

18 April 1989

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

*Report of the Panel adopted on 22 June 1989
(L/6491 - 36S/93)*

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Note: "Tons" refers to metric tons throughout this report.

1. INTRODUCTION

1.1 In communications circulated as L/6329 and L/6929/Add.1 of 22 April 1988 and 3 May 1988 respectively, Chile set out a complaint under Article XXIII:2 of the General Agreement concerning the licensing system applied by the European Economic Community to imports of apples from Chile, the suspension of import licences for apples originating in Chile, and the EEC's subsequent adoption of a system of quotas for apples imported into the Community. The Government of Chile further detailed the basis for its complaint in a communication addressed to the Director-General and circulated as L/6339 of 2 May 1988.

1.2 In a communication circulated as L/6337 of 22 April 1988, the Commission of the European Communities advised CONTRACTING PARTIES that it had taken action concerning dessert apples under Article XI:2 of the General Agreement, i.e., the establishment of import quotas applicable until 31 August 1988. It offered consultations with any substantially interested contracting party concerning the details of these measures.

1.3 At the meeting of the Council on 4 May 1988 the representative of Chile stated that two sets of Article XXIII:1 consultations had been held with no satisfactory result and requested the prompt establishment of a panel under Article XXIII:2 to examine the complaint. The Council agreed to establish a panel to examine the matter referred to the CONTRACTING PARTIES by Chile and authorized its Chairman to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned. As notified to CONTRACTING PARTIES in a Note from the Council Chairman of 5 August 1988 (C/158), the agreed terms of reference were:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Chile in document L/6329 and Add. 1 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

The composition of the Panel was:

Chairman: Mr. George A. Maciel

Members: Ms. Margaret Liang
Dr. Thomas Cottier

1.4 The Panel met on 4-6 October and 9-11 November 1988, and on 13-15 February 1989. In the course of its work the Panel held consultations with the European Economic Community and Chile, as well as with interested third parties (Argentina and Canada). Another interested third party (South Africa) made a written submission. The United States, Uruguay, Australia, New Zealand, Romania and Poland also reserved their rights to make submissions to the Panel (C/M/220).

1.5 The Panel submitted its report to the parties to the dispute on 23 March 1989.

2. FACTUAL ASPECTS

2.1 The common organization of the EEC market for dessert apples (and for other fruit and vegetables) is based on Council Regulation 1035 of 1972 (Official Journal L 118 of 20.5.72), as subsequently amended. This regulation replaced similar measures in place since 1966. The basis of the external régime is set out also in Regulation 2707/72 (OJ L 291 of 1972). These regulations were described

in an earlier panel report in 1980.¹ Despite a number of amending regulations since 1980 the essential features of the system established under Regulation 1035/72 have not changed. At the internal level, therefore, the main elements of the market continue to be:

Producer Groups, which are a basic structural element;

Quality Standards, which apply both to the marketing of Community products and to imports;

Prices and Intervention System. Before the start of each marketing year, the EEC Council of Ministers fixes a basic price and a buying-in price under Article 16 of Regulation 1035/72. The basic price is a guide price which determines the buying-in and withdrawal prices, explained below. It is fixed for quality class I of certain pilot varieties, and applies for the period August through May. For the 1987-88 marketing year, the basic prices were fixed as follows (ECU/100 kg.):

| | | | |
|-----------|-------|----------------|-------|
| August | 26.51 | November | 27.22 |
| September | 26.51 | December | 29.61 |
| October | 26.51 | January to May | 32.01 |

The buying-in price is fixed at between 40 and 55 per cent of the basic price. For the 1987/88 marketing year the buying-in prices were as follows (ECU/100 kg.):

| | | | |
|-----------|-------|----------------|-------|
| August | 13.51 | November | 14.06 |
| September | 13.51 | December | 15.17 |
| October | 13.63 | January to May | 16.27 |

2.2 Market intervention takes the form of withdrawal from the dessert apple market of apples meeting certain quality standards. Community regulations prescribe two possible methods; "buying-in" by member state authorities and "withdrawal" by producer organizations.

(a) Buying-in

During the period when the basic and buying-in prices are in force, member States notify the Commission daily of actual prices recorded on representative markets. If these remain below the buying-in price for three consecutive market days the Commission must, on member state request, record that the market in question is in a state of serious crisis. The member states are then required to buy apples of Community origin offered to them at a price equivalent to the buying-in price.

(b) Withdrawal by producer groups

When it appears to producer organizations that market prices are likely to fall substantially because of surplus supply, they may ask the member state authorities for permission to initiate withdrawal operations, at a withdrawal price not exceeding the public buying-in price plus 10 per cent of the basic price. (Article 15a of Regulation 1035/72 also enables member states to authorize "preventive withdrawals" by producer groups early in the marketing year in the light of the

¹Report of the Panel on "EEC Restrictions on Imports of Apples from Chile", BISD 27S, pp. 98-117, paragraph 2.2.

production outlook.) The member states, through their local representatives, verify that withdrawals have taken place and grant financial compensation, paid by the Community, to the producer groups for the withdrawal payments, less net receipts from the disposal of withdrawn apples.

Withdrawals by producer organizations, offering a somewhat higher price, account in practice for the major share of apples withdrawn. It is also Community policy to encourage the development of producer organizations and their role in market intervention.

2.3 Under Article 21 of Regulation 1035/72, member states shall ensure that products withdrawn are used for:

- free distribution;
- non-food purposes;
- animal feed;
- processing into alcohol;
- industrial processing.

2.4 The EEC has not enacted restrictions on the planting of apple trees. It did not operate a grubbing-up programme for apple orchards during the period in which the import restrictions in question were applied.

2.5 Imports are subject to a customs duty and the application of a reference price. The customs duty is bound and varies according to the period:

- from 1 August to 31 December: 14 per cent
- from 1 January to 31 March: 8 per cent
- from 1 April to 31 July: 6 per cent

2.6 Under Regulation 1035/72 (Article 22 *et. seq.*), the Commission fixes the reference price for each marketing year, or seasonal sub-divisions thereof, on the basis of an average of Community producer prices, plus marketing costs. An "entry price" is calculated daily for third country imports. If this falls below the reference price, a countervailing charge (in addition to the customs duties) may be levied to make up the difference.

2.7 The Community regulations also provide the possibility of recourse to protective measures against imports. In the case of actual or threatened disruption of the Community market by imports, or in the case of heavy EEC interventions or market withdrawals, Article 29 of Regulation 1035/72 (as amended by Council Regulation 2454/72)² authorizes the application of "appropriate measures" to trade with third countries. These measures, and conditions for their application, are defined in Regulation 2707/72. Under Article 3 of that Regulation, they may take the form either of suspension of imports or the levying of a prescribed amount additional to the customs duties and any countervailing charges. The Regulation goes on to state that such measures may only be taken insofar, and for as long, as they are strictly necessary. They should "take account of the special position of goods in transit to the Community". They may be limited to products exported from certain countries.

2.8 At the Commission's request, southern hemisphere countries have in recent years supplied forecasts of their apple exports to it in confidence before each export season.

²OJ L 266, 25.11.72, p. 1.

Licensing

2.9 On 3 February 1988, in Commission Regulation No. 346/88 (published in Official Journal L 34 of 6.2.1988), the EEC Commission introduced a system of surveillance through import licensing of (dessert) apple imports from outside the Community valid until 1 September 1988. Characteristics of this system were:

- import subject to issue of licence by the importing member state;
- surety deposit (1.5 ECU/100 kg. net) with refund conditional on import;
- import licences valid for one month from date of issue;
- licences issued on fifth working day after request lodged (this provision applied as from 22.2.1988).

2.10 The licensing system was modified by two subsequent Commission Regulations. Regulation 871/88 of 30 March 1988 (OJ L 87 of 31.3.88) extended, *inter alia*, the validity period of the licences to 40 days with the proviso that no licence would be valid after 31 August 1988. Regulation 1155 of 28 April (OJ L 108 of 29.4.1988) extended, on a trader's request, the 40-day validity period to licences requested before 31 March 1988 and issued from that date.

Suspension of licences

2.11 By Regulation 962/88 of 12 April 1988 (OJ L 95 of 13 April) the EEC Commission suspended the issue of import licences for (dessert) apples originating in Chile for the period 15 to 22 April 1988. Any applications pending on 18 April were to be rejected and the relevant securities released.

2.12 The basis in Community law referred to in the preamble to this Regulation was (*inter alia*) Reg. 2707/72, which lays down "the conditions for applying protective measures for fruit and vegetables". In this case the Commission stated that import licence applications from Chile exceeded the traditional quantity of imports. The preamble went on:

"Whereas since the existence of substantial stocks and withdrawals and of prices considerably lower than those in the previous marketing year on the markets of the main producer countries is a feature of the Community market for dessert apples, the continuation of such imports could lead to serious disturbance of the market such as to jeopardize the objectives of Article 39 of the EEC Treaty and in particular to cause serious injury to Community producers; whereas, on account of these critical circumstances, protective measures must be urgently taken in respect of imports of such products by suspending the issue of import licences for the period necessary for a review of the overall situation on the market for dessert apples."

2.13 On 14 April 1988 the Commission (Reg. 984/88, OJ L 98 of 15 April 1988) changed the period of suspension for import licences on Chilean apples from 15-22 April to 18-29 April. In the preamble to the Regulation the change was explained in terms of the need to carry out an in-depth review of the overall situation of the market in dessert apples.

2.14 Then, on 20 April, the Commission adopted Reg. 1040/88 (OJ L 102 of 21.4.88) which suspended until 31 August 1988 the issue of import licences for third-country imports in respect of tonnages which exceeded a prescribed quantity. In the case of Chile that "reference quantity", fixed at 142,131 tons, was deemed to have been already exceeded in terms of licences applied for, and therefore the suspension in place under Regulations 962/88 and 984/88 was continued through to 31 August.

2.15 The "reference quantities" fixed for suppliers other than Chile in Reg. 1040/88 were:

| | |
|-----------------|--------------|
| South Africa | 166,000 tons |
| New Zealand | 115,000 tons |
| Australia | 11,000 tons |
| Argentina | 70,000 tons |
| Other countries | 17,600 tons |

2.16 Regulation 1515/88 of 31 May 1988 (OJ L 135 of 1.6.88) amended the import licence application and issue forms and procedure in order to ensure that imports were consigned from the country of origin. The stated intent was to ensure that the "equitable distribution" of import quantities was properly applied.

2.17 The measures noted above expired on 31 August 1988 as specified.

TABLE I

EEC Apple Production, Withdrawals and Stocks
(Community of Ten)

| EEC Marketing Year | ('000 tons) | | | | |
|-------------------------------------|-------------|---------|---------|---------|---|
| | 1983/84 | 1984/85 | 1985/86 | 1986/87 | 1987/88 |
| Production (season July-October) | 6,188 | 7,357 | 6,334 | 7,368 | 6,383 |
| Withdrawals (season August-May) | 125 | 661 | 151 | 354 | 207 @ 15.1.88 370 @ 29.2.88 591 @ 31.5.88 |
| Stocks (Calendar Year) | 1984 | 1985 | 1986 | 1987 | 1988 |
| at: 1 January | 2,175 | 2,350 | 2,032 | 2,275 | 2,404 |
| 1 February | 1,831 | 1,866 | 1,683 | 1,951 | 2,001 |
| 1 April | 1,038 | 1,046 | 912 | 1,061 | 1,140 |

Source: EEC Commission (Eurostat, member states)

TABLE II
EEC-10: Imports of Dessert Apples
(tons)

| | 1984 | 1985 | 1986 | 1987 | 1988 (Quotas) |
|--|--------------------|--------------------|--------------------|--------------------|--------------------|
| CHILE (% of southern hemisphere total) | 97,820 (25.2%) | 86,963 (21.5%) | 151,088 (33.5%) | 158,755 (32.3%) | 142,131 (28.1%) |
| ARGENTINA | 52,932 (13.6%) | 64,338 (15.9%) | 32,181 (7.1%) | 52,190 (10.6%) | 70,000 (13.8%) |
| SOUTH AFRICA | 157,467 (40.6%) | 147,327 (36.4%) | 164,210 (36.4%) | 169,457 (34.5%) | 166,000 (32.9%) |
| AUSTRALIA | 2,238 (0.6%) | 10,278 (2.5%) | 6,156 (1.4%) | 8,637 (1.7%) | 11,000 (2.1%) |
| NEW ZEALAND | 77,275 (19.9%) | 95,614 (23.6%) | 97,331 (21.6%) | 102,481 (20.8%) | 115,000 (22.8%) |
| Southern Hemisphere total | 387,732 | 404,520 | 450,966 | 491,520 | 504,000 |
| All imports total | 515,223 | 497,930 | 517,232 | 524,900 | 521,731 |

TABLE II (a)
Imports as Percentage of EEC Production

| Year | 1984 | 1985 | 1986 | 1987 | 1988 (Quotas) |
|------------------------|------|------|------|------|------------------|
| Southern Hemisphere | 6.2 | 5.5 | 7.1 | 6.7 | 7.9 |

3. MAIN ARGUMENTS

Article XI

3.1 Chile stated that the EEC's restrictions on imports of dessert apples were clearly contrary to Article XI:1. It noted that it was incumbent on the contracting party invoking an exception under the General Agreement to demonstrate that it was fulfilling all of the requirements laid down by that exception. This had been confirmed as regarded Article XI:2 by a recent panel decision.³

3.2 The European Economic Community maintained, as it had done in its notification to contracting parties (L/6337), that its measures concerning Chilean apples were taken in conformity with Article XI. It did not argue that the measures were consistent with Article XI:1, but that they involved a justified use of the exemption from the terms of that provision allowed, on certain precise conditions, under Article XI:2. The EEC argued that it had satisfied the conditions as previously interpreted, in particular by a Panel on a similar case.

