

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

L/5047

31 October 1980

Limited Distribution

EEC RESTRICTIONS ON IMPORTS OF APPLES FROM CHILE

Report of the Panel

I. Introduction

1.1 In a communication dated 4 May 1979 and circulated to contracting parties, the Commission of the European Communities informed that it had taken protective measures limiting imports of apples under Regulation No. 687/79 of 5 April 1979 and that it was prepared to enter into consultation with any contracting party having a substantial exporting interest which wished to examine these measures with the Commission (L/4807).

1.2 In a communication dated 7 June 1979 and circulated to contracting parties the Government of Chile informed that it had requested and was currently engaged in consultations with the European Economic Community under Article XXIII:1 with regard to the measure referred to above (L/4805).

1.3 In a further communication dated 13 July 1979 and circulated to contracting parties, the Government of Chile stated that in its view the EEC measure contravened the provisions of the General Agreement in that the measure, inter alia, had been applied retroactively, was discriminatory and concerned a product the tariff on which was bound in the EEC schedule. Chile also expressed its hope that, by the date of the next Council meeting, there would be a mutually satisfactory agreement reached in its consultations with the EEC under Article XXIII:1 and that Chile would report on this at that time (L/4816).

1.4 Since these bilateral consultations did not lead to agreement, the representative of Chile requested the GATT Council, at its meeting of 25 July 1979, to establish under Article XXIII:2 a Panel to examine the compatibility of the EEC measures with GATT provisions. The GATT Council agreed to establish, in principle, a panel to examine the complaint by Chile relating to EEC restrictions on imports of apples from Chile. The Council, however, deferred until its next meeting a decision on the terms of reference and membership for the panel, inviting the parties concerned to continue their bilateral efforts to find a solution on this matter (C/M/134).

1.5 These bilateral consultations having failed to reach a mutually satisfactory solution, the Council agreed at its next meeting on 6 November 1979 (C/M/135) to the following terms of reference for the panel:

"To examine in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Chile, relating to restrictions which were applied by the EEC on imports of apples from Chile (L/4816), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings, as provided for in Article XXIII:2."

1.6 At the same meeting, the Council also authorized the Chair to nominate the chairman and the members of the Panel in consultation with the two parties concerned. Accordingly, the Chairman of the Council informed the Council at its meeting of 29 January 1980 of the following composition of the Panel (C/M/138):

Chairman: Dr. A. El Gowhari (Egypt)

Members: Mr. M. Lemmel (Sweden)
Mr. R. Wright (Canada)

1.7 In the course of its work, the Panel held consultations with the European Economic Community and Chile. 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.

II. Factual aspects

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

2.2 The European Economic Community has a common organization for the marketing of apples which includes common quality standards, an internal price support and intervention system, and a levy system on imports. When market prices fall below a certain minimum in representative markets, for three successive marketing days, member States are authorized to buy up at a certain price apples offered for intervention. Producer groups may also be compensated for effecting market withdrawals. Offer prices of apples from third countries are compared daily to a fixed minimum price, called a reference price which is based, inter alia, on EEC average costs of production. If for any origin the offer price is below the reference price, a compensatory tax is applied to apples of that origin in addition to the normal customs duty. In case there is a disruption of the Community market or threat thereof from imports, or in case of heavy EEC interventions or market withdrawals, the EC Commission is authorized under EEC regulations to suspend imports totally or partially or impose a supplementary charge on them.

2.3 At the beginning of 1979, the EC Commission undertook consultations with Southern Hemisphere supplying countries (Argentina, Australia, Chile, New Zealand and South Africa) in order to achieve voluntary restrictions of their respective apple shipments to the Community. Negotiations for similar arrangements had been carried out with these countries in 1976. Agreements were reached between the EEC with Argentina, Australia, New Zealand and South Africa but negotiations broke down in March 1979 between the EEC and Chile. The EC Commission had proposed 42,000 m.t. which was considered insufficient by Chile in that its exporters had already negotiated commercial contracts with EEC importers for up to 60,500 m.t.

2.4 On 5 April 1979, the EC Commission issued regulation No. 687/79 which suspended the free circulation into the Community of apples (Common External Tariff No. 08.06 AII) originating from Chile for the period 25 April to 15 August 1979. Commission Regulation No. 797/79 on 23 April 1979 revised the previous regulation by stipulating that for apples which left Chile not later than 12 April 1979 in vessels bound for a Community port, the placing into free circulation in the Community would be suspended only as from 5 May 1979. Commission Regulation No. 1152/79 of 12 June 1979, further stipulated that for apples which reached a Community port before 19 May 1979, the placing into free circulation would be suspended only as from 17 June 1979. The latter two amendments to Commission Regulation No. 687/79 were made so as to allow the importation of approximately 42,000 m.t. of Chilean apples all tolled for the period 1 January-15 August, 1979. The EEC protective measures against apples from Chile were terminated on 15 August 1979.

