

ARTICLE XI

GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

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I. TEXT OF ARTICLE XI AND RELEVANT INTERPRETATIVE NOTES

Article XI*

General Elimination of Quantitative Restrictions

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

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

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
 - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

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

Interpretative Notes from Annex I

Ad Article XI

Paragraph 2 (c)

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

Paragraph 2, last sub-paragraph

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

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations.

II. INTERPRETATION AND APPLICATION OF ARTICLE XI**A. SCOPE AND APPLICATION OF ARTICLE XI****1. Paragraph 1****(1) “prohibitions or restrictions other than duties, taxes or other charges”****(a) Measures under Article XI:1**

The 1988 Panel Report on “Japan - Trade in Semi-conductors” examined *inter alia*, “administrative guidance” by the Japanese government and its status as a “restriction” under Article XI.

“The Panel examined the parties’ contentions in the light of Article XI:1 ... [text of Article XI:1 omitted] The Panel noted that this wording was comprehensive: it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges. ...

“The Panel then examined the contention of the Japanese Government that the measures complained of were not restrictions in the sense of Article XI because they were not legally binding or mandatory. In this respect the Panel 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 which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.

“Having reached this finding on the basis of the wording and purpose of the provision, the Panel looked for precedents that might be of further assistance to it on this point. [The Panel discussed the Panel Report on ‘Japan - Restrictions on Imports of Certain Agricultural Products’ (see below, page 339)] The Panel recognized the differences between Article XI:1 and Article XI:2(c) and the fact that the previous case was not the same in all respects as the case before it, but noted that the earlier case supported its finding that it was not necessarily the legal status of the measure which was decisive in determining whether or not it fell under Article XI:1.

“The Panel recognized that not all non-mandatory requests could be regarded as measures within the meaning of Article XI:1. Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors. There was thus a wide spectrum of government involvement ranging from, for instance, direct government orders to occasional government

consultations with advisory committees. The task of the Panel was to determine whether the measures taken in this case would be such as to constitute a contravention of Article XI.

“In order to determine this, the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI:1 ...¹

“All these factors [discussed in paragraphs 110-116 of the Report] led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs. This was exercised through such measures as repeated direct requests by MITI, combined with the statutory requirement for exporters to submit information on export prices, the systematic monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilization in a manner to directly influence the behaviour of private companies. These measures operated furthermore to facilitate strong peer pressure to comply with requests by MITI and at the same time to foster a climate of uncertainty as to the circumstances under which their exports could take place. The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements. The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States, inconsistent with Article XI:1.”²

See also the material on “mandatory versus discretionary legislation” under “general scope” in the chapter on Article III, and the material on “measures” and “discretionary legislation” under “scope” in the chapter on Article XXIII.

(b) *Relevance of trade effects*

The 1962 Report of the Panel on the “Uruguayan Recourse to Article XXIII” concluded that the maintenance of import permit requirements justified an assumption of “nullification or impairment” of benefits accruing under the General Agreement insofar as it had not been established that these measures were being applied consistently with the provisions of the General Agreement.³

The 1984 Report of the “Panel on Japanese Measures on Imports of Leather” found that restrictions on imports of leather constituted a *prima facie* case of nullification or impairment:

“The Panel noted that its terms of reference explicitly required it ‘to make findings on the question of nullification or impairment’. It noted that since a *prima facie* case had been established, according to established GATT practice it was up to Japan to rebut the presumption that nullification or impairment had actually occurred.

“Against this background the Panel considered Japan’s argument that the existence of the quotas themselves did not necessarily mean that nullification or impairment of benefits accruing to the United

¹L/6309, adopted on 4 May 1988, 35S/116, 153-155, paras. 104-109.

²*Ibid.* 35S/157-158, para. 117.

³L/1923, adopted on 16 November 1962, 11S/95, 105, 108, 123.

States had actually been caused, but that this depended solely upon whether or not the allocation system and its implementation functioned so as to hinder United States' trade. ...

"... the Panel could not escape the conclusion that the import restrictions were maintained in order to restrict imports ...

"In any event, the Panel wished to stress that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans".⁴

The 1990 Panel Report on "European Economic Community - Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" observes that "the CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports".⁵

(2) "made effective through quotas"

(a) Import quotas

Import quotas have been examined by Panels on a number of occasions. For instance, the 1962 Panel on "French Import Restrictions"⁶ examined import quotas maintained by France; the 1988 Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products"⁷ examined import quotas maintained by Japan; and the 1989 Panel Report on "United States - Restrictions on Imports of Sugar"⁸ and the 1991 Panel Report on "United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions"⁹ examined the United States import quota on sugar.

See also the material on import licensing below.

(b) Residual restrictions

The Review Working Party on "Quantitative Restrictions" "considered in detail the type of problems which some contracting parties may have in connection with the elimination of the import restrictions which they have been applying for a number of years for balance-of-payments reasons. The Working Party concluded that it would be undesirable to deal with such problems which are essentially of a temporary nature by means of an amendment to the provisions of the Agreement, even in the form of transitional measures".¹⁰ The Working Party proposed instead adoption of the "Hard-core Waiver" decision on "Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance-of-Payments Difficulties", providing for a temporary waiver of obligations under Article XI (subject to concurrence by the CONTRACTING PARTIES) for contracting parties which would apply for such a waiver.¹¹ Waivers were granted under this Decision to Belgium and Luxembourg.¹²

In 1960, procedures were approved for dealing with residual import restrictions; contracting parties were invited to notify lists of import restrictions which they were applying contrary to the provisions of the General

⁴L/5623, adopted on 15/16 May 1984, 31S/94, 112-113, paras. 47-48, 53, 55.

⁵L/6627, adopted on 25 January 1990, 37S/86, 130, para. 150, referring to Panel Report on Japanese Measures on Imports of Leather, adopted on 15/16 May 1984, 31S/113.

⁶L/1921, adopted on 14 November 1962, 11S/94.

⁷L/6253, adopted on 2 February 1988, 35S/163.

⁸L/6514, adopted on 22 June 1989, 36S/331, 343, para. 5.6.

⁹L/6631, adopted on 7 November 1990, 37S/228, 262, para. 6.

¹⁰L/332/Rev.1 + Adds., adopted on 2, 4 and 5 March 1955, 3S/170, 191, para. 75.

¹¹Decision of 5 March 1955, 3S/38; see also material on interpretation of this Decision at 3S/191-195.

¹²S/22, S/27; see table of waivers following chapter on Article XXV.

Agreement, and to notify changes to those lists. The procedures provided for bilateral consultations upon request under Article XXII:1, and if necessary, resort either to Article XXII:2 or Article XXIII:2.¹³ In 1962, a Panel appointed by the CONTRACTING PARTIES examined the adequacy of these notifications and put forward certain suggestions on the type of information that should be included in notifications.¹⁴

The 1962 Panel on “French Import Restrictions” examined certain restrictions, formerly maintained by France under Article XII, which France had disinvoked in 1960. The Panel Report notes that the French government did not contest that the restrictions under consideration were contrary to Article XI:1, and did not invoke any other provisions of the General Agreement in justification of their maintenance.

“The Panel agreed that the maintenance by a contracting party of restrictions inconsistent with Article XI after the contracting party concerned had ceased to be entitled to have recourse to Article XII constituted nullification or impairment of benefits to which other contracting parties were entitled under GATT and the effects of such nullification or impairment were aggravated if such maintenance of restrictions continued for an extended period of time.”¹⁵

The 1983 Panel Report on “EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong” examined restrictions maintained by France *de jure* since 1944 on eight product categories. The EEC stated that all of the restrictions in question were “residual restrictions”, i.e. measures for which liberalization had not been possible in the OEEC programme of liberalization of the 1950s, and stated that social and economic factors must be taken into account. The EEC also argued that Article XI did not constitute an absolute prohibition on all residual restrictions, and that the discussions in the GATT on quantitative restrictions showed that they had come to be accepted as negotiable.

“The Panel considered the arguments put forward by the European Community regarding the social and economic conditions which prevailed in the various product categories under examination. The European Community did not claim any corresponding GATT provision in justification for these arguments. The Panel was of the opinion that such matters did not come within the purview of Articles XI and XIII of the GATT, and in this instance concluded that they lay outside its consideration.

“With regard to Article XI ... the Panel acknowledged that there exist quantitative restrictions which are maintained for other than balance-of-payments reasons. It recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties. In fact, contracting parties and in particular Hong Kong have made it clear that the discussions on quantitative restrictions which have taken place in the GATT over the years were without prejudice to the legal status of the measures or the rights and obligations of GATT contracting parties. ...

“The Panel considered the argument put forward by the European Community that the principle referred to as ‘the law-creating force derived from circumstances’ could be relevant in the absence of law. It found, however, that in the present case such a situation did not exist, and the matter was to be considered strictly in the light of the provisions of the General Agreement.”¹⁶

The 1984 Panel Report on “Japanese Measures on Imports of Leather” likewise examined restrictions maintained after disinvocation of Article XII.

“... The Panel considered that the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine

¹³Procedures approved 16 November 1960, 9S/18-20.

¹⁴11S/206, 210.

¹⁵L/1921, adopted on 14 November 1962, 11S/94, para. 4.

¹⁶L/5511, adopted on 12 July 1983, 30S/129, 138-139, paras. 27-29.

the matter ‘in the light of the relevant GATT provisions’ and these provisions did not provide such a justification for import restrictions ... [Referring to the preceding Panel Report] The Panel therefore found that the Japanese import restrictions at issue, maintained through quotas and import licenses, contravened Article XI:1.

“The Panel noted that Japan had ceased to invoke Article XII regarding balance-of-payment difficulties in 1963. It noted that the Panel Report referred to above had also concluded that the fact that ‘restrictions had been in place a long time ... did not alter the obligations which contracting parties had accepted under GATT provisions.’ The Panel found this to be valid also in the present case.”¹⁷

See also the discussion below at pages 350-352 of work in the GATT on quantitative restrictions.

(3) “import or export licences”

In 1950, the CONTRACTING PARTIES granted a release for certain aspects of the operation of the Haitian tobacco monopoly under Article XVIII:12 (which at that time provided for notification and concurrence with regard to certain measures affecting imports which were not otherwise permitted by the General Agreement). The Report of the Working Party on “Notification by Haiti under Article XVIII” noted that “After examination the working party was satisfied, and the Haitian representative agreed, that in so far as the law establishing the *Régie* provided that the importation of *tobacco, cigars and cigarettes* should be subject to licences issued by a government authority and that licences should be issued at the discretion of that authority in the light of market requirements, there was an element of restriction in the measure which was contrary to Article XI of the General Agreement”.¹⁸ A re-examination of the same measure by the Working Party on “The Haitian Tobacco Monopoly” in 1955 found as follows: “With regard to cigars, cigarettes and other tobacco, the representative of Haiti informed the Working Party that importers act as agents of the *Régie* and that import licences represent in effect orders by the *Régie*; further, that the *Régie* only determines the extent of the market demand and the Law requires that licences be issued to the full extent of such demand. The Working Party considered that under these circumstances there would be no infringement of the provisions of Article XI”.¹⁹

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” found with regard to the import certificate and associated security system at issue:

“The Panel ... noted that, without prejudice to the application of safeguard measures, import certificates were to be issued on the fifth working day following that on which the application was lodged and that import certificates were to be valid for seventy-five days. The Panel considered that, pending results concerning automatic licensing in the Multilateral Trade Negotiations, this system did not depart from systems which other contracting parties claimed were justified as automatic licensing. The Panel also considered that automatic licensing did not constitute a restriction of the type meant to fall under the purview of Article XI:1. Therefore, the Panel concluded that the import certificate and associated security system operated by the Community was not inconsistent with the Community’s obligations under Article XI:1”.²⁰

See also the discussion of import licensing and tariff quotas in the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.²¹

See also the material under “Administration of import licensing” in Article XIII.

¹⁷L/5623, adopted on 15/16 May 1984, 31S/94, III, para. 45.

¹⁸GATT/CP.5/25, adopted on 27 November 1950, II/87; Decision of the same date, II/27.

¹⁹L/454, adopted on 22 November 1955, S/38, 40, para. 11.

²⁰L/4687, adopted on 18 October 1978, 25S/68, 95, para. 4.1.

²¹DS38/R, dated 11 February 1994, para. 140.

(4) “or other measures”: other examples of restrictions

(a) Import or export prohibitions

The Panel on “United States Manufacturing Clause” examined Section 601 of Title 17 of the United States Code (the “Manufacturing Clause” of the copyright law), which prohibited, with certain exceptions, the importation or public distribution in the United States of copies of a work consisting preponderantly of copyrighted non-dramatic literary material in the English language, unless the portions consisting of such material had been manufactured in the United States or Canada. The EC maintained that this clause constituted a breach of Article XI:1; the US did not contest this position, maintaining its legality under the Protocol of Provisional Application.²² The Panel found that the Manufacturing Clause was inconsistent with Article XI:1.²³

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, examined the provisions of the US Marine Mammal Protection Act (MMPA) which regulated harvesting of tuna within the jurisdiction of the US, and required that, as a condition of access to the United States market for the yellowfin tuna or yellowfin tuna products caught by its fleet, each country of registry of vessels fishing yellowfin tuna in the Eastern Tropical Pacific Ocean had to prove to the satisfaction of the US authorities that its overall regulatory regime regarding the taking of marine mammals is comparable to that of the US. To meet this requirement, the country in question had to prove that the average rate of incidental taking of marine mammals by its tuna fleet operating in the ETP was not in excess of 1.25 times the average incidental taking rate of US vessels operating in the ETP during the same period. The MMPA also provided that ninety days after imports of yellowfin tuna and yellowfin tuna products from a country had been prohibited as above, importation of such tuna and tuna products from any “intermediary nation” would also be prohibited, unless the intermediary nation proved that it too had acted to ban imports of such tuna and tuna products from the country subject to the direct import embargo. The Panel found that these measures did not constitute internal regulations covered by the Note Ad Article III.

“The Panel noted that the United States had, as mandated by the MMPA, announced and implemented a prohibition on imports of yellowfin tuna and yellowfin tuna products caught by vessels of Mexico with purse seine nets in the ETP. The Panel further noted that under United States customs law, fish caught by a vessel registered in a country was deemed to originate in that country, and that this prohibition therefore applied to imports of products of Mexico. The Panel noted that under the General Agreement, quantitative restrictions on imports are forbidden by Article XI:1 ... The Panel therefore found that the direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the MMPA under which it is imposed were inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.”²⁴

“The Panel further noted that the MMPA required that the United States authorities implement a prohibition on imports of yellowfin tuna and yellowfin tuna products from ‘intermediary nations’, and that the United States was refusing entry to yellowfin tuna unless the importer declared that no yellowfin tuna or yellowfin tuna product in the shipment were harvested with purse-seine nets in the ETP by vessels of Mexico. The Panel therefore found that these measures and the provisions of the MMPA mandating such an embargo were import restrictions or prohibitions inconsistent with Article XI:1. The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.”²⁵

With regard to import prohibitions in relation to Article XI:2(c), see also the excerpts from the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” and the 1988 Panel Report on “Japan - Restrictions on Certain Agricultural Products”, below at page 330ff. With regard to export prohibitions under Article XI:2(b), see the excerpts below at page 327 of the 1988 Panel Report on “Canada -

²²L/5609, adopted on 15/16 May 1984, 31S/74, 78, paras. 10-11.

