese Corporation (hereinafter referred to as "Hoechst").

⁶Asahi Chemical Industry Company, Limited (hereinafter referred to as "Asahi").

⁷Government of Korea's Ministry of Finance Public Notice No. 91-29, 14 September 1991.

⁸The Determination, op. cit., page 1.

10. On 30 September 1991, Korea's Ministry of Finance implemented a basic price system of relief under which anti-dumping duties were to be applied where PAR was imported at prices lower than certain specified prices. The anti-dumping duty order was due to expire on 3 October 1993, unless extended.

III. MAIN ARGUMENTS

Summary

11. The main arguments of the United States were as follows: (a) the determination of injury by the KTC was inconsistent with Articles 3:1, 3:2, 3:3 and 3:4 because it was not based on positive evidence or an objective examination of the volume and price effects of subject imports, or of developments regarding certain other factors which could have justified a negative determination. This, according to the United States, was because the KTC had applied a presumption of "import substitution", i.e., the KTC had presumed that if a domestic producer was a new entrant in the market, it was "normal" for it to undercut the price of imports and to capture a large proportion of the domestic market within a short period of time; (b) the Determination had failed to specify the type of injury suffered by the domestic industry, i.e. there was no indication of whether the KTC had found material injury, threat of material injury, or material retardation. Thus it was impossible to discern the real basis for the injury determination, and the KTC's determination was therefore inconsistent with the requirements of Articles 3:4 and 8:5 of the Agreement; (c) the KTC's Determination did not provide an adequate basis for affirmative findings regarding material injury, threat of material injury or material retardation. Therefore, the United States argued that the determination of injury by the KTC was inconsistent with Articles 3:1, 3:2, 3:3, 3:4 and 3:6 of the Agreement; (d) the KTC had not conducted an objective examination also because it had considered certain factors when they tended to favour an affirmative finding of injury but not when they favoured a finding of no injury, thus violating Article 3:1; and, (e) the KTC had violated Article 3:4 by relying upon the injurious effects of factors other than dumped imports.

12. In reply, the main arguments of Korea were as follows: (a) the KTC had conducted an objective examination based on positive evidence of the requisite factors for causality, price effect, material injury, threat of injury and material retardation. The term "import substitution" in the Determination did not denote the use of any presumption or theory, but was only a description of the situation that sales by the newly established domestic industry had displaced imports in the domestic market. This was a normal occurrence whenever a new entrant started producing in a domestic market which had earlier been supplied entirely by imports. Thus, the KTC's determination was not inconsistent with Articles 3:1, 3:2, 3:3 and 3:4; (b) it was clear from the text of the Determination that all the three bases for injury, i.e. material injury, threat of material injury, and material retardation, had been found by the KTC in this case, and therefore, the KTC's determination was not inconsistent with the requirements under Articles 3:4 and 8:5; (c) the record evidence and the Determination showed that there was sufficient basis to find each of the three bases for injury, and thus, the determination of injury by the KTC was not inconsistent with Articles 3:1, 3:2, 3:3, 3:4 and 3:6 of the Agreement; (d) regarding the United States' complaint that the KTC's analysis of certain factors was not conducted in a consistent manner and hence was inconsistent with Article 3:1, Korea said that the United States' objection was essentially an argument that the KTC should have weighed certain factors differently compared to what it did. However, the Agreement provided discretion to the investigating authorities in this regard. The Panel's task was not to reweigh the importance of different factors, but to assess whether there was positive evidence to support the basis of the KTC's determination; and, (e) the KTC's determination of injury was not inconsistent with Article 3:4 of the Agreement because the Agreement required that imports be "a" cause of injury, and not the "only" or "main" cause of injury. The KTC had first found that there was injury to the domestic industry, and then found that imports had been "a" cause of this injury.

III.1 Findings Requested by the Parties

13. The United States requested the Panel to find that the KTC's Determination was not in conformity with the Agreement. The United States further requested the Panel to recommend to the Committee that the Committee request Korea to bring its law as applied into conformity with its obligations under the Agreement. Explaining its request, the United States said that in essence, it was requesting that the Panel confirm the violation or violations of the Agreement that had occurred in this case, and to recommend that Korea take steps to achieve compliance with the Agreement. However, the United States was not requesting that the Panel recommend the specific steps that Korea should take to achieve compliance with the Agreement. The United States believed that detailed and specific recommendations exceeded the appropriate role of a dispute settlement Panel convened under the Agreement. Because the violating Party should be permitted in the first instance to determine the appropriate steps to take to bring its laws and practices into compliance with the Agreement, the United States intended the term "law as applied" to have a broad, inclusive meaning potentially encompassing the administrative practices and procedures of the KTC (including the particular injury determination on PAR and the subsequent imposition of anti-dumping measures on imports of PAR), the applicable Korean administrative regulations, or even the Korean legislation.

14. The United States said that at present it was not aware of any Korean statute or administrative regulation that would mandate the type of violations of the Agreement that the United States had identified in these proceedings. Thus, it might be that Korea could come into conformity with the Agreement through action involving its administrative practices. Should the current information on this point prove incorrect, the United States expected Korea to take necessary action to amend the offending statute or regulation.

15. Korea requested the Panel to find that the KTC's Determination satisfied the requirements of the Agreement. Korea said that according to the United States, the law "as applied" by the KTC was inconsistent due to the application of an assumption of "import substitution". However, since no such assumption had been used, the request for relief was meaningless. Thus, the Panel need not order, and Korea need not implement, the relief which the United States requested because the problem which the United States sought to have remedied did not exist. Similarly, Korea could not correct any problem involving the weighing of evidence by four of the seven Commissioners. This would involve an impermissible effort to interfere with the discretion possessed under the Agreement by the investigating authorities.

III.2 Consideration of the Transcript of the KTC's Voting Session

16. To support the argument that the Determination had met the requirements under the Agreement, Korea submitted on 18 August 1992, an English translation of the transcript of the 49th meeting of the KTC (hereinafter referred to as the "transcript"). At this meeting, the different KTC Commissioners had given their individual views and findings in the case under review by the Panel. This transcript was first mentioned by Korea in a response provided on 24 July 1992 to a question by the Panel as to whether the KTC had found actual material injury, threat of material injury or material retardation of the establishment of an industry. In the transcript, the Commissioners were not identified by name.

17. The United States said that, in view of the requirements of Articles 8:5 and 3:4 of the Agreement, the transcript could not be used to assist Korea in meeting its obligations under the Agreement, and hence the Panel should not consider it in its examination of the matter in this case. Korea's reliance on the transcript before the Panel raised fundamental questions about the transparency of anti-dumping proceedings, the certainty of the investigating authorities' basis for taking anti-dumping measures, the ability of the exporting country to assess whether its rights under the Agreement had been violated, and the meaningfulness of dispute settlement procedures under the Agreement. It was also contrary

to one of the fundamental goals of the Agreement mentioned in its preamble, namely "to provide for equitable and open procedures as the basis for a full examination of dumping cases."

18. The United States argued that the transcript was a post hoc attempt by Korea to supplement the Determination, and did not comport with Korea's obligations to provide public notice of its findings under Article 8:5 or to demonstrate that imports were causing injury under Article 3:4. Article 8:5 of the Agreement provided in relevant part that

"Public notice shall be given of any preliminary or final finding whether affirmative or negative and of the revocation of a finding. In the case of affirmative finding each such notice shall set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor. ... All notices of findings shall be forwarded to the Party or Parties the products of which are subject to such finding and to the exporters known to have an interest therein" (emphasis added by the United States).

19. The United States said that Article 8:5 required transparency of anti-dumping proceedings, and promoted fairness by limiting the reasons to those asserted at the time of the determination rather than permitting subsequent revelations purporting to justify the action. This provision gave the affected parties a "right-to-know" the official statement of reasons, and enabled the Government of the exporting country to assess whether its rights under the Agreement had been violated by the actions of the investigating authorities. Moreover, the notice of an action had to be given at a time reasonably close to when the action was taken. Korea had never mentioned the existence of the transcript until after the first hearing of the Panel, and as far as the United States was aware, that was the first time that the transcript, which was still considered by Korea to be a confidential document, had been made available to anyone outside the Korean Government. Throughout the consultations, conciliation, and the Panel proceedings till the first hearing of the Panel, Korea had maintained that the only document that set forth the KTC's official findings and conclusions in the investigation was the written Determination. This document, dated 24 April 1991, was unequivocally entitled "Determination of the Korean Trade Commission". The United States informed the Panel that during consultations, Korea had proffered to the United States a document entitled "The Government of Korea's Position", which had elaborated on the Determination in various respects. In order to clarify the status of that document, the United States had asked Korea to indicate whether Korea claimed that the position paper was a part of the official Determination. Korea confirmed that the position paper was not part of the official determination but simply prepared for purposes of consultations. Korea did not at that time indicate that documents other than the Determination might also form part of the KTC's explanation of its finding in this case. Moreover, even though the very issue of dispute settlement proceedings had been whether the Determination was in conformity with the Agreement, at no time did Korea ever indicate that a "transcript" might exist.

20. Regarding Article 3:4, the United States said that this provision required the investigating authorities to "demonstrate" that imports were causing injury within the meaning of the Agreement. Since this provision pertained to all the other obligations relating to the rendering of injury determinations, it was clear that the required demonstration had to be made at the time that the affirmative injury determination was rendered, rather than in submissions filed only when the determination was subsequently challenged. The "demonstration" requirement in Article 3:4 reinforced the Agreement's emphasis on the investigating authority stating publicly, for all to see, the basis for the determination.

21. Thus, the United States urged the Panel to disregard the transcript in its deliberations, for purposes of examining whether the affirmative finding satisfied the Agreement.

22. Korea argued that because the transcript was the most direct evidence of the deliberative process engaged in by each KTC Commissioner in this case, it was an essential and most important administrative

record document bearing upon issues which this Panel had to resolve. According to Korea, the record of the investigation comprised all documents considered by the KTC and all other documents which were part of the investigation until the KTC reached its determination, i.e. everything from the petition to the written Determination. Korea also pointed out that the United States had not claimed that the transcript was not part of the administrative record.

23. Korea said that under its law, a transcript of the voting session had to be prepared in every KTC injury investigation. Thus, this transcript was both a routine part of the KTC's administrative record and a contemporaneous and reliable record of the reasons which each individual Commissioner had expressed as the basis for his vote. The fuller expression of these views had been later summarized in the KTC's published written Determination. Such a summarization could not modify or change the opinion that each Commissioner had expressed. There was nothing in the Agreement that prevented an investigating authority from conducting its internal deliberations in a confidential session; in fact, this allowed for more candid and complete discussion of the relevant issues. The public and the parties concerned were not injured in any way by this procedure because the written Determination contained an ample summary of the basis of the majority's decision. The transcript had been confidential in order not to disclose how the different individual KTC Commissioners had voted. The version of the transcript provided to the Panel was a public version of the document because it had suppressed the identities of the Commissioners. Korea had provided the transcript only because the United States had repeatedly challenged the truthfulness of Korea's assertion that the KTC had not used an import substitution theory. The transcript had been submitted to the Panel to assist in interpreting and to provide an understanding of the context in which the statements in the Determination were made. The only real issue before this Panel concerned the KTC's intent in using the word "import substitution" in its written determination. The transcript was useful in assisting the Panel in interpreting how these words were intended to be understood, and thus it assisted in interpreting the basis for the affirmative determination. Korea should not be penalized for providing more information concerning the basis for its determination than was normally provided to panels.

24. Korea said that there was nothing in the Agreement that prevented the Panel from considering the transcript in order to evaluate whether the KTC's determination had satisfied the requirements of Article 3. Confidential documents were part of the administrative record of an investigation and panels had the authority to review such confidential information in evaluating compliance with the Agreement, and in certain cases the review of confidential information formed an important part of a panel's inquiry. By ignoring confidential information which was nonetheless relevant and material for a panel's evaluation, the panel might reach incorrect results; no panel should be free to disregard a portion of the record. The United States had not claimed that panels lacked the authority to consider confidential information, nor that the Panel may not consider the entire record in evaluating whether or not the demonstration required under Article 3 had been made. The transcript was no more or no less relevant to resolving the issue of the required demonstration having been made than any other part of the record, and the United States had failed to explain why it should be treated any differently from the other confidential record document to which the United States did not object. In the situation under review, there was nothing inappropriate in using any materials which helped to shed light on the intentions of those who drafted the language at issue. If this Panel found it appropriate to disregard any part of an agency's administrative record bearing upon the final determination, it would seriously undermine the dispute resolution process and have extremely significant repercussions for all national investigating authorities as to how they would conduct and conclude their investigations in the future.

25. Korea said that this Panel proceeding would have taken an entirely different course if the KTC had done one of two simple things. First, it could have taken the transcript, deleted the names of the Commissioners, and issued it as its final written determination. Alternatively, it could have stated in the Determination that the transcript remarks should be deemed to be incorporated in the written Determination by reference to them. Either of these two simple options would have resulted in many,

if not all, of the United States' challenges to the Determination not being raised. The question for the Panel was whether the KTC should be penalized, through the Panel's disregard of the transcript, for failing to take either of the two simple options, and deciding to attempt to combine the reasoning of all four Commissioners in a single integrated document.

26. Korea stated that the United States International Trade Commission (hereinafter referred to as "USITC") also followed the exact same transcription procedure. Even for the USITC, the transcript became part of the record of the investigation, and it could be reviewed by a United States court in considering whether the USITC determination had satisfied the applicable evidentiary test under United States law. Similarly, here, the Panel had to consider the transcript in evaluating whether the requirements of the Agreement had been met. If the Panel would ignore to do so, it would impermissibly obstruct Korea's right to show that the factors identified in Article 3 had been considered and that the required demonstration of material injury by reason of dumped imports had been made. Moreover, Korea said that the United States had earlier requested Korea to provide the administrative record, and now was arguing for a part of this record not to be considered by the Panel.

27. Korea said that it did not claim that the transcript constituted public notice under Article 8:5. Nor did Korea claim that the Panel should consider the transcript as being part of the Determination. Rather, the transcript assisted in showing that the KTC had considered all the relevant issues which were required to be considered under Article 3. It also showed that an objective examination had occurred and that no import substitution theory or presumption had been used. The fact that the transcript contained a fuller expression and the precise basis for the separate opinion of each Commissioner did not violate Article 8:5 because the basis of the affirmative determination was clear from the text of the Determination. Moreover, under the logic of the United States assertion that the public notice provision of Article 8:5 had been violated in this case, Article 8:5 would also be violated if a determination was based entirely on confidential information that could not be released. In that case too, the United States would say that parties could not understand all of the facts upon which the decision had been based.

28. Korea said that by arguing that the submission of the transcript violated Article 8:5 of the Agreement, the United States was attempting to obscure the sole issue before this Panel, namely whether positive evidence existed of injury and causation under Article 3 of the Agreement. The initial complaint of the United States, and its subsequent submissions to the Panel, only alleged that certain provisions under Article 3 had not been met. The United States' sole focus in this case had been on the failure of the KTC to conduct an objective evaluation and to rely on positive evidence. The United States had earlier never claimed that Article 8:5 was at issue. The terms of reference defined, and thus limited, the permissible scope of review by a Panel. The terms of reference presented to this Panel by the Chairman of the Committee on 29 April 1992 provided that the matter before it was defined in documents ADP/72 and Add.1. These documents, particularly ADP/72/Add.1, explicitly limited the basis for the United States' challenge of the KTC's final determination to Articles 3:1 to 3:3. This was reconfirmed in the United States' response to the Panel's questions of 10 July 1992 and in its first written submission. Nowhere in these documents had the United States contended that it was challenging the KTC's affirmative determination on the basis of the public notice requirement of Article 8:5, and the Panel must reject the United States' efforts to raise an entirely new issue.

29. Furthermore, Korea said that the Agreement did not limit an investigating authority's ability to demonstrate that it had considered all of the required factors, and to demonstrate that dumped imports had caused injury, to the text of the public notice which announces its determination. In particular, the "demonstration" requirement of Article 3:4 did not require an investigating authority to "demonstrate" in the published written determination the findings and conclusions reached on all issues of fact and law it had considered material. What Article 3:4 required was a demonstration that dumped imports were causing injury. The purpose of this requirement was to prohibit an investigating authority from

attributing injury caused by other factors to dumped imports. Article 8:5, on the other hand, required an investigating authority to provide adequate notice to the public of the basis for its final determination. The concern expressed in Article 8:5 was not found in Article 3:4 or in any other paragraph of Article 3. Had the drafters of the Agreement intended the public notice requirement for Article 3:4, they would have said so. The transcript was also relevant in making the required demonstration, and nothing in the Agreement prohibited the Panel from considering it in this connection. The transcript was the most direct and contemporaneous evidence of the precise factors considered by each KTC Commissioner in reaching a conclusion on how to vote.

30. Korea said that if there was any defect in the amount of notice afforded in the KTC's Determination, it was merely the harmless omission of a statement that of the four Commissioners voting in the affirmative, one had voted affirmative on the basis of current material injury, two had voted on the basis of threat of material injury, and one had voted on the basis of material retardation. However, the public had not been denied notice of the three alternative bases for the determination, because the Determination quite clearly stated that all three had been found to exist. Also, the fact that the vote was four to three in favour of the affirmative finding had been released to the public.

31. Korea argued that since the KTC was required by its regulation to make a transcript of its voting session, the interested parties were aware of the existence of the document. These interested parties would have been allowed access to the public version of the transcript, i.e. with the names of the Commissioners deleted from the document, provided these parties had requested for the document. However, no interested party had requested for the transcript. Furthermore, had this case been appealed in a Korean court, the court would have considered the transcript in order to ascertain the basis of the Determination.

32. Regarding the United States' protest that Korea had never mentioned the transcript during consultations, Korea stated that the United States had not requested the transcript during either the consultation or conciliation phase of this proceeding even though the companies whose interests it was representing were aware that one existed. It was not Korea's fault that the respondents to the investigation apparently failed to notify the United States that a transcript of the voting session had been made or that they had not exercised their right to request a non-confidential version of the transcript. Also, apparently the United States was not familiar with the KTC's regulations which expressly stated that a transcript of every voting session had to be prepared, but this was not Korea's fault. Korea had not specifically discussed the transcript with the United States because the bases for the affirmative determination were clearly stated in the Determination. More importantly, Korea had explained to the United States all of the reasoning for the KTC's decision that appeared in the transcript. There was nothing new in the transcript as far as the United States was concerned.

33. Therefore, Korea argued that the Panel should consider the transcript in its deliberations.

34. The United States replied that the issue was not whether the transcript was officially a part of the record, or whether the Commissioners may meet in confidence, or whether the Panel may look at the entire record in deciding the consistency of the Determination with the Agreement. The issue was what should constitute the basis for the affirmative determination of injury by the KTC. The GATT had been concerned about transparency for some time, and this concern had been carried over directly into the Agreement. The 1959 Report of the Group of Experts on Anti-Dumping and Countervailing Duties had stated that the reasons for a decision concerning the application of anti-dumping measures "should be made public in the appropriate form so as to avoid the impression that the decisions had been taken in an arbitrary way".⁹ Similarly, in its 1983 Recommendation concerning transparency

⁹BISD 8S/145, 151, paragraph 21.

of anti-dumping proceedings, the Committee on Anti-Dumping Practices had stated that "a notice of ... a positive determination ... shall contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures ...".¹⁰ Articles 3:4 and 8:5 required that the determination be set forth publicly, and be forwarded to the exporting parties so that they knew the basis for the determination. However, the transcript itself had been never made available to the parties to the investigation; never published; never disseminated outside the Korean Government; never mentioned during consultations; never mentioned by Korea during conciliation; never referred to in Korea's first submission to the Panel; never referred to in Korea's oral presentation at the Panel's first meeting; and was still considered confidential by Korea. Instead it was the written Determination, dated 24 April 1991, and entitled "Determination of the Korean Trade Commission" that was published as the official statement of reasons at the time the anti-dumping duty order was issued; was given to the United States during consultations as being the determination; was treated as the statement of reasons during consultations and conciliation; was represented to the Panel as being the determination in Korea's first submission; and was represented to the Panel as being the determination during the first Panel meeting.

35. The United States said that when the drafters of the Agreement had intended a more limited requirement for public explanation, such as in the case of a negative determination, they had indicated it in the Agreement. Thus, for a negative determination, Article 8:5 provided that "each notice shall set forth at least the basic conclusions and a summary of the reasons therefor." For affirmative findings, Article 8:5 made clear that the entire explanation had to be made public, and this meant that investigating authorities could not use non-public documents such as the transcript to compensate for gaps and deficiencies in the determination. Nor did it permit authorities to use such non-public documents to elaborate on the determination, expand upon the determination, or provide fuller explanation of the finding.

36. The United States agreed with Korea that the transcript issue had grave implications for the viability of the GATT dispute settlement process, but not for reasons Korea had offered. Having only introduced the transcript at a late stage in the proceedings, Korea proceeded to base its arguments almost exclusively on the transcript, which it described as "the most important record document". Korea's late introduction of the transcript as the basis for the KTC determination threatened to render largely meaningless the dispute settlement proceedings, including consultations and conciliation, to date in this case. Even in its first submission to the Panel, Korea had not included the transcript in the list of items under the administrative record. There, Korea had stated that:

"The administrative record which the KTC compiled in the course of its investigation contained the required positive evidence supporting the affirmative determination. The USG [i.e., the United States Government] has submitted only the English language version of the KTC's April 24, 1991 affirmative determination, but the full record also includes: an extensive report compiled by the staff of KTC summarizing various data submitted by the parties ...; a questionnaire response submitted by the petitioner, KEP; financial statements submitted by KEP; an analysis of KEP's financial condition prepared by an outside accounting firm; minutes of two public hearings held by the KTC in which all parties participated; written "opinion letters" ... and rebuttal opinion letters and supplemental submissions prepared by counsel for the petitioner and for the respondents; and questionnaire responses submitted by the three foreign producers subject to investigation" (emphasis added by the United States).

If Korea were permitted to rely on the transcript to provide some or all of the reasons or explanation for the determination, the dispute settlement proceedings preceding the introduction of the transcript would have been of little or no meaning. Permitting Korea to do so would send a clear message that

¹⁰BISD 30S/24, 27, paragraph 6(c), emphasis added by the United States.

it was acceptable for a contracting party to conceal some or all of the actual reasons for the decision for as long as the party was able to do so. If challenged, the party could subsequently come forward with the full statement of reasons. Article 8:5 of the Agreement was in place to prevent precisely such a situation. Carried to its logical extreme, this would permit the investigating authorities of a contracting party simply to state only certain findings publicly, but hold in reserve the reasons for the determination. Also, the very concept of a demonstration under Article 3:4 meant an overt showing at the time of the determination, not only when challenged before a Panel. Thus, it was clear that the transcript was not in conformity with the notice and the demonstration requirements of Articles 8:5 and 3:4 of the Agreement.

37. Referring to Korea's argument that the transcript was the most important document in the administrative record, and contained the precise basis for the determination, the United States asked why if that was the case, Korea had not mentioned it till a late stage in the Panel's proceedings. Furthermore, Korea was relying on the transcript to fill in deficiencies in the KTC Determination. For example, the Determination stated nothing about which of the three bases for injury had been found by which Commissioner. Regarding threat of injury, the Determination contained essentially no findings or explanation of why, in the imminent future, imports were likely to cause injury. Moreover, while the determination of threat had to be a conclusion about future injury, the discussion in the Determination had been framed entirely in the present or past tense, e.g., the KTC's conclusions on causal link was based on the finding that "the Commission finds that the import price caused the domestic price to be suppressed and depressed".¹¹ That the transcript was offered by Korea to establish, wholly or largely, the basis for the KTC's determination, and not simply to provide an explanation or elaboration of the Determination, nor merely to clarify the Determination, was further demonstrated by Korea's own description and use of the transcript. Korea, for example, had stated before the Panel that:

the transcript "identifies more specifically with respect to each of the four Commissioners voting in the affirmative the rationale for, and positive evidence supporting, their votes; "the transcript is the most direct evidence of the deliberative process engaged in by each Commissioner"; "[i]n Korea's opinion, the most important administrative record document bearing upon issues which this Panel must resolve is the transcript of the KTC's voting session"; "[i]n short, the transcript constitutes a contemporaneous and reliable record of the reasons which each individual Commissioner expressed as the basis for his vote"; the transcript is a "fuller expression of the views which are later summarized in the KTC's published written determination"; "[t]he voting transcript, however, contains the precise basis for the separate opinion of each of the four" majority Commissioners; the transcript is "the most direct and contemporaneous evidence of the precise factors considered by each KTC Commissioner in reaching a conclusions on how to vote; the "transcript contains a very clear articulation of the factors which led two Commissioners to conclude that the petitioner faced a real and imminent threat"; "the transcript proves that the Commissioners who found threat relied on real evidence demonstrating an imminent threat"; "the transcript clearly explains this Commissioner's basis for focusing on net profits" (emphasis added by the United States).

Thus, it was clear that Korea offered the transcript, not the written determination, as the base document that contained the views of the KTC Commissioners; in fact, according to Korea, the Determination merely "summarized" the views set forth in the transcript. If in fact the transcript were to be used in the manner urged by Korea, i.e. as additional explanation and reasons for the determination, Korea had committed a per se violation of Article 8:5. This Article required that the notice set forth all issues of fact and law considered material by the investigating authorities, and the reasons and bases therefor. If there were other reasons or explanations, then, by necessity, all material issues had not been included in the notice. By clear implication, therefore, points that were not included in the public notice were

¹¹Determination, page 11, emphasis added by the United States.

not considered material by the investigating authorities. For all these reasons, the Panel should assess the KTC's affirmative finding's consistency with the Agreement based on the Determination itself.

38. Regarding the provision of the transcript to the interested parties, the United States asked whether the interested parties had any notice about the availability of the transcript in any form, and whether a public version of the transcript had ever been created and put on the record. Since counsel for the United States and Japanese companies subject to investigation had no access to the confidential record, presumably they had no opportunity to view the document, since Korea deemed it confidential. Moreover, there were two flaws in Korea's argument that the interested parties could have simply requested a public version of the transcript, but none had done so. First, waiting for parties to request the secret transcript was not sufficient to discharge Korea's obligations under the Agreement. Article 8:5 required public notice -- which is an affirmative act by investigating authorities -- of reasons and bases for the investigation authorities' decision, and that the reasons and bases be affirmatively forwarded to the exporting Parties and to the interested exporters. Similarly, the requirement under Article 3:4 for "demonstration" that imports were causing injury within the meaning of the Agreement implied an overt, public act by the investigating authorities, not a passive wait for someone to ask for the transcript. Second, the argument that the transcript was "publicly available" strained credulity. Korea had not asserted that the KTC had actually informed any parties that the transcript was available, or even that it had been made. Korea had not shown that its regulations provided that a public version of the transcript would be created upon request. To the contrary, Korea had strenuously argued the opposite, i.e. that it had the right to keep the transcript confidential. The way in which Korea treated the transcript in the dispute settlement proceedings also contradicted its claim that the transcript was publicly available. The fact that Korea introduced the transcript at a late stage and only after the Determination had been challenged belied the notion that the transcript would have been made available to interested parties just for the asking. In addition, a notice of the decision, with reasons therefor, had been ultimately published when anti-dumping measures were imposed. In view of that, what reason did the interested parties have to expect that the reasons for the KTC determination might, in fact, be contained in the transcript of the KTC vote?

39. The United States said that Korea was not correct in contending that the United States' position regarding the transcript would imply that the investigating authorities had to reference publicly all information, even confidential information. This was not the United States' position, and Korea's statement had confused information with reasons. Under the Agreement, confidential business information need not publicly be disclosed: Article 6:3 provided that confidential information shall not be disclosed without the permission of the person submitting it. The Agreement's treatment of confidential "information" was in stark contrast to its provisions regarding the investigating authorities' "findings", "conclusions", "reasons" and "bases". Article 8:5 specifically provided that these be made public. Furthermore, Korea had not claimed that the transcript had been withheld on grounds that it had contained confidential business information submitted by the parties. Rather, Korea had claimed that the KTC had wished to protect the identities of the individual Commissioners.

40. About not invoking Article 8:5 earlier in the proceedings, the United States said that it had not known that the transcript would be submitted by Korea; in fact, it had not even known about the existence of the transcript until after the first meeting of the Panel. The United States' raising of Article 8:5 in defence was appropriate and was done at the earliest opportunity. The United States argued that it was using Article 8:5 not as a basis for finding a violation but as a basis for directing the Panel to the relevant statement of reasons that it should consider in deciding the consistency of the KTC's determination with the Agreement. The effect of Article 8:5 was to preclude investigating authorities from justifying their actions under Article 3 on the basis of hidden or unofficial reasons. The Determination, and not the transcript, was properly the statement of reasons that the Panel had to be concerned with.