2.5 The EEC applies different duty rates on apples depending on the season, all rates being bound under the GATT. Chile has an initial negotiating right dating from the Dillon Round in 1961, on the EEC tariff of 8 per cent ad valorem with a minimum duty of 1.40 u.a./100 kgs. net, for the period 1 April to 31 July. The current duty rate applied by the EEC for this marketing period is 6 per cent ad valorem with a minimum duty of 1.40 u.a./100 kgs. net.

2.6 The following tables give statistics relative to the EEC situation on apples. In addition, it should be noted that the EEC financed the grubbing-up of 54,876 hectares of apple orchards in 1969 and 8,852 hectares in 1976.

TABLE 2.6.1

EEC PRODUCTION OF APPLES

(in '000 metric tons)

| | Production |
|---------|-----------------------------|
| 1969/70 | 7,793 (7,211) ^{1/} |
| 1970/71 | 7,098 (6,415) ^{1/} |
| 1971/72 | 6,971 (6,331) ^{1/} |
| 1972/73 | 6,022 (5,530) ^{1/} |
| 1973/74 | 7,481 (6,857) ^{1/} |
| 1974/75 | 5,896 |
| 1975/76 | 7,551 |
| 1976/77 | 6,497 |
| 1977/78 | 5,136 |
| 1978/79 | 6,888 |
| 1979/80 | 6,869 |

^{1/} EEC production in the six original member States.

TABLE 2.6.2

EEC MONTHLY STOCKS OF APPLES
(in '000 metric tons)

| | 1973/74 | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 |
|-----------|---------|---------|---------|---------|---------|---------|---------|
| 1 January | 2,065 | 1,707 | 2,116 | 1,952 | 1,653 | 2,162 | 2,167 |
| 1 April | 956 | 727 | 1,082 | 872 | 750 | 1,152 | 970 |

TABLE 2.6.3

EEC MARKET WITHDRAWALS OF APPLES
(in metric tons)

| | |
|---------|---------|
| 1973/74 | 403,360 |
| 1974/75 | 42,916 |
| 1975/76 | 830,471 |
| 1976/77 | 167,189 |
| 1977/78 | 2,713 |
| 1978/79 | 378,974 |

TABLE 2.6.4

EEC IMPORTS OF APPLES
(in metric tons)

| Origin | 1974 | 1975 | 1976 | 1977 | 1978 | 1979 | |
|--------------------------------------|---------|---------|---------|---------|---------|---------|-------------------------|
| Chile | 15,241 | 35,985 | 48,360 | 35,686 | 64,714 | 46,407 | (46,326) ^{1/} |
| Argentina | 88,947 | 89,095 | 56,893 | 68,328 | 97,879 | 87,307 | (87,302) ^{1/} |
| Australia | 50,506 | 54,031 | 39,136 | 26,298 | 17,866 | 32,440 | (32,101) ^{1/} |
| New Zealand | 45,103 | 45,138 | 56,810 | 32,589 | 48,253 | 48,630 | (48,077) ^{1/} |
| South Africa | 131,976 | 143,985 | 159,213 | 86,405 | 156,552 | 128,405 | (129,608) ^{1/} |
| Total from Southern Hemisphere | 331,773 | 368,234 | 360,412 | 249,306 | 385,264 | 343,189 | (343,406) ^{1/} |
| Total from all third countries | 397,361 | 404,480 | 432,878 | 331,925 | 437,325 | 377,473 | (364,368) ^{1/} |

^{1/} EEC member State statistics for period January-September 1979.

III. Main arguments

Article I

3.1 Chile maintained that the EEC protective measure against Chile was discriminatory as it affected exclusively apples of Chilean origin and was thus inconsistent with the most-favoured-nation treatment prescribed in Article I. The fact that the EEC had concluded "voluntary restraint agreements" with other Southern Hemisphere exporters did not, in the view of Chile, provide any justification for the nullification or impairment of Chile's rights under the General Agreement.

3.2 The EEC stated that nothing in its action could be considered in contradiction with the basic most-favoured-nation principle embodied in Article I. Moreover, the EEC maintained that its action, being a quantitative restriction, should be examined in connexion with the most-favoured-nation type commitment contained in Article XIII. (See paragraphs 3.25 and 3.26.)

Article II

3.3 Chile stated that it has an initial negotiating right dating from the Dillon Round as regards an EEC tariff binding of 8 per cent ad valorem on apples imported during the marketing period 1 April to 31 July (BTN No. 08.06 AIIc). Chile held that it had a principal supplying interest on subsequent EEC tariff concessions concerning apples imported during the relevant marketing period as well as a principal supplying interest on other EEC bindings concerning apples imported during other marketing periods.

3.4 Chile held that these tariff concessions were a contractual obligation of the EEC and were incorporated in the legal system of the General Agreement through the references contained in Article II:1 and :7 of Part I of the General Agreement. Under Article II and other provisions of the GATT, Chile considered that a contracting party may do nothing that impairs a tariff concession it has granted except for the case of measures of exception authorized by the General Agreement.

