GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

L/6513
9 June 1989

Limited Distribution

EUROPEAN ECONOMIC COMMUNITY - RESTRICTIONS ON IMPORTS OF APPLES - COMPLAINT BY THE UNITED STATES

Report of the Panel

1. INTRODUCTION

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

1.2 In a communication circulated as L/6371 of 8 July 1988, the United States set out a complaint under Article XXIII:2 of the General Agreement concerning the quantitative restrictions applied by the European Economic Community to imports of dessert apples. It stated that consultations had been held under Article XXIII:1, but that these had not resulted in a mutually satisfactory settlement of the issue.

1.3 The United States recourse to Article XXIII:2 was considered by the Council on 22 September 1988. The representative of the United States stated that further consultations had been held, to no satisfactory result, and requested the prompt establishment of a panel under Article XXIII:2 to examine the complaint. The Council agreed to establish a panel to examine the matter referred to the CONTRACTING PARTIES by the United States and authorized its Chairman to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/224). As announced to the Council by its Chairman on 20 October 1988 (C/M/226), the agreed terms of reference were:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in document L/6371 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

The composition of the Panel was:

Chairman:	Mr. George A. Maciel
Members:	Ms. Margaret Liang
	Dr. Thomas Cottier

1.4 The Panel met on 9-11 November 1988, and on 13-15 February 1989 and 28 April 1989. In the course of its work the Panel held consultations with the European Economic Community and the United States, as well as with an interested third party (Canada). Chile, Argentina, Australia and New Zealand also reserved their rights to make submissions to the Panel (C/M/224).

1.5 The Panel submitted its report to the parties to the dispute on 25 May 1989.

2. FACTUAL ASPECTS

2.1 The common organization of the EEC market for dessert apples (and for other fruit and vegetables) is based on Council Regulation 1035 of 1972 (Official Journal L 118 of 20.5.72), as subsequently amended. This regulation replaced similar measures in place since 1966. The basis of the external régime is set out also in Regulation 2707/72 (OJ L 291 of 1972). These regulations were described in an earlier panel report in 1980.[1] Despite a number of amending regulations since 1980 the essential features of the system established under Regulation 1035/72 have not changed. At the internal level, therefore, the main elements of the market continue to be:

Producer Groups, which are a basic structural element;

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

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

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

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

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

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

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

(a) Buying-in

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

(b) Withdrawal by producer groups

When it appears to producer organizations that market prices are likely to fall substantially because of surplus supply, they may ask the member state authorities for permission to initiate withdrawal operations, at a withdrawal price not exceeding the public buying-in price plus 10 per cent of the basic price. (Article 15a of Regulation 1035/72 also enables member states to authorize "preventive withdrawals" by producer groups early in the marketing year in the light of the production outlook.) The member states, through their local representatives, verify that withdrawals have taken place and grant financial compensation, paid by the Community, to the producer groups for the withdrawal payments, less net receipts from the disposal of withdrawn apples.

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

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

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

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

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

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

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

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

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

Licensing and Suspension of Licences

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

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

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[2] OJ L 266, 25.11.72, p. 1

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

2.11 On 20 April, the Commission adopted Reg. 1040/88 (OJ L 102 of 21.4.88) which suspended until 31 August 1988 the issue of import licences for third-country imports in respect of tonnages which exceeded a prescribed quantity.

2.12 The "reference quantities" fixed in Regulation 1040/88 were:

South Africa	166,000 tons
New Zealand	115,000 tons
Australia	11,000 tons
Argentina	70,000 tons
Chile	142,131 tons
Other countries	17,600 tons.

The United States was included in the "other countries" allocation. No provision was made for sub-quotas within this allocation.

2.13 By Commission Regulation 1128/88 of 27 April 1988[3], the EEC gave notice that the applications for import licences under the "other countries" category had exceeded the quantities fixed in Regulation 1040/88, and that the issue of licences requested after 22 April for apples originating in these countries would therefore be suspended until 31 August 1988. On 22 April licence applications for import of apples from the United States totalled 11,935 tons.

2.14 The import licence suspension expired on 31 August 1988 as specified.

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[3]OJ L 107, 28.4.88, p. 27

TABLE I

EEC Apple Production, Withdrawals and Stocks

(Community of Ten)

EEC Marketing Year	1983/84	1984/85	('000 metric tons) 1985/86	1986/87	1987/88
Production (season July-October)	6,188	7,357	6,334	7,368	6,383
Withdrawals (season August-May)	125	661	184	354	207 @ 15.1.88 370 @ 29.2.88 591 @ 31.5.88
Stocks (Calendar Year)	**1984**	**1985**	**1986**	**1987**	**1988**
at: 1 January	2,175	2,350	2,032	2,275	2,404
1 February	1,831	1,866	1,683	1,951	2,001
1 April	1,038	1,046	912	1,061	1,140

Source: EEC Commission (Eurostat, member states)

TABLE II

EEC Dessert Apple Imports

(metric tons)

Marketing Year	1984/85	1985/86	1986/87	1987/88*	of which Quota Feb-Aug 1988
United States	9,860	12,970	11,742	30,980	11,935
"Other Countries" (i.e., other than southern hemisphere)	37,470	60,294	93,400	57,500	17,600
(Total)					
Total Imports	448,000	511,000	524,000	621,000	521,000

*Provisional figures

MAIN ARGUMENTS

Article XI:1

3.1 The United States recalled that Article XI:1 generally prohibited quantitative restrictions on imports and exports, and held that the EEC's measures fixing quantitative limits on the import of dessert apples constituted a restriction under that Article.

3.2 The EEC did not argue that its measures on imports were consistent with Article XI:1, per se, but that they constituted a justified use of the exception to that general provision made available under Article XI:2(c).

Article XI:2(c)

3.3 The United States noted that Article XI:2(c) provided a narrowly-drawn exception to the general prohibition on quantitative restrictions. The party invoking such an exception had the burden of demonstrating that each and every one of its requirements were met. The United States cited previous panel findings in illustration of this point.[4] The United States summarized the conditions which must be satisfied to justify an invocation of this exception as follows:

The quantitative restrictions in question must:

1. Involve an agricultural or fisheries product

2. Which is subject to governmental measures

3. Be necessary to the enforcement of those governmental measures

4. Be accompanied by public notice of the total quantity restricted, and

5. The quantitative restriction and the governmental measures must apply to "like products" (or directly substitutable products if there is no substantial production of the like products).

In addition, an exception under Article XI:2(c)(i) must also:

6a. Restrict the quantities of a like domestic product permitted to be marketed or produced, and

7a. Cannot reduce the proportion of imports relative to the total of domestic production

While an exception under Article XI:2(c)(ii) must also:

6b. Remove a temporary surplus of a like domestic product

7b. By making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level.

The United States argued that the EEC did not fulfil these conditions.

3.4 The EEC argued that the question of whether the Community restrictions on apple imports were consistent with Article XI had already been dealt with by a panel set up in 1980 at the request of Chile to examine EEC measures, equivalent to those applied in 1988, on the same product, dessert apples.[5] The report of that panel was adopted without reservation at the time by the CONTRACTING PARTIES, including the United States of America. It should therefore be taken into account, in particular, in assessing the legality of the Community measures in relation to Article XI, particularly as, on certain points of law, it changed the interpretation previously

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[4]Reports of Panels on "Japan - Restrictions on Imports of Certain Agricultural Products", L/6253, page 65; and "Canada - Administration of the Foreign Investment Review Act" - BISD 30S/164

[5]BISD 27S/98

established when the "European Tomatoes" case was examined.[6] By invoking the burden of proof, the United States was attempting to sidestep the precedent of the 1980 panel in favour of other panel reports. The Community had based its approach on the 1980 precedent, particularly as that panel dealt specifically with the subject of the dispute, whereas the others did not. Furthermore, however relevant the other panels might be, the "1980 apple" panel created a "legitimate expectation" for the contracting parties concerned, particularly with regard to the Community's rights under Article XI. It was generally accepted that, when legitimate expectation existed, it affected the burden of proof. It therefore followed that the evidence should be examined in the light of the conclusions of the 1980 report. The EEC referred the Panel, in this connection, to the arguments it had recently made before another panel.[7]

3.5 It was important, therefore, that the conclusions of the panel set up in 1979 for the same product and for similar Community measures be taken into account; furthermore, the conclusions of that panel replied to the arguments advanced by the United States concerning the consistency of the Community measures with Article XI of the General Agreement. The United States had also adopted the arguments and criteria concerning compliance with Article XI:2(c) set out in the report of the panel set up to examine Japanese measures concerning certain agricultural products.[8] Given the conclusions of the 1980 panel, the Community could refute the arguments advanced by the United States concerning non-observance of these criteria. Nonetheless it wished to stress that these criteria did not apply in the present case. First, because the Community measures were short-term measures, even if they were based on long-term regulations; second, because the conclusions of the Japanese Agriculture panel could not replace the report of a panel established to deal specifically with apples; and, above all, because that panel's conclusions with regard to Article XI:2(c) criteria could not be considered to constitute any kind of prior ruling in this respect because they were the subject of express reservation on the part of many contracting parties.