41. Korea said that the transcript had been submitted to the Panel because the United States had consistently rejected Korea's explanation of what the KTC had meant by the use of the term "import substitution". In this regard, the transcript made clear how the term was used in the Determination itself. It was evident that the Determination was a summary of the transcript, that the transcript did not contain anything new, and that the transcript merely further explained or clarified the basis for the determination as found in the Determination. The transcript was not a substitute for the Determination.

42. Korea said that the list of the record items it had provided in its first submission to the Panel had included examples of documents in the administrative record which contained the required positive evidence that supported the affirmative determination. The transcript, unlike the Determination, contained the views of Commissioners and was not a document that contained evidence. Rather, it was a discussion and evaluation of evidence contained elsewhere, and thus had not been identified in that list.

43. Korea said that the United States had not denied the fact that the parties to the investigation before the KTC had been aware that a transcript had been made. Thus, the transcript was not a secret; the contents had been kept confidential, but for entirely legitimate reasons explained earlier. The main point was that the United States was asking the Panel to ignore the most fundamental document that showed how the KTC had reached its determination. Consideration of the transcript would in no way damage the Panel's deliberative process. Moreover, Korea did not believe that the Panel had the authority to ignore a document in the administrative record that directly bore upon the issue before it. The Panel was obligated to examine all evidence in the KTC's administrative record, including the KTC's voting session transcript. If the Panel disregarded the transcript, it would be acting illegally because it could not ignore selected portions of the administrative record which were relevant and material to the basis for the KTC's determination.

III.3 Alleged Use of a Presumption of "Import Substitution"

(a) "Import substitution" and a consideration of the developments regarding import volume

44. The United States argued that the Determination failed meaningfully to examine or consider the large decline in the volume of imports, due to the KTC's reliance upon a presumption or theory of "import substitution", i.e. the KTC had presumed that it was normal or inevitable that goods produced by domestic producers would replace imports. By relying on this presumption, the KTC had not conducted an objective examination based upon positive evidence required under Article 3:1. For evidence to be "positive" in the context of Article 3:1, it must be based upon specific facts of record that tended to support the conclusion reached, rather than upon theoretical possibilities, assumptions, mere assertions, or speculation. In this sense, "positive" was similar to "real".

45. The United States said that the Determination had explicitly referenced the "import substitution" concept in two key places, namely at the beginning of the injury discussion (i.e. as a starting point of its analysis), and later when assessing a causal link. The Determination had stated that

"[C]onsidering that the domestic market was in the process of import substitution, the domestic industry's increases in sales and market share should be regarded as normal occurrences ... The decline in the volume of dumped imports is a normal occurrence because the domestic market is in the process of import substitution" (pages 4 and 9, emphasis added by the United States).

Thus, the concept of import substitution had occupied a central place in the Determination, and the KTC had relied on the concept of "import substitution" to discount the sharp decline in import volumes. The presumption of "import substitution" used by the KTC had no factual basis in the investigation record and was therefore unsupported by positive evidence. Moreover, an objective examination cannot

be squared with the biased view that it is normal or inevitable that imports will be substituted by domestic production. The reliance on the presumption of "import substitution" had meant that certain factors, such as the volume of imports, for which the Agreement mandated consideration, had not been given meaningful consideration. This was inconsistent with the Article 3:1 requirement that

"A determination of injury for the purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and their effects on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

46. Furthermore, the United States said that the "import substitution" theory had also formed the basis for the KTC's analysis of the volume of imports under Articles 3:2, 3:3 and 3:4 of the Agreement, and thus an objective examination based on positive evidence had not been carried out with regard to these provisions of the Agreement. The requisite consideration of whether there had been a substantial increase in dumped imports had not been carried out. Moreover, in the absence of findings based on an import substitution presumption, there was no evidence that could support an affirmative determination.

47. Korea argued that the United States had incorrectly interpreted the term "import substitution" used in the Determination. This term did not denote the use of any theory or presumption by the KTC. It was a shorthand way of expressing the unique market situation in the PAR case, i.e. if there was a new domestic firm entering a market in which there were no quality differences between its products and the dumped imports, the new entrant would necessarily acquire additional sales and market share so long as it was willing to engage in price competition with existing foreign competitors. The use of the term "import substitution" was thus merely a description of what had happened, and was not a method of analyzing or presuming anything under the Agreement.

48. Korea also said that "positive evidence" did not require some mathematical quantum of proof, but rather, required findings based on specific facts and not on theories, assumptions, or assertions. Thus, in this case, the Panel had to decide whether the evidence which the KTC had relied upon was "positive evidence", i.e. real evidence or real facts, which had supported the conclusions reached. The transcript and the other documents on record showed that the KTC determination was based on "positive evidence" and had involved an objective examination. The KTC had evidence of (1) an undeniable deterioration in the petitioner's financial condition during the period of investigation, (2) respondents' willingness to engage in fierce price competition to retain market share, (3) evidence of huge margins of dumping, (4) price underselling by imports leading to price depression and suppression, (5) continuing enormous spare capacity maintained by respondents sufficient to capture the entire Korean market, and (6) a demonstrated willingness to again capture that market. Giving some background to the competition in the PAR sector, Korea said that since the original development of PAR by DuPont in 1960, the worldwide market for PAR had been controlled by a five-company oligopoly consisting of DuPont, Celanese, Hoechst, Asahi and Mitsubishi. Korea argued that by declining to transfer their technology and by maintaining low prices in selected countries, the oligopoly was able to maintain its dominance, and that this was particularly true in Korea till Dong Yang Nylon was able to enter into a 50-50 joint venture arrangement with Mitsubishi in 1987 to form a new company, i.e. KEP, for the purpose of constructing and operating a PAR production facility in Korea; Mitsubishi transferred its technology to KEP.

49. Korea stated that the Agreement did not require a significant increase in the volume of imports in order to make an affirmative determination. The Agreement required that the volume of imports and the market share trends be considered. These factors were relevant and material to the KTC's evaluation of the condition of the domestic industry, and the Determination made clear that the KTC had considered these factors in its evaluation, but had decided that in the situation of a new entrant they would not be the basis for a negative determination. The critical factor in the KTC's evaluation

of the volume effect of dumped imports was set forth on page 9 of the Determination, where the KTC had expressly recognized that "dumped imports continued to account for a substantial share of the domestic market ... [and therefore that] imports continued to have a real impact on the domestic price." These conclusions were positive evidence of the KTC's consideration of the volume of imports and subsequent conclusion that, regardless of the trend, they had a materially injurious effect on KEP's prices. The large dumping margins of the imports, the competition in the market being mainly in terms of price competition, and the intense price competition between dumped imports and domestic products which resulted in a substantial decline in prices, were seen as adequate basis for finding injury under the Agreement. Had the KEP not made the decision to compete on a price basis, the respondents in this case would have continued to enjoy complete control of the Korean market. The KTC might have evaluated the situation differently if the respondents had not themselves continued to engage in price competition with KEP. If the Panel adopted the United States' position that the decline in import volume and market share prevented consideration of all of the other factors which were deemed positive evidence, it would be doing precisely what the Agreement prohibited. Article 3:2 stated that no single factor, including the factor of decreased or increased import volume, could necessarily give decisive guidance.

50. Korea also pointed out that the USITC itself had made an affirmative finding in a case where a new domestic producer had gathered market share at the expense of dumped imports. In that case, the USITC had found that it was "expected" that a new domestic entrant would acquire market share at the expense of imports.¹² In this case, the affirmative finding by the KTC had been made for a similar situation, and the term "import substitution" denoted the "expected" situation of a new domestic entrant having had acquired market share at the expense of imports.

51. The United States said that Korea had not denied that it would be a violation of the Agreement if the KTC had used the concept of import substitution as the United States had described. Korea had argued that the KTC had used "import substitution" to describe a fact. Thus, the Panel's task was to consider whether the Korean explanation was valid. An examination of the facts showed that it was not so. By the very terms of the Determination, the concept of import substitution had occupied a central place in the Determination.

52. The United States said that there was nothing in the Determination that supported Korea's argument that the term "import substitution" expressed nothing more than the fact that the domestic industry was entering a market that was traditionally dominated by imports and that, in such circumstances, some decrease in imports volume was expected. Korea's post hoc explanation was not plausible because reliance on "import substitution" by the KTC permitted it to give little or no weight to (1) an increase in KEP's market share from less than 1 per cent to 60 per cent, (2) corresponding increases in KEP's production, shipments, and employment, and (3) matching decreases in the volume and market share of imports, all in a little over one year. Thus, the facts of the case revealed much more than simply some decrease in import volume as a result of entry of a new producer into the market, or some decrease in domestic market share and shipments.

53. Furthermore, the United States said that "import substitution" was not a term that had arbitrarily and unexpectedly appeared in the Determination, with no particular significance attached to it. Traditionally, the theory of import substitution had been used to describe an economic strategy that envisioned systematic and intentional replacement of imported goods with domestic production, and the KTC's reference to "import substitution" had to be understood in that context. The KTC's reliance on "import substitution" was particularly significant in view of Korea's own programs for promoting domestic production of goods that were traditionally imported. The United States also mentioned that the Korean Government had an import substitution programme dating back to the 1970s. In the present time the Korean Government had prepared a "localization list" which, according to the GATT Report

¹²Benzyl Paraben from Japan, Investigation No. 731-TA-462 (Final), USITC Publication 2355, page 14.

of the Trade Policy Review of Korea, "lends financial support for import substitution". Funds under the localization programme had been made available to domestic firms which were seeking to develop items on this list. For a description of these policies the United States referred to the Report of the Trade Policy Review of Korea.¹³ This list had provided special emphasis to "components and electric and electronic products", and PAR fitted in that category. Similarly, the Korean delegation had explained that the unwillingness of foreign PAR producers to transfer technology to Korean interests represented a "special circumstance" relevant to the KTC's determination in this case.

54. Regarding the reference by Korea to the USITC decision which showed that the United States' authorities had recognized the possibility of an affirmative finding even when imports had declined as a result of the entry of a new domestic producer, the United States said that the decisions of the United States' authorities were not at issue in these Panel proceedings. The United States also pointed out that the facts were different in the case mentioned by Korea.¹⁴ In that case, although the domestic producer had gained some market share during the period leading to the determination, at the time of the determination the sole domestic producer's operations had been completely shut down, due in large part to the effects of the subject imports from Japan.

55. Further, the United States clarified that it was not contending that any decline in the volume of imports automatically required a negative determination. Rather, it was emphasizing that import volume occupied a central place in an analysis of injury under the Agreement: Articles 3:1 and 3:2 of the Agreement mandated an objective examination of the volume of imports and a consideration of whether there had been a significant increase in imports in absolute terms or relative to production or consumption in the importing country. To the extent that import volume had declined, and the domestic producer - whether a new entrant or not - had gained market share, these factors were relevant under the Agreement. In no case, and certainly not in a case involving the severe import decline and transfer of market share as in the PAR investigation, could such events be written off as a "normal occurrence" of "import substitution". If replacement of most imports was "a normal occurrence," why was not the replacement of all imports equally expected?

56. Korea argued that the United States wanted the Panel to give decisive weight to the decline in the volumes and market shares of imports, and to disregard the KTC's analysis of pricing trends and all of the other evidence before it upon which it had relied. However, the Agreement authorized the investigating authorities to consider both volume and price trends, and expressly stated in Article 3:2 that "[n]o one or several of these factors can necessarily give decisive guidance." Thus, the investigating authorities had ample discretion under Article 3:1 to consider the "volume of dumped imports and their effect on prices" without regard to whether or not there had been a significant increase in such imports during the period of investigation. The documents on record showed beyond any doubt that the KTC had considered the effect of import volume on the petitioner, and that it had been aware of the fact that import volume had declined. The KTC had been amply justified, under the Agreement, in concluding that in the case of a new domestic entrant in the market, focus on prices rather than volumes was the reasonable method of evaluation.

57. Korea said that it was not the task of the Panel to second guess the KTC, particularly where the KTC had relied on economic factors expressly identified in the Agreement. The affirmative finding of injury in this case was due to four KTC Commissioners voting in favour of such a finding and three KTC Commissioners voting against it. Therefore, it was evident that there would be evidence which would form the basis of both a positive and a negative determination; however, the Panel's job was not to conduct a de novo investigation nor to attach its own weights to the different factors. Its job

¹³GATT /1992), Trade Policy Review: Republic of Korea, Volume I, GATT Geneva.

¹⁴Benzyl Paraben from Japan, op. cit.

was to consider whether, under the Agreement, there was a basis for the majority decision of the KTC in favour of an affirmative finding of injury. If the Panel, in its investigation, decided to assign greater significance to some factors rather than others, it would usurp the authority of the investigating body, and the Agreement did not permit that. The standard of review which the Panel applied in this case would be critical, particularly in view of the fact that no GATT Panel had yet articulated the requirements of the positive evidence standard of review.

58. Regarding the "localization lists" mentioned by the United States, Korea stated that though the list identified over 1700 items eligible for financial support by 1990, PAR was not on that list. There was no factual support for the claim that import substitution policy had been applied to the product subject to the KTC's investigation. Also, it was well known that for some time now, Korea had followed a policy not of import substitution but of export promotion. In addition, Korea noted that the United States' resort to information which was outside the administrative record of the KTC's investigation (i.e. from a Trade Policy Review Mechanism document) was totally irrelevant to the Panel's inquiry and may not be considered by the Panel.

59. The United States said that whether or not PAR was actually on the "localization list", it appeared to be official Korean Government policy to replace imports of this type of goods with domestic production through such a list. Thus, the phrase "import substitution" was indicative of the broader context in which the KTC viewed its injury determination.

60. The United States said that it was not asking the Panel to reweigh the evidence, to make factual findings or to otherwise act as an investigating authority. Rather, it was asking the Panel to consider whether an objective examination of the evidence had been made. The issue before the Panel was not whether there was evidence "existing" in the record that could, in the abstract, support an affirmative finding. Instead, because the Agreement stated that the determination had to be "based" on positive evidence, the issue was whether what the KTC actually did was based on positive evidence, and reflected the objective examination and consideration required by the Agreement. For this, it would be necessary to examine the reasons the KTC had actually offered in its Determination.

61. The United States said that not only did the volume of imports occupy a central place in injury determinations under the Agreement, it was one of only a few factors specified by the Agreement for determining causation of injury. This suggested that the drafters of the Agreement had intended an increase in the volume of imports to be particularly relevant to the determination of causal link. Therefore, it would be highly unusual to have an affirmative determination when the volume and market share of imports were sharply declining, as in the case before the Panel. More importantly, the Agreement did not allow evidence concerning import volume to be disregarded or accorded substantially less weight based upon an analytical approach that presumed that it was "normal" or "inevitable" that imports would be replaced by domestic production. In this case, the Determination was built upon an assumption of "import substitution", which the KTC had invoked to disregard the wealth of "positive evidence" supporting a negative finding. Whether termed a presumption, assumption, theory, or market view, "import substitution" was not "positive evidence" under the Agreement.

62. Korea said that the transcript and some other documents in the record, particularly the staff memoranda which were originally attached to the agenda provided to the KTC Commissioners in advance of the voting session, furnished complete and irrefutable proof that the KTC analysis did not use any theory of "import substitution". The staff memoranda included a detailed pricing analysis, a very detailed summary of the arguments of both the petitioner and the respondents along with staff comments on those arguments, a detailed memorandum concerning the rules of anti-dumping procedures and a list of issues for consideration at each stage of the investigation. None of these documents had mentioned the import substitution theory or its appropriateness for use by the KTC. If the import substitution theory was deemed at all relevant, or potentially relevant, to the outcome of the case, one would certainly

expect to have seen it referenced in one of these three documents. Moreover, any ambiguity in this regard was laid to rest by an examination of the transcript itself.

63. Korea said that the transcript identified specifically with respect to each Commissioner voting in the affirmative the rationale for, and positive evidence, supporting their votes. In the transcript, only two Commissioners had even referred to the "substitution" of domestic products for imports, but neither had made a reference to any theory or policy of "import substitution". One of the two Commissioners (identified in the transcript as "Commissioner C"), in discussing the issue of causation had stated that

"because a new domestic industry has recently begun operations, the demands supplied by the existing companies were being substituted with the new market entrant. Therefore, it is inevitable that sales volume and market share would decline" (Transcript, page 16)

This statement appeared nearly at the end of a long analysis of the evidence and arguments submitted by the two sides, and from Commissioner C's statements in the transcript it was clear that he had considered all the relevant factors identified by the Agreement and had based his decision on his evaluation of these factors. He had not even used the term "import substitution"; rather, his statement described an event which had occurred. Likewise, the other Commissioner who had referred to substitution (identified in the transcript as "Commissioner D"), had not mentioned "import substitution" in his oral remarks. Similar to Commissioner C, his written remarks¹⁵ revealed that by the term "substitution", he was also describing an event that had occurred and was explaining why that event, in his opinion, did not require a negative determination. Thus, from the remarks of both Commissioners C and D, there was no basis to conclude that they had employed a theory which they never articulated.

64. Regarding references to the USITC practice, Korea said that these references were not irrelevant to this Panel's deliberations insofar as those precedents and authorities assisted in understanding the basis for the KTC's determination. Moreover, the United States' hypocrisy in challenging various aspects of the KTC's determination was relevant. The issue was one of the United States' position on various matters, and credibility was subject to grave doubt where the United States had criticized Korea for actions which the USITC had itself taken in various cases in the past.

65. The United States said that the absence of the term "import substitution" in the documents prepared by the KTC staff could be interpreted in another way. The issue was not the actions of the KTC staff, but of the KTC Commissioners, who were the decision makers in the investigation. The absence of an import substitution theory in the staff documents and the presence of this in the Determination itself indicated that the Commissioners had affirmatively added it to the Determination. This itself underscored the importance of the concept in the Determination.

66. Regarding Korea's arguments pertaining to the opinions of the two Commissioners in the transcript, the United States reiterated that under the Agreement, the transcript was not relevant as an explanation of the basis of the KTC decision. If the Determination was a consolidation and summary of all the four Commissioners voting in the affirmative, then the statements in the Determination had to be

¹⁵On page 1 of his written remarks, Commissioner D stated that "[t]he domestic industry is not in a situation where dumped imports are entering into the domestic market and increasing their market share. Rather, it is in a situation where there were no supplies from a domestic industry and a new domestic industry is entering into a market where foreign companies had controlled 100 per cent of the market. Therefore, the decline in import volume and market share and the fact that the market is being substituted with the domestic industry are not all that important factors in an injury determination."

attributed to all the Commissioners. If that was not the case, then Korea had to explain what the Determination was. In any event, it was not proper under the Agreement for even one Commissioner to base a determination on the import substitution rationale.

67. Further, the United States said that the transcript only confirmed that the KTC Commissioners had employed a view of import substitution. For example, Commissioner C stated that "the demands supplied by the existing companies were being substituted with the new market entrant. Therefore, it is inevitable that sales volume and market share would decline" (Transcript, page 16). This analysis paralleled closely the "normal occurrence" analysis contained in the Determination.¹⁶ Likewise, Commissioner D had also used the concept of import substitution in a manner similar to that found in the Determination. Commissioner D had written that "the decline in import volume and market share and the fact that the market is being substituted with the domestic industry are not all that important factors in an injury determination" (Transcript, page 1 of Commissioner D's written outline, emphasis added by the United States). Thus, Commissioner D had expressed his view of the extremely limited weight he had given to the import market share and volume developments in view of the expected displacement of imports by domestic production.

68. Regarding Korea's argument that the KTC's use of import substitution was harmless because the "the two Commissioners who referred to such substitution were describing an event, not analytical theory", the United States said that this emphasized form over substance. It mattered little whether the KTC's import substitution analysis was called a presumption, assumption, market view, or even a description of an event. The point was that the KTC had indicated what it expected as a "normal occurrence" in the market. Also, of all the reasons for the affirmative finding offered in the transcript, the KTC had chosen to highlight the "normal occurrence" of import substitution prominently in the written Determination released to the public. In view of the requirements of Article 8:5 that the public notice set forth the findings and conclusions considered material by the investigating authorities, this "normal" process had to be presumed to be one of the most "material" findings or conclusions reached by the KTC.

69. Moreover, the United States said that its argument in this proceeding was not dependent on the KTC's use of the specific term "import substitution". It was the KTC's embrace of an import replacement concept, rather than its use of the specific phrase "import substitution", that concerned the United States most about the Determination. Even if the term "import substitution" was nowhere mentioned in the Determination, the Determination would still express clearly KTC's view that the domestic producer's gains in market share and sales, and the decline in import volume, were "normal occurrences". It was this clear expression of what was expected in the market that was not consistent with the Agreement's requirements under Articles 3. The KTC's use of the particular phrase "import substitution" reinforced the conclusion that the KTC had employed an impermissible analysis.

70. The United States reiterated that the USITC practice was not pertinent to the Panel review. Further, it argued that Korea was incorrect in stating that the KTC Determination in this case would pass muster under the United States' law. Korea had not cited anything in United States' law that would permit the basic violations of the Agreement committed by the KTC in this case. For example, there was nothing in the United States' law that would justify failing even to state the basis upon which the

¹⁶The United States also said that Commissioner C had used the concept on more than one instance. On page 1 of his written remarks attached to the transcript, Commissioner C had emphasized that "this case involves a new industry which is a new entrant in import substitution merchandise" (emphasis added by the United States); later, on page 4 of his written remarks, Commissioner C had again focused on the fact that "the import volume was in the process of substitution with the domestic products".

determination was rendered.¹⁷ Nor would United States' law permit the USITC to find threat of material injury, and not discuss in any way the reasons for that finding.¹⁸ Similarly, United States' law forbade introduction of a market view -- like Korea's import substitution theory -- that substituted for analysis of specific injury factors required by the United States statutes.¹⁹ Furthermore, under United States law, a transcript of the USITC voting session would be considered part of the administrative record, but would in no way be part of the USITC determination. On judicial review, it was the determination itself that had to either stand or fall.

71. Korea said that the United States was wrong in contending that the Determination had to be attributed to all the Commissioners. The Determination was a consolidation of the views of all four Commissioners, and not an expression of a single viewpoint in which all concurred. If the transcript showed anything, it showed that they each had approached the case from a different perspective. No single Commissioner should be deemed to subscribe to every opinion and conclusion expressed in the written determination. Rather, the Commissioners subscribed to the result reached.

72. Korea emphasized that the KTC, like the USITC, was an independent body which was insulated from politics. The deliberations of the KTC were not, and are not, influenced by other elements of the Korean Government. With hindsight, it was unfortunate that the KTC had used the phrase "import substitution" in the written final Determination when no KTC Commissioner had used it. The Determination should have made clear that the two Commissioners who referred to such substitution were describing an event, not analytical theory. However, the transcript laid to rest all concerns on this issue.

73. Korea argued that the cornerstone of the United States' complaint was that an import substitution theory or concept had been used by the KTC in this case. The transcript showed that this was not the case, and that the Commissioners had considered all the relevant factors. Thus, the remaining arguments of the United States constituted nothing more than a disagreement with the weights which each Commissioner had assigned to various pieces of evidence. Even the argument that the large increase in sales by the domestic producer and the corresponding decline in sales by the respondents somehow proved that the KTC had used an import substitution theory or concept was nothing more than a disguised argument that the KTC had incorrectly analyzed the significance of the sales volume data. However, the evaluation of data was a matter entrusted by the Agreement to the KTC's administrative discretion and expertise.

(b) "Import substitution", price effects, and causal link

74. The United States said that the KTC's view that "import substitution" was a "normal" process was also evident with regard to its findings on the subject import volume's causal link with price effects and injury. Hence, the Determination was inconsistent with Articles 3:2 and 3:4 of the Agreement. Article 3:2 required that the investigating authorities consider

"whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree ..."

¹⁷The United States said that the United States Court of International Trade had stated that the USITC must not simply state the basis for its determinations, but it must explain the basis. See, for example, SCM Corp. v. United States, 487 F. Supp. 96, 108 (CIT 1980).

¹⁸See, for example, A. Hirsch, Inc. v. United States, 729 F. Supp. 1360, 1363 (CIT 1990).

¹⁹See, for example, Trent Tube Div. v. Avesta Sandvik Tube AB, Appeal No. 91-1173 (Fed. Cir. 1992).

Article 3:4 required the investigating authorities to demonstrate that the dumped imports were, through the effects of dumping, causing injury within the meaning of the Agreement.

75. The United States said that to find a causal link, the KTC had to brush aside not only the absence of an increase, but a substantial decrease in subject import volume and market share over the investigation period. The subject imports had declined from 10,243 tons in 1988 to 5,821 tons in 1989, and had continued to fall during the first-quarter 1990 to only 890 tons (corresponding to an annual rate of 3,560 tons). The market share of subject imports had dwindled from about 61 per cent in 1988 to 33 per cent in 1989, and then to about 24 per cent in first-quarter 1990. Not only had there not been a "significant increase" in import volume, as required by Article 3:2, but imports had plummeted at a break-neck pace. Nevertheless, the KTC had found this not to be remarkable or noteworthy but to be a "normal occurrence" because the domestic market was "in the process of import substitution", and that "[t]he decrease in the volume of imports is an inevitable result of the fact that a new domestic producer entered the domestic market that was dominated by imports."

76. Moreover, the United States pointed out that in response to the respondents' arguments that the domestic industry had caused the decline in price levels by pricing below the subject imports, the KTC had stated in the Determination that

"it is reasonable for a new entrant to sell at a price slightly below the established price in order to secure customers." (pages 10-11, emphasis added by the United States).

This view was entirely consistent with the KTC's "import substitution" theory, i.e. if price undercutting facilitated an occurrence that was "normal" or "inevitable", it could not, in the KTC's view, be counted against the domestic industry nor be viewed as a significant factor in examining price effects. However, this was inconsistent with the requirements of the Agreement under Articles 3:2.

77. The United States said that in the KTC's view, the subject imports had continued to affect prices because "the dumped imports continued to account for a substantial share of the domestic market" (Determination, page 9, emphasis added by the United States). However, it was difficult to consider how rapidly declining imports could have adversely affected domestic prices or caused injury to domestic industry. Also, the KTC had not explained how the diminishing imports could have significantly affected prices when the imports were not undercutting domestic prices. The evidence showed that the domestic industry had been the price leader and its pricing policies had been the cause of the price depression because the import prices had only responded to the prices set by the domestic industry. This was shown by the KTC's own finding that the domestic industry had captured 60 per cent of the market for a product that Korea itself had described as price-sensitive. Only by ignoring the price leadership of the domestic industry, the domestic industry's rapid movement toward a dominant market position, and the dwindling of the subject imports, could the KTC conclude that imports were responsible for negative price effects and injury to domestic industry. Moreover, the KTC's finding that it was reasonable for KEP to undercut price was also inconsistent with another of its findings that "a substantial portion of [KEP's] market share represents customers that were delegated to the domestic industry by its investors." If the domestic industry already had a substantial portion of the market, then why did the industry need to undercut prices in order to get a foothold into the market?

78. Further, the United States said that it was logical to assume that if, as here, the absolute and relative volume of imports had declined sharply, the "positive evidence" concerning price effects of imports had to be more substantial than if there had not been such a volume decline. Instead, in this case, the KTC had specifically found an absence of price undercutting and had cited little evidence in support of its conclusion that imports had caused price suppression or depression, notwithstanding their rapidly declining volume.

79. Korea said that in an industry where the product was basically fungible (i.e. imported and domestic products competed mainly on a price basis), resolving the issue of who was the price leader was not particularly helpful in evaluating the issue of causation. More significant was the fact that imports were at their particular level due to dumping and dumping had allowed the respondents to continue to decrease their prices. Given that PAR was a fungible product, even a small amount of dumped imports could have had significant impact on prices. The Determination had expressly referenced the high dumping margins and linked the resulting prices to its finding of price suppression and depression. It had mentioned that the dumped imports, even after declining, continued to account for a significant share of the market and thus continued to have a significant effect on prices. The key sentence in the Determination regarding the dumped imports being the cause of injury was "[h]owever, the fact that the dumped imports continued to account for a substantial share of the domestic market demonstrates that notwithstanding the reduction in import volumes, imports continued to have a real impact on domestic price". Also, immediately following the reference to the high dumping margins, the KTC had noted that the "imports from the three respondent companies were competing with the domestic goods", which was a reference to price competition and furnished the basis for the KTC's decision to cumulate imports from all three respondents. It was clear under the simple laws of economics that without dumping, import prices would have been higher, and most likely significantly higher. KEP's prices and resulting profits had been dragged down by the dumped imports, and under Article 3:2 of the Agreement, the enormous dumping margins in themselves furnished a sufficient "causal link" to a finding of price suppression and depression.