3.5 Chile indicated that the prohibition against imports of apples from Chile imposed by the EEC clearly contravened Article II:1(a), in that the EEC measure involved treatment less favourable than that provided for in the concession granted by the EEC for apples.

3.6 As regards Article II:1(b), Chile stated that although the measure applied by the EEC was not in the form of a customs duty, it had the effect of being an absolute or infinite duty, and completely nullified the concession granted.

3.7 Furthermore, Chile considered that Article II, as well as the whole of Part I, of the GATT could not be read in isolation but must be examined in conjunction with the other provisions of the GATT, including Article XI:1.

3.8 The EEC stated that it was not appropriate to raise Article II with regard to the measures it had taken as the measures had not constituted a tax or supplementary charge in excess of the bound customs duty on apples. Moreover, the EEC maintained that Chile had not received a tariff treatment less favourable than the other GATT beneficiaries.

Article XI

3.9 Chile maintained that the EEC had imposed a restriction that is expressly prohibited by Article XI:1. Chile also argued that the EEC measure did not conform to the criteria for exception to Article XI:1 as set out in Article XI:2c(i) or (ii).

3.10 Chile stated that the EEC import restriction was not necessary to the effective enforcement of EEC measures operating in the domestic sector. There was no causal link between imports from Chile and EEC consumption of domestic apples, according to Chile, as the two products are not, in fact, competitive with one another. Chilean apples are of different varieties than those in surplus in the Community (Golden Delicious) and they are bought by selective consumers looking and willing to pay a premium for a fresh and high quality product. This was clearly demonstrated, according to Chile, by the fact that restrictions imposed on imports of Chilean apples did not induce the EEC consumer to buy more domestic apples on stock than it would have done in the absence of such restrictions. Chile pointed out that the EEC restriction on imports occurred at a time in the marketing season when there was no domestic EEC production of apples.

3.11 Chile held that the EEC restriction was not in conformity with the last paragraph of Article XI:2. Chile stated that the EEC cutbacks, in percentage terms, on imports, as compared to the level Southern Hemisphere suppliers had intended or estimated they would ship to the EEC, were larger than the EEC market withdrawals of domestic apples compared to EEC production. Chile had intended to export 60,500 m.t. of apples to the EEC and the other four Southern Hemisphere exporters had estimated they would be sending 279,500 m.t.. Moreover, Chile considered that the EEC had not based its restrictions on a "representative period" and had not taken into account "special factors", in particular, Chile's increased export potential and its actual commercial contracts for 1979.

3.12 As regards XI:2c(ii), Chile questioned whether the EEC situation in 1979 could be considered a "temporary surplus" in light of the high levels of EEC production and surplus removal over the years. Chile also noted that apples withdrawn from the market in the EEC were destroyed, which was not provided for in XI:2c(ii).

3.13 The EEC considered that its action was consistent with Article XI.

3.14 The EEC recalled that the EEC had taken a series of internal measures over the years with the aim of assuring an acceptable level of production and marketings of apples in the EEC. The EEC noted that two grubbing-up actions since 1969 had removed 63,728 hectares from production of apples, which was equal to six times the area of apple orchards planted in Chile in 1973 and four times the area in 1978. The EEC stated that there were no member State aids to apple production. Since 1970, apples of the quality class III were not permitted to be marketed for consumption in the fresh stage. According to the EEC, apples withdrawn from the market either via public intervention purchases or by producers' groups in 1979 were utilized as follows: 3.6 per cent were distributed freely, 32.6 per cent were distilled into alcohol, 56.8 per cent went into animal feed and 7 per cent spoiled.

3.15 The EEC noted that apples were unquestionably an agricultural product, and that an EEC apple was a like product to a Chilean or Southern Hemisphere apple. With reference to Article XI:2c, the EEC internal measures described had shown, according to the EEC, that "quantities of the like domestic product permitted to be marketed or produced" in the EEC had been restricted considerably and that these measures also aimed at removing "a temporary surplus of the like domestic product ... by making the surplus available to consumers free of charge or at prices below the current market level". The EEC stated that the import restrictions had been necessary in the sense that had they not been applied, the quantities offered into intervention would have increased to an unbearable level, and the measures taken to restrict marketings and production as well as to remove the temporary surplus would have been nullified.

3.16 In the EEC's view, the implicit philosophy behind Article XI consisted of allowing an exception to the general rules against quantitative restrictions under certain conditions. When a contracting party took measures not only for the benefit of its producers but for exporters as well (since the measures aimed at rendering healthy the market conditions), the EEC stated that Article XI provided for other contracting parties to accept an equitable and corresponding sacrifice as regards their exports. This is what the EEC had asked of its third country suppliers from the Southern Hemisphere, the EEC stated, and only Chile had objected to this request. Chile had not questioned the grounds behind the EEC request, according to the EEC, but had considered that the import share accorded to Chile should be greater.