²³*Ibid.* 31S/91, para. 42(i).

²⁴DS21/R (unadopted), 39S/155, 196, paras. 5.17-5.18.

²⁵*Ibid.*, 39S/201, para. 5.36.

Measures Affecting the Export of Unprocessed Herring and Salmon”.²⁶ See also the material on “prohibitions and restrictions” in the unadopted 1994 panel report on “United States - Restrictions on Imports of Tuna”.²⁷

(b) *Minimum price systems for imports or exports*

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” notes as follows:

“... The Panel ... noted the argument by the representative of the United States that this system prohibited importation of goods below a certain price and was, therefore, a restriction within the meaning of Article XI on the importation of those goods. The Panel also noted the argument by the representative of the Community that this system, as enforced by the additional security, was a non-tariff measure and that, in principle, imports of tomato concentrates into the Community were allowed, but not below the minimum price level. ... Finally, the Panel noted the assertion by the representative of the Community that this system was a measure which fell within the purview of Article XI and Article XI alone, and furthermore, that it qualified for the exemption from the provisions of Article XI:1 provided by Article XI:2(c)(i) and (ii). Having noted the foregoing, the Panel considered that the minimum import price system, as enforced by the additional security, was a restriction ‘other than duties taxes or other charges’ within the meaning of Article XI:1”.²⁸

The Panel Report on “Japan - Trade in Semi-conductors” provides:

“The Panel noted that the CONTRACTING PARTIES had decided in a previous case that the import regulation allowing the import of a product in principle, but not below a minimum price level, constituted a restriction on importation within the meaning of Article XI:1 (BISD 25S/99). The Panel considered that the principle applied in that case to restrictions on imports of goods below certain prices was equally applicable to restrictions on exports below certain prices”.²⁹

See also the 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Commercial Purposes”, cited at page 324 below.

In February 1994, the EC gave notice that under a measure in force since 5 February 1994, importation of certain whitefish from all origins (including cod, haddock, coalfish, hake, monkfish and Alaska pollack) had been made conditional on observance of a reference price for imported fresh, frozen and chilled presentations of these products. The notification stated that the action had been “taken in relation to Community measures aimed at restricting the marketing of like or similar domestic products under Article XI:2 of GATT”.³⁰

(c) *State-trading operations*

See the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII. The material in this note was originally located in Article 26 of the Geneva Draft (corresponding to GATT Article XII); however, as it was considered applicable to the entire section on quantitative restrictions, it was reworded so as to cover export restrictions as well as import restrictions, and was moved to become paragraph 3 of Article XI in the text of the General Agreement agreed 30 October 1947.³¹ The text of paragraph 3 read: “Throughout Articles XI, XII, XIII and XIV the terms ‘import restrictions’ or ‘export restrictions’ include restrictions made effective through State-trading operations”. This text was transferred to the Interpretative Notes and broadened (through addition of a reference to Article XVIII) by the 1955 Protocol Amending the Preamble and Parts II and III of the GATT.

²⁶L/6268, adopted on 22 March 1988, 35S/98.

²⁷DS29/R, dated 16 June 1994, para. 5.10.

²⁸L/4687, adopted on 18 October 1978, 25S/68, 99, para. 4.9.

²⁹L/6309, adopted on 4 May 1988, 35S/116, 153 para. 105.

³⁰L/7413, “European Communities’ Trade Measures Affecting the Imports of Whitefish”, including text of Commission Regulation (EC) No. 275/94 of 4 February 1994.

³¹EPCT/141, p. 3.

The 1961 Report of the Working Party under Article XXII:2 on “Italian Restrictions Affecting Imports from the United States and Certain other Contracting Parties” notes, with regard to residual restrictions maintained through State-trading agencies operating under Article XVII, that “Insofar as the State-trading operation had the effect of restricting imports, the Italian authorities fully recognized that, by virtue of the interpretative notes *ad* Articles XI, XII, etc. in Annex I to the General Agreement, it constituted an import restriction within the purview of Article XI”.³²

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined practices of provincial liquor boards which had a monopoly over distribution and sale of alcoholic beverages within each province; federal legislation restricted the importation of liquor except under conditions established by a provincial liquor board. In respect to Article XI, the Panel examined the liquor boards’ practices concerning listing and delisting of products for sale, and the availability of points of sale which discriminated against imported beverages.

“The Panel first examined the relevance of Article XI to these requirements. The Panel noted Canada’s claim that the practices referred to were not ‘restrictions’ in the sense of Article XI because they were not associated with the ‘importation’ of the products. ...

“... The Panel considered it significant that the note [to Articles XI, XII, XIII, XIV and XVIII] referred to ‘restrictions made effective through state-trading operations’ and not to ‘import restrictions’. It considered that this was a recognition of the fact that in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made in the General Agreement between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly. The Panel considered that systematic discriminatory practices of the kind referred to should be considered as restrictions made effective through ‘other measures’ contrary to the provisions of Article XI:1.”³³

The Panel Report adopted in 1992 on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” again examined the practices of Canadian provincial liquor boards. The Panel found that the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI, with the exception of listing and delisting practices in Ontario; as for the Ontario liquor board’s practice of limiting listing of imported beer to the six-pack size, while according listings in different package sizes to domestic beer, “The Panel noted that this package-size requirement, though implemented as a listing requirement, was in fact a requirement that did not affect the importation of beer as such but rather its offering for sale in certain liquor-board outlets. The Panel therefore considered that this requirement fell under Article III:4 ... The Panel found that the imposition of the six-pack configuration requirement on imported beer but not on domestic beer was inconsistent with that provision”.³⁴ As for the restrictions on access to points of sale, which the 1988 Panel had found to be inconsistent with Article XI:1,

“... the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:1 or Article III:4 because Canada was not invoking an exception to the General Agreement applicable only to measures taken under Article XI:1 (such as the exceptions in Articles XI:2 and XII) and the question of whether the restrictions violated Article III:4 or Article XI:1 of the General Agreement was therefore of no practical consequence in the present case. The Panel found that the restrictions on access by imported beer to points of sale were contrary to the provisions of the General Agreement”.³⁵

With respect to restrictions on private delivery of imported beer, and Canada’s argument that its right to deliver imported beer to the points of sale was an inherent part of Canada’s right to establish an import monopoly in accordance with Article XVII, “The Panel noted that ... Articles II:4, XVII and the Note *Ad* Articles XI, XII, XIII, XIV and XVIII clearly indicated the drafters’ intention not to allow contracting parties to frustrate the

³²L/1468, adopted on 16 May 1961, 10S/117, 119, para. 7.

³³L/6304, adopted on 22 March 1988, 35S/37, 89, para. 4.24.

³⁴DS17/R, adopted on 18 February 1992, 39S/27, 74-75, para. 5.3-5.4.

³⁵*Ibid.*, 39S/75-76, paras. 5.6-5.7.

principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies. ... The Panel found ... that the practice of the liquor boards of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario and Quebec to prohibit the private delivery of imported beer to the points of sale while according domestic brewers the right to deliver their products to the points of sale was inconsistent with Article III:4”.³⁶

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined, *inter alia*, import restrictions on prepared and preserved beef and certain dairy products, which Japan argued were justified on the basis of its monopoly import system for certain beef and dairy products, maintained by the Livestock Industry Promotion Corporation (LIPC).

“The Panel noted the view of Japan that Article XI:1 did not apply to import restrictions made effective through an import monopoly. According to Japan, the drafters of the Havana Charter for an International Trade Organization intended to deal with the problem of quantitative trade limitations applied by import monopolies through a provision under which a monopoly of the importation of any product for which a concession had been negotiated would have ‘to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product’ (Article 31:5 of the Havana Charter). Japan contended that that provision had not been inserted into the General Agreement and that quantitative restrictions made effective through import monopolies could therefore not be considered to be covered by Article XI:1 of the General Agreement (paragraph 3.3.3 above).

“The Panel examined this contention and noted the following: Article XI:1 covers restrictions on the importation of any product, ‘whether made effective through quotas, import ... licences *or other measures*’ (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term ‘import restrictions’ throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies. The note to Article II:4 of the General Agreement specifies that that provision ‘will be applied in the light of the provisions of Article 31 of the Havana Charter’. The obligation of a monopoly importing a product for which a concession had been granted ‘to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product’ is thus part of the General Agreement. The Panel could therefore not follow the arguments of Japan based on the assumption that Article 31:5 of the Havana Charter was not included in the General Agreement. The Panel found for these reasons that the import restrictions applied by Japan fell under Article XI independent of whether they were made effective through quotas or through import monopoly operations.”³⁷

The 1989 Panel Report on “Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States” notes the argument made by the US that the Livestock Products Marketing Organization (LPMO), which was established to administer import restrictions on beef, constituted an import monopoly controlled by domestic producers and that the LPMO constituted a separate “import restriction” within the meaning of Article XI, aside from the restrictions administered by the LPMO. Korea stated that the LPMO administered but did not itself determine quota levels.

“The Panel ... examined the further claim by the United States that the existence, or use, of producer-controlled import monopolies to restrict imports was inconsistent with the provisions of Articles XI:1 and XVII. Korea contested that the existence of a producer-controlled import monopoly in itself constituted an additional barrier to trade. The Panel noted that the LPMO had been granted exclusive privileges as the

³⁶*Ibid.*, 39S/80, paras. 5.15-5.16.

³⁷L/6253, adopted on 2 February 1988, 35S/163, 229, paras. 5.2.2.1-5.2.2.2. For findings applying this rule to individual products see paragraphs 5.3.1.1 and 5.3.9 of the same Report.

sole importer of beef. As such, the LPMO had to comply with the provisions of the General Agreement applicable to state-trading enterprises, including those of Articles XI:1 and XVII.

“Article XI:1 proscribed the use of ‘prohibitions or restrictions other than duties, taxes or other charges’, including restrictions made effective through state-trading activities, but Article XVII permitted the establishment or maintenance of state-trading enterprises, including enterprises which had been granted exclusive or special privileges. The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1. The Panel had already found that the import restrictions presently administered by the LPMO violated the provisions of Article XI:1. As the rules of the General Agreement did not concern the organization or management of import monopolies but only their operations and effects on trade, the Panel concluded that the existence of a producer-controlled monopoly could not in itself be in violation of the General Agreement.”³⁸

See also the material on the Haitian tobacco monopoly at page 319.

(d) *Import and export restrictions*

The 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Commercial Purposes”³⁹ examined the use of both import and export restrictions. The Report provides, *inter alia*:

“... The Working Party noted that there was evidence of a number of types of misuse of import restrictions, in particular:

- “(i) The maintenance by a country of balance-of-payment restrictions, which give priority to imports of particular products upon the basis of the competitiveness or non-competitiveness of such imports with a domestic industry, or which favour particular sources of supply upon a similar basis, in a manner inconsistent with the provisions of Articles XII to XIV ... Such type of misuse, for example, might take the form of total prohibitions on the import of products competing with domestic products, or of quotas which are unreasonably small having regard to the exchange availability of the country concerned and to other relevant factors.
- “(ii) The imposition by a country of administrative obstacles to the full utilization of balance-of-payment import quotas, e.g., by delaying the issuance of licences against such quotas or by establishing licence priorities for certain imports on the basis of the competitiveness or non-competitiveness of such imports with the products of domestic industry, in a manner inconsistent with the provisions of Articles XII to XIV ... In this connection, the Contracting Parties took note of Article XIII:2(d), which provides that ‘no conditions or formalities shall be imposed which would prevent any contracting party from utilising fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate’.
- “(iii) Quantitative restrictions on imports imposed not on balance-of-payment grounds but as a means of retaliation against a country which has refused to conclude a bilateral trade agreement with the country concerned.

“It appeared to the Working Party that insofar as these types of practice were in fact carried on for the purposes indicated above and were not justified under the provisions of Articles XII to XIV relating to the use of import restrictions to protect the balance of payments or under other provisions of the Agreement specifically permitting the use of import restrictions, they were inconsistent with the provisions of the

³⁸L/6503, adopted on 7 November 1989, 36S/268, 301-302, paras. 114-115.

³⁹GATT/CP.4/33, republished as “The Use of Quantitative Restrictions for Protective and Commercial Purposes,” Sales No. GATT/1950-3.

Agreement, and such misuse of import restrictions might appropriately provide a basis for recourse to the procedures laid down in the Agreement for the settlement of disputes. Moreover, it was not particularly relevant to the Agreement whether such practices were determined unilaterally or in the course of bilateral negotiations.

“The Working Party agreed that there did not appear to be any provision in the Agreement which would permit the imposition by a contracting party of quantitative restrictions on imports of a particular product for the purpose of avoiding an increase in the cost to the importing country of maintaining a price support programme for the like product of domestic origin and not for other purposes provided for in the Agreement”.⁴⁰

The same Report also sets out the Working Party’s examination of “several types of export restrictions ... applied for protective, promotional or other commercial purposes ... which appear to fall outside the exceptions provided for in [Articles XI, XIII, XIV, XV and XX]: (i) export restrictions used by a contracting party for the purpose of obtaining the relaxation of another contracting party’s import restrictions; (ii) export restrictions used by a contracting party to obtain a relaxation of another contracting party’s export restrictions on commodities in local or general short supply, or otherwise to obtain an advantage in the procurement from another contracting party of such commodities; (iii) restrictions used by a contracting party on the export of raw materials, in order to protect or promote a domestic fabricating industry; and (iv) export restrictions used by a contracting party to avoid price competition among exporters”.⁴¹

“... the Working Party could not find any provisions in the Agreement which would justify the linking of the issue of export licences for a particular product with the purchase by another contracting party of any other particular product. ... It was agreed that the use of export restrictions as a bargaining weapon to obtain the relaxation of import restrictions was inconsistent with the provisions of the Agreement. However, whether any particular export restriction could justly be regarded as having the assumed purposes would depend upon the facts in each particular case.”⁴²

“The Working Party concluded that the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the objective of any given export restriction would have to be determined on the basis of the facts in each individual case.”⁴³

“The Working Party discussed a wide variety of circumstances in which exportation may be restricted in order to maintain the export price. The cases discussed included a commodity whose value might be greatly reduced if its supply to the world market were not controlled and a commodity whose world price was liable to be impaired by the collusive action of importers. The Working Party concluded that where export restrictions were in fact intended for the purpose of avoiding competition among exporters and not for the purposes set out in the exception provisions of Articles XI and XX, such restrictions were inconsistent with the provisions of the Agreement.”⁴⁴

(5) *Tariff rate quotas*

See the discussion of tariff rate quotas and high secondary tariffs in relation to Article XI:1, in the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.⁴⁵

⁴⁰*Ibid.*, paras. 21-23.

⁴¹*Ibid.*, para. 2.

⁴²*Ibid.*, para. 6-7.

⁴³*Ibid.*, para. 12.

⁴⁴*Ibid.*, paras. 14-15.

⁴⁵DS38/R, dated 11 February 1994, paras. 138, 139.

