

GENERAL AGREEMENT ON
TARIFFS AND TRADE

RESTRICTED

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EUROPEAN COMMUNITY PROGRAMME OF MINIMUM IMPORT PRICES,
LICENCES AND SURETY DEPOSITS FOR CERTAIN
PROCESSED FRUITS AND VEGETABLES

Report of the Panel

I. INTRODUCTION

1.1. The Panel's terms of reference were established by the Council on 15 July 1976 (C/M/115, pages 4 and 5) as follows:

"To examine the United States complaint concerning the minimum import price for tomato concentrates and the systems of licensing and surety deposits applied by the Community in respect of imports of certain processed fruits and vegetables, that

- the system of minimum import prices for tomato concentrates maintained by the EEC is not consistent with the obligations of the EEC under the GATT;
- the licensing and surety deposit systems maintained by the EEC are not consistent with the obligations of the EEC under the GATT;
- the EEC systems of minimum import prices, licensing and surety deposits nullify or impair benefits accruing to the United States under the GATT.

In examining the complaint, the Panel shall take into account all pertinent elements, including the Council's discussions on the question."

1.2. The Chairman of the Council informed the Council of the agreed composition of the Panel on 12 November 1976 (C/M/117, page 23):

Chairman: Mr. Carlo S.F. Jagmetti (Switzerland)

Members: Mrs. Nimal L. Breckenridge (Sri Lanka)
Mr. Mauri Eggert (Finland)
Mr. Viktor Segalla (Austria)
Mr. Takashi Yoshikuni (Japan)

With this composition, the Panel held ten meetings from 2 December 1976 to 28 March 1977.

1.3. Subsequently, at the Council meeting on 14 March 1978 (C/M/124, page 21) the Chairman informed the Council that Mr. Eggert and Mr. Yoshikuni had been transferred from Geneva and were no longer available to serve as members of the Panel. He further informed the Council that the new agreed composition of the Panel was the following:

Chairman: Mr. Carlo S.F. Jagmetti (Switzerland)

Members: Mrs. Nimal L. Breckenridge (Sri Lanka)
Mr. Erik Hagfors (Finland)
Mr. Viktor Segalla (Austria)
Mr. Kornelius Sigmundsson (Iceland)

With this composition, the Panel held thirteen meetings from 23 December 1977 to 16 June 1978.

1.4. In the course of its work the Panel held consultations with the European Communities and the United States. Background arguments and relevant information submitted by both parties, their replies to questions put by the Panel, as well as relevant GATT documentation served as a basis for the examination of the matter. In addition, Australia, having requested Article XXIII:1 consultations with the Community concerning the same measures (L/4322), submitted a written presentation to the Panel outlining Australia's interest in the matter and supporting the United States allegation that these measures were not in accordance with the Community obligations under the GATT.

II. FACTUAL ASPECTS

2.1. The following is a brief description of the factual aspects of the Community measures as the Panel understood them.

2.2. On 22 July 1975, the Council of the European Communities adopted Regulation (EEC) No. 1927/75 which stated in Article 2 that a minimum import price for tomato concentrates falling within sub-heading 20.02 C of the Common Customs Tariff would be fixed each year before 1 April for the subsequent marketing year. This Article further stated the factors that were to be taken into account when the minimum price was established.

2.3. This Article further stated that a special minimum price would be fixed for imports into the new Member States until 31 December 1977 and that this special minimum price would be aligned by stages with the minimum price established for the original Member States.

2.4. The foregoing provisions of Article 2 of Council Regulation (EEC) No. 1927/75 were replaced by identical provisions contained in Article 3 of Council Regulation (EEC) No. 516/77 which became effective on 1 April 1977.

2.5. Article 4 of Council Regulation (EEC) 1927/75 stated that any imports into the Community of the products listed in the Annex (recorded in paragraph 2.7) would be subject to the production of an import certificate, which would be issued by Member States to any interested party who applied for such a certificate, irrespective of his place of establishment within the Community, and that the certificate would be valid for an import transaction carried out within the Community.

2.6. The second paragraph of this Article stated that the issue of an import certificate would be conditional upon the following:

- with respect to all products, the lodging of a security to guarantee the undertaking to effect certain imports for as long as the certificate was valid, which security, except in cases of force majeure, would be forfeit in whole or in part if the imports were not effected or were effected only in part within the period;
- for tomato concentrates, the lodging of an additional security to guarantee that the free-at-frontier price of the products to be imported under cover of the certificate plus the customs duty payable thereon would together be equal to or more than the minimum price or the special minimum price, whichever was appropriate. The security would be forfeit in proportion to any quantities imported at a price lower than the minimum price or than the special minimum price; however, the lodging of such additional security would not be required for products originating in third countries which undertook, and were in a position, to guarantee that the price on import into the Community would not be less than the minimum price for the product in question, and that all deflection of trade would be avoided.

2.7. The Annex referred to in paragraph 2.5 read as follows:

ANNEX

CCT heading No.	Description
ex 20.02 C	Tomato concentrates
ex 20.02 C	Peeled tomatoes
ex 20.06 B	Peaches in syrup
ex 20.07 B	Tomato juice
20.02 A	Mushrooms
ex 20.06 E	Pears
08.12 C	Prunes ¹
ex 20.02 G	Peas
ex 20.02 G	Beans in pod
ex 08.10 A)	
ex 08.11 E)	
ex 20.03)	Raspberries
ex 20.05)	
ex 20.06 B II)	

¹From 1 January 1978

2.8. The foregoing provisions of Article 4 of Council Regulation (EEC) No. 1927/75 were replaced by identical provisions contained in Article 10 of Council Regulation (EEC) No. 516/77, which became effective on 1 April 1977. The foregoing Annex was replaced by an identical Annex IV to Council Regulation (EEC) No. 516/77.

2.9. Council Regulation (EEC) No. 1931/75 of 22 July 1975 fixed, for tomato concentrates with a dried extract content of 28 to 30 per cent, in immediate packaging of not less than 4 kgs., a minimum import price of 60 units of account per 100 kgs., and a special minimum price of 40 units of account per 100 kgs. These prices included customs duties and were applied from 1 September 1975 until 30 June 1976. Council Regulation (EEC) No. 1197/76 of 18 May 1976 raised the minimum price to 64 units of account and raised the special minimum price to 48 units of account for the period from 1 July 1976 until 30 June 1977. Council Regulation (EEC) No. 1361/77 of 20 June 1977 raised the minimum price to 66 units of account per 100 kgs., and raised the special minimum price to 57 units of account per 100 kgs. The minimum price was applicable for the marketing year from 1 July 1977 until 30 June 1978, while the special minimum price was applicable from 1 July 1977 until 31 December 1977.

2.10. Commission Regulation (EEC) No. 2104/75 of 31 July 1975 established special detailed rules for the application of the system of import licences for products processed from fruits and vegetables. Article 3 of this regulation stated that, without prejudice to the application of safeguard action, import licences, with or without advance fixing of the levy, would be issued on the fifth working day following that on which the application was lodged.

2.11. Article 4 of this Commission Regulation stated that import licences with or without advance fixing of the levy, would be valid for seventy-five days from their actual day of issue.

2.12. Article 5 of this Commission Regulation established the amount of the security for import licences, without advance fixing of the levy, for each product as follows:

CCT heading No.	Description of goods	Amount in u.a./100 kgs. net
ex 20.02 C	Peeled tomatoes	0.5
ex 20.02 B	Peaches in syrup	0.5
ex 20.06 B	Tomato juice	0.5
20.02 A	Mushrooms	1.0
ex 20.06 B	Pears	0.5
08.12 C	Prunes ¹	1.0
ex 20.02 G	Peas	0.5
ex 20.02 G	French beans	0.5
ex 08.10 A)		0.5
ex 08.11 E)		0.5
ex 20.03)	Raspberries	0.5
ex 20.05)		0.5
ex 20.06 B II)		0.5
		Amount in u.a./100 kgs. including immediate packings
ex 20.02 C	Tomato concentrates	1.0

¹From 1 January 1978

2.13. Article 6 of this Commission Regulation established the amount of the security for import licences, with advance fixing of the levy, for each product as follows:

CCT heading No.	Description of goods	Amount in u.a./100 kgs. net
ex 20.06 B	Peaches in syrup	0.75
ex 20.07 B	Tomato juice	0.75
ex 20.06 B	Pears	0.75
ex 20.03)		1.10
ex 20.05 C I)		2.00
ex 20.05 C II)	Raspberries	0.75
ex 20.06 B II)		0.75

2.14. Article 7 of this Commission Regulation established the additional security to enforce the minimum import price for tomato concentrates at 10 units of account per 100 kgs., including immediate packings. This Article further stated that the additional security would be released:

- (a) in respect of quantities for which the party concerned had not fulfilled the obligation to import;
- (b) in respect of quantities imported for which the party concerned furnished proof that the minimum price, or as the case may be the special minimum price, had been respected.

Such proof would be furnished by production of:

- the customs entry for home use in respect of the product concerned, or a certified copy thereof,
- a copy of the purchase invoice for the product concerned, and
- a banker's declaration certifying that payment of the purchase price shown on the invoice had been effected.

2.15. This Article, as amended by Commission Regulation (EEC) No. 213/78 of 1 February 1978, further stated that this additional security would be forfeit if the applicant had not provided one of the proofs necessary for its release within six months from the last day of validity of the licence.