3.17 The EEC maintained that its measures had been necessary in the sense of Article XI:2c. The EEC noted that apples can be stored until the beginning of the next season while preserving their quality and organoleptic characteristics. Therefore, even when the production season for apples is over in the EEC, the EEC maintained that there is still an important domestic supply of

apples. EEC stocks of apples on 1 April 1979 stood at 1,152,000 m.t., and, according to the EEC, excessive imports would have affected the release of these stocks onto the EEC market.

3.18 The EEC considered that it would not have been appropriate to take into consideration the 1979 projected exports to the EEC on the basis that (a) this procedure could have motivated traders to inflate their forecasts in order to obtain a larger share of the quotas; (b) the intention of exporters cannot be easily proved; and (c) the forecasts by Chile for 1979 were influenced by other Latin American countries' decisions to limit their imports. For these reasons, the EEC considered it more equitable and more in conformity with GATT practice to take into account the 1976-78 representative period.

Article XIII

3.19 Chile maintained that the EEC had not strictly complied with the provisions of Article XIII as regards non-discriminatory treatment. Chile stated that the EEC import suspension had applied exclusively to Chile and that the "voluntary agreements" which the EEC had reached with the other Southern Hemisphere suppliers were not "similar" either in form or substance to the prohibition imposed on Chile. Chile maintained that legal, administrative and economic reasons prevented its government from accepting a "voluntary restraint agreement".

3.20 Chile stated that it was not obliged to reach a voluntary restraint agreement with the EEC, even though the other Southern Hemisphere suppliers had done so. Chile maintained that under the terms of Article XIII:1 and :2(d) a contracting party could not conclude agreements with some countries and unilaterally impose a restriction on those with whom it was not possible to arrive at an understanding. Chile's view was that under Article XIII:2(d), a contracting party imposing a restriction was required to reach agreement with all countries having a substantial interest in the product concerned and not only with some countries. In cases when this was not practicable, Chile held that the contracting party concerned must allot shares on the basis of the rules of Article XIII.

3.21 Under Article XIII:2 first sentence, Chile noted that a contracting party shall aim at a distribution of trade in the product concerned approaching as closely as possible to the trade which the suppliers affected might be expected to obtain in the absence of restrictions. This obligation is developed in Chile's view by paragraph 2(d), which lays down the method by which the shares should be allotted. This paragraph speaks of "a previous representative period" and of "any special factors". The EEC used 1976-1978 as a representative period, in determining the levels of imports from the Southern Hemisphere that should come into the EEC market in 1979. The year 1970, in Chile's view, was not "representative" as voluntary restraint agreements with the EEC were in effect at that time. Chile believed that the EEC

should have considered an estimate of what the supplier concerned could have exported in the absence of such restrictions for that year or taken into consideration the year immediately preceding that year. Furthermore, Chile explained that Chilean exporters had exceeded the 1976 export restraint because EEC importers operated through third parties and bought on a f.o.b. basis.

3.22 Chile drew attention to the interpretative note to the term "any special factors" as used in Article XIII:2(d).¹ This note as well as its drafting history indicated, according to Chile, that, a country whose productive efficiency or ability to export has increased relative to other foreign suppliers since the representative period on which import quotas were based, should receive a relatively larger quota. Chile stated that the figures for its exports in general and for apples in particular, demonstrate that there has been an obvious change in relative productivity in its favour, for reasons both of greater productive efficiency and of greater ability to export.

3.23 Chile noted that another example of how the EEC had not acted in an equitable manner in conformity with Article XIII was the 31,000 m.t. share which the EEC "voluntarily" agreed to with Australia. This figure, according to Chile, was higher than what Australia had estimated its exports to the EEC could be (25,000 m.t.), and higher than the average of Australia's exports for 1976-1978 (27,700 m.t.).

3.24 Finally, Chile believed that the obligation under Article XIII:3(b) not to exclude from entry goods "en route", should not limit itself to goods on board, but should also cover goods for which contracts have been signed and are in full legal and commercial execution. Chile held that the EEC prohibition had a retroactive effect contrary to the principles of international law. Chile stated that retroactive was defined according to Black's Law Dictionary as being "those laws or acts which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect of the transactions or considerations already past". Chile claimed that the EEC measure affected contracts previously signed by Chilean exporters with European importers, leaving

¹The relevant interpretative note on "special factors" as used in Articles XI and XIII reads as follows:

