

# GENERAL AGREEMENT ON

RESTRICTED

## TARIFFS AND TRADE

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### EUROPEAN ECONOMIC COMMUNITY - RESTRICTIONS ON IMPORTS OF DESSERT APPLES - COMPLAINT BY CHILE

#### Communication from the European Communities

The following communication has been received from the Commission of the European Communities, with the request that it be circulated as a document in connection with the Council's consideration of items 17 and 18 at its regular meeting on 21-22 June 1989.

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#### Observations of the European Community

on the report of the Panel on restrictions  
on imports of dessert apples (document L/6491)

1. The report of the above-mentioned Panel on Community restrictions on imports of dessert apples calls for a number of comments from the Community, in particular as regards the following points:

- the rôle of panels in dispute settlement and in particular as regards the interpretation of the rights and obligations accepted by contracting parties;
- rights and obligations under Articles XI and XIII of the General Agreement;
- compensation for past injury.

2. The Panel, first of all, deliberately chose to eschew the report of an earlier Panel dealing with the same subject (report of the Panel on EEC restrictions on imports of apples from Chile of 1980<sup>1</sup>) for reasons which appear to be unfounded.

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<sup>1</sup>BISD 27S/98-117

The 1980 Panel had previously concluded that "the EEC did restrict quantities of apples permitted to be marketed...". The 1989 Panel, however, felt free to set aside this conclusion despite the fact that the 1980 report had been duly adopted by the CONTRACTING PARTIES.

To justify doing so, the 1989 Panel argued that it was faced with two contradictory conclusions, that of the 1980 apples Panel and that of the 1978 tomatoes Panel<sup>1</sup>, namely:

- firstly, the Community provision "allowing Member States to claim an exemption... was so liberal that it would constitute a lack of effective enforcement of the intent of this Article of the Regulation";
- secondly, the buying-in or withdrawal prices were fixed at levels that would not effectively restrict the marketing of tomatoes.

With regard to the first reason, the Community showed the 1989 Panel that this provision was no longer applicable in the case of apples.

As for the second reason, it must first be pointed out that pricing policies in the apples sector in 1988 and in the tomatoes sector in 1978 are obviously different. To dismiss the 1980 precedent for the reason given is therefore unfounded, as the factual and legal circumstances were all the less transposable in that they concerned two different products and hence two necessarily different policies. Only the 1980 apples precedent was directly transposable regarding this point, especially as the Community régime has not been modified since then.

The Panel was therefore wrong to believe that it faced contradictory precedents and could therefore not feel itself bound by an established precedent which has provided the Community with a firm basis for the application in good faith of Article XI.

3. The conclusions of the Panel concerning rights and obligations under Articles XI and XIII call for several types of comments:

- (a) Firstly, the Panel upholds a new interpretation in excluding the right to restrict solely the marketing and not the production of the domestic product.

In paragraph 12.14, the Panel holds that a restriction simply on marketing which does not affect production cannot justify import restrictions.

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<sup>1</sup>BISD 25S/68-107

Regardless of the subtlety of reasoning based on the context of a provision, it cannot justify an interpretation that goes beyond the text of the Article. The Article establishes the obligation of restricting the quantity of a product, but clearly leaves a choice as to whether this result is obtained by a restriction of production or by a restriction of marketing.

Furthermore, this interpretation makes it even more difficult to comply with the requirements of Article XI:2(c)(i), compliance with which was already almost impossible hitherto, as the Panel itself recognizes.

The weakness of this reasoning is further shown by the fact that the Community system has permitted a reduction of about 1 million tonnes in Community apple production for the year under consideration.

- (b) The other conclusions delivered by the Panel concerning Article XI rights and obligations are also noteworthy, in particular in relation to the conditions of application which may be made for this Article.

- In paragraphs 12.12 and 12.13 of its report, the Panel considers that Article XI:2(c)(i) does not cover schemes which "could result in a reduction of products reaching the consumer through withdrawals activated... without quantitative targets". The Panel considers that only "schemes which set quantitative limits on the amounts producers could offer for sale" are covered.

This interpretation must be noted, in particular in view of its restrictive character. Moreover, the Panel draws attention to the restrictive nature of this interpretation in its report (paragraph 12.13), on the grounds that since this is an exception, it must be interpreted restrictively.

It should be pointed out that to support this interpretation, the Panel has given priority to one linguistic version (English) of the text of the General Agreement over another, whereas both versions are equally authentic.

- Furthermore, in paragraph 12.4 (page 38), the Panel observes that, in its view, the requirements of Article XI:2(c)(i) are "extremely difficult to comply with" and that no contracting party had to date been found to comply with them.

The Panel saw fit to mention (paragraph 12.4) that it "was also aware that there existed widespread dissatisfaction with this provision and that its revision was under discussion".

- (c) As for the Panel's conclusions concerning Article XIII, they do not seem to be operative.

The Panel focused in this case on the question of "special factors" as provided for in paragraph 4 of Article XIII, but from the standpoint of a single supplier, Chile. With a narrow interpretation of this kind, the Panel has not specified how "special factors" might be taken into account in relation to the data concerning all suppliers and in particular to the relative shares of the various suppliers.

4. Finally, the Panel's conclusions may be challenged as regards the recommendation on compensation addressed to the European Community.

The Commission does share the view expressed by the Panel (paragraph 12.35) to the effect that it is customary for a Panel examining complaints under paragraph 2 of Article XXIII to make a finding regarding nullification or impairment of benefits and to recommend the termination of measures found to be inconsistent with the General Agreement.

Furthermore, the Panel rightly recalls that according to the 1979 Understanding compensation may be envisaged only as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement.

In the case under consideration, the measure in dispute expired on 31 August 1988, and this should be reflected and taken into account in the general conclusions of the Panel.

As the measure has been repealed, there is therefore no legal basis for the Panel to state, as it does in paragraph 12.36, that it would be possible for the two parties to negotiate retroactive compensation.

By failing to rule out clearly the possibility of compensation in a situation where the complainant was asking for retroactive compensation for past injury, the Panel has created a situation of uncertainty with potentially serious consequences.

Furthermore, in paragraph 12.35 (pages 48 and 49) it may be seen that the Panel, while rejecting a precedent adopted by the CONTRACTING PARTIES, on the other hand is prepared to base its interpretation on a Secretariat note which is purely informative and on which the CONTRACTING PARTIES have not taken a decision. The Community for its part would point out that this note simply refers to the fact that it is impossible for the CONTRACTING PARTIES, or a body set up by them, to adjudicate on specific compensations, but by no means that it is impossible "to make an assessment of the loss sustained" where compensation may be contemplated, as the first sentence of the quoted text furthermore states.