3.3 The findings of the Panel on "EEC Restrictions on Imports of Apples from Chile" (L/5047), adopted by the Council on 10 November 1980, without reservation by the two parties, were the starting point for the EEC. The parties in that case had been the same, and the matter examined - the application by the Community of import restrictions on apples - had also been substantially the same. The Community's firm view was that questions settled in the 1980 case could not, and should not, be re-opened in this case. It emphasized that, to ensure respect for the obligations and rights of contracting parties under the General Agreement, the decisions of the CONTRACTING PARTIES and the operation of the dispute settlement system, it was essential to assess the GATT legality of the Community measures taking into account the considerations and conclusions already put forward by the 1980 Panel insofar as the issues in dispute had already been resolved. In applying the import restrictions under challenge in this case, the Community had taken pains to comply with the criteria concerning Article XI laid down by that Panel, and could show that its application of measures in 1988 was consistent with those criteria.

3.4 The Community's policy had not fundamentally changed with regard to the intervention and support mechanisms on the apple market since 1980, apart from statistical changes, which were further evidence of conformity with the 1980 Panel's criteria. The EEC had no fundamentally new arguments further to those submitted to the 1980 Panel (summarized by the latter in paragraphs 3.13 to 3.18 of its report), subject to statistical amendment.

3.5 The EEC noted that the 1980 Panel found that the EEC measures at that time "met some but not all of the criteria contained in Article XI:2(c)(i) and (ii) in order to qualify as an exception to Article XI:1". In particular the Panel had specified that "the measures could not qualify as an exception to Article XI:1 under Article XI:2(c)(i) in that they had not fulfilled the conditions of the last paragraph of Article XI:2". This meant that the Panel had found the other conditions of Article XI:2(c)(i) to be fulfilled, and the EEC therefore only needed to provide evidence that it had fulfilled in 1988 the conditions of the last paragraph of Article XI:2.

3.6 Chile expressed the view that the EEC was not waived from providing evidence that it met all of the requirements of Article XI:2 by the findings of the 1980 Panel. That Panel did not adopt a clear position on many of the points involved in the justification of measures under Article XI:2(c)(i). Furthermore, there were other relevant GATT panels. The Panel concerning Japan's restrictions on certain agricultural imports had established a comprehensive approach for examining such restrictions

³Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253).

in light of the provisions of Article XI:2. Another was the 1978 Panel report on the EEC's minimum import prices for processed fruits and vegetables (L/4687).

3.7 Chile maintained that the Community's measures were a prohibition, not a restriction, of imports. When the EEC suspended licences for Chile under Commission Regulation 962/88, it did so not by virtue of any quota, but simply prohibited Chilean apples from continuing to be imported into the EEC. And even Regulation 1040/88, which established the quotas, was a prohibition inasmuch as it entered into force when the exporting process was already well under way and extended the earlier prohibition, permitting no further Chilean imports for the remainder of the importing season to 31 August.

3.8 The EEC stated that the suspension of import licences for Chilean apples under Regulation 962/88 was a question of the administration of quantitative restrictions, and hence should be examined under Article XIII. (Its arguments relating to this provision are set out below.) The Community had imposed restrictions in conformity with Article XI:2(c), not prohibitions. It was clear from Regulation 1040/88 that quotas had been established and that Chile had been permitted to import 142,131 tons.

3.9 Chile did not accept that the EEC satisfied the requirement for governmental measures which operated to restrict the quantities of a product permitted to be marketed or produced. The EEC did not control domestic apple production. But there were also no governmental measures which operated to restrict the quantities of apples permitted to be marketed, as Chile maintained that a system of compensation for withdrawals by producers' organizations did not constitute such measures in the terms of Article XI:2(c)(i). While noting that the 1980 Panel had considered that the EEC did restrict the quantities of apples permitted to be marketed, it also cited the report of the Panel on "EEC - Minimum Import Prices for Certain Processed Fruits and Vegetables" (1978, L/4687) which had examined the Community's intervention system for fresh tomatoes and concluded (para. 4.13) on a number of grounds that it did not meet the requirements of that GATT provision. The basic Community Regulation (1035/72) and the essentials of the system were the same, Chile stated, for tomatoes and apples then and now. Thus the 1978 Panel's findings also remained relevant in the present case insofar as the EEC did not provide evidence of changes in its system which would bring it into conformity with Article XI:2(c)(i).

3.10 Chile stated that while the EEC had described its system as two-fold, with member state and private (producer group) intervention, direct member state intervention was in practice not operational. The establishment and membership of producers' organizations in the EEC fresh fruit sector was voluntary, and their recognition by member states discretionary to an extent. A high proportion of Community apple producers were not in fact members of such organizations. Chile gave the average participation level in the Community of 10 as less than 50 per cent, and as low as 10 per cent in one member state. Producers were under no governmental compulsion to limit their marketings to a specific quantity. There were no guidelines laid down in Community regulations concerning the quantity of fresh apples which should be permitted to be marketed in a given year or which would enable such quantity to be determined. This determination was left to producers' organizations. Quantities withdrawn had sometimes been as low as 3 per cent of Community production. Furthermore Chile noted that withdrawal prices were low - a quarter or less of the price of imported apples - and thus constituted a safety net far below market prices rather than a target or intervention price as existed in some other sectors.

3.11 The EEC argued that its system of market withdrawals for apples did constitute "government measures which operate to restrict the quantities of the like product permitted to be marketed or produced". It did not claim that the Community restricted production, but that it effectively restricted the quantities of apples marketed. The drafters had clearly intended effectiveness to be the key consideration; the measures should maintain the quantity placed on the market below the level it would have reached in their absence. This approach had, the EEC recalled, been confirmed in recent panel

reports. The Community's withdrawal programme was clearly a "governmental" measure in the sense of Article XI. It was established by Community regulation and connected to the basic and buying-in prices fixed each year by EEC Ministers. It was financed by the Community through the member states, and triggered under Community control through direct or indirect management by the member state authorities. "Governmental measure" did not mean the government itself had physically to intervene - there were different ways to organize such systems, and the EEC's measures did effectively limit the quantities able to be marketed. Furthermore, Article XI did not require that governmental measures aim at controlling the quantities produced or marketed but that they have this effect. Fixing target quantities before a production season was neither necessary nor, for a product as influenced by climatic variations as apples, possible. The aim of the withdrawal system was to restore a better balance between supply and demand at a given time so as to prevent prices from collapsing. The Commission encouraged the involvement of producer groups, as it found the decentralized system to be more responsive to market movements and more efficient in achieving the objective of supply control. The well-publicized existence of surplus apple stocks was evidence of the effectiveness of the system. In the 1987-88 marketing year withdrawals, at 591,000 tons, had exceeded imports, and had accounted for some 9 per cent of Community production. These apples had all been taken out of the market under clear Community law and under financing from the Community budget.

3.12 The EEC also noted that the 1980 Panel (para. 4.6 of its Report) had found that the Community did restrict the quantities permitted to be marketed. As the system (outlined in paras. 2.1-2.8 above) remained the same, there were no grounds on which to reverse this finding. The precedent value of the 1978 Panel finding concerning the Community's régime for tomatoes was obviously less than that of the previous Panel which had looked directly at the marketing restrictions on apples. More generally, the EEC distinguished between relevant and irrelevant precedents. They saw the 1980 Panel report as a clear and relevant precedent in the present case. Other cases were irrelevant because they concerned a totally different situation, or they lacked any precedential value because the legal reasoning involved had not been agreed upon by the CONTRACTING PARTIES. The latter point was particularly true of the 1987 Panel on the Japanese import restrictions. The EEC recalled the reservations expressed concerning its adoption by several contracting parties, including the Community. Indeed, the EEC had agreed to its adoption only on the basis that it did not in fact constitute a precedent.

3.13 Chile countered that there was nothing in the GATT Council minutes on the adoption of the report of the Panel on Japanese agricultural restrictions which would justify taking the above view. The report had been adopted in toto by the Council (C/M/217). The difficulties which had been expressed concerning its findings related to issues which did not appear relevant to the issues before the current Panel. Therefore Chile considered that the findings of the 1987 Panel on points relevant to the issues in the present case could serve as precedents for this Panel to draw on.

3.14 Chile further argued that even had the EEC restricted domestic marketing or production as Article XI:2(c)(i) required, which it did not admit, the domestic restrictions and the import restrictions would not have been applied to like products in terms of Article XI:2(c)(i). Noting that the 1980 Panel had ruled in effect that an apple is an apple, Chile nonetheless maintained that the differences in variety, quality, freshness and price between Chilean and Community apples during the import season were such that they could not be regarded as substitutable, and doubted whether stored EEC apples on sale in the European spring or summer could even be called dessert apples.

3.15 The EEC held that as the 1980 Panel had found Chilean and Community apples, though of different varieties, to be like products for the purposes of Article XI:2(c), this point did not remain open to question. The relevant facts had not changed since 1980, and if the 1980 Panel's findings were to have any importance at all it must be noted that they had said an apple was an apple. Furthermore, though they could be stored for some months, all apples were certainly perishable.

3.16 Chile also argued that the EEC's import restrictions were not "necessary to the enforcement" of the claimed governmental supply control measures. It stated that the level of imports had no influence on the quantities of EEC apples withdrawn from the market. The Chilean apples sent to the EEC were generally of the Granny Smith (about 56 per cent of the volume of exports to the EEC during 1987) and Richard Delicious (about 34 per cent of export volume during 1987/88) varieties, green and red respectively. Community withdrawals of these two varieties together were less than 4 per cent of total EEC withdrawals in 1985/86. The variety most commonly withdrawn in the Community was the Golden Delicious (46 per cent in 1985/86). Southern hemisphere apples appeared on the EEC market during the period March-August, in other words, outside the EEC production season which was in the previous (European) autumn. Consequently, at the time when southern hemisphere apples arrived, European apples in stock were already several months old (most withdrawals occurred before January) and, from a commercial standpoint, were no longer directly substitutable for southern hemisphere apples. This was brought out all the more clearly by the fact that the most common destination for withdrawn Community apples was animal consumption, followed by conversion into alcohol and spoilage. Only a very small proportion of withdrawn apples was distributed free for human consumption: a mere 3 per cent according to Community statistics for 1985/86. Even were they saleable on the commercial market, this was not allowed by Regulation 1035/72. Therefore the level of imports of southern hemisphere apples, destined exclusively for the table market, had no influence on the disposal of withdrawn apples.

3.17 Moreover, the import price for Chilean apples was higher than the Community internal price and higher than the reference price established by the EEC to "obviate disturbances caused by offers from third countries at abnormal prices" (Regulation 1035/72, Article 23). The reference price was more than triple the withdrawal price, so that the system itself ensured that the withdrawal price would not be affected by import prices.

3.18 Chile contended, therefore, that the restrictive action the Community took in 1988 was arbitrary rather than necessary. In previous years (e.g., 1985) a higher rate of withdrawals than in 1988 had not led the EEC to enact import restrictions; this did not mean that Chile suggested it ought to have done so, merely that it questioned why the EEC had done so in 1988 when the price and withdrawal data showed it was not in a critical internal condition. Chile provided price, withdrawal and other information to support this argument, and stated that the Commission had in fact refused a member state request to extend apple intervention past May. It also rejected Community arguments based on the high levels of imports forecast for 1988, as in the words of the drafters the exception under Article XI "was not intended to provide a means of protecting domestic producers against foreign competition ..." EEC producers were already protected by seasonal tariffs and minimum import prices. Even less, Chile argued, was Article XI:2(c) intended to allow a contracting party to suspend imports from only one other contracting party in order to conduct "a review of the overall situation on the market" (EEC Regulations 962/88 and 984/88). Yet Chile saw in the preambles to Regulations 962/88, 984/88 and 1040/88 a statement by the Community that their measures were specifically intended to protect domestic producers from the "serious injury" which imports threatened to cause them. This was clearly not a justification for import restrictions under Article XI:2(c)(i).