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

contracts for approximately 18,000 m.t. of Chilean apples unfulfilled. The EEC measure had also affected, according to Chile, a series of related contractual arrangements, including contracts concerning charters, credit, insurance and prior payment. Chile stated that while the General Agreement does not contain any specific reference to retroactivity, it is implicit in any system of law that acts or laws may not have a retroactive effect. Although there are exceptions which are to be found in the emergency actions provided for in the General Agreement, Chile maintained that these are called for only in the presence of unforeseen situations which cannot be resolved by other means. Consequently, the question of retroactivity is directly linked to a responsible behaviour in matters of trade policy, in Chile's view. In this connexion, Chile maintained that the EEC action to consult with Chile and other suppliers came late (March): later than when Commission services knew what the internal situation for apples would be (November) and after a third of Chile's exports had left for EEC ports. Therefore, Chile said that it could not be alleged that this was an unforeseen situation and that the measure applied by the EEC should not be allowed to constitute a precedent. Furthermore, in Chile's opinion, the EEC retroactive restriction had a discriminatory effect because it did not take into consideration the fact that Chile ships apples to the EEC market earlier than the other Southern Hemisphere suppliers. The whole process of fixing the date of entry into force of the EEC prohibition and the subsequent changes thereto, meant that high costs were incurred, because in some cases exporters had to place the apples in cold storage, with loss due to deterioration, and in others they had to re-export the apples to third countries on less favourable price terms.

3.25 The EEC maintained that the import measures taken on apples were in conformity with Article XIII. The suspension of imports from Chile was not discriminatory, according to the EEC, as all other Southern Hemisphere suppliers had agreed to limit their respective shipments to the EEC voluntarily. The EEC accepted that Chile was not obliged to reach a voluntary restraint agreement on apples. However, the EEC stated that having obtained agreements with all other Southern Hemisphere suppliers, it could not simply leave Chile free to export to the EEC all the quantities it desired. In the EEC view, this would have been inequitable and discriminatory for the other suppliers. The EEC therefore decided to allocate to Chile a quota (42,000 m.t.) which the EEC considered equitable on the basis of Article XIII criteria. The EEC stated that if it had adopted a different course and applied Article XI restrictions to all these suppliers, the quantity allocated to Chile would not have been any greater. The EEC maintained that, for the purpose of Article XIII, it was necessary to examine to what extent the quantity given to Chile (42,000 m.t.) was in proportion to that given to the other suppliers (271,000 m.t.). The EEC stated that it was irrelevant to examine the means by which respect of these quantities was enforced, provided that enforcement was assured. The EEC recalled that the Chilean quota had been enforced by the EEC Regulation previously quoted, while the quotas allocated to the other suppliers were managed by the exporters themselves, the EEC limiting itself to an active and continuous examination of the import figures. The facts demonstrate that this management was reliable and effective, according to the EEC.

3.26 The EEC held that it had observed the provisions of Article XIII:2(d) in allocating shares among the Southern Hemisphere exporters. It stated that it had calculated the shares on the basis of imports of apples from these countries for the preceding three years (1976-1978). As regards Chile, however, the EEC had "corrected" the import figure from 48,360 m.t. to 28,000 for 1976. During that year, the EEC stated, voluntary restraint agreements with the Southern Hemisphere suppliers had been in force but Chile had largely exceeded its negotiated level, while the other suppliers respected the engagements. Consequently, Chile's actual exports should not have been taken into account, according to the EEC. The EEC stated that the "corrected" average for Chile totalled 42,800 m.t. and the quantity given was 42,000 m.t. (98 per cent of the "corrected" 1976-1978 period). Average EEC imports for the period 1976-78 from the other four exporters together totalled 282,074 m.t. and the EEC stated that it had reached voluntary restraint agreements with these countries together in the amount of 271,000 (96.1 per cent of the 1976-1978 period). The EEC noted that it had not taken into account any special factors in the allocation of shares other than that as regards the correction of the import figure from Chile during 1976. The EEC considered that the notion of "productive efficiency" was difficult to take into account in allocating shares as one could not confirm whether an increase observed in exports reflected increased productivity.

3.27 The EEC did not share the view expressed by Chile, that the consultations had been held late. The EEC recalled that before the formal consultations initiated in March, the Chilean Mission in Brussels had been approached by the EC Commission in January. The EEC stated that, at that time, it was made clear to that Mission that while no decision had been taken on restrictive measures, the possibility of such measures did exist, particularly if the difficult situation on the internal apple market were to worsen. The EEC maintained that Chile was thus aware, at that time, that contracts for export were subject to the risk of restrictive measures.

3.28 The EEC further held that the measure against Chilean apples was not retroactive. The Community had conformed to the provisions of Article XIII:3(b), the Commission stated, in that it had not banned entry of Chilean apples on board and destined for the EEC at the time it gave public notice of the protective measures, but did count them against the total quantity to be permitted to be imported from Chile. The EEC stated that if the EEC had allowed in all apples Chile intended to export, even those not yet "afloat", this would have favoured the one supplier with whom negotiations had lasted the longest. According to the EEC, this would have been discriminatory for other suppliers, and contrary to Article XIII.