3.6 The United States rejected the EEC's claim of "legitimate expectations" arising from the 1980 panel report. Accepting the EEC argument would lead to a GATT that would quickly lose touch with present reality. To be credible, a dispute settlement system must take account of new facts, new knowledge about facts, and new interpretations of law. Much more was known about the EEC intervention system than did the parties or the panel in 1980, and there had been several significant interpretations of Article XI since then (particularly the 1987 Japanese Agriculture report). The Panel and the CONTRACTING PARTIES could not be precluded from taking these developments into account. In addition, there was the as yet

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

[7]Report of the Panel on "European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile" (L/6491)

[8]L/6253

unexplained contradiction in reasoning between the 1980 Apples report and the 1978 European Tomatoes report. This Panel needed to resolve that contradiction, to explain which report provided better precedent here.

3.7 The United States averred that the 1980 panel report was not dispositive of this case. Panels under GATT Dispute Settlement procedures served to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. They did not, however, define new obligations, nor did they create permanent legitimate expectations. While this Panel should examine all relevant provisions of the General Agreement, including the 1980 panel report, this Panel was not required to follow the details and legal reasonings of that particular case. Furthermore, it appeared that the 1980 panel did not make its findings on the basis of all the relevant information. For example, the 1980 panel introduced an aberration into GATT practice by defining the concept of a "temporary surplus above a recurring surplus". The United States believed that this and other misconceptions indicated that the 1980 panel report should not be blindly accepted as precedent and that the issue should be re-examined in light of the evolution of GATT practices and the additional knowledge available today.

3.8 The United States noted that the Community now attempted to place doubt on the validity of the Japanese panel report[9] because it was adopted with reservations; but, at the time, the Community hailed the report as "carefully reasoned".[10] That panel took care to develop broad criteria which would be applicable to any dispute under Article XI. The United States urged this Panel to heed the findings of the Japanese agricultural panel and reject the Community position that only panels involving apples were relevant to apple disputes.

3.9 In response to these arguments, the EEC clarified its position as follows. It had not advanced abstract theory about one panel report taking precedence over another report. It argued, rather, that the previous panel report which was by far the most relevant in this case was the 1980 report. This concerned essentially the same subject matter and the same legal issues and had been approved by all contracting parties without any reservation. In the EEC's view this adopted report therefore clearly had a res judicata effect to the extent that the issues decided were the same and the fundamental, factual and legal circumstances had not changed.

3.10 The EEC further stated that the United States attempted to discard the clearly relevant 1980 report in favour of the 1987 report on Japanese agricultural restrictions. It recalled the serious reservations by many contracting parties regarding certain conclusions of the latter report, and that this report concerned different products and different kinds of restrictions imposed by another contracting party in totally different

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[9] L/6253

[10] Minutes of GATT Council, 2 February 1988, C/M/217, page 20, paragraph 2

circumstances. It was made explicitly clear that the panel's findings were limited to the specific measures under examination and that it was on this condition and on this condition only that the Community agreed to its adoption. The 1980 panel obviously considered that the Community fully met whatever burden of proof it had in respect of all the conditions of Article XI:2 except for the proportionality requirement. Again, insofar as the situation remained the same, the conditions were still there and the Community, then and now, met the burden-of-proof requirements. The United States also referred to the 1978 panel report on an EEC scheme of minimum import prices.[11] Again, this report concerned different products and different issues. The United States did not demonstrate in what way the conclusions of this report could put into question those of the 1980 panel on import restrictions on apples, which was the primarily relevant precedent. Moreover, even if there were contradictions, the later report concerning a similar situation to the one under consideration should take precedence in view of the fact that the findings of the 1978 panel report on a different matter were clearly known to the 1980 panel.

3.11 On the question of "legitimate expectation", the EEC added that if the confirmation of GATT rights by CONTRACTING PARTIES as the supreme body interpreting the General Agreement had any meaning, and if legal certainty had any meaning in GATT, then the Community must have a legitimate expectation to the effect that it could not be found to have nullified or impaired a GATT right of another contracting party to the extent that it had respected the adopted conclusions of the 1980 panel.

3.12 Concerning the specific requirements of Article XI:2(c), both parties agreed that for this Panel's purposes apples were an agricultural product in terms of that provision. Their arguments as to whether or not the restrictions constituted a prohibition are covered in paragraphs 3.39-3.41 below.

3.13 The United States recalled that Article XI:2(c)(i) required that there be in existence a domestic production or marketing control system which covered the like product or (in the absence of any substantial domestic production of the like product) a domestic product for which the like product could be directly substituted. It maintained that the EEC's import restrictions and its withdrawal system did not apply to like products in terms of this requirement. An apple was not always an apple. The import quotas impaired the marketability of high-quality fresh United States apples, while the domestic restrictions reduced the quantities of low-quality, undesirable apples. All imported American apples were for human consumption as dessert apples. Of the EEC domestic apples withdrawn, 30 per cent were unfit for consumption and 46 per cent went for animal feed. These withdrawn apples, for which the EEC paid a maximum of 16.27 ECU/100 kg. in April 1987, and an average of 11.91 ECU for the season, were surely not like products to imports which entered the EEC at a reference price of 53.76 ECU in that month.

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[11] BISD 25S/68

3.14 Furthermore, the United States noted that although the General Agreement did not elsewhere define either term, Article XI:2(c) clearly differentiated between a "like product" and a "direct substitute". The plain meaning of Article XI:2(c) implied that the domestic programme must primarily cover the like product, if there was "substantial domestic production" of that like product. Only if there was no such production could the domestic programme primarily operate on a direct substitute.

3.15 As both the United States and the European Community produced substantial quantities of high-quality, fresh apples, the European Community must have a domestic control system which covered the like product to high-quality, fresh apples. The United States submitted that low-quality apples which entered the Community withdrawal system were not like products to high-quality, fresh imported United States apples; instead low-quality apples entering withdrawal were at best a direct substitute to high-quality, fresh United States apples. Thus, because the Community withdrawal system primarily affected the direct substitute for high-quality, fresh apples, not the like product, it could not justify import restrictions under Article XI:2(c)(i).

3.16 The EEC maintained that the apples imported from the United States were like products to Community apples, differences in variety or price notwithstanding. It noted that the 1980 Panel had concluded (paragraph 4.4 of its Report) that "[(Chilean apples)], although of different varieties, were "a like product" to Community apples for the purpose of Article XI:2(c)". The conclusions of this report were all the more relevant as there was no new factual basis for contradicting them. In addition the EEC argued that even if the American apples had not been stored since October, they would nonetheless remain like products to Community apples. The fact that Community apples remained in storage longer than imported apples (which were all stored at some stage, if only during transport) did not modify the fundamental perishability of these products. Moreover, the apples exported by the United States to the Community as of 15 February each year were clearly products that had been stored since harvesting, that is, from June to October of the previous year (the production period ended on 15 February, as it did in the Community). American apples were therefore unquestionably like products to Community apples.