2.16. The Panel noted that all of the tariff headings and products listed in the Annex contained in paragraph 2.7. were bound in the Community's GATT Schedule, with the following exceptions:

- ex 20.06 B Peaches in syrup, containing added spirit
- 20.02 A Mushrooms
- ex 20.06 B Pears, containing added spirit
- ex 08.11 E Raspberries, provisionally preserved

III. MAIN ARGUMENTS

Article XI:1

3.1. The representative of the United States noted that Article XI:1 prohibited the institution of any restriction other than duties, taxes or other charges whether made effective through quotas, import or export licences or other measures.¹ He argued that Article XI:1 was violated

¹Article XI:1 reads: No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

by the minimum import price for tomato concentrates which prohibited the importation of goods below a certain price and was, therefore, a restriction on the importation of those goods. In practical effect, he argued, the minimum import price served as a bar to lower quality products which, if their price was raised to the minimum price in order to gain access to the Community, would not be competitive in the Community market place. He further argued that the effect of the minimum import price was to artificially raise prices for the benefit of Community producers by limiting imports.

3.2. He charged that the import licensing system and the associated security deposit system were devices to facilitate the imposition of restrictions and themselves served as a bar and a restriction on importation in violation of Article XI:1. He argued that this licensing system did not work automatically and, in fact, served as an impediment to trade through burdensome administrative procedures and through the requirement of a security deposit which itself was an additional burden to trade which had no justification under the GATT. He further argued that this licensing system violated Article XI by encumbering trade and interfering with the normal contractual arrangements between buyers and sellers.

3.3. The representative of the European Communities stated the opinion that the minimum import price and associated additional security system for tomato concentrates was indeed a measure falling within the purview of Article XI:1. He stated that the mechanics and the objective of the system showed that the measures applied, i.e. the minimum import price and the security, could not be appreciated independently, but in their totality as a combination of measures put in place with the objective of evening out import prices, it being understood that each such measure could not be used separately in order to attain this objective. He argued that the main obligation of the importer was to respect the minimum import price so that, in principle, imports of tomato concentrates into the Community were allowed, but not below the minimum price level. He further argued that, in order to ensure compliance with this minimum import price regulation, the importer must lodge a security which was an administrative measure intended to ensure compliance with the minimum price requirement and was, therefore, an obligation derived from the obligation to observe the minimum import price requirement.

3.4. He argued that the restriction and the tax concept were mutually exclusive and that one could not, in good logic, argue that the system was at the same time inconsistent with Article XI because it restricted imports and with Article II because it provided for the collection of a charge. Consequently, he argued, the minimum import price and additional security system for tomato concentrates was, in the view of the Community, a measure which fell within the purview of Article XI and Article XI alone, so that it should be examined only in the light of the provisions of this Article.

3.5. With regard to the import certificate and associated security system applied for all of the specified products, he argued that this measure was an administrative formality in accordance with the provisions of Article VIII. He argued that, since these import certificates were issued automatically and unrestrictedly upon request, this system did not constitute a restriction of the type meant to be prohibited by Article XI:1.

Article XI:2(c)(i) and (ii)

3.6. The representative of the European Communities argued that the minimum import price and associated additional security system for tomato concentrates qualified for the exemptions offered by Article XI:2(c)(i) and (ii) from the provisions of Article XI:1.^{1/} He argued that this system

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Article XI:2(c) reads:

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

- (a) ...
- (b) ...
- (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, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted;
 - or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
 - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned."

had been established to prevent supplies from coming from third countries at prices which could adversely affect the existence, in the fresh tomato market, of a system of intervention prices which resulted in the withdrawal of fresh tomatoes from the market and the limitation of marketing and production of tomato concentrates.

3.7. The representative of the United States presented the view that the minimum import price for tomato concentrates could not be justified as an exemption allowed under Article XI:2(c)(i) and (ii). He noted that Article XI:2(c) gave an exemption for import restrictions on any agricultural or fisheries product imported in any form, necessary to the enforcement of certain specified governmental measures. He argued that tomato concentrate was not an "agricultural ... product imported in any form" on which import restrictions could be allowable under some circumstances. He noted that Article XI:2(c) contained a definition of the term "in any form" based on language in the Havana Charter as follows:

"the term 'in any form' in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective."¹

3.8. Therefore, he argued, the three requirements in Article XI:2(c) were: first, that the product on which the restriction was placed be a perishable product; secondly, that it compete directly with the fresh product; and thirdly, that there be a restriction on the fresh product. He charged that none of these requirements were met in the case of the Community's system of minimum import price for tomato concentrates.

¹Ad. Article XI, page 66, Basic Instruments and Selected Documents, Volume IV.

3.9. He referred to the notes concerning the term "in any form"¹ in the Analytical Index, and argued that tomato concentrate, either in tins or barrels, was not a perishable product. He quoted the opinion of food technologists in this field that tomato concentrate, whether packed in tins or barrels, did not have characteristics of perishability in the general meaning of the term as it applied to agricultural products. He stated that with proper and normal handling and storage, tomato concentrate retained its full value for several years.

3.10. He noted that Ad. Article XI stated that the product which was still perishable had to compete directly with the fresh product and argued that tomato concentrate did not compete with the fresh product except insofar as the fresh product was processed industrially into tomato concentrate and therefore lost its characteristics of freshness. Therefore, he argued, there was no direct competition between canned or barrelled tomato concentrate and its use, and the fresh tomato and its use.

3.11. With respect to the term "in any form" as used in Article XI:2(c), the representative of the European Communities argued that the concept of "perishable" goods was an extremely loose notion and it was difficult to determine at what stage a product could be regarded as perishable and at what stage as not perishable. Moreover, he argued that since the text of the General Agreement did not include this term there was in any case no interpretation that could be deemed authentic or even merely logical or economic. Furthermore, he stated that the United States references with

¹These notes on page 58, Analytical Index, Third revision, read:

"(iii) "in any form" (paragraph 2(c)). This was meant to cover only "those earlier stages of processing which result in a perishable product" (e.g. kippers). (EPCT/A/PV/19, page 43).

In the interpretative Note to the GATT the word "perishable" is used. This wording was changed at Havana because "... the term 'perishable' which is inapplicable to many types of agricultural products had unduly narrowed the scope of paragraph 2(c)". "The Sub-Committee, however, wishes to make clear that the omission of the phrase "when in an early stage of processing and still perishable" is dictated solely by the need to permit greater flexibility in taking into account the differing circumstances that may relate to the trade in different types of agricultural products, having in view only the necessity of not making ineffective the restriction on the importation of the product in its original form and is in no way intended to widen the field within which quantitative restrictions under paragraph 2(c) may be applied." (Havana Reports, p. 93, paras. 38-39)

"In particular, it should not be construed as permitting the use of quantitative restrictions as a method of protecting the industrial processing of agricultural or fisheries products."

regard to the Analytical Annex were incomplete and could easily be counter-balanced by other quotations supporting the Communities contentions. He argued that this was the case in particular for tomato concentrates which could be marketed in different packings. He stated that, for example, the Community imported considerable quantities of barrelled tomato concentrates (preserved in an entirely provisional manner) intended for direct utilization by the more advanced processing industry. Moreover, he argued that, in general, it would be easy to adduce evidence, from food technicians specialized in this field, that tomato concentrates declined considerably in value the longer they were stored, not only in the processing industry but also in private households. He stated that direct competition existed between fresh tomatoes and those concentrates. He argued that it was necessary to consider the consequences of the application of the concept that tomato concentrates were not perishable goods to determine if this concept would be reasonable. He argued that, in view of the proportion of the production of fresh tomatoes used for processing, i.e. 40 per cent of aggregate world production and 20 per cent of Community production for tomato concentrates alone, it was clear that any measure for the organization of the fresh market would become inoperative unless adequate protection was provided for the processed product which was a substantial outlet for the fresh product. As a result, he argued, such an interpretation would prevent any market organization measure in the tomato market, contrary to the intent of Article XI:2, which was designed precisely to promote such organization. He argued that one could not reasonably imagine that the intention of the GATT drafters had been to oppose the functioning of any mechanism, as provided for in paragraph 2(c) of Article XI, for this product in particular.

3.12. As to whether the minimum import price system for tomato concentrates was "necessary to the enforcement" of the intervention system for fresh tomatoes, he argued that where the tomato concentrates industry was not in a position to market its production throughout the year at a price level corresponding at least to cost prices resulting from the existence of intervention prices, the quantities normally used by the preserves industry would be subject to intervention. He further argued that, since the quantities used by the tomato concentrates industry represented about 20 per cent of total Community tomato production, such production was therefore of basic importance for the equilibrium of the fresh tomato market.

3.13. He argued that, as a result of the operation of the intervention system for fresh tomatoes, the Community canning industry could not purchase tomatoes for processing at a price below the intervention price. Indeed, he argued the domestic canning industry had to enter into contracts with producers at prices above the intervention price because the producer could always argue that, in any case, he could secure this price level. Therefore, he argued, the cost price for the Community canner was directly affected by the system applied in the market for the fresh produce, independently of the question of whether there was any real intervention at a given

moment, because it was the continuing existence of the intervention price throughout the season that ensured maintenance of the price at that level. Consequently, he argued, it had to be possible to maintain the domestic price for tomato concentrates within the Community at a minimum level because imports represented about 80 to 85 per cent of Community production.

3.14. In addition, he argued, prices for tomato concentrates fluctuated considerably on the international market and changes in the volume of production occurred yearly in response to these changes in economic circumstances. He further argued that, as a result of these fluctuations, it had been possible to establish production of tomato concentrates in countries which had not previously produced this product and, that as this new production reached the market, a surplus situation was created and prices could fall to extremely low levels. He drew the Panel's attention to an FAO analysis of trends in this market which showed the amplitude of such fluctuations and also that it would be highly beneficial if the tomato concentrate market could be stabilized further. He stated that the Community intended to promote price stabilization in its own market, thus contributing to a general stabilization in the interest of all producers and consumers alike. He also noted that 99.9 per cent of the Community's imports were effected under this régime without creating any problems for Community suppliers.

3.15. In summary, he argued that the functioning of the Community market for fresh tomatoes implied a sound market situation for tomato concentrates. But, he argued, as the international market was subject to such fluctuations that it was not possible to guarantee an adequate domestic price level, and in view of existing regulations regarding fresh tomatoes, it was necessary to take action in order to ensure the proper operation of intervention measures which had a restrictive effect on domestic marketing. He stated that the minimum import price system had been selected on the grounds that it was a more flexible measure than, for instance, quantitative restrictions, and made it possible to attain the desired objective.