3.19 Chile also recalled the report of the Ninth Session Working Party on Quantitative Restrictions (BISD 3S/190) which stated that "... if restrictions of the type referred to in paragraph 2(c) of Article XI were applied to imports during that part of the year in which domestic supplies of the product were not available, such restrictions would be regarded as consistent with the provisions of the Article only to the extent that they were necessary to enforce or to achieve the objectives of the governmental measures relating to control of the like domestic product".

3.20 The EEC recalled the findings of the 1980 Panel on the question of whether the import restrictions were "necessary to the enforcement" of the Community's marketing restrictions:

"The Panel considered that although the EEC measures occurred outside the EEC domestic production season, imports could have affected the possibilities for the disposal or release of EEC apples out of intervention onto the EEC market at that time."

Thus, the EEC argued, it was clear the Panel considered that its import restrictions had been necessary to the enforcement of the internal marketing restrictions.

3.21 The EEC maintained that its 1988 measures were, likewise, "necessary" in terms of Article XI:2(c) and that the previous Panel's findings applied here also, as the essential situation was similar. Under Community law, the protective measures enabling the Commission to suspend imports from third countries totally or in part were intended to deal with serious disturbances which the Community market experienced or was threatened with by reason of such imports; they could also be applied if withdrawal operations by producer groups or official buying-in groups involved significant quantities. Account was taken in particular of:

- the actual or probable volume of imports;
- the availability of products on the Community market;
- the prices of domestic products recorded on the Community market or the probable trend of those prices;
- the prices on the Community market of products imported from third countries, and in particular any tendency to an excessive fall in such prices;
- quantities which were, or might be, withdrawn.

The objective of the Community's policy was to adjust supply to demand; the need to control imports followed from the need to control supply as a whole, in accordance with Article XI. The Commission's analysis each year used domestic withdrawals (i.e., its internal marketing restrictions) as an inverse indicator of demand. Only when withdrawals were high and imports were also rising was it necessary to restrict the latter as well.

3.22 The Community rules did not impose criteria which automatically determined when it was necessary to restrict imports. It was for the Commission to take the necessary steps, on the basis of a complex economic situation in which the use of predetermined criteria was risky. Furthermore, it was the Community's policy to prefer concerted action with its partners in order to avoid as far as possible any recourse to unilateral restrictions even when they might appear necessary or justified.

3.23 Thus, in 1985, even though the Community had considered that the conditions for restricting imports were met, it had finally been able to avoid doing so. Under the market conditions prevailing in 1987-88, the restrictions on imports had been necessary in order to maintain the effect of the withdrawal programme and keep stocks within a level which could be disposed of. In pursuit of the same objectives it had been necessary to apply import restrictions outside the production period for Community apples, as marketing of both EEC and imported apples also took place outside that period. This was in line with the views of the Working Party on Quantitative Restrictions (BISD 3S/214).

3.24 The EEC stated that the production of apples in the Community in recent years had been relatively stable, but that prices in 1987-88 had been lower than in the previous season; that stocks of dessert apples had been larger in 1987/88 than in any of the four previous years, with the exception of 1984/85; and that forecasts for exports of dessert apples to the Community during marketing year 1988 indicated an expected increase of more than 26 per cent over the quantities fixed for 1987 and more than 37 per cent in relation to the average of imports over the previous three years, strongly depressing marketing

prospects. The export forecasts of the southern hemisphere countries and the expected rate of these imports had an influence in particular on the marketing prospects and prices for Community apples in stock at the end of the marketing year. The forecasts thus influenced the level of withdrawals and weighed on market prices, even before imports began. When they did so the effect was magnified, especially when they exceeded the forecasts. Information on the average price of apples in intra- and extra-Community trade in 1986-87 and 1987-88 showed a remarkable parallelism between import and domestic prices. This showed there was indeed a single market for all apples, in which imported and domestic products were generally competing despite differences in varieties or prices.

3.25 The EEC added that preventive withdrawals had not been used in the 1987/88 marketing year, since a principal factor triggering them was the level of production, and the gravity of the market situation had not shown up here so much as in the withdrawal rates from January onwards.

3.26 The EEC also argued that the word "necessary" should not be defined too rigidly in cause-and-effect terms. Otherwise, it would be extremely difficult to establish what in fact constituted a necessary measure. The EEC submitted that in a situation where an increasing amount of EEC apples was withdrawn from the market, and where at the same time there was an abrupt rise in imports beyond past levels and what had been foreseen, then there was a necessity to have proportional measures on both sides. It was not required to pre-establish a fixed correspondence between the two quantities (the "proportionality" rule was relevant elsewhere in Article XI) but the fundamental principle was that of parallel action internally and externally, which the 1980 Panel had recognized.

3.27 In respect of the foregoing, Chile queried how the confidential forecasts which it supplied each January to the Commission could be available to, and thus influence, the EEC producers' organizations who carried out withdrawals - most of which would in any case already have taken place by January. It went on to maintain that in addition to failing to meet the criteria to qualify for the exemption under Article XI:2(c)(i), the EEC could not meet the requirements of Article XI:2(c)(ii) either. Chile noted that the 1980 Panel "could not conclude that the EEC did not meet" these requirements, since it found the 1979 surplus could be considered to be a temporary surplus above the recurring surplus of Community apples. This did not imply that the EEC could be said to have had a temporary surplus above the recurring surplus every year since 1979. It would be a distortion of GATT principle to see such a situation - which was really one of chronic surplus - as sanctioned by the 1980 Panel. Furthermore Community production in 1987/88 was substantially below that in previous years.

3.28 The EEC noted the 1980 Panel's finding that there could be a temporary surplus above the recurring surplus. The EEC stated that its surplus situation in 1987/88 was once again considerably worse than in previous years, for example in 1985/86, when production had been much the same. This, the EEC argued, was another instance of a temporary surplus above the recurring surplus, and thus the 1980 Panel's findings were directly applicable.

3.29 Chile recalled those points, concerning Article XI:2 (last paragraph), where the 1980 Panel had found clearly against the EEC and argued that the 1988 measures were again in breach of the GATT obligations. The Community did not "give public notice of the total quantity or value of the product permitted to be imported during a specified future period" as regarded Chile. The EEC published a quota only on 21 April, one week after suspending the issue of import licences in respect of apples from Chile. Before this date, and since the introduction of licensing in February, Chile had in effect been under a "secret quota". This was shown by the mention in Reg. 1040/88 of a "reference quantity" which Chilean licence applications had exceeded - a quantity which had not previously been published and of which Chile had been unaware. When the EEC did publish a quota (in Regulation 1040/88) it was a retroactive measure, which merely extended the suspension by reference to quantities already imported.

3.30 The EEC indicated that there could be no question but that by publishing Regulation 1040/88 the EEC had given public notice of the quantity of the product permitted to be imported during a specified future period. The EEC also rejected the claim that there had been a "secret quota". There had been a suspension of Chilean import licences pending the calculation of the quota. The 8-day difference between these two actions had been necessary to protect the rights of other suppliers under Article XIII.

3.31 Chile contended, furthermore, that the EEC failed to fulfil the requirements of the last two sentences of the last paragraph of Article XI:2 which stipulated that a contracting party applying import restrictions must maintain a minimum proportion between total imports and total domestic production. It considered that to satisfy the proportionality or minimum access requirement the Community should have taken into account the ratio between the import reduction and the restriction on production or marketing of product on the internal market so that both reductions were equivalent. The percentage reduction applied to southern hemisphere imports (from the forecasts) was 18.4 per cent. The same percentage reduction should have been applied to the marketing of Community products.

3.32 With regard to the "proportionality" requirement, the EEC recalled that the 1980 Panel considered that to meet the requirements of the second sentence of the final paragraph of Article XI:2, it was necessary to look at total imports into the EEC from southern hemisphere suppliers, including Chile, and establish the proportion between such imports and Community production during a previous representative period (see Tables II and II(a), above). In 1988, the Community had taken as the previous representative period the three years (in the form of marketing years) preceding the action, in other words 1986/87, 1985/86 and 1984/85. During this period, the proportion between gross domestic production and southern hemisphere imports came to an average of 6.4 per cent. During the marketing year 1987/88, the proportion between gross domestic production and imports from the southern hemisphere came to 7.9 per cent, or a rise of 23 per cent. Looking at the figures for net domestic production, in other words after deduction of withdrawals from marketing, the proportion came to 6.8 per cent over the past three years and 8.7 per cent in 1987/88. The Community therefore chose to go beyond the average for the last three years by substantially improving the share of imports.

4. Article XIII

4.1 Chile noted that Article XIII only regulated quotas which were not illegal under the General Agreement, which it maintained the restrictions imposed by the EEC were. Nevertheless it presented arguments relating to this Article because it offered a standard for demonstrating the discrimination against Chile and the specific damage which, more than other suppliers, it had suffered.

4.2 The Community's suspension of import licences for Chilean apples in Regulation 962/88 of 12 April 1988 was, Chile maintained, discrimination contrary to Article XIII:1. Chile drew the Panel's attention to the fact that the suspension, effective from 15 to 22 April (later amended by Regulation 984/88 to 18-29 April) applied to Chilean apples only. Given the 5-day period taken to issue licences, Chile argued that, effectively, no licences were issued in respect of applications for Chilean apples lodged later than 8 April 1988. Only on 20 April were import restrictions applied to other supplying countries, and even then Chile was discriminated against as the outright suspension of licences was continued whereas other suppliers were permitted to continue importing under quota. The result was that during most of the export season for southern hemisphere apples, Chilean apples were not allowed to enter the EEC market while others were.

4.3 Chile argued that Article XIII:3(b) had also been infringed. It provided that if a contracting party fixed quotas it should give public notice of the total quantity or value of the product which would be permitted to be imported during a specified future period. However, as Chile had argued concerning Article XI, the Community operated a secret quota against Chile. It suspended imports from Chile exclusively, before public notice of a quota. When a quota was later published it was backdated in

the case of Chile. Yet in the absence of any published quota there had been no obligation to observe any restraint or limitation in applying for licences. Only Chilean exporters had no official advance information to guide their planning of apple shipments.

4.4 The EEC maintained that its restrictions had been administered in full accordance with the requirements of Article XIII. Concerning the suspension of licences for Chile, the EEC stated that from 1 to 7 April total licence requests amounted to 41,000 tons, of which 73 per cent were for Chilean apples. Applications for import licences were exceeding the traditional quantity of imports from Chile. These were, the EEC argued, clearly unrealistic and speculative levels designed to establish an irreversible position at the expense of other exporters, who were less well informed or less inclined to engage in speculative operations. Before engaging in the complex and difficult assessment both of the global amount of the quota and of the shares to be allocated to the various supplying countries, the Community had therefore considered it necessary to take precautionary action to protect the rights of other suppliers and hence its obligations towards them under Article XIII as a whole, and in particular paragraph 2(d). Interim protective measures were all the more clearly necessary in the specific case of the application of Article XIII to a seasonal product. The Community's other suppliers who had a later production and shipping season were not in a position to apply for licences which they could not be sure of fulfilling within the prescribed time-periods.

4.5 In the circumstances, the fact that the decision to suspend the issue of licences was taken on 12 April, i.e., 8 days before the publication of the global quota and its distribution in Regulation (EEC) No. 1040 dated 20 April, seemed both reasonable and lawful. At a time of year when there were a limited number of working days, this was in fact a very short delay for carrying out the detailed legal and economic studies required by the 1980 Panel report and in particular for taking into account the relative export capacities of the various suppliers. This precaution had proved to be justified, as the calculations made had shown that Chile had reached the acceptable levels within the meaning of Article XIII:2(d), and that any further rise would have resulted in a reduction in the share of the other suppliers.

4.6 On the other hand, the reason that the issue of licences for apples originating from other third countries was not suspended at this time was that imports from those countries had clearly not yet reached the level of their fair share within a foreseeable quota. It was therefore wrong to maintain that the suspension measures were in themselves a "clear violation" of the principle of non-discrimination. There was nothing in this provision or elsewhere which prevented a contracting party from adopting precautionary interim measures in a situation such as that in 1988, pending the fixing and allocation of global quotas. This interim protective measure was adopted as part of a set of measures whose overall compatibility must be judged in relation to Article XIII as a whole, including paragraph 2(d).

4.7 Chile also held that the EEC had violated the second sentence of Article XIII:3(b), which stated that:

"Any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry; ..."