3.17 The argument that imported products were not like products in that withdrawal prices were lower than the prices of imported products was unsustainable: the withdrawal price was not a market price, but compensation paid to the producer for the very reason that the product was not marketed. Furthermore, the Community authorities fixed the withdrawal price at a sufficiently low level, in relation to market prices in particular, so as not to stimulate Community production.

3.18 The United States argued that EEC apples were not effectively covered by Community governmental measures. Article XI:2(c) required that there be "governmental measures which operate ... to restrict the quantities ... [or] to remove a temporary surplus "of the like domestic product"". The EEC supply management programme for apples failed to meet this test. The EEC restrictions did not effectively restrain output (or remove a

surplus)[12] because they were voluntary and included no effective enforcement of withdrawals. EEC Council Regulation 1035/72 provided for the withdrawal of apples through producers' organizations (Article 18) but defined the term "producers' organization" as "any organization of fruit and vegetable producers: (a) which is formed on the producers' own initiative ..." (Article 13(1)). Producers could only become eligible to avail themselves of withdrawal through membership in these organizations; however, the EEC did not require its apple producers to create, join or market their production through them. In some member states a significant proportion of apple producers did not belong to producer organizations. A previous panel had examined a similar withdrawal scheme for Community tomatoes, also established under Regulation 1035/72, and found that such a scheme did not meet the requirements of Article XI:2(c) as "there was no effective Community or governmental enforcement of the withdrawals of fresh tomatoes by the producers' organizations".[13]

3.19 The United States did not dispute that any apple withdrawn was unavailable for consumption. But the mere fact that apples were removed from the market did not make the Community's measures effective in Article XI:2(c)(i) terms. The legal test under Article XI:2(c)(i) was whether such withdrawals effectively restricted output. The EEC measures failed this legal test. Although the drafters did not exactly define the nature of an "effective" domestic programme, they did state that "the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions" (Havana Reports, p. 89, para. 17, emphasis added). The European Community programme, though, did not affect output at all; instead, it withdrew apples already harvested, only affecting the amount of apples available for consumption. The United States emphasized that the withdrawal price was substantially lower than the market price, and only affected low-quality apples which often could not be sold in the fresh market. The withdrawal system acted like a safety net to subsidize the production of inefficient apple producers; it provided a market of last resort for apples that would otherwise go to processors for a pittance. The level of withdrawals related mainly to the supply of low-quality apples for processing and to the price paid by processors. When the latter was low, withdrawals were high, and vice versa. Thus the EEC's internal measures were effective only as price support for processing apples - not as supply management for table apples. The only supply management was the import quota.

3.20 Having argued that the EEC withdrawal programme's characteristics were, in fact, closer to a price stabilization programme than to an output reduction programme, the United States further argued that price stabilization programmes did not meet the strictures of Article XI:2(c). In fact, the drafters were careful to note that the inclusion of an exception for price stabilization programmes would distort the nature of

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[12] Arguments specifically relating to Article XI:2(c)(ii) are set out in paras 3.46-3.50 below

[13] BISD 25/S; p. 102, para. 4.13

Article XI:2(c) and overly expand it. The United States referred to the drafting history in support of this point.[14]

3.21 The EEC stated that its internal measures concerning the marketing of apples did indeed constitute "governmental measures" in terms of Article XI:2(c). Withdrawal operations were carried out within the framework of a Community regulation; the cost was defrayed entirely from public funds; and it was the Community which saw to the process of initiation of withdrawal operations and which saw to it that the withdrawals took place in the framework either of direct or indirect management. Nothing in Article XI or in the relevant interpretations of that Article required that the governmental measures in question should be mandatory or compulsory. The Article specifically referred to "governmental measures which operate to restrict the quantities of the like domestic product permitted to be marketed or produced". The report on the Havana Charter pointed out in this connection that, in interpreting the term "restrict" for the purposes of the provision quoted above, the essential point was that the measures of domestic restriction must effectively keep the quantities marketed below the level they would have attained in the absence of restrictions.[15] Thus, it was the character of effectiveness of the governmental measures which was the criterion adopted and emphasized. There was no reference in the preparatory work of the drafters to any requirement that the governmental measures in question must be "legally binding". This approach was supported by the reports of various panels which had had occasion to deal with this question. For example, the Panel on "Japan - Trade in Semi-Conductors"[16] noted that "Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party ... was covered by this provision, irrespective of the legal status of the measure". While there were differences between paragraph 1 and paragraph 2 of Article XI, this conclusion was all the more valid for paragraph 2 in that the same Panel developed its finding on the basis of another Panel report, which it thus supported on this point, and from which it emerged that in certain cases even measures addressed to private farmers' organizations within the framework of mutual collaboration with the authorities could be regarded as coming under Article XI:2(c)(i). It followed that, if measures of this kind could be accepted under Article XI:2(c), then measures which were clearly of a governmental nature, as were the Community's withdrawal measures, must also be accepted regardless of whether or not they were binding or mandatory.

3.22 Furthermore, the question of whether price stabilization was one of the purposes for which marketing restrictions were enforced was not relevant. Article XI:2(c) said nothing about the policy aims behind such restrictions, which would obviously involve price stabilization in most cases. It was the existence of the domestic output restrictions and their

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[14] EPCT/A/PV/19, 27.6.47, pp. 29-40

[15] Havana Reports, p. 89, para. 17; p. 90, para. 22

[16] L/6309, paras. 106 and 107

effect which counted, and was on these, not on price stabilization grounds, that the Community's parallel and proportional import restrictions were justified.

3.23 Examination of the way in which the Community system operated made it clear not only that it did indeed constitute "governmental measures" but also that it effectively restricted marketing so as to fulfil the requirements of Article XI:2(c)(i). The Community did not base its case on restriction of production but on restriction of the marketing of apples already harvested. It should be noted that the conclusions of the 1980 Panel[17] on this point were quite clear:

> "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 Community system of withdrawals was based on the level of apple prices observed on the various Community markets; if the prices observed on these markets fell below a certain level, established in advance, withdrawals were effected. The purpose of the withdrawals was precisely to limit the total quantities offered for sale, in order to avoid any imbalances on these markets. The intervention mechanism worked in the following way:

- apple prices were recorded on a number of representative markets. The list of representative markets was published in the Official Journal;

- the various producers' associations monitored price trends on each of their markets. When the associations considered that prices were likely to fall substantially as a result of excess supply, they applied to the national authorities for permission to begin withdrawal operations;

- member states then granted financial compensation, which was defrayed by the Community, to the producers' organizations which carried out withdrawal operations, provided the withdrawal price remained within certain limits. In practice, all intervention prices applied to withdrawals were lower than the regular market price;

- finally, when on one of the representative markets the prices communicated remained below the reference price for three consecutive market days, the Commission, if the member state concerned so requested, recorded that the market was in a state of serious crisis. Upon such finding, the member states, through the bodies appointed by them for the purpose, bought in products of Community origin offered to them.

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[17] BISD 27S/112

3.24 The EEC emphasized that both of the above methods of carrying out intervention - decentralized, through producer groups, and direct buying-in by member states - depended on government decisions. In practice the decentralized system was the one preferred and most used. But member states still had an obligation to intervene directly under certain conditions, as noted above. The possibility that a member state facing "serious difficulties" in intervening could be exempted from doing so (Reg. 1035/72, Article 19) had never been invoked in the case of dessert apples. Furthermore subsequent revision of the regulation had further restricted the grounds on which such an exemption could be claimed. In both direct and decentralized intervention, also, the apples withdrawn became the legal property of the member-state authorities and were stored at Community expense. (This was to be distinguished from private commercial stockage - see paragraph 3.36 below.)