80. Further, regarding price undercutting, Korea said that this was an alternative, but not an exclusive, basis for an affirmative determination under Article 3:2 of the Agreement. Moreover, the Agreement did not require evidence of consistent price undercutting for an affirmative finding. In this case, there was substantial evidence on record that imports had undercut prices, and the data on prices showed that there had been a mixed pattern of underselling and overselling by dumped imports.

81. Referring to KEP having had acquired a substantial customer base at its inception, Korea explained that the term "delegated" did not convey fully the nature of the evidence considered by the KTC. The Korean term which had been translated could also be translated as "succeeded", "acceded", or "took over". According to the KEP's representatives at the hearings before the KTC, there were four reasons why the company had been able to acquire the former customers of Mitsubishi and Dong Yang (i.e. the two partners in KEP): (1) KEP was able to acquire Mitsubishi's technology, and the previous customers had some assurance about product quality; (2) as a domestic producer, KEP could provide timely and reliable delivery; (3) before entering the market, KEP had conducted a thorough study of current and projected demand; and, (4) KEP had provided technical services to customers along with its PAR, which had helped build customer loyalty and confidence.

82. The United States said that Korea was seeking to recast the Determination through its argument that dumping margins were found to be a direct cause of price suppression and depression. While the Determination had referenced the dumping margins, the placement of the reference indicated that the KTC was simply listing the events in the anti-dumping investigation that had preceded the injury determination: the reference to the dumping margins was in the context of the Ministry of Finance's notification to the KTC of the margins decision, and the same paragraph also included the Ministry of Finance's decision to limit the investigation to three companies. Also, the text of the Determination did not make clear whether and how the dumping margins had entered into the KTC's analysis, and in what way the margins supported an injury finding. Not only did the Determination have no explanation of the role of the dumping margins, there was also no reference to these margins in the KTC's discussion of the price effects. If the margins had played a key role in the analysis, one would certainly expect at least some explanation of that role in the Determination itself.

83. Further, the United States said that the existence of dumping margins alone could not justify a finding of injury or significant price effects under the Agreement. This was because the Agreement required that, before taking anti-dumping measures, investigating authorities had to find both dumping and injury. If the existence of dumping margins was sufficient by itself to establish significant price effects, the injury determination would become superfluous. For margins to be at all relevant, the investigating authorities had to draw a nexus between the margins and negative impact on prices or on the domestic industry. Reliance on dumping margins could not be presumed without explanation; Article 8:5 required findings and conclusions on all issues of fact and law considered material by the investigating authorities to be provided in the public notice.

84. The United States said that Korea was also injecting into the Determination a finding of price undercutting by imports. However, the only findings on price undercutting in the Determination were that, (a) there was no significant undercutting and, (b) it was expected for a new domestic producer to undercut imports to gain market share. The Determination had to be judged on the bases set forth in the Determination itself and not on post hoc reasons offered subsequently to the Panel. Thus, any assertion by Korea that the record might contain some instances of price undercutting that could support an affirmative determination was irrelevant to the Panel's review of the KTC's actual determination.

85. Furthermore, the United States said that Korea's claim that KEP had to price aggressively as a new market entrant trying to enter the market, was contradicted in two key respects; namely, KEP's market position when it began operations, and its position at the end of the period of investigation. Korea had argued that "KEP was able to acquire at its inception a significant customer base and sales volume". None of the reasons provided to explain the acquisition of a significant customer base, which was about [**] per cent of the domestic market and had made KEP the largest single supplier of the Korean market, were related to price competition with imports.²⁰ Thus, KEP had obtained this market share without price competition when it had entered the market, and this contradicted the statement that KEP had to engage in price competition in order to make any sales.

86. Similarly, the United States argued that from the initial base of [**] per cent of the Korean market, KEP had become the dominant supplier with 60 per cent of the market share by the end of the investigation period. Thus, KEP had the largest stake in the market when it had started production, and during the period of investigation had undertaken a pricing strategy that had left it in control of the majority of the market. In view of these facts, the KTC's statement that "it is reasonable for a new entrant to sell at a price slightly below the established price in order to secure customers" reflects its import substitution thinking. In this case, the KTC's statement meant that it was reasonable to price sufficiently low to move from [**] to 60 per cent of the market share, displacing (or "substituting" for) [**] per cent of the imports' market share in the process. In fact, since the real starting point for KTC's aggressive pricing was [**] per cent of the market, under KTC's logic it would be reasonable for any industry producing a fungible product, even an industry in business for many years, to attempt to increase its market share through low prices. It would always be expected that import volume and market share would decline as a result of such pricing, but the KTC's analysis would not examine or consider these and only see if there were significant price effects. This was what had happened in the PAR investigation. The Agreement, however, did not permit an analysis that, as a matter of course, assumed import declines. It required an objective examination of the volume of dumped imports and a consideration of whether there had been a significant increase in those imports in absolute terms or relative to production or consumption.

²⁰[**] indicates data for which confidential treatment was requested by Korea.

87. The United States said that the only adverse price effect found by the KTC was that imports had depressed and suppressed prices, and a consideration of the Determination revealed that the KTC had cited little evidence in support of a causal link of import volume with price suppression or depression.

88. Regarding the Determination not containing any finding of underselling, Korea agreed that while this was the case, the underselling evidence had been relied upon by the KTC for a different proposition, namely that price depression had occurred. Thus, the evidence of price underselling had constituted positive evidence of price depression, and price depression²¹ was an independent factor which would support an affirmative finding under the Agreement.

89. Regarding the United States' claim that the KTC should have substantiated the price effects of imports more than it did in the Determination, Korea said that even assuming that this was correct (though Korea contended that this was not correct), the KTC clearly had an evidentiary basis for finding those "price effects" in that it had evidence of fierce price competition and underselling by imports which had been enabled by the huge dumping margins. In fact, the record evidence that the respondents had engaged in price suppression and depression had been submitted by Korea to the Panel. The adverse effects of dumped imports on profitability had been clearly identified and discussed in the transcript and in the Determination itself, and this was all that was required under the Agreement.

90. Korea stated that high dumping margins were cited in the Determination on page 9 and contrary to the United States' assertion, the role of these margins had been explained in the Determination. The United States was simply refusing to acknowledge that the existence of dumping by definition meant that a foreign producer's price was lower than normal or fair value. If the foreign producers' prices were at a normal value, in an industry with a fungible product that was sold primarily on the basis of price, like PAR, then domestic prices would be higher. The KTC's reference in the Determination to the respondents' high dumping margins necessarily included these implicit concepts, and moreover, imports and domestic PAR had been found to be in direct price competition. Thus, dumping had caused price depression and suppression, and that was precisely what the KTC had found.

91. Korea said that the transcript clearly showed that high dumping margins had been deemed to be a causal factor.²² All the four Commissioners had expressly discussed how the high dumping margins had caused adverse price effects, and the transcript clearly showed that high dumping margins had caused the domestic producer to lower its prices to compete. Only by ignoring the transcript could the United States suggest that high dumping margins had not been considered by the KTC.

92. Further, Korea said that the record evidence on individual price data, upon which the average prices were based, and the discussion of these data in the transcript, clearly showed that there had been price underselling by imports and that this record evidence had been relied upon by the KTC. Also, based on detailed analysis, the Commissioners had concluded that KEP would be unable to increase its prices due to the continuing presence of substantial volumes of dumped imports. This finding had provided a complete and incontrovertible basis under the Agreement for an affirmative causation finding.

93. The United States said that the Determination did not indicate whether some instances of price undercutting had been used to support a finding of price effect, nor did it indicate how the evidentiary basis referred to by Korea had been used to make a finding of adverse price effect.

²¹Korea said that the KEP had also submitted in its questionnaire response a significant number of examples of sales lost to DuPont and Hoeschst as well as instances of revenue lost in price competition with those two companies.

²²Korea referred to pages 14, and 16 to 20 of the transcript for an analysis of the effects of dumping on the petitioner.

(c) "Import substitution" and impact on the domestic industry

94. The United States argued that by relying on the presumption of "import substitution", the KTC had also discounted those aspects of the domestic industry's performance which favoured a negative determination. Thus, the KTC had not conducted an objective examination based on positive evidence of the impact of imports on the domestic industry in accordance with the factors the listed in Article 3:3, and therefore, had failed to satisfy the requirements of Articles 3:1 and 3:3.

95. The United States said that, to the extent consideration of any of the factors listed in Article 3:3 was marred by the import substitution rationale, the Determination was in violation of the Agreement. Article 3:3 was an elaboration of the general requirement of Article 3:1 that a determination of injury "shall ... involve an objective examination of ... the consequent impact of imports on domestic producers"; moreover, Article 3:3 began with the phrase "[t]he examination of ..." (emphasis added by the United States). An "examination" of the impact of imports on domestic producers that was based on an expectation of domestic market share increases and sales gains was hardly objective; indeed, it was not an examination at all, and it assumed away the very thing that the Agreement required to be examined. In addition, Article 3:3 itself required an "evaluation" of all relevant economic factors and indices. An analysis based on an expectation of import substitution was not a meaningful evaluation as required by the Agreement.

96. The United States noted that the KTC's Determination stated explicitly that increases in market share and sales were normal occurrences because the market was in the process of import substitution. The KTC had viewed the domestic industry's capacity utilization in excess of 90 per cent, and the dramatic gains in its sales, market share and employment as indicating only "superficial" positive performance. In contrast to these remarkable gains, the KTC had cited only a few indicators that could conceivably support an affirmative finding of material injury, namely, increased inventories, lost sales revenue, and insufficient net profits. At least two of these factors, i.e. sales revenue and profits, reflected KTC's import substitution thinking.

97. The United States said that, by focusing on the price decline in the domestic market, the KTC had concluded that "there was substantial loss to the domestic industry's sales revenues during the period of investigation due to price depression." Sales revenues, however, were a function of both prices and volume of sales; to find a "substantial loss" in revenues, one had to disregard the increase in KEP's sales volume from practically nothing in 1988 to over 12,000 million Won in 1989, and focus instead on the modest price decline. The KTC was able to disregard the sales volume increase by concluding that the increase was a "normal occurrence" of import substitution. If the KTC had considered both the elements of sales revenue, i.e. volume and price, it would have found that there was no loss in sales revenue, but instead a substantial gain. Thus, the point was not whether one element should have "greater weight" than the other, but a failure of the KTC to consider one of the elements in making its categorical statement.

98. Similarly, the United States argued that the presumption of "import substitution" was reflected in the KTC's consideration of the financial performance of the domestic industry. During 1989, the first year of its operation, KEP had earned an operating profit in excess of 20 per cent of net sales. However, the KTC had considered not operating profits but net profits of the domestic industry. KEP's net profits were substantially lower than operating profits because they were calculated by deducting from operating profits a huge sum of "other" expense items, which comprised mainly the interest expense for construction of KEP's production facilities. By definition, net profits included items that were not directly related to current operations. Thus, in this case, reliance on net profits distorted the true picture of the "operations" of the industry.

99. In this context, the United States said that the first plant of the KEP had a capacity that accounted for about two-thirds of all demand for PAR in the Korean market. The deduction of the vast construction costs from KEP's operating profit during its first year of operation appeared designed to produce the

lowest possible profit margin. Moreover, this reflected the "import substitution" thinking of the KTC because, if the domestic industry was "normally" expected to "substitute" for imports, then expenses for this facility could be considered simply part of the process of substitution. Furthermore, the interest expenses considered to calculate net profits might have extended beyond the KEP's first production facility, i.e. the financial analysis might have included the interest payments for the second plant which was under construction during the investigation period. Including the second plant, KEP's capacity would exceed 100 per cent of the domestic PAR market. The logic of KTC's "import substitution" analysis suggested that expenses related to the second facility should also be factored into the analysis of KEP's performance because, taken to the extreme, import substitution envisaged total replacement of imports.

100. The United States said that the KTC had found that KEP had earned net profits of 1.6 per cent in 1989 which, according to the KTC, "cannot be regarded as sufficient to permit the domestic industry to maintain normal operations and development" on the basis that the domestic industry "requires enormous investments", "needs to continue R&D investments for product diversification and new product development", "requires considerable internal reserves for equipment replacements", and did not earn "the domestic chemical industry's 3.24 per cent average profit rate". The KTC's view that the domestic industry was entitled to a level of performance that provided for long-term development and the accumulation of "internal reserves" even in its first year of operation, reflected the KTC's stated expectation that the industry would replace imports. Also, the KTC's "sufficient profits" test, which compared the average profits of chemical industries with KEP's net profit, ignored KEP's status as a start-up firm and the fact that the industries included in the cited survey of chemical industries might have been established industries: it would not be surprising for a new firm to earn no profit at all for several years. Further, the cited survey of chemical industries covered a range of industries such as chemicals, oil, coal, rubber and plastic industries which could have had different profitability norms than would be expected in the nascent PAR industry. Moreover, there was no mention by the KTC of the "norm" for operating profits for the chemical industries, and it was unlikely that those businesses could have equalled the 20 per cent-plus operating profits achieved by the Korean PAR industry.

101. The United States said that the first-quarter 1990 financial data would also not support a finding of injury because they suffered from the same flaws as the 1989 data. In first-quarter 1990, KEP's gross and operating profits, as a percentage of net sales, were even higher than KEP's substantial margins in 1989. A "net loss" had resulted in this period only when the KTC included the expense item identified as "other income".

102. Korea said that the KTC was clearly aware of each of the factors which according to the United States mandated a negative determination, and it had not ignored them. There was no basis to conclude under the Agreement that the KTC had not been justified in placing primary reliance upon certain factors which the Agreement authorized it to consider and in placing less reliance or no reliance on certain other factors which it was also authorized to consider. It was this discretionary process which the Agreement expressly endorsed in Articles 3:2 and 3:3 when it stated that "[n]o one or several of these factors can necessarily give decisive guidance." The KTC had complied with the requirements of Article 3:3 of the Agreement, which first stated that the investigating authority's examination of the impact of dumped imports on the industry concerned "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and then provided an illustrative, but not an exclusive, list of examples of such factors and indices. Here, the KTC had considered the relevant factors, including the downward trend in the KEP's financial condition, the profit margins of KEP in comparison to companies in the same general industry, whether there were any ways in which KEP could improve its profitability in the near term, the nature of the industry (i.e. capital intensive and high technology), inventories, the "potential" as well as "actual" effects on profits, productivity, return on investments, growth, and ability to raise capital or investments. The staff report included several other factors, including a break-even analysis which had calculated

the prices required to recover costs under different assumptions.²³ Though each of the factors considered had not been reflected in the Determination, it was clear that each Commissioner was aware of all the information summarized in the staff report.

103. Korea said that on considering the relevant factors, the KTC had found that KEP's financial condition had deteriorated and that there were no means of "self-help" which KEP could use to improve its situation. The KTC had found that dumped imports had made it impossible for KEP to raise prices sufficiently to the level enjoyed by firms in the chemical industry or to generate sufficient funds to ensure KEP's competitive viability. Dumping had been found to be a direct cause of price suppression and depression, and without dumped imports, the sales revenues would have been higher. The fact that KEP was a new entrant faced with dumping did not require a special type of analysis of its financial statements; there was no inconsistency with the KTC's analysis of KEP's financial statements which irrefutably showed a deterioration in the company's financial condition during the period of investigation. Also, the United States had itself conceded that there were a few indicators that could conceivably support an affirmative finding of material injury, including lost sales revenue, insufficient net profits, and increased inventories.

104. Regarding the KTC's examination of whether KEP's level of profitability was sufficient for long term development, Korea said that there was nothing in the Agreement which prohibited such a consideration. Article 3:3 of the Agreement expressly allowed an investigating authority to consider actual and potential declines in profits, return on investments, cash flows, growth, and ability to raise capital or investments -- to name a few examples of considerations relevant to the current and "long-term development" of KEP.

105. Further, Korea said that the Agreement did not prohibit an examination of net profits and losses because the term used in Article 3:3 was "profits" and not "gross profits" or "operating profits". In this case, the use of net profits was particularly appropriate because the only product which KEP produced was PAR. Thus, in a very real sense, all income and expense items were directly related to KEP's PAR production. The real issue was whether the enterprise as a whole was generating sufficient revenues and profits to fund both current and future operations, all of which were devoted solely to PAR production.

106. Korea said that the KTC's net profit analysis had not included expenditures related to construction of KEP's second 10,000 ton facility.²⁴ All of the expenses considered were legitimate expenses incurred in the running of the KEP business. The costs attributable to "plant construction" constituted current costs: depreciation and amortization, for example, were clearly current costs under generally accepted accounting principles. These costs had affected the financial position of the domestic industry, and

²³The four scenarios under which the break-even prices were calculated were: (1) prices which recovered only expenses which had a direct relation to production and sales of PAR, i.e. costs excluding special expenses such as congratulations, condolences and receptions; (2) prices which recovered total expenses incurred, without yielding any profits; (3) prices which resulted in a net profit of 3.24 per cent; (4) prices which resulted in a capital earning rate of 9.81 per cent.

²⁴Korea said that the "other income (expense)" items which had been deducted in order to calculate net profits had been explained in the record compiled by the KTC. The non-operating expense items which had reduced net profits to very low levels in 1989 and to a negative amount in 1990 were interest, research and development, facilities and raw materials, experiments, initial start-up costs, general administration, foreign exchange losses, and "others". The non-operating income items consisted of interest, foreign exchange gains, and "others". By far the largest expense item was interest expense incurred primarily to construct KEP's initial 10,000 tons facility. Such an expense was directly related to PAR production.

thus had a very material effect on the ability of the KEP to function and survive in a business environment characterized by significant dumping. Regardless of whether the industry was viewed as "established" under the material injury/material retardation standards, the KTC had determined that KEP needed to earn a sufficient return to be able to ensure its competitive viability. What this meant was not simply gross profits or operating profits but net profits which could be reinvested, for example, in research and development.

107. Korea said that though the Agreement did not prohibit a consideration of net profits, the KTC could have found injury even on the basis of operating profits. Excluding the effects of a decline in material costs which KEP had incurred in the first quarter of 1990, a comparison of operating profits between 1989 and first quarter of 1990 would have shown a decline. This decline would have sufficed under the Agreement as positive evidence of material injury particularly since it was attributable to a decline in price levels caused by dumping. Also, the United States' argument that it would not be surprising for a new industry to earn no profit at all for several years was incorrect, because there was no basis for assuming that in PAR business no profits could be earned right from the start.

108. Korea said that as far as comparison of profits with other firms in the chemical industry was concerned, the KTC had not used such a comparison as a basis for its determination. Rather, the KTC had found low net profits in 1989 and net losses in 1990, and these findings by themselves, and without regard to the profits earned by comparable firms, had been sufficient positive evidence of injury under the Agreement. The comparison to the domestic chemical industry's average profit rate had not been a part of, nor essential to, the affirmative finding. In both the Determination and the transcript, the reference to the average profit rate of the chemical industry appeared only after a detailed discussion of the domestic industry's capital requirements. Nevertheless, there was nothing wrong under the Agreement with comparing a domestic industry's financial data to that of a similar or analogous industry or group of producers. This was particularly true in the case of a new domestic producer where a frame of reference in the form of already existing producers in the same industry was lacking.

109. Referring to the transcript, Korea said that only one Commissioner, i.e. Commissioner C, had made any reference to the 3.24 per cent average profit rate earned by the Korean chemical industry.²⁵ He did so only after stating that he had determined that there was material injury, which he had found mainly on the basis of depressed and falling profits of the domestic industry.

110. The United States said that the issue was not that since the only product produced by the KEP was PAR, all expenses were related to the domestic industry's production. Rather, the issue was whether it was appropriate for the KTC to judge KEP's financial performance by including costs apparently unrelated to KEP's current operations. Moreover, the KTC had measured injury according to whether the industry had made sufficient net profits for R&D investments, product diversification, new product development, and internal reserves. Although consideration of such other items was not improper per se, it made no sense to judge a new industry by such a standard. It only made sense if one, like the KTC, viewed a new entrant's overnight capture of the majority of the market as a "normal occurrence". By taking for granted KEP's gains in market share, sales, etc., the KTC was forced to measure injury by another standard. Thus, the KTC examined whether the domestic industry had achieved the level of profitability of developed, not developing, industries and whether it had earned profits for such things as product diversification and internal reserves. And in doing so the KTC had factored in costs related to plant construction amounting to 20 per cent of net sales.

²⁵Korea said that Commissioner E, who had made a finding of threat of material injury, had also made a brief reference to the fact that the domestic industry's profit rate was lower than that of similar industries. However, even for this Commissioner, it was clear from the context in which the reference to "similar industries" was made that a comparative analysis of net profit was not essential to his finding that the domestic industry's condition was worsening.

111. Regarding Korea's assertion that "additional information" from the staff report supported the finding of the KTC Commissioners, the United States said that the mere existence of information in the KTC staff report did not mean that the Determination had found the information to support an affirmative determination. Only the Determination itself, entitled "Determination of the Korean Trade Commission", provided the KTC's explanation for the affirmative finding of injury, and additional information, whether or not it was "considered" by the Commissioners, did not represent KTC's basis for an affirmative finding in this case. The staff report, entitled "Information obtained in the Injury Determination", represented only a summary of the facts gathered in the investigation. Though the Determination relied on facts contained in the staff report, only the Determination itself discussed which facts the KTC had found to support an affirmative finding of injury, and why. The distinction between the Determination and the staff report was shown also by the fact that the Determination cited only certain information set out in the staff report, and ignored or even departed from other information.²⁶ In view of the differences between the two, if the staff report were to be considered as part of the Determination, then the Determination necessarily contained self-contradictory findings, and internal contradictions would not satisfy the requirements for an objective examination under the Agreement.

112. The United States said that the Determination had either not referred to certain factors mentioned by Korea, or had not explained how they provided the basis for the affirmative finding. For example, in the particular instance of the break-even price analysis in the staff report, the KTC's Determination had made no reference to it. Moreover, the four scenarios considered for the calculation of the break-even or minimum prices did not disprove the points raised by the United States. In the first scenario, the 1989 average sale price had exceeded the necessary minimum price. The second scenario had included several hundred million Won of expenses that had no direct relation to the business operations, such as, apparently, "congratulations, condolences, and receptions". The third scenario was nothing more than the fact that KEP's 1989 net profits were below the 3.24 per cent level of the "chemical, oil, coal, rubber and plastic" industries, an issue which had already been commented upon earlier. The fourth scenario substituted an even higher minimum profitability figure of 9.81 per cent. In contrast, the KTC report did not include any analysis based on the operating income norm for the "similar" industries.

113. Korea said that in evaluating the effect of dumped imports on KEP's financial condition, it would be inconsistent with the economic reality to exclude the expenses considered by the KTC, including interest costs, R&D costs and general and administrative expenses, because they were directly related to PAR production by the domestic industry, and because it produced only PAR. Moreover, both the Determination and the transcript showed that an objective examination based on the relevant positive evidence had been conducted by the KTC in reaching its findings.

III.4 Basis for the Determination

114. The United States contended that the Determination had failed to state the basis for an affirmative finding, i.e. the Determination did not specify whether the domestic industry had suffered material injury, threat of material injury or material retardation. Though the Determination contained some discussion apparently relevant to all the three bases, it did not contain any conclusions regarding any of these bases. This violated the requirements under Articles 3:4 and 8:5 of the Agreement. Article 3:4 required that the investigating authorities demonstrate that the dumped imports were causing injury

²⁶The United States gave the examples that whereas the Determination stated (page 7) that "inventory level increased sharply", the staff report stated that "total inventories of polyacetal resin increased slightly" (page 19). Similarly, while the Determination stated (page 8) that "considering the domestic industry's financial condition and the fact that it is a new entrant which has been in operation for only a year and six months, the domestic industry does not seem to have attained stable operations (a reasonable break-even point)" (page 46).

within the meaning of the Agreement, and a failure to state the basis for injury meant that such a demonstration was not possible. Moreover, Article 8:5 required explicit public notice of the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

115. The United States clarified that it was not contending that there was a requirement under the Agreement for each Commissioner in the majority to rely upon the same basis for injury. However, even when different bases for injury were found by the investigating authorities (or the Commissioners in this case), there was still an obligation to state the actual bases for the determination.

116. Furthermore, the United States argued that the failure to state the basis of the determination in this case meant that there was inadequate information to assess whether the Determination had complied with the Agreement, and this made it difficult to review the Determination under the Article 15 dispute settlement process.

117. While Korea agreed that the different bases for the affirmative injury finding had not expressly been stated in the Determination, it contended that any person familiar with Korean law, and certainly the parties to the investigation, had understood that the Determination encompassed findings of material injury, threat of material injury and material retardation. This was evident from page 8 of the Determination, which stated that

"the Commission hereby determines that the domestic industry has suffered material injury, etc. as defined in Article 10-1 of the Customs Act."

Korea said that Article 10-1 of the Customs Act defined "material injury, etc." to mean all the three alternative bases for injury under the Agreement. Article 10-1 of the Customs Act provided that: "In cases where the importation of foreign goods for sale at a price lower than the normal value causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry (hereinafter in this Article referred to as "material injury, etc."), if deemed necessary to protect the domestic industry concerned, a duty may be imposed ...". Thus, the context in which the term "material injury, etc." had been used in the Determination made it clear that this term was a short-hand way of stating that all three different types of injury had been found. To support its contention, Korea submitted a journal article prepared by the counsel for the petitioner, which stated that the KTC had determined injury in this case on all three bases for injury.²⁷

118. Further, Korea said that it was clear from the text of the Determination where the analysis concerning each of the three alternative bases of injury could be found. Facts supporting a finding of material injury were set forth in the portion of the Determination which was entitled "The Condition of the Domestic Industry". Regarding the threat of injury, page 6 of the Determination indicated that the discussion of the condition of the domestic industry and the other relevant factors was identical to that described as relevant to current injury. The facts relevant to the finding of material retardation appeared in the Determination at pages 6 to 8. Moreover, the transcript clearly showed the precise basis for the separate opinion of each of the four Commissioners who voted in the affirmative.

119. Korea contended that at no time during the consultation and conciliation had the United States indicated that it had been confused regarding the bases for the KTC's determination, nor had it asked Korea for clarification on this point.

²⁷J.H. Lee, et. al. "Introduction to anti-dumping and recent experience with the law in the Republic of Korea", International Trade Committee Newsletter, Summer 1991, pages 5 to 9.

120. In response to Korea's argument based on Article 10-1 of the Customs Act, the United States said that even under the Korean statute, the phrase "material injury, etc." merely indicated that the KTC had found at least one of the three bases for injury, and not that the KTC had found all three. Article 8:5 required that findings and conclusions be clearly set forth. The issue was not whether the record evidence was such that the KTC could have based a determination on all three bases; instead, the issue was whether the Determination indicated that the KTC did in fact base its determination on all three bases. Also, Korea had stated that one Commissioner had found material injury, two had found threat, and one had found retardation. Thus, it would be inaccurate to state that the KTC had found all three bases, only that individual Commissioners had done so. Furthermore, the journal article referred to by Korea was not an official document. It was written by the petitioner's counsel, who was clearly not a disinterested observer, for publication after the KTC determination, and was not a part of the record of the investigation. Therefore, the Panel should not consider this journal article in its deliberations.

121. Regarding the United States not having raised earlier with Korea the issue of the KTC not explicitly stating the basis for its determination, the United States said that Korea had not provided it with a copy of the English-language document the Panel now had before it entitled "Determination of the Korean Trade Commission" until the second consultation meeting, which had preceded conciliation by less than one week. Therefore, Korea was hardly in a position to complain on this issue.

III.5 Other Aspects of the Determination of Injury

Summary

122. The United States said that while reliance on a presumption of "import substitution" had pervaded KTC's assessment of the various aspects of the determination of injury under the Agreement, there were also some additional deficiencies with the KTC's Determination, namely: (a) the KTC's findings were deficient to serve as a basis for affirmative findings regarding each of the three bases for injury, i.e. threat of material injury, material injury, and material retardation. Korea had agreed that, because the vote in this case was four to three (with two of the four Commissioners voting in the affirmative on threat of material injury) and all the three bases for injury had been relied upon, the Determination would be required to support a finding on all three bases. If the findings concerning any one of the bases was not in conformity with the Agreement, the four to three majority in favour of an affirmative finding would be lost; (b) the KTC had not conducted an objective examination required under Article 3:1 because it had considered certain factors when they tended to favour an affirmative finding of injury but not when they favoured a finding of no injury; and, (c) the KTC had incorporated the adverse effects of factors other than dumped imports in its finding of injury, thus violating Article 3:4.