2. Paragraph 2(a)

(1) *“export prohibitions or restrictions temporarily applied to prevent or relieve”*

The preparatory work indicates that the words “prevent or” were added in Geneva “to enable a member to take remedial action before a critical shortage has actually arisen”.⁴⁶

(2) *“critical shortages of foodstuffs”*

In the US proposed Charter in 1946 the phrase used was “conditions of distress”. The US representative stated that this phrase did not mean “economic distress but referred to shortages of crops, etc., in cases such as famine”.⁴⁷ With reference to the term “critical”, it was agreed in discussions at Geneva and again at Havana that the Australian export prohibitions on merino sheep were covered by paragraph 2(a).⁴⁸

At the Havana Conference the Sub-Committee on Articles 20 and 22 “was satisfied that the terms of paragraph 2(a) ... are adequate to allow a country to impose temporary export restrictions to meet a considerable rise in domestic prices of foodstuffs due to a rise in prices in other countries”.⁴⁹ The Report of the Review Working Party on “Quantitative Restrictions” also recorded the view that “to the extent that the rise in prices was associated with acute shortages of the products in question, as it normally would be, [temporary export restrictions applied to meet a considerable rise in domestic prices of food-stuffs due to a rise in prices in other countries], whether affecting foodstuffs or other products, was clearly covered by that sub-paragraph [2(a)]”.⁵⁰

(3) *“essential to the exporting country”*

The Sub-Committee at the Geneva session of the Preparatory Committee which considered this provision altered the wording “to indicate the view of the Sub-Committee that for the purposes of this provision the importance of any product should be judged in relation to the particular country concerned”.⁵¹

3. Paragraph 2(b)

The Sub-Committee at the Geneva session of the Preparatory Committee which considered this article widened this paragraph so as to include marketing regulations.⁵² It was also agreed in Geneva that this exception would permit the Australian butter marketing scheme, which utilized export licenses to spread exports of butter over time and was “not used in any way that could be reasonably described as restrictive over the period of the operation of the scheme”.⁵³ The Havana Conference Sub-committee which examined the general exceptions to the Charter chapter on commercial policy “expressed the view that governmental measures relating to the orderly marketing of agricultural commodities for which storage facilities in both the country of origin and destination were insufficient, were covered in paragraph 2(b) of Article 20 [corresponding to Article XI:2(b) of the General Agreement]”.⁵⁴

The Review Working Party on “Quantitative Restrictions” in 1954-55 considered various proposals to amend Article XI:2. While it considered that it was not desirable to amend these provisions,

“The Working Party agreed, however, to insert in this report brief agreed statements which would clarify some of the points that the proposed amendments were intended to cover. It might be useful, for instance, to reaffirm that the maintenance or the application of a restriction which went beyond what would

⁴⁶EPCT/141, p. 2.

⁴⁷EPCT/C.II/36, p. 9.

⁴⁸EPCT/A/PV/40(1), pp. 4, 6, 8, 9 discussing Australian proposal at EPCT/W/218 (post-drought shortage of sheep); endorsed in Sub-Committee Report in Havana Reports, p. 88, para. 11. See discussion of the interpretation of “critical” at EPCT/A/PV/40(1) p. 4-9.

⁴⁹Havana Reports, p. 88, para. 14.

⁵⁰L/332/Rev.1 + Adds., adopted on 2, 4 and 5 March 1955, 3S/170, 191, para. 73.

⁵¹EPCT/141, p. 2.

⁵²EPCT/141, p. 2.

⁵³EPCT/A/PV/19, pp. 8-10.

⁵⁴Havana Reports p. 85, para. 24; E/CONF.2/C.3/SR.37, p. 3.

be ‘necessary’ to achieve the objects defined in paragraph 2(b) or 2(c) of Article XI would be inconsistent with the provisions of that Article. This is made clear in the text of these provisions by the use of the word ‘necessary’. Restrictions related to the application of standards or regulations for the classification, grading or marketing of commodities in international trade which go beyond what is necessary for the application of those standards or regulations and thus have an unduly restrictive effect on trade, would clearly be inconsistent with Article XI”.⁵⁵

The Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon” examined, *inter alia*, the claim of Canada that its regulations prohibiting the exportation of unprocessed sockeye and pink salmon and herring were permitted under Article XI:2(b), as the fish were “commodities” and the regulations dealt with “standards” and “marketing”.

“... The Panel noted that Canada considered it necessary to prohibit the export of certain unprocessed salmon and unprocessed herring to maintain its quality standards for these fish, including the standards for frozen salmon exported from Canada ... The Panel noted that Canada applied quality standards to fish and that it prohibited the export of fish not meeting these standards. The Panel further noted, however, that Canada prohibited export of certain unprocessed salmon and unprocessed herring even if they could meet the standards generally applied to fish exported from Canada. The Panel therefore found that these export prohibitions could not be considered as ‘necessary’ to the application of standards within the meaning of Article XI:2(b).

“The Panel then examined the Canadian contention that the prohibition of exports of certain unprocessed salmon and unprocessed herring was necessary for the international marketing of processed salmon and herring. Canada had argued that, without these prohibitions, Canadian processors would not have been able to develop a superior quality fish product for marketing abroad and would not have been able to maintain their share of the market for herring roe in Japan. ... The question before the Panel therefore was thus whether the export restrictions on certain unprocessed salmon and unprocessed herring constituted marketing regulations on processed salmon and herring within the meaning of Article XI:2(b). The Panel noted that this provision referred to ‘... regulations ... for the marketing of commodities in international trade’, which suggests that the regulations covered by the provisions are not all regulations that facilitate foreign sales but only those that apply to the marketing as such. The drafters of Article XI:2(b) agreed that this provision would cover export restrictions designed to further the marketing of a commodity by spreading supplies of the restricted product over a longer period of time.⁵⁶ During the drafting mention was made only of export restrictions designed to promote foreign sales of the restricted product but not of export restrictions on one commodity designed to promote sales of another commodity. The broad interpretation of the term ‘marketing regulation’ implied in Canada’s argument would have the consequence that any import or export restriction protecting a domestic industry and enabling it to sell abroad would be exempted from the General Agreement’s prohibition of import and export restrictions. Such interpretation would therefore expand the scope of the provision far beyond its purpose. The Panel found for these reasons that the export prohibitions on certain unprocessed salmon and unprocessed herring were not ‘regulations for the marketing’ of processed salmon and herring in international trade within the meaning of Article XI:2(b). In the light of the considerations set out above, the Panel concluded that the export prohibitions were not justified by Article XI:2(b).”⁵⁷

4. Paragraph 2(c)

(1) General

The “Suggested Charter for an International Trade Organization of the United Nations” which was proposed by the United States in 1946 contained a provision corresponding to Article XI:2(c)(i). Except for some refinement and the addition of “fisheries products”, this provision remained unchanged through the course of the negotiations of the GATT and the Charter.

⁵⁵L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 189-190, para. 67.

⁵⁶A footnote to this sentence refers to EPCT/A/PV/19, p. 8.

⁵⁷L/6268, adopted on 22 March 1988, 35S/98, 112, paras. 4.2-4.3.

It was stated during discussions on this provision at the Geneva session of the Preparatory Committee, in reply to objections that industrial products should also be included in this exception, that

“... in agriculture and fisheries you have to deal with the capricious bounty of nature, which will sometimes give you a huge catch of fish or a huge crop, which knocks the bottom out of prices. You also have the phenomenon peculiar to agriculture and fisheries of a multitude of small unorganized producers that cannot organize themselves. It often happens that the Government has to step in and organize them. But if it does so, it cannot allow the results of its organization to be frustrated by uncontrolled imports”.⁵⁸

On the same occasion it was stated that “we view this not as a means of protection but as a means of making watertight, and making possible the working of, necessary forms of internal control”.⁵⁹

At the Havana Conference the Sub-Committee which examined Articles 20 and 22 of the Charter discussed various proposals to widen or narrow paragraph 2(c). It “agreed that paragraph 2(c) was not intended to provide a means of protecting domestic producers against foreign competition, but simply to permit, in appropriate cases, the enforcement of domestic governmental measures necessitated by the special problems relating to the production and marketing of agricultural and fisheries products”.⁶⁰

(2) Relationship with concessions and other obligations

The same Sub-Committee at the Havana Conference also noted in its report that “... the Sub-Committee agreed to have it recorded that in its view the freedom given to a Member to apply restrictions under paragraph (2)(c) did not free such Member from a prior obligation to any individual Member”.⁶¹

The Second Report of Committee I, which drew up the rules and procedures for the Dillon Round of trade negotiations which took place during 1960-61, discusses an Australian proposal to make import restrictions maintained under Article XI:2(c) negotiable. In response to comments on this proposal,

“The Australian representative ... recognized that a distinction should be drawn between restrictions which were ‘necessary’ in terms of paragraph 2(c) of Article XI and those which, although they might be applied in connection with measures which protected domestic production or marketings, were not necessary to the operation of such arrangements. It was not the intention ... to negotiate on those restrictions which were not an integral part of the protective system and which could not be justified under that provision under the General Agreement. On the other hand, ‘necessary’ restrictions should be regarded as negotiable in the same way as other elements of the arrangements covered by paragraph 2(c) of Article XI. It could well be that negotiations for the reduction of these restrictions would form part of wider negotiations on the products concerned.

“On ... non-discriminatory application of any concessions, the Australian representative pointed out that the results of such negotiations could take the form of global quotas or of country quotas in conformity with the provisions of Article XIII”.⁶²

The Dillon Round rules and procedures provided that “Participating countries may ... enter into negotiations in accordance with these rules in respect of the following matters: ... import restrictions as provided in paragraph 2(c) of Article XI”.⁶³

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes that “Article XI:2 - unlike some other provisions of the General Agreement permitting restrictive trade measures, such as Articles XVIII:C, XXVIII or XIX - does not provide for compensation for contracting parties adversely

⁵⁸EPCT/A/PV/19, p. 42; see also references to this passage at 36S/222, 37S/221-222.

⁵⁹*Ibid.*, p. 44.

⁶⁰Havana Reports, p. 89, para. 16.

⁶¹*Ibid.*, p. 95, para. 45.

⁶²L/1043, adopted on 19 November 1959, 8S/103, 106-107, para. 5.

⁶³Annex to *ibid.*, 8S/116, para. II(b)(ii).

affected by the measures taken under it”⁶⁴ The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, and “EEC - Restrictions on Imports of Apples - Complaint by the United States” each note that

“... The Panel ... 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 producers⁶⁵ - 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 framework for the exchange of tariff concessions in the agricultural field would be seriously impaired”.⁶⁶

(3) *Elements and burden of proof regarding claims under paragraph 2(c)(i)*

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” summarizes the elements and burden of proof regarding claims under paragraph 2(c) and 2(c)(i) as follows, drawing on the earlier Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”:

“As the party invoking an exception, it was incumbent upon Canada to demonstrate that the measures applied to imports of ice cream and yoghurt met each of the conditions under Article XI:2(c)(i) and XI:2(c) last sub-paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1. These conditions are:

- “- the measure on importation must constitute an import restriction (and not a prohibition);
- “- the import restriction must be on an agricultural or fisheries product;
- “- the import restriction and the domestic marketing or production restriction must apply to ‘like’ products in any form (or directly substitutable products if there is no substantial production of the like product);
- “- there must be governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced;
- “- the import restriction must be necessary to the enforcement of the domestic supply restriction;
- “- the contracting party applying restrictions on importation must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and
- “- the restrictions applied 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”.⁶⁷

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes that the Panel “considered ... that the burden of providing the evidence that all the requirements of Article XI:2(c)(i),

⁶⁴L/6253, adopted on 2 February 1988, 35S/163, 227, para. 5.1.3.7.

⁶⁵The footnote to this sentence refers to e.g., Articles XVIII:A and C, XIX and XXVIII.

⁶⁶L/6491, adopted on 22 June 1989, 36S/93, 129, para. 12.15, and L/6513, adopted on 22 June 1989, 36S/135, 164, para. 5.15.

⁶⁷L/6568, adopted on 5 December 1989, 36S/68, 85-86, para. 62. See also identical passages in “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, L/6491, adopted on 22 June 1989, 36S/93, 124-125, para. 12.3, and in “EEC - Restrictions on Imports of Apples - Complaint by the United States”, L/6513, adopted on 22 June 1989, 36S/135, 160, para. 5.3.

including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision”.⁶⁸

In the 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt”:

“The Panel recalled that it had previously been concluded that a contracting party invoking an exception to the General Agreement bore the burden of proving that it had met all of the conditions of that exception.⁶⁹ It also noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i).⁷⁰ The Panel was aware 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.⁷¹ However, any change in the burden of proof could have consequences equivalent to amending Article XI, seriously affecting the balance of tariff concessions negotiated among contracting parties, and was therefore outside the scope of the Panel’s mandate”.⁷²

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.⁷³

(4) Scope and application of Paragraph 2(c)

(a) “Import restrictions”

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” examined a US embargo of all tuna and tuna products from Canada, imposed following the seizure by Canada of US fishing boats in a dispute over fishing jurisdiction. The Panel found that the US action constituted a prohibition in terms of Article XI:1; as for the claim of the United States that the action fell under the exception in Article XI:2(c), “... the Panel noted the difference in language between Article XI:2(a) and (b) and Article XI:2(c), and it felt that the provisions of Article XI:2(c) could not justify the application of an import prohibition”. A footnote to this sentence provides: “In Article XI:2(a) and (b) the words ‘prohibitions or restrictions’ are used while in Article XI:2(c) mention is only made of ‘restrictions’”.⁷⁴

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” provides: “The Panel notes that Article XI:2(c)(i) does not permit the prohibition of imports but only their restriction. It finds that Japan maintains a *de facto* prohibition on the importation of evaporated milk (04.02 ex), sweetened condensed milk (04.02 ex), processed cheese (04.04 ex) and certain single-strength fruit juices (20.07 ex) into its general customs territory. The Panel concludes that these prohibitions maintained by Japan are contrary to Article XI”.⁷⁵ The Panel had earlier found with respect to various of these products that an import quota available only for imports for use in Okinawa, or for use in international tourist hotels and for international shipping vessels travelling between Japan and foreign countries, resulted in a *de facto* prohibition on the importation of the product into the general customs territory of Japan.⁷⁶

The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” “followed the view that prohibitions

⁶⁸L/6253, adopted on 2 February 1988, 35S/163, 227, para. 5.1.3.7.

⁶⁹The footnote to this sentence refers to: Panel Report on “Canada - Administration of the Foreign Investment Review Act”, 30S/140, 164, para. 5.20; Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, 35S/163, 227, para. 5.1.3.7; Panel Report on “European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile”, 36S/93, 124, para. 12.3.

⁷⁰The footnote to this sentence refers to, e.g., the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, L/6253, 35S/163, 226-27, para. 5.1.3.7, and Panel Report on “EEC - Restrictions on Imports of Apples - Complaint by the United States”, L/6513, 36S/135, 164, para. 5.13.

⁷¹The footnote to this sentence refers to, e.g., the Panel Report on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile”, L/6491.

⁷²L/6568, adopted on 5 December 1989, 36S/68, 84-85, para. 59.

⁷³DS32/R, dated 3 June 1994, para. 328.

⁷⁴L/5198, adopted on 22 February 1982, 29S/91, 107, para. 4.6.

⁷⁵L/6253, adopted on 2 February 1988, 35S/163, 244, para. 6.4.