3.25 That these withdrawal operations were effective was obvious from the level of withdrawals effected. The EEC furnished statistics to support this point. It noted that during the 1987/88 marketing year, up to 31 May 1988, the Community had financed the withdrawal from the market of 591,000 tons of apples. Comparison of this figure with, for example, the figure for Community production (6,383,000 tons during the same marketing year), and especially with the figure for total imports (621,600 tons), left no doubt as to the effectiveness of the operations designed to reduce the quantities placed on the market. There was thus no doubt that the withdrawal measures, as implemented during the 1987/88 marketing year corresponded to measures such as those covered by Article XI:2(c)(ii).

3.26 The EEC added, in response to arguments of the United States, that the withdrawal price was deliberately set low so that it would not act as a production subsidy. It was therefore not logical to argue that it kept inefficient producers in business or that it was a subsidy to processing. Furthermore it was incorrect to allege that only low-quality or processing-grade apples were withdrawn. In fact only apples of quality categories I and II - i.e. dessert apples - were eligible for withdrawal. Although withdrawn apples went into processing (etc.), they had started out as table apples for the fresh market.

3.27 The United States further argued that the EEC's import restrictions were not necessary to the enforcement of the domestic supply restrictions (even had these been consistent with the other requirements of Article XI:2(c)). It argued in particular that the import restriction could not be necessary in terms of Article XI:2(c) because imports did not compete with domestic European Community apple supplies; because the domestic programme stopped before the import quotas ended; because there was no positive correlation between apples entering intervention and the volume of imports; and because the Community's apple market was healthy.

3.28 In support of its contention that imports did not compete with EEC domestic apples, the United States stated that because of the Community's reference price system, the only imports were high-quality, higher-priced apples, whereas the apples entering the EEC intervention system were low-priced and low-quality. Imported, and especially United States, apples were sufficiently distinct in variety, quality and price to constitute a special and unique market sector, in which demand was strong. There were

effectively two markets for apples in the EEC: (a) high-quality, desirable varieties, including (but not limited to) imports; and (b) low-quality, less desirable varieties which sold for less than half the price of the first group. The United States identified the following market channels for apples in the EEC:

(i) high-quality, fresh market apples; all United States imports fell into this channel;

(ii) low-quality, fresh market apples (EEC Category II); and

(iii) low-quality apples for processing; these apples, mainly rejects from the table apple market including both Category II and III apples, were a major source of supply for EEC apple juice processors.

Whereas imported apples, as noted above, must be priced at the reference price 53.76 ECU/100 kg. in April 1988) the withdrawal price, and the price paid by processors - which were similar - were much lower. (The United States provided statistical illustration of these points.) As noted above, the Community's intervention system acted as a safety net for growers of apples for processing, providing a floor price for Category II processing apples. Imports obviously did not compete in this market. The United States recalled that the Interpretative Note to Article XI:2(c) stated that the exception only covered restrictions on those products "which compete directly with the fresh product and if freely imported would tend to make the restrictions on the fresh product ineffective". The EEC's withdrawal system, affecting only low-quality apples destined for juicing, could therefore not justify import restrictions on high-priced table apples.

3.29 The United States stated that it was accepted GATT practice that import restrictions were only legally necessary as long as the domestic restrictions remained in force. It cited the report of the Working Party on Quantitative Restrictions[18], previous panel reports[19] and the drafters' intentions[20] in support of this view. The EEC's withdrawal programme terminated on 31 May 1988; yet the import quotas were applied up until 31 August 1988. The Community could not use stocks to justify the maintenance of quotas in June and July, when intervention was not in operation, because only a small proportion of EEC apple supplies was marketed during these months. Overall, imports accounted for only 6-9 per cent of EEC apple consumption, and imports were at their heaviest when domestic supplies were shortest.

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[18] BISD 3S/189, paragraph 67

[19] Report of the Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada" (BISD 29S/107); Report of the Panel on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" (BISD 25S/100)

[20] EPCT/A/PV/19, 27.6.47, p. 42-3; Havana Reports, p. 93, paragraph 39

3.30 The United States also claimed that import restrictions could not be necessary to protect a healthy domestic apple market. It stated that the European apple industry did very well overall in 1988. The average 1987/88 European Community apple price was better than in the previous year. Prices were substantially above the previous season's prices in the northern member states (where 90 per cent of apple imports were destined) and stocks were down substantially. Imports remained below 9 per cent of the market, and the import price was maintained substantially above the European Community internal price. As the withdrawal programme initiated under EEC Regulation 1035/72 was based on the representative price in local markets, and producers' organizations could only withdraw apples in those local markets with low prices (Regulation 1035/72, Article 19), imports had not significantly affected the level of withdrawals. Imports arriving in Northern Europe, where apple prices were strong, did not affect the bulk of European Community apple withdrawals, which were in southern member states. Moreover, the EEC's system of reference prices and countervailing charges on apple imports prevented them from affecting domestic prices.

3.31 Lastly, the United States detailed its argument that there was no positive correlation between apples entering intervention and the volume of imports. In fact, during years when intervention had been low, imports had also been low. EEC prices had also remained high when imports had been high. In 1987/88, both imports and intervention levels increased. In that year, intervention increased because of the relatively poor quality of the crop. As many low-quality, Category III apples were not eligible for intervention and were thus marketed, processors were not willing to pay relatively high prices for Category II apples. In addition, processors bought fewer low-quality apples because the season began with abnormally large stocks of concentrated apple juice and because of depressed prices in the United States, the world's largest importer of concentrated apple juice. The producer organizations withdrew large quantities of Category II apples because the withdrawal price was higher than the price processors were willing to pay in the depressed market for apple juice concentrate. Thus, even in 1987/88, the quantity of imports had no effect on the amount of domestic apples withdrawn.

3.32 The EEC held that its import restrictions were indeed necessary to the enforcement of its internal restrictions, in terms of Article XI:2(c). The purpose of Article XI:2(c) was to allow prevention of the quantitative effect of imports whenever such effect seemed prejudicial to the proper implementation of measures to restrict the quantities produced or marketed domestically. In the case under review, it was obvious that an increase in the quantity of imports had an impact on, or even nullified, the restrictive effect of withdrawal operations on the quantities marketed. The quantities established as regards both withdrawals and imports were of comparable magnitude and the products concerned were like products, regardless of difference of variety or of price. In the light of the findings of the 1980 panel, the Community could not take measures which distinguished among qualities. The United States had given the impression that only the lowest quality category of apples were withdrawn. In fact, only the highest two categories (I and II) were eligible for withdrawal; i.e., although withdrawn apples went to processing (etc.), they had all started out as table apples for the fresh market.

3.33 The EEC rejected the United States argument that the Community market could be divided into two parts, either geographically or by quality, with one market for Community apples of low quality and one for imported apples of high quality. A comparison of average unit values showed that, on the whole, apples traded within the Community and those imported from third countries were of comparable value and that the two series moved in parallel. Moreover, as well as being like products, apples remained competitive products. Thus, imports of apples into the Community were high because apple prices in the Community were high, unlike those in other markets; and if apple prices were, in general, high in the Community, it was because the quantities available on the market were subject to restrictive measures. The United States had also asserted that the demand for United States apples was strong when the supply of Community apples was weak, and vice versa. The Community provided data to show that in recent years United States imports occurred throughout the year, though at a lower rate between 1 April and 1 August - the same period during which import restrictions had been applied in 1988. Lastly, excessive sub-segmentation of the apple market on the basis of difference of variety or of price - despite the fact that the products remained like, and therefore competitive, products - would eventually render Article XI inoperative, for only strictly identical products could be covered by Article XI:2 and all other products would consequently be excluded. Such an interpretation would excessively limit the scope of the Article and could not be supported by legal argument.

3.34 As to whether it was necessary to restrict apple imports at periods other than the production period of Community apples, the EEC noted that Article XI posed no requirement in this regard. Examination of the preparatory work showed that this omission was quite intentional, for the exclusion of restrictions outside the production period was considered but ultimately abandoned.[21] The Working Party on Quantitative Restrictions expressed the view that import restrictions during the part of the year in which domestic supplies of the product were not available could be imposed only to the extent that "they were necessary ... to achieve the objectives of the governmental measures relating to control of the domestic product".[22] It followed that Article XI made no distinction according to periods of <u>production</u> as such but rather according to periods of <u>supply</u>, and that, in the absence of earlier available supply, it could nevertheless be necessary to restrict imports, depending on the magnitude of the particular case.