4.8 "Public notice" here referred to public notice of the quotas as provided in the first sentence of Article XIII:3(b). Yet the EEC had excluded from entry Chilean apples which were en route to the Community on or prior to 21 April 1988, the date when quotas were published in Regulation 1040/88, and which were not covered by a licence application made on or before 8 April. Chile provided details concerning these consignments. Chile also referred to the "Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls", adopted by the CONTRACTING PARTIES in 1950 (GATT/CP.5/30/Rev.1), according to which:

" ...

2. Any new or intensified restrictions on importation or exportation should not apply to goods shown to the satisfaction of the control authority to have been en route at the time the change was announced or to have been paid for in substantial part or covered by an irrevocable letter of credit.

3. Goods proven to have been covered by adequate confirmed prior order at the time new or intensified restrictions are announced, and not marketable elsewhere without appreciable loss, should receive special consideration on an individual case basis, provided their delivery can be completed within a specified period ..."

The Community had violated these provisions as well.

4.9 Chile noted that according to the last preambular paragraph of Regulation 962/88 the Commission had felt no need to observe the requirement not to exclude from entry Chilean apples on board and destined for the EEC at the time that Regulation suspending Chilean imports was published, on the following grounds:

"Whereas, since the period of validity of import licences has been fixed so as to cover amply the dispatch of dessert apples to the Community and to permit the operators to obtain import licences before the ships depart, no account should be taken of goods being transported to the Community other than those for which import licences have been issued."

This argument was totally unfounded; the statement that "no account should be taken of goods being transported to the Community other than those for which import licences have been issued" meant that no account of such goods was being taken at all, which was manifestly contrary to the clear wording of Article XIII:3(b). Furthermore, the argument started from the assumption that operators should have applied for, and even obtained, licences before the departure of the ships. This assumption was not valid as there was no requirement to do so. Precisely, because of the clear wording of Article XIII:3(b) of the General Agreement and of Article 3(3) of EEC Regulation 2707/72, no importer felt a need to obtain, or even apply for, import licences before the vessel had sailed. The mere fact that they were permitted to do so could not justify the attitude taken by the Commission. As Chile had stated with regard to the operation of the licences, in many cases it was not possible to request licences before the vessel concerned had actually sailed.

4.10 Finally, it was not true that "the period of validity of import licences had been fixed so as to cover amply the dispatch of dessert apples to the Community and to permit the operator to obtain import licences before the ship departs". The crossing from Chile to Western European harbours usually took some three weeks and not all ships sailed directly from the harbour where the apples were loaded to the European harbour where the same apples were unloaded. Therefore, importers would have taken commercially unacceptable risks to apply for licences before the ships holding their cargo had actually sailed.

4.11 Chile maintained that the quantities of apples on sea destined for the EEC and covered by an application for an import licence must be considered "goods en route" in the sense of that Article. Chile drew the Panel's attention to an Interim Judgment of the European Court of Justice of June 1988⁴ which ruled against the Commission on this issue in respect of Community law. One such shipment had been allowed to enter the EEC by order of the European Court of Justice; it was not reasonable to request more evidence or further legal actions in respect of the other shipments. The Community

⁴Order of the President of the Court, No. 296040 of 10 June 1988.

gave the impression that Chilean producers put their apples on any ship and then subsequently decided at which ports they should be unloaded. Chile rejected this, detailing the specific selection, quality controls and packaging that its apples destined for the EEC (and other) markets underwent.

4.12 Concerning the requirement in the second sentence of Article XIII:3(b) that goods en route should be allowed entry provided (*inter alia*) that they could be "counted so far as practicable" against future quota entitlement, Chile argued that it had been the EEC which caused any practical difficulties in this respect, by publishing a backdated quota. Chile noted that during the two rounds of consultations on this matter under Article XXIII:1, the EEC had refused to take corrective action. Chile supplied supporting information to substantiate the commercial losses and market disruption it claimed the Commission's actions had caused.

4.13 The EEC considered that it had correctly applied the provisions of GATT Article XIII:3(b) with regard to products en route at the time of publication of Regulation 962/88 of 12 April 1988. Article XIII:3(b) did not contain an obligation to permit entry into the territory of the contracting party imposing restrictions of any product that had already left the place of production. Nor did it concern all products that were in the process of being transported simply as a result of the fact that they had been purchased by an importer situated in that contracting party. GATT practice confirmed that the notion of "products en route" fundamentally required that the product should be clearly destined for the territory of the contracting party in question without the importer (or more generally whoever had the disposal of them) having any possibility of re-routing them as he wished according to last-minute economic calculations. All the apples found, under the Community's licensing system, to be definitely destined for it were permitted to be imported.

4.14 It was not the case that the system required that a licence be applied for prior to shipment, but it did allow it. Precisely in order to take account of the uncertainties inherent in shipping, the Community, by Regulation 871/88 of 30 March 1988, had extended the validity of import licences from thirty to forty days. Thus, the period of validity provided reasonable protection against any risk of delay due to possible stoppages of ships in ports along the way. The system introduced did, however - and solely - prevent any speculative manoeuvre under which operators could send off products towards a stated destination which was in fact only provisional and destined to be changed during transportation in the light of developments in different markets. The EEC claimed that such was the practice of Chilean exporters.

4.15 The Order of the President of the Court of Justice of the European Communities was only a preliminary order, and the Court's final ruling was yet to come. It recognized as goods actually "en route" only 1,790 tons, which had since been permitted to be imported over and above the quota fixed for Chile. Chilean exporters had not provided proof in the case of other shipments.

4.16 Chile argued that a quota of 142,131 tons was smaller than it was entitled to under Article XIII. The chapeau of Article XIII:2 stated:

"In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions ..."

Chile argued that the Commission should therefore have used the export forecasts submitted by the southern hemisphere countries to calculate quota shares, as this would have provided the best estimate of what these countries might have been expected to obtain in the absence of quotas. According to such a standard Chile, with its forecast of 200,000 metric tons, should have then received a share of at least 32.6 per cent rather than the 28 per cent the EEC granted it. Chile also noted that South Africa,

which had forecast exports of 199,000 metric tons - that is, only 1,000 metric tons less than Chile's forecast - had received a quota of almost 24,000 metric tons more than Chile.

4.17 Chile recalled that Article XIII:2(d) stated in part:

"... the contracting party concerned shall allot to contracting parties having substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product ..."

Chile argued that the EEC had not observed this requirement either.

4.18 Normal GATT practice, it said, was to consider the last three years as a previous representative period unless it could be shown for some reason that one or more of those years was not representative. In 1985, EEC imports from Chile were 86,963 metric tons, which was down from 97,820 metric tons in 1984 and also below the generally upward annual trend of shipments. Chilean exports of apples dropped in 1985 because of the severe earthquake of 3 March that year which damaged the export infrastructure. Chile argued that the earthquake should be considered as a "special factor" and therefore 1985 should not be considered as "representative" nor be included in any calculation of a representative period. If EEC imports of the last two years only were taken into account, this would give a Chilean share of 33 per cent; i.e. almost the same as the forecast. Chile also observed that imports from Chile during those years reached 155,000 and 158,000 metric tons, and therefore the Commission's assertion in its regulation suspending imports that applications for import licences exceeded the "traditional quantity" from Chile was not correct. A quota of 142,131 metric tons was well below the quantities of the previous two years.

4.19 Moreover the Community should have considered as a "special factor" the increase in Chilean productive efficiency vis-à-vis its southern hemisphere competitors. This was provided for in the note Ad Article XI:2, last sub-paragraph, and was duly taken into consideration by the previous (1980) Panel on EEC Restrictions on Apples from Chile:

"The Panel believed that Chile's increased export capacity should have been taken into account by the EEC in its allocation of shares among the southern hemisphere suppliers. The Panel felt such a consideration was in line with the interpretative note to the term "special factors" as drafted in the Havana Charter, in particular with reference to "the existence of new or additional ability to export" as between foreign producers" (BISD 27S/p. 115).

It was clear that a country whose productivity and capacity for exports had increased vis-à-vis other foreign suppliers should be given a relatively bigger quota. Chile provided data on the evolution of its exports in general and apples in particular, to prove that there had been a clear trend in its favour, through higher productivity and improved export capacity.

4.20 Furthermore, the EEC should have taken into consideration, as a demonstration of the increased export capacity of Chile, the commercial contracts for 180,000 metric tons. The previous GATT Panel took account of this factor:

"Moreover, the Panel considered that the fact that Chilean exporters had signed commercial contracts with EEC importers to the amount of 60,500 metric tons further demonstrated Chile's increased export capacity and that these contracts should have been taken into account as a "special factor" as well" (BISD 27S/p. 115).

4.21 Analysis of the respective shares of southern hemisphere countries over the last three years showed that there had been discrimination against Chile. Comparing individual 1988 quotas against previous actual performance, the Argentinean quota of 70,000 metric tons represented 141 per cent of its three-year average. In fact the only time the EEC had ever imported anything close to that quota amount from Argentina was seven years before (67,266 metric tons), and there had been a downward trend ever since. Similarly the quotas granted to Australia and New Zealand represented 132 per cent and 117 per cent, respectively, of the average of EEC imports from these countries for the previous three years. Their 1988 quotas, too, were levels at which these countries had never exported to the EEC in the past. For Chile, the quota was only 7 per cent higher than the three-year average of actual EEC imports of Chilean apples, and it was smaller than the actual quantities for 1986 and 1987. Furthermore, Chile stated that the EEC's discrimination in the administration of its quotas was demonstrated by the fact that it allowed the entry of 135,000 tons of dessert apples from New Zealand whereas the quota published for that country was 115,000 tons.

4.22 The EEC rejected Chile's claim that its quota allocation had been smaller than it was entitled to. In allocating quotas, the Community had complied with the obligations under Article XIII as interpreted by the 1980 Panel (in particular paragraphs 4.16 and 4.17 of its report). It had therefore determined the traditional share as the average of the three years preceding the measure, and also taken into account special factors which could affect trade in the product and which could call for adjustment to this average figure. These factors included in particular, but not exclusively, new or improved export capacity of foreign suppliers. The figures obtained by averaging over the reference period were in fact close to those adopted for the shares allocated in the quota.

4.23 In order to assess the export capacities of the various southern hemisphere suppliers as objectively as possible, the Community took account of the following production figures which indicated that Chile did not have a more favourable production and export potential than the other countries:

Trends in Production of Dessert Apples in the
Five Southern Hemisphere Producers

| | 1,000 MT | | |
|--------------|----------|------|-------|
| Country | 1985 | 1986 | 1987 |
| Chile | 530 | 480 | 550 |
| Argentina | 594* | 990* | 1,078 |
| South Africa | 371 | 488 | 470 |
| Australia | 352 | 290 | 362 |
| New Zealand | 270 | 285 | 295 |

*The EEC noted that these figures had been inverted by the FAO in its most recent publications.

Source: FAO

Over the three years preceding the measure, Chile's production was relatively stable (about 520,000 tons). Furthermore, 1985, which was close to the three-year average, did not show a significant drop in Chilean output, although Chile claimed that it must have been affected by the earthquake that year. The EEC also stated that it had not been informed, at the time it was calculating the quotas, that Chile considered this a special factor to be taken into account. On the other hand, a supplier such as Argentina appeared to have clearly increased its production, and therefore deserved an improvement over its three-year average.

4.24 The determining factor in apple exports was that since the beginning of the present decade the Community's traditional suppliers had been aware of the need to maintain an orderly Community market and had moderated the quantities exported to the Community, whereas Chile had been taking advantage of that moderation to increase its share at the others' expense. To adjust Chile's market share slightly downwards as compared to the average of actual exports in the past three years could therefore not be considered as discriminatory but only as taking full account of all relevant factors: past performance, export capacity and trade patterns and policies of exporting countries. This was not a question of "punishment", just that the EEC tried to take account of the legitimate interests of other exporters.

4.25 As there appeared to be no objective basis for the assertion that Chilean producers had a higher productivity, the Community did not see fit on these grounds, either, to privilege Chile and harm the interests of other suppliers. On the contrary, it considered that the relative potential of other suppliers, such as Argentina, should lead to an improvement in the shares allocated to those countries in comparison with their three-year export average, and therefore found it necessary to reduce Chile's relative share slightly (by 1 per cent).

4.26 Other elements, such as the forecasts provided by southern hemisphere countries, did not appear to be sufficiently reliable to provide a basis for the distribution of the shares of the Community's various suppliers. Whereas in 1979/80 the forecasts of most of the Community's suppliers were in keeping with their desire to limit exports, since at the time they had agreed to voluntary export restraint, the situation was otherwise in 1987-88. Since in 1986/87 the Community had already envisaged restricting imports from these countries, it argued that these forecasts no longer corresponded to any economic reality but were designed to gain positions in the event that restrictions were introduced.