3.16. With regard to the provisions of Article XI:2(c)(i), the representative of the European Communities argued that the Community system fell within the purview of this paragraph because the intervention system for fresh tomatoes limited the marketing and production of tomato concentrates as follows:

- the fact that intervention prices for fresh tomatoes were fixed at a level about half of the normal market price involved a considerable market risk for producers and limited production correspondingly;

- the quantities of tomatoes withdrawn from the market limited the quantities of tomatoes available for processing; and
- as market prices were prevented from falling below the intervention prices, producers of tomato concentrates had to obtain their supplies at higher prices, thus detracting from their ability to compete and discouraging them from producing tomato concentrates;
- lastly, tomato concentrates could be produced from the quantities of fresh tomatoes withdrawn from the market but, in this case, would be distributed free of charge to charitable institutions.

3.17. The representative of the United States argued that, in order to qualify for the exemption offered by Article XI:2(c)(i), there had to be a domestic restriction on the production or marketing of the fresh product which the unlimited importation of the still fresh and perishable product would make ineffective and he charged that this was not the case in the Community. He argued that the Community intervention system for fresh tomatoes in no way restricted production and was not aimed at removing temporary surpluses. He noted that internal Community support measures for tomatoes were limited strictly to the fresh product and that there was no provision for any domestic support measures or domestic production or marketing restrictions for processed tomato products. He argued that the internal support system for fresh tomatoes basically relied on producer organizations to withhold produce from the commercial market when prices fell to a low level, but that the producer organizations were not obliged by the Community legislation to withhold supplies from the market to support prices, they were merely entitled to do so. He noted that, if the price at which they withheld produce from the market did not exceed a maximum level established by the Community, the member States had to compensate them for any financial losses incurred.

3.18. He argued that the purpose of withholding supplies from the market was to provide support to market prices and producer incomes and was not intended to restrict production or remove temporary surpluses. In fact, he argued, to the extent that the system was effective, it acted to maintain or encourage production by cushioning producers against the price effects of over-production. He noted that the Community's production of fresh tomatoes had been at least sustained during the previous ten years with a slight upward tendency.

3.19. He drew attention to the interpretation of the word "restrict" in the Analytical Index¹ and argued that, given the fact that the impact of the Community's intervention scheme was on, at the most, 1 per cent of production, it was clear that even if the intent was to restrict production, which he argued it obviously was not, it would not be effective under this system. In this regard, he also noted the Analytical Index interpretation that "the essential point was that the restrictions on domestic production could be effectively enforced and the Sub-Committee recognized that unless this condition were fulfilled, restrictions on imports would not be warranted".²

3.20. He noted that there were no internal restrictions on sales of tomato concentrates and no evidence that internal sales of tomato concentrates had ever been restricted during periods when withdrawals of fresh tomatoes were occurring. He argued that if the Community did not consider internal sales of tomato concentrates to be competitive with domestic fresh tomatoes, then it was not logical to argue that imports needed to be restricted.

¹

This interpretation, on page 55, Analytical Index, Third Revision reads:

"(iii) "restrict". "The Sub-Committee agreed that in interpreting the term 'restrict' for the purposes of paragraph 2(c), the essential point was that the measures of domestic restriction must effectively keep domestic output below the level which it would have attained in the absence of restrictions."^h
(Havana Reports, p. 89, para. 17)

²

This interpretation, on page 56, Analytical Index, Third Revision, reads:

"(v) Domestic subsidies on agricultural or fisheries production. "The Sub-Committee agreed that it was not the case that subsidies were necessarily inconsistent with restrictions of production and that in some cases they might be necessary features of a governmental programme for restricting production. It was recognized, on the other hand, that there might be cases in which restrictions on domestic production were not effectively enforced and that this, particularly in conjunction with the application of subsidies, might lead to misuse of the provisions of paragraph 2(c). The Sub-Committee agreed that members whose interests were seriously prejudiced by the operation of a domestic subsidy should normally have recourse to the procedure of Article 25 XVI and that this procedure would be open to any member which considered that restrictions on domestic agricultural production applied for the purposes of paragraph 2(c) were being rendered ineffective by the operation of a domestic subsidy. The essential point was that the restrictions on domestic production should be effectively enforced and the Sub-Committee recognized that unless this condition were fulfilled, restrictions on imports would not be warranted."

Havana Reports
p. 90, para. 22

To meet this point and also to ensure that paragraph 2(c) should apply only when there was a surplus of production the word "effectively" was inserted after "operate" in the Charter. No corresponding change has been made in the General Agreement."

Havana Reports
p. 90, para. 23

3.21. In summary, he argued that there was clearly no system of restriction, nor any enforcement leading to a restriction, in production in the Community's intervention system for fresh tomatoes in accordance with the provisions of Article XI:2(c)(i) and, that production had in fact not been restricted and had indeed tended to increase over the previous ten years.

3.22. With respect to the provisions of Article XI:2(c)(ii), the representative of the European Communities stated that intervention prices for fresh tomatoes were fixed at relatively low levels (emergency prices about one half the cost of production) and that, where market prices fell below such levels, provision had been made for the withdrawal of products from the market by producer organizations such as co-operatives. He argued that, in their capacity of representing the producers, those organizations always had to make use of that facility, which had until now moreover relieved the member States of having to make use of their similar rights of intervention. He stated that all such withdrawals were financed by the Agricultural Guidance and Guarantee Fund. With regard to the utilization of these withdrawals, he stated that the regulation concerned provided that these would be distributed free of charge, either in the fresh state or in the form of concentrates, to charitable organizations or school canteens, or would be destroyed.

3.23. He stated that, during the 1975/76 season, 136,000 tons of fresh tomatoes or 2.81 per cent of total Community production, representing 20,600 tons of tomato concentrates, were withdrawn from the market and, during the 1976/77 season, when production was adversely affected by bad weather, withdrawals amounted to 21,000 tons (the total production figure was not yet available), which represented 3,500 tons of tomato concentrates. He further stated that, it should be underlined that any concept linked to quantitative limitation could not be related to past production, but to potential production which was extremely difficult to quantify, although such quantification should in principle be beyond dispute, given that the intervention price was fixed at a level corresponding to one half of production costs.

3.24. The representative of the United States noted that the actual quantities of fresh tomatoes withdrawn from the market had been very small, having exceeded one half of 1 per cent of production in only three of the previous nine years and having exceeded 1 per cent only once since 1967. He noted that the very small quantity of fresh tomatoes normally withdrawn from the market could be due to the fact that in Italy, which accounted for 75 per cent of Community tomato production, producer organizations did not play a significant rôle. He noted that co-operatives were the main vehicle for carrying out whatever support measures might be implemented but that, according to the Community's 1976 Agricultural Situation Report, only 5 per cent of Italian vegetable production was marketed through co-operatives in 1975.

3.25. He further noted that the Community support system provided for the possibility of direct purchases of fresh tomatoes by the member States when market prices dropped to distress levels, but that member States rarely availed themselves of this possibility, probably because of the difficulty in disposing of a perishable product like fresh tomatoes. He also noted that tomatoes withheld from the market under the Community support system could not be put back into normal trade channels but, he argued, in most cases they were simply allowed to rot.

3.26. In summary, he argued that there was no indication that the operation of the minimum import price for tomato concentrates worked in any way to facilitate the removal of 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, as required in Article XI:2(c)(ii).

3.27. With regard to the definition of the term "like product" as found in Article XI:2(c)(i) and (ii), the representative of the United States drew attention to the interpretation¹ in the Analytical Index which stated that this term did not mean a competing product and reference was made to the following definition of the League of Nations: "practically identical with another product". He noted that in another discussion of this term, John Jackson, in his treatise on the law of GATT, commented on the concept of "like product" as follows:

¹This interpretation on page 57, Analytical Index, Third Revision, reads:

"(i) like product. It was agreed that the definition of this phrase should be left to the ITO. It was stated, however, that in this Article the term did not mean a competing product. Reference was made to the following definition of the League of Nations: "practically identical with another product".

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p. 14
EPCT/C.II/36
p. 8

"It appears that when used in Article VI and in Article XI, paragraph 2(c), 'like products' is very narrowly defined. This may be because these provisions are exceptions to GATT obligations and therefore should be more narrowly construed."¹

3.28. He argued that there was no indication from any of the interpretations of Article XI:2(c) that the term "like product" in that Article could refer to an article industrially processed from the domestic fresh primary product and stored in a non-perishable form. He argued that all interpretations of this Article concluded that it had to be either practically identical with the domestic product or, as stated in Article XI:2(c)(i) and (ii), a directly substitutable product, neither of which was applicable to tomato concentrate, which was an industrially processed product derived from fresh tomatoes.

3.29. With regard to the provisions of the last sub-paragraph of Article XI:2, the representative of the European Communities argued that, as regards the volume of trade, the method used to fix the minimum import price for tomato concentrates had been arranged to allow trade to be conducted normally. He argued that the criteria applied for the determination of the minimum price (domestic cost of production, average import prices and prices on the main world markets) had led to the minimum price being fixed at the level of the normal price for trade, and would have to permit the realization of an equitable level of trade.

3.30. He further argued that the fact that the need to ensure harmonious and normal development of competition with third countries was taken into account in the regulation concerning the management of the price system, indicated that the Community ensured that this side of its obligations would be respected. In such circumstances, he argued, the minimum price system would not be able to affect the relationship between total imports and total domestic production. He stated that no factual verification of this assertion could be drawn from the figures then available because the system had been enforced only since September 1975.

3.31. Lastly he noted that, whereas the Community was a major world producer of tomato concentrates, the Community production trend had been unchanged for the previous ten years with output of about 150,000 to 180,000 tons, in contrast with the situation among other major producers.