(a) Sufficiency of findings as basis for injury

123. The United States said the findings in the KTC's Determination with regard to the condition of the domestic industry did not provide an adequate basis for affirmative findings regarding threat of material injury, material injury, or material retardation. Therefore, the United States argued that the determination of injury by the KTC was inconsistent with Articles 3:1, 3:2, 3:3, 3:4 and 3:6 of the Agreement.

(i) Threat of material injury

124. The United States said that, in its assessment of threat of material injury, the KTC had ignored certain factors that were relevant to threat of future injury, had not considered whether there would be "change in circumstances" in the future, and had not identified changes that were "clearly foreseen and imminent". Thus, the KTC's findings which formed the basis for its affirmative finding of threat of material injury did not meet the requirements of Article 3:6 of the Agreement, namely:

"A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent."

125. The United States said that, pursuant to Article 3:1, the focus of a determination of threat of material injury had to be on the volume of dumped imports, their effects on prices for like products, and the consequent impact of imports on domestic producers. However, unlike present injury, a determination of threat of material injury involved a prediction of what was likely to occur in the future, rather than a conclusion regarding what was presently occurring or what had previously occurred. Article 3:6 provided that the prediction must be based on facts, and that the change in circumstances that will cause future injury be clearly foreseen and imminent. In this case, conspicuously absent from the Determination was any analysis of what was likely to occur in the future with regards to imports or the Korean domestic market. Also absent was any analysis of why future events were likely to result in material injury to the domestic industry -- the essence of threat analysis. For example, past import volume was discussed in the Determination, but there was no discussion of any likely future import volumes or how such volumes might support a finding of injury. Similarly, with respect to effects of imports on prices, past effects were discussed, but the KTC's only reference to future prices was a statement that the domestic industry would experience financial difficulty "if the dumped imports continue to depress the domestic price". There was no indication that such price effects were in fact likely to take place in the future or why. With respect to the effect of imports on domestic production, the KTC had explicitly excluded from consideration "favourable market forces that are beyond the domestic industry's control, such as falling material costs and interest rates" (Determination, page 6). Thus, the KTC's Determination, being framed in an examination of past trends, failed to carry out the requisite consideration of whether a threat of future injury existed, including whether a clearly foreseen and imminent change of circumstances existed, as required by Articles 3:1, 3:2, 3:3 and 3:6.

126. Korea said that there was sufficient basis for a finding of threat of material injury, and the Panel should reject the United States' comments, and affirm the KTC's determination. The Agreement did not provide detailed guidance on what evidence was sufficient to support a finding of threat. Article 3:6 simply stated that the evidence had to be "based on facts and not merely on allegation, conjecture or remote possibility [and that the] change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." In this case, the evidence had amply supported a threat finding. The discussion in the Determination and in the transcript had expressly referenced high dumping margins, substantial volumes of dumped imports in the Korean market, a "real" impact of those imports on domestic prices, evidence of domestic price declines where imports were present, and price suppression and depression caused by imports. The high dumping margins had shown the willingness of the respondents to establish low price levels in the Korean market, and there was no evidence that they would not continue indefinitely to dump. The respondents had the capacity to supply 100 per cent of demand in the Korean market. Imports had earlier supplied all of the Korean market, and there was no evidence that they would not again seek to do so in the absence of competition from KEP. The KTC had clearly believed that if KEP ceased to engage in price competition, dumped imports would immediately regain their dominant market share. Also, KEP's inventories had increased substantially over the period, and there had been a substantial decline in prices charged by the respondents. All these factors had provided the appropriate basis for a finding of threat.

127. Korea said that since a determination of threat was predictive in nature, an element of discretion and judgement was necessarily involved. The Panel's role here was not to decide whether it would also have found a threat to exist, but to examine whether there were sufficient factors under the Agreement upon which a threat determination could have been made. In this case, there were proper and relevant factors. Indeed, several of them (i.e. available capacity, price depression or suppression, and increase in inventories), had been expressly identified in the "Recommendation Concerning

Determination of Threat of Material Injury" (hereinafter referred to as "Committee Recommendation") adopted by the Committee on Anti-Dumping Practices on 21 October 1985.²⁸

128. Regarding the lack of consideration by the KTC of the fall in KEP's material costs, Korea said that the KTC had assessed that these costs were "beyond the domestic industry's control," and that they did not provide a reliable basis upon which the KTC could have projected that KEP's condition would improve sufficiently without anti-dumping relief, i.e. the KTC majority could not find that factors which were beyond the domestic industry's control furnished a sufficient basis for a negative determination.

129. Further, Korea argued that imports did have a current effect, and this effect was by definition "real" and "imminent" because it was happening at that time. Because the effect was real and imminent, it was sufficient under the Agreement to also constitute positive evidence of threat. The only difference between the Commissioners who had found threat of injury and the Commissioner who had found current injury was in the degree of harm that had already been suffered and not in how or why that harm had occurred. This was implicit in the fact that the causation section of the Determination was identical for current injury, threat, and material retardation. Thus, only by ignoring the reality of the market place could the United States argue that the KTC had not explained how or why a threat of injury had been present.

130. The United States said that Korea had essentially cited four factors to support its contention that the record evidence supported a finding of threat of injury, i.e. (1) high dumping margins, (2) respondents' capacity to supply 100 per cent of demand in the Korean market, (3) substantial increase in KEP's inventories over the period of investigation, and (4) substantial decline in prices charged to distributors by respondents. Although the Determination referred to several but not all of these factors, the Determination had not cited any of these factors in support of a finding of threat of material injury, and Korea's arguments endeavoured to create a threat finding where none existed in the Determination. The Agreement, however, required that it was the investigating authorities who had the responsibility for rendering injury determinations, and the obligation to set forth publicly the bases. The absence of such findings in the Determination had rendered it inconsistent with the Agreement. Moreover, Article 5:5 provided that "[i]nvestigations shall, except in special circumstances, be concluded within one year", and supplying new reasons for the determination or attempting to ignore the reasons actually given, at this late date, would violate Article 5:5.

131. Regarding the KTC not taking account of the decline in material costs, the United States said that the issue was not whether there was a "reliable basis" or "sufficient basis" for rendering a negative determination, but whether the facts had supported a finding that there was a threat of material injury, and whether the change from present circumstances that would cause future injury was "clearly foreseen and imminent".

132. The United States said that there were two flaws in Korea's argument that if imports were having a current effect, such an effect, by definition, was sufficient to constitute a real and imminent threat of material injury. One, this argument attempted to make a finding which the KTC had not made. There was no indication in the Determination that the KTC was relying on these factors as support for a finding of future material injury, nor was there indication that the KTC had found that although the industry was not presently injured, there was a change in circumstances leading to a threat of injury that was "clearly foreseen and imminent". Second, this argument equated present injury with future injury. In the Agreement, these two were distinct, and though a threat determination could be based on the continuation of present trends, a threat determination had to indicate how the trends provided

²⁸ADP/25, 31 October 1985.

a real and imminent threat of future injury. A threat determination involved a "forecast" of future events²⁹, and such a forecast was lacking in the KTC Determination. The United States pointed out that Korea's current-effects-equals-future effects argument was Korea's third different explanation for the KTC's threat finding; Korea had given two varying explanations in its first (at page 35) and second (at pages 19-22) submissions.

133. Furthermore, the United States said that while the determination of threat had to be a conclusion about future injury, the discussion in the Determination had been framed entirely in the present or past tense, e.g., the KTC's conclusion concerning causal link was based on the finding that "the Commission finds that the import price caused the domestic price to be suppressed and depressed" (page 11).

134. Korea said that the causal relationship between imports and threat of injury was shown by the high dumping margins which had depressed KEP's sales revenues and profits, and the "instances of low individual transaction prices" of respondents. The causation section of the Determination was adequate under the Agreement to support a finding that a threat of injury from imports was clearly foreseen and imminent. The discussion in the Determination had expressly referenced: (1) high dumping margins (at page 9); (2) substantial volumes of dumped imports currently present in the Korean market (idem.); (3) a "real" impact of those imports on domestic prices (idem.); (4) evidence of domestic price declines where imports were present (at page 10); (5) price suppression and depression caused by imports (at page 11). The factors relating to the respondents' large capacity in comparison to the Korean market were implicitly reflected in the Determination at page 9 where the KTC had found that the respondents continued to have a real impact on the domestic price notwithstanding the reduction in the import volumes. In general, the reasons for finding threat of material injury appeared at pages 3 to 6 and 8 to 11 of the Determination; the factors considered in evaluating the existence of threat were identical to those considered in evaluating the existence of current injury as well. All of these factors, and more, had been referred to in the transcript by Commissioners D and E when they had voted in the affirmative on the basis of threat (Transcript, pages 18-20). The transcript contained a very clear articulation of the factors which had led the two Commissioners to conclude that the petitioner had faced a real and imminent threat. The evidence was not contradicted by anything on the record, and collectively constituted real evidence that a threat existed.

135. Giving some details of the factors identified by the Commissioners in support of a threat determination, Korea said that Commissioner D, in addition to mentioning a number of factors in his oral comments, had mentioned in his written comments factors such as "high dumping margins", "supply capacity [of respondents] that exceeds ten times the domestic demand", "sufficient idle facilities to recapture 100 per cent of the market as in the past by forcing the domestic industry into bankruptcy by continuing to engage in dumping", "capability [of respondents] to significantly lower domestic prices," and the demonstrated willingness to lower prices as shown by the 16.2 per cent decline in distributor prices during the period of investigation. Commissioner E's written statement showed that he had been convinced that KEP had faced an imminent and real threat because of the "increase in inventories, price depression, decline in profits, as well as insufficient profits, which are lower than the net sales profit rates over capital of similar industries. ... [He determined threat] considering the high dumping margins of the foreign exporters, the possibility of increases in exports through foreign suppliers' idle production facilities, the increases in inventories and the rate of their increase, the high rates of decline in the prices of dumped imports, and the consequent trend of decline of domestic prices".³⁰

²⁹The United States referred to paragraph 7 of the Committee Recommendation in this context.

³⁰Transcript, page 20.

136. Thus, Korea argued that both Commissioners D and E had focused on positive evidence as required by Article 3:6, on the basis of factors enumerated in the Committee Recommendation. In the Committee Recommendation, in addition to enumerating certain factors relevant to a finding of threat, the Committee had stated that "[t]he determination of whether future injury is imminent in this context must depend on the facts and commercial realities in each case. ... no one of these factors by itself can necessarily give decisive guidance but that the totality of factors considered must lead to the conclusion that further dumped exports are imminent and that unless protective action is taken, material injury would occur" (paragraphs 8 and 9). The transcript made clear that the two Commissioners who had found threat had an objective and positive evidentiary basis for their findings, and that they had considered the relevant positive evidence on the facts in light of the "commercial realities" particular to the domestic industry.

137. Responding to Korea's argument that the statements of Commissioners D and E in the transcript had set forth the KTC's threat findings, the United States noted that these statements did not match those given in the Determination.³¹ The reasons given in the transcript for finding threat were not found in the Determination, and in the absence of the transcript, there was no statement of reasons concerning why imports presented a real and imminent threat of future injury. Further, referring to Korea's statement that "the transcript contains a very clear articulation of the factors which led two Commissioners to conclude that the petitioner faced a real and imminent threat", the United States contended that Korea was not even arguing that the Determination contained the KTC's basis for finding threat.

138. Furthermore, the United States argued that, similar to the Determination, the transcript also provided a deficient discussion of threat because the discussion in the transcript had also been based on an unfounded assumption, that the future would be the same as the past. The conclusions of both Commissioners D and E were based on the assumptions that the previous downward trend of prices would continue and that the other factors affecting the industry's profitability would remain unchanged.³² However, their expectation that future price levels would resemble those of the past was speculative, as established by the KTC's own analysis. The KTC had stressed the fact that it was reasonable for KEP, as a new producer, to price below imports to gain market share. KEP's pricing strategy to underprice and gain market share had worked, and by the time of the Determination, KEP had become a majority supplier in the domestic market. However, the KTC had not considered whether, once KEP had achieved market dominance, there was any further need for KEP to continue to engage in the same aggressive pricing strategy. Any argument that KEP would continue with its pricing strategy to capture additional market share would reflect the import substitution view that it was expected and proper for the domestic industry to take steps to remove all or most imports from the Korean market. Likewise, because the KTC's future profit projections were based on its assumption that present price trends would continue, its conclusion that future profits would be insufficient to avoid injury was insupportable. In the context of price analysis, the United States also pointed out that the KTC had found that it was reasonable for a "new entrant" to price low to gain new customers. For a producer who held two-thirds of the market, attempting to further increase its market share could not logically be viewed in the same way as for a new entrant. On the other hand, however, if the KTC had found

³¹The United States also said that the transcript contained both an oral statement and a "written outline" by Commissioner D, and these two items had set forth a different set of reasons for finding threat. Thus, it was not clear even in the transcript what represented the views of Commissioner D.

³²For example, Commissioner D had stated that, "I determine that, notwithstanding the existence of profit, if the present market condition is permitted to continue, there is a great threat of injury" (Transcript, page 19). Similarly, Commissioner E had based his threat determination in large part on the fact that "the financial condition of the domestic industry is continuing to worsen," and on the "high rates of decline in prices of dumped imports, and the consequent trend of decline of domestic prices" (Transcript, page 20).

it not to be reasonable for the industry to continue to undercut prices in order to gain more than its 60 per cent market share, then it could not have found that imports were responsible for any resulting harm to the industry.

139. The United States added that, the KTC had not taken into account another crucial fact, i.e. the doubling of the KEP's production capacity. This fact, which the KTC itself had found, would have had a profound impact on the domestic industry's future fortunes. Nonetheless, KTC had conducted its analysis on the assumption that future industry profit requirements would be based on an annual production capacity of 10,000 tons. KEP had added a new plant with additional annual capacity of 10,000 tons, and yet the Commissioners had treated that plant as non-existent in their analysis. The Committee Recommendation stated that "an examination of whether future injury is 'clearly foreseen' must focus on the reasonableness and reliability of different forecasts" (paragraph 7). A forecast of continuation of the status quo that did not at least address the major changes in KEP's status was neither "reasonable" nor "reliable".

140. The United States agreed that, in the transcript, Commissioners D and E had cited several factors in support of their findings of threat. These factors included high dumping margins, falling import prices, and the exporting companies' available productive capacity. Nonetheless, Commissioners D and E had not explained why these factors heralded an imminent future effort by the exporters to retake the market share. All of these factors had existed throughout the investigation period, during which imports had steadily and swiftly lost market share, and thus the existence of these factors did not support a finding of a clearly foreseen and imminent threat. Indeed, Commissioner D had explicitly found that the imports had not been increasing their market share. Nonetheless, Commissioners D and E had suggested the possibility that the subject exporting companies would attempt to recapture their lost market share.³³ Such an effort would require the subject companies to undertake substantial price cuts in the future, and KEP would then have had to keep its prices low to match the imports' price decline or risk losing market share. However, the KTC staff report and the Determination indicated that, although import prices had fallen, exporting companies had been unable or unwilling to, reduce prices even to maintain market share successfully. The United States inquired what record basis there was to conclude that they would be willing, and able, to do so to recapture market share in the future. The United States also asked what basis there was for assuming that the foreign producers had any intention of significantly increasing their exports to Korea, or that their behaviour would have changed substantially in the future. Thus, KTC's speculation about the future behaviour of exporters epitomized conjecture, and the Agreement specifically rejected threat findings based on conjecture or remote possibility.³⁴ In the Agreement, an example of what was required for a finding of threat was "convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product". However, Commissioners D and E had not provided convincing reasons to expect, in the immediate or even distant future, any increased imports. Their analysis had not met the requirement under the Agreement that the change in circumstances that would result in injury be "clearly foreseen and imminent". The United States emphasized that its critique of the KTC threat analysis was not based on a difference in interpreting facts. Rather, it was based on an identification of a significant legal deficiency in the KTC analysis. In sum, the United States considered that the KTC had substituted assumptions for analysis.

141. Responding to Korea's argument that several of the threat factors cited in the transcript corresponded to those set forth in paragraph 9 of the Committee Recommendation, the United States

³³Transcript, page 20 (Commissioner E's views), and page 1 of the written remarks of Commissioner D.

³⁴The United States said that the dictionary definition of "conjecture" was "inference from defective or presumptive evidence; a conclusion deduced by surmise or guesswork."

said that this did not lessen the requirements of Article 3:6 of the Agreement that the relevant change in circumstances supporting a threat finding had to be "clearly foreseen and imminent". Indeed, paragraph 9 of the Committee Recommendation specifically provided that administering authorities must pay "due regard to Article 3 of the Anti-Dumping Code." In this case, Commissioners D and E's analyses were based on assumptions about future behaviour, which were assumptions that were inconsistent with the KTC's own facts.

142. Furthermore, the United States argued that the findings of Commissioners D and E did not, in large part, correspond to the factors listed in paragraph 9 of the Committee Recommendation.³⁵ Of the four factors referred to in paragraph 9 of the Committee Recommendation, the first factor, i.e. increase in imports, had not existed in this case; in fact, the opposite situation had existed. Commissioners D and E had not discussed a portion of the second factor, i.e. the availability of other export markets to absorb any additional exports. The third factor referenced the prices of exports that "will have a significant depressing or suppressing effect on domestic prices". Though the two Commissioners had listed past price effects, their findings with respect to future price effects were flawed or speculative. Regarding the fourth factor, i.e. "inventories in the importing country of the product being investigated", it was clear that this product was the imported product and not the domestically-produced product: the only other times the Committee Recommendation had used the term "product" it was in explicit reference to the imported product. This was the relevant interpretation of the term product being investigated because a threat might exist where importers had stockpiled substantial quantities of the imported product for imminent sale in the future, even if the importers were not likely to import substantial additional quantities. In the transcript, only Commissioner E had cited "the increases in inventories and the rate of their increase" (page 20), without clarifying whether he was referring to inventories of imported or domestic product. Inventories of imported PAR had been steady at 133-134 tons, less than 1 per cent of total 1989 domestic consumption of PAR, and had shown no increase. To the extent the reference was to the domestic product, such inventories were not encompassed by paragraph 9 of the Committee Recommendation. Although such inventories might be relevant as one factor among many pertaining to the condition of the domestic industry, they did not correct the deficiencies in the threat determination.

143. Korea said that despite the statement by the United States that it was not asking the Panel to "second guess" the KTC, that was exactly what it was asking the Panel to do. Thus, the United States had admitted that the two KTC Commissioners had found that the "downward trend in prices would continue, and that the factors affecting the industry's profitability would remain unchanged", but then stated that this analysis was "speculative" and, consequently, impermissible. There was nothing inherently wrong with such "speculation" since a threat determination was inherently predictive. The United States was engaging in its own speculation in suggesting how Commissioners D and E should have analyzed the likelihood of future events. Even if such speculation presented a credible alternative scenario, it could not serve as the basis for finding a violation of the Agreement. The issue was existence of "positive evidence" of threat. The respondents had engaged in dumping and had undersold KEP. If they had not done so, the KTC might have evaluated the case differently regarding the issue of threat. However, this had not happened, and the Panel may not now second guess the KTC by finding that the KTC

³⁵Paragraph 9 provided that: "In making a determination regarding threat of material injury, with due regard to Article 3 of the Anti-Dumping Code, the administering authority should consider inter alia such factors as: a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importations thereof; sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports; whether exports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further exports; and inventories in the importing country of the product being investigated."

had no basis for assuming that the actions of the respondents in the past would not have continued in the future, leading to even greater financial losses, lost sales, and depressed prices.

144. Korea said that the Agreement required only that a threat finding be based on "facts" and that the threat be "clearly foreseen and imminent". No one could be sure of the future and the Agreement did not require the impossible in terms of accurate forecasts. Each of the bases considered by the KTC for threat had been outlined in the transcript, and repeated in the Determination, albeit in summary form. The United States' claim really amounted to a disagreement with the KTC's judgement that, in the absence of anti-dumping relief, the respondents would have continued to dump products at high dumping margins, would have continued to engage in price competition, would have continued to undersell the domestic producer which in turn would lead to price suppression and depression, and would have continued to use their enormous capacity to capture the entire Korean market. There could be no doubt that there was factual basis for all of the evidence which supported the prediction of a threat.

145. Further, in the context of United States' challenge of the KTC's assumption that future prices would resemble past trends, Korea said that a prediction had to be made concerning future pricing trends in evaluating the presence or absence of a threat. The fact that the United States disagreed with the KTC's prediction about the price trends did not render that prediction invalid under the Agreement. Similarly, regarding the prediction of the likely use that the United States producers would make of their capacity, Korea stated that there was no dispute that the United States' production capacity far exceeded Korean demand, and that the United States and Japanese producers had in fact supplied all of Korean demand prior to KEP entering the market. Thus, given demonstrated capacity and willingness to supply, the KTC was amply justified in predicting that United States producers could and would attempt to supply the entire Korean market in the absence of anti-dumping relief. In this context, any claim that there was no evidence that foreign capacity would be used in the future to increase exports to Korea, would seem to require an investigation of the state of mind of the United States producers as to their future intentions. This was an impossibility. Past performance was an acceptable basis for a prediction of future behaviour.

146. Korea said that the United States had repeatedly insisted that the KTC had an obligation to "point to facts that are likely to occur or persist in the future and that would likely lead to future injury". What the United States had overlooked was that Commissioners D and E had relied on facts occurring during the period of investigation as the basis for their finding of threat. The only way that the United States could even make its argument was to posit a set of facts different from the facts upon which the KTC had based its finding. The transcript proved that the Commissioners who had found threat had relied on real evidence which demonstrated an imminent threat. Moreover, the United States had focused, erroneously, on the contention that there was no evidence that respondents would cut prices in the future in order to recapture market shares. However, for a threat finding, it was not necessary for the KTC to find that the respondents would cut prices in the future. Rather, the evidence was sufficient (i.e. "positive"), that respondents had held 100 per cent of the Korean market (along with some other exporters who were not investigated) and had priced their products at levels reflecting dumping throughout the period of investigation. Thus, as long as the KEP had continued to compete in the Korean market, the respondents had indicated their willingness to remain in that market by dumping.

147. Korea said that the United States' emphasis on KEP's growing market share was also misplaced. This market share had grown only because KEP had demonstrated a willingness to engage in vigorous price competition with dumped imports. The alternative was to price above the respondents, and to have depressed profitability because of fewer sales. Thus, the growing market share of the KEP was, in the KTC's judgement, not enough of a reason to find in the negative. If this Panel were to second guess the KTC's judgement on this point, it would be acting beyond the scope of its authority under the Agreement.

148. Regarding the United States' allegation that the KTC had failed to consider the impact of the second plant of the KTC, Korea said that there was no reason to question the KTC's judgement that the addition of capacity would not diminish the threat presented by dumped imports. For example, with the KEP losing money with only one plant, the addition of capacity would imply that the KEP would lose more money under the reasonable assumption that the respondents would continue to dump and to undersell. Moreover, it was speculative to predict the effect on market conditions of a capacity expansion that had not even occurred during the period of investigation. The KTC, in these circumstances was amply justified in relying on known, observable, verifiable conditions which, in its judgement, were more reliable predictors of threat.

149. Korea said that the United States' arguments regarding the Committee Recommendation concerning threat should be rejected because they elevated certain aspects of the Committee Recommendation and diminished those aspects which the KTC had relied upon. It was up to the KTC to assign weight to the factors which the United States had attempted to elevate, such as volume of imports, capacity, and price levels. Failure to rely upon the factors which militated against a threat finding did not invalidate reliance upon those factors which had militated in favour of a threat finding. Furthermore, the United States was in error in alleging that the KTC had erred in considering the inventory levels of domestically produced products. The United States' claim that only inventories of imported products be considered, was wrong. The Agreement did not prohibit consideration of inventory levels of domestic product in evaluating threat: if it did, it would say so. In the Committee Recommendation, it was not clear that the relevant phrase referred only to imported products, and even if it did so, it would not prohibit consideration of the effect of imports on inventories of domestic product. Confirmation of this fact could be found in USITC precedents in which the agency had considered inventories of both imported and domestic products in evaluating threat.

(ii) Material injury

150. The United States said that KTC's findings had been deficient to serve as a basis for an affirmative finding on material injury. The main bases for an affirmative finding of material injury by the KTC had been that (1) KEP's financial condition had deteriorated and consequently it had been unable to undertake the required investments, replacement of equipments, and research and development, and (2) a finding of a rise in inventories, and of a decline in sales revenue and net profits. However, (as mentioned above in section III.3(c), i.e. paragraphs 94 to 113) the findings relating to sales revenue and net profits showed a reliance on the presumption of "import substitution", and hence were inconsistent with Articles 3:1 and 3:3. Furthermore, a consideration of the positive evidence on inventories and the expenditures on investment, replacement of equipment, and research and development showed that the KTC's findings had been deficient to serve as a basis for affirmative finding of material injury. Thus, KTC's findings relating to material injury were inconsistent with Articles 3:1, 3:3 and 3:4 of the Agreement due to the lack of positive evidence on, and objective examination of, the factors considered in the examination of the condition of the domestic industry, and due to the inadequate basis (or causal link) for an affirmative finding of material injury.

151. The United States said that, to the extent that the KTC had found the 1989 level of profit to be insufficient to cover investments and generate "reserves" for the industry's future development and growth, such a finding could not support a finding of present injury. Moreover, neither the Determination nor the staff report indicated that the industry had been prevented from undertaking the planned expenditures on investment, replacement of machinery, and R&D. If anything, the record suggested the opposite: substantial "investments" had occurred in 1989, and the industry had conducted

substantial "research and development" during 1989, in accordance with KEP's business plan and still earned a net profit.³⁶

152. Further, the United States said that the KTC Determination (page 5) had indicated that R&D expenses were for "product diversification and new product development", which suggested the evolution of different products. However, R&D and capital expenses for "product diversification" or "product development", could not be the basis for a finding of injury to the extent such activities pertained to products other than "like product". Under Article 4:1 of the Agreement, only the "like product" - in this case PAR -- was within the industry being examined.

153. The United States also pointed out that the KTC's use of increased inventories as a basis for an affirmative finding of material injury was contradicted by its own report. The KTC had found that the increase in inventories, since the fourth quarter of 1989, had been slight and that inventories could not be drawn down to increase the level of shipments because the industry's maintenance of inventories was necessary to "ensure a stable supply of product to customers". Also, the KTC had noted that the increase in inventories from fourth quarter 1989 to first quarter 1990 had resulted from sluggish demand during first quarter 1990, rather than due to subject imports whose market presence was further decreasing at the time. Thus, in view of the KTC's own findings, inventories could not have constituted a meaningful basis for finding material injury.

154. Regarding inventories, the United States added that, on the one hand, the KTC had stated that "as the domestic industry shipped 89.1 per cent of its production volume, improving sales revenue by increasing shipments will be difficult". On the other hand, the KTC, apparently as a reason supporting an affirmative finding, stated that "the inventory level increased sharply after the first quarter of 1990". The KTC had not provided any explanation of why, if there was a "sharp increase" in inventories, such increased inventories would not provide a basis for increasing shipments to improve sales revenue. Conversely, the KTC did not explain how it could find that the domestic industry was shipping most of its production such that it could not increase shipments, and also justify an affirmative finding on the basis of a "sharp increase" in inventories.

155. Korea said that the finding of material injury had been made on the basis of the relevant factors under Article 3 of the Agreement, but once again the United States was simply not agreeing with the KTC's analysis and believed that the KTC should have found that KEP was not suffering material injury. However, mere disagreement did not encompass a demonstration that the KTC did not have positive evidence sufficient to satisfy the Agreement. The central point of the dispute centred around the petitioner's financial condition. The facts supporting the finding of material injury were set forth in the section of the Determination captioned "The Condition of the Domestic Industry". Under generally accepted accounting principles, KEP had suffered a net loss in the first quarter of 1990 after earning a small net profit in calendar year 1989. These results, in the opinion of the KTC, constituted positive evidence of material injury. In this case, the "prevention" of investment or research and development was not the issue. Rather, the issue was whether the effect of dumped imports on KEP prevented it from generating sufficient profits; in the last quarter of the five-quarter period of KTC' investigation, the KEP had no profits. There was no basis for the United States' contention that KEP had made "substantial" investments and R&D expenditures. In the judgement of the KTC, these expenditures had been relatively small, and were inadequate to assure the KEP's future competitive viability.³⁷ Furthermore, in cases such as this one, the domestic industry had undertaken the second phase of its plant construction in accordance with its original business plan (which called for a 20,000 ton production

³⁶To support its contention, the United States referred to pages 23 and 43 of the staff report.

³⁷Korea said that the remarks of Commissioner C on page 15 of the transcript were directly relevant to this issue.

facility). Under such circumstances, it was inappropriate for the United States to characterize KEP's construction of the second facility as a substantial investment and thereby imply that KEP's financial condition had not deteriorated during the investigation period.