⁷⁶*Ibid.*, 35S/230-231, 232, 238, paras. 5.3.1.2, 5.3.2.1, 5.3.10.2.

on imports were not permitted under this part of Article XI” but found that “As the EEC had at no time prohibited all imports of apples, its measures therefore constituted an import restriction, rather than an import prohibition”. The question of whether the EEC measures had operated as an effective prohibition of imports from Chile was dealt with under Article XIII.⁷⁷

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.⁷⁸

(b) “on any agricultural or fisheries product”

It was agreed at the Geneva session of the Preparatory Committee that a decision as to whether whales were included within fisheries products should be made by the ITO when established.⁷⁹

In discussions during the Havana Conference it was agreed that “the term ‘agricultural product’ in subparagraph 2(c) ... may include, inter alia, sericultural products and certain plant products (a) which are derived from the plant in the natural process of growth, such as gums, resins and syrups, and (b) a major part of the total output of which is produced by small producers”.⁸⁰

In the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, the Panel stated: “The General Agreement does not define the term ‘agricultural product’. In the past rounds of trade negotiations it was accepted that the products falling under Chapters 1 to 24 in the Customs Co-operation Council Nomenclature could in principle be regarded as agricultural products”.⁸¹

The Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” followed this rule, and “further noted that ice cream and yoghurt were food products generally regarded by consumers and the industry to be agricultural products. The Panel thus found that ice cream and yoghurt were agricultural products within the meaning of Article XI:2(c)”.⁸² The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” also followed the same rule referring to CCCN Chapters 1 to 24 and found that the measures involved applied to an agricultural product.⁸³

(c) “the like ... product”

(i) *General*

During discussions at the London session of the Preparatory Committee reference was made to the definition of the term “like product” adopted by the League of Nations, which was “practically identical with another product”;⁸⁴ however it was also stated that “the expression had different meanings in different contexts of the Draft Charter”⁸⁵ and it was later agreed that the definition of this phrase should be left to the ITO.⁸⁶ As regards the use of the term “like domestic product” in paragraph 2(c) of Article XI, it was stated that in this context “the words ‘like product’ are used, but those words definitely do not mean what they mean in other contexts - merely a competing product. In other words, to take an extreme case, if a country restricted its output of apples, it could not restrict importation of bananas because they only compete with them”.⁸⁷

⁷⁷L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/125 and 36S/161, paras. 12.5 and 5.5.

⁷⁸DS32/R, dated 3 June 1994, paras. 329-330.

⁷⁹EPCT/A/PV/40(1), pp. 12-15.

⁸⁰E/CONF.2/C.3/66 and E.CONF.2/C.3/SR.41, p. 8.

⁸¹L/6253, adopted on 2 February 1988, 35S/163, 223, para. 5.1.3.2.

⁸²L/6568, adopted on 5 December 1989, 36S/68, 86, para. 64.

⁸³L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/125 and 36S/161, paras. 12.6 and 5.6.

⁸⁴EPCT/C.II/36, p. 8.

⁸⁵EPCT/C.II/65, p. 2.

⁸⁶EPCT/A/PV/41, p. 14.

⁸⁷EPCT/C.II/PV.12, p. 6.

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” refers to this material on “like product” and notes:

“Thus, the mere fact that a product is competitive with another does not in and of itself make them like products. ... Article XI:2(c) and the note supplementary to it regarding ‘in any form’ establish different requirements for (a) restrictions on the importation of products that are ‘like’ the product subject to domestic supply restrictions and (b) restrictions on the importation of products that are *processed* from a product that is ‘like’ the product subject to domestic supply restrictions. This differentiation would be lost if a product in its original form and a product processed from that product were to be considered to be ‘like’ products with the meaning of Article XI:2(c).”⁸⁸

The same panel report further notes that “as different requirements were established for restrictions on like products and on the importation of those products processed from a like product, a product in its original form and a product processed from it could not be considered to be ‘like products’.”⁸⁹

(ii) *“Like product” in particular instances*

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”

“The Panel ... examined the concept of ‘the like domestic product’ within the meaning of Article XI:2(c)(i) and (ii), and attempted to determine which Community product should be considered as ‘the like domestic product’ in relation to imported tomato concentrate. Having noted that the General Agreement provided no definition of the terms ‘the like domestic product’ or ‘like product’, the Panel reviewed how these terms had been applied by the CONTRACTING PARTIES in previous cases and the discussions relating to these terms when the General Agreement was being drafted. During this review, the Panel noted the League of Nations definition of ‘practically identical with another product’ and the diverging interpretations of these terms by contracting parties in different contexts. The Panel further noted the definition of ‘like product’ contained in the GATT Anti-Dumping Code and the definitions of ‘identical goods’ and ‘similar goods’ contained in the Customs Co-operation Council’s Customs Valuation Explanatory Notes to the Brussels definition of value. On the basis of this review, the Panel considered that tomato concentrate produced within the Community would qualify as ‘the like domestic product’ but was unable to decide if fresh tomatoes grown within the Community would also qualify. As a pragmatic solution, the Panel decided to proceed to determine if the other conditions set forth in Article XI:2(c)(i) and (ii) were satisfied by the Community system, on the basis that ‘the like domestic product’ in this case could be domestically-produced tomato concentrate, fresh tomatoes or both.”⁹⁰

In the 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile”, the Panel considered “that Chilean apples, although of different varieties, were ‘a like product’ to Community apples for the purposes of Article XI:2(c).”⁹¹ The 1989 Panels on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” each provide with respect to this issue:

“The Panel examined carefully the arguments of the parties ... including the argument that differences in price, variety and quality between [Chilean and US apples respectively] and EEC apples were such as to make them unlike products in terms of this GATT provision. It concluded that while such differences did exist, as they might for many products, they were not such as to outweigh the basic likeness. Dessert apples whether imported or domestic performed a similar function for the consumer and were both marketed as apples, i.e., as substantially similar products. The Panel therefore found that EEC and [Chilean and US dessert apples respectively] were like products for the purposes of Article XI:2(c)(i).”⁹²

⁸⁸L/6253, adopted on 2 February 1988, 35S/163, 224-225, para. 5.1.3.4.

⁸⁹*Ibid.*, 35S/231 para. 5.3.1.4.

⁹⁰L/4687, adopted on 18 October 1978, 25S/68, 101, para. 4.12.

⁹¹L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.4.

⁹²Panel Reports on complaint by Chile, L/6491, 36S/93, 125, para. 12.7; and on complaint by US, L/6513, 36S/135, 161, para. 5.7.

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined import restrictions on twelve categories of products. The Panel found with respect to restrictions on prepared and preserved milk and cream that fresh milk for manufacturing use was not a “like product” in relation to products prepared from it, particularly evaporated milk, sweetened condensed milk, skimmed milk powder, whole milk powder, prepared whey, and whey powder;⁹³ imported processed cheese;⁹⁴ lactose;⁹⁵ and food preparations not elsewhere specified consisting mainly of dairy products (e.g. frozen yoghurt base, ice cream powder and prepared milk powder for infants).⁹⁶ The Panel found that imported dried leguminous vegetables were “like” the domestic product within the meaning of Article XI:2(c)⁹⁷ and that groundnuts produced in Japan and imported groundnuts were identical in all respects and were, therefore, like products.⁹⁸ With respect to the import restrictions on starch and inulin, the Panel observed that “the import restrictions were applied to all starches (except modified starch) and inulin and therefore considered that the Japanese ‘like product’ in this case would be all starches produced in Japan”.⁹⁹ The Panel considered that “imported fruit purée and paste, fruit pulp and fruit juice were not ‘like’ Japanese produced fresh fruit in terms of Article XI:2(c)(i)”,¹⁰⁰ that prepared and preserved pineapple was not “like” fresh pineapple in terms of Article XI:2(i)(c);¹⁰¹ and fresh tomatoes and tomato juice, sauce and ketchup were not “like products”.¹⁰²

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” examined import restrictions maintained by Canada on imports of yoghurt, ice cream, ice milk and ice milk novelties, and the claim of Canada that these import restrictions were justified under Article XI:2(c). The Panel determined that

“... the domestic product subject to restrictions had to be the product produced by farmers. In this case the farmers were producing raw milk, not ‘industrial’ or ‘fluid’ milk. The Panel found that the relevant Canadian ‘fresh’ product subject to restriction was total raw milk.

“The Panel next considered whether ice cream and yoghurt were ‘like’ products to raw milk. In the drafting of this provision it had been stated that the words ‘like products’ in Article XI:2(c) ‘... definitely do not mean what they mean in other contexts - merely a competing product’ (EPCT/C.II/PV.12). The Japanese Agriculture Panel had observed that Article XI:2(c)(i) and the note supplementary to it regarding ‘in any form’ established different requirements for (a) restrictions on the importation of products that are ‘like’ the product subject to domestic supply restrictions and (b) restrictions on the importation of products that are processed from a product that is ‘like’ the product subject to domestic supply restrictions. The Japanese Agriculture Panel had considered that this differentiation would be lost if a product in its original form and a product processed from the original one were to be considered to be ‘like’ products within the meaning of Article XI:2(c). This Panel concurred with that observation. It further noted that there was virtually no international trade in raw milk”.¹⁰³

In the 1991 Panel Report on “Thailand - Restrictions on Importation and Internal Taxes on Cigarettes” the Panel examined the claim of Thailand that its restrictions on the importation of cigarettes were necessary to enforce domestic marketing or production restrictions for leaf tobacco and cigarettes and that they were therefore justified under Article XI:2(c)(i). The Panel found that

“the reference to ‘the fresh product’ in this Note [*Ad* Article XI:2(c)] makes clear that the agricultural products subject to marketing or production restrictions must be fresh products. ... this interpretation was borne out by the drafting history, which suggested that the provision was intended to enable governments to

⁹³L/6253, adopted on 2 February 1988, 35S/163, 231, para. 5.3.1.4.

⁹⁴*Ibid.*, 35S/232, para. 5.3.2.2.

⁹⁵*Ibid.*, 35S/233, para. 5.3.3.

⁹⁶*Ibid.*, 35S/233-234 para. 5.3.4.

⁹⁷*Ibid.*, 35S/234, para. 5.3.5.1.

⁹⁸*Ibid.*, 35S/236, para. 5.3.8.1.

⁹⁹*Ibid.*, 35S/235, para. 5.3.6.1.

¹⁰⁰*Ibid.*, 35S/238, para. 5.3.10.3.

¹⁰¹*Ibid.*, 35S/239, para. 5.3.11.

¹⁰²*Ibid.*, 35S/240, para. 5.3.12.1.

¹⁰³L/6568, adopted on 5 December 1989, 36S/68, 87, paras. 66-67; see also Panel Report on “Thailand - Restrictions on Importation and Internal Taxes in Cigarettes”, 37S/200, 221, para. 69 (following the Ice Cream panel on this point).

protect farmers and fishermen who, because of the perishability of their produce, often could not withhold excess supplies of fresh product from the market.

“The Panel found for these reasons that the only domestic marketing and production restrictions that would be relevant under Article XI:2 (c)(i) were those that Thailand claimed to have imposed on the production of leaf tobacco - not those on cigarettes - and that consequently this provision would cover import restrictions only on (a) products that were ‘like’ domestic leaf tobacco and (b) products processed from such “like” products that met the conditions of the Note ad Article XI:2(c). The Panel not[ed] that ‘cigarettes were not ‘like’ leaf tobacco, but processed from leaf tobacco ...’¹⁰⁴

(d) *“imported in any form”: application of paragraph 2(c) to processed products*

The Interpretative Note to paragraph 2(c) states that “The term ‘in any form’ in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective”.

In discussions on this provision at the Geneva session of the Preparatory Committee, it was stated that the term “in any form” was meant to cover only “those earlier stages of processing which result in a perishable product” (e.g. kippers). The drafters stated that it was not the intention “... to extend the [import] control not merely to cured and smoked fish but to things like tinned fish and sardines. All that we have in view is an extension to those earlier stages of processing which result in a perishable product. You cannot keep a kipper indefinitely”.¹⁰⁵ and “... what we have in mind here is the perishable kind of processed product, not the kind which is capable of being stocked”.¹⁰⁶ While the word “perishable” was used in the Geneva Draft Charter and the General Agreement, at the Havana Conference this note (to Article 20 of the Charter) was redrafted to read:

“imported ‘in any form’ means the product in the form in which it is originally sold by its producer and such processed forms of the product as are so closely related to the original product as regards utilization that their unrestricted importation would make the restriction on the original product ineffective”.¹⁰⁷

This change was made because “... the term ‘perishable’ which is inapplicable to many types of agricultural products had unduly narrowed the scope of paragraph 2(c)”.¹⁰⁸ The Sub-Committee on Quantitative Restrictions at Havana noted:

“The Sub-Committee, however, wishes to make clear that the omission of the phrase ‘when in an early stage of processing and still perishable’ is dictated solely by the need to permit greater flexibility in taking into account the differing circumstances that may relate to the trade in different types of agricultural products, having in view only the necessity of not making ineffective the restriction on the importation of the product in its original form and is in no way intended to widen the field within which quantitative restrictions under paragraph 2(c) may be applied. In particular, it should not be construed as permitting the use of quantitative restrictions as a method of protecting the industrial processing of agricultural or fisheries products”.¹⁰⁹

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” examined the EEC’s minimum import price and associated additional security system in relation to Article XI:2(c)(i) and (ii). “The Panel considered that tomato concentrate was perishable because after a certain time it would decline in quality and value. The Panel also considered that tomato concentrate could compete directly with fresh tomatoes insofar as a large number of end-uses were

¹⁰⁴DS10/R, adopted on 7 November 1990, 37S/200, 222, paras 69-70.

¹⁰⁵EPCT/A/PV/19, p. 43.

¹⁰⁶EPCT/A/PV/19, p. 44; see citation to this passage in L/6253, Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, adopted on 2 February 1988, 35S/163, 225, para. 5.1.3.4.

¹⁰⁷See reference to this Note in L/6253, Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, adopted on 2 February 1988, 36S/163, 225, para. 5.1.3.4.

¹⁰⁸Havana Reports p. 93, para. 38.