¹Jackson, John, World Trade and the Law of GATT, Bobbs, Merrill, 1969, page 263.

3.32. In summary, the representative of the European Communities argued that prices for tomato concentrates in the Community market were affected by the intervention system applied in the fresh tomato market which showed that the provisions concerned fall well within the requirements of Article XI, paragraph 2(c)(i) and (ii), which authorized import measures necessary to the enforcement of measures which operated to restrict the quantities of a domestic product being marketed or to remove a temporary surplus by making this surplus available to certain groups of domestic consumers free of charge. In conclusion, he stated the Community opinion that the system of minimum import prices with security deposit which it had established was consistent with the provisions of the General Agreement.

Article VIII

3.33. With regard to the minimum import price and associated additional security, the representative of the European Communities argued that a measure within the purview of Article XI, as was the case in the view of the Community in this instance, could not be inconsistent with other provisions of the General Agreement. He argued that it was not acceptable to view a measure, which was said to be of a non-tariff nature under Article XI, as a violation of Article VIII. He further argued that this would be the case, in particular, if one considered paragraph 2 of Article XI, which authorized exceptions from the provisions of paragraph 1. He argued that, logically, an exception authorized under paragraph 2 of Article XI could not be regarded as a violation of another provision of the General Agreement because such an exception would otherwise have no meaning whatsoever.

3.34. With regard to the additional security to enforce the minimum import price, he argued that this was the most flexible measure to ensure that the minimum import price would be respected. He argued that this instrument could not operate without a risk for the importer if the minimum price was not respected and, that the risk in this case was the possible forfeiture of the security.

3.35. He further argued that paragraph 2 of Article XI authorized the application of more rigid measures such as quotas or minimum prices combined with a prohibition to import below a fixed minimum price. He argued that the sole fact that the Community, rather than apply more rigid measures, limited itself to the strict minimum by introducing the security deposit concept, certainly could not be a violation of the General Agreement.

3.36. He argued that the import certificate and associated security system for the specified products was an administrative formality and was not an instrument which operated to modify the economic circumstances of trade. He stated that import certificates were issued automatically and unrestrictedly upon request.

3.37. He further argued that these certificates were essential to enable the Community to follow the evolution of import volumes for these products because the Community had no other practical possibility to achieve this. He stated that accurate and prompt knowledge of the evolution of trade at a centralized level was, for any contracting party, an extremely useful and necessary instrument of policy and noted that systems, as sophisticated as the capabilities of each country allowed, existed in all contracting parties and that these systems often required resort to considerable physical equipment. In the Community, he argued, the situation was such that import certificates for these products provided the most adequate means.

3.38. He argued that there was no GATT provision prohibiting the imposition of administrative formalities and that, in this case, these were reduced to the essential minimum in accordance with the provisions of Article VIII.

3.39. The representative of the United States noted that Article VIII:1(a) stated that all charges and fees imposed on the importation of articles "shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestically produced products."¹ He argued that it was clear that the import security deposit schemes used to enforce the licence system for the specified products and the minimum import price for tomato concentrates were imposed as protection for domestic products and, therefore, were contrary to the provisions of Article VIII:1(a).

3.40. He further argued that, if importation did not take place and the security deposit was forfeited, this charge imposed as a penalty for not importing, would be a charge, in connexion with importation, in violation of Article VIII:1(a). He argued that, in most cases, where the product was en route or did not meet the quantity requirement, the product would subsequently be imported under a new licence, with a new security

¹ Article VIII.1 reads:

"1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connexion with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a).

(c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.

deposit. Where this happened, he argued, there would be two additional charges on or in connexion with importation, i.e. the forfeited security deposit and concomitant administrative expenses and the costs of the new security deposit with concomitant administrative expenses.

3.41. He further noted that Article VIII:1(c) exhorted the contracting parties to minimize the incidence and complexity of import and export formalities and to simplify import documentation and requirements. He argued that, while there may have been no affirmative obligation to decrease such complexities, there was inherent in this Article a duty not to increase such administrative burdens which acted as restrictions on trade.

3.42. The representative of the European Communities argued that the lodging of a security at the time of filing the application for a certificate was an integral part of the import certificate system because the security was necessary so that certificates would be representative of the actual volume to be imported in order that it would be possible to follow the evolution of trade. He argued that the security was a guarantee that the certificates were genuine and, when the goods had been imported, the security was released. He argued that the question of two securities never arose for any operation not carried out by the importer, since the latter needed only one certificate for each operation.

3.43. He argued that the financial cost of the security, which was in the form of a banker's guarantee, could not be regarded as an additional levy, but only as an administrative cost item which in fact was a very small amount compared with the cost of other administrative formalities required for any import, and certainly lower than the cost of import formalities in the United States where customs clearance procedures were particularly burdensome.

3.44. The representative of the United States noted that Article VIII:3 stated that "no contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements".¹ He argued that the substantial penalty of forfeiture of all or part of a

¹Article VIII:3 reads:

"3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning."

security deposit, if an article was imported below the minimum import price, if the product was not imported within seventy-five days or, if the total amount of the product was not imported, impose a substantial penalty for minor breaches of procedural requirements and worked to inhibit importation in violation of the provisions of Article VIII:3.

3.45. He charged that Article VIII was clearly violated by the cumulative effect of the Community system which led to uncertainty and had caused the complete elimination of the normal commercial practice of long-term contracting. He further charged that this system also hampered market development activities and disrupted the forward planning of exporters, processors and growers. He noted that the normal six-month or one-year contract was no longer feasible in light of the risks inherent in the seventy-five day validity licence, which involved strict quantity and, in regard to tomato concentrates, price requirements.

3.46. He claimed that, in addition, access was uncertain because of the possibility that import licences could be restricted or suspended at any point of time. He noted the Community contention that the licence itself increased the certainty that no safeguard action could be taken against the product and the assurance that a licence, once issued, would not be revoked, but stated that he was unable to find any statement in any regulation to this effect. He further noted that in one case, Greece, licences already issued had been revoked while goods were in transit and wondered what might occur with respect to countries where no special relationship existed, and particularly, where there were no regulations setting forth the guarantee that licences would not be revoked. Irrespective of this question, he argued that a degree of certainty for seventy-five days was not equivalent to a long-term contract which represented an actual sale six-months to one year in the future and which provided legal remedies if the contract was not fulfilled, which had been the normal commercial practice for the products in question before this system was implemented.

3.47. The representative of the European Communities argued that criticizing the licensing system, because of its seventy-five day validity, on the grounds that, beyond such a period it created an uncertainty for the operator, in that it halted the practice of long-term contracting, was unjustified. Nowhere in the world, he argued, including the United States, was there an import system guaranteeing to operators that measures taken in pursuance, for instance, of Article XIX, would not be applied for any specified period of time. He noted that, in theory, an importer could obtain a licence seventy-five days before the importation was expected to take place and, in fact, in such a case, the importer would undertake an obligation to import. However, he noted, the importer would receive, with the licence issued, an absolute guarantee regarding the realization of the importation concerned, leaving him moreover some margin of flexibility by permitting a 5 per cent variation in either direction from the quantity stated on the certificate, without reimbursement of the security being affected.

3.48. With regard to the criticism that this commitment by the importers constituted an additional obstacle, he stressed that, in practice, this was only a facility afforded to the importer. He argued that it was clear that an importer would not apply for a licence before he had entered into a contract with an exporter and, in this case, the obligation to import could not normally be regarded as involving any risk. However, he argued, if an importer wanted to have more freedom, he had every possibility to obtain a licence at the time when the goods were approaching the frontier and, at this stage, the obligation to import resulting from the licence, which had been criticized by the United States, was no longer meaningful as such.

3.49. He concluded with the argument that the certificate with security deposit system was indeed an additional administrative formality, but that it was not inconsistent with the GATT provisions and was limited to the strict minimum necessary to permit meaningful surveillance, and in no way constituted an obstacle to trade.

3.50. The representative of the United States argued that the seventy-five day validity limit for a licence, the commitment to import exactly the quantity stated in the licence, and the uncertainty caused by the arbitrary ability of member States to suspend import licences clearly were contrary to the provisions of Article VIII. He noted the Community allegation that the cost of the security deposit was simply the cost of an administrative service within the meaning of Article VIII, and was used as a statistical tool. He argued that the licence was not merely a statistical tool but a permit to import a specified quantity within a limited time period. He argued that, while the cost of a bank guarantee might be minimal, assuming an importer could qualify for such a guarantee and did not have to post the actual security deposit, the threat that the entire security deposit might be forfeited, if the conditions in the licence were not clearly met, went far beyond the intent of Article VIII and imposed an additional charge in violation of Article II.

3.51. The representative of Australia supported the United States' argument that the charges relating to the provision of the required security deposits appeared to be inconsistent with the provisions of Article VIII.

Previous GATT examinations of licensing systems

3.52. The representative of the United States noted that licensing systems used for surveillance, with potentially restrictive consequences, had been used in instances when there was another justification for the restriction, i.e. balance of payments. However, he argued, those uses had been severely criticized. He argued that even in balance of payments and other cases involving the use of trade measures, which had come before GATT Panels and Working Parties, the CONTRACTING PARTIES had scrutinized in great detail the mechanics of licensing systems and import deposit schemes and had insisted that those systems not be prolonged beyond a time when there was a justification for import restrictions under some other Article of the GATT.

3.53. The representative of the European Communities noted that references had been made to previous scrutinies, by GATT Working Parties, of measures such as licensing systems and/or import deposit schemes showing that the Working Parties insisted that those systems be eliminated as promptly as possible. However, he pointed out that in some cases these were not opinions expressed by the CONTRACTING PARTIES but by certain members of the relevant Working Parties. Moreover, he argued that it seemed preferable to base the reasoning on the text of the General Agreement itself.