Part IV

3.29 Chile stated that its complaint must also be examined in the light of the provisions of Part IV of the General Agreement, which constituted legal obligations contracting parties had accepted. Accordingly, Chile believed

that the objectives and principles of Part IV must also be taken into consideration in the interpretation of all of the provisions of the General Agreement. Chile stated that the EEC measures should be examined, in particular in light of the commitments contained in Articles XXXVI:1(a), :1(b), :2 and :3, and XXXVII:1(b) and :3(c).

3.30 In this context, Chile considered it appropriate to raise the following questions: whether the EEC had acted in a manner consistent with its obligations under Part IV; whether EEC did everything possible to avoid introducing restrictions; whether EEC did everything possible to give notice in good time about the alleged difficulties that were being caused in its internal market by imports from the Southern Hemisphere countries; whether it did everything possible to avoid discrimination or application of the prohibition with retroactive effect; whether the EEC really had special regard to the interests of Chile, as a developing country; and whether the EEC really explored all possibilities of constructive remedies before restricting imports from Chile.

3.31 Chile drew attention to the fact that it had made a major effort to open its economy to foreign trade, to control inflation, to foster economic growth and to promote and increase traditional and non-traditional exports without the benefit of subsidies of any kind. The economic policy applied over the past six years by the Chilean Government had given a powerful impulse to the agricultural sector and, in particular, better use has been made of comparative advantages in the fruit sector, and more especially, in apples.

3.32 Chile stated that its tariff was set at 10 per cent for all products, and that Chile had no non-tariff barriers. There was nothing to prevent Chile from buying apples from the EEC, Chile stated, if European apples were competitive in the Chilean market and satisfied the taste of consumers.

3.33 Chile did not import apples from the EEC but it did purchase manufactures and semi-manufactures. In respect of motor vehicles alone, Chile pointed out that its purchases from the EEC totalled \$21 million in one year. Chile's imports of capital goods from the EEC reached a value of \$150 million. In respect of consumer goods and the foodstuffs industry, the figure was in excess of \$43 million. The EEC had practically doubled its exports to Chile in the past few years. Last year those exports were in excess of \$580 million. In 1978 they were of the order of \$478 million; in other words, they increased by more than \$100 million in one year.

3.34 In contrast, Chile cited that the EEC applied a common agricultural policy that had the effect of generating huge surpluses of apples, among other products. The efforts that the EEC said it had made to eliminate over-production were clearly insufficient in the view of Chile. Chile stated that supplies from the Southern Hemisphere and in particular from Chile had not threatened to disturb the EEC market, given their limited quantities. Chile maintained that the real problem was the magnitude of EEC surplus stocks and the EEC could have engaged in more substantial market withdrawals as it had done in 1976 to avoid penalizing outside suppliers.

3.35 In Chile's view the Community had not complied with the objectives, principles and commitments of Part IV as it had not done all it could to give Chile proper notice of its alleged domestic difficulties, nor to explore possibilities of constructive remedies, nor to avoid taking discriminatory action against a less-developed country.

3.36 The EEC considered that it had done all it reasonably could have done to avoid suspending imports from Chile in 1979. The EEC stated that it could not have predicted in November what the price trends or stocks would have been in the ensuing months of the season. It considered that it would not have been appropriate to use the reference price mechanism to protect against apple supplies from the Southern Hemisphere under the circumstances, as offer prices from these countries were already high and EEC consumers were ready to pay high prices for apples from Southern Hemisphere because of quality and consumer preference.

3.37 The EEC noted that it had tried to reach a satisfactory agreement with Chile to limit its exports as evidenced by the fact that the EEC raised its initial proposed allocation from 35,000 m.t. to 42,000 m.t. As a matter of fact, the EEC ended up importing 46,000 m.t. from Chile in 1979. The EEC explained that it had taken protective measures against Chile late because the EEC wanted to arrive at a mutually satisfactory agreement with Chile and to avoid having to take protective measures. The EEC noted that Chile for its part, could have stored the 18,000 m.t. in question for a short period and shipped them to the EEC after 15 August or else exported them to other markets like the United States.

IV. CONCLUSIONS

Article I

4.1 The Panel examined the consistency of the EEC measures with the most-favoured-nation principles of the General Agreement. The Panel considered it more appropriate to examine the matter in the context of Article XIII which deals with the non-discriminatory administration of quantitative restrictions rather than Article I:1. (See paragraphs 4.11 to 4.21.)

Article II

4.2 The Panel examined the EEC measure in relation to Article II:1(a) and (b). The Panel considered that the EEC import suspension did affect the value of the EEC tariff binding to Chile on apples. With reference to II:1(b), however, the Panel considered that the EEC measure was not strictly speaking a duty or charge in excess of the tariff concession provided in the EEC schedule. Therefore, the Panel considered that it was more appropriate to examine the EEC measure in the context of Article XI.

Article XI

4.3 The Panel examined the EEC measure in relation to Article XI:1 and found that the measure was a prohibition or restriction in terms of that paragraph. The Panel next examined whether the EEC measure could qualify as an exception to Article XI:1 under the provisions of Article XI:2c (i) or (ii).