¹⁰⁹*Ibid.*, para. 39.

concerned. Therefore, the Panel concluded that tomato concentrate qualified as an ‘agricultural or fisheries product, imported in any form’ within the meaning of Article XI:2(c).¹¹⁰

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” refers to the passage from the Havana Reports cited directly above and notes that “this extension to cover also products which were not perishable was not incorporated into the General Agreement and the condition of perishability remains in force”.¹¹¹ The Panel concluded that

“Article XI:2(c)(i) permits restrictions not only on fresh products but also on those processed agricultural and fishery products that are in the early stages of processing and still perishable which compete directly with the fresh product and, if freely imported, would render ineffective the restrictions on the fresh product. It concludes, on the basis of its findings presented above, that the import restrictions maintained by Japan on the following items do not meet all of these conditions and are thus not justified under Article XI:2(c)(i): prepared and preserved milk and cream (04.02), processed cheese (04.04 ex), starch and inulin (11.08), glucose, lactose and other sugars and syrups (17.02 ex), prepared or preserved pineapple (20.06 ex), certain fruit juice and tomato juice (20.07 ex), tomato ketchup and sauce (21.04), and certain food preparations, not elsewhere specified, consisting mainly of milk or of sugar (21.07 ex).”¹¹²

Some of these products were found to be “not perishable”¹¹³ or “a stable product capable of being stocked”,¹¹⁴ some were found to be a “product not intended for further processing”¹¹⁵ or “further processed from a processed product”¹¹⁶ or “consumer-ready prepared foods as opposed to products which had undergone only initial processing”.¹¹⁷ With respect to restrictions on imported processed products when an input of that product is unrestricted, in the case of canned pineapple the Panel “noted that imports of fresh and frozen pineapple were not restricted, and substantial quantities of the latter were imported for processing into canned pineapple. The Panel considered that if imports of frozen pineapple for processing into canned pineapple were presumed not to render ineffective the domestic measures relating to production of fresh pineapples, the importation of the further processed canned pineapple could not have such an effect”.¹¹⁸ With respect to dairy import quotas in particular,

“The Panel ... examined whether [prepared and preserved milk and cream products] met the requirements of products ‘in any form’, that is, whether these milk products were in an early stage of processing and still perishable, which competed directly with fresh milk and if freely imported would render ineffective the restrictions on fresh milk, as required by the interpretative note to Article XI:2(c). It noted that fresh milk as such was rarely traded internationally because of its bulk and perishability, but rather it was processed into (among other things) the canned, powdered or otherwise prepared milk and cream products in question which rendered it capable of being transported and stocked. The Panel considered that the difficulties regarding transport into Japan of a perishable milk product were such that it was highly unlikely that imports of such a product would of themselves render ineffective the government restriction on the production of fresh milk, nor that restriction of its importation would be necessary to the enforcement of the government program. Thus, although the Panel considered that some of these products might meet some of the requirements of being products in an early stage of processing and still perishable which could compete directly with fresh milk for manufacturing use and whose free importation might render ineffective the domestic measures on fresh milk, the Panel did not find that any of the products under consideration in

¹¹⁰L/4687, adopted on 18 October 1978, 25S/68, 100, para. 4.10.

¹¹¹L/6253, adopted on 2 February 1988, 36S/163, 225, para. 5.1.3.4.

¹¹²*Ibid.*, 35S/244, para. 6.6.

¹¹³Prepared and preserved milk and cream (35S/231-232, para. 5.3.1.4); lactose (35S/233, para. 5.3.3); fruit juices and those fruit products entering in a canned form (35S/238, para. 5.3.10.3); canned pineapple (35S/239, para. 5.3.11); “tomato juice in the canned form primarily imported into Japan” (35S/240, para. 5.3.12.2).

¹¹⁴Prepared and preserved milk and cream (e.g. evaporated milk, sweetened condensed milk, skimmed milk powder, whole milk powder, prepared whey, and whey powder) (35S/231-232, para. 5.3.1.4); processed cheese (35S/232, para. 5.3.2.2); lactose (35S/233, para. 5.3.3); starch (35S/236, para. 5.3.6.2); canned pineapple (35S/239, para. 5.3.11).

¹¹⁵Processed cheese (35S/232, para. 5.3.2.2); tomato juice, tomato paste and ketchup (35S/240, para. 5.3.12.2).

¹¹⁶Glucose and other sugars and food preparations, not elsewhere specified, consisting mainly of sugar (35S/236, para. 5.3.7).

¹¹⁷Food preparations not elsewhere specified consisting mainly of dairy products (35S/233-234, para. 5.3.4); tomato juice, tomato sauce and ketchup (35S/240, para. 5.3.12.3).

¹¹⁸*Ibid.*, 35S/239, para. 5.3.11; see also similar findings with respect to processed cheese (35S/232, para. 5.3.2.2), fruit pulp, fruit purée and fruit juice (35S/238-239, para. 5.3.10.3) and tomato sauce and ketchup (35S/240, para. 5.3.12.3).

tariff category 04.02 met all of the conditions of Article XI:2(c)(i), particularly that regarding perishability”.¹¹⁹

In the 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” the Panel examined “whether ice cream and yoghurt were ‘like’ products ‘in any form’ to raw milk. It was recognized in Article XI:2(c)(i) that it might be necessary to restrict not only the fresh product, but also some of its processed forms. However, the scope of this exception from the general prohibition on quantitative restrictions was limited by the interpretative note Ad Article XI ... Thus, the exception could not be extended to all processed forms of the fresh product but only to those which met the specified criteria”. Citing the Note to Article 20 as redrafted at Havana (see above at page 334), the Panel noted that

“It was this close relationship with regard to use that justified extension of the exception to some forms of processed products. While the interpretative note to the General Agreement focused more on defining the acceptable forms of the processed product, i.e. those that were in an early stage of processing and still perishable, the concept of a close relationship in terms of use was nonetheless retained in the requirements that the processed product compete directly with the fresh one to the extent that its free importation would render ineffective the restrictions on the fresh product. There was no evidence in either the drafting history nor the texts of the General Agreement itself that the exception was ever meant to apply to all, or even most, of the processed forms of any particular fresh product”.¹²⁰

The Panel found that

“The exception to Article XI:1 can be applied only to those processed products which meet all the conditions for ‘like’ products ‘in any form’ of the interpretative note Ad Article XI:2(c)(i): are in ‘an early stage of processing’, ‘still perishable’, ‘compete directly’ with the fresh product and if freely imported would ‘make the restriction on the fresh product ineffective’. The Panel found that ice cream and yoghurt did not compete directly with raw milk, and that their free importation would not render ineffective the Canadian production measures for raw milk. The Panel did not find it necessary to make findings with regard to the criterion of early stage of processing or perishability”.¹²¹

While the Panel did not make findings with respect to “early stage of processing” or “still perishable”, the Report contains an extensive discussion of these issues in relation to modern production methods and rapid changes in technology since the General Agreement was drafted.¹²² With respect to “directly competitive” and “would make the restrictions ineffective”,

“... The Panel considered that the term ‘compete directly with ...’ imposed a more limiting requirement than merely ‘compete with’. As stated in the US arguments, the concept of ‘displacement’ was apparently not intended by this provision. The essence of direct competition was that a buyer was basically indifferent if faced with the choice between one product or the other and viewed them as substitutable in terms of their use. Only limited competition existed between raw milk and ice cream and yoghurt. Their marketing was quite different, and as was implied in the Canadian arguments the competition which did exist was related to displacement of raw milk used in Canadian ice cream and yoghurt production. The Panel recalled that this provision was not designed to protect the processing industry. It further recalled its consideration concerning the narrow interpretation of exceptions (paragraph 59 above). The Panel did not consider it appropriate to broaden the scope of this requirement to include the concept of displacement or indirect competition. The Panel thus found that imports of ice cream and yoghurt did not compete directly with raw milk in terms of Article XI:2(c)(i). ...

“The Panel recognized that Canada’s concern was with regard to potential import levels, rather than historic ones, and with the accumulated effects of imports of various dairy products and the consequential effects on its domestic milk program. Prior to the imposition of the quantitative restrictions, imports of ice

¹¹⁹*Ibid.*, 35S/231-232, para. 5.3.1.4.

¹²⁰L/6568, adopted on 5 December 1989, 36S/68, 87-88, paras. 68-69.

¹²¹*Ibid.*, 36S/90, para. 76.

¹²²*Ibid.*, 36S/88-89, paras. 71, 72.

cream and yoghurt into Canada had been very small compared to Canadian production of these items, and these imports amounted to less than ten one-thousandths of one per cent of Canadian raw milk production. The factors cited by Canada could potentially lead to an increase in this import level; however, Canada had not provided evidence sufficient to convince the Panel that there existed an immediate threat of imports at such significantly increased levels as could render ineffective the Canadian dairy supply program. Article XI:2(c)(i) did not provide for the imposition of quantitative restrictions on imports at current levels merely on the basis of some hypothetical future situation. The Panel did not find that the evidence submitted by Canada justified the conclusion that unrestricted imports of ice cream and yoghurt would presently render ineffective the Canadian domestic restrictions on raw milk production”.¹²³

In the 1991 Panel Report on “Thailand - Restrictions on Importation and Internal Taxes in Cigarettes”

“... The Panel, noting that cigarettes were not ‘like’ leaf tobacco, but processed from leaf tobacco, examined whether cigarettes fell within the range of products covered by this Note [ad Article XI:2(c)]. It recognized that a central requirement of the Note was that the product processed from the fresh product was still ‘in an early stage of processing’. It noted that a previous panel had found that agricultural products not normally intended for further processing such as ketchup could not be regarded as eligible for import restrictions under Article XI:2(c)(i).¹²⁴ Since cigarettes could not be described as ‘leaf tobacco in an early stage of processing’ because they had already undergone extensive processing and, moreover, were not intended for further processing, the Panel found that they were not among the products eligible for import restrictions under Article XI:2(c)(i)”.¹²⁵

(e) “*necessary*”

The Report on the London session of the Preparatory Committee notes that it was suggested that restrictions imposed under the exception contained in paragraph 2(c) “should not be imposed on seasonal commodities at a time when similar domestic products were not available”.¹²⁶

The Report of the Review Session Working Party on “Quantitative Restrictions” notes that the Working Party considered and rejected a number of proposals for revision of Article XI, but agreed to insert in its report brief agreed statements which would clarify some of the points that the proposed amendments were meant to cover, including:

“... the maintenance or the application of a restriction which went beyond that which would be ‘necessary’ to achieve the objects defined in paragraph 2(b) or 2(c) of Article XI would be inconsistent with the provisions of that Article. This is made clear in the text by the use of the word ‘necessary’. ... Moreover, if import restrictions of the type referred to in paragraph 2(c) were to be applied after the governmental measures referred to in that paragraph had ceased to be in force, those restrictions would no longer be necessary for the enforcement of those measures and would therefore be inconsistent with the provisions of that paragraph.

“It was also recognized that if restrictions of the type referred to in paragraph 2(c) were applied to imports during that part of the year in which domestic supplies of the product were not available, such restrictions would be regarded as consistent with the provisions of the Article only to the extent that they were necessary to enforce or to achieve the objectives of the governmental measures relating to control of the domestic product. Finally, it was recognized that it would be an abuse of intent of the provisions under paragraph 2(c)(i) of Article XI if contracting parties were to apply restrictions to processed products exceeding those ‘necessary’ to secure enforcement of the actual measure restricting production or marketing of the primary product”.¹²⁷

¹²³36S/89-90, paras. 73, 75.

¹²⁴The footnote to this sentence refers to the Panel Report on “Japan - Restrictions on the Import of Certain Agricultural Products”, adopted on 2 February 1988, 35S/163, para. 5.3.12.

¹²⁵DS10/R, adopted on 7 November 1990, 37S/200, 222, para. 70.

¹²⁶London Report, para.(e), p. 12.

¹²⁷L/332/Rev.1 and Addenda, adopted on 2,4 and 5 March 1955, 3S/170, 189-190, paras. 67-68.

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”

“The Panel ... noted that the minimum import price and additional security system for tomato concentrates was permanent, i.e. in operation year round. The Panel also noted that the intervention system for fresh tomatoes, while being permanently in force, only operated at certain times of year, i.e. when fresh tomatoes were being marketed in quantities in excess of commercial market requirements. The Panel found that the minimum import price and associated additional security system for tomato concentrates would be ‘necessary to the enforcement of’ the intervention system for fresh tomatoes essentially during those periods when fresh tomatoes were being bought-in by the intervention organizations, and only to the extent that the system satisfied the other conditions contained in Article XI:2(c)(i) and (ii)”.¹²⁸

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” found that “although the EEC measures occurred outside the EEC domestic production season, imports could have affected the possibilities for the disposal or release of EEC apples out of intervention on to the EEC market at that time”.¹²⁹

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found as follows:

“The Panel observes that import restrictions applied under Article XI:2(c)(i) cannot exceed those ‘necessary’ for the operation of the domestic governmental measure concerned. Such restrictions can thus not normally be justified if applied to imports during that time of year in which domestic supplies of the product are not available (paragraph 5.1.3.5 above). The Panel further considers that a restriction on imports of a processed product can in general not be considered as necessary if importation of more directly competitive forms of the product, i.e. the fresh product (when economically feasible) or earlier-stage products processed from the fresh product, are not also restricted. For these reasons and in light of its findings in paragraph 5.3.10 above, the Panel concludes that Japanese import restrictions on fruit purees and pastes (20.05 ex), prepared or preserved fruit pulp (20.06 ex), and certain fruit juices (20.07 ex) are not justified under Article XI:2(c)(i)”.¹³⁰

However, the Panel did find that import restrictions were “necessary” to secure enforcement of production restrictions for dried leguminous vegetables, as it “noted that the Japanese production restrictions were applied to all categories of dried leguminous vegetables and that the various dried legumes were substitutable in terms of the principal form of their consumption in Japan, namely sweetened bean paste”.¹³¹ The same finding was made for groundnuts:

“The Panel ... noted that Japanese groundnuts and imported groundnuts were essentially identical and perfectly substitutable in terms of their use. It further observed that the marketing period for Japanese groundnuts was not limited to a few weeks or months, but was essentially the entire year. The Panel considered that the absence of restrictions on imports of processed groundnut products was not relevant to this consideration. The Panel found, therefore, that the restrictions maintained by Japan on imports of groundnuts could be reasonably considered as ‘necessary’ in terms of Article XI:2(c)”.¹³²

In the Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt”,

“... When restrictions on processed products were involved, the Panel found it difficult to separate completely the criterion of ‘necessary to the enforcement’ from that regarding ‘would render ineffective the restriction on the fresh product.’ If unrestricted imports would render a government measure ineffective, it would be difficult not to conclude that some restriction of the imports was necessary. ...

¹²⁸L/4687, adopted on 18 October 1978, 25S/68, 100, para. 4.11.

¹²⁹L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.6.

¹³⁰L/6253, adopted on 2 February 1988, 35S/163, 244, para. 6.7.

¹³¹*Ibid.*, 35S/235, para. 5.3.5.2.

¹³²*Ibid.*, 35S/237, para. 5.3.8.2.

“The Panel recognized the merits of Canada’s argument that for a product which is traded almost exclusively in its processed forms, such as milk, restrictions on the imports of the processed products might in some sense be ‘necessary’ to ensure that the restriction on the production of the raw material was not undermined. ... At this time, however, there was not sufficient evidence to believe that future imports of ice cream and yoghurt would achieve such levels as to significantly affect Canadian producers’ ability to market raw milk. In the past, unrestricted imports had gained less than a half a per cent share of the Canadian ice cream and yoghurt market, and accounted for less than ten one-thousandths of one per cent of total raw milk production. Against this background and in the absence of an imminent threat to the Canadian dairy system, the Panel found that the criterion of ‘necessary’ to the operation of the governmental restrictions could not be met”.¹³³

See also at page 334 *et seq.*

(f) “to the enforcement of governmental measures”

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” notes, in relation to the argument made that Japan’s supply management measures were not “governmental measures” because they were non-legally-binding administrative guidance with which compliance was allegedly voluntary, that

“... in one respect the Panel took into account the special circumstances prevailing in Japan. This concerns the interpretation of the term ‘the enforcement of governmental measures’ in Article XI:2(c)(i) ... the text of this provision does not specify how the domestic production or marketing restrictions are to be imposed, except that they have to be governmental and the drafting history suggests that the drafters were primarily concerned with the effectiveness of the measures. Although the Panel had some difficulty during its initial proceedings in establishing the exact nature of the domestic restrictions, Japan fully cooperated in providing the necessary detailed information, from which it became clear that the measures did in fact emanate from the government. As regards the method used to enforce these measures the Panel found that the practice of ‘administrative guidance’ played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgements on the effectiveness of the measures in spite of the initial lack of transparency. In view of the special characteristics of Japanese society the Panel wishes, however, to stress that its approach in this particular case should not be interpreted as a precedent in other cases where societies are not adapted to this form of enforcing government policies”.¹³⁴

See also the excerpts from the Panel Report on “Japan - Trade in Semi-Conductors” at page 315ff.