156. Regarding inventories, Korea said that maintenance of a stable supply by the KEP and the decline in demand were not the only causes of KEP's increased inventories. Underselling by imports necessarily contributed to inventory growth, as well. Material injury could be due to a number of factors, and the existence of high inventories did not mean that imports, as well, could not be "a cause" of material injury, threat, and/or material retardation. Moreover, the presence of other causes did not prohibit the KTC from considering inventory growth as being relevant to the current condition of the domestic industry and the issue of whether that industry was materially injured. KEP's sales volume had declined substantially after the second quarter of 1989, as a result of which inventories had increased significantly: KEP's inventories had increased from 1,589 tons at the end of the first quarter of 1989 to 2,089 tons at the end of the first quarter of 1990. The decline in shipments and consequent revenue declines and inventory gains constituted positive evidence of both injury and causation which the KTC could properly consider under the Agreement.

157. Korea said that the United States' argument that a sharp increase in inventories had provided a basis for increasing shipments which would have increased sales revenue, demonstrated a misunderstanding of the KTC's determination. In the context of the KEP's ability to increase its net profits by increasing shipments and/or decreasing costs, the KTC had found that it would be difficult to achieve an increase in shipments because KEP was already shipping 89.1 per cent of its total production volume. However, because the KTC was analysing the domestic industry's projected performance, it was entirely appropriate for the KTC to rely on the actual ratio of KEP's total shipments to total production volume in fiscal 1989 to conclude that it could not realistically expect KEP to improve its financial performance through increasing shipments. Increasing sales from the existing inventories was simply not relevant in that analysis.

158. Furthermore, Korea said that PAR was the sole product produced by KEP, and there was nothing wrong with an investigating authority considering the need for a domestic industry to generate sufficient funds for R&D. The Agreement specifically authorized a consideration of "all relevant factors" including "actual and potential negative effects on cash flow, ..., growth, ...". Subsumed within the concept of "growth" was the concept of R&D, i.e. development of future generations of existing products that fell within the like product definition. The KEP had submitted to the KTC information concerning the R&D that it needed to perform to ensure its "potential" for growth. KEP had indicated that it was attempting to develop special grades of PAR, which required greater value added and which would meet more of its customers' needs, and had established a technical service centre to assist it in doing so. However, the KEP had also asserted that its ability to develop these special grades was being hampered by its inability, due to dumping, to generate sufficient profits to pay for R&D.

159. Korea said that the transcript showed that an objective examination had been conducted by the Commissioner who had found material injury (i.e. Commissioner C), and that no theory or presumption of import substitution had been applied. Commissioner C had evaluated the entire record to reach his decision that KEP had suffered material injury, and had recognized that "disagreements are possible" with respect to the finding. He had found material injury on the basis of several factors, including the decline in KEP's net profits between 1989 and the first quarter 1990. The Commissioner had clearly explained in the transcript the reasons for his consideration of net profits rather than gross profits or operating profits. The Agreement expressly provided for an evaluation of both actual and potential profits, and authorized consideration of a domestic producer's ability to make investments and expenditures which would ensure its future viability. The transcript clearly explained Commissioner C's basis for focusing on net profits, and showed that the basis for his choice of net profits was rational and logical and took into account the relevant factors. Commissioner C had rejected using an analysis

of operating profits because the issue was whether "the profit levels of the domestic industry under the market conditions established by the dumped imports and the price structure are reasonable levels necessary for the normal maintenance and development".

160. Korea said that Commissioner C had decided that the most important factors, given that KEP was a new entrant, were inventories, sales prices, and profit levels, and that factors such as production, sales, and market share, while important, should have lesser emphasis. He had recognized that, while in some cases, increases in production, sales and market share of the domestic industry would militate in favour of a negative determination, this was not necessarily so in the case of a new entrant. He had considered the decline in KEP's profitability and prices, and that KEP would have little possibility to increase these. He had compared individual transaction prices of the dumped imports to KEP's reported prices, and had found that "import prices at times were lower than domestic prices and were at other times higher" and that "individual transaction prices of the dumped imports can be seen as being considerably lower than the average domestic prices".³⁸ Any fair reading of the transcript showed that Commissioner C had fully and fairly considered the relevant factors identified by the Agreement, weighed them, and had found that KEP should be deemed to have suffered material injury.

161. Regarding causality, Korea said that Commissioner C had not disregarded any of the evidence supporting the respondents' arguments, but had expressly discussed many of them. His causation finding was expressly premised on his view that the high dumping margins had caused price suppression and depression of KEP prices, which in turn had adversely affected its sales revenue.³⁹

(iii) Material retardation of the establishment of an industry

162. The United States said that the KTC's findings did not provide an adequate basis for an affirmative finding of material retardation, and the KTC's conclusion that "considering the domestic industry's financial condition and the fact that it is a new entrant which has been in operation for only a year and six months, the domestic industry does not seem to have attained stable operations (a reasonable break-even point)", was flawed. Moreover, that conclusion did not support a finding of material retardation under the Agreement. Thus, the KTC's findings relating to material retardation were inconsistent with Articles 3:1, 3:3 and 3:4 of the Agreement on account of the lack of positive evidence on, and objective examination of, the factors considered in the context of material retardation, and due to the inadequate basis (or causal link) for an affirmative finding of material retardation.

163. The United States said that the KTC's conclusion that the domestic industry had not reached stable operations contradicted other statements in the Determination and the staff report, namely, that "the domestic industry can be considered as having achieved normal operations during the period of investigation [and] ... by operating the factory at its 10,000 tons production capacity, the company can be said to have achieved the profit-and-loss point (i.e. break-even point) in the fiscal year of 1989" (Determination, page 3 and the staff report, pages 45-46). Either an industry was established -- in which case injury and threat analysis applied -- or it was not established -- in which case material retardation analysis applied. The KTC could not have it both ways. Further, it would seem illogical to consider a producer as not being an "established" industry, despite it becoming the single dominant producer and accounting for a majority of all sales in the market.

³⁸Korea said that the pricing data which formed the basis of Commissioner C's assessment had been provided to the Panel.

³⁹He said that "in this case, the domestic industry entered the domestic market dominated by imports sold at dumped prices. To survive in this difficult market, [the domestic industry] engaged in price competition. However, because imports were continuing to engage in dumping, it resulted in further lowering of domestic and import prices, resulting in the overall depression of domestic prices and suppression of increases in domestic prices" (Transcript, pages 16-17).

164. Furthermore, the United States argued that a finding of non-establishment of the domestic industry only provided a threshold indication that material retardation was the appropriate standard, rather than present injury or threat. In addition to such a finding, the KTC had to find that the industry was in a retarded or stunted condition, and that imports had caused any such condition. However, the KTC Determination did not contain such findings.

165. The United States also pointed out that in the discussion of material retardation, the KTC Determination had stated that the "1990 financial statement" revealed a 464 million Won loss. However, the Determination had not indicated whether the KTC had relied on the 1990 data for the purposes of injury. It would be improper to rely upon a full-year 1990 statement because that period had not been covered by any other indicators in the KTC report (and had not even been encompassed by the KTC report).

166. Korea said that the Agreement and Article VI of the General Agreement were silent with respect to the circumstances which justified an affirmative finding that the domestic industry had been materially retarded. Thus, the investigating authorities necessarily possessed an extremely broad measure of administrative discretion which the Panel should be careful not to overturn. Given the lack of guidance in the Agreement, the KTC had looked at the precedents of other investigating authorities, particularly the USITC precedents. Korea also said that the Panel might look to decisions of various national investigation authorities for useful analogies. For example, in one particular case the USITC had stated that "[i]n material retardation investigations, as in any other anti-dumping investigation, the Commission is to determine whether material injury or material retardation is 'by reason of' the imports subject to investigation. Accordingly, we [i.e. the USITC] believe that the existing law on causation of material injury is also applicable to causation of material retardation. Thus, the Commission [i.e. the USITC] may take into account information concerning other causes of harm to the domestic industry, but it is not to weigh principal or substantial cause of material retardation. Rather, the imports need only be a cause of material retardation".⁴⁰

167. Korea said that there was no inconsistency in the KTC's treatment of KEP, and nothing in that treatment had violated the Agreement. There was no inconsistency in one Commissioner voting in the affirmative on the basis of material injury, another Commissioner voting affirmative on the basis of threat, and yet another Commissioner voting affirmative on the basis of a finding of material retardation. It was possible in this case, as in others handled by other investigating authorities, to view facts differently and to reach different conclusions concerning them. The Agreement did not prohibit such a result. Also, the voting transcript revealed that there was no internal inconsistency in the views of any Commissioner voting in the affirmative. That was the true test of whether the required demonstration under the Agreement had been made.

168. Korea argued that the finding that KEP had reached "normal operations" was not the same as a finding that it was already established. Though the term "normal operations" had not been later described in the Determination, it would be consistent with the plain meaning of the term to infer that the KTC had meant that the production operations of KEP had reached their normal level. This was not the same as finding that a domestic industry was "established" in the sense of proving itself to be a viable entity capable of competing indefinitely in an environment characterised by unfair trade. The very newness of the enterprise meant that KEP was not "established" in any meaningful sense, and the poor financial results of the company in its first two years meant that the KTC could easily find that KEP's competitive viability, and its ability to survive significant dumping, had not been established. This was especially true because KEP had constructed two production facilities, and in view of the precarious financial condition of the first facility, the KTC had strong reason to believe that the second facility, as well, would be jeopardized by the continuation of significant dumping.

⁴⁰Benzyl Paraben from Japan, USITC Publication 2355, February 1991, page 13.

169. Korea said that there was no flaw in the KTC's finding of material retardation. The first inquiry in a material retardation situation was whether or not a domestic industry was established. In this regard, a break-even analysis had been particularly useful, and the text of the Determination revealed that the KTC had found that KEP had not yet reached "stable operations", i.e. a reasonable break-even point. Also supporting the finding of non-establishment were the facts that KEP was a new producer with a short operating history and it produced only a single product and thus was dependent solely on it for the generation of revenue and profits. The second part of the inquiry was whether or not a non-established industry was materially retarded. The facts supporting this aspect were discussed on pages 7 and 8 of the Determination which related specifically to the issue of material retardation as distinguished from the issues of present injury and threat of material injury. The discussion on causation appeared in the Determination from page 8 onwards. Regarding the net profit data for the full year 1990, Korea said that it was taken from the audited financial statement submitted by KEP to the KTC, and that this statement was part of the record in the investigation.

170. The United States clarified that the factors listed in the Determination were not per se irrelevant to a determination of material retardation of the establishment of an industry. Rather, the KTC's import substitution rationale was inconsistent with the Agreement's requirements regarding material retardation, and that the KTC's finding of material retardation had not been based on positive evidence and had not involved an objective examination, as required under the Agreement. The requirements of Article 3 with the exception of paragraphs six and seven applied equally to the determination of material retardation as to the other bases for injury. Moreover, there was no finding in the Determination that the KEP was in a stunted or retarded condition, nor was there any finding in the "causal link" section that imports were causing any such condition.

171. Korea said that the details in the transcript clearly showed that there was adequate basis for an affirmative finding of material retardation. One Commissioner (Commissioner B) had found that the domestic industry was materially retarded, and that the cause of this retardation was dumped imports. The KTC's staff memorandum to the Commission which had outlined the steps necessary for a material retardation finding, as well as for a current injury or threat of injury finding, was proof that an objective evaluation of all relevant factors had occurred. The staff had not suggested or encouraged the use of any type of presumption, theory, or assumption in substitution for an examination of each of the relevant factors identified in the Agreement, and the transcript made clear that Commissioner B had not relied on any presumption. Rather, Commissioner B had first noted the lack of any specific standards in the Agreement with regard to material retardation, and then had considered that while the KEP's market share and capacity utilization rate tended to indicate that the company was already established, the financial condition of the company indicated that it could not "truly be considered as having reached a secure stage" (Transcript, page 12). Moreover, on examining the overall data, Commissioner B had found that "the financial condition of the domestic industry will not improve in the future", and that though import volume had declined, if dumping continued, KEP's establishment would be retarded, particularly in view of the ability of the respondents to increase imports at any time.

172. Regarding causation, Korea said that Commissioner B had first observed that though "dumped imports need not be the only, or the principal cause of injury" (Transcript, page 13), they were here an important cause because the high dumping margins had had a significant adverse effect on KEP's prices and profits. Moreover, in a situation where the domestic producer was not yet established, the elements of price and profitability had to be "given a greater weight in reaching a determination" than

volume and market share.⁴¹ Thus, Commissioner B had amply described why he had thought that KEP was not established, why its establishment was retarded, and what "a cause" of that retardation was. In doing so, he had also found that sales volumes of dumped imports could have an adverse effect on the domestic industry even while declining.

(b) Consistent use of information

173. The United States said the KTC had not considered the data in a consistent manner because it had considered some factors when they weighed in favour of an affirmative finding, but not when they weighed in favour of a negative finding. This violated the Article 3:1 requirement that the administering authorities conduct an "objective examination".

174. According to the United States, examples of the KTC's inconsistency in this regard included the treatment of KEP as a new entrant in the industry, the assessment of inventories, and the view regarding the KEP having had achieved normal operations. For example, the United States contended that the KTC had considered the domestic industry to be a new firm when such a consideration had tended to support an affirmative finding, but not when it had tended to support a negative finding. Thus, on the one hand, KTC had: viewed KEP as a start-up firm in order to justify KEP's price undercutting; found that KEP had not "attained stable operations" for the purpose of making a finding of material retardation; and found that the KEP still had a weak industrial basis. On the other hand, the KTC had also: found that KEP's profitability in its first year of operations -- 20 per cent operative profits and 1.6 per cent net profits -- were indicative of material injury without mentioning KEP's start-up nature or the fact that newer firms generally would not be expected to show the same financial results as more established firms; compared KEP's net profits to other industries that likely included mostly established firms; and, found that the large gains in the KEP's sales and market share were not significant because customers had been delegated to it. Further, the United States contended that the KTC had not conducted an objective examination required under Article 3:1 because it had included a loss in foreign exchange transactions to get a net loss for the domestic industry in first quarter 1990, but had excluded gains in foreign exchange transactions in 1989 in order to reach a conclusion that KEP had been materially injured. Regarding the calculation of profits in 1989, the United States referred to the KTC's statement in the Determination that "although the domestic industry's 1989 financial statement had recorded 205 million Won net profit before tax, considering that 228 million Won in gain was from foreign currency exchange transactions, the domestic industry could be said to have suffered an actual loss" (page 7).⁴²

175. Korea replied that there was no inconsistency in the analysis conducted by the KTC, and the findings of the KTC were not inconsistent with the Agreement. Thus, for instance, achievement of normal operations and of stable operations by a firm (as explained above) were not the same; the Agreement did not prohibit a consideration of net profits, which in this case were the appropriate financial statistic to consider; there was ample evidence of price undercutting by imports, which was used by the KTC as a basis for a finding of price suppression and depression; and, the treatment of inventories was consistent with the requirements of the Agreement. Furthermore, Korea said that there was no basis for the argument that the KTC had to exclude foreign exchange gains in order to reach a conclusion

⁴¹Transcript, page 13. Similarly, in his oral comments, Commissioner B had noted that "if dumping is allowed to continue, the petitioner will not be able to maintain sales prices which ensure a reasonable profit, and, thus, its profitability will continue to worsen" and that "one of the direct causes of the material retardation is the fact that [the petitioner] had set its prices at below the reasonable level in order to compete against the dumped prices."

⁴²The arguments regarding KTC's inconsistent treatment of inventories have been mentioned earlier in the section on "material injury", and the arguments regarding KEP having achieved normal operations have been mentioned in the section on "material retardation of the establishment of an industry".

that KEP had been materially injured. In fact, the opposite appeared from an examination of the text in the Determination, where the KTC had clearly concluded that profits including the foreign exchange gains in 1989 had been inadequate. Similarly, the KTC had included foreign exchange losses in calculating the first-quarter 1990 net profit, and thus it would be incorrect to conclude that foreign exchange gains/losses had not been included in one year but had been included in another year.

(c) Causal factors other than subject imports

176. The United States said that the KTC had found that KEP's first-quarter 1990 net loss was due to foreign exchange loss and increased interest payments, as acknowledged by the KTC staff report's statement that "[d]uring the first quarter of 1990, the KEP experienced a ... loss on net income before tax. KEP's reversal of a net profit to a net loss was due to fluctuating exchange rates which resulted in foreign exchange loss and increased interest payments" (page 28). Attributing to imports a loss that was "due to fluctuating exchange rates" had violated the Article 3:4 requirement that "injuries caused by other factors must not be attributed to the dumped imports".⁴³

177. Korea said that under the Agreement, it was sufficient that imports be "a cause" of injury, and not that they be a substantial cause, or a primary cause of injury. A number of factors had influenced KEP's financial condition during the period of investigation, including foreign exchange gains and losses and increased interest payments. To the KTC, the small net profit in 1989 and the net loss posted in first-quarter 1990 had furnished ample basis for a finding of material injury. After having found that the domestic industry was injured, the next question for the KTC was whether any portion of that injury was attributable to imports, i.e. were imports "a cause" of material injury. There were other causes, but the KTC was well within the permissible bounds of its discretion under the Agreement in finding that dumped imports had also contributed to the injury suffered by KEP through their price depressing effect.

IV. ARGUMENTS PRESENTED BY THIRD PARTIES

IV.1 Canada

178. Canada stated several concerns regarding the basis on which the material injury determination was arrived at by the KTC in this case. Canada argued that the problem facing the Korean producers in this case was a lack of competitiveness and not of alleged dumping of imports. The KTC decision, which stated that the domestic market was in the process of "import substitution", was explicitly based on the assumption that it was normal to expect the product of a new domestic producer to replace those of established importers and that a failure to do so was somehow a basis for finding material injury. Canada did not accept this assumption, and considered that any material injury decisions based upon it were fundamentally flawed. According to this reasoning, the mere fact that competition existed between foreign and domestic producers quite apart from any consideration of dumping, could be found to be a cause of material injury. Thus, the KTC decision contravened Article 3:4 of the Agreement by attributing to the dumped imports material injury which was due to other factors, namely the existence of competition between foreign and domestic producers. In this context, Canada noted the Article 3:4 requirement that "it must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Agreement. There may be other factors which at the same time are injuring the industry, and injuries caused by other factors must not be attributed to the dumped imports", and that Footnote 5 in Article 3:4 clearly specified that "such factors include ... competition between foreign and domestic producers ..." (emphasis added by Canada).

⁴³The United States also raised another issue in this context, namely that the adverse price effect was not due to the import volume but due to price undercutting by the domestic industry. The arguments in relation to this point have been mentioned earlier in the section on " 'import substitution', price effects, and causal link".

179. Canada said that the KTC's determination of material injury did not take into account the factors mentioned by Article 3:3, namely, "all relevant economic factors and indices having a bearing on the state of the industry, such as actual and potential decline in output, sales, market share, profit, productivity ...; factors affecting domestic prices; ... inventories ...". In its determination of material injury, the KTC did not take into account the question of productivity and market share. Furthermore, it did not appear that the dumped imports had been the cause of the accumulated inventories. The KTC itself had admitted that the increase in inventories was mainly due to the sluggishness of domestic market demand and to the fact that the domestic industry could not regulate production levels by controlling the level of input material because of the special characteristics of the production system.

180. With respect to the effect of dumped imports on prices, Canada noted the Article 3:2 requirement that "... the investigating authorities shall consider ... whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." Canada argued that the KTC had not taken this into consideration when determining material injury. The KTC had confirmed that the petitioners had themselves taken a leading role in setting the price in order to increase their market share. The finding of price suppression or depression in this situation depended on the same flawed assumption that it was "normal" for a domestic industry to increase market share at the expense of imports. This assumption could not form the basis for a valid material injury determination.

IV.2 The European Communities

181. The European Communities said that the injury determination in this case was not sufficient. All normal indicators for injury mentioned in the Agreement, such as increase in volume of imports, loss of market share or domestic production, price suppression or depression, were not found by the investigating authorities. On the contrary, there was a decrease of imports and a consequent loss of market share of the exporters, while the domestic producer was able to increase his market share and profits. All evidence pointed to the absence of injury. The Korean authorities had based their determination on the rather obscure notion of "import substitution" which was not a legal criteria under the Agreement. Therefore, the European Communities could not support the views of Korea in this case.

IV.3 Japan

182. Japan said that the General Agreement was founded on two basic principles, the reduction of tariffs and the equal application of these tariffs to all GATT parties through the most-favoured-nation clause. Article II:2(b) of the GATT allowed the use of anti-dumping duties under the specific circumstances provided in Article VI, and since anti-dumping duties ran contrary to the basic principles of the General Agreement, Japan was in agreement with the United States that Article VI was a deviation from GATT principles.⁴⁴ Japan said that previous GATT Panels had also supported the view that Article VI was an exception to the General Agreement and that such an exception had to be interpreted

⁴⁴In this context, Japan referred to the following statement in the United States' first submission to the Panel: "A contracting party may deviate from national treatment principles through a proper finding of dumping and injury under Article VI of the General Agreement, as expanded upon by the Code" (page 16, footnote 15).

narrowly.⁴⁵ When a party invoked an exception to the General Agreement, it had to demonstrate that it had complied with the requirements of doing so.⁴⁶ GATT panel precedents also made it clear that the contracting party imposing the anti-dumping duties had the affirmative obligation to establish the facts necessary to support the finding of dumping and injury.⁴⁷ This supported the view that GATT panels had the authority to review the facts and determine whether the facts were sufficient. Japan therefore requested the Panel to require Korea to justify the Code-consistency of its dumping and injury determinations, and to demonstrate to this Panel's satisfaction the sufficiency of the facts relied upon to reach its final injury finding.

183. Japan agreed with the United States that the KTC's determination had violated Article 3:1, 3:2 and 3:3 because the findings set forth in the determination did not reflect an objective examination and were insufficient to constitute positive evidence in three key respects, namely, volume of imports, price effect, and impact on the domestic industry. Thus, there was lack of positive evidence to support any of the three possible bases for an affirmative injury finding -- present material injury, threat of injury, or material retardation.

184. Japan said that without a significant increase in imports, the requirement under Article 3:1 that the volume of dumped imports be examined would not be satisfied, and injury from dumping could not be found under the Agreement. Similarly, without a significant degree of effect on prices (which under Article 3:2, was the only factor to be considered with regard to the effect of dumped imports), the requirement under Article 3:2 that the effect of the dumped imports on prices be examined would not be satisfied, and thus injury from dumping could not be found under the Agreement. In the PAR case, the volume and market share of the subject imports had declined significantly, and during the period of investigation, the KTC Determination had recognized that "the domestic price ... continued to be slightly lower than the import price" (page 10).⁴⁸ The KTC had not found evidence of consistent price leadership by the dumped imports, and furthermore, there was no positive evidence of significant price depression or price suppression caused by the dumped imports. Rather, the KTC had found price suppression or depression based upon the fact that the price of the domestic product had declined and

⁴⁵Japan referred to the panel on "European Economic Community - Regulation on Imports of Parts and Components" which stated that "[e]ach of the exceptions in the General Agreement -- such as Articles VI, XII, XIX -- recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective" (report of the panel adopted 16 May 1990, BISD 37S/132 at 196), and to the panel on "United States -- Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada" (hereinafter referred to as "United States - Pork") which stated that "Article VI:3, as an exception to the basic principles of the General Agreement, ha[s] to be interpreted narrowly" (report of the panel adopted 11 July 1991, BISD 38S/30 at 44).

⁴⁶Japan referred to the report of the "United States - Pork" panel, which had stated that "[i]n conformity with the practice followed by the CONTRACTING PARTIES in previous cases (cf. BISD 30S/164; BISD 35S/65; L/6513, page 33; L/6568, page 25), the Panel found that Article VI:3, as an exception to basic principles of the General Agreement, had to be interpreted narrowly and that it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3" (BISD 38S/30 at 44).

⁴⁷Japan said that the report of the panel on "New Zealand - Imports of Electrical Transformers from Finland" (report of the panel adopted 18 July 1985, BISD 32S/68) had stated that the contracting party imposing anti-dumping measures was obligated to establish the facts.

⁴⁸To support the point that there was no price undercutting by imports, Japan also referred to the average price data for 1989 and first-quarter of 1990 on page 69 of the "Information Obtained in the Injury Investigation - Polyacetal Resin" (i.e. the staff report). According to this data, the average prices for the domestic product during these two periods were, respectively, \$1,884/ton, and for the subject imports were \$1,960/ton and \$1,857/ton.

on the unsupported assumption that "it is reasonable for a new entrant to sell at a price slightly below the established price in order to secure customers" (Determination, pages 10-11).

185. Regarding the requirements under Article 3:3, Japan said that the economic data with respect to the Korean domestic industry were quite favourable during the period of investigation: there was a significant increase in the volume of its production, sales, capacity utilization, profits, capacity of production, operating income, and employment. These facts did not support the injury finding made by the KTC. The KTC had found injury based mainly on net profits before tax. However, this might include income or losses which were not directly related to the production of PAR, and the KTC had failed to demonstrate the relationship between other income and the operating income from production of PAR by the domestic industry. In any case, the favourable economic data demonstrated that there was no material injury, threat of material injury nor material retardation. The KTC could not demonstrate, solely on the basis of net profit before tax, that the examination of the impact on the industry concerned was affirmative. Therefore, the KTC's injury determination was not a result of an objective examination based on positive evidence as required by Articles 3:1, 3:2 and 3:3.

186. Japan said that even assuming that there was material injury based on the volume of dumped imports, the effect of these imports on prices, and their impact on the domestic producer, the KTC finding of a causal link between material injury to the domestic industry and the dumped imports was not supported by positive evidence, as required by Article 3:1 of the Agreement. The KTC's finding of an affirmative finding of a causal link hinged on the existence of dumping, the volume of dumped imports, and the impact of the dumped imports on prices. However, the mere existence of dumping was not a basis for a finding of a causal link between material injury and dumped imports. The existence of dumping showed only one of the three conditions set out by the Agreement, and not the other two, namely, the existence of injury and a causal link.

187. Further, Japan said that in reaching its affirmative finding, the KTC had attributed injury from other factors such as excessive investment by the domestic industry, to the dumped imports. This violated the Article 3:4 requirement that "[t]here may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports".

188. Japan referred to the fact that a Japanese product had also been involved in this anti-dumping case. Japan had earlier made an exception to the decision made by the Korea, and had held a series of consultations with Korea without reaching any satisfactory solution. Therefore, Japan reserved its rights to take further dispute settlement measures in order to resolve the issues not presented to this Panel.

189. Commenting on Japan's submission, the United States noted the following areas of agreement and disagreement with that submission. The United States agreed with: Japan's conclusion that the KTC's finding of injury in this case did not meet the requirements of the Agreement because it was not based on positive evidence and did not involve an objective examination; Japan's statement that the KTC's finding of price depression was not based on positive evidence that the decline in price was caused by dumped imports as required under the Agreement; Japan's description of the favourable economic data regarding the performance of the domestic industry in Korea; Japan's statement that mere existence of dumping was not a basis for a finding of a causal link between material injury and the dumped imports; Japan's assertion that the KTC could not demonstrate that the examination of the impact on the industry concerned was affirmative based solely on net profit before tax; and Japan's statement that net profit before tax might include income or losses which were not directly related to the production of PAR and the KTC had failed to demonstrate the relationship between other income and the operating income of the domestic industry.

190. The United States disagreed with the following points: any implication in Japan's submission that it was appropriate for the Panel to reweigh the significance of the various factors considered by the KTC, or to consider the case as if it were the administering authority in the first instance; any implication that in Panel proceedings, the importing country bore the "burden of proof" to show consistency of its actions with the Agreement. Rather, in the United States' view, it was incumbent upon the party challenging the determination to point to areas of inconsistency with the Agreement (and the United States said that it had clearly done so in the PAR case presently before the Panel); Japan's characterization of Article VI as a "deviation" from the national treatment principles, to the extent that it implied that Article VI should be construed narrowly.⁴⁹ In referring to the sentence from the United States' first submission (page 16, note 15), Japan's "deviation" argument had taken the sentence wholly out of context and had misconstrued it. Properly read, there was nothing in the United States' submission to suggest that Article VI should be given any lesser weight than other provisions in the General Agreement; Japan's statement that injury from dumping could not be found under Article 3:1 if there was not a significant increase in imports. According to the United States, although the usual case might involve a significant increase in import volume, it was not an absolute prerequisite of an affirmative finding that there exist a significant increase in import volume; and, Japan's statement that without a significant degree of effect on prices, the requirement under Article 3:2 that the effect of dumped imports on prices be examined would not be satisfied, and hence injury from dumping could not be found under the Agreement. According to the United States, although the usual case might involve a significant effect on prices, it was not an absolute prerequisite of an affirmative finding that there exist a significant effect on prices.