4.27 Finally, the argument advanced by Chile as to the existence of commercial contracts for an amount of 180,000 tons also seemed unacceptable. Chile had not provided any proof of the existence of such contracts. It also remained to be verified that these were indeed commitments of a contractual nature and not merely estimates subject to modification.

4.28 In the light of the foregoing, the calculation of the quantities allocated to supplying countries was carried out as follows:

- no supplier should be allocated a quantity smaller than the traditional quantities resulting from the three-year average;
- the total quota being higher than the three-year average, the distribution of this surplus (55,000 tons) should be carried out taking account of the special factors. This surplus, representing an increase of 12.3 per cent over the three-year average, was distributed as follows:

| | |
|----------------|-------|
| . Chile | + 2.2 |
| . Argentina | + 4.6 |
| . South Africa | + 1.3 |
| . Australia | + 0.6 |
| . New Zealand | + 3.7 |

4.29 Independently of the decisions the Panel would come to about the specific points above, the EEC suggested that, in view of the complexity and difficulty of the concept of "special factors", it might be wise to adopt a practical solution which would allow the contracting party using quantitative restrictions to rely in principle on the average of the previous three years and for other contracting parties to accept that reliance on this period created a presumption of conformity with the requirements of Article XIII. If there were special factors which were claimed to modify this average, the party which wished to rely on them should then have the burden of proving that one or other such factor should be considered.

4.30 Chile rejected the EEC's statistics concerning southern hemisphere apple production and supplied the following data in support of its argument that Chile's production and export capacity had indeed been increasing:

Southern Hemisphere Production of Apples

| Country | 1985 | 1986 | 1987 |
|--------------|------|-------|------------------|
| Chile | 413 | 530 * | 560 * |
| Argentina | 982 | 594 | 1,078 |
| South Africa | 352 | 288 | 362 |
| Australia | 277 | 298 | 310 * |
| New Zealand | 373 | 488 | 501 ^F |

*Unofficial figures

^FFAO estimate

Source: FAO Quarterly Bulletin of Statistics Vol.1, 1988, page 53, table 18

Chile noted that the Commission had not asked southern hemisphere producers for estimates of production levels when asking them for export forecasts.

4.31 Chile also rejected the EEC's argument that Chile had behaved irresponsibly while other suppliers moderated their exports. In 1979, when the EEC suspended imports of apples from Chile because it did not agree to a voluntary restraint agreement, all the other suppliers exported more than their voluntary quotas to the EEC. Since then, every southern hemisphere country had exported more than its forecast in one year or another, including, in the last four years, those countries whose "moderation" the Commission said it had taken into account. After all, there was no obligation under the GATT whereby exports must not exceed a forecast. The EEC alleged that Chile's behaviour in the past had led other suppliers to inflate their estimates. If that was so, why did the EEC grant Australia, for example, a quota higher than its forecast if the latter was already inflated? Furthermore, the EEC did not request any southern hemisphere supplier to provide evidence of its commercial contracts when setting quota levels, as it suggested Chile should have done to justify a quota of 180,000 tons.

4.32 To counter any impression that there was close co-operation between the EEC and the southern hemisphere countries, and that in its actions the Community took into consideration the interests of southern hemisphere countries, Chile stated that the sole purpose of the system of providing the EEC with export forecasts was to co-operate in the provision of information. This information was provided on a confidential basis. In no case did it prejudge export quantities or constitute a commitment. There was no process of consultation, still less of negotiation, but solely unilateral provision of information, in which Chile had always co-operated. There was thus no reason for the EEC to plead ignorance of special factors or argue that they were so complex that the requirements of Article XIII:2 needed redefining. There had been no such reciprocal co-operation from the EEC. In addition, it was not Chile alone but also other suppliers who had previously refused to enter into a voluntary export restraint agreement, which Chile argued would also have been GATT-illegal.

5. Article I

5.1 Chile argued that the Community's import quotas were discriminatory and thus a breach of general most-favoured-nation treatment and of Article I of the General Agreement.

5.2 The EEC argued that, as this was a question of the administration of quantitative restrictions, it was appropriate that it should be examined not under Article I but solely under Article XIII, which was the "lex specialis" (c.f. para. 4.1 of the 1980 Panel's report).

6. Article X

6.1 Chile argued that the licensing and deposit system on dessert apple imports introduced by the EEC on 6 February (Commission Regulation Nos. 346/88, 871/88 and 1155/88) and administrative arrangements by the member states putting this into effect were not "published promptly in such a manner as to enable governments and traders to become acquainted with them" as required under Article X:1 (first sentence) nor administered in a "uniform, impartial and reasonable manner" as required under Article X:3(a). In particular Chile maintained, concerning Article X:1, that the establishment of a licensing system as late as February 1988, with licences expected to be issued a little over two weeks after publication of the initial regulation, gave member states scant time to organize their administrative machinery for the processing of licences, and traders insufficient, or no, time to become acquainted with the new rules. Chile noted that the regulation introducing the licensing system was published, and entered into force, on 6 February - one week before the first ship loaded with Chilean apples left port destined for the Community and months after commercial contracts had been signed. Chile argued that as the licensing system entered into force before the administrative arrangements giving it effect were established by the EEC's member states or known, the Community had not respected the requirements of Article X:1 (first sentence). According to Chile, these requirements would be met only if publication was carried out sufficiently in advance of the actual trading period for the goods.

6.2 The EEC argued that the regulations introducing and amending the Community's import licensing system were published promptly and properly in the Official Journal. For example, Regulation 346/88 introducing surveillance was published three days after its adoption and provided for entry into force on the eighth day following publication. This delay showed the Community's desire to respect the spirit of Article X:1 even though this Article did not contain any rule concerning entry into force. There was, however, no basis, in Article X or elsewhere, for Chile to argue that the licensing system could not enter into force before administrative arrangements were established by all member states, even had this been the case, which the Community did not admit. Any such requirement would be completely unacceptable for the Community and impossible to meet in all cases.

6.3 Concerning Article X:3, Chile argued that there were differences among the ten member states of the EEC as to the requirement they imposed on applications for licences for imports of dessert apples. It cited examples, such as a French requirement for licence applications to be accompanied by a pro forma invoice, which effectively meant that licences could not be applied for until after ships had been loaded. Other examples cited by Chile included acceptance of telexed licence applications by some member states and not others; differing procedures for bank guarantees; and refusal by one member state to accept a licence issued by another. Therefore the requirements for licence issue were not "uniform" throughout the Community in terms of Article X:3(a). Chile adduced the changes made in the system by the Commission while it was in operation as further evidence that it was not uniform over time, either, since these led to the system being applied in a substantially different manner at different stages of the season. Chile argued that the problem was not whether the licences were administered in an identical manner in all member states, but that in some of them the licences were restrictive and non-automatic in character.

6.4 Chile argued further that the one-month validity period of the import licences was too short, and hence "unreasonable" in terms of Article X:3(a). The later extension of this period to forty days came too late to correct the position with respect to Chile, as its trade was suspended shortly afterwards. As the first of the southern hemisphere suppliers to send apple shipments during the EEC off-season beginning in February, Chile suffered most from this and the other irregularities in the system mentioned above. Hence, it argued, the regulations had not been administered in an "impartial" way, as required by Article X:3(a), among the supplying countries. Nor had their administration been impartial in relation to Community importers, some of whom had been in a more favourable position than others to obtain licences, depending on the member state involved.

6.5 The EEC stated that even if certain differences did exist among the ten member states concerning the administrative requirements to obtain licences, as claimed by Chile, these could not in themselves establish a breach of Article X:3(a). Otherwise, this provision would require the generalization of centralized or identical administration within each contracting party. The EEC argued that the Chilean case was based on a misinterpretation of Article X:3(a), whose correct meaning they gave as requiring in substance that the administration of trade measures by the various administrations should not be discriminatory among contracting parties. They quoted in support of their interpretation from the Director-General's Note of 29 November 1968⁵, concerning the Agreement on Implementation of Article VI. The EEC denied that the Community surveillance measures were administered in a different manner with regard to imports of Chilean apples and imports of apples originating in other contracting parties. The fact that Chilean exporters were the first to send apples to the Community was not proof of discriminatory, non-uniform, partial or unreasonable administration, but simply an objective fact due to the climatic differences among exporting countries and having nothing to do with the principles of application of the surveillance measures within the Community.

⁵L/3149. The last paragraph, referred to by the EEC, reads:

"I would refer also to Article X. Paragraph 3(a) of that Article provides that all laws, regulations, judicial decisions and administrative rulings pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges shall be administered in "a uniform, impartial and reasonable manner". These last words would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would they permit the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others."

6.6 The EEC noted that the imposition of import quotas and the allocation of licences was the object of Community legislation through a regulation. Under Article 189 of the Treaty of Rome, a regulation had general scope, was binding in its entirety, and was directly applicable in all member States. Consequently, unlike directives, which were addressed to member States and called for precise complementary measures in the form of national regulations, it was the regulation and the regulation alone which established the legal situation for all persons. Of course, member States might adopt the internal administrative provisions necessary for their administrations to enforce the Community regulation, but such provisions could in no way alter or modify the provisions of the regulation and hence the rights of persons as established by the regulation. Hence the internal administrative provisions which certain member States may have found necessary could not validly modify the rights and obligations of persons. Furthermore, these internal administrative provisions did not have to be published and were not usually brought to the attention of the Commission. Nonetheless in the specific case noted by Chile of the French request for a pro forma invoice to support licence applications, the Commission had intervened with the French authorities who had replied that this was not a mandatory requirement.

7. Article XXIV:12

7.1 Chile also raised the question of obligations under Article XXIV:12 of the General Agreement, under which each contracting party shall take "such reasonable measures as may be available to it to ensure the provisions of this Agreement by the regional and local governments and authorities within its territory". Noting the Commission's responsibility for EEC trade policy, and that the establishment of a system of import licensing and surveillance for apples in the member states was decided by the Commission on the basis of Regulations passed by the EEC Council of Ministers, Chile argued that the Commission should therefore be held responsible for seeing that member states administered this system in accordance with Article X.

7.2 The EEC stated that it understood Article XXIV:12 to be essentially an exception clause to the implementation of certain GATT obligations. As the Community had not invoked this exception in the present case, it saw no grounds for the Panel to make an examination of obligations under it. Even were this Article to be relevant, which it was not, the Commission Regulation (3183/80) laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products, enacted such "reasonable measures" as to fully satisfy the requirement.

8. Part IV

8.1 Chile argued that in imposing the measures complained of, the EEC had not respected the commitments by developed contracting parties in favour of developing ones contained in Articles XXXVI and XXXVII of Part IV of the General Agreement.

8.2 Chile was a developing country which had made major, deliberate efforts to diversify its economy away from dependence on the production and export of one commodity, copper. Fresh fruits were the largest export item for Chile after copper, amounting to over US\$527 million in 1987. They also accounted for 75 per cent by value of all agricultural exports from Chile. Exports of fruit had increased by 4,186 per cent from their level of fourteen years ago. Chile was now the primary fruit exporter of the southern hemisphere.

8.3 For countries such as Chile, agriculture was a very important factor in socio-economic development. The sector's growth possibilities, which were basically determined by the international market's conditions of access and their transparency, were an urgent priority for development. Furthermore, the critical situation confronted by Chile - as by many other developing countries - due

to foreign external debt should have been taken into consideration by the EEC before it closed the principal market for the exports of a product of great importance to Chile.

8.4 It was clear that in restricting imports of apples from Chile the Community had paid no regard to the special needs of Chile as a developing country as it was obliged to do under Part IV. It made no conscious and purposeful effort to ensure that Chile secure a share of growth in international trade in apples commensurate with the needs of its economic development. It did not provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, as required under Article XXXVI. Nor did the Community refrain to the fullest extent possible from introducing non-tariff import barriers on apples, which were of particular export interest to Chile, a less-developed contracting party, as required under Article XXXVII:1(c). In fact it designed its restrictions to discriminate, through the initial operation of the licensing system, secret quota against Chile, non-entry of Chilean apples en route at the time of the suspension, publication of backdated quota, discrimination vis-à-vis other apple supplying countries as to similarity and transparency of restrictions, and discrimination in quota level. Chile also drew attention to its account of the EEC's consultations with southern hemisphere suppliers (paragraph 4.41 above) which, it argued, supported its claim under Part IV.

8.5 The EEC submitted that it did take these commitments seriously and that it made every effort to avoid having to take restrictive measures against a developing country. It had refrained from imposing import restrictions on apples against Chile in the past, even though Chile had in its view unduly profited from the moderation of other supplying countries. The EEC had also tried to avoid having to take restrictive measures in 1988, but there had been an insufficient comprehension of the situation on the side of its trading partners, in particular Chile, with whom the Community had made every effort to consult. On the other hand, Part IV did not, and could not, mean that the EEC should forego its rights or be obliged to discriminate against other contracting parties.