3.54. In addition, he argued, these views related to exceptional import and export measures which were introduced by contracting parties because of serious temporary difficulties, in particular balance-of-payments reasons. He argued that these measures were being represented to the CONTRACTING PARTIES by the applying countries, as being of an essentially temporary nature and were, therefore, of an altogether different type from the measures which were being examined by this Panel. He further argued that, in these circumstances, it was not surprising that some members of the Working Parties had expressed the wish that the elimination, which had been expected or announced, by the countries imposing the measures, be achieved as promptly as possible. This, he argued, would not be regarded as the general view of the CONTRACTING PARTIES that all import or export measures imposed by any contracting party consistently with its obligations under the General Agreement be eliminated as promptly as possible.

Article II

3.55. The representative of the United States noted that Article II:1(b) of the General Agreement stated that products included in bound Schedules of concessions shall be exempt from all other duties or charges of any kind imposed on or in connexion with importation in excess of those imposed on the date of the agreement.¹ He further noted that there were exemptions

¹Article II:1(b) reads:

"(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connexion with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

from this sub-section, including those for internal taxes consistent with Article III, Countervailing Duty or Anti-Dumping Fees, and other fees or charges commensurate with the cost of services rendered.

3.56. He argued that the minimum import price system for tomato concentrates operated as a charge on imports and not merely as a price below which the product could not be imported. He further argued that, for both tomato concentrates and the other specified products subject to the licensing system, charges in excess of the bound levels were levied through lost interest, debt servicing, and clerical and administrative costs associated with the provision of security deposits and also, to a much greater extent, through the forfeiture of security deposits if the importation did not occur within the seventy-five day validity of the licence or, if the minimum import price for tomato concentrates was not respected. He charged that, for tomato concentrates, even if the c.i.f. price, increased by the customs duty, was only slightly below the minimum import price, the entire security deposit was forfeited with the result that the product could be charged an amount far in excess of the bound rate. He argued that all of these charges should be considered as charges imposed on or in connexion with importation in excess of those allowed in Article II:1(b). In this connexion, he noted that the language in this Article was considered to be all inclusive¹, leaving no flexibility for small charges or variable charges.

3.57. He argued that these security deposits related neither to the cost of services rendered nor to the enforcement of any legitimate system of import administration. He also argued that there was no provision to be found in the Regulations for the refund of the deposits, making it impossible to calculate the likely cost of debt servicing, thus creating an element of unpredictability which served as a barrier to trade.

3.58. The representative of Australia argued that the requirement for, and the direct and indirect costs of securing security deposits, and the more substantial costs resulting from any security deposit forfeitures, constituted charges on imports of a kind specifically proscribed by Article II:1(b), in that they were charges other than ordinary customs duties which were not levied or leviable at the time the items were bound.

3.59. He further argued that, even if these charges were not of a type proscribed by Article II:1(b), there remained the objection that these measures resulted in the total level of charges levied exceeding the levels bound in the Community's GATT Schedule. In the case of canned peaches and canned pears, he argued that the level of customs duties levied on importation into the Community was already equivalent to the bound rate which the Community had undertaken not to exceed. Therefore, he argued, if that bound level was exceeded, no matter how small the margin may have been, then a contractual commitment would have been breached and the exporting countries' rights would have been impaired.

¹Jackson, John World Trade and the Law of GATT, Bobbs, Merrill 1969, page 209.

3.60. The representative of the European Communities noted the United States arguments that the minimum import price and associated additional security system, as well as the import certificate and associated security system, were in breach of Articles II and XI at the same time because, the minimum import price and import certificate securities operated as charges on imports, and because the minimum import price and the import certificate operated as restrictions on importation and as import barriers. He recalled that the General Agreement made a clear distinction between the measures referred to in each of these Articles. He noted that Article II dealt only with tariff matters, and Article XI dealt only with non-tariff measures. He argued that, in view of the different nature of these matters, the United States position was self-contradictory to the extent that it attempted to identify the minimum import price system and the import certificate system as both tariff and non-tariff measures.

3.61. With regard to the minimum import price and associated additional security, he repeated the arguments presented in paragraphs 3.33, 3.34 and 3.35 with respect to Article VIII, to the effect that a measure within the purview of Article XI, as was the case in the Community view in this instance, could not be inconsistent with other provisions of the General Agreement.

3.62. He admitted that the security could be forfeited in certain cases but, in actual fact, forfeiture was highly improbable, in view of the nature of the system which resulted in operators complying with the minimum price obligation. He stated that, from 1 September 1975 to February 1977, there had been forfeitures in only seventeen cases, representing only 0.15 per cent of total Community imports of tomato concentrates during that time period and moreover, there was no case that had concerned any import from the United States. He argued that such forfeitures should not be viewed as an additional levy but rather as part of the minimum import price system in the sense that it was a penalty intended to discourage importers from infringing the obligation to comply with the minimum import price requirement. He further argued that this was in line with any administrative practice followed, where non-compliance with an obligation of this kind had to be sanctioned and the fact that this penalization had financial implications could not be sufficient reason to deviate from a correct appreciation of the legal situation.

3.63. He argued, in a similar manner, that the import certificate and security system for the specified products was an administrative formality which was in accordance with the provisions of Article VIII and therefore, could not at the same time be considered to be inconsistent with the provisions of Article II.

Article I

3.64. The United States representative noted that the Community Regulations in question provided an exemption from the security deposit which enforced the minimum import price for tomato concentrates to any country which guaranteed that its duty paid price on import into the Community would not be below the minimum. He argued that such a provision amounted to conditional most favoured nation (MFN) treatment inconsistent with the provisions of Article I¹ of the General Agreement since it removed one of the requirements for the guaranteeing countries while leaving a burden on other countries. He maintained that only countries with State trading or central marketing organizations could benefit from this provision since it involved a guaranteed price which was only possible in a controlled price economy.

3.65. The representative of the European Communities noted that the Community provision concerned did not make any distinction based on the economic system, or any other factor, between third suppliers and, that the possibility to guarantee that the minimum price would be respected was open to all, unconditionally. Consequently, he argued that this provision was fully compatible with the most favoured nation clause of Article I of the General Agreement.

3.66. He noted further that, from a practical and factual point of view, it was not true that only countries with State trading or controlled price economies could benefit from an exemption from the security. He stated that in other agricultural sectors, where common market organizations comprised strictly identical provisions, the Community could demonstrate that many supplying countries with liberal economies, i.e. without State trading organizations or controlled price economies, had provided guarantees that minimum prices would be respected, and that these guarantees operated to the mutual satisfaction of both parties.

¹Article I:1 reads.

"1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III * any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

3.67. He accepted that there were supplying countries which did not have the necessary administrative machinery to meet the requirement to provide an adequate price guarantee, but he argued that such countries were not justified in inferring that requiring such a guarantee was a violation of the most favoured nation clause of Article I.

Article XXIII

3.68. The representative of the United States noted that Article XXIII¹ stated that any contracting party which believed that a benefit accruing to it directly or indirectly under the GATT was being nullified or impaired, or that the attainment of any objective was being impeded as a result of the application by another contracting party of any measure

¹

Article XXIII reads:

"1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. A contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary¹ to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him."

whether or not it conflicted with the provisions of the General Agreement, or the existence of any other situation, could attempt to get redress for the nullification or impairment. He claimed that the CONTRACTING PARTIES had, in the past, reacted favourably to those complaining countries who could show that regulations, licensing systems, import deposits and other obstacles were unjustified impediments to trade, not taken on a temporary or emergency basis. He argued that these Community regulations were definitely not for emergency or temporary use but were used to protect domestic producers to the detriment of countries with whom trade concessions on the products involved had been negotiated and thereby nullified or impaired those concessions through violations of the spirit and letter of the GATT. He noted that the major products of concern to the United States in this case were bound, including tomato concentrate which was subject to the minimum import price.

3.69. He argued that the cumulative effect of these regulations was to directly and indirectly burden and restrict the trade involved. He claimed that there was not only a direct financial cost arising from the import licence with security deposit requirement but also, an additional administrative burden with an associated cost factor and element of unpredictability imposed on traders, which did not exist when the products were bound in the Community Schedule. He argued that these points inhibited trade and, individually and collectively, impaired the value of the binding.

3.70. He argued that the minimum import price for tomato concentrates operated in such a way as to levy an additional charge, which raised the price of the imported product, thus increasing protection above the level permitted by the concession rate of duty and violating the provisions of Article II of the GATT. He further argued that such a charge was also an impairment of a trade concession within the meaning of Article XXIII. He also argued that the provisions of Article II assumed access at the negotiated bound level unconditionally and that the condition of a minimum import price on a bound item was, in itself, an impairment, apart from and in addition to the noted charges.

3.71. He recalled that after Uruguay invoked Article XXIII against fifteen countries in 1961, the Panel appointed by the CONTRACTING PARTIES to examine the cases in question, reported 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 GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party, the action would, prima facie, constitute a case of

nullification or impairment and would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization or suspension of concessions or obligations.¹

Accordingly, he stated, the Panel recommended, in each case where a measure was clearly maintained in contradiction with the provisions of the General Agreement, that the measure in question should be removed. He noted that among the measures which the Panel recommended should be removed were the permit requirements of Belgium, although the Belgian Government had stated that the permits were granted automatically, free of charge, and with no distinction between sources of supply. He also noted that, in the case of beef meats, it was stated that the permit could be used to administer a quota if one were enforced, although at the time in question such quota restrictions were not applied.

3.72. He recalled that the Panel had considered that, in so far as it had not been established that the Belgian measures regarding import permit requirements and such quotas as might exist were being applied consistent with the provisions of the General Agreement, it had to proceed on the assumption that their maintenance could nullify or impair the benefits accruing to Uruguay under the Agreement. He further recalled that the Panel had therefore concluded that the CONTRACTING PARTIES should recommend to the Government of Belgium that it give immediate consideration to the removal of such measures.²

¹Basic Instruments and Selected Documents, Eleventh Supplement, page 100, paragraph 15.