191. Japan said that reports of the panel on "Swedish Anti-Dumping Duties" (adopted 26 February 1955), and the panel on "New Zealand - Imports of Electrical Transformers from Finland" (adopted 18 July 1985) had noted the affirmative obligation upon the contracting party imposing the anti-dumping duties to demonstrate the facts leading to the dumping and injury determination.⁵⁰ Indeed this point had been implicitly made by the United States' submission in this case in its argument that the Panel had the authority to -- and should -- examine the underlying facts and their sufficiency.

192. Referring to the report of the "United States - Pork" panel, Japan maintained that it was a settled issue in GATT jurisprudence that, when challenged, there was an affirmative obligation on the contracting party imposing anti-dumping duties to demonstrate the consistency of its actions with the Agreement. Regarding Article VI, Japan asserted that GATT panels had consistently found that this Article was an exception to the principles of the General Agreement, and as such, had to be interpreted narrowly.⁵¹ However, Japan clarified that it was not arguing that Article VI be given lesser weight than other provisions in the General Agreement, but that as an exception, Article VI had to be construed narrowly.

193. Regarding the requirements of Articles 3:1 and 3:2, Japan said that Article 3:1 required that an injury determination "involve an objective examination of ... the volume of the dumped imports and their effect on prices in the domestic market for like products ..." (emphasis added by Japan). The use of the term "and" required that the investigating authorities had to consider both volume and price effects. With regard to volume, Article 3:2 required a consideration of "whether there has been a significant increase in dumped imports" (emphasis added by Japan). With regard to price effects, Article 3:2 required the authorities to consider whether there had been significant price effects, and a footnote in Article 3:4 referenced to Article 3:2, which indicated that the causation requirement in

⁴⁹The United States said that the relationship of Article VI to other provisions in the General Agreement had been raised in several other recent panel proceedings, and that it would submit an explanation of its views on this subject should the Panel so wish.

⁵⁰BISD 3S/81 at 85-86, paragraph 15, and BISD 32S/55 at 67-68, paragraph 4.4.

⁵¹BISD 37S/132 at 196, paragraph 5.17, and BISD 38S/30 at 44, paragraph 4.4.

Article 3:4 was inextricably linked to both a significant increase in volume and significant price effects. If there was no such linkage, as in the case under review, it was difficult to see how anti-dumping duties could be imposed consistently with the Agreement.

V. FINDINGS

V.1 Introduction

194. The dispute before the Panel arose from the imposition by Korea of definitive anti-dumping duties on imports of polyacetal resins from the United States. These duties were imposed by Presidential Decree 13,467 of 14 September 1991, following affirmative findings of dumping and injury made by the Korean authorities in respect of these imports in February and April 1991, respectively.

195. The United States requested the Panel to find that the affirmative determination of injury made by the Korean Trade Commission (hereinafter: "KTC") in the investigation which had led to the imposition of these anti-dumping duties was inconsistent with the obligations of Korea under the Agreement on Implementation of Article VI of the General Agreement (hereinafter: "the Agreement"). The affirmative determination of dumping was not at issue in this dispute.

196. The United States presented the following claims with regard to the affirmative determination of injury by the KTC.

- (i) First, the determination was inconsistent with the provisions in Articles 3:1, 3:2, 3:3 and 3:4 of the Agreement because it was not based on positive evidence, and had not involved an objective examination of the volume and price effects of the imports under investigation and of the impact of these imports on the domestic industry. In the view of the United States, this resulted from the reliance by the KTC on a presumption of import substitution which, inter alia, had led the KTC to treat the increases in the domestic industry's sales and market share and the decline in import volume as normal occurrences.
- (ii) Second, the determination failed to specify the type of injury suffered by the Korean domestic industry, i.e. there was no indication of whether the KTC had found material injury, threat of material injury, or material retardation of the establishment of an industry. In the view of the United States this failure to state the basis for the determination was inconsistent with Articles 3:4 and 8:5 of the Agreement.
- (iii) Third, the determination did not provide an adequate basis for affirmative findings of material injury, threat of material injury, or material retardation of the establishment of an industry. As such, the determination was in the view of the United States inconsistent with Articles 3:1, 3:2, 3:3, 3:4 and 3:6 of the Agreement.
- (iv) Fourth, the determination was not based on an objective examination because the KTC had considered certain factors when they tended to favour an affirmative finding, but not when they favoured a negative finding. In this respect, the determination was inconsistent with Article 3:1 of the Agreement.
- (v) Fifth, the United States argued that the determination was inconsistent with Article 3:4 of the Agreement because the KTC had relied upon the injurious effects of factors other than the dumped imports.

197. The United States requested the Panel to recommend that the Committee on Anti-Dumping Practices request Korea to bring its "law as applied" into conformity with its obligations under the Agreement.

198. Korea requested the Panel to find that the affirmative determination of injury made by the KTC in respect of imports of polyacetal resins satisfied the requirements of the Agreement. Korea's main arguments were the following:

- (i) First, the KTC's injury determination had involved an objective examination and was based on positive evidence of the requisite factors under Article 3; this determination had not been improperly based on the use of a presumption or theory of import substitution.
- (ii) Second, it was clear from the text of the KTC's determination that the KTC had found the existence of material injury, threat of material injury and material retardation of the establishment of an industry.
- (iii) Third, the record of this investigation and the determination showed that there was sufficient evidence in support of an affirmative finding under each possible standard of injury (i.e. material injury, threat of material injury and material retardation of the establishment of an industry).
- (iv) Fourth, the United States arguments amounted to a disagreement with the weight accorded by the KTC to certain factual evidence. However, the Agreement provided discretion to the investigating authorities in this regard, and it was not the task of the Panel to reweigh the evidence before the KTC but to assess whether there was positive evidence to support the KTC's determination.
- (v) Fifth, with regard to the KTC's finding of a causal relationship between the imports under investigation and injury to the domestic industry, the KTC's determination was consistent with the Agreement because Article 3:4 required that dumped imports be "a" cause of material injury, not that they be the "only" or the "main" cause of injury.

V.2 Basis for the Review by the Panel of the KTC Injury Determination

199. The affirmative determination of injury made by the KTC which was the object of this dispute was contained in KTC Decision No. 91-6, dated 24 April 1991.⁵²

200. During the course of the proceedings before the Panel the parties to the dispute expressed conflicting views as to whether the Panel could properly take into account an additional document provided by Korea. This document contained an English translation of a transcript of a meeting held by the KTC on 24 April 1991. The transcript contained statements by the individual members of the KTC explaining the reasons for their votes in the polyacetal resins investigation. This document was submitted to the Panel by Korea in August 1992 after the Panel's first meeting with the parties to the dispute.

201. The United States considered that the Panel should not take account of this transcript in its examination of the KTC's determination while Korea urged the Panel to treat this document as relevant to its review of the KTC's determination.

202. The United States argued in particular that Korea's reliance in the proceedings before the Panel on the material in this transcript was inconsistent with the transparency requirements of Article 8:5 and with the requirement in 3:4 of the Agreement to "demonstrate" the existence of a causal relationship between injury and dumped imports. Korea argued that the transcript was a contemporaneous and reliable record of the reasons which each individual Commissioner had expressed as the basis for his

⁵²See ANNEX 2.

vote. Interested parties were aware of the existence of the transcript and could have requested access to a public version of this document. Korea stressed that the transcript was part of the administrative record of the KTC's investigation and that the Panel therefore could not disregard this document. With regard to the reference made by the United States to Article 8:5 of the Agreement, Korea argued that this provision was not covered under the Panel's terms of reference. Finally, with regard to Article 3:4 of the Agreement, Korea considered that the Agreement did not limit an investigating authority's ability to demonstrate that it had considered the requisite factors and to demonstrate the existence of a causal relationship between injury and dumped imports to the text of the public notice which announced the authority's determination.

203. At the second meeting of the Panel with the parties, Korea requested the Panel to give a ruling on whether the transcript was a relevant document to the Panel's examination of the KTC's injury determination. The Panel indicated to the parties on this occasion that it would decide this question in its findings. The Panel allowed the parties to address in their arguments the contents of the transcript, but made it clear that this was without prejudice to its eventual decision on the relevance of this document to its examination of the KTC's determination.

204. The Panel observed that public notice of the imposition of anti-dumping duties on polyacetal resins from the United States and Japan had been given in Ministry of Finance Public Notice No. 91-29 of 14 September 1991. This Public Notice was entitled "Reasons for the imposition of anti-dumping order on polyacetal resin". Its first paragraph read as follows:

"Pursuant to Article 10 of the Customs Act, the reasons for the imposition of anti-dumping duty on polyacetal resin imported from ... of the United States and ... of Japan are publicly notified as below."

With regard to the determination of injury, this Public Notice incorporated the text of the KTC's injury determination in Decision No. 91-6 of 24 April 1991. This Decision was entitled "Determination of the Korean Trade Commission". It was apparent from the text of this Decision that it not only announced that an affirmative determination had been made but also purported to set forth the factual and legal considerations which formed the basis for this determination. Thus, the Decision opened with a paragraph entitled "Determination" which read as follows:

"The Commission hereby determines that dumped imports of polyacetal resin of middle viscosity, low viscosity and audio/video grades ... caused material injury to the domestic industry as set forth in Article 10-1 of the Customs Act." (emphasis added)

Furthermore, section 3 of the part of the Decision entitled "Basis for Determination", which dealt with the issue of the causal relationship between the imports under investigation and injury to the domestic industry, concluded as follows:

"Based on the above analysis, ... the Commission hereby concludes that there is a causal relationship between the dumped imports and the injury to the domestic industry." (emphasis added)

The text of KTC Decision 91-6 thus purported to give a complete statement of the reasons for the KTC's affirmative determination of injury and the introductory paragraph of Public Notice No. 91-29 made it clear that, as far as the injury aspect was concerned, it was this Decision which formed the basis for the imposition of anti-dumping duties.

205. The Panel noted that Article 8:5 of the Agreement provided that in the case of an affirmative finding a public notice of such a finding "shall set forth the findings and conclusions reached on all

issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor". Footnote 12 to Article 6:8 defined the term "finding" as a "formal decision or determination". The Panel concluded from the preceding observations that public notice within the meaning of Article 8:5 of an affirmative finding as defined in Article 6:8, and of the findings and conclusions reached on all issues of fact and law considered material by the KTC, had been given in Decision 91-6 of 24 April 1991, subsequently incorporated in the Ministry of Finance public notice of 14 September 1991. Neither the KTC Decision nor the public notice of the Ministry of Finance made any reference to the availability of any further, publicly available statement of reasons underlying the KTC's injury determination.

206. The Panel noted that the transcript of the KTC's meeting held on 24 April 1991 was confidential; while Korea had referred to the possibility for interested parties to request access to a non-confidential version of this document, Article 8:5 contained an obligation of investigating authorities to give public notice of the bases of their findings on their own initiative. This document therefore could not be considered to be a public notice within the meaning of Article 8:5.

207. The Panel noted in this connection that Korea had referred to the transcript in order to further explain the reasons upon which the determination of the KTC was based. Thus, Korea had characterized the transcript as "a contemporaneous and reliable record of the reasons which each individual Commissioner expressed as the basis for his vote" and had indicated that "the voting session transcript was submitted to assist in interpreting and to provide an understanding of the context in which certain statements in the written determination were made." On a number of specific issues in dispute, such as the alleged reliance by the KTC on a presumption or theory of import substitution, Korea had explained passages in the text of the published determination by reference to the statements of the individual Commissioners as recorded in the transcript.

208. The legal question raised by the references made by Korea to statements in the transcript of the KTC's meeting was therefore whether the Panel could properly review the injury determination of the KTC by reference to considerations in the transcript which were not included or referred to in the public statement of reasons given by the Korean authorities at the time of the imposition of the anti-dumping duties.⁵³

209. In analyzing this question, the Panel was guided by the provisions in Articles 3 and 8:5 of the Agreement. Article 3 of the Agreement required investigating authorities to consider certain factors and to make a determination based on positive evidence with regard to these factors. In the view of the Panel, effective review under Article 15 of an injury determination against the standards set forth in Article 3 required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that Article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice. An explanation of how in a given case investigating authorities had evaluated the factual evidence before them pertaining to the factors to be considered under Article 3 clearly fell within the scope of the requirement in Article 8:5 that authorities articulate in a public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor." This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding under Article 15 of the Agreement a Party were allowed to defend a challenged injury determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination. The Panel therefore did not accept Korea's argument that the Agreement did not

⁵³Supra, paragraphs 204 and 205.

limit an investigating authority's ability to demonstrate that it considered all of the required factors, and to demonstrate that dumped imports caused material injury, to the text of the public notice which announced its determination.

210. Furthermore, for a panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process under Article 15. A full and public statement of reasons underlying an affirmative determination at the time of that determination enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism under Article 15 was appropriate and provided a basis for a delimitation of the object of such dispute settlement proceedings. In this connection the Panel noted that, in light of the wording of the public notice given by the Korean authorities at the time of the imposition of the anti-dumping duties⁵⁴, Parties to the Agreement and exporters affected by these measures had no reason to believe that the injury determination of the KTC was based on considerations not reflected in that notice.

211. The Panel noted Korea's argument that the transcript was an accurate record of the KTC's deliberations and should therefore be taken into account by the Panel. The Panel had no reason to doubt the factual accuracy of the transcript as a record of the KTC's deliberations. However, the Panel considered that what was relevant was not whether this transcript was factually accurate as a record of the views expressed by individual KTC Commissioners at their meeting on 24 April 1991 but that it was not a formal, public statement by the KTC as the institution responsible under Korean law for injury determinations of the "issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor." Implicit in Korea's argument was the view that a panel should examine evidence of any factual and legal considerations actually relied upon by the investigating authorities, rather than only the factual and legal considerations expressed by the authorities in a public statement of reasons accompanying an affirmative determination. For the reasons set forth in the preceding paragraphs, the Panel was unable to accept this view.

212. Korea had also argued that, since the transcript was part of the administrative record of this investigation, the Panel was under an obligation to consider it. However, the question of whether the transcript was part of the administrative record of the investigation was not decisive of whether the Panel was bound to take account of the transcript for purposes of reviewing the reasons upon which the KTC had based its determination. The task of the Panel was to review the consistency with the Agreement of the KTC's injury determination in Decision 91-6, not the administrative record upon which that determination was based. While an examination of elements of the administrative record might be appropriate in order for a panel to determine whether certain findings of fact made by investigating authorities were based on positive evidence of record, it was only the public notice issued pursuant to Article 8:5, not the administrative record per se, which was relevant as a statement of reasons. In the case before the Panel, Korea had relied on the transcript not to provide evidence in support of specific statements of a factual nature in the KTC's injury determination but to further explain the reasons for that determination.⁵⁵

213. In light of the foregoing considerations, the Panel concluded that in its review of the KTC's injury determination it could not properly take account of the transcript of the KTC's voting session as a further explanation of the reasons upon which this determination was based. The only relevant statement of reasons in respect of this determination was that contained in KTC Decision 91-6.

⁵⁴Supra, paragraph 204.

⁵⁵Supra, paragraphs 23, 26, 27 and 207.

V.3 Alleged Failure of the KTC to State the Basis of its Determination

214. The Panel then proceeded to examine the specific grounds upon which the United States had alleged that the KTC's injury determination in respect of imports of polyacetal resin from the United States was inconsistent with the obligations of Korea under the Agreement.⁵⁶

215. One of these grounds pertained to the alleged failure of the KTC to state whether its determination was based on a finding of present material injury, threat of material injury or material retardation of the establishment of an industry. The argument of the United States was that while there was some discussion in the determination relevant to all these standards of injury, the KTC had not drawn any conclusions on any of these standards. In the view of the United States, this failure to state the basis of the determination was inconsistent with Articles 3:4 and 8:5 of the Agreement. A failure to state the basis for a finding of injury meant that a demonstration of a causal relationship between dumped imports and injury (as required under Article 3:4) was not possible. Furthermore, Article 8:5 required explicit public notice of the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

216. Korea had pointed out that, although the different bases for the KTC's affirmative determination had not been stated expressly in this determination, it was clear from the reference made by the KTC to "material injury, etc. as defined in Article 10-1 of the Customs Act"⁵⁷ that the KTC's determination had encompassed affirmative findings on all three standards of injury. Moreover, it was clear from the text of the determination where the analysis relevant to the findings on each of these alternative standards could be found. In addition, Korea provided to the Panel a journal article written by counsel for the petitioner which stated that the KTC had made its determination on the basis of affirmative findings on all three standards of injury. Korea had also argued that the transcript of the voting session of the KTC clearly indicated the separate opinions of each of the four KTC Commissioners who had voted in the affirmative. Finally, Korea had pointed out that during prior stages of the dispute settlement proceeding in this case the United States had never raised this question of the alleged lack of clarity of the KTC's determination.

217. The Panel considered that logically an examination of this claim of the United States regarding the alleged failure of the KTC to articulate on what standard(s) of injury its conclusions were based had to precede the examination of the other grounds of the complaint of the United States. Under the Agreement, there were certain inherent differences between the criteria for affirmative findings of present material injury, threat of injury, and material retardation of the establishment of an industry. For example, the distinguishing feature of an analysis of a threat of material injury was the examination of whether there was a clearly foreseen and imminent change of circumstances. If the determination before the Panel were the result of affirmative findings based on different standards of injury, a necessary condition of effective review by the Panel of the consistency of these findings with the Agreement would be that the determination contain specific conclusions with regard to each of these standards and sufficient reasoning to explain how the factors discussed in the determination were relevant to each particular standard. Accordingly, in order for the Panel to be able to review the KTC's injury determination against the criteria of Article 3, the Panel first had to satisfy itself that this determination was sufficiently clear with regard to the standard(s) of injury on which the KTC had based its conclusions. This question was therefore properly before the Panel, regardless of whether or not the United States had raised it in this form during prior stages of the dispute settlement process.

⁵⁶Supra, paragraph 196.

⁵⁷See, ANNEX 2, page 8.

218. As noted above, the injury determination which was the object of the Panel's review was contained in KTC Decision No. 91-6 of 24 April 1991. The first paragraph of this Decision read as follows:

"The Commission hereby determines that dumped imports ... caused material injury to the domestic industry as set forth in Article 10-1 of the Customs Act." (emphasis added)

Section 2 of this Decision, entitled "The Condition of the Domestic Industry" concluded with the following statement:

"Having examined various economic factors and indicators which are relevant to the evaluation of the domestic industry's condition, the Commission hereby determines that the domestic industry has suffered material injury, etc. as defined in Article 10-1 of the Customs Act." (emphasis added)

Finally, the section of the Decision dealing with the existence of a causal relationship between the allegedly dumped imports and injury to the domestic industry contained the following concluding sentence:

"Accordingly, the Commission hereby concludes that there is a causal relationship between the dumped imports and the injury to the domestic industry."

Korea had indicated to the Panel that this determination encompassed findings of all three types of material injury: present material injury, threat of material injury and material retardation of the establishment of an industry. In the view of Korea this was clear from the reference in the determination to the term "material injury, etc. as defined in Article 10-1 of the Customs Act". Korea had also stated before the Panel that the public was aware that this determination was the result of four Commissioners voting in the affirmative and three Commissioners voting against an affirmative determination. Finally, Korea explained that of the four Commissioners who had voted in the affirmative, two had found a threat of material injury, one had found present material injury and one had found material retardation of the establishment of an industry.

219. Notwithstanding Korea's arguments, the Panel considered that it was not discernible from the text of the KTC's determination if and how this determination was the result of affirmative findings on all three standards of injury.

220. The Panel did not consider that, as contended by Korea, the reference in the determination to the term "material injury, etc. as defined in Article 10-1 of the Customs Act" necessarily meant that the determination encompassed findings of injury on three distinct bases. According to Korea, Article 10-1 of the Customs Act defined the term "material injury, etc." to mean all three standards of injury under the Agreement. However, the Panel noted that Article 10-1 read in relevant part as follows:

"(i) In cases where the importation of foreign goods for sale at a price lower than the normal value causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry (hereinafter in this Article referred to as "material injury, etc.") ..." (emphasis added)

Given the use of the word "or" in this provision, the Panel was of the view that a reference to the concept of "material injury, etc.," in Article 10-1 could not be said to provide, by itself, a clear statement that the KTC had found all the three possible types of injury distinguished in that provision.

221. The Panel noted that there was one passage in the determination which suggested that the KTC's determination had indeed involved a consideration of the three standards of injury. Section 2 of the determination (pages 3-8) dealt with "The Condition of the Domestic Industry". In this section the KTC had stated on pages 6-7:

"In addition to considering the issues related to material injury and threat of injury to the domestic industry as noted above, the Commission also considered the issues that relate to material retardation of the establishment of the domestic industry, in light of the domestic industry's additional production facility with a capacity of 10,000 tons, which was in the process of operational testing during the investigation period."

This statement suggested that the text on pages 3-6 of the determination purported to reflect the KTC's analysis relevant to its findings of present material injury and threat of material injury, while the text on pages 7-8 following the quoted passage apparently pertained to the KTC's analysis of whether the establishment of an industry was materially retarded. This had been confirmed by Korea during the Panel's proceedings.

222. However, while it could thus be inferred from the text that the determination had involved a consideration of factors and evidence relevant to all three standards of injury in the examination of the condition of the domestic industry, the section of the determination which examined the existence of a causal relationship between the imports and injury to the domestic industry did not distinguish between the questions of present material injury, threat of material injury and material retardation of the establishment of a domestic industry. Thus, the introductory sentence of this section noted that the "Commission examined causation between the injury to the domestic industry and the dumped imports" and the concluding sentence stated that "... the Commission hereby concludes that there is a causal relationship between the dumped imports and the injury to the domestic industry" (emphasis added). It was in particular unclear from the text of this section of the determination that the conclusion drawn by the KTC at the end of the section related not only to present material injury, but also to a threat of material injury and material retardation of the establishment of an industry. First, the text of the causation section did not specifically discuss the rôle of the subject imports in causing a threat of material injury or in causing material retardation of the establishment of an industry. Second, if the conclusion at the end of this section were to be interpreted to mean that the KTC had made a finding of injury based simultaneously on all three standards of injury, this would necessarily mean that the KTC's statement was internally contradictory: the KTC could not logically have found that a domestic industry was being injured by dumped imports (which presupposed that such an industry was already established) and at the same time that the establishment of a domestic industry was materially retarded by those imports.

223. As explained above, the Panel considered that a clear statement of the conclusions reached by investigating authorities, and of the reasons of those conclusions, was a necessary condition for effective review by a panel of an injury determination in light of the requirements of Article 3. The importance of an adequate statement of reasons was underscored by Article 8:5 of the Agreement. Under this provision, investigating authorities were under an obligation to include in a public notice of an affirmative finding

"... the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor."

In the view of the Panel where, as argued by Korea in this case, an affirmative determination involved distinct alternative findings based on different standards of injury, the phrase "findings and conclusions" in Article 8:5 required a clear statement of those distinct findings and conclusions and of the relevant "issues of fact and law considered material" in respect of each of those findings and conclusions. The

KTC's injury determination before the Panel did not meet this requirement. The determination did not contain specific conclusions on each of the three standards of injury discussed in the determination nor did it explain the relationship between the analyses of these injury standards.

224. The Panel therefore concluded that in this respect the KTC's determination was inconsistent with Korea's obligations under Articles 3 and 8:5 of the Agreement.

V.4 Sufficiency of the KTC's Determination as a Basis for Affirmative Findings of Present Material Injury, Threat of Material Injury, or Material Retardation of the Establishment of an Industry

225. The Panel noted that there appeared to be some overlap between the issues raised by the United States under the four other claims mentioned in paragraph 196. Thus, more than one claim of the United States focused on the KTC's treatment of factors such as net profits, sales revenue and inventories. Many of these issues pertained to whether the KTC had carried out an objective examination of the factors it was required to consider under Article 3 of the Agreement and had based its findings on positive evidence. The Panel was of the view that the most efficient way of proceeding was to begin its analysis by addressing the issues raised by the United States in support of its claim that the findings in the KTC's determination were deficient to serve as basis for an affirmative determination on the basis of any of the three possible standards of injury under Article 3 of the Agreement.

226. The Panel noted that the arguments of the United States in support of this claim involved to a certain extent the question of the sufficiency of the evidence to support the findings reached by the KTC and that there had been some discussion in the proceedings before the Panel as to the nature of a panel's task in reviewing an injury determination in light of the positive evidence requirement in Article 3:1. Thus, Korea had argued that there was positive evidence to support an affirmative finding under each standard of injury and that the arguments of the United States amounted to not more than a disagreement with the weight given by the KTC to certain factual information before it. Korea had stressed that it was not the proper rôle of a panel to reweigh factual evidence relied upon by investigating authorities.

227. The Panel considered that a review of whether the KTC's determination was based on positive evidence did not mean that the Panel should substitute its own judgement for that of the KTC as to the relative weight to be accorded to the facts before the KTC. To do so would ignore that the task of the Panel was not to make its own independent evaluation of the facts before the KTC to determine whether there was material injury to the industry in Korea but to review the determination as made by the KTC for consistency with the Agreement, bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts. The Panel considered that a proper review of the KTC's determination against the requirement of positive evidence under Article 3:1 meant that it should examine whether the factual basis of the findings articulated in the determination was discernible from the text of the determination and reasonably supported those findings. This entailed the need for the Panel to satisfy itself that there was sufficient reasoning in the determination as to the connection between this factual basis and these findings, and that the KTC had not relied upon incorrect factual information.

228. Consistent with its analysis of why the transcript of the KTC's voting session could not be properly taken into account in the Panel's review of the KTC's determination⁵⁸, the Panel was of the view that in examining whether the determination was based on positive evidence it should have regard only to the factual findings and analysis actually reflected in this determination; factual considerations not expressed in this determination could not be considered to be "issues of fact ... considered material

⁵⁸Supra, paragraphs 208-213.

by the investigating authorities" within the meaning of Article 8:5. Therefore in reviewing the KTC's determination the relevant question before the Panel was not whether there was sufficient evidence in the record of the KTC which could support an affirmative determination, but whether the evidence as referenced and evaluated by the KTC in its determination constituted positive evidence in support of the findings in that determination.

(a) Present material injury to a domestic industry in Korea

229. The Panel then proceeded to examine the claim of the United States that the findings in the KTC's determination were insufficient to serve as a basis for an affirmative determination of the existence of present material injury.

230. In the view of the United States, insofar as the determination was the result of a finding of present material injury, the determination was inconsistent with the obligations of Korea under Articles 3:1, 3:3 and 3:4 of the Agreement because of the KTC's failure to base its findings on positive evidence, the lack of an objective examination of certain factors, and the attribution to the imports under investigation of effects caused by other factors. These arguments of the United States pertained in particular to the KTC's analysis of sales revenue, net profits and accumulation of inventories.

231. Korea had submitted that the KTC's finding of present material injury was based on positive evidence of the relevant factors under Article 3. Korea considered that the KTC had properly relied upon factors such as the deterioration of the financial condition of the domestic industry and the increase in inventories. In the view of Korea, the arguments of the United States amounted to a simple disagreement with the KTC's view on the significance of certain factual evidence before it.

232. The Panel noted that the KTC's finding of present material injury caused by the imports under investigation was the result of a bifurcated analysis: the KTC had first analyzed the condition of the domestic industry and found that "the domestic industry has suffered material injury, etc. as defined in Article 10-1 of the Customs Act". In a separate section of the determination the KTC had examined the rôle of the imports under investigation in causing injury to the industry and had found that "there is a causal relationship between the dumped imports and the injury to the domestic industry".

233. The discussion on pages 3-5 of the KTC's determination of the condition of the domestic industry included as relevant indicators the industry's capacity utilization, inventories, sales and market share, the evolution of domestic prices, sales revenue, and net profit. With regard to capacity utilization, the KTC had noted that the industry had achieved "normal operations during the investigation period, as indicated by the fact that the domestic industry in 1989 maintained a capacity utilization rate of 90.1% ..." (page 3). In respect of inventories, the KTC had found that there had been an increase in inventories since the last quarter of 1989 explained by the fact that the industry could not regulate levels of production and by the evolution of the volume of sales in the second half of 1989. The determination did not, however, state that the KTC considered this to be an indication of injury to the industry. Finally, after noting the industry's market share in 1989 and its total sales volume in that year, the KTC had observed that "[t]he domestic industry, therefore, superficially appeared to have performed well" (page 4). It therefore appeared to the Panel that with the possible exception of the rise in inventories, the KTC had not relied upon the above-mentioned factors in finding that the domestic industry was experiencing present material injury. The text on page 5 of the KTC's determination suggested that this finding was based on the KTC's evaluation of the industry's sales revenue and net profit. The text on pages 5-6 of the determination indicated that the KTC had also considered certain factors pertaining to the "projected performance" of the industry as part of its analysis of the condition of the domestic industry. However, it appeared to the Panel that this examination related to the KTC's evaluation of the existence of a threat of material injury.