3.35 While the production of apples in the Community, as elsewhere, was concentrated in a few months, their marketing extended over a longer period, although less than twelve months. With the help of appropriate storage techniques, apples could now keep their organoleptic qualities longer than in the past. This was demonstrated by the fact that the marketing of (Community or imported) northern hemisphere apples continued until the summer and that the marketing of southern hemisphere apples

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[21] London Report, page 13, paragraph (e)

[22] BISD, Third Supplement, page 190, paragraph 68

continued beyond the summer months. Even though most marketing took place during the production period, marketing was still substantial throughout the year and the seasonal division was tending to fade because of the interpenetration of marketing periods. It followed that the domestic supply of the market was assured throughout the marketing year in combination with the outside supply coming from either the northern or the southern hemisphere. In these circumstances, it was clear that achievement of the objectives of governmental measures relating to the control of the domestic product made necessary the implementation of restrictive measures outside the period of Community production, and that the marketing year was a more realistic basis. Moreover, although apples, whether produced in the northern or the southern hemisphere, could be marketed over a period of several months, they did not thereby lose their perishable character since their limited preservability was due to special techniques of storage of the product in its natural state and not to transformation of the product.

3.36 Contrary to the United States' assertion, the Community apple market was not "healthy", the EEC stated. Apple stocks during the marketing year 1987-88 reached very high levels, even higher than in the immediately preceding years, largely owing to low consumption of apples in the Community. Stock levels appeared all the higher, in relative terms, as production for the 1987/88 marketing year - 6,315,000 tons - was nowhere near the levels of previous years. (Data on stock levels were supplied by the EEC.) Other factors had also to be taken into consideration in assessing the Community apple market situation during the 1987/88 period. Owing to increased imports, together with improved storage methods, a residue of imports remaining from the 1986/87 period could be marketed well after the beginning of the Community market year, with the result that the market was technically "heavy". In addition, prices were particularly low on several representative markets (the French and Italian markets in particular). The poor state of the Community market explained why high import forecasts could only hamper the disposal of apple stocks on the Community market.

3.37 It was important not to confuse withdrawals and stocks. "Withdrawals" were that quantity of apples which could not be put back on to the table apple market. "Stocks" were commercial stocks, destined for deferred commercialization on the table market. These were private stocks, not aided by the EEC. Withdrawal enabled private stocks to stay within reasonable limits and eventually be disposed of on the market without upsetting price levels. The interplay of the withdrawal scheme and the parallel and proportional supervision and control of imports was essential to the functioning of the stockage mechanism. The whole system had to be seen and evaluated in its entirety.

3.38 Whether there was a fixed and pre-established link between imported quantities and quantities affected by restrictive measures was not relevant

to the question of assessing the need for an import restriction.[23] It was not required under Article XI:2(c) to have such a fixed and pre-established link. When, in 1982, the Community engaged in large withdrawals, it evaluated the trend of imports and, after finding that they were stable - or even declining - at the time, it did not have recourse to import restrictions. In the course of the 1987/88 marketing year, the Community found that, despite lower production, withdrawals were rising strongly. This reflected a trend towards lower consumption at a time when imports were tending to increase. The Community therefore deemed it necessary to restrict imports in order to preserve the effect of its policy of restricting marketed quantities, and it did so in the light of two considerations:

- First, since the imports increased the quantity of apples on the market, the forecast growth of those imports could only nullify the effects of the withdrawals that had already taken place and lead to an increase in the quantities of apples that would have to be withdrawn from the market in order for it to remain balanced.

- Secondly, withdrawal operations were also designed to keep stocks at a level capable of future disposal. However, the halting of import restrictions at the same instant as the halting of withdrawal operations financed from the Community budget could only endanger the future disposal of stocks, and the anticipation of such a problem in the disposal of stocks could only correspondingly increase the withdrawals necessary for the proper management of Community markets.

3.39 At the same time, the Community acted in strict compliance with Article XI:2 by case-by-case analysis of the situation on each marketing year as concerned the balance of supply and demand. In that respect, different patterns might emerge:

- if Community withdrawals (i.e., domestic marketing restrictions) were declining, that meant that there was a potential for consumption which did not require restriction of imports;

- if Community withdrawals were rising, that meant that there was a strain at the level of the supply-demand balance and therefore that it was necessary to restrict the total marketed supply, including imports. It was only where there was a combination of growing withdrawals (which meant declining consumption) and increasing imports that the need to restrict the latter became imperative in order to ensure control of the <u>global</u> supply.

There was thus clearly a link between the trends of domestic supply and of imported supply in assessing whether or not it was necessary to act on the totality of supply in order that the balance and level of the market should

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[23]Without prejudice to the fact that determination of the exact level of marketing or production restrictions relative to import restrictions came under the rule of proportionality.

keep reflecting the level of consumption. The fact that the Community did not use levels pre-established before the beginning of the marketing year was due to the unforeseeability of supply and demand, and made possible adjustment of the supply restriction as closely as possible to the trend of real demand - thus avoiding automatic restrictions that might turn out, in reality, to have been either excessive or inadequate. The Community considered the objective of controlling the marketed supply to be perfectly legitimate and consistent with the objectives of Article XI, and in particular paragraph 2.

3.40 Regarding the above arguments of the EEC, the United States rejected the claim that the level of Community production in 1987/88 was nowhere near that of previous years; it maintained that EEC data showed this to be a normal level. It also held that the price data from which the Community had argued was selective and unrepresentative, covering only the small, high-quality, percentage of EEC apples which were traded among member states.

3.41 The United States further argued that the EEC did not give adequate public notice of its import quotas. It claimed that this was contrary to the requirements, not only of Article XI:2(c) (last paragraph) but also of Articles X:1 and XIII:3(b). Any contracting party that undertook import restrictions must give public notice of the total value or quantity of the restrictions and publish them promptly so as to enable governments and traders to become acquainted with them. In this case, the European Community published and notified the CONTRACTING PARTIES on 21 April of the imposition of quotas for the period of 15 February to 31 August 1988. Thus, the quotas applied retroactively to all apples imported in the two months prior to announcement of the quota. Such retroactive notice did not satisfy the requirement of prompt publication, nor could it be considered to be adequate public notice. In addition, one day after the quota's announcement, the "other country" allocation was filled, and all United States apples en route to the European Community had to be diverted. Thus, the Community's public notice allowed only one day of apple imports. Such public notice was tantamount to an import prohibition, which was contrary to the provisions of Article XI:2(c) (United States Tuna, BISD 29S/107, para. 4.7).

3.42 Furthermore, exporters from various contracting parties who normally shipped apples after 20 April witnessed the market effectively undercut by those who had shipped between 15 February and 20 April. The drafters of Article XI:2(c) explicitly intended that import restrictions should not "operate in a manner unduly favourable to those countries best able for any reason to take prompt advantage of the global quota at the opening of the quotas period" (Havana Reports, p. 91, para. 28). Here, as the United

States was included in the quota for "other countries" and the quota applied retroactively, the lack of adequate public notice adversely affected United States trading interests.[24]

3.43 The EEC denied that it had violated any notification or publication requirements, applied a quota retroactively or applied an import prohibition. All Community measures were published promptly and in advance of their entry into force, in accordance with the requirements of Articles X, XI:2 last paragraph and XIII:3(b). There was nothing in any of these provisions which required a particular interval between publication and entry into force. In Regulation 1040/88 of 20 April 1988 (published in the Official Journal of 21 April 1988), the Commission fixed the quantities of imports of dessert apples originating in third countries for the period up to 31 August 1988. The Community notified the CONTRACTING PARTIES of these quotas, under Article XI, in document L/6334 of 27 April 1988. They included a quota for the "other countries" that is, countries other than the main southern hemisphere suppliers. Therefore, on 21 April 1988, the United States could know the total volume of apple imports that would be authorized for the period up to 31 August 1988.