²This conclusion, on page 103, Basic Instruments and Selected Documents, Eleventh Supplement, reads:

"(c) As regards the import permit requirements and such quotas as may exist, the Panel considers that, insofar as it has not been established that these measures are being applied consistently with the provisions of the General Agreement or are permitted by the terms of the Protocol under which Belgium applies the GATT, it has to proceed on the assumption that their maintenance can nullify or impair the benefits accruing to Uruguay under the Agreement. It concludes, therefore, that the CONTRACTING PARTIES should recommend to the Government of Belgium that it give immediate consideration to the removal of these measures. The procedure set out in paragraph 20 of the Panel's general report would become applicable in the event of the Government of Belgium's failing to carry out this recommendation."

3.73. He then argued that, since there was a prima facie case of nullification or impairment arising from the measures introduced by the Community with regard to the specified processed fruit and vegetable products, it was the Community's obligation to remove the measures in question. He further argued that it was clear GATT practice that any question of the degree of impairment of a concession should be determined only after a determination had been made on the GATT consistency of the measures in question.

3.74. He stated that a major concern of the United States was that this system had nullified or impaired important trade concessions negotiated and paid for by the United States and had resulted in a clear interference with the importation into the Community of products of major concern to the United States. He argued that the fact that previous national quantitative limitations had limited the United States share of the Community market should in no way prejudice the United States in attempting to gain access to the Community which had been bargained for in previous trade negotiations.

3.75. He further stated that, in light of previous proposals to extend and tighten the system then in effect, the United States was increasingly concerned that trade concessions would be further eroded, resulting in more serious impact on United States trade, should this system be justified. He reiterated that this was not merely an academic exercise in so far as the United States was concerned but that it involved an important question of principle with significant implications for the world trading system.

3.76. The representative of the European Communities noted the United States argument that, under GATT precedents, any infringement of a GATT provision automatically constituted a prima facie case of nullification or impairment under Article XXIII, but maintained the Community view that no GATT provision had been infringed by the Community Regulations and therefore, there was no such prima facie case.

3.77. He argued that the minimum import prices for tomato concentrates were fixed taking into account the need to ensure harmonious and normal development of competition with third countries and the impact of the charges associated with the securities and licences, which did not exceed 0.005 per cent. Consequently, he argued, the advantages resulting for the United States from the General Agreement were neither nullified nor impaired by the minimum import price system.

3.78. With regard to the fact that an advantage resulting for a contracting party from the General Agreement could be nullified or impaired by a measure consistent with the General Agreement, he recalled that Article XXIII purported to maintain the balance of economic advantages which had resulted from previous exchanges of concessions. He argued that it could not be the purpose of this Article to require a contracting party to go beyond its obligations under the General Agreement, if the action taken did not impair the economic balance of concessions which Article XXIII was intended to safeguard. In this respect, he recalled that Community imports of tomato concentrates from the United States, the direct beneficiary of the Community concession, amounted to US\$163,000 in 1975, US\$123,000 in 1974 and zero in 1972, with a peak of US\$350,000 in 1973. He further recalled that in 1974-75 the United States ranked as the twenty-third Community supplier of this product and accounted for about 0.1 per cent of the Community's total imports while United States exports to the Community represented about 1.8 per cent of total United States exports of this product. Referring to the detailed figures that the Community had presented to the Panel, the representative of the Community said that the total costs incurred by operators in respect of securities for certificates and minimum prices, for total Community imports of processed fruit and vegetables from the United States, did not reach \$200 each year.

3.79. Considering that the concession had been granted in 1962, and that there had been no change until 1975 regarding the system applied at the frontier for this product by the member States, except for the modification resulting from the tariff equalization process which could have been foreseen, he argued that there had been every opportunity for United States exports to the Community to develop, but noted that such exports had always stood at an insignificant level. He stated that this was probably due to the fact that the Community market was not attractive to American exporters because they were competing in this market with other third country exporters located closer to the Community and whose supply prices were lower. Therefore he claimed, it was not justified to argue that economic advantages related to such insignificant and sporadic trade volumes were impaired by the minimum import price system.

3.80. He argued that, considering that the system was consistent with Article XI, it would be legitimate to claim that this fact was sufficient justification to contend that no imbalance of concessions could result because, in fact, Article XI was self-sufficient and balanced. He argued that the reason Article XI authorized, in certain circumstances, the imposition of import measures by a contracting party, whereas as a general rule such measures were prohibited, was that the circumstances appeared to be such that they ensured in another way a balance of advantages and concessions. He argued that this was so because Article XI authorized

this exception when measures introduced in the domestic market led to a contraction in the supply of domestic products in the domestic market (whether for the product itself or for the base product from which the product concerned was manufactured). In this case, he argued, the direct or indirect limitation of the supply of the domestic product balanced economically the resulting situation for the imported product.

3.81. In summary he stated the Community view that the minimum import price system was consistent with Article XI of the General Agreement, and that the economic advantages resulting for the United States from the concession granted had in no way been impaired or nullified by this system.

3.82. With regard to the import certificate and associated security system applied to the specified products, he stated that the Community's analysis was that this system was in no way inconsistent with the GATT. He argued that it was merely an administrative measure which had no influence on trade and therefore, the advantages resulting from the tariff binding could not be affected.

3.83. He noted that the United States benefited from tariff bindings on canned peaches, tomato juice, canned pears, canned tomatoes and canned peas which were subject to the import certificate requirement. He further noted that, with regard to imports of peaches and pears, the United States ranked as the fourth and fifth supplier, with imports amounting to US\$5 million and US\$7 million respectively. He stated that imports from the United States of the other products concerned were negligible, amounting to US\$100,000 for the three products together.

3.84. He argued that it was not reasonable to assume that the decision by importers to import or not to import would be affected by the existence of administrative measures imposed in addition to other import costs whose incidence was extremely small. In addition, he argued that the import certificate and associated security system had been in existence since 1962 and covered many agricultural items imported into the Community.

3.85. In summary, he stated the Community view that the concessions granted to the United States were in no way impaired or nullified, in the sense of Article XXIII of the General Agreement, by the operation of the import certificate and associated security system which was fully consistent with the provisions of the GATT.

IV. ANALYSIS AND CONCLUSIONS

(a) Import certificate and associated security system

Article XI:1

4.1. The Panel began by examining the import certificate and associated security system in relation to the Community's obligations under Article XI:1. In this regard, the Panel noted that Article 10 of Council Regulation (EEC) No. 516/77 stated that: "The issue of an import certificate shall be conditional upon the following: - with respect to all products, the lodging of a security to guarantee the undertaking to effect certain imports for as long as the certificate is valid ..." The Panel further noted that, without prejudice to the application of safeguard measures, import certificates were to be issued on the fifth working day following that on which the application was lodged and that import certificates were to be valid for seventy-five days. The Panel considered that pending results concerning automatic licensing in the Multilateral Trade Negotiations, this system did not depart from systems which other contracting parties claimed were justified as automatic licensing. The Panel also considered that automatic licensing did not constitute a restriction of the type meant to fall under the purview of Article XI:1. Therefore the Panel concluded that the import certificate and associated security system operated by the Community was not inconsistent with the Community's obligations under Article XI:1.

Article VIII

4.2. The Panel next examined the status of the interest charges and costs in connexion with the lodging of the security associated with the import certificate in relation to the Community's obligations under Article VIII:1(a). The Panel noted the complaint by the United States representative that the interest charges and costs associated with the lodging of the security were imposed as protection for domestic products contrary to the provisions of Article VIII:1(a). The Panel further noted that Article VIII:1(a) stated that: "All fees and charges of whatever character ... shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes." The Panel also noted the contention by the Community representative that the incidence of these charges did not exceed 0.005 per cent. The Panel considered that these interest charges and costs were limited in amount to the approximate costs of administration. The Panel further considered that the term "cost of services rendered" in Article VIII:1(a) would include these costs of administration. Therefore, the Panel concluded that the interest charges and costs associated with the lodging of the security were not inconsistent with the Community's obligations under Article VIII:1(a).

4.3. The Panel next examined the provisions for the forfeiture of the security associated with the import certificate in relation to the obligations of the Community under Article VIII. The Panel noted the argument by the United States representative that, when a security was forfeited because importation did not take place within the seventy-five day validity of the certificate, this forfeiture should be considered as a charge "in connection with importation" in violation of Article VIII:1(a), since the importation would likely take place later under a new licence. The Panel further noted the argument by the United States representative that the forfeiture of all or part of this security imposed "substantial penalties for minor breaches of customs regulations or procedural requirements" in violation of Article VIII:3. The Panel considered that such a forfeiture could not logically be accepted as a charge "in connection with importation" within the meaning of Article VIII:1(a), since no importation had occurred, but only as a penalty to the importer for not fulfilling his obligation to complete the importation within the seventy-five day time-limit. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality "in connection with importation" within the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the provision for the forfeiture of the security associated with the import certificate could not be inconsistent with the obligations of the Community under Article VIII.

4.4. The Panel next examined the obligations which the importer had to undertake when he applied for the import certificate in relation to the Community's obligations under Article VIII. The Panel noted that the importer, when applying for the certificate, must agree to complete the importation within the seventy-five day validity limit of the certificate and, to import the quantity stated on the certificate plus or minus 5 per cent. The Panel further noted that the importer was not required to obtain an import certificate when a contract was signed, but could wait until the product was approaching the Community frontier. The Panel further considered that these obligations, which had to be assumed by the importer, were not onerous enough to violate Article VIII. Therefore, the Panel concluded that the obligations which had to be undertaken by the importer when he applied for the import certificate were not inconsistent with the Community's obligations under Article VIII.