The 1989 Panel Reports on “EEC Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC Restrictions on Imports of Apples - Complaint by the United States” examined, *inter alia*, the issue of whether the EEC had “governmental” measures consistent with Article XI:2(c)(i). Each of the two Panel Reports provides as follows:

“... 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”.¹³⁵

These Panel Reports then refer to the Panel findings noted immediately above from the Reports on “Japan - Restrictions on Imports of Certain Agricultural Products” and “Japan - Trade in Semi-Conductors”, and

¹³³L/6568, adopted on 5 December 1989, 36S/68, 91-92, paras. 80-81.

¹³⁴L/6253, adopted on 2 February 1988, 35S/163, 242, para. 5.4.1.4; cited in Panel Report on “Japan - Trade in Semi-Conductors”, L/6309, 35S/116, 154, para. 107.

¹³⁵L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/126 and 36S/161-162, paras. 12.8 and 5.8.

to a 1960 Panel which, examining the question of whether subsidies financed by a 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".¹³⁶

"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)."¹³⁷

(5) Paragraph 2(c)(i)

(a) "restrict the quantities ... permitted to be marketed or produced"

The report of a sub-committee which considered these provisions during the Geneva session of the Preparatory Committee in 1947 notes that the sub-committee was "unable to accept a proposal that governmental measures operating to regulate prices should be included under sub-paragraph (c)(i)".¹³⁸ Two proposals to include governmental measures to stabilize prices were also rejected.¹³⁹

The report of Sub-Committee B of the Third Committee, on Quantitative Restrictions, at the Havana Conference, which considered the Charter provision corresponding to Article XI, notes as follows:

"The Sub-Committee agreed that in interpreting the term 'restrict' for the purposes of paragraph 2(c), the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions".¹⁴⁰

"... the Sub-Committee agreed that it was not the case that subsidies were necessarily inconsistent with restrictions of production and that in some cases they might be necessary features of a governmental programme for restricting production. It was recognized, on the other hand, that there might be cases in which restrictions on domestic production were not effectively enforced and that this, particularly in conjunction with the application of subsidies, might lead to misuse of the provisions of paragraph 2(c). The Sub-Committee agreed that members whose interests were seriously prejudiced by the operation of a domestic subsidy should normally have recourse to the procedure of Article 25 [corresponding to Article XVI] and that this procedure would be open to any member which considered that restrictions on domestic agricultural production applied for the purposes of paragraph 2(c) were being rendered ineffective by the operation of a domestic subsidy. The essential point was that the restrictions on domestic production should be effectively enforced and the Sub-Committee recognized that unless this condition were fulfilled, restrictions on imports would not be warranted".¹⁴¹

To meet this point, and also to ensure that paragraph 2(c) should apply only when there was a surplus of production the word "effectively" was inserted after "operate" in the Charter. However, this change was not taken into the General Agreement.¹⁴²

¹³⁶L/1160, Report of the Panel on "Review pursuant to Article XVI:5", adopted on 24 May 1960, BISD 9S/188, 192, para. 12.

¹³⁷L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/126-127 and 36S/162, paras. 12.9 and 5.9.

¹³⁸EPCT/141, p. 3.

¹³⁹Proposals at EPCT/W/75, EPCT/W/199, summarized in EPCT/W/223; discussion at EPCT/A/PV/19 p. 14-33.

¹⁴⁰Havana Reports, p. 89, para. 17.

¹⁴¹Havana Reports, p. 90, para. 22.

¹⁴²Havana Reports, p. 90, para. 23.

In 1975 a Working Party on “Canadian Import Quotas on Eggs” was set up to make an advisory ruling on certain questions in connection with Canada’s imposition of import quotas for eggs and egg products in connection with its supply management program for eggs. While the US did not agree that the system was effectively able to control production, the other members of the Working Party “agreed with the Canadian view that the operation of the Canadian supply management programme for eggs, as described and explained to the Working Party, was in conformity with the requirements of Article XI:2(c)(i)”.¹⁴³

The 1978 Panel on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables” found with respect to the EEC intervention system for fresh tomatoes (under Council Regulation 1035/72) that:

“the Panel considered that there was no effective Community or governmental enforcement of the withdrawals of fresh tomatoes by the producers’ organizations; these organizations were merely encouraged to make such withdrawals. The Panel further considered that there was no requirement that tomato producers must create, join or market their production through such producers’ organizations. In the case where member States were obligated to buy in tomatoes which had been offered to them, the Panel considered that the provision allowing member States to claim an exemption from this obligation was so liberal that it would constitute a lack of effective enforcement of the intent of this Article of the Regulation. The Panel further considered that, in addition, in light of the fact that the buying-in or withdrawal prices were fixed at about one half of the normal cost of production, the intervention system would not effectively restrict the marketing or production of fresh tomatoes, but simply remove any market surplus after all potential commercial markets, including processing into tomato concentrate, had been saturated. The Panel further considered that, since this system was not considered to be an effective restriction on the marketing and production of fresh tomatoes, then it could not be considered to be an effective restriction on the marketing or production of tomato concentrate. Therefore, the Panel concluded that even if fresh tomatoes were considered to be the ‘like domestic product’, the intervention system for fresh tomatoes did not qualify as a governmental measure which operated ‘to restrict the quantities of the like domestic product permitted to be marketed or produced’, or ‘to remove a temporary surplus of the like domestic product by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level’, within the meaning of Article XI:2(c)(i) and (ii)”.¹⁴⁴

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” found with regard to the EEC domestic supply controls on apples that “As regards XI:2(c)(i), the Panel considered that the EEC grubbing-up programmes in 1969 and 1976 seemed to be isolated actions of production control rather than steps in a continuing long-term policy of the Community to restrict production. The Panel noted that the programmes had not resulted in any significant drop in EEC apple production. 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”.¹⁴⁵

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found generally, in relation to this issue:

“‘To restrict’ means, according to the drafters, to ‘keep output below the level which [would have been] allowed in the absence of restrictions’. The drafters rejected the proposal that *regulation* of production, through price stabilization programmes, also be an accepted criterion (EPCT/PV/19). They agreed that subsidies were *not* ‘necessarily inconsistent with restrictions on production and that in some cases they might be necessary features of a governmental programme for restricting production’ (Havana Reports, p. 90). According to the note to Article XI the proportion between imports and domestic production is to be determined by taking into account ‘special factors’ that may have affected or may be affecting the trade in the product concerned. The note specifically excludes from the definition of the term ‘special factors’ changes ‘artificially brought about by means not permitted under the [General] Agreement,’ but not changes artificially brought by legal means such as production subsidies or tariff protection granted within the

¹⁴³L/4279, adopted on 17 February 1976, 23S/91, 92, para. 4.

¹⁴⁴L/4687, adopted on 18 October 1978, 25S/68, 102-103, para. 4.13.

¹⁴⁵L/5047, adopted on 10 November 1980, 27S/98, 112, paras. 4.5-4.6.

bounds of Article II. It is thus clear that the production restrictions applied under Article XI:2(c)(i) may in principle coexist with production subsidies. This means that it is not necessary to restrict the level of production below the level that would exist in the absence of all government support. It also means that production which exists only because of production subsidies may be effectively restricted by imposing quantitative limits on the availability of subsidies. Other than requiring a government measure, Article XI:2(c)(i) does not specify how the production restriction is to be imposed”.¹⁴⁶

The Panel found specifically with respect to the restrictions on groundnuts that:

“The Panel considered that restrictions on planted area could not be considered the equivalent of restrictions on production or marketing unless they demonstrably had that effect. ... In this regard, the Panel noted that there was no penalty or charge imposed on Japanese producers who exceeded their target cultivation area, but rather they could lose eligibility to receive a benefit in the form of a subsidy or loan. The Panel considered that, as indicated by the drafting history of Article XI:2(c)(i), the important factor was not the methods used in restricting production but their effectiveness. The Panel further found that there were many factors, including the long-standing application of import restrictions, the provision of subsidies or loans for production, the changing pattern of agricultural production, and varieties, cultivation methods and improved yields, which affected historic and current output in often contradictory ways, rendering it virtually impossible to objectively determine what the level of production would have been in the absence of restrictions. The Panel considered, therefore, the actual pattern of quantities produced. It found that production exhibited a long-term trend of decline, and on an in-shell basis, had further declined since the reinforcement of the governmental measures in 1984. The Panel found, therefore, that the Japanese measures in the past had in practice been effective in restricting the quantity of groundnuts produced or marketed. On this basis the Panel considered that it could reasonably be assumed that the current production measures were capable of effectively limiting production”.¹⁴⁷

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” found with respect to Canadian domestic milk marketing programmes that:

“The Panel recalled that the requirement was for the effective *restriction* of production, not merely its *regulation*. A major element of the requirement of restricted production was that the measure, regardless of how operated, had to reduce production below the level it would otherwise have attained. The Panel observed that this concept was difficult to apply in practice. In situations such as the Canadian one, where the government measures had been in place for many years and were interrelated with price support and other production incentives, it was virtually impossible to determine what production levels would be in their absence. This determination would be necessary in order to have an objective basis for comparison with current production levels. In light of its findings in paragraphs 73 to 76 above, the Panel did not consider it necessary to further examine this issue. The Panel, therefore, did not make a finding with regard to whether the Canadian dairy management scheme constituted a government measure which effectively restricted total raw milk production in Canada”.¹⁴⁸

The 1989 Panel Reports on “EEC Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC Restrictions on Imports of Apples - Complaint by the United States” examined, *inter alia*, the issue of whether the EEC measures (based on Council Regulation 1035/72) “operated to restrict the quantities of [EEC apples] permitted to be marketed”. Each of the Panel Reports notes the 1978 and 1980 Panel findings cited above with respect to the same intervention system for certain horticultural crops, and further notes “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”.¹⁴⁹

¹⁴⁶L/6253, adopted on 2 February 1988, 35S/163, 223-224, para. 5.1.3.3.

¹⁴⁷*Ibid.*, 35S/236-137, para. 5.3.8.1.; see also similar findings with respect to restrictions on dried leguminous vegetables, *ibid.*, 35S/234-235, para. 5.3.5.1.

¹⁴⁸L/6568, adopted on 5 December 1989, 36S/68, 91, para. 79.

¹⁴⁹L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/127 and 36S/162, paras. 12.10 and 5.10.

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

“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 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. ...

“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. ... 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.

“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 ... The Panel noted that Article XI:2(c)(i) - unlike all provisions of the General Agreement specifically permitting actions to protect domestic producers [e.g. Articles XVIII:A and C, XIX and XXVIII] - 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.”¹⁵⁰

“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).”¹⁵¹

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.¹⁵²

b) “*of the like domestic product*”

See at page 331 *et seq.*

(6) Paragraph 2(c)(ii)

The 1989 Panel Reports on “EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile” and “EEC - Restrictions on Imports of Apples - Complaint by the United States” 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”.¹⁵³

(a) “*temporary surplus*”

At the Havana Conference, the Sub-Committee on Quantitative Restrictions “agreed that the provisions of paragraph 2(c)(ii) would cover arrangements under which the government concerned made temporary surpluses of grain available as animal feeding stuffs to small holders and similar categories with a low standard of living, free of charge or at prices below the current market level”.¹⁵⁴ The Review Working Party on Quantitative Restrictions also agreed that this case was clearly covered by the terms of that provision.¹⁵⁵

The 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile” found with respect to a claim by the EEC that the restrictions were justified under Article XI:2(c)(ii):

“As regards XI:2(c)(ii), the Panel found that the EEC was ‘making the surplus available to certain groups of domestic consumer free of charge or at prices below the current market level’, in so far as the apples withdrawn from the market during 1978/79 went into animal feed as well as were distributed freely to social organizations. The panel thought that the EEC surplus of apples could not be considered ‘temporary’ as it appeared year after year. However, the Panel noted that the surplus in 1979 was significantly higher than normal and could be considered to be a temporary surplus above the recurring surplus”.¹⁵⁶

The 1989 Panels on the complaints by Chile and the United States on “EEC - Restrictions on Imports of Dessert Apples” also examined the restrictions in question in relation to Article XI:2(c)(ii).

“... The Panel ... 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

¹⁵⁰*Ibid.*, at 36S/127-129 and 36S/163-165, paras. 12.11-12.15 and 5.11-5.15.

¹⁵¹*Ibid.*, 36S/129 and 36S/165, paras. 12.17 and 5.17.

¹⁵²DS32/R, dated 3 June 1993, paras. 331-335.

¹⁵³L/6491 and L/6513, both adopted on 22 June 1989, 36S/93 and 36S/135, at 36S/128 and 36S/164, paras. 12.14 and 5.14.

¹⁵⁴Havana Reports, p. 93, para. 34.

¹⁵⁵L/332/Rev.1 and Addenda, adopted on 2,4 and 5 March 1955, 3S/170, 191, para. 73.

¹⁵⁶L/5047, adopted on 10 November 1980, 27S/98, 114, para. 4.10.

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 ... it observed that while amounts withdrawn had varied in the years up to and including the 1987-88 marketing year, stocks had remained relatively stable at levels which indicated a substantial structural surplus. The Panel thus found that the 1988 surplus could not be considered a temporary one, and that therefore the EEC did not meet the conditions for imposing import restrictions under Article XI:2(c)(ii). In the light of this finding the Panel did not consider it necessary to examine whether the EEC measures were in conformity with the other requirements of this provision."¹⁵⁷

(7) Paragraph 2(c)(iii)

(a) "the production of which is directly dependent, wholly or mainly"

The Report of the Sub-Committee on Quantitative Restrictions at the Havana Conference provides that

"... It was agreed that under the existing text, in a case for example in which a Member wished to restrict the quantities permitted to be produced of any animal product the production of which was dependent wholly or mainly on two or more imported kinds of feeding stuffs considered together but not necessarily on either kind considered separately, it would be open to that Member to restrict the production of animal products, provided that domestic production of imported kinds of feeding-stuffs were relatively negligible, by treating the imported kinds of feeding-stuffs as a single commodity and applying import restrictions thereto.

"It was further agreed that if the various imported feeding-stuffs were in fact treated as a single commodity, import restrictions thereon should be applied globally on the total combined imports without allocating shares to the individual feeding-stuffs. It was felt that, in cases where this procedure would not be practicable, the import restrictions should take the form of an equal proportionate reduction in the amount permitted to be imported of each of the several feeding-stuffs".¹⁵⁸

5. Last sub-paragraph of paragraph 2

(1) "Public notice", miscellaneous or "basket" import quotas and quota administration through discretionary licensing

The Report of the Review Working Party on "Quantitative Restrictions" notes the following agreed interpretations:

"The requirement that any contracting party applying restrictions pursuant to paragraph 2(c) should give public notice of the quantities or values to be imported should be construed as requiring that contracting party to send a copy of that notice to the CONTRACTING PARTIES ... which would circulate this information to all contracting parties concerned.