8.6 The EEC had met with representatives of southern hemisphere apple-supplying countries and had agreed to requests from them insofar as it could without jeopardizing the legitimate interests of the Community and the rights of other contracting parties under the General Agreement. Some amendments to the original regulations had been the result of these requests, e.g. the extension of the validity period of import licences from 30 to 40 days, the sole purpose of which was to allow greater facility for exporting countries and importers.

Standstill commitment of the Punta del Este Declaration

8.7 Chile recalled the so-called standstill commitment adopted by the CONTRACTING PARTIES under the Punta del Este Declaration, which read in part as follows:

"Commencing immediately and continuing until the formal completion of the negotiations, each participant agrees to apply the following commitments:

- (i) not to take any trade restrictive or distorting measure inconsistent with the provisions of the General Agreement or the instruments negotiated within the framework of GATT or under its auspices;
- (ii) not to take any trade restrictive or distorting measure in the legitimate exercise of its GATT rights, that would go beyond that which is necessary to remedy specific situations, as provided for in the General Agreement and the instruments referred to in (i) above ...".

8.8 Chile was acutely aware of the difficulties governments faced in maintaining or adopting liberal trade policies. Of all the contracting parties, only two had bound all of their tariff duties; one of them was Chile. Not only had Chile abided by the standstill commitment, in 1988 it had reduced the tariff level actually applied to less than half of the bound rate: 15 per cent across-the-board. It had not been easy for Chile to do this, given a current external debt of US\$19 billion, but it had done so. On the other hand, the European Community, which had far greater resources and a more diversified developed economic base than a small, developing country, had violated its commitment on standstill as well as its obligations under the General Agreement to exclude 100,000 tons of apples (60,000 tons from Chile), a minute percentage of its own production.

8.9 The EEC considered that an examination of the measures in question in relation to the standstill commitment of the Punta del Este Ministerial Declaration did not come within the Panel's terms of reference. Those terms of reference stated that the measures in question should be examined in the light of the relevant provisions of the General Agreement. The Ministerial Declaration was not part of those provisions. The standstill commitment was a political and not a legal commitment. It contained no obligations within the meaning of Article XXIII:1(a). It added nothing to the contractual obligations under the General Agreement. Compliance with that commitment might be raised in the Surveillance Body set up by the Committee on Trade Negotiations (as Chile had done) but not within a dispute settlement procedure under Article XXIII of the GATT.

9. Article XXIII:2 - Prima Facie Nullification or Impairment

9.1 Chile cited established GATT practice to the effect that "in cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of the GATT ..., the action would, prima facie, constitute a case of nullification or impairment" (BISD 11S/99, para. 15). It stated that the Panel should find therefore that as a result of the failure of the European Community to carry out its obligations under the General Agreement with respect to Articles I, X:1 first sentence, X:3(a), XI:1, XIII and Articles XXXVI:9 and XXXVII:1(b) of Part IV, there was a prima facie case of nullification or impairment of benefits accruing to Chile within the meaning of Article XXIII.

9.2 The EEC maintained that its arguments had demonstrated that it had not infringed any provision of the General Agreement by adopting the measures in question. Thus there was no prima facie case of nullification or impairment and consequently no grounds for conclusions or recommendations.

10. Compensation

10.1 Chile recalled that for fresh apples imported by the EEC during the period 1 April to 31 July (Ex. CCCN no. 0806), it had a Dillon Round Initial Negotiating Right with an 8 per cent ad valorem. It also had a principal supplying interest on subsequent EEC tariff concessions concerning imported fresh apples during that and other marketing periods. The Community had an obligation under Article II:1 and II:7 of Part I of the General Agreement to afford "treatment no less favourable" to apples imported from Chile than that provided for in the appropriate part of the EEC's schedule of concessions, apart from the exceptions authorized under the General Agreement.

10.2 Since, Chile argued, the Community's restrictions on imports of apples of Chilean origin were clearly inconsistent with EEC obligations under the General Agreement and were discriminatory both in intent and in application against Chile, they had nullified and impaired the value of the various concessions granted by the Community on fresh apples imported during the period in which the restrictions were in force. Even if the Panel concluded that the EEC had established that its restrictions fulfilled each and every one of the requirements of Article XI:2, Chile would still be entitled to compensation since the restrictions distorted the competitive relationship which would otherwise have

prevailed between Chilean suppliers and other suppliers on the Community market in the absence of such restrictions (BISD 1S/58). Compensation was appropriate since of the other possible recommendations - withdrawal of the restrictions, retaliatory withdrawal of concessions - one was meaningless as the measures had lapsed on 31 August 1988 and the other was a last resort which would not be in Chile's interests or consistent with its liberal trade policy.

10.3 Chile requested that the Panel make a finding of "retroactive prejudice" against it. (This had been discussed in the Uruguay Round Negotiating Group on Dispute Settlement.) The prejudice could be calculated on the basis of the losses and lost opportunities to Chilean exporters which had been demonstrated to the Panel. Chile also requested that the Panel propose that the CONTRACTING PARTIES recommend to the EEC that it take positive measures to compensate Chile for this damage. One possibility for compensation would be an appropriate reduction in the EEC duty rate during the peak period for Chilean apple shipments.

10.4 The EEC considered that Chile's suggested recommendations for compensation would be inappropriate even if the Community had violated a GATT provision. While agreeing that the question of panel recommendations on the question of compensation, and perhaps even retroactive compensation, could merit discussion in the Negotiating Group on Dispute Settlement, the EEC did not see even the possibility of such a recommendation on the basis of existing provisions and practices unless, perhaps, to the extent that a panel had been specifically mandated to do this. The Panel's terms of reference certainly did not allow it to go beyond the framework of the General Agreement, and in particular of Article XXIII:2, and create new obligations.

11. SUBMISSIONS BY OTHER CONTRACTING PARTIES

11.1 Argentina stated that, while the 70,000-ton quota it had been allocated under Regulation 1040/88 was in line with its export potential, the EEC measures as a whole had no basis under Article XI. There was no evidence that they were linked to a reduction in domestic production or to a need to remove a temporary surplus of a like product. Hence they were not justified under any of the criteria set out in Article XI:2 in order to qualify as an exception to Article XI:1. Furthermore Argentina argued that the EEC's consultations with Southern Hemisphere suppliers in the past had already suggested potential restrictions and could be said to have acted as indirect restrictions through the negative expectations they had aroused among exporters.

11.2 Canada likewise maintained that the EEC measures were contrary to Article XI:1 and not justified as an exception thereto under Article XI:2. Canada noted that it had exported up to 13,000 tons in the period of the year covered by the EEC restrictions. It was included in the "other countries" quota under Regulation 1040/88 (17,600 tons). This had been declared to be exhausted on 22 April 1988, i.e., two days after it was announced. Licences had been issued for 4,680 tons of apples from Canada in the period 15 February-22 April 1988.

11.3 Concerning the specific requirements of Article XI:2, Canada argued that the EEC did not have a temporary, but a chronic surplus of apples. Its protective measures, which were additional to the existing protection afforded by the CAP fruit and vegetable régime, were not justified by governmental measures on the internal market in terms of Article XI:2(c)(i). None such were in force, as the EEC did not effectively restrict the quantities of apples permitted to be produced or marketed. Canada noted that there was no restraint on production. The Community's régime was, it argued, mainly aimed at ensuring price support. Withdrawals, at prices well below market levels, provided at best a market of last resort, not a restriction on marketing. The producer organizations which were basic to the withdrawal scheme were voluntary; there were no quotas or limits set down in Regulation 1035/72 on marketing or production; and as the language of the Regulation was discretionary, producer organizations were not obliged to make withdrawals. Preventive withdrawal under Article 15a of

Regulation 1035/72 was also discretionary at the level both of member states and of producer organizations. It, likewise, was not effective in limiting marketing - it had been used in 1986/87 to less than half the authorized level.

11.4 Even were these discretionary schemes to be considered "government measures ..." in terms of Article XI:2(c)(i), Canada maintained that the import restrictions were not necessary to their enforcement. The domestic apple withdrawal and compensation measures operated independently of the quantity of third-country imports. The latter were already prevented from undermining prices by a reference price and countervailing levy provisions. Canada asked the Panel to recognize that, as the EEC's import measures were inconsistent with its GATT obligations, they constituted a case of nullification or impairment. Any resolution of the complaint should be on a m.f.n. basis.

11.5 South Africa submitted that the EEC's import restrictions were in breach of Article XIII, paragraphs 1, 2, 3 and 4. The shares in the global quota distributed among supplying countries were at variance with shares based upon the proportions supplied by third countries during a previous representative period. Therefore, the like product of all third countries was not similarly restricted. South Africa argued in particular that the difference between the global import quota and the average total quantity imported in the previous three years had been distributed on a discriminatory basis. Concerning Article XIII:2(d) and Article XIII:4, South Africa claimed that the EEC had not consulted with affected contracting parties as required and in accordance with its undertaking in L/6337, and in particular had not provided information requested under the provisions of Article XIII:3(a) and Article XIII:4. Therefore it had not sought to allocate quotas in agreement with substantially interested suppliers under Article XIII:2(d).

11.6 South Africa, as the principal supplier in the period concerned, argued that 166,000 tons was a smaller share of southern hemisphere supplies than it had had in any of the previous four years. Regarding the special factors which should have been considered, it argued that it had voluntarily restricted its exports to the EEC in 1987 (as it had done in 1976, 1979 and 1983). Thus voluntary export restraints had operated in 1987 - and the 1980 Panel had held that years in which VERs were in place could not be held to be representative for the purposes of quota allocation. Therefore South Africa maintained that for the determination of its quota share, 1984, 1985 and 1986 were the appropriate years to take as representative. This would result in a quota of 190,561 tons.

11.7 South Africa asked the Panel to find that the non-conformity of the EEC's import restrictions on dessert apples with Article XIII nullified or impaired benefits accruing to contracting parties, and to make appropriate recommendations to the CONTRACTING PARTIES.

11.8 In response to South Africa, the EEC said that although it had held consultations in 1987 with some of its southern hemisphere suppliers pursuant to its policy of concerted market management and discussions on export forecasts, these did not lead to voluntary restraint agreements in any legal sense, such as had led the 1980 Panel to discount 1976 as a representative year. Furthermore, since the 1980 Panel had considered that the reference period was the same for the application of Article XI:2 as for Article XIII, the replacement of 1987 by 1984, as argued by South Africa, would have lowered the three-year average for the global quota.

11.9 The EEC responded to Canada's arguments in terms of paras. 3.11 to 3.25 (above). More specifically, it maintained that Article XI:2(c)(i) did not require the governmental measures limiting domestic production or marketing to be compulsory. The EEC rejected as irrelevant Canada's argument that the Community régime was aimed primarily at price support. It cited the drafters' intentions as recorded in the Havana Reports to argue that under Article XI price support and marketing restrictions could co-exist. The EEC also rejected Canada's argument that the import restrictions were not necessary to the enforcement of the above measures. The reference price and duties applied to imports obviously

did not limit their quantity, which was what Article XI was about. As the domestic and imported apple markets were not in fact independent, substantial growth in imports necessarily undercut the effect of the domestic supply restrictions. The EEC considered that its 1988 import measures were therefore necessary and justified under Article XI:2.

12. FINDINGS

Introduction

12.1 The Panel first examined the EEC's system of restrictive licensing applied to imports of apples from April through August 1988 under Article XI, as consistency with this Article was the primary determinant of the conformity of the EEC's system with the General Agreement, before proceeding to consider the measures under Articles XIII and X and Part IV of the Agreement. In considering the facts and arguments relating to Article XI in particular, the Panel took note of the fact that a previous Panel, in 1980⁶, had reported on a complaint involving the same product and the same parties as the present matter and a similar set of GATT issues. The Panel noted carefully the arguments of the parties concerning the precedent value of this Panel's and other previous panels' recommendations, and the arguments on the legitimate expectations of contracting parties arising out of the adoption of panel reports. The Panel construed its terms of reference to mean that it was authorized to examine the matter referred to it by Chile in the light of all relevant provisions of the General Agreement and those related to its interpretation and implementation. It would take into account the 1980 Panel report and the legitimate expectations created by the adoption of this report, but also other GATT practices and panel reports adopted by the CONTRACTING PARTIES and the particular circumstances of this complaint. The Panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report. The Panel communicated this decision to the parties early in its proceedings to assist them in the presentation of their arguments.