4.5. The Panel then examined the relevant Community Regulations to determine if member States had the authority to arbitrarily suspend import certificates, and, if so, to examine this authority in relation to the Community's obligations under Article VIII. The Panel noted that the United States representative had argued that the uncertainty caused by the arbitrary ability of member States to suspend import certificates was contrary to Article VIII. On examining the relevant Community Regulations,

the Panel was unable to find any provision which allowed member States to arbitrarily suspend import certificates which had already been issued. The Panel noted the assertion of the Community representative that an import certificate, once issued, could not be revoked and could not be subject to any subsequent safeguard action. In this connexion, the Panel further noted that member States could totally or partially suspend the issuing of new import certificates, pending Community action in response to a request for safeguard action by a member State. The Panel also noted that such a request must be acted upon by the Community within twenty-four hours. The Panel considered that such a short delay would not cause any harmful disruption of trade. Therefore, the Panel concluded that the authority of member States to totally or partially suspend the issuing of import certificates, pending Community action in response to a request for safeguard action, was not inconsistent with the Community's obligations under Article VIII.

Article II

4.6. The Panel next examined the status of the interest charges and costs in connexion with the lodging of the security associated with the import certificate in relation to the obligations of the Community under Article II. The Panel noted the arguments by the representatives of the United States and Australia that these interest charges and costs were charges imposed on or in connexion with importation in excess of those allowed by Article II:1(b). The Panel accepted the argument that these interest charges and costs were in excess of the bound rate, but noted that they had been found to be limited in amount to the approximate costs of administration in accordance with the provisions of Article VIII:1(a). The Panel further noted that Article II:2(c) stated that: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: ... fees or other charges commensurate with the cost of services rendered." The Panel considered that the term "fees or other charges commensurate with the cost of services rendered" in Article II:2(c) would include these costs of administration. Therefore, the Panel concluded that the interest charges and costs in connexion with the lodging of the security associated with the import certificate were not inconsistent with the obligations of the Community under Article II.

4.7. The Panel next examined the provision for the forfeiture of the security associated with the import certificate in relation to the Community's obligations under Article II:1(b). The Panel noted the arguments by the representatives of the United States and Australia that the forfeiture of a security was a charge imposed on or in connexion with importation in excess of those allowed by Article II:1(b). The Panel considered that such a forfeiture could not logically be accepted as a charge "imposed on or in connection with importation" within the meaning of Article II:1(b), since no importation had occurred, but only as a penalty

to the importer for not fulfilling the obligations which he had undertaken when he applied for the certificate. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a charge "imposed on or in connection with importation" within the purview of Article II:1(b). As a result, the Panel considered that Article II:1(b) was not relevant, and therefore concluded that the provision for the forfeiture of the security associated with the import certificate could not be inconsistent with the Community's obligations under Article II:1(b).

(b) Minimum import price and associated additional security system

4.8. The Panel began its examination of the minimum import price and associated additional security system for tomato concentrates by noting that the representative of the United States had argued that this system was inconsistent with the Community's obligations under Articles II, VIII, XI and I of the General Agreement. The Panel further noted that the representative of the Community had argued that this system was justified by the provisions of Article XI:2. Therefore, the Panel decided to examine the minimum import price system first in relation to the provisions of Article XI, and then in relation to the other Articles of the General Agreement taken up by the two parties.

Article XI:1

4.9. The Panel examined the minimum import price and associated additional security system for tomato concentrates in relation to the obligations of the Community under Article XI:1. The Panel noted that Article 3 of Council Regulation (EEC) No. 516/77, provided that "A minimum price for tomato concentrates falling within subheading 20.02 C of the Common Customs Tariff shall be fixed each year before 1 April for the subsequent marketing year." The Panel further noted that this minimum import price was enforced by the following provision of Article 10 of Council Regulation (EEC) No. 516/77: "The issue of an import certificate shall be conditional upon the following: ...

- for tomato concentrates, the lodging of an additional security to guarantee that the free-at-frontier price of the products to be imported under cover of the certificate plus the customs duty payable thereon shall together be equal to or more than the minimum price ... The security shall be forfeit in proportion to any quantities imported at a price lower than the minimum price ..."

The Panel further noted the argument by the representative of the United States that this system prohibited importation of goods below a certain price and was, therefore, a restriction within the meaning of

Article XI on the importation of those goods. The Panel also noted the argument by the representative of the Community that this system, as enforced by the additional security, was a non-tariff measure and that, in principle, imports of tomato concentrates into the Community were allowed, but not below the minimum price level. The Panel further noted the argument by the Community representative that, in view of the nature of the system itself, which resulted in importers complying with the minimum price obligation, the additional security had been forfeited in only a very limited number of cases. Finally, the Panel noted the assertion by the representative of the Community that this system was a measure which fell within the purview of Article XI and Article XI alone, and furthermore, that it qualified for the exemption from the provisions of Article XI:1 provided by Article XI:2(c)(i) and (ii). Having noted the foregoing, the Panel considered that the minimum import price system, as enforced by the additional security, was a restriction "other than duties, taxes or other charges" within the meaning of Article XI:1. Having noted, in particular, the claim by the representative of the Community that this system qualified for the exemption from the provisions of Article XI:1 provided by Article XI:2(c)(i) and (ii), the Panel concluded that the question of the system's consistency with the Community's obligations under Article XI could only be decided after an examination of the system in relation to the provisions of Article XI:2(c)(i) and (ii). One member of the Panel considered that the minimum import price system, as enforced by the additional security, could well be applied in a way which would qualify it as a restriction "other than duties, taxes or other charges" within the meaning of Article XI:1. However, having noted the explanations given with respect to the functioning of the system, this member considered that importation of tomato concentrate at a price lower than the minimum price could still be carried out by importers who had an interest in doing so. He further considered that the system operated in a way to levy an additional charge which raised the price of tomato concentrate imported at a price lower than the minimum price. Therefore, he concluded that the minimum import price system was not being enforced in a manner which would qualify it as a restriction within the meaning of Article XI.

Article XI:2(c)(i) and (ii)

4.10. The Panel then examined the minimum import price and associated additional security system in relation to the provisions of Article XI:2(c)(i) and (ii). The Panel began this examination by considering if tomato concentrate qualified as an "agricultural or fisheries product imported in any form" within the meaning of Article XI:2(c). The Panel noted the interpretative note on page 66 of Basic Instruments and Selected Documents (BISD), Volume IV, which stated "The term 'in any form' in this paragraph covers the same products when in an early stage of

processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective." The Panel considered that tomato concentrate was perishable because after a certain time it would decline in quality and value. The Panel also considered that tomato concentrate could compete directly with fresh tomatoes in so far as a large number of end-uses were concerned. Therefore, the Panel concluded that tomato concentrate qualified as an "agricultural or fisheries product, imported in any form" within the meaning of Article XI:2(c).

4.11. The Panel next examined if the minimum import price and associated additional security system for tomato concentrates was "necessary to the enforcement of" the intervention system for fresh tomatoes within the meaning of Article XI:2(c). The Panel noted the report of the ninth session Working Party on Quantitative Restrictions 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 domestic product". "... it would be an abuse of intent of the provisions under paragraph 2(c)(i) of Article XI if contracting parties were to apply restrictions to processed products exceeding those 'necessary' to secure enforcement of the actual measures restricting production or marketing of the primary product". The Panel further noted that the minimum import price and additional security system for tomato concentrates was permanent, i.e. in operation year round. The Panel also noted that the intervention system for fresh tomatoes, while being permanently in force, operated only at certain times of the year, i.e. when fresh tomatoes were being marketed in quantities in excess of commercial market requirements. The Panel found that the minimum import price and associated additional security system for tomato concentrates would be "necessary to the enforcement of" the intervention system for fresh tomatoes essentially during those periods when fresh tomatoes were being bought-in by the intervention organizations, and only to the extent that the system satisfied the other conditions contained in Article XI:2(c)(i) and (ii).

4.12. The Panel next examined the concept of "the like domestic product" within the meaning of Article XI:2(c)(i) and (ii), and attempted to determine which Community product should be considered as "the like domestic product" in relation to imported tomato concentrate. Having noted that the General Agreement provided no definition of the terms "the like domestic product" or "like product", the Panel reviewed how these terms had been applied by the CONTRACTING PARTIES in previous cases and the discussions relating to these terms when the General Agreement was being drafted. During this review, the Panel noted the League of Nations

definition of "practically identical with another product" and the diverging interpretations of these terms by contracting parties in different contexts. The Panel further noted the definition of "like product" contained in the GATT Anti-Dumping Code and the definitions of "identical goods" and "similar goods" contained in the Customs Co-operation Council's Customs Valuation Explanatory Notes to the Brussels definition of value. On the basis of this review, the Panel considered that tomato concentrate produced within the Community would qualify as "the like domestic product" but was unable to decide if fresh tomatoes grown within the Community would also qualify. As a pragmatic solution, the Panel decided to proceed to determine if the other conditions set forth in Article XI:2(c)(i) and (ii) were satisfied by the Community system, on the basis that "the like domestic product" in this case could be domestically-produced tomato concentrate, fresh tomatoes or both.