"The Working Party recommends that, whenever practicable, a contracting party intending to introduce restrictions pursuant to paragraph 2(c) of Article XI should give advance notice, on a confidential basis, to interested contracting parties and to the CONTRACTING PARTIES ... to give them an opportunity for consultation".¹⁵⁹

Various contracting parties have notified trade measures they consider to be in conformity with Article XI:2(c).¹⁶⁰

In the 1980 Panel Report on "EEC Restrictions on Imports of Apples from Chile", examining the criteria in the last paragraph of Article XI:2, "The Panel noted that the EEC had not given public notice of the quantities or

¹⁵⁷L/6491, adopted on 22 June 1989, 36S/93, 129-130, para. 12.19; L/6513, adopted on 22 June 1989, 36S/135, 165, para. 5.19.

¹⁵⁸Havana Reports, p. 92, paras. 32-33.

¹⁵⁹L/332/Rev.1 and Addenda, adopted on 2,4 and 5 March 1955, 3S/170, 190, paras. 70-71.

¹⁶⁰See, e.g., L/3455, L/4187, L/4868.

values to be imported under the voluntary restraint agreements it had negotiated ... as required by the first sentence of this paragraph”.¹⁶¹

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” found that “import restrictions made effective through a miscellaneous ‘basket’ quota for which only a global value or quantity was announced could not satisfy the requirements of Article XI:2(c)”¹⁶², and concluded:

“The Panel recalls that under the last sub-paragraph of Article XI:2(c) a contracting party applying an import restriction must give public notice of the total quantity or value of each product permitted to be imported during a specified future period. This requirement implies that under Article XI:2(c) only those quotas can be applied which define the particular quantity or value for each product subject to quota. The Panel finds that the Miscellaneous Import Quota maintained by Japan precludes the identification of the quantity or value of permitted imports of each product included therein. The Panel therefore concludes that those import restrictions maintained by Japan through the Miscellaneous Import Quota on prepared whey powder (04.02 ex), starch and inulin for special use (11.08 ex), certain prepared and preserved bovine meat products (16.02 ex), lactose, glucose and other sugars and sugar syrups (17.02 ex), certain fruit purees and pastes (20.05 ex), certain fruit juices (20.07 ex), and food preparations not elsewhere specified mainly consisting of dairy or sugar (21.07 ex), are not justified under the provisions of Article XI:2(c)”.¹⁶³

The 1989 Panel Report on “Canada - Import Restrictions on Ice Cream and Yoghurt” noted, in connection with a permit system for imports of these products, that the Panel “did observe ... that restrictions applied through discretionary licensing could not meet the requirement in Article XI:2(c) of prior public notice of the quantity or value permitted to be imported”.¹⁶⁴

(2) “during a previous representative period”

In the 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile”

“... the Panel looked at total imports into the EEC from Southern Hemisphere suppliers, including Chile, as these were the main EEC suppliers during the marketing season concerned when restraints were in effect. The Panel looked at the proportion of these imports to EEC production ‘prevailing during a previous representative period’ as provided in the third sentence of the last paragraph of XI:2. In keeping with normal GATT practice, the Panel considered it appropriate to use as a ‘representative period’ a three-year period previous to 1979, the year in which the EEC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977 and 1978 as a ‘representative period’”.¹⁶⁵

See also the discussion of “previous representative period” under Article XIII.

(3) *Proportionality requirement*

In the 1980 Panel Report on “EEC Restrictions on Imports of Apples from Chile”

“The Panel noted ... that measures taken under XI:2(c)(i) must also meet the criteria expressed in the last paragraph of XI:2. ... The Panel considered that the evidence before it suggested that the EEC measures did not fulfil the conditions of the second sentence of this paragraph ... The Panel found that the EEC had not maintained this proportion [between ‘the total of imports’ and ‘the total of domestic production’]”.¹⁶⁶

¹⁶¹L/5047, adopted on 10 November 1980, 27S/98, 112-113, para. 4.7.

¹⁶²L/6253, adopted on 2 February 1988, 35S/163, 231, para. 5.3.1.3.

¹⁶³*Ibid.*, 35S/245, para. 6.8; see also 35S/226, para. 5.1.3.6.

¹⁶⁴L/6568, adopted on 5 December 1989, 36S/68, 93, para. 83.

¹⁶⁵L/5047, adopted on 10 November 1980, 27S/98, 113, para. 4.8.

¹⁶⁶L/5047, adopted on 10 November 1980, 27S/98, 113, para. 4.7.

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” provides as follows:

“The Panel noted that in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. The Panel further noted that the CONTRACTING PARTIES recognized in a previous case that a contracting party invoking an exception to the General Agreement had the burden of demonstrating that the requirements of the exception were fulfilled.¹⁶⁷ The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c)(i) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. The Panel, therefore, examined whether it would be possible to change the burden of proof in such a way that the provision could be resorted to also in such a situation. The Panel noted that one among the possible ways of achieving this aim would be to consider a demonstration that the size of the quota is equivalent to a certain percentage of the quantities marketed or produced in the importing country as a sufficient proof that the proportionality requirement had been met. The Panel however also noted that the practical consequence of such a change in the burden of proof would be to turn the requirement of Article XI:2(c)(i) to fix the size of the import quotas in relation to the reduction in the quantities marketed or produced into a requirement to determine the size of the quota in relation to the quantities actually marketed or produced. The Panel found that the above or any other change in the burden of proof to make Article XI:2(c)(i) operational in the case of long-term import and/or supply restrictions would have consequences equivalent to those of an amendment of this provision and could therefore seriously affect the balance of tariff concessions negotiated among contracting parties. The Panel noted in this context that Article XI:2 - unlike some other provisions of the General Agreement permitting restrictive trade measures, such as Articles XVIII:C, XXVIII or XIX - does not provide for compensation for contracting parties adversely affected by the measures taken under it. The Panel considered for these reasons that the burden of providing the evidence that all the requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision”.¹⁶⁸

In this connection see also the unadopted 1993 panel report on “EEC - Member States’ Import Régimes for Bananas”.¹⁶⁹

(4) “special factors”

See the Interpretative Note to the last sub-paragraph of paragraph 2. See also the discussion of “special factors” under Article XIII:4.

In discussions at the Geneva session of the Preparatory Committee, it was stated that “the term ‘special factors’ would include real changes in relative productive efficiency as between domestic producers and foreign producers, or as between different foreign producers: in a word, real changes in the competitive situation and not changes artificially introduced or encouraged by government action of a kind which other sections of the Charter would not allow”.¹⁷⁰ The Report of the Sub-Committee on Quantitative Restrictions at Havana notes that “... the Sub-Committee agreed that it was desirable to make it clear that changes in relative productive efficiency between the home producers and foreign producers should be taken into consideration in determining the size of import quotas under paragraph 2(c)(i). ... The Sub-Committee, after consideration of the interpretative notes on ‘special factors’ to Articles 20 and 22 of the Geneva text, agreed that, as stated in those notes, changes artificially brought about since the representative period (assuming that period to have preceded the coming into force of the Charter) were not to be regarded as ‘special factors’ for the purposes of paragraph 2(c) and Article 22 [corresponding to

¹⁶⁷A footnote to this sentence refers to the Report of the Panel on “Canada - Administration of the Foreign Investment Review Act”, 30S/140.

¹⁶⁸L/6253, adopted on 2 February 1988, 35S/163, 226-227, para. 5.1.3.7.

¹⁶⁹DS32/R, dated 3 June 1993, paras. 336-339.

¹⁷⁰EPCT/A/PV/19, p. 45.

Articles XI:2(c) and XIII]”.¹⁷¹ The same Report also notes that “It was ... agreed that in the case of perishable commodities, due regard should be had for the special problems affecting the trade in these commodities”.¹⁷²

In the Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, the Panel stated that “the last sentence of Article XI:2 prescribes the minimum size of the import quotas that contracting parties may establish in accordance with sub-paragraph (c)(i) of that provision. The quotas must be such as not to reduce the total of imports relative to domestic production as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In order to determine the size of the import quota the contracting party thus has to estimate what the amount of domestic production and of imports would be during the quota period in the absence of supply and quantitative import restrictions. The General Agreement states that in making this determination contracting parties shall pay ‘due regard’ to the proportions that prevailed during a previous representative period and to ‘special factors’ that affected or may be affecting the trade in the product concerned”.¹⁷³ See also the reference to “special factors” in the excerpt from this panel report at page 341 above.

B. RELATIONSHIP BETWEEN ARTICLE XI AND OTHER GATT ARTICLES

1. Article III

See under Article III.

2. Article VI

During the Geneva discussions of the Preparatory Committee, “The suggestion was made that it should be permissible to use import restrictions, under proper safeguards, as an anti-dumping measure in those cases of intermittent dumping in which import duties did not provide a suitable instrument of control. After consideration it was generally agreed that as far as the establishment of new industries is concerned, the position should be sufficiently covered by the provisions of Chapter IV [Article XVIII]. In respect of the threat of intermittent dumping to established industries, there was wide agreement with the view that the position was probably already adequately covered under Article 34 [XIX]”.¹⁷⁴ See also the chapter on Article VI.

3. Article XXIII

See under Article XXIII.

4. Article XXIV:12

See under Article XXIV.

C. RELATIONSHIP BETWEEN ARTICLE XI AND OTHER INTERNATIONAL AGREEMENTS

1. General

The Report of the Havana Conference Sub-Committee on Quantitative Restrictions notes: “... the Sub-Committee agreed to have it recorded that in its view the freedom given to a Member to apply restrictions under paragraph 2(c) did not free such Member from a prior obligation to any individual Member”.¹⁷⁵

¹⁷¹Havana Reports, p. 94, paras. 42-43.

¹⁷²Havana Reports, p. 91, para. 28.

¹⁷³L/6253, adopted on 2 February 1988, 35S/163, 226, para. 5.1.3.7.

¹⁷⁴London Report, para.(j), p. 12.

¹⁷⁵Havana Reports, p. 95, para. 45.

2. Arrangement Regarding International Trade in Textiles

The Arrangement Regarding International Trade in Textiles (“Multi-Fibre Arrangement”, or MFA) of 20 December 1973,¹⁷⁶ as extended by various Protocols allows for various quantitative restrictions among participating countries but states in paragraph 6 of Article 1: “The provisions of this Arrangement shall not affect the rights and obligations of the participating countries under the GATT”.

3. Agreement on Import Licensing Procedures

See the discussion above on “import and export licences”, the discussion under Article XIII:3 on “administration of import licensing”, and the material on this Agreement at the end of the chapter on Article XIII.

3. Agreement on Trade in Civil Aircraft

Article 5 of the Agreement on Trade in Civil Aircraft of 12 April 1979 reads:

“5.1 Signatories shall not apply quantitative restrictions (import quotas) or import licensing requirements to restrict imports of civil aircraft in a manner inconsistent with applicable provisions of the GATT. This does not preclude import monitoring or licensing systems consistent with the GATT.

“5.2 Signatories shall not apply quantitative restrictions or export licensing or other similar requirements to restrict, for commercial or competitive reasons, exports of civil aircraft to other Signatories in a manner inconsistent with applicable provisions of the GATT”.¹⁷⁷

D. EXCEPTIONS AND DEROGATIONS

See Article XI:2 above; also Articles XII, XVIII, XIX, XX and XXI.

1. Reservations in accession protocols

Paragraph 4 of the Protocol for the Accession of Switzerland¹⁷⁸ provides that “Switzerland reserves its position with regard to the application of the provisions of Article XI of the General Agreement” to the extent necessary to permit it to apply import restrictions pursuant to certain internal legislation. However, this reservation is qualified by the requirements that Switzerland, so far as is consistent with the implementation of these laws, observe to the fullest possible extent the appropriate provisions of the General Agreement, and endeavour to ensure that they are applied in such a manner as to cause minimum harm to the interests of contracting parties. Annual reports and a triennial review are required; also, paragraph 6 of the Protocol provides that “Switzerland shall enter into consultations pursuant to Articles XXII and XXIII of the General Agreement upon request of any contracting party regarding the reservations mentioned in paragraphs 4 and 5 above”. When the text of the Protocol was submitted to the CONTRACTING PARTIES for approval, the Chairman stated that this reservation could be considered analogous to a waiver granted under Article XXV, paragraph 5, “in that such waivers normally contain a clause to the effect that the decision does not preclude the right of affected countries to have recourse to all the provisions of Article XXIII”.¹⁷⁹

The Protocol of Accession of Costa Rica provides that “As indicated in paragraph 50 of document L/6589, Costa Rica will continue to gradually eliminate current import licensing restrictions, and quantitative restrictions, and will complete their elimination four years after the day of Costa Rica’s accession to the General Agreement. ... If this is not accomplished, the issue will be reviewed by the CONTRACTING PARTIES”.¹⁸⁰

¹⁷⁶21S/3.

¹⁷⁷26S/162, 165.

¹⁷⁸14S/6, 8.

¹⁷⁹SR.23/7.

¹⁸⁰L/6626, 37S/7-8, para. 4.

2. Waivers under Article XXV:5

The few waivers which have been granted to Article XI are listed in the table of waivers at the end of the chapter on Article XXV.

E. WORK CARRIED OUT IN THE GATT ON QUANTITATIVE RESTRICTIONS MAINTAINED FOR OTHER THAN BALANCE-OF-PAYMENTS REASONS

1. Import restrictions

The text of Article XII:4(b) in the 30 October 1947 text of the General Agreement required that a review of all restrictions under Article XII be conducted not later than 1 January 1951. This review was carried out in connection with the second review of discriminatory application of import restrictions under Article XIV:1(g), and documents the widespread use of balance-of-payments restrictions at that time.¹⁸¹ When the balance-of-payments Articles were revised in the Review Session of 1954-55, the revised Article XII:4(b) and Article XVIII:12(b) each called for another review of such restrictions. This review was completed by the CONTRACTING PARTIES in 1958-59.¹⁸²

As for restrictions for other than balance-of-payments purposes, a Report was adopted at the Fourth Session on "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes"; see the material on this Report above at page 324. At the Fifth Session in 1950, it was agreed as a follow-up to this Report to gather information on import and export restrictions maintained as exceptions to Article XI:1, other than those applied for balance-of-payments purposes.¹⁸³ A Note was later circulated which summarized the information received.¹⁸⁴

During the first fifteen years of the GATT, work on progressive liberalization of quantitative import restrictions in Europe was being carried out in the Organization for European Economic Co-operation (OEEC).¹⁸⁵

In 1955, at the Review Session, the Review Working Party on Quantitative Restrictions considered problems raised by certain contracting parties in eliminating balance-of-payments import restrictions. The Working Party drafted a waiver decision, temporarily waiving Article XI for the "hard core" restrictions (many of them on agricultural products) which these contracting parties considered to be difficult to eliminate immediately. Application of this "hard-core" waiver decision was extended successively until 31 December 1962, and then expired.¹⁸⁶

In the period following the Review Session, work on quantitative restrictions continued in two directions: one focusing on non-tariff barriers of all types to agricultural trade, and one focusing on other quantitative restrictions, particularly those affecting developing country exports. Under the Programme for Expansion of International Trade initiated in 1958, agricultural policies including subsidies and quantitative restrictions were discussed in Committee II, and barriers to trade in products of interest to developing countries (including quantitative restrictions) were discussed in Committee III.