234. The Panel first examined the issues raised by the United States regarding the KTC's consideration of sales revenue of the domestic industry as an indication of the existence of present material injury.

235. In this connection, the Panel noted that the KTC had made the following observations in its determination:

"The average ex-factory price of the domestic industry in the first quarter of 1989 was [] Won per ton. Since then, the average price continued to decline and by the first quarter of 1990, it decreased to [] Won per ton, a 6.3% decline compared to the same period of the previous year. The ex-factory price by each grade also showed a declining trend: middle viscosity grade by 13.7%, low viscosity grade by 14.3% and audio/video grade by 3.3%.

In light of these facts, the Commission recognized that there was a substantial loss to the domestic industry's sales revenue during the period of investigation due to price depression." (pages 4-5, emphasis added)

236. The United States had not contested the factual basis of the KTC's statements on the decline of the domestic price over the investigation period but had argued that the KTC's conclusion on the substantial loss of sales revenue was not based on positive evidence because the KTC had failed to take into account the impact of the increased volume of sales on the sales revenue of the domestic industry. According to the United States, had the KTC examined both elements of sales revenue, i.e. prices and volume of sales, it would have found a substantial gain in sales revenue. In the view of the United States, the KTC's disregard of the volume of sales in its examination of sales revenue reflected the KTC's presumption that it was normal for the domestic industry to gain market share in a market that was in a process of import substitution.

237. Korea had argued that dumping had been found to be a direct cause of price suppression and depression and that without dumped imports, the industry's sales revenue would have been higher. Moreover, sales volume had declined substantially after the second quarter of 1989, as a result of which inventories had increased significantly. The decline in sales volume and consequent revenue declines and inventory gains constituted positive evidence of material injury.

238. The Panel noted that the statement in the determination on the loss of sales revenue⁵⁹ followed immediately after the KTC's discussion of the data on the evolution of domestic prices. However, the Panel considered that sales revenue logically was a function of both prices and volumes of sales. Therefore, the evidence on declining domestic prices by itself could not constitute positive evidence to conclude that there had been an actual substantial loss in sales revenue over the investigating period.

239. Data in the KTC staff report⁶⁰ indicated that the volume of sales had increased from 1,665 to 2,498 tons from the first to the second quarter of 1989 and had decreased to 2,326 tons in the third quarter. In the fourth quarter of 1989 sales volume had increased to 2,420 tons, while in the first quarter of 1990 sales volume had declined to 2,280 tons. The Panel found nothing in the text of the KTC's determination to explain how on the basis of this data the KTC had concluded that over the investigation period the domestic industry had incurred a substantial loss in sales revenue. While Korea had referred to a substantial decline of shipments after the second quarter of 1989, the text of the KTC's determination did not indicate that the KTC had relied on the decrease of shipments after the second

⁵⁹Supra, paragraph 235.

⁶⁰Korean Trade Commission, Trade Investigation Office, "Information Obtained in the Injury Investigation. Polyacetal Resin" (hereinafter referred to as the "KTC staff report"), Investigation Number Taemu-40-6-90-2, April 1991, page 16.

quarter of 1989 to 2,326 tons in the third quarter in 1989 as an element in its conclusion that there had been a substantial loss in sales revenue over the investigation period. In fact, the KTC on page 4 of its determination had referred to "the domestic industry's increases in sales and market share" which it considered to be "normal occurrences". On page 7 of its determination the KTC had in its discussion of material retardation stated that certain economic indicators, including shipments, "seemed to show a favourable situation".

240. The Panel noted that, although not specifically mentioned by Korea during the Panel's proceedings, the KTC staff report prepared in this investigation provided information on the evolution of sales revenue over the period of investigation.⁶¹ During the investigation period an increase in sales revenue from 2,504 million Won to 3,497 million Won from the first to the second quarter of 1989 had been followed by a decline to 3,222 million Won in the first quarter of 1990. This data, according to which a rise in sales revenue of about 40 per cent over one quarter was followed by a total decline of about 8 per cent over three quarters, had not been discussed or referred to in the text of the KTC's determination. As written, the KTC's determination did not explain how the KTC had evaluated this data in finding a substantial loss of sales revenue.

241. The Panel noted that Korea had offered an alternative interpretation of the KTC's statement on the substantial loss of sales revenue during the period of investigation. Under this interpretation, this statement meant that without the price effects of the dumped imports, the industry's sales revenue would have been higher. However, also under this interpretation an examination of the volume of sales would have been required in order to substantiate this statement. In the view of the Panel, it was not sufficient for the KTC to have simply assumed that if domestic prices had not declined but had remained stable or had increased, this would not have affected the volume of sales realized by the domestic industry. The Panel did not find an indication in the KTC's determination explaining if and how such examination had taken place. The Panel therefore concluded that even if one interpreted that KTC's statement as referring to what the level of sales revenue would have been if prices had evolved differently, it could not be considered to have been adequately substantiated by positive evidence.

242. The Panel concluded, in light of its considerations in paragraphs 238-241, that the only factual basis discernible from the text of the KTC's determination of its finding on the loss of sales revenue was the reference to the decline of domestic prices. As noted in paragraph 240, while there was factual data before the KTC on the evolution of sales revenue during the period under investigation, the determination did not explain how this data had been evaluated by the KTC in finding that there had been a substantial loss of sales revenue. As a result of the apparent failure of the KTC to consider the impact of sales volume on sales revenue the determination did not provide sufficient reasoning as to the connection between the KTC's reference to the decline of domestic prices and the KTC's finding on the substantial loss of sales revenue. In light of the considerations in paragraphs 227 and 228, the Panel concluded that the KTC's finding of a substantial loss of sales revenue could not be considered to have been adequately substantiated by positive evidence and was therefore inconsistent with Korea's obligations under Article 3:1 of the Agreement.

243. The Panel proceeded to examine the issues raised by the United States regarding the KTC's reliance on profits as an indication of present injury to the domestic industry.

244. In its determination the KTC had discussed the net profit realized by the industry in 1989 as follows:

⁶¹KTC staff report, page 16.

"The domestic industry's 1989 financial statement records a net profit before tax of 205 million Won (i.e., a profit rate of 1.6%). However, the domestic industry is regarded in Korea as a "high-tech materials" and "capital-intensive equipment" industry, which requires enormous investments. The domestic industry also needs to make continuous R&D investments for product diversification and new product development. Further, the domestic industry requires considerable internal reserves for equipment replacements. Therefore, the domestic industry's net profit (before tax) rate of 1.6%, which falls short of the domestic chemical industry's 3.24% average profit rate, cannot be regarded as sufficient to permit the domestic industry to maintain normal operations and development." (page 5)

245. The United States had argued that, insofar as the KTC had found that the net profit realized by the industry in 1989 was insufficient to cover investments and generate reserves for the industry's future development and growth, that finding could not support a finding of present material injury. Moreover, neither the determination nor the KTC staff report provided evidence that the industry had in fact been prevented from undertaking planned expenditures. If anything, the KTC staff report suggested that substantial investments and research and development expenditures had taken place in 1989. In addition, the research and development expenses referred to by the KTC were for "product diversification and new product development". To the extent that such expenses related to products which were not like the product under consideration, Article 4:1 precluded the consideration of those expenses as a relevant factor.

246. Korea had argued that the domestic industry had suffered a net loss in the first quarter of 1990 after earning a small net profit in calendar year 1989. These results constituted positive evidence of material injury. Furthermore, there was no basis for the contention of the United States that the industry had made substantial investments and research and development expenditures. In fact, in the view of the KTC these expenditures had been relatively small and were inadequate to ensure the future competitive viability of the industry. The construction of a second production facility by the industry in accordance with its original business plan could not be characterized as a substantial investment. Finally, the domestic industry produced only polyacetal resins and the planned research and development expenses of the industry related to future generations of this product, i.e. products like the product under consideration. The reference in Article 3:3 to the concept of "growth" meant that consideration could be given to an industry's ability to generate sufficient funds for research and development.

247. The Panel noted that the United States had also raised issues regarding the KTC's profit analysis under its claim that the KTC's determination violated several provisions of Article 3 because of the alleged reliance by the KTC on a presumption on theory of import substitution. In this connection, the United States had objected to the KTC's use of net, rather than operating profit. This had, in the view of the United States, distorted the true picture of the industry's operations. Moreover, the United States had questioned the KTC's view that already in its first year of operation the domestic industry was entitled to a profit rate sufficient to ensure its long-term development and adequate internal reserves. The KTC also had ignored the nature of the industry as a new entrant to the market when it compared the net profit earned by the industry in 1989 with the average net profit earned by a number of chemical industries that included established industries.

248. Korea had argued in response to these arguments of the United States that Article 3 of the Agreement did not prohibit the considerations of net, instead of operating profit, and that in this case it was appropriate for the KTC to use net profit because the only product produced by the domestic industry was polyacetal resin. Korea considered that there was no basis to assume that in this sector no profit could be earned right from the start of a company's operations. Korea had further pointed out that the KTC had not relied upon a comparison of the net profit earned by the industry in 1989 with the net profit earned by other industries. Rather, the KTC had found a low net profit in 1989 and net losses in 1990 and these findings were positive evidence of material injury under the Agreement.

249. The Panel considered that it could reasonably be inferred from the statement quoted in paragraph 244 that the KTC had not relied upon an actual decline of the net profit over the investigation period in finding that the industry was materially injured. This statement did not indicate that the KTC had attached significance to the fact that while in 1989 the industry had made a small profit, there had been a net loss in the first quarter of 1990. The Panel therefore considered that Korea's argument on the net loss incurred in the first quarter of 1990 was not relevant to its examination of whether the KTC's finding on the insufficiency of the net profit in 1989 was based on positive evidence.

250. As reflected in the last sentence of the statement quoted in paragraph 244, the key element in the KTC's evaluation of the net profit as an indicator of injury to the domestic industry was that this profit did not permit the industry to maintain "normal operations and development". The Panel therefore proceeded to examine whether this finding was based on positive evidence, bearing in mind the considerations in paragraphs 227 and 228.

251. The Panel noted that the KTC staff report contained some data regarding investments made and planned by the domestic industry. First, on pages 22-23 and 42-43 of the report, information was provided on investments made in 1987, 1988, 1989 and the first quarter of 1990. Second, pages 31-35 of the report contained what was described as an "analysis of appropriate sales price and profit level of the domestic industry, taking into account market conditions such as domestic demand, import, and price terms, business activity (such as production and sales), and financial status." Third, a section of the report which dealt with information relevant to the KTC's evaluation of whether a threat of material injury was caused by the imports under investigation provided data on the expenses planned by the industry for product development. Finally, data on investments made by the industry also appeared in a section of the KTC staff report which purported to provide information relevant to the KTC's consideration of whether the establishment of a domestic industry was materially retarded.

252. The Panel noted that the KTC's determination did not discuss or refer to the information referred to in the preceding paragraph as the basis for the KTC's finding that the level of net profit in 1989 was not sufficient. This information might have been relevant to an evaluation of the adequacy of the profit realized by the industry in 1989, but it could not be inferred from the text of the determination how and to what extent the KTC had evaluated this information in finding that this level of profit was insufficient to permit the industry to maintain normal operations and development. For example, Korea had argued that the KTC had found that the investments and research and development expenditures made by the industry during the period of investigation were relatively small and inadequate to ensure the future competitive viability of the industry. However, the determination noted that the industry required "enormous investments" and "continuous R and D investments for product diversification and new product development" but did not indicate that the KTC had considered data on the actual investments and research and expenditures made by the industry over the investigation period and found that these were less than what was necessary to ensure the future competitive viability of the industry.

253. The Panel further noted that there was a statement in the KTC staff report pertaining to the difficulties the industry was expected to face in realizing planned investments if the "current market situation" continued but this statement did not indicate that over the investigation period (1989-first quarter 1990) the industry had in fact experienced such difficulties. Moreover, this statement appeared in a part of the KTC staff report which contained data relevant to the KTC's evaluation of whether a threat of material injury existed, not whether there was present material injury to the industry. It was therefore not clear to the Panel how this data had been used by the KTC in finding that the insufficient profit realized in 1989 was an indication of present material injury to the industry. Finally, the Panel could not determine whether and how the analysis in the KTC staff report of reasonable profit and price levels was related to the statement on page 5 of the KTC's determination on net profit in 1989 as an indication of present material injury, or whether this analysis was related to the statement on page 6 of the determination regarding the difficulty of the industry "to secure the profits necessary in the future for normal operations and growth."

254. For the reasons set forth in the preceding paragraphs, the Panel was of the view that it was unable to ascertain from the text of the determination on what factual basis the KTC had found that the level of net profit in 1989 was insufficient to enable the industry "to maintain normal operations and development." While there might have been relevant information before the KTC in this regard, the determination did not enable the Panel to determine how this information had been evaluated by the KTC in making this finding. The Panel recalled its statement in paragraphs 227 and 228 regarding the considerations by which it was guided in reviewing whether the KTC's determination was based on positive evidence. The Panel concluded that the KTC's finding that the level of net profit in 1989 was not sufficient to permit the industry "to maintain normal operations and development" was not adequately substantiated by positive evidence and was thereby inconsistent with Korea's obligations under Article 3:1 of the Agreement.

255. In light of its conclusion in the preceding paragraph, the Panel did not consider it necessary to make findings on other aspects of the profit analysis of the KTC raised by the United States.

256. The Panel then proceeded to examine the issues raised by the United States with regard to the discussion in the KTC's determination of inventories as an element in the KTC's analysis present material injury to the domestic industry.

257. In this connection, the Panel noted the following statement in the KTC's determination:

"Because of the special characteristics of the production system, the domestic industry cannot regulate production levels by controlling the level of input materials, and the share of fixed costs is relatively high. Therefore, the domestic industry had little choice but to utilize full production capacity, and the Commission found that this factor and the sluggishness of the domestic market in the second half of 1989 resulted in the accumulation of inventory since the fourth quarter of 1989." (page 4)

In the proceedings before the Panel Korea had argued that this increase in inventories was one of the factors relied upon by the KTC in finding that the domestic industry was materially injured.

258. The United States had argued that the KTC's use of the increase in inventories as an indication of present material injury to the domestic industry was contradicted by the statement in the KTC's determination that this increase was the result of the sluggish demand. In addition, information in the KTC staff report indicated that the increase in inventories since the fourth quarter of 1989 had been slight and that the industry's maintenance of inventories was necessary to "ensure a stable supply of product to customers". The United States had also pointed out that in its determination the KTC had stated:

"As the domestic industry shipped 89.1% of its production volume, improving sales revenue by increasing shipments will be difficult." (page 6)

However, the KTC had also stated that:

"... the inventory level increased sharply after the first quarter of 1990 ..." (page 7)

According to the United States the KTC had failed to explain why this allegedly sharp increase in inventories since the first quarter of 1990 did not provide a basis for increasing shipments to improve sales revenue.

259. Korea had argued that the decline of domestic demand and the maintenance of a stable supply had not been the only causes of the increase in inventories but that underselling by imports had

necessarily led to an accumulation of inventories. The fact that there might also have been other factors contributing to this increase did not preclude a finding that imports were also a cause of the increase in inventories. The volume of sales of the domestic producer had declined substantially after the second quarter of 1989, as a result of which inventories had increased significantly. In addition, Korea had argued that the argument of the United States that a sharp increase in inventories could be used to increase shipments reflected a misunderstanding of the KTC's determination.

260. The Panel first noted that when read in its context, it was not evident from the statement quoted in paragraph 257 that the KTC had relied upon the evolution of inventories in finding that the industry was experiencing present material injury. The Panel further noted that the KTC had expressly explained the accumulation of inventory as resulting from the need for the industry to utilize full production capacity and the sluggishness of the domestic market in the second half of 1989. The Panel was aware that the phrase "... and the sluggishness of the domestic market in the second half of 1989" might be the result of an inaccurate translation of the original Korean text and that Korea had suggested that a better translation was that the domestic industry's "sales have been sluggish since the second half of 1989". However, even when this translation problem was taken into account, the Panel could not find a clear statement in the determination indicating that the KTC had found that the increase in inventories was not only caused by the industry's need to produce at full capacity and by the evolution of sales in 1989 but also by the effects of the imports. Korea's argument that sales volume had declined substantially after the second quarter of 1989, as a result of which inventories had increased significantly, did not appear in the KTC's determination. Nor was there any discussion of how this allegedly substantial decline in sales volume was an effect of the imports under investigation.

261. The Panel concluded that, if the KTC's finding of present material injury to the domestic industry was based on the accumulation of inventory since the end of 1989, it was inconsistent with Article 3:4 of the Agreement in that the KTC's determination failed to explain the rôle of the imports under investigation as a cause of this accumulation of inventory.

262. In light of its conclusions in paragraphs 242, 254 and 261, the Panel concluded that the KTC's finding that there was present material injury to the domestic industry was (i) not based on positive evidence as required under Article 3:1 insofar as this finding was based on the industry's sales revenue and net profit, and (ii) inconsistent with Article 3:4 insofar as it was based on the industry's inventories.

263. The Panel noted that the United States had also claimed that the KTC's determination was inconsistent with Article 3 of the Agreement because it reflected a reliance on an "import substitution" rationale. This claim related to the KTC's examination of the market share of the domestic industry, the industry's sales revenue and net profits, and the volume and price effects of the imports under investigation.

264. Having concluded that the KTC's examination of the domestic industry's sales revenue and net profit was not based on positive evidence, the Panel did not find it necessary to consider whether this examination was also inconsistent with Article 3 because of the alleged reliance by the KTC on an "import substitution" rationale. For the same reason, the Panel considered that it was not necessary to address the question of whether the KTC had somehow improperly discounted the growth in market share of the domestic industry. Finally, in light of the Panel's conclusion that the KTC's finding that the domestic industry was materially injured was inconsistent with Article 3 with regard to the KTC's examination of sales revenue, net profits and inventories, the Panel did not reach the question of the KTC's analysis of the rôle of the volume and price effects of the imports under investigation in causing present material injury.

(b) Threat of material injury

265. The Panel then proceeded to examine the claim of the United States that the KTC's determination did not provide an adequate basis for a finding of a threat of material injury and was in this respect inconsistent with the requirements of Articles 3:1, 3:2, 3:3 and 3:6 of the Agreement.

266. The essence of the claim of the United States with regard to the inadequacy of the analysis in the KTC's determination as a basis for a finding of a threat of material injury was that this analysis did not include a consideration of whether there was a clearly foreseen and imminent change of circumstances, as required under Article 3:6. The KTC had in particular failed to examine likely future developments with regard to the volume and price effects of the imports subject to investigation, the prices of these imports and the consequent impact of these imports on the domestic industry.

267. With regard to the impact of imports on domestic producers, the United States had also considered as inconsistent with Article 3 the fact that the KTC had explicitly excluded from its analysis "favourable market forces that are beyond the domestic industry's control, such as falling material costs and interest rates".

268. Korea had argued that there was sufficient evidence to support a finding of a threat of material injury caused by the imports under investigation, based on the existence of large margins of dumping, the presence of a substantial volume of imports, the impact of those imports on domestic prices in terms of price suppression and price depression, the capacity of the producers in question to supply the Korean market, and the increase in inventories of the domestic producer. These factors, several of which were expressly identified in the relevant Recommendation adopted by the Committee on Anti-Dumping Practices⁶², provided a proper basis for a finding of a threat of material injury consistent with the Agreement.

269. Korea had also argued that the KTC's findings on the current effect of the dumped imports on the domestic industry were pertinent as evidence in support of a finding of a threat of material injury. In the view of Korea, if imports had a current effect, this effect was by definition real and imminent and thereby sufficient as positive evidence of a threat of material injury.

270. With regard to the KTC's consideration of favourable market forces beyond the domestic industry's control (i.e. the declining material costs and interest rates), Korea pointed out that the KTC had been unable to find that these factors furnished a sufficient basis for a negative determination.

271. The Panel observed that apart from the requirements of Article 3:1 regarding positive evidence and an objective examination of certain factors, a determination of a threat of material injury was in particular subject to the requirements of Article 3:6:

"A determination of threat of injury shall be based on facts and not merely on allegation, conjecture and a remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent."⁶

Footnote 6 ad Article 3:6 provided:

"One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices."

⁶²BISD 32S/182.

It followed from the text of Article 3:6 that a proper examination of whether a threat of material injury was caused by dumped imports necessitated a prospective analysis of a present situation with a view to determining whether a "change in circumstances" was "clearly foreseen and imminent". Interpreted in conjunction with Article 3:1, a determination of the existence of a threat of material injury under Article 3:6 required an analysis of relevant future developments with regard to the volume, and price effects of the dumped imports and their consequent impact on the domestic industry.

272. In this connection, the Panel noted Korea's argument that if imports had a current effect on the domestic industry, that effect by definition was real and imminent and thereby sufficient evidence of a threat of material injury. However, Korea had also argued that in this case the finding of a threat of material injury was separate from findings of present material injury and material retardation of the establishment of an industry. This logically meant that the Panel had to review this finding as a finding that, while no present material injury was caused by the dumped imports under investigation, such imports caused a threat of material injury. Such a finding of threat of material injury necessitated an examination of whether there was a clearly foreseen and imminent change in circumstances such that a threat of injury would develop into actual injury.

273. In light of the interpretation of Article 3:6 set forth in paragraph 271, the Panel then examined whether the KTC's determination included an analysis of relevant future developments regarding the condition of the domestic industry and the volume and price effects of the imports under investigation.

274. The text of the KTC's injury determination indicated that the KTC had analyzed the likely condition of the domestic industry in the future:

"In addition, based on the domestic industry's 1989 operational results, the Commission also examined the domestic industry's projected performance in terms of cuts in production costs, increases in revenues, etc.

Of the optimal production capacity of 10,000 tons, the domestic industry produced 10,005 tons. Therefore, it will be practically impossible to lower production costs and improve profitability by increasing its capacity utilization.

As the domestic industry shipped 89.1% of its production volume, improving sales revenue by increasing shipments will be difficult.

As the domestic industry elected to use the straight-line depreciation method, improving profit through the future reduction of depreciation costs is not possible.

Therefore, not taking into account favourable market forces that are beyond the domestic industry's control, such as falling materials costs and interest rates, ameliorating the domestic industry's financial performance without increasing price appears to be difficult. As a result, under the present circumstances of stagnant domestic demand and depression of actual prices, the effect of price depression has not only worsened the domestic industry's financial condition, but has also made it considerably more difficult for the domestic industry, which still has a weak industrial basis, to secure the profits necessary in the future for normal operations and growth." (pages 5-6, emphasis added)

275. The Panel first addressed the argument of the United States that this analysis of the projected performance of the domestic industry was inconsistent with Article 3 because of the exclusion by the KTC of "favourable market forces that are beyond the domestic industry's control".

276. In this connection, the Panel noted that Article 3:3 of the Agreement provided that:

"The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

While the relative weight to be accorded to each of these factors depended upon the circumstances of each particular case, the overall context of an analysis of the specific factors mentioned in Article 3:3 was that of "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". The wording of Article 3:3 did not support the view that factors which were beyond the industry's control were, by definition, not "relevant economic factors and indices having a bearing on the state of the industry". The Panel therefore considered that insofar as the KTC's decision not to take account of factors such as declining costs of materials was based on the ground that such factors were beyond the domestic industry's control, the KTC had failed to evaluate relevant economic factors and indices having a bearing on the state of the industry. In this respect, the KTC's examination of the "projected performance" of the domestic industry was inconsistent with Korea's obligations under Article 3:3 of the Agreement.

277. The Panel then proceeded to examine if and how the KTC had analyzed the future evolution of the volume and price effects of the imports in relation to its projection of the performance of the domestic industry.

278. With regard to the volume of the dumped imports, the KTC had made the following statement in the causation section of its determination:

"The volume of the dumped imports continuously decreased and their market share also fell from 39.5% in the first quarter of 1989 to 23.7% in the first quarter of 1990. The decline in the volume of dumped imports is a normal occurrence because the domestic market is in the process of import substitution. However, the fact that the dumped imports continued to account for a substantial share of the domestic market demonstrates that notwithstanding the reduction in import volumes, imports continued to have a real impact on the domestic price." (page 9)

This statement pertained to the evolution of the volume of the dumped imports over the investigation period. The Panel, however, could not find any discussion in the text of the KTC's determination of the likely evolution of the volume of imports under investigation as part of an analysis of whether these imports constituted a threat of material injury.

279. In this connection, the Panel noted Korea's argument that the capacity of the foreign producers to supply the Korean market was one of the factors supporting an affirmative finding of a threat of material injury. Korea had argued that the respondents had the capacity to supply 100 per cent of the demand in the Korean market, that in the past they had supplied 100 per cent of the demand in the Korean market, and that there was no evidence that they would not again seek to do so in the absence of competition from the domestic producer in Korea.

280. The Panel noted that information on production capacity of the foreign producers under investigation could be found in the KTC staff report. However, the text of the KTC's determination did not discuss the foreign producers' capacity to supply the Korean market. Korea had indicated that this fact was reflected "implicitly" in a statement on page 9 of the determination where the KTC had

found that, in view of the substantial market share of the dumped imports, the imports continued to have a real impact on domestic prices. The Panel considered that market share of imports and the capacity of foreign producers to supply the Korean market were distinct concepts and that the statement in the KTC's determination on the presence of a substantial market share of the imports therefore could not be said to reflect a consideration of available capacity of foreign producers to supply the Korean market.

281. The Panel noted, however, that had the text of the determination reflected a reliance by the KTC on foreign producers' capacity to supply the Korean market, it would have been necessary to decide whether a reference to the capacity of foreign producers to supply the Korean market, rather than the likelihood that such capacity would actually be used to increase supplies to that market, was consistent with Article 3:6 of the Agreement. While Korea had argued that reliance on capacity of foreign producers to supply the Korean market was consistent with the Recommendation of the Committee on Anti-Dumping Practices, this Recommendation provided for the consideration of whether there existed

"sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports."⁶³

This indicated that capacity per se was not a sufficient factor in considering the likelihood of increased import volumes.

282. With regard to the price effects of the dumped imports, the Panel noted the following remarks in the causation section of the KTC's determination:

"The Commission analyzed the impact of the dumped imports on domestic prices by focusing on the two major distribution channels: direct sales to end-users and sales to distributors.

In the case of direct sales prices to end-users, the average dumped import price was higher than the domestic price by 7.7% in the first quarter of 1989, but it continued to decline until the last quarter of 1989. The domestic price, on the other hand, showed an increasing trend from the first quarter of 1989 to the third quarter of that year, notwithstanding the declining trend in import price, but it continued to be slightly lower than the import price. However, since the fourth quarter of 1989, import and domestic prices have been at similar levels, and in the first quarter of 1990, the two prices have increased slightly.

In the case of sales prices to distributors, the domestic price was 3.6% higher than the import price in the first quarter of 1989. Thereafter, both import and domestic prices declined sharply. In comparison to corresponding prices in the first quarter of 1989, the import price in the first quarter of 1990 fell by 16.2%, and the domestic price by 20.9%.

The respondents argued that the price depression in the domestic market was caused by the petitioner, which took a leading role in setting the price, and that the import price was set at a level competitive to the petitioner's price in order to maintain their market shares. However, it is reasonable for a new entrant to sell at a price slightly below the established price in order to secure customers. Therefore, in examining the effect of dumped imports on the domestic price, the Commission carefully examined the presence of considerably low import prices and the issue of whether the domestic price was either suppressed or depressed by reason of dumped imports.

⁶³BISD 32S/182 at 183.

Conclusion

Based on the above analysis, although the import price does not appear to be considerably lower than the domestic price, the import price has nonetheless continued to decline in the course of price competition with the domestic product. Therefore, the Commission finds that the import price caused the domestic price to be suppressed and depressed. Accordingly, the Commission hereby concludes that there is a causal relationship between the dumped imports and the injury to the domestic industry." (pages 9-11, footnotes omitted)

As in the case of the KTC's analysis of the volume of dumped imports, this analysis of the price effects of the imports was clearly retrospective in nature. Based on an examination of price developments over the investigation period, the KTC had concluded that "the import price caused the domestic price to be suppressed and depressed". The Panel found nothing in this analysis indicating how the KTC had considered the likely future price effects of the imports under consideration as part of an analysis of a threat of material injury caused by the imports under investigation.