3.44 The United States also argued that the European Community had reduced the proportion of imports relative to total domestic production. The last paragraph of Article XI:2 required that any restrictions applied under Article XI:2(c)(i) might not be such as would reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be present in the absence of either domestic or import restrictions. In determining this proportion, the contracting party must pay due regard to the proportion prevailing in a previous representative period, and to any special factors influencing trade in the product concerned. The notes to the General Agreement explained that "the term "special factors" included 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". The European Community could not meet these requirements. Under any reasonable measure the proportion of imports relative to domestic production had not been maintained, and no legitimate special factors could be cited to explain the drop.

3.45 The EEC stated that by restricting imports of apples through the establishment of import quotas, the Community did not reduce the proportion of total imports relative to total domestic production as compared with the proportion that might reasonably exist in the absence of restrictions. In a recent submission to another panel, the Community had provided the evidence to demonstrate that it had been at great pains to respect this

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[24]The United States also argued that the exclusion of United States apples, which were in transit at the time the quota was imposed, constituted an additional violation of Article XIII:3(b).

particular criterion, the only criterion it had not met in 1980.[25] It should be recalled that the 1980 panel considered that to fulfil the conditions of the second sentence of Article XI:2, last paragraph, it was necessary to look at the ratio of total imports into the EEC to EEC production during a previous representative period. The Community took the three years (in the form of marketing years) preceding the measure as the previous representative period; that is, 1986/87, 1985/86 and 1985/84. The EEC supplied statistical data which showed that during that period, the average proportion of imports to gross domestic production was 7.7 per cent. In marketing year 1987/88, the proportion was 8.7 per cent, in other words, it increased by almost 11 per cent. In the case of a marketing, as proposed to a production, restriction, it stood to reason that the quantities withdrawn from sale should be taken into account; and a similar increase was visible in the net domestic production figures. In other words, the Community chose to exceed the average of the last three years by substantially increasing the share of imports.

3.46 The United States contended that the above arguments of the EEC had not proved that the proportionality requirement had been met. Whereas Article XI:2(c) was concerned with the proportionality between imports and the total of domestic production in the absence of restrictions, the EEC had furnished statistics to show the ratio of imports, after imposition of restrictions, to domestic production, after institution of the withdrawal scheme. The United States submitted that in the absence of the EEC domestic programme, which artificially supported the production of low-quality apples, imports would have attained a larger proportion of the EEC market both historically and currently. Thus, the proper ratio should be much higher.

3.47 The EEC reiterated that the statistics provided had shown that there was no reduction in the total of imports, relative either to gross production or to net production (i.e. less withdrawals).

3.48 The United States argued that the EEC's import quotas did not remove a temporary surplus of a like domestic product in terms of Article XI:2(c)(ii). They could not remove a temporary surplus because

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[25] From EEC submission to the Panel on "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile": "In 1988, the Community took as the previous representative period the three years (in the form of marketing years) preceding the action, in other words 1986/87, 1985/86 and 1984/85. During this period, the proportion between gross domestic production and southern hemisphere imports came to an average of 6.4 per cent. During the marketing year 1987/88, the proportion between gross domestic production and imports from the southern hemisphere came to 7.9 per cent, or a rise of 23 per cent. Looking at the figures for net domestic production, in other words, after deduction of withdrawals from marketing, the proportion comes to 6.8 per cent over the last three years and 8.7 per cent in 1987/88. The Community therefore chose to go beyond the average for the last three years by substantially improving the share of imports."

there was no "temporary" surplus. The Common Agricultural Policy had conceived surpluses in nearly every year that the programme had been in existence for apples. The European Community's voluntary supply management programme caused the development of a permanent surplus by guaranteeing a minimum price for apples which, in the absence of the programme, would not be sold at all - with or without imports. The programme did not limit production; in reality it kept trees in production which should be removed. In its 1980 examination of the Article XI:2(c)(ii) exception for European Community apples, the Chile Apple Panel "thought that the EEC surplus of apples could not be considered "temporary" as it appeared year after year".[26] If the "temporary" surplus existed year after year through 1980 and continued through today, surely it could no longer be considered temporary. Notwithstanding its finding that the European Community "temporary" surplus in apples recurred year after year, the Chile Apples Panel "could not conclude that the EEC did not meet the conditions of Article II:2(c)(ii)".[27] The panel based its "non-conclusion" on the fact that "the surplus in 1979 was significantly higher than normal and could be considered to be a temporary surplus above the recurring surplus". The United States found this reasoning highly suspect, and urged the Panel to reconsider it. However, even if the reasoning were accepted, no such "temporary surplus above a recurring surplus" existed today. In fact, total domestic production of apples had fallen from 7,131,000 tons in 1986/87 (when no import quotas were imposed) to 6,500,000 tons in 1987/88. Thus, under either view, the European Community could not legitimately invoke Article XI:2(c)(ii).

3.49 Furthermore, the European Community had not removed the surplus by making it available to domestic consumers. Article XI:2(c)(ii) additionally required that the temporary surplus be removed "by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level". Available statistics, however, showed that of the apples withdrawn from the market in 1986/87 (the last season for which data were available) 46.7 per cent went into animal feed, 20.6 per cent into alcohol, and 29.66 per cent were destroyed. Only 3.04 per cent were distributed free of charge. Secondly, Community withdrawn apples were sold for animal feed to any farmer, not just to poor, disadvantaged farmers. Thirdly, the Community tendered the apples for animal feed so as to sell them at market price. (See, EEC Regulation 1035/72, Article 21(3) - "The disposal of products to the feedingstuffs industry .. shall be carried out by tendering procedure by the agency designated by the member state concerned.") And, fourth, over half of the withdrawn apples went toward neither of these Article XI:2(c)(ii) uses: 20.6 per cent were converted into alcohol, and 29.66 per cent were destroyed. Thus, the Community had not complied with its burden of proof as to the removal of a temporary surplus.

3.50 The EEC argued that in the light of the features which marked the 1987/88 marketing year, the Community could be considered to have been

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[26] BISD 27S/114

[27] Ibid., p. 114

facing a temporary surplus during that year. The surplus that year exceeded by far the levels of previous marketing years. The level of withdrawals effected during a marketing year should be referred to in order to establish whether or not a surplus was temporary, as withdrawals in fact measured the difference between the quantities produced and consumed. During the 1987/88 marketing year, withdrawals amounted to 600,000 tons, which was well above the levels of the previous marketing years, except for 1984/85. While it was true that withdrawals were effected each year, it was the scale of such withdrawals which determined that the surplus was temporary and not chronic. Given the amount of the surpluses traditionally seen on the market (averaging 9 per cent of production over the last six marketing years), the level of the surplus found to exist in 1987/88 made it a temporary surplus by definition, contrary to the United States' assertions. The temporary nature of the 1987/88 surplus was further obvious from the fact that the Community had had recourse to the provisions of Article XI only exceptionally - for the marketing years of 1987/88 and, earlier, of 1978/79 - i.e. only in periods when the Community surplus was very high. It was precisely because this surplus was temporary that the Community had had to take measures to restrict imports in 1988 whereas it had not done so in previous years. Finally, the Community surplus was made available to certain groups of consumers in the Community free of charge or at prices below the current market level, in accordance with the provisions of Article XI:2(c)(ii). The disposal of apples withdrawn from the market was covered by Community rules which provided that apples withdrawn from the market should, inter alia, be distributed to charitable organizations and used for animal feed. The Community rules stipulated that the use of withdrawals should not, in any circumstances, disrupt the disposal of products marketed normally, which was why these withdrawals were disposed of either free of charge (distribution on a humanitarian basis), or at prices lower than market prices (for animal feed). It was on this account that the 1980 panel was able to conclude that the withdrawals effected by the Community complied with the provisions of Article XI:2(c)(ii).