In 1960, procedures were approved for dealing with residual import restrictions; contracting parties were invited to notify lists of import restrictions which they were applying contrary to the provisions of the General Agreement, and to notify changes to those lists. The procedures provided for bilateral consultations upon request under Article XXII:1, and if necessary, resort either to Article XXII:2 or Article XXIII:2.¹⁸⁷ In 1962, a Panel appointed by the CONTRACTING PARTIES examined the adequacy of these notifications and put forward certain

¹⁸¹See GATT/CP.6/12/Rev.2 and GATT/CP.6/48, published as *Use of Quantitative Import Restrictions to Safeguard Balances of Payments* (Sales No. GATT/1951-2, out of print).

¹⁸²The results of the review appear in MGT(59)75 of 30 July 1959. See also material under Article XII:4(b) in this Index.

¹⁸³GATT/CP.5/SR.4, GATT/CP.5/SR.25, GATT/CP.5/3, GATT/CP.5/39/Rev.1, GATT/CP/93 (Note inviting notifications).

¹⁸⁴GATT/CP/93/Add.1, dated 20 October 1951.

¹⁸⁵See reference in Report of Review Working Party on "Quantitative Restrictions", L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 178-179, paras. 31-33.

¹⁸⁶*Ibid.*, 3S/191-195, paras. 75-91; Decision of 3 March 1955 on "Problems Raised for Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance-of-Payments Difficulties", 3S/38, extended at 7S/33, 8S/27, 9S/35, 10S/35.

¹⁸⁷Procedures approved 16 November 1960, 9S/18-20.

suggestions on the type of information that should be included in notifications.¹⁸⁸ In 1965 it was suggested to newly-independent countries that, even if they were not yet in a position to determine whether they wished to invoke the provisions of Article XVIII as justification for some or all restrictions in force, they might submit descriptive material relative to their entire import control systems, without prejudice to the consistency of the measures maintained with their GATT obligations.¹⁸⁹ A number of notifications under this procedure were made.

A meeting of the CONTRACTING PARTIES at Ministerial level held in May 1963, which also launched the Kennedy Round of multilateral trade negotiations, adopted an Action Programme and Ministerial Conclusions on the expansion of trade of developing countries. Point (ii) of the Action Programme provided that "Quantitative restrictions on imports from less-developed countries which are inconsistent with the provisions of the GATT shall be eliminated within a period of one year. Where, on consultation between the industrialized and the less-developed countries concerned, it is established that there are special problems which prevent action being taken within this period, the restrictions on such items would be progressively reduced and eliminated by 31 December 1965".¹⁹⁰ Notifications of residual restrictions had been examined in Committee III.¹⁹¹ This examination was continued in the Action Committee and in the Committee on Trade and Development, and in the Group on Residual Restrictions of the Committee on Trade and Development.¹⁹²

In January 1970 the Council established a Joint Working Group on Import Restrictions (JWG), which submitted a report in March 1971 including a systematic collection of data on quantitative restrictions in eighteen developed countries.¹⁹³ In 1971 the Council decided that the data assembled by the JWG should be kept up to date and that the contracting parties concerned should be invited to notify annually by 30 September any changes which should be made concerning the restrictions listed in the consolidated document.¹⁹⁴ This decision was reaffirmed by the Council in March 1980.¹⁹⁵ Accordingly, the consolidated table on import restrictions prepared by the JWG was revised annually until 1982 on the basis of notifications from countries applying restrictions.¹⁹⁶ However, not all contracting parties concerned submitted notifications.

During the Tokyo Round of 1973-79, further discussions took place in the Committee on Industrial Products, the Committee on Trade and Development, and the NTM Subgroup on Quantitative Restrictions.¹⁹⁷ The Agreement on Import Licensing Procedures was negotiated as a result of this process. Negotiations were also conducted on a request-offer basis concerning quantitative restrictions¹⁹⁸ and "non-tariff measures not dealt with multilaterally".¹⁹⁹ Negotiations also took place separately on non-tariff barriers of all types in agricultural trade.

Since 1979, some work on quantitative restrictions has taken place in the context of the Committee on Trade and Development's work on trade liberalization in areas of special interest to developing countries which led to the updating of the data on restrictions applied by developed countries to products of export interest to

¹⁸⁸11S/206, 210.

¹⁸⁹14S/161.

¹⁹⁰Ministerial Conclusions adopted on 21 May 1963, 12S/36-37, para. I.1(ii).

¹⁹¹See Report of Committee III, L/1989, 12S/88, 95-97, and Secretariat compilation of restrictions, AC/SC.1/3, 12 November 1963.

¹⁹²See Secretariat notes from 1965-1969 in COM.TD/16, COM.TD/19, COM.TD/W/19, COM.TD/W/43, COM.TD/W/60, COM.TD/W/64, COM.TD/W/68, COM.TD/W/76, COM.TD/W/93, COM.TD/W/95. See also the annual reports of the Committee.

¹⁹³L/3391/Rev.1.

¹⁹⁴C/M/70.

¹⁹⁵C/M/139; see C/III, Proposal by the Director-General on "Notification and Surveillance - Procedures for the Review of Developments in the Trading System", adopted on 26 March 1980, 27S/20.

¹⁹⁶L/5265. The last revised data of the JWG were contained in document L/5415 and Corrigenda.

¹⁹⁷See documents listed in TA/INF/1/Rev.8, p. 38-44.

¹⁹⁸See Secretariat Notes on "Technical arrangements for bilateral or plurilateral consultations or discussions on quantitative restrictions" (MTN/NTM/W/13); "Consultations or discussions on QRs: Status report and proposed procedure for reports" (MTN/NTM/W/21) and further status reports in MTN/NTM/W/54; "Information regarding import restrictions" (MTN/NTM/W/30, MTN/NTM/W/77, MTN/NTM/W/131, MTN/NTM/W/199); "Feasibility study of establishment of a list of QRs" (MTN/NTM/W/112) and various other papers in the MTN/NTM/W/ series.

¹⁹⁹See Secretariat Note on "Negotiations on Non-tariff Measures Not Dealt with Multilaterally", MTN/NTM/W/4; "Notification of Non-tariff Measures Not Dealt with Multilaterally", MTN/NTM/W/82+Add.; notes on procedures for such negotiations at NTM/W/45, MTN/NTM/W/137; and other papers in the MTN/NTM/W series.

developing countries.²⁰⁰ Also, the GATT Committee on Trade in Agriculture established in 1982 drew up documentation on non-tariff measures, including quantitative restrictions, for agricultural products.²⁰¹

A Group on Quantitative Restrictions and Other Non-Tariff Measures was established under the 1982 Ministerial work programme to review existing quantitative restrictions and other non-tariff measures, the grounds on which these were maintained and their conformity with the General Agreement, so as to achieve the elimination of quantitative restrictions which were not in conformity with the General Agreement or their being brought into conformity with the General Agreement, and also to achieve progress in liberalizing other quantitative restrictions and non-tariff measures, adequate attention being given to measures affecting products of export interest to developing countries.²⁰² It was agreed that:

“The Group’s establishment and any work carried out by it, including the presentation, examination and discussion of quantitative restrictions and other non-tariff measures, were without prejudice to the rights and obligations of contracting parties under the GATT and to any action already taken by the CONTRACTING PARTIES”.²⁰³

The Group drew up an information base comprised of notifications made by contracting parties of the quantitative restrictions which they themselves apply, including information on grounds and GATT justifications.²⁰⁴ It also kept up to date the Inventory of Non-Tariff Measures (Industrial Products), which contains notifications by contracting parties affected by the measures.²⁰⁵ Procedures for up-dating the Inventory had been adopted in 1980.²⁰⁶

Since 1986, a Technical Group on Quantitative Restrictions and Other Non-Tariff Measures has taken over the task of updating and analysis of the documentation in accordance with the timetable and procedures agreed by the CONTRACTING PARTIES in 1984 and 1985.²⁰⁷ These procedures provide for contracting parties to notify details of changes in the quantitative restrictions that they maintain as and when these changes occur and to make a complete notification of their quantitative restrictions once every two years; they also specify the content of the notifications, which are to include an indication of the grounds and GATT justification for the measures maintained.²⁰⁸ The most recent compilation of quantitative restrictions was issued in 1989 and has been periodically updated.²⁰⁹ Information on quantitative restrictions and non-tariff measures is also included in the Integrated Data Base established by a Council Decision of November 1987.²¹⁰

2. Export restrictions

During 1978-79, the Tokyo Round “Framework” Group drafted an “Understanding regarding export restrictions and charges”, which provides:

“The participants in the Multilateral Trade Negotiations have examined the various existing provisions of the General Agreement relating to export restrictions and charges. The Annex contains a statement of these provisions.

²⁰⁰COM.TD/W/338/Rev.1.

²⁰¹AG/FOR/- and AG/FOR/REV/- series.

²⁰²29S/17.

²⁰³L/5713, adopted on 30 November 1984, 31S/211, 212, para. 4; see also NTM/2.

²⁰⁴NTM/W/6/- series.

²⁰⁵NTM/INV/I-V and Addenda.

²⁰⁶C/110, Proposal by Director-General on “Documentation on Non-Tariff Measures”, adopted on 26 March 1980, 27S/18.

²⁰⁷L/6200, Action taken on 24-26 November 1986, 33S/54.

²⁰⁸L/5713, Report (1984) of the Group on Quantitative Restrictions and Other Non-Tariff Measures, adopted on 30 November 1984, 31S/211, 221-223 and 227-228, paras. 44 and 65; L/5888, Report (1985) of the Group on Quantitative Restrictions and Other Non-Tariff Measures, adopted on 28 November 1985, 32S/91, 92-94, paras. 5-II.

²⁰⁹NTM/W/6/Rev.5 dated 31 January 1989, Secretariat compilation of “Quantitative Restrictions” including table by CCCN or HS classification, and Addenda 1-7 (to September 1993).

²¹⁰Decision on “Integrated Data Base” of 10 November 1987, L/6290, 34S/66; see also material on the IDB in the chapter on Article II, and the April 1994 User Reference Manual for the IDB, IDB/URM/1.

“In the light of the examination referred to, participants agree upon the need to reassess in the near future the GATT provisions relating to export restrictions and charges, in the context of the international trade system as a whole, taking into account the development, financial and trade needs of the developing countries. They request the CONTRACTING PARTIES to address themselves to this task as one of the priority issues to be taken up after the Multilateral Trade Negotiations are ended”.

This Understanding was adopted by the Trade Negotiations Committee at the end of the Tokyo Round²¹¹ and was submitted to the CONTRACTING PARTIES at their Thirty-fifth Session held in November 1979.²¹²

See also a 1974 Technical Note by the Secretariat on “GATT and Export Restrictions”²¹³ discussing legal mechanisms for negotiation in this area; a Secretariat Note of 1980 on “Export Restrictions and Charges”, which also lists known export prohibitions, embargoes and licensing-based restrictions²¹⁴; and a 1989 Background Note by the Secretariat on “Export Restrictions and Charges”²¹⁵ providing information on export restrictions and charges, their nature, purpose and coverage, relevant GATT provisions and past GATT work.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Corresponding provisions in the Havana Charter are contained in Article 20; in the US Proposals in Chapter III C-1; in the US Draft in Article 19; in the London & New York Drafts in Article 25; and in the Geneva Draft in Article 20.

Differences from the Havana Charter: Article 20:2(b) of the Charter included a reference to the revision of internationally agreed standards. The drafters of the General Agreement decided not to include it in the General Agreement; it was stated that it would be “unwise to envisage the CONTRACTING PARTIES as being in a position to examine marketing standards and agree on regulations”, and that this would be appropriate for the ITO, which would have a staff of experts.²¹⁶ Article 20 also included additional safeguards for exporting countries (prior notice and consultation) in the case of invocation of Article 20:2(c); these were inserted at Havana and were not taken into the General Agreement.²¹⁷ The Sub-Committee at Havana also inserted an interpretative note to Article 20:2(a) to respond to Greek concerns relating to olive oil production, which permitted export restrictions necessary to maintain domestic stocks to avoid critical shortages, in the case of products which are basic to the diet in the exporting country and are subject to alternate annual shortages and surpluses.²¹⁸ This too was not taken into the General Agreement.

The wording of the Interpretative Note to paragraph 2(c) in the General Agreement is different from that in the corresponding Interpretative Note to paragraph 2(c) of Article 20 of the Charter. The wording of the Interpretative Note to the last sub-paragraph of paragraph 2 in the General Agreement is different from that in the corresponding Interpretative Note 3(d) of Article 20 of the Charter: “The words ‘or as between different foreign producers’ had been deleted from this footnote (in the Charter) because they were pertinent only to the footnote on ‘special factors’ in Article 22 [XIII]”.²¹⁹

The inclusion in the General Agreement of Articles XI-XIV was accepted by certain delegations without the insertion of the Charter Articles 4 and 6 relating to the removal of maladjustments within the balance-of-payments and safeguards for members subject to external inflationary or deflationary pressure, on the understanding that if

²¹¹MTN/FR/6, pp. 5/1-5/10; adopted by TNC at MTN/28 and Corr.1.

²¹²L/4884 and Add.1.

²¹³MTN/3B/9, dated 1 May 1974.

²¹⁴CG.18/W/43 dated 10 October 1980.

²¹⁵MTN.GNG/NG2/W/40, dated 8 August 1989.

²¹⁶EPCT/TAC/PV/27, p. 18.

²¹⁷Havana Reports, pp. 90-91, paras. 24-28.

²¹⁸Havana Reports p. 88, para. 12.

²¹⁹E/CONF.2/C.3/SR.37, p. 7.

a situation of the sort envisaged in the chapter relating to employment and economic activity should arise, the provisions on nullification and impairment could be invoked.²²⁰

Article XI has been amended only once. In the Review Session it was agreed to move the former paragraph 3 of Article XI into an interpretative note and to add a reference in that note to Article XVIII (which had been revised into its present form at the Review Session).²²¹ A number of other amendments were considered and rejected in the Review Session Working Party on Quantitative Restrictions; see the documents listed below.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/27, 36, 45;
EPCT/C.II/QR/PV/1, 4, 5
(part 3);
EPCT/C.II/PV/4, 5, 13
Reports: EPCT/C.II/36, 43, 59; EPCT/30

New York

Discussion: EPCT/C.6/17, 20, 21, 27, 64,
106
Reports: EPCT/C.6/14, 97/Rev.1
Other: EPCT/C.6/W/5, 16, 17, 29, 43
and Corr.1, 70, 72

Geneva

Discussion: EPCT/EC/PV.2/22
EPCT/A/SR.19, 21, 22, 23, 26,
30 (p. 6), 40(1);
EPCT/A/PV/19, 22 and Corr. 1-
5, 23 and Corr. 1-2, 41
EPCT/TAC/SR.11, 13
EPCT/TAC/PV/27, 28
Reports: EPCT/135, 189, 196, 212,
214/Add.1/Rev.1
Other: EPCT/141, 162, 163, 164,
EPCT/W/64, 75, 196, 199, 208,
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²²⁰EPCT/TAC/SR.13, pp. 4-5.

²²¹Protocol Amending the Preamble and Parts II and III of the General Agreement, as rectified by Procès-Verbal of Rectification concerning (*inter alia*) this Protocol; both entered into effect 7 October 1957.