283. The Panel also noted the KTC's statement that:

"Although the volume of the dumped imports has fallen by almost one half since the domestic industry began production, if the dumped imports continue to depress the domestic price, it will be impossible for the domestic industry to secure a reasonable profit and, therefore, the domestic industry will continue to experience financial deterioration." (page 8)

This observation identified what would be the expected effect on the domestic industry if imports continued to depress the domestic price but did not explain why it was considered likely that the imports would continue to depress the domestic price. Moreover, this observation was made in a section of the determination discussing material retardation of the establishment of an industry, not the existence of a threat of material injury caused by the dumped imports.

284. The Panel noted that there was a discussion of data pertaining to the likely future price effects of the imports under investigation in the sections of the KTC staff report which provided information relevant to the KTC's evaluation of whether a threat of material injury was caused by the imports under investigation and whether the establishment of a domestic industry was materially retarded by the imports. Because this information on future price effects of the imports had not been discussed or referred to in the KTC's determination, the Panel could not satisfy itself that this information had in fact been a factor in the KTC's finding of a threat of material injury.

285. The Panel concluded that, by reason of the lack of any prospective analysis of developments regarding the volume and price effects of the imports under consideration, the KTC's injury determination, to the extent it was based on an affirmative finding of a threat of material injury caused by the imports subject to investigation, was inconsistent with Korea's obligations under Articles 3:1 and 3:6 of the Agreement.

286. The Panel noted in addition that Korea had argued that in finding a threat of material injury caused by the imports under investigation the KTC had relied upon the size of the margins of dumping, the presence of a substantial volume of imports, the current price effects of these imports, and the inventories of the domestic producer. However, the text of the determination did not indicate that these factors had in fact played a rôle in the KTC's analysis of whether a threat of material injury existed.⁶⁴

⁶⁴The Panel referred here to the statements with regard to the above mentioned factors on pages 4, 7 and 9-11 of the determination.

287. From the preceding analysis of the text of the KTC's determination, the Panel drew the following conclusions. First, the KTC's examination of the projected performance of the domestic industry was inconsistent with Article 3:3 because of the KTC's treatment of favourable market forces beyond the control of the domestic industry such as declining costs of materials and interest rates. Second, the determination did not include an examination, let alone evidence, of the future evolution of the volume of imports and price effects of these imports. Therefore, if the KTC's determination involved a finding of a threat of material injury caused by the imports subject to investigation, that finding was inconsistent with Articles 3:1, 3:3 and 3:6 of the Agreement.

(c) Material retardation of the establishment of a domestic industry

288. The Panel then turned to the claim of the United States that the KTC's injury determination did not provide a sufficient basis for an affirmative finding of material retardation of the establishment of a domestic industry and was therefore inconsistent with Articles 3:1, 3:3 and 3:4 of the Agreement.

289. The United States had argued that the statement in the KTC's determination that the domestic industry "does not seem to have attained stable operations (a reasonable break-even point)" was contradicted by other statements in the determination and in the KTC staff report. The United States had also considered it illogical to treat a producer as not being an "established" industry where that producer had become the single dominant producer and accounted for a majority of all sales in the market. Moreover, a finding that an industry was not established only indicated that the appropriate standard of injury was that of material retardation of the establishment of an industry, rather than present material injury or a threat of material injury. In addition to finding that the industry was not yet established, the KTC was required to find that the establishment of the industry was materially retarded, and that the imports caused such material retardation. However, the KTC's determination did not contain such findings. Finally, the United States had pointed out that in its discussion of material retardation the KTC had relied on data on profits in the full year 1990 whereas for other factors the KTC had only considered data covering the period 1 January 1989-31 March 1990.

290. Korea had argued that the finding of the KTC that the domestic industry had not attained "stable operations" was not in contradiction with other statements in the determination. Moreover, given that the domestic producer had only recently entered the market and in view of the poor financial results of that producer in the first two years, the KTC had properly found that the domestic industry was not established by using a break-even analysis. The KTC had found that the industry had not yet reached a reasonable break-even point. The KTC had then examined whether the establishment of this industry was materially retarded as reflected in the analysis on pages 7-8 of the determination. The rôle of imports subject to investigation in causing material retardation of the establishment of the industry was dealt with in the determination from page 8 onwards. Finally, the data on the profits of the industry in the full year 1990 were taken from the audited financial statement of the producer submitted to the KTC and were part of the record.

291. The Panel noted that the KTC had in the section of its determination on the condition of the domestic industry made the following observations on the question of whether the establishment of a domestic industry was materially retarded:

"In addition to considering the issues related to material injury and threat of injury to the domestic industry as noted above, the Commission also considered the issues that relate to material retardation of the establishment of the domestic industry, in light of the domestic industry's additional production facility with a capacity of 10,000 tons, which was in the process of operational testing during the investigation period. The domestic industry began operating its first production facility in October 1988, and completed the construction of the second 10,000 ton production facility in June 1990. The domestic industry currently has a total production capacity of 20,000 tons.

Although, during the investigation period, certain economic indicators - such as production, capacity utilization, shipments, and market share - seemed to show a favourable situation, the inventory level increased sharply after the first quarter of 1990, and price has shown a downward trend. As to profit, although the domestic industry's 1989 financial statement records 205 million Won in net profit before tax, considering that 228 million Won in gain was from foreign currency exchange transactions, the domestic industry can be said to have suffered an actual loss.

In 1990, the domestic industry experienced a much larger loss (the 1990 financial statement shows 464 million Won in losses). Further, the prospect of the likelihood of improvements to the domestic industry's financial condition was poor.

Considering the domestic industry's financial condition and the fact that it is a new entrant which has been in operation for only a year and six months, the domestic industry does not seem to have attained stable operations (a reasonable break-even point). Although the volume of the dumped imports has fallen by almost one half since the domestic industry began production, if the dumped imports continue to depress the domestic price, it will be impossible for the domestic industry to secure a reasonable profit and, therefore, the domestic industry will continue to experience financial deterioration." (pages 6-8)

292. The Panel first considered the argument of the United States regarding the KTC's finding that the domestic industry "does not seem to have attained stable operations (a reasonable break-even point)." It appeared to the Panel that the United States only contested the factual basis of the KTC's finding that the industry had not reached a break-even point and not the use of a break-even analysis per se.

293. According to the United States, this finding was contradicted by a statement elsewhere in the determination where the KTC had found:

"The domestic industry can be considered as having achieved normal operations during the investigation period, as indicated by the fact that the domestic industry in 1989 maintained a capacity utilization rate of 90.1%, producing 10,005 tons out of a total production capacity of 11,000 tons (optimal production capacity of 10,000 tons)." (page 3)

In addition, the United States had pointed to the following observation on pages 45-46 in the KTC staff report:

"By operating the factory at its 10,000 ton production capacity, the company can be said to have achieved the profit-and-loss point (i.e. break-even point) in the fiscal year 1989." (footnote omitted)

294. The Panel noted Korea's argument that the KTC's finding that the domestic industry had reached "normal operations" did not mean that the KTC had found that the industry was established. According to Korea the statement of the KTC that the industry had reached "normal operations" meant that the industry's production operations had reached their normal level but not that the industry was established in the sense of being "viable".

295. It appeared to the Panel that the argument of the United States on the inconsistency of the KTC's finding that the industry had not attained "stable operations" with the statements quoted in paragraph 293 would be well founded if this finding pertained to the industry with a production capacity of 10,000 tons. The Panel considered that the text of the KTC's determination was not entirely clear on this point. Given that at the beginning of the section on material retardation the KTC had noted that "the domestic industry currently has a total production capacity of 20,000 tons", the statement by the KTC that the industry did not seem to have attained "stable operations" could be read to pertain to a production

capacity of 20,000 tons. Read in this manner, this statement was not in contradiction with the statement earlier in the determination that the industry had reached "normal operations" and with information in the KTC staff report. The Panel noted in this respect the following statement in the KTC staff report:

"Therefore, if a 10,000 ton production facility is regarded as standard, then the company has reached its break-even point. But if a 20,000 ton production facility is regarded as standard, then the company should produce and sell approximately 15,000 tons yearly in order to reach the break-even point." (page 46, emphasis added)

296. The Panel then turned to the argument of the United States that in its discussion of material retardation the KTC had relied upon data regarding the financial condition of the industry in the full year 1990 whereas for other indicators the KTC had only examined data for the period 1 January 1989-31 March 1990. The Panel noted that with regard to the financial losses incurred by the industry as an indication of material retardation the KTC had stated:

"In 1990, the domestic industry experienced a much larger loss (the 1990 financial statement shows 464 million Won in losses)." (page 7)

This was not the only instance in which the KTC had referred to data beyond the period 1 January 1989-31 March 1990. Thus with regard to inventories, the KTC had observed that:

"... the inventory level increased sharply after the first quarter of 1990 ..." (page 7, emphasis added)

297. The Panel noted, however, that while the time frame used by the KTC in its analysis of certain indicators of material retardation of the establishment of an industry thus included the full year 1990, the section of the KTC's determination which discussed the causal relationship between the imports under investigation and injury to the domestic industry only covered the period 1 January 1989-31 March 1990. The Panel recalled in this respect its finding that the causation section of the KTC's determination did not specifically discuss the rôle of the imports under investigation in causing material retardation of the establishment of a domestic industry. However, if as argued by Korea the analysis in this section was to be read as also pertaining to the rôle of the imports under investigation in causing material retardation of the establishment of a domestic industry, the discrepancy between the time frame for the consideration of certain indicators of material retardation and the time frame for the consideration of the volume and price effects of the imports under investigation meant that this analysis could not be said to provide a proper basis for finding that material retardation of the establishment of an industry was caused by the imports under investigation. The Panel therefore concluded that, leaving aside the issue of the factual basis of the KTC's findings on the financial losses in 1990 and on the increase in inventories after the first quarter of 1990, the KTC's determination was inconsistent with Article 3:4 of the Agreement insofar as it was based on a finding of material retardation of the establishment of a domestic industry.

298. In light of its conclusion in the preceding paragraph, the Panel did not reach the question of whether the Agreement allowed for a finding of material retardation of the establishment of a domestic industry where, as in this case, that industry had acquired a market share of 47.7 per cent in its first year of operation and had installed new production capacity. The Panel noted however that under the "break-even" analysis performed by the Korean authorities it seemed possible to find material retardation of the establishment of an industry whenever an industry expanded its production capacity of the like product. The Panel also recalled its observation in paragraph 222 that if the KTC's determination meant that the KTC had made a single affirmative finding based on all three standards at the same time, this determination was internally contradictory.

299. The Panel concluded that, to the extent the KTC's determination was based on a finding of material retardation of the establishment of a domestic industry, this determination was inconsistent with Korea's obligations under Articles 3:4 of the Agreement.

VI. CONCLUSIONS AND RECOMMENDATION

300. The Panel's conclusions, based on a review of the KTC's injury determination as written, can be summarized as follows:

- (i) The KTC's determination of injury in respect of imports of polyacetal resins from the United States was inconsistent with Articles 3 and 8:5 of the Agreement because of the absence of specific conclusions in respect of each of the standards of injury discussed in its determination (i.e. present material injury to a domestic industry, threat of material injury, and material retardation of the establishment of a domestic industry) and the lack of explanation of the relationship between the KTC's analyses under these standards;
- (ii) The KTC's finding that there was present material injury to a domestic industry in Korea was inconsistent with the requirement of positive evidence⁶⁵ under Article 3:1 of the Agreement in that the determination did not provide sufficient reasoning as to the connection between the reference to the decline of domestic prices and the KTC's finding of a substantial loss of sales revenue and did not enable the Panel to determine how the KTC had evaluated the information before it in finding that the net profit of the industry in 1989 was insufficient. This finding was also inconsistent with Article 3:4 of the Agreement because of the KTC's failure to explain the rôle of the imports under investigation as a cause of the increase in inventories.
- (iii) Insofar as the KTC's affirmative determination included a finding of a threat of material injury caused by the imports under investigation, that finding was inconsistent with Article 3:3 of the Agreement because of the KTC's treatment of factors beyond the control of the domestic industry, such as declining costs of materials and interest rates, and inconsistent with Articles 3:1 and 3:6 because of the apparent lack of a prospective analysis of the volume and price effects of the imports under investigation;
- (iv) Insofar as the KTC's affirmative determination included a finding of material retardation of the establishment of an industry, that finding was inconsistent with Article 3:4 of the Agreement because of the discrepancy between the time frame for the consideration of profits and inventories and the time frame for the consideration of the volume and price effects of the imports under investigation.

301. The Panel noted that the United States had requested the Panel to recommend that the Committee on Anti-Dumping Practices request Korea "to bring its law as applied into conformity with its obligations under the Agreement". However, it was not clear to the Panel how a recommendation related to Korea's "law as applied" was relevant to the matter which the United States had requested the Panel to consider. In accordance with its terms of reference, the Panel had reviewed a determination of injury made by the Korean authorities on 24 April 1991 which (together with an affirmative finding of dumping) had formed the basis for a specific measure taken by Korea on 14 September 1991 (i.e. the imposition of anti-dumping duties). The Panel considered that its recommendation had to address this specific measure.

⁶⁵Supra, paragraphs 227-228.

302. The Panel therefore recommends to the Committee on Anti-Dumping Practices that it request Korea to bring its measure (the imposition of anti-dumping duties on 14 September 1991 on polyacetal resins from the United States) into conformity with its obligations under the Agreement.

ANNEX 1

KOREA - ANTI-DUMPING DUTIES ON IMPORTS OF
POLYACETAL RESINS FROM THE UNITED STATES

Request by the United States for the Establishment of a Panel
under Article 15:5 of the Agreement
(ADP/72)

The following communication, dated 21 January 1992, has been received by the Chairman of the Committee from the United States Trade Representative.

My authorities have instructed me to request that the Committee establish a panel pursuant to Article 15:5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the "Anti-Dumping Code") to adjudicate US concerns relating to a determination by the Government of Korea concerning imports of polyacetal resins from, inter alia, the United States.

On 19 June 1991, the United States requested consultations with the Government of Korea under Article 15:2, with a view to reaching a mutually satisfactory resolution of this matter. On 24 July, representatives of my Government met with Korean Government representatives in Geneva to discuss the determination. Representatives of the US and Korean governments held a second round of consultations in Geneva on 30 September. On 4 October, the Committee on Anti-Dumping Practices conducted a conciliation meeting.

Unfortunately, neither the consultations nor the conciliation by the Committee resulted in the United States and Korea arriving at a mutually agreed solution. Accordingly, it continues to be the view of my Government that, as a result of the Korean decision, benefits accruing to the United States under the Anti-Dumping Code are being nullified or impaired and that the achievement of the proper application of the Code is being impeded as a result of the Korean Government's decision in this case.

Our specific concerns in this regard were described in detail in our requests for conciliation (ADP/64 and ADP/64/Add.1) and in our statements at the Committee's 4 October 1991 conciliation meeting.

We request that the Committee establish a panel to consider this matter at the earliest opportunity.

KOREA - ANTI-DUMPING DUTIES ON IMPORTS
OF POLYACETAL RESINS FROM THE UNITED STATES

Communication from the United States

Addendum
(ADP/72/Add.1)

The following communication, dated 14 February 1992, has been received by the Chairman of the Committee from the United States Trade Representative.

This letter relates to the request of the United States for establishment of a panel under Article 15:5 of the Anti-Dumping Code to adjudicate US concerns relating to a determination by the Government of Korea concerning imports of polyacetal resins from, inter alia, the United States.

I have been advised that to avoid any possibility of misunderstanding as to the scope of the mandate of the panel (once it is established) it would be preferable to amplify the concerns of the United States in this proceeding.

In our request for a panel (ADP/72) we stated that:

"Our specific concerns in this regard were described in detail in our requests for conciliation (ADP/64 and ADP/64/Add.1) and in our statements at the Committee's October 4, 1991, conciliation meeting."

Drawing from those documents, let me state below the issues that the United States will ask the panel to address.

The United States contends that the affirmative determination of injury made by the Korean Trade Commission (KTC) in the anti-dumping investigation concerning polyacetal resin imported from the United States and Japan departed from the standards set forth in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, and was therefore, as a matter of law, inconsistent with Korea's obligations under the Agreement. The relevant standards in the Agreement which were not observed in this case were the following:

1. Article 3:1, which requires that a determination of material injury "involve and objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these import on domestic producers of such products."
2. Article 3:2, which requires "consider[ation of] whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country" and requires that consideration be given to "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product in the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree, or prevent price increases, which otherwise would have occurred, to a significant degree."

In particular, the failure to meet these Code requirements is demonstrated in the KTC's presumptions that it is "normal" for products of a new domestic producer to replace those of established importers and that imports exerted downward pressure on prices, despite the absence of evidence that this was the case.

3. Article 3:3, which requires that investigating authorities take into account "all relevant economic factors and indices having a bearing on the state of the industry, such as actual and potential decline in output, sales, market share, profits, productivity, return on investments or utilization of capacity, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, employment, wages growth, ability to raise capital or investments."

In particular, the KTC determination demonstrates that the KTC relied on a presumption of an adequate level of profitability for the domestic industry and that the industry could not increase its profitability through increased production and/or lower raw material costs. The KTC determination also relied on a materially erroneous production capacity figure in calculating industry break-even profit level; attributed injury to imports despite its recognition elsewhere that injury resulted from the industry's exchange rate losses, a factor that is unrelated to imports; and appears to rely on information, concerning, for example, domestic inventories and lost sales, that was not part of the investigation record.

The KTC's determination, in the opinion of the United States, was contrary to the above-cited legal requirements of the Agreement.

I trust that the above recitation will ensure that the scope of the complaint of the United States in this matter is properly understood.

DETERMINATION OF THE KOREAN TRADE COMMISSION

April 24, 1991

Decision No. 91-6

Investigation No.: Taemu 40-6-90-2

Subject: Determination on Injury to the Domestic Industry by Reason of Dumped Imports of Polyacetal Resin

With regard to the above subject matter, the Korean Trade Commission ("Commission"), after carefully reviewing the record, determines as follows:

DETERMINATION

The Commission hereby determines that dumped imports of polyacetal resin of middle viscosity, low viscosity and audio/video grades (HSK, 3907-10-0000) from Asahi Chemical Industry Co. Ltd. of Japan, and E.I. du Pont de Nemours, Inc. and Hoechst Celanese Corp. of the United States, caused material injury to the domestic industry as set forth in Article 10-1 of the Customs Act.

Basis for Determination

1. Like Product/Domestic Industry

Polyacetal resin, the product covered by this investigation, is a plastic substance used in manufacturing electronics, machinery and automobile parts. Polyacetal resin is generally classified into Homo-Polymer or Co-Polymer types, depending on the processing method, and can further be categorized by grade as high viscosity, middle viscosity, low viscosity, audio/video, and special grades, depending on the degree of polymerization and types of additives used in the production process.

In deciding to initiate this investigation, the Ministry of Finance ("MOF"), after deliberation by the Customs Deliberation Committee ("CDC") in accordance with Article 4-5-(1) of the Presidential Decree of the Customs Act ("the Decree"), ruled that Homo-Polymer and Co-Polymer were to be considered as a like product for the purpose of this investigation.¹ The MOF further limited the scope of investigation to middle viscosity, low viscosity and audio/video grade resins, thus excluding from the investigation high viscosity and special grade resins, which are not manufactured by the domestic industry.²

¹The term "like product" hereinafter shall refer to products that are the "same or similar to the dumped products", as set forth in Article 4-4-(1) of the Decree.

²See CDC Ref. 69 and the MOF Notice 90-25 (Aug. 25, 1990).

The Commission examined whether it would be possible to differentiate the three grades of polyacetal resin covered by this investigation as separate categories. For the reasons stated below, however, the Commission determined that it would be difficult to do so. First, in order to conduct investigations for all three grades of polyacetal resins as separate categories of like product, information on imports and economic indicators must be available for each grade of resin. However, in the case of the domestic industry, middle viscosity, low viscosity, and audio/video grade resins are manufactured on the same production line, and it is easy to shift production from one grade to another. Accordingly, any production and inventory data on a grade-specific basis will have little relevance, and it is especially difficult to break down profit and other financial data on the basis of each grade. The Commission, therefore, decided not to differentiate the three grades of products under investigation -- middle viscosity, low viscosity, and audio/video grades -- and decided to investigate them as one like product. Further, the Commission determined that there was one domestic industry consisting of one domestic producer, the Korean Engineering Plastic Co., Ltd. ("KEP").³

2. The Condition of Domestic Industry

The domestic industry can be considered as having achieved normal operations during the investigation period, as indicated by the fact that the domestic industry in 1989 maintained a capacity utilization rate of 90.1 per cent, producing 10,005 tons out of a total production capacity of 11,000 tons (optimal production capacity of 10,000 tons).

Because of the special characteristics of the production system, the domestic industry cannot regulate production levels by controlling the level of input materials, and the share of fixed costs is relatively high. Therefore, the domestic industry had little choice but to utilize full production capacity, and the Commission found that this factor and the sluggishness of the domestic market in the second half of 1989 resulted in the accumulation of inventory since the fourth quarter of 1989.

With respect to sales, the domestic industry sold 8,399 tons in 1989, thereby capturing a market share of 47.7 per cent. Including exports, the domestic industry's total annual sales quantity was 8,909 tons, amounting to 89.1 per cent of total production in 1989. The domestic industry, therefore, superficially appeared to have performed well.

However, considering that the domestic market was in the process of import substitution, the domestic industry's increases in sales and market share should be regarded as normal occurrences. It is worth noting that although the domestic industry appears to have captured a substantial market share in 1989, the actual increase in its market share was much lower because a substantial portion of its market share represents customers that were delegated to the domestic producer by its investors.

The average ex-factory price of the domestic industry in the first quarter of 1989 was [] Won per ton. Since then, the average price continued to decline and by the first quarter of 1990, it decreased to [] Won per ton, a 6.3 per cent decline compared to the same period of the previous year. The ex-factory price by each grade also showed a declining trend: middle viscosity grade by 13.7 per cent, low viscosity grade by 14.3 per cent and audio/video grade by 3.3 per cent.

In light of these facts, the Commission recognized that there was a substantial loss to the domestic industry's sales revenue during the period of investigation due to price depression.

³On the issue of excluding related producers from the definition of the domestic industry under Article 4-4-(1) of the Decree, the MOF, after the CDC's examination, decided to initiate a full investigation on the basis of its finding that KEP had standing to file an antidumping petition.

The domestic industry's 1989 financial statement records a net profit before tax of 205 million Won (i.e., a profit rate of 1.6 per cent). However, the domestic industry is regarded in Korea as a "High-tech materials" and "capital intensive equipment" industry, which requires enormous investments. The domestic industry also needs to make continuous R&D investments for product diversification and new product development. Further, the domestic industry requires considerable internal reserves for equipment replacements. Therefore, the domestic industry's net profit (before tax) rate of 1.6 per cent, which falls short of the domestic chemical industry's 3.24 per cent average profit rate, cannot be regarded as sufficient to permit the domestic industry to maintain normal operations and development.

In addition, based on the domestic industry's 1989 operational results, the Commission also examined the domestic industry's projected performance in terms of cuts in production costs, increases in revenues, etc.

Of the optimal production capacity of 10,000 tons, the domestic industry produced 10,005 tons. Therefore, it will be practically impossible to lower production costs and improve profitability by increasing its capacity utilization.

As the domestic industry shipped 89.1 per cent of its production volume, improving sales revenue by increasing shipments will be difficult.

As the domestic industry elected to use the straight-line depreciation method, improving profit through the future reduction of depreciation costs is not possible.

Therefore, not taking into account favourable market forces that are beyond the domestic industry's control, such as falling material costs and interest rates, ameliorating the domestic industry's financial performance without increasing price appears to be difficult. As a result, under the present circumstances of stagnant domestic demand and depression of actual prices, the effect of price depression has not only worsened the domestic industry's financial condition, but has also made it considerably more difficult for the domestic industry, which still has a weak industrial basis, to secure the profits necessary in the future for normal operations and growth.

In addition to considering the issues related to material injury and a threat of injury to the domestic industry as noted above, the Commission also considered the issues that relate to material retardation of the establishment of the domestic industry, in light of the domestic industry's additional production facility with a capacity of 10,000 tons, which was in the process of operational testing during the investigation period. The domestic industry began operating its first production facility in October 1988, and completed the construction of the second 10,000 ton production facility in June 1990. The domestic industry currently has a total production capacity of 20,000 tons.

Although, during the investigation period, certain economic indicators -- such as production, capacity utilization, shipments, and market share -- seemed to show a favourable situation, the inventory level increased sharply after the first quarter of 1990, and price has shown a downward trend. As to profit, although the domestic industry's 1989 financial statement records 205 million Won in net profit before tax, considering that 228 million Won in gain was from foreign currency exchange transactions, the domestic industry can be said to have suffered an actual loss.

In 1990, the domestic industry experienced a much larger loss (the 1990 financial statement shows 464 million Won in losses). Further, the prospect of the likelihood of improvements to the domestic industry's financial condition was poor.

Considering the domestic industry's financial condition and the fact that it is a new entrant which has been in operation for only a year and six months, the domestic industry does not seem to have attained stable operations (a reasonable break-even point). Although the volume of the dumped imports has fallen by almost one half since the domestic industry began production, if the dumped imports continue to depress the domestic price, it will be impossible for the domestic industry to secure a reasonable profit and, therefore, the domestic industry will continue to experience financial deterioration.

Conclusion

Having examined various economic factors and indicators which are relevant to the evaluation of the domestic industry's condition, the Commission hereby determines that the domestic industry has suffered material injury, etc. as defined in Article 10-1 of the Customs Act.

3. Causation

In order to render a final decision on the issue of injury to the domestic industry by reason of the dumped imports, the Commission examined causation between the injury to the domestic industry and the dumped imports.

In its decision to initiate this investigation, the MOF limited the foreign exporters that are subject to the investigation to Asahi, Hoechst and Du Pont.⁴ This was reconfirmed by the MOF in response to the Commission's enquiry. As to the dumping margin, the Commission was informed by the MOF that, according to the Office of Customs Administration, which conducted the investigation of sales at less than normal value, the dumping margin rates for the three companies ranged from 20.6 per cent to 107.6 per cent.⁵

Based on the finding that during the investigation period the imports from the three respondent companies were competing with the domestic goods and that they were sold in the domestic market during the same period, the Commission decided to cumulate the imports from the three companies in examining causation.

The volume of the dumped imports continuously decreased and their market share also fell from 39.5 per cent in the first quarter of 1989 to 23.7 per cent in the first quarter of 1990. The decline in the volume of dumped imports is a normal occurrence because the domestic market is in the process of import substitution. However, the fact that the dumped imports continued to account for a substantial share of the domestic market demonstrates that notwithstanding the reduction in import volumes, imports continued to have a real impact on the domestic price.

The Commission analyzed the impact of the dumped imports on domestic prices by focusing on the two major distribution channels: direct sales to end-users and sales to distributors.

In the case of direct sales prices to end-users, the average dumped import price⁶ was higher than the domestic price by 7.7 per cent in the first quarter of 1989, but it continued to decline until the last quarter of 1989. The domestic price, on the other hand, showed an increasing trend from the first quarter of 1989 to the third quarter of that year, notwithstanding the declining trend in import price, but it continued to be slightly lower than the import price. However, since the fourth quarter of 1989, import and domestic prices have been at similar levels, and in the first quarter of 1990, the two prices have increased slightly.

⁴See Kwan Hyup 22710-49 (Feb. 9, 1991).

⁵Kwan Hyup 22710-145 (Apr. 16, 1991).

⁶The weighted average CIF import price of the three respondent companies.

In the case of sales prices to distributors,⁷ the domestic price was 3.6 per cent higher than the import price in the first quarter of 1989. Thereafter, both import and domestic prices declined sharply. In comparison to corresponding prices in the first quarter of 1989, the import price in the first quarter of 1990 fell by 16.2 per cent, and the domestic price by 20.9 per cent.

The respondents argued that the price depression in the domestic market was caused by the petitioner, which took a leading rôle in setting the price, and that the import price was set at a level competitive to the petitioner's price in order to maintain their market shares. However, it is reasonable for a new entrant to sell at a price slightly below the established price in order to secure customers. Therefore, in examining the effect of dumped imports on the domestic price, the Commission carefully examined the presence of considerably low import prices and the issue of whether the domestic price was either suppressed or depressed by reason of dumped imports.

Conclusion

Based on the above analysis, although the import price does not appear to be considerably lower than the domestic price, the import price has nonetheless continued to decline in the course of price competition with the domestic product. Therefore, the Commission finds that the import price caused the domestic price to be suppressed and depressed. Accordingly, the Commission hereby concludes that there is a causal relationship between the dumped imports and the injury to the domestic industry.

⁷The weighted average sales price to the distributors of the two US companies, Hoechst Celanese and Du Pont.