4.13. The Panel next examined the Community's intervention system for fresh tomatoes to determine if it qualified as a governmental measure which operated "to restrict the quantities" of fresh tomatoes or tomato concentrates "permitted to be marketed or produced" or "to remove a temporary surplus" of fresh tomatoes "by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level" within the meaning of Article XI:2(c)(i) and (ii). The Panel noted that paragraph 1 of Article 15 of the Council Regulation (EEC) No. 1035/72 provided that: "... producers' organizations or associations of such organizations may fix a withdrawal price below which the producers' organizations will not offer for sale products supplied by their members ...". The Panel further noted that this paragraph also provided that: "The disposal of products thus withdrawn from the market shall be determined by the producers' organizations in such a way as not to interfere with normal marketing of the product in question." The Panel also noted that paragraph 1 of Article 19 of Council Regulation (EEC) No. 1035/72 provided that: "Where, for a given product on one of the representative markets referred to in Article 17(2), the prices communicated to the Commission pursuant to Article 17(1) remain below the buying-in price for three consecutive market days, the Commission shall without delay record that the market in the product in question is in a state of serious crisis." The Panel also noted that paragraph 2 of this Article stated that: "Upon such finding the member States shall, through the bodies or natural or legal persons appointed by them for the purpose, buy in products of Community origin offered to them, provided that these products satisfy the requirements of quality and sizing laid down by the quality standards and that they were not withdrawn from the market pursuant to Article 15(1)." The Panel also noted that paragraph 4 of this Article stated that: "Member States for whom the obligation laid down in paragraph 2 presents serious difficulties may be exempted therefrom. In order to claim exemption, member States shall inform the Commission of the existence of

such difficulties. Member States claiming such exemption shall take all appropriate steps to set up producers' organizations which will intervene on the market under Article 15. Finally, the Panel noted that paragraph 1 of Article 21 of Council Regulation (EEC) No. 1035/72 provided that products withdrawn from the market would be disposed of inter alia by "free distribution to charitable organizations and foundations and to persons whose right to public assistance is recognized by their national laws, in particular because they lack the necessary means of subsistence". Having noted all of the foregoing provisions of the Community Regulations, the Panel considered that there was no effective Community or governmental enforcement of the withdrawals of fresh tomatoes by the producers' organizations; these organizations were merely encouraged to make such withdrawals. The Panel further considered that there was no requirement that tomato producers must create, join or market their production through such producers' organizations. In the case where member States were obligated to buy in tomatoes which had been offered to them, the Panel considered that the provision allowing member States to claim an exemption from this obligation was so liberal that it would constitute a lack of effective enforcement of the intent of this Article of the Regulation. The Panel further considered that, in addition, in light of the fact that the buying-in or withdrawal prices were fixed at about one half of the normal cost of production, the intervention system would not effectively restrict the marketing or production of fresh tomatoes, but simply remove any market surplus after all potential commercial markets, including processing into tomato concentrate, had been saturated. The Panel further considered that, since this system was not considered to be an effective restriction on the marketing or production of fresh tomatoes, then it could not be considered to be an effective restriction on the marketing or production of tomato concentrate. Therefore, the Panel concluded that, even if fresh tomatoes were considered to be the "like domestic product", the intervention system for fresh tomatoes did not qualify as a governmental measure which operated "to restrict the quantities of the like domestic product permitted to be marketed or produced", or "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", within the meaning of Article XI:2(c)(i) and (ii).

4.14. As a result of the conclusions contained in the preceding paragraphs, the Panel concluded that the minimum import price and associated additional security system for tomato concentrates did not qualify for the exemptions provided by Article XI:2(c)(i) and (ii) from the provisions of Article XI:1. Therefore, the Panel concluded that this system was inconsistent with the obligations of the Community under Article XI. One member recalled his earlier conclusion, in paragraph 4.9, that the minimum import price system was not being enforced in a manner which would qualify it as a restriction within the meaning of Article XI. As a result, this member of the Panel considered that Article XI was not relevant, and therefore concluded that this minimum import price system, as actually

enforced by the additional security, could not be inconsistent with the obligations of the Community under Article XI.

Article II

4.15. The Panel next examined the status of the interest charges and costs in connexion with the lodging of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article II:1(b). The Panel noted the argument by the representative of the United States that the interest charges and costs associated with the lodging of the additional security were charges on or in connexion with importation in excess of those allowed by Article II:1(b). The Panel further noted that the minimum import price and additional security system for tomato concentrates had not been found to be consistent with Article XI, nor had any justification been claimed by the Community under any other provision of the General Agreement. The Panel considered that these interest charges and costs were "other duties or charges of any kind imposed on or in connection with importation" in excess of the bound rate within the meaning of Article II:1(b). Therefore, the Panel concluded that the interest charges and costs in connexion with the lodging of the additional security associated with the minimum import price for tomato concentrates were inconsistent with the obligations of the Community under Article II:1(b).

4.16. The Panel next examined the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article II:1(b). The Panel noted the argument by the representative of the United States that the forfeiture of all or part of the additional security, if importation took place at a price below the minimum, was a charge imposed on or in connexion with importation in excess of the bound rate in violation of Article II:1(b). The Panel further noted the argument by the Community representative that, in view of the nature of the system itself, which resulted in importers complying with the minimum price obligation, the additional security had been forfeited in only a very limited number of cases. The Panel also noted that the forfeiture of the additional security was meant by the Community to be a penalty imposed on the importer for not fulfilling an obligation which he had undertaken when he applied for the import certificate. The Panel considered that such a forfeiture should be considered as part of an enforcement mechanism and not as a charge "imposed on or in connection with importation" within the purview of Article II:1(b). As a result,

the Panel considered that Article II:1(b) was not relevant, and therefore concluded that the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates could not be inconsistent with the obligations of the Community under Article II:1(b). One member of the Panel recalled his earlier conclusion, in paragraph 4.9, that the minimum import price system was not being enforced in a manner which would qualify it as a restriction within the meaning of Article XI. He noted that no justification for this system had been claimed by the Community under any other provision of the General Agreement. He considered that importation of tomato concentrate at a price lower than the minimum price could still be carried out by importers who had an interest in doing so. He further considered that the system operated in a way so that the forfeiture of a security levied an additional charge which raised the price of tomato concentrate imported at a price lower than the minimum price. He also considered that such a forfeiture qualified as "other duties or charges of any kind imposed on or in connection with importation" in excess of the bound rate within the meaning of Article II:1(b). Therefore, he concluded that the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates was inconsistent with the obligations of the Community under Article II:1(b).

Article VIII

4.17. The Panel next examined the status of the interest charges and costs associated with the lodging of the additional security which enforced the minimum import price for tomato concentrates in relation to the Community's obligations under Article VIII. The Panel noted the complaint by the representative of the United States that the interest charges and costs associated with the lodging of the additional security were imposed as protection for domestic products contrary to the provisions of Article VIII:1(a). The Panel recalled its earlier conclusions with regard to Article XI and Article II. As a result of these previous conclusions, the Panel considered that this minimum import price and associated additional security system could not also be considered merely as an administrative formality or fee falling under the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the interest charges and costs associated with the lodging of the additional security could not be inconsistent with the obligations of the Community under Article VIII.

4.18. The Panel next examined the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article VIII. The Panel noted the argument by the representative of the United States that such a forfeiture, if importation took place at a price below the minimum, imposed a substantial penalty for minor breaches of customs regulations or procedural requirements in violation of Article VIII:3. The Panel noted that the forfeiture of the additional security was a penalty imposed on the importer for not fulfilling an obligation which he had undertaken when he applied for the import certificate. The Panel considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality "in connexion with importation" within the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates could not be inconsistent with the obligations of the Community under Article VIII.

Article I

4.19. The Panel next examined the provision for an exemption from the lodging of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article I:1. The Panel noted that Article 10 of Council Regulation (EEC) No. 516/77 stated that the "lodging of such additional security shall not be required for products originating in non-member countries which undertake, and are in a position, to guarantee that the price on import into the Community shall be not less than the minimum price for the product in question, and that all deflection of trade will be avoided". The Panel noted the argument by the representative of the United States that this provision amounted to conditional most-favoured-nation treatment inconsistent with Article I:1 of the General Agreement, since it removed one of the requirements for certain countries while leaving a burden on other countries. The Panel further noted the argument by the representative of the Community that this provision did not make any distinction based on the economic system or any other factor between third suppliers and, that the possibility to guarantee that the minimum price would be respected was open to all, unconditionally. The Panel considered that, regardless of whether a guarantee had to be provided by the importer or the government of the exporting country, so long as a guarantee was necessary for all imports from all potential third country suppliers, there would be no discrimination within the meaning of Article I:1. Therefore the Panel concluded that the provision for an exemption from the lodging of the additional security associated with the minimum import price for tomato concentrates was not inconsistent with the obligations of the Community under Article I:1.

(c) Nullification or impairment

Article XXIII

4.20. The Panel next examined the import certificate and associated security system and the minimum import price and associated additional security system to determine if there had been any nullification or impairment of any benefit accruing to the United States under the General Agreement within the meaning of Article XXIII. The Panel noted that Article XXIII:1 provided that nullification or impairment could be the result of:

- "(a) the failure of another contracting party to carry out its obligations under the Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation."

In accordance with established GATT practice¹, the Panel considered that where measures were applied which were judged to be inconsistent with the GATT obligations of the contracting party concerned, this action would prima facie constitute a case of nullification or impairment.

4.21. The Panel then recalled its previous conclusions with respect to the import certificate and associated security system that no inconsistency with the provisions of Articles XI, VIII and II of the General Agreement had been found. Therefore, the Panel concluded that no prima facie case of nullification or impairment existed. The Panel then examined if there had been any damage to trade serious enough to constitute nullification or impairment within the meaning of Article XXIII. The Panel recalled its earlier conclusions that the obligations which the importer had to undertake when he applied for the import certificate were not onerous enough to violate Article VIII. The Panel considered that this system, being a measure which was not inconsistent with the provisions of Article VIII, did not have trade effects which could be considered as a nullification or impairment within the meaning of Article XXIII. Therefore, the Panel concluded that the Community's import certificate and associated security system did not constitute a nullification or impairment of any benefit accruing to the United States under the General Agreement within the meaning of Article XXIII.

¹For example, Basic Instruments and Selected Documents, Eleventh Supplement, page 100, paragraph 15.

4.22. The Panel then recalled its conclusions with regard to the minimum import price and associated additional security system for tomato concentrates that this system was inconsistent with the provisions of Articles XI and II. Noting that the Community had claimed justification of this system under Article XI:2(c)(i) and (ii) only, the Panel concluded that there was a prima facie case of nullification or impairment of benefits accruing to the United States within the meaning of Article XXIII.