Article XI:1

12.2 The Panel found that the system of restrictive licensing applied by the EEC to imports of apples from April through August 1988 constituted an import restriction or prohibition inconsistent with Article XI:1 of the General Agreement. The Panel noted that the EEC had presented no arguments to refute this conclusion.

Article XI:2(c)(i)

12.3 The relevant sections of Article XI:2 read:

"2. The provisions of paragraph 1 of this Article shall not extend to the following: ...

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced ..."

The Panel noted that the EEC invoked Article XI:2 to justify its import restrictions on apples. The Panel recalled that a contracting party invoking an exception to the General Agreement bears the burden

⁶BISD 27S/98-117.

of proving that it has met all of the conditions of that exception.⁷ In the present case, therefore, it was incumbent upon the EEC to demonstrate that the measures applied to imports of apples met each and every one of the conditions under Article XI:2(c)(i) and XI:2(c) last paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1. These conditions were:

- the measure on importation must constitute an import restriction (and not a prohibition);
- the import restriction must be on an agricultural or fisheries product;
- the import restriction and the domestic marketing or production restriction must apply to "like" products in any form (or directly substitutable products if there is no substantial production of the like product);
- there must be governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced;
- the import restriction must be necessary to the enforcement of the domestic supply restriction;
- the contracting party applying restrictions on importation must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and
- the restrictions applied under (i) must not reduce the proportion of total imports relative to total domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions.

12.4 The Panel observed that the requirements of Article XI:2(c)(i) for invoking an exception to the general prohibition on quantitative restrictions made this provision extremely difficult to comply with in practice. Indeed no contracting party had to date been found by a Panel to comply with all its requirements. The Panel was also aware that there existed widespread dissatisfaction with this provision and that its revision was under discussion. The Panel recalled, however, that it was not the function of panels to propose changes to the provisions of the General Agreement but to make findings regarding their interpretation and application.⁸ With these general considerations in mind, the Panel proceeded to examine the EEC's import restrictions on apples in the light of the conditions set out above.

The measure on importation must constitute an import restriction

12.5 The Panel followed the view that prohibitions on imports were not permitted under this part of Article XI.⁹ It considered that Article XI:2 (last paragraph) established conditions regarding the minimum quantity of imports that must be permitted; it did not regulate the distribution of that quantity of imports among supplying countries. As the EEC had at no time prohibited all imports of apples, its measures therefore constituted an import restriction, rather than an import prohibition in terms of Article XI:2(c)(i). The question of whether the EEC measures had operated as an effective prohibition of imports from Chile was examined under Article XIII of the General Agreement, which regulated the non-discriminatory administration of quantitative restrictions.

⁷Report of the Panel on "Canada - Administration of the Foreign Investment Review Act" (BISD 30S/140, 164); and Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253, p. 64).

⁸Ministerial Declaration of 1982, BISD 29S/16.

⁹Report of the Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada" (BISD 29S/91).

The import restriction must be on an agricultural or fisheries product

12.6 The Panel took account of longstanding GATT practice which classed as agricultural or fisheries products items specified in Chapters 1-24 of the CCCN, and concurred with both parties that the measures involved in this case applied to an agricultural product.

The import restriction and the domestic supply restriction must apply to like products, in any form (or directly substitutable products if there is no substantial production of the like product).

12.7 The Panel examined carefully the arguments of the parties on this issue, including the argument that differences in price, variety and quality between Chilean and EEC apples were such as to make them unlike products in terms of this GATT provision. It concluded that while such differences did exist, as they might for many products, they were not such as to outweigh the basic likeness. Dessert apples whether imported or domestic performed a similar function for the consumer and were both marketed as apples, i.e., as substantially similar products. The Panel therefore found that EEC and Chilean dessert apples were like products for the purposes of Article XI:2(c)(i).

There must be governmental measures which operate to restrict the quantities of a domestic product permitted to be marketed or produced

12.8 The Panel proceeded by examining first whether the EEC did have "governmental" measures consistent with Article XI:2(c)(i), and second whether such measures did operate to restrict domestic supply in terms of the same provision. The Panel noted that the EEC did not claim that it restricted production of apples, but that it effectively restricted their marketing, through a system of market withdrawals carried out mainly by producer groups. The Panel also took note of the argument that these could not be considered "governmental" measures in terms of Article XI:2(c) because of the voluntary basis of the organization and the non-obligatory method of their operation. The Panel recalled that the concept of "governmental" measure had been previously examined on a number of occasions in respect of different articles of the General Agreement. A 1960 Panel, examining the question of whether subsidies financed by non-governmental levy were notifiable under Article XVI, expressed the view that "... the question ... depends upon the source of the funds and the extent of government action, if any, in their collection".¹⁰ Another Panel found that the informal administrative guidance used by the Japanese Government to restrict production of certain agricultural products could be considered to be a governmental measure within the meaning of Article XI:2 because it emanated from the Government and was effective in the Japanese context.¹¹ A third Panel considered that legally non-mandatory measures could constitute restrictions within the meaning of Article XI:1 if "sufficient incentives or disincentives existed for non-mandatory measures to take effect ... [and] the operation of the measures ... was essentially dependent on Government action or intervention [because in that case] ... the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance".¹²

12.9 The Panel examined the EEC measures in the light of these decisions by the CONTRACTING PARTIES. It noted that the EEC internal régime for apples was a hybrid one, which combined elements of public and private responsibility. Legally there were two possible systems, direct buying-in of apples by Member State authorities and withdrawals by producer groups. Under the system of withdrawals by producer groups, which was the EEC's preferred option, the operational involvement of public

¹⁰Report of the Panel on "Review pursuant to Article XVI:5" (BISD 9S/192).

¹¹Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253, p. 79).

¹²Report of the Panel on "Japan - Trade in Semi-Conductors" (L/6309, p. 40).

authorities was indirect. However, the régime as a whole was established by Community regulations which set out its structure. Its operation depended on Community decisions fixing prices, and on public financing; apples withdrawn were disposed of in ways prescribed by regulation. The Panel therefore found that both the buying-in and withdrawal systems established for apples under EEC Regulation 1035/72 (as amended) could be considered to be governmental measures for the purposes of Article XI:2(c)(i).

12.10 Having made the above finding, the Panel went on to examine whether these governmental measures "operated to restrict the quantities of [EEC apples] permitted to be marketed". The Panel noted that the 1980 Panel had reached the conclusion that:

"the EEC did restrict quantities of apples permitted to be marketed through its system of intervention purchases by member States and compensation to producer groups for withdrawing apples from the market".¹³

That Panel did not, however, explain the basis for this conclusion. The Panel also noted that a 1978 Panel¹⁴ had come to the opposite conclusion about the consistency with Article XI:2(c)(i) of the EEC system set up under the same Regulation 1035/72 as it applied to tomatoes. While taking careful note of the earlier panel reports, the Panel did not consider they relieved it of the responsibility, under its terms of reference, to carry out its own thorough examination on this important point.

12.11 The Panel's scrutiny of the EEC market intervention scheme for apples led it to distinguish a number of features particularly relevant to the application of Article XI:2(c)(i). The system's operation and targets were essentially price-related; it was activated or suspended according to market price movements in relation to target prices fixed by the EEC. This was true of both direct intervention (buying-in) by member states and the decentralized withdrawal of apples from the dessert apple market by producers' organizations which could take place at a slightly higher price level than the former. The system thus operated to provide a price floor to EEC producers. In certain years it had resulted in the withdrawal of substantial quantities of apples from the consumer market for dessert apples; but there was no quantitative target or limit defined by the EEC either for these withdrawals or for the overall quantity marketed. The overall quantity withdrawn in any year was a residual amount, resulting from the interplay of market forces instead of being determined by the EEC authorities. Likewise there was no quantitative restriction on supply by producers - i.e., the quantity they could offer for sale. The EEC régime, in assuring producers a minimum price but prescribing no ceiling on the quantity eligible for this guarantee, could in fact act as an incentive for producers operating at the margin of profitability and thereby increase the total amount of apples offered for sale. As noted in paragraph 12.8 above, marketing restrictions under Article XI:2(c)(i) may be implemented and enforced in various ways; but the Panel considered that the above features of the EEC system raised the more basic issue of whether it constituted a marketing restriction within the meaning of Article XI:2(c)(i) at all.

12.12 The Panel considered it necessary to examine a basic interpretative issue involved in this GATT requirement - i.e., did Article XI:2(c)(i) cover only schemes which set quantitative limits on the amount producers could offer for sale, or did it also cover schemes which could result in a reduction of products reaching the consumer through withdrawals activated by reference to a floor price without quantitative targets? The Panel examined this interpretative issue in the light of the wording of Article XI:2(c)(i), the context in which this provision appears in the General Agreement, the purpose of the General Agreement and the intentions of the drafters.

¹³BISD 27S/112.

¹⁴Report of the Panel on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" (BISD 25S/68-107).

12.13 The Panel noted that Article XI:2(c)(i) referred to governmental measures which "operated to restrict the quantities" of the domestic products "permitted to be marketed or produced". Given the ordinary meanings of "to permit" (to authorize or allow) and "to market" (to expose for sale in a market or to sell) the wording of the provision suggested in the view of the Panel that the governmental measures must include an effective limitation on the quantity that domestic producers are authorized or allowed to sell. Measures which simply prevented consumers from buying products below certain prices would not appear to be covered by this wording. If the withdrawal of a product from the market without any governmental limitation on the amount that could be sold was included within the purview of Article XI:2(c)(i), the words "permitted to be" would not have any function. The Panel took into consideration, however, the argument that in the official languages of the General Agreement this provision could possibly be interpreted in a way which concentrated more on the market effects than on the government policy direction. It had been argued, for example, that the fact that a quantity of apples had been withdrawn from the dessert apple market as a result of governmental measures amounted, in effect, to a marketing restriction in terms of Article XI:2(c)(i). This interpretation would involve a more flexible reading of "permitted to be marketed". The Panel recalled the legal principle that exceptions were to be interpreted narrowly and considered that this argued against such a flexible interpretation of Article XI:2(c)(i).

12.14 As to the context in which the provision appears, the Panel noted that the final paragraph of Article XI:2 stipulated that imports may be restricted under Article XI:2(c)(i) only in proportion to domestic production, whether the government has chosen to restrict the quantities permitted to be marketed or those permitted to be produced. It is thus clear that in the case of marketing restrictions, also, imports may only be reduced to the extent that production declines. Schemes which operate to prevent, or effectively discourage, producers from selling their products beyond fixed amounts can reasonably be expected to have an effect on production because producers will tend to produce only up to the quantitative ceiling set. By contrast, a scheme which imposes no limitations on what producers may sell cannot, by itself, bring about a restriction of production. It therefore follows from the context of the provision that such a scheme would not be covered by Article XI:2(c)(i). The Panel also noted that, unlike Article XI:2(c)(i), Article XI:2(c)(ii), which concerned the removal of a temporary surplus, did not stipulate any restriction on domestic output in order to justify import restrictions. A withdrawal programme not capable of limiting production could possibly come under Article XI:2(c)(ii), provided that the specific requirements of the provision were met. The difference between the two sub-paragraphs was a further contextual indication that Article XI:2(c)(i) could not be interpreted as widely as argued by the EEC.

12.15 Concerning the purpose of Article XI:2(c)(i), the Panel recalled that the title of Article XI was "General Elimination of Quantitative Restrictions". Article XI:2(c)(i) made an exception to this general rule. It permitted governments, under certain conditions, to enforce domestic output restrictions at the border. The Panel furthermore considered that, as one of the basic functions of the General Agreement was to provide a legal framework for the exchange of tariff concessions, great care had to be taken to avoid an interpretation of Article XI:2(c)(i) which would impair this function. The Panel noted that Article XI:2(c)(i) - unlike all provisions of the General Agreement specifically permitting actions to protect domestic producers¹⁵ - did not provide either for compensation to be granted by the contracting party invoking it, or for compensatory withdrawals by contracting parties adversely affected by the invocation. This reflected the fact that Article XI:2(c)(i) was not intended to be a provision permitting protective actions. If Article XI:2(c)(i) could be used to justify import restrictions which were not the counterpart of any governmental measure capable of limiting production, the value of the General Agreement as a legal frame-work for the exchange of tariff concessions in the agricultural field would be seriously impaired.

¹⁵E.g., Articles XVIII:A and C, XIX and XXVIII.

12.16 The Panel also noted that during the drafting of the provision it had been agreed that the exception under Article XI:2(c)(i):

"... was not intended to provide a means of protecting domestic producers against foreign competition, but simply to permit, in appropriate cases, the enforcement of domestic governmental measures..."¹⁶. The drafters had also given some guidance as to the nature of the governmental measures intended to be covered by the provision. They recognized that output limitation might co-exist with subsidies¹⁷, but that:

"... in interpreting the term "restrict" for the purposes of paragraph 2, the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions."¹⁸

12.17 In the light of the considerations set out above, the Panel found that the EEC measures taken under the intervention system for apples did not constitute marketing restrictions of a type which could justify import restrictions under Article XI:2(c)(i).