3.51 The United States replied that withdrawals only measured price differences for the lowest quality apples in the Community member states and (as argued above) were more influenced by the market for concentrated apple juice than the market for high-quality, fresh apples which the United States exported. Imported apples, especially United States apples, met a special market niche that Community apples could not fill and did not affect the price of domestic apples in 1987/88. Thus, by artificially raising the price of imported apples through the threat of the variable levy and producing too many low-quality apples for processing through the Common Agricultural Policy, the Community alleged that a "temporary" surplus arose. If such a "surplus" could be described as "temporary", then the temporary import quotas could become as temporary as the chronic Community surpluses.

3.52 The EEC maintained that the statistical data before the Panel clearly established that in 1987/88 the Community did in fact produce a surplus above demand which was considerably higher than the average of surplus production in previous years. Such a surplus, as confirmed by the 1980 panel, was the temporary element of otherwise existing recurring surpluses. It would be nonsensical to accept the GATT concept of a temporary surplus only in areas where recurring, chronic or structural surpluses did not

exist at all. Nothing in the General Agreement could be interpreted to mean that the existence of a structural surplus took away GATT rights with respect to the reduction of temporary surpluses. Both types of surpluses were recognized to exist by the General Agreement itself: otherwise why would Article XI:2(c)(ii) make the distinction? If they were both recognized to exist, they were also recognized to exist at the same time.

Article XXIII

3.53 The United States argued that, since the EEC import restrictions were in contravention of Articles X, XI and XIII, there was a prima facie case of nullification or impairment of the rights of the United States under the General Agreement. Citing, inter alia, the relevant provisions of the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance[28], the United States stated that nullification or impairment was presumed to exist - especially in the case of quotas - whether or not actual trade damage had been caused. In fact the United States had suffered such harm; it lost $238,000-worth of sales of apples in transit to the EEC, $3.67 million in cancelled orders and $5 million of expected sales, as well as suffering disruption in the United States and third-country markets.

3.54 The EEC maintained that it did not violate any of the provisions of the General Agreement. There was thus no prima facie case of nullification or impairment of rights accruing to the United States under the General Agreement. Furthermore the United States had not suffered trade damage; in fact its share of the "other countries" sector of Community apple imports had increased from its 1985-87 level of 26.3 per cent to 67.8 per cent during the period of the restrictions. Likewise the evidence - including United States official statistics - did not support the United States contention that the EEC measures had disrupted the United States and third-country apple markets.

THIRD-COUNTRY SUBMISSION: CANADA

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

4.2 Concerning the specific requirements of Article XI:2, Canada argued that the EEC did not have a temporary, but a chronic surplus of apples. Its protective measures, which were additional to the existing protection afforded by the CAP fruit and vegetable régime, were not justified by

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[28] BISD 26S/210

governmental measures on the internal market in terms of Article XI:2(c)(i). None such were in force, as the EEC did not effectively restrict the quantities of apples permitted to be produced or marketed. Canada noted that there was no restraint on production. The Community's régime was, it argued, mainly aimed at ensuring price support. Withdrawals, at prices well below market levels, provided at best a market of last resort, not a restriction on marketing. The producer organizations which were basic to the withdrawal scheme were voluntary; there were no quotas or limits set down in Regulation 1035/72 on marketing or production; and as the language of the Regulation was discretionary, producer organizations were not obliged to make withdrawals. Preventive withdrawal under Article 15a of Regulation 1035/72 was also discretionary at the level both of member states and of producer organizations. It, likewise, was not effective in limiting marketing - it had been used in 1986/87 to less than half the authorized level.

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

FINDINGS

Introduction

5.1 The Panel first examined the EEC's system of restrictive licensing applied to imports of apples from April through August 1988 under Article XI, as consistency with this Article was the primary determinant of the conformity of the EEC's system with the General Agreement, before proceeding to consider the measures under Articles XIII and X of the Agreement. In considering the facts and arguments relating to Article XI in particular, the Panel took note of the fact that a previous Panel, in 1980[29], had reported on a complaint involving the same product as the present matter and a similar set of GATT issues. The Panel noted carefully the arguments of the parties concerning the precedent value of this Panel's and other previous panels' recommendations, and the arguments on the legitimate expectations of contracting parties arising out of the adoption of panel reports. The Panel construed its terms of reference to mean that it was authorized to examine the matter referred to it by the United States in the light of all relevant provisions of the General Agreement and those related to its interpretation and implementation. It would take into account the 1980 Panel report and the legitimate expectations created by the adoption of this report, but also other GATT practices and panel

[29] BISD 27S/98-117

reports adopted by the CONTRACTING PARTIES and the particular circumstances of this complaint. The Panel, therefore, did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel report.

Article XI:1

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

Article XI:2(c)(i)

5.3 The relevant sections of Article XI:2 read:

> "2. The provisions of paragraph 1 of this Article shall not extend to the following: ...
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> (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
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> (i) to restrict the quantities of the like domestic product permitted to be marketed or produced ..."

The Panel noted that the EEC invoked Article XI:2 to justify its import restrictions on apples. The Panel recalled that a contracting party invoking an exception to the General Agreement bears the burden of proving that it has met all of the conditions of that exception.[30] In the present case, therefore, it was incumbent upon the EEC to demonstrate that the measures applied to imports of apples met each and every one of the conditions under Article XI:2(c)(i) and XI:2(c) last paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1. These conditions were:

- the measure on importation must constitute an import restriction (and not a prohibition);
- the import restriction must be on an agricultural or fisheries product;
- the import restriction and the domestic marketing or production restriction must apply to "like" products in any form (or directly substitutable products if there is no substantial production of the like product);

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

- there must be governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced;

- the import restriction must be necessary to the enforcement of the domestic supply restriction;

- the contracting party applying restrictions on importation must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and

- the restrictions applied under (i) must not reduce the proportion of total imports relative to total domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions.

5.4 The Panel observed that the requirements of Article XI:2(c)(i) for invoking an exception to the general prohibition on quantitative restrictions made this provision extremely difficult to comply with in practice. Indeed no contracting party had to date been found by a Panel to comply with all its requirements. The Panel was also aware that there existed widespread dissatisfaction with this provision and that its revision was under discussion. The Panel recalled, however, that it was not the function of panels to propose changes to the provisions of the General Agreement but to make findings regarding their interpretation and application.[31] With these general considerations in mind, the Panel proceeded to examine the EEC's import restrictions on apples in the light of the conditions set out above.

The measure on importation must constitute an import restriction

5.5 The Panel followed the view that prohibitions on imports were not permitted under this part of Article XI.[32] It considered that Article XI:2 (last paragraph) established conditions regarding the minimum quantity of imports that must be permitted; it did not regulate the distribution of that quantity of imports among supplying countries. As the EEC had at no time prohibited all imports of apples, its measures therefore constituted an import restriction, rather than an import prohibition in terms of Article XI:2(c)(i).

The import restriction must be on an agricultural or fisheries product

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

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[31] Ministerial Declaration of 1982, BISD 29S/16

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

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

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

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

5.8 The Panel proceeded by examining first whether the EEC did have "governmental" measures consistent with Article XI:2(c)(i), and second whether such measures did operate to restrict domestic supply in terms of the same provision. The Panel noted that the EEC did not claim that it restricted production of apples, but that it effectively restricted their marketing, through a system of market withdrawals carried out mainly by producer groups. The Panel also took note of the argument that these could not be considered "governmental" measures in terms of Article XI:2(c) because of the voluntary basis of the organization and the non-obligatory method of their operation. The Panel recalled that the concept of "governmental" measure had been previously examined on a number of occasions in respect of different articles of the General Agreement. A 1960 Panel, examining the question of whether subsidies financed by non-governmental levy were notifiable under Article XVI, expressed the view that "... the question ... depends upon the source of the funds and the extent of government action, if any, in their collection".[33] Another Panel found that the informal administrative guidance used by the Japanese Government to restrict production of certain agricultural products could be considered to be a governmental measure within the meaning of Article XI:2 because it emanated from the Government and was effective in the Japanese context.[34] A third Panel considered that legally non-mandatory measures could constitute restrictions within the meaning of Article XI:1 if "sufficient incentives or disincentives existed for non-mandatory measures to take effect ... [and] the operation of the measures ... was essentially dependent on Government action or intervention [because in that case] ... the measures would be operating in a manner equivalent to mandatory

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

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

requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance".[35]

5.9 The Panel examined the EEC measures in the light of these decisions by the CONTRACTING PARTIES. It noted that the EEC internal régime for apples was a hybrid one, which combined elements of public and private responsibility. Legally there were two possible systems, direct buying-in of apples by Member State authorities and withdrawals by producer groups. Under the system of withdrawals by producer groups, which was the EEC's preferred option, the operational involvement of public authorities was indirect. However, the régime as a whole was established by Community regulations which set out its structure. Its operation depended on Community decisions fixing prices, and on public financing; apples withdrawn were disposed of in ways prescribed by regulation. The Panel therefore found that both the buying-in and withdrawal systems established for apples under EEC Regulation 1035/72 (as amended) could be considered to be governmental measures for the purposes of Article XI:2(c)(i).