4.4 The Panel considered that the EEC measure concerned an agricultural product and that Chilean apples, although of different varieties, were "a like product" to Community apples for the purposes of Article XI:2c.

4.5 As regards XI:2c(i), the Panel considered that the EEC grubbing-up programmes in 1969 and 1976 seemed to be isolated actions of production control rather than steps in a continuing long-term policy of the Community to restrict production. The Panel noted that the programmes had not resulted in any significant drop in EEC apple production.

4.6 The Panel considered that the EEC did restrict quantities of apples permitted to be marketed, through its system of intervention purchases by member States and compensation to producer groups for withdrawing apples from the market. The Panel considered that although the EEC measures occurred outside the EEC domestic production season, imports could have affected the possibilities for the disposal or release of EEC apples out of intervention on to the EEC market at that time.

4.7 The Panel noted, however, that measures taken under XI:2c(i) must also meet the criteria expressed in the last paragraph of XI:2. The Panel noted that the EEC had not given public notice of the quantities or values to be imported under the voluntary restraint agreements it had negotiated with Argentina, Australia, New Zealand and South Africa as required by the first sentence of this paragraph. The Panel considered that the evidence before it suggested that the EEC measures did not fulfil the conditions of the second sentence of this paragraph. According to that sentence, any restrictions applied under XI:2c(i) "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". The Panel found that the EEC had not maintained this proportion.

4.8 In making this finding, the Panel looked at total imports into the EEC from Southern Hemisphere suppliers, including Chile, as these were the main EEC suppliers during the marketing season concerned when restraints were in effect. The Panel looked at the proportion of these imports to EEC production "prevailing during a previous representative period" as provided in the third sentence of the last paragraph of XI:2. In keeping with normal GATT practice, the Panel considered it appropriate to use as a "representative period" a three-year period previous to 1979, the year in

which the EEC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977 and 1978 as a "representative period". The Panel noted that the proportion between total imports of apples from the Southern Hemisphere to total EEC production had been 5.7 per cent on the average during 1975, 1977 and 1978, and would have been 4.9 per cent in 1979 based on estimated export intentions of the Southern Hemisphere countries before restraints were put into place.¹ The levels the EEC fixed during its negotiations of voluntary restraint agreements with the Southern Hemisphere countries (including Chile) totalled 313,000 m.t. which meant a proportion of imports to EEC production of 4.5 per cent.

4.9 As regards XI:2c(ii), the Panel found that the EEC was "making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level", in so far as the apples withdrawn from the market during 1978/79 went into animal feed as well as were distributed freely to social organizations. However, the Panel had doubts as to whether the EEC apple surplus could be considered a "temporary surplus" in terms of XI:2c(ii). The Panel noted that the EEC production statistics indicated the EEC has constantly had a surplus of apples over the years. On the other hand, it appeared from the statistics on monthly stocks in the EEC, that the levels of stocks during 1979 were significantly higher than normal.

4.10 In concluding its examination of the EEC measures in relation to Article XI, the Panel found that they met some but not all of the criteria contained in :2c(i) and (ii) in order to qualify as an exception to :1. The Panel found the EEC measures could not qualify as an exception to XI:1 under XI:2c(i) in that they had not fulfilled the conditions of the last paragraph of Article XI:2. As regards XI:2c(ii) the Panel thought that the EEC surplus of apples could not be considered "temporary" as it appeared year after year. However, the Panel noted that the surplus in 1979 was significantly higher than normal and could be considered to be a temporary surplus above the recurring surplus. Therefore, the Panel could not conclude that the EEC did not meet the conditions of XI:2c(ii) and proceeded to examine the EEC measures in relation to Article XIII.

¹L/4816 and C/M/134

Article XIII

4.11 The Panel examined the EEC measure in relation to Article XIII:1. The Panel found that the EEC suspension applied to imports from Chile was not a restriction similar to the voluntary restraint agreements negotiated with the other Southern Hemisphere suppliers on the basis primarily that:

- (a) there was a difference in transparency between the two types of action;
- (b) there was a difference in the administration of the restrictions, the one being an import restriction, the other an export restraint; and
- (c) the import suspension was unilateral and mandatory while the other was voluntary and negotiated.

4.12 The Panel noted that the EEC held that it had observed the provisions of Article XIII:2(d) in allocating shares among the Southern Hemisphere suppliers. Notwithstanding the Panel's conclusions regarding the lack of similarity of the restrictions with reference to Article XIII:1, and in light of XIII:5, the Panel proceeded to consider the EEC import suspension against Chile and the voluntary restraint agreements with other Southern Hemisphere exporters as "quotas" for purposes of the Panel's examination of the EEC measure under XIII:2.

4.13 The Panel noted that the first sentence of XIII:2 stated that "in applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".