12.18 Having made the above finding, the Panel did not consider it needed to continue its examination under the remaining Article XI:2(c)(i) criteria, in particular the question of whether the import restrictions were "necessary" in terms of this provision. It then proceeded to examine the EEC restrictions under Article XI:2(c)(ii).

Article XI:2(c)(ii)

12.19 Article XI:2(c)(ii) provides an exception to Article XI:1 for "import restrictions ... necessary to the enforcement of government measures which operate to remove a temporary surplus of the like domestic product ... by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level". The Panel also took note of the views of the 1980 Panel on this point, noting that that Panel's finding of a "temporary surplus above the recurring surplus" related only to the situation in 1979. Article XI:2(c)(ii) clearly required the Panel to consider whether the EEC's surplus at the time the import restrictions were imposed, i.e. April 1988, had been demonstrated to be temporary. The Panel considered that the only practicable way to reach a finding on this point was to compare the EEC's apple surplus in 1988 with that in the previous years. From the statistics available to it (see Table I), it observed that while amounts withdrawn had varied in the years up to and including the 1987-88 marketing year, stocks had remained relatively stable at levels which indicated a substantial structural surplus. The Panel thus found that the 1988 surplus could not be considered a temporary one, and that therefore the EEC did not meet the conditions for imposing import restrictions under Article XI:2(c)(ii). In the light of this finding the Panel did not consider it necessary to examine whether the EEC measures were in conformity with the other requirements of this provision.

¹⁶Havana Reports, p. 89, paragraph 16.

¹⁷Havana Reports, p. 90, paragraph 22.

¹⁸Havana Reports, p. 89, paragraph 17.

Article XIII

Non-discriminatory administration of quantitative restrictions

12.20 The Panel recognized that, given its finding that the EEC measures were a violation of Article XI:1 and not justified by Article XI:2(c)(i) or (ii), no further examination of the administration of the measure would normally be required. Nonetheless, and even though the Panel was concerned with measures which had already been eliminated, in view of the questions of great practical interest raised by both parties it considered it appropriate to examine the administration of the EEC measures in respect of Article XIII.

12.21 The first paragraph of the Article established the general obligation of non-discrimination in the administration of quantitative restrictions. The Panel noted that Commission Regulation 984/88 of 12 April 1988 suspended the issue of import licences in respect only of apples originating in Chile, eight days before the publication of import quotas. The Panel found that this measure constituted a prohibition in terms of Article XIII:1, and that it was applied contrary to that provision since the like products of all third countries had not been similarly prohibited. The Panel then proceeded to consider the EEC administration of the import quotas under Regulation 1040/88 in light of the subsequent provisions which delineated more specific requirements to achieve the aim of Article XIII:1.

Article XIII:2

12.22 The Panel noted that the first sentence of Article XIII:2 committed contracting parties applying import restrictions to any product to "aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions", and sub-paragraph (d) provided more specific requirements for the allocation of quota shares. The Panel considered that it would not be useful for it to make a finding regarding the actual size of quota shares. It observed that the previous three years were normally considered to be the appropriate reference period, with due account taken of relevant special factors. The Panel did not construe "special factors" applicable to only one, or some, exporters as sufficient reason to change the base period which applied to all - though these special factors should be taken into account in considering individual quota allocations. Therefore the Panel found that the reference period applied by the EEC for the purpose of allocating quota shares - i.e., the previous three years - was consistent with its obligations under Article XIII.

12.23 Concerning "special factors", the Panel took into account the Interpretative Note to paragraph 4 of Article XIII, which refers to the Note relating to "special factors" in connection with the last sub-paragraph of Article XI:2. This reads:

"The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement".

Though not included in the General Agreement, the following interpretative note had been added at Havana to the Charter¹⁹:

"The term "special factors" as used in Article 22 [XIII] includes among other factors the following changes, as between the various foreign producers, which may have occurred since the representative period:

¹⁹Havana Reports, page 95, paragraph 52; Havana Charter Interpretative Note ad Article 22.

- (1) changes in relative productive efficiency;
- (2) the existence of new or additional ability to export; and
- (3) reduced ability to export."

It was also agreed at Havana that "changes artificially brought about ... by means not permissible under other provisions of the Charter were not to be regarded as special factors for the purposes of paragraph 2(c) and Article 22 [XIII]".

12.24 The Panel further recalled that Article XIII:4 permits the party applying the restriction to initially select the representative period and appraise the special factors. It should subsequently consult, upon their request, with contracting parties seeking reappraisal of these factors. The Panel considered that this requirement for consultation was designed to ensure that due account was taken of special factors in terms of Article XIII:2(d) and in the light of the interpretation noted above. The Panel found that the overall trend towards an increase in Chile's relative productive efficiency and export capacity had not been duly taken into account, nor had the temporary reduction in export capacity caused by the 1985 earthquake. On the other hand the Panel did not find any basis in the General Agreement for the EEC taking into account as special factors the "restraint" alleged to have been exercised in previous years by other suppliers. Therefore the Panel found that the account taken of special factors by the EEC in allocating Chile's quota share did not meet the requirements of Article XIII:2(d).

Article XIII:3(b) and (c)

12.25 Concerning the notification of quotas and quota shares, the Panel noted that Article XIII:3(b) requires that "in the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period ...". And Article XIII:3(c) requires that "in the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof". The Panel also took into account the requirement of Article X:1 to publish trade regulations, including prohibitions or restrictions on imports, promptly in such a manner as to enable governments and traders to become acquainted with them. In the context of Article XIII's overall concern with the non-discriminatory application of quantitative restrictions, it interpreted Article XIII:3(b) and (c) together as requiring that both the total quota and shares allocated in it be publicly notified for a specified future period. The Article XIII:3(c) requirement to promptly notify other contracting parties with an interest in supplying the product would otherwise be meaningless, as would the Article XIII:3(b) provision for supplies en route to be counted against quota entitlement.

12.26 The Panel therefore considered that the allocation of back-dated quotas, that is, quotas declared to have already been filled at the time of their announcement, did not conform to the requirements of Article XIII:3(b) and Article XIII:3(c). It found that EEC Commission Regulation 1040/88 constituted a back-dated quota in respect of Chile, since although it published a quota share for Chile it simultaneously declared that share to be filled and, in fact, continued the suspension of imports from Chile enacted eight days before quotas were published. The EEC had therefore not observed the notification requirements of Article XIII:3(b) and (c). Moreover, the fact that such a back-dated quota was allocated to only one supplying country, Chile, resulted in the discriminatory administration of the restriction in violation of Article XIII:1.

12.27 The Panel went on to examine the EEC's treatment of goods en route, in the light of Article XIII:3(b)'s stipulation that "any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry". The Panel also took note of the (non-obligatory) Standard Practices for the Administration of Import and Export Restrictions approved by the CONTRACTING PARTIES in 1950.²⁰ These state in part that "any new or intensified restrictions should not apply to goods shown to the satisfaction of the control authority to have been en route at the time the change was announced ...". The Panel noted that the EEC, in the preamble to Regulation 962/88, suspending the issue of import licences for Chilean apples, had stated that "... no account should be taken of goods being transported to the Community other than those for which import licences have been issued" but the issue of import licences before sailing was not mandatory under EEC Regulations. The Panel found that by allowing entry only to those goods en route for which an import licence had been issued prior to the Regulation's entry into force the EEC had added a requirement for which there was no basis in Article XIII. The wording of the Article clearly meant that apples en route - i.e., on board and destined for the EEC - at the time the suspension of Chilean import licences was published should have been admitted to the EEC. The Panel was also aware of the interim decision of the President of the European Court of Justice, dated 10 June 1988, which suspended the operation of the EEC regulations enacting the measures in question in respect of 89,514 cartons of Chilean apples which had been in transit but for which an import licence had not been issued at the time the issue of such licences was suspended for Chile.

Article I

12.28 The Panel considered it more appropriate to examine the consistency of the EEC measures with the most-favoured-nation principles of the General Agreement in the context of Article XIII (see above). This provision deals with the non-discriminatory administration of quantitative restrictions and is thus the lex specialis in this particular case.

Article X

12.29 The Panel found that the EEC had observed the requirement of Article X:1 to publish the measures under examination "promptly in such a manner as to enable governments and traders to become acquainted with them" through their publication in the Official Journal of the European Communities. It noted that no time limit or delay between publication and entry into force was specified by this provision. However it interpreted the requirements of this provision as clearly prohibiting the use of back-dated quotas, whose use by the EEC in the case of Chile had already been the subject of a finding under Article XIII (above).

12.30 The Panel further noted that the EEC Commission Regulations in question were directly applicable in all of the ten Member States concerned in a substantially uniform manner, although there were some minor administrative variations, e.g. concerning the form in which licence applications could be made and the requirement of pro-forma invoices. The Panel found that these differences were minimal and did not in themselves establish a breach of Article X:3. The Panel therefore did not consider it necessary to examine the question whether the requirement of "uniform" administration of trade regulations was applicable to the Community as a whole or to each of its Member States individually.

²⁰GATT/CP.5/Rev.1.

Part IV

12.31 The Panel examined the EEC measures in relation to the objectives and commitments embodied in Articles XXXXVI and XXXVII of Part IV of the General Agreement, particularly XXXVII:1(b) which states that "the developed contracting parties shall to the fullest extent possible ... refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less developed contracting parties"; and XXXVII:3(c), which requires developed contracting parties to "have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties".

12.32 The Panel found that the EEC's import measures on dessert apples did affect a product of particular export interest to less-developed contracting parties. It noted that the EEC had held consultations with affected suppliers and had amended its regulations, but these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV. Following a careful examination of this issue, the Panel could not find that the EEC had made appropriate efforts to avoid taking protective measures on apples originating in Chile. However, the Panel noted that the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I-III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I-III. As the Panel had found the EEC's import restrictions to be inconsistent with specific obligations of the EEC under Part II of the General Agreement, it therefore did not consider it necessary to pursue the matter further under Article XXXVII.

Standstill

12.33 The Panel regarded the Standstill Commitment of the Punta del Este Declaration as outside its mandate. The Punta del Este Declaration contained commitments in the context of a plan for continuing negotiations whose outcome was yet to be decided. The Punta del Este Standstill commitments had their own special forum - the Surveillance Body established by the Committee on Trade Negotiations - to which any complaint concerning them should be taken. These commitments could therefore not be considered to be obligations within the meaning of Article XXIII:1(a).

Compensation

12.34 The Panel considered carefully Chile's arguments for a recommendation of compensation against the EEC, and the EEC's opposing arguments.

12.35 The Panel observed that it was 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. It noted that there was no provision in the General Agreement obliging contracting parties to provide compensation, and that the Annex to the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance indicated that:

"... The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement."²¹

²¹BISD 26S/216.

The Panel further recalled that a 1965 Secretariat note discussed this issue in relation to residual quantitative restrictions affecting developing countries. This note indicated:

"... Where a proposal for compensation has been made, it would appear that it is open to the CONTRACTING PARTIES to make an assessment of the loss sustained ... and to make a recommendation that pending elimination of these restrictions the country applying such restrictions should consider the establishment of other appropriate concessions which would serve to compensate this loss. There are, however, two points which need to be noted in this connection. Firstly, any such recommendation under the provisions of the present Article XXIII can be implemented only to the extent that it proves acceptable to the contracting party to whom it is addressed. If such contracting party is not in a position to accept the recommendation, the final sanction must remain the authority for withdrawing equivalent obligations as provided in paragraph 2 of Article XXIII.

Secondly, the nature of the compensatory concessions and the items on which these are offered would have to be determined by the contracting party to whom the recommendation is directed and would have to be a matter of agreement between the parties concerned. It would not be possible for a panel or other body set up by the CONTRACTING PARTIES to adjudicate on the specific compensations that should be offered ..."²²

12.36 The Panel endorsed the views contained in this note. It recognized that it would be possible for the EEC and Chile to negotiate compensation consistent with the provisions of the General Agreement; however the Panel did not consider that it would be appropriate for it to make a recommendation on this matter.

13. CONCLUSIONS

13.1 The main conclusions of the Panel were that:

- the EEC restrictions on imports of apples were inconsistent with Article XI:1 and were not justified by Article XI:2;
- the administration of the quotas resulted in a discriminatory application of import restrictions contrary to Article XIII; and
- the operation of a back-dated import restriction in respect of Chile was inconsistent with Articles X and XIII.

²²COM.TD/5, March 1965.