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

> "the EEC did restrict quantities of apples permitted to be marketed through its system of intervention purchases by member States and compensation to producer groups for withdrawing apples from the market".[36]

That Panel did not, however, explain the basis for this conclusion. The Panel also noted that a 1978 Panel[37] had come to the opposite conclusion about the consistency with Article XI:2(c)(i) of the EEC system set up under the same Regulation 1035/72 as it applied to tomatoes. While taking careful note of the earlier panel reports, the Panel did not consider they relieved it of the responsibility, under its terms of reference, to carry out its own thorough examination on this important point.

5.11 The Panel's scrutiny of the EEC market intervention scheme for apples led it to distinguish a number of features particularly relevant to the application of Article XI:2(c)(i). The system's operation and targets were essentially price-related; it was activated or suspended according to market price movements in relation to target prices fixed by the EEC. This was true of both direct intervention (buying-in) by member states and the decentralized withdrawal of apples from the dessert apple market by producers' organizations which could take place at a slightly higher price

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

[36] BISD 27S/112

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

level than the former. The system thus operated to provide a price floor to EEC producers. In certain years it had resulted in the withdrawal of substantial quantities of apples from the consumer market for dessert apples; but there was no quantitative target or limit defined by the EEC either for these withdrawals or for the overall quantity marketed. The overall quantity withdrawn in any year was a residual amount, resulting from the interplay of market forces instead of being determined by the EEC authorities. Likewise there was no quantitative restriction on supply by producers - i.e., the quantity they could offer for sale. The EEC régime, in assuring producers a minimum price but prescribing no ceiling on the quantity eligible for this guarantee, could in fact act as an incentive for producers operating at the margin of profitability and thereby increase the total amount of apples offered for sale. As noted in paragraph 8 above, marketing restrictions under Article XI:2(c)(i) may be implemented and enforced in various ways; but the Panel considered that the above features of the EEC system raised the more basic issue of whether it constituted a marketing restriction within the meaning of Article XI:2(c)(i) at all.

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

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

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

5.15 Concerning the purpose of Article XI:2(c)(i), the Panel recalled that the title of Article XI was "General Elimination of Quantitative Restrictions". Article XI:2(c)(i) made an exception to this general rule. It permitted governments, under certain conditions, to enforce domestic output restrictions at the border. The Panel furthermore considered that, as one of the basic functions of the General Agreement was to provide a legal framework for the exchange of tariff concessions, great care had to be taken to avoid an interpretation of Article XI:2(c)(i) which would impair this function. The Panel noted that Article XI:2(c)(i) - unlike all provisions of the General Agreement specifically permitting actions to protect domestic producers[38] - did not provide either for compensation to be granted by the contracting party invoking it, or for compensatory withdrawals by contracting parties adversely affected by the invocation. This reflected the fact that Article XI:2(c)(i) was not intended to be a provision permitting protective actions. If Article XI:2(c)(i) could be used to justify import restrictions which were not the counterpart of any governmental measure capable of limiting production, the value of the General Agreement as a legal frame-work for the exchange of tariff concessions in the agricultural field would be seriously impaired.

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

> "... was not intended to provide a means of protecting domestic producers against foreign competition, but simply to permit, in appropriate cases, the enforcement of domestic governmental

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[38] E.g., Articles XVIII:A and C, XIX and XXVIII

measures..."[39] The drafters had also given some guidance as to the nature of the governmental measures intended to be covered by the provision. They recognized that output limitation might co-exist with subsidies[40], but that:

"... in interpreting the term "restrict" for the purposes of paragraph 2, the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions."[41]

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

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

Article XI:2(c)(ii)

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

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[39] Havana Reports, p. 89, paragraph 16

[40] Havana Reports, p. 90, paragraph 22

[41] Havana Reports, p. 89, paragraph 17

examine whether the EEC measures were in conformity with the other requirements of this provision.

Article XI:2(c) (last paragraph), Article X:1 and Article XIII:3(c): Notification and administration of import quotas

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

5.21 The Panel found that the EEC had observed the requirement of Article X:1 to publish the measures under examination "promptly in such a manner as to enable governments and traders to become acquainted with them" through their publication in the Official Journal of the European Communities. It noted that no lapse of time between publication and entry into force was specified by this provision.

5.22 The Panel noted that EEC Commission Regulation 1040/88 of 20 April 1988 published, inter alia, a quota allocation of 17,600 tons for "other countries", including the United States, for the period up to 31 August that year. Use of this quota allocation was measured in terms of applications for import licences. However, licensing of imports had been in effect since 14 February 1988 (Reg. 346/88). Therefore, utilisation of the quota published in April was counted as from 14 February. The quota allocation announced on 20 April 1988 thus covered a quota period which began on 14 February 1988 and ended on 31 August 1988.

5.23 The Panel noted that Article XIII:3(b) requires that "in the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period ..." and that Article XIII:3(c) requires that "in the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof". In the context of Article XIII's overall concern with the non-discriminatory application of quantitative restrictions, the Panel interpreted these provisions together as requiring that both the total quota and the shares allocated in it be publicly notified for a specified future period. The Article XIII:3(c) requirement to promptly notify other contracting parties with an interest in supplying the product would otherwise be meaningless, as would the Article XIII:3(b) provision for supplies en route to be counted against quota entitlement. The Panel therefore considered that the allocation of back-dated quotas did not conform to the requirements of Article XIII:3(b) and (c). It also interpreted the requirements of Article X:1 as likewise prohibiting back-dated quotas. It therefore found that the EEC had been in breach of these requirements since it had given

public notice of the quota allocation only about two months after the quota period had begun.

5.24 The Panel also found that the wording of Article XIII:3(b) clearly meant that apples en route - i.e., on board and destined for the EEC - at the time the suspension of import licences was published should have been admitted to the EEC.

Article XXIII: Nullification or Impairment

5.25 The Panel noted the arguments of both parties as to whether or not the United States had suffered trade damage as a result of the EEC's measures and whether such a determination was relevant to a finding on nullification and impairment in the present case. The Panel took account of the provisions of the 1979 Understanding on Dispute Settlement[42] concerning the presumption that an infringement of obligations under the General Agreement constituted a prima facie case of nullification or impairment. It also took note of the interpretations of these provisions by previous panels.[43] The Panel concurred with the view that Article XI protected expectations of the contracting parties as to competitive conditions, not trade volumes. Hence the presumption that a measure inconsistent with Article XI had nullified or impaired a benefit accruing under that provision would stand irrespective of arguments concerning trade volumes.

CONCLUSIONS

5.26 The main conclusions of the Panel were that:

- The EEC restrictions on imports of apples were inconsistent with Article XI:1 and were not justified by Article XI:2;

- The operation of a back-dated import restriction in respect of "other countries", including the United States, was inconsistent with Articles X and XIII.

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[42] Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/216)

[43] Report of the Panel on "United States Taxes on Petroleum and Certain Imported Substances" (L/6175, pp. 19-24); Report of the Panel on "Japan - Measures on Imports of Leather" (BISD 31S/94); and Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253, p. 79)