4.14 The Panel noted that XIII:2a stipulated that "wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed". The Panel also noted that the EEC had issued regulations in the Official Journal regarding the suspension of imports from Chile but that there had not been public notice given of the quantity or value of permitted imports under the voluntary restraint agreements. Such notice is required by XIII:2a and :3b first sentence.

4.15 The Panel noted that the EEC had held bilateral consultations with each Southern Hemisphere supplier "with respect to the allocation of shares in the quota" in keeping with XIII:2(d) first sentence but that it had not been possible to reach agreement with Chile. The Panel noted that XIII:2(d) second sentence states that "the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product".

4.16 In this context, the Panel examined the volume of imports of apples into the EEC from the Southern Hemisphere. For reasons previously cited the Panel considered 1975, 1977 and 1978 as a "representative period" (see paragraph 4.8). On the basis of this representative period, the Chilean share of total EEC imports from the Southern Hemisphere would be 13.6 per cent. Thus a Chilean share of a quota of 313,000 m.t. would have been 42,600 m.t. using this percentage. This figure is close to what the EEC allocated to Chile.

4.17 However, the Panel noted the fact that exports from Chile into the EEC had been expanding rapidly. Chile had more than doubled its share among Southern Hemisphere suppliers into the EEC market over a recent period, accounting for 5 per cent in 1974, 10 per cent in 1975, 13 per cent in 1976, 14 per cent in 1977 and 17 per cent in 1978. The Panel believed that Chile's increased export capacity should have been taken into account by the EEC in its allocation of shares among the Southern Hemisphere suppliers. The Panel felt such a consideration was in line with the interpretative note to the term "special factors" as drafted in the Havana Charter, in particular with reference to "the existence of new or additional ability to export" as between foreign producers.¹ Moreover, the Panel considered that the fact that Chilean exporters had signed commercial contracts with EEC importers to the amount of 60,500 m.t. further demonstrated Chile's increased export capacity and that these contracts should have been taken into account as a "special factor" as well.

4.18 The Panel was unable to determine precisely what the Chilean share should have been. Nevertheless, the Panel believed that Chile should have received at any rate a greater quota share than 42,000 m.t. because of the special factors mentioned above.

4.19 The Panel noted that at the time of the suspension, Chilean exporters had signed commercial contracts for 60,500 m.t. of apples with EEC importers. The Panel reviewed the Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls² that were approved by the CONTRACTING PARTIES in 1950. These guidelines specify, inter alia that:

- (a) "any new or intensified restrictions on importation or exportation should not apply to goods shown to the satisfaction of the control authority to have been en route at the time the change was announced or to have been paid for in substantial part or covered by an irrevocable letter of credit" and

¹ Havana Charter Interpretative Note ad Article 22, paragraphs 2(d) and 4.

² GATT/CP.5/30/Rev.1

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

The Panel noted however that these standard practices "should be regarded as a code for the guidance of contracting parties and not as additional obligations imposed upon them under the General Agreement" and that individual contracting parties "should endeavour to adopt them to the maximum practicable extent".

4.20 With the above in mind, the Panel examined whether the EEC measure against Chile was "retroactive" in the context of XIII:3(b) second sentence. The Panel found the EEC to be consistent therewith, as the EEC had not excluded from entry Chilean apples on board and destined for the EEC, at the time the EEC regulation regarding the import suspension was published.

4.21 In sum, the Panel found the EEC measure to be in conformity with Article XIII:3(b) second sentence. The Panel found the EEC measure was not in conformity with the most-favoured-nation type obligations of Article XIII as it had not fulfilled the requirements of paragraphs 1 and 2(d) thereof. The Panel also found that the EEC had not conformed to the provisions regarding public notice under:2(a) and:3(b) first sentence.

Part IV

4.22 The Panel examined the EEC measure in relation to the objectives and commitments embodied in Articles XXXVI and XXXVII; in particular, XXXVII:1(b) which states that "the developed contracting parties shall to the fullest extent possible... refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties."

4.23 Although the EEC measure did affect the ability of a developing country to export into the EEC market, the Panel noted that the EEC had taken certain actions, including bilateral consultations in order to avoid suspending imports of apples from Chile. After a careful examination, the Panel could not determine that the EEC had not made serious efforts to avoid taking protective measures against Chile. Therefore the Panel did not conclude that the EEC was in breach of its obligations under Part IV.

Article XXIII

4.24 The Panel examined the EEC measure to determine if there had been any nullification or impairment of any benefit accruing to Chile 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 a measure was applied which was 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.

4.25 The Panel recalled that it had found the EEC measure not to be in conformity with Article XIII:1, 2(a), 2(d) and 3(b) first sentence. Accordingly, the Panel concluded that there was a prima facie case of nullification or impairment of benefits accruing to Chile within the meaning of Article XXIII.

4.26 In light of the above, the Panel was of the view that the economic interests of Chile had been adversely affected. The Panel considered that the CONTRACTING PARTIES should recommend that the EEC and Chile consult bilaterally with a view to arriving at a mutually satisfactory solution.

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