ARTICLE XI

GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

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. ...
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> "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.
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> "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 Im.9(s)-5.8Q7N2/TTinse difo5.1(ducs)-5.8Q7' (sen tel8.5(o9Tw13(h)-,TD04 T2.7t

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

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

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

[5]L/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.

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

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

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

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

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

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

[12]S/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

Measures Affecting the Export of Unprocessed Herring and Salmon".[26] See also the material on "prohibitions and reons

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.

principles of the General Agreement governing measures affecting private trade by regulating trade through

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

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

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

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]

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

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

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 producers[65] - 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]

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

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]

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[88] L/6253, adopted on 2 February 1988, 35S/163, 224-225, para. 5.1.3.4.
[89] *Ibid.*, 35S/231 para. 5.3.1.4.
[90] L/4687, adopted on 18 October 1978, 25S/68, 101, para. 4.12.
[91] L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.4.
[92] Panel 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.
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> "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

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]

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

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.

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 conclude

"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

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

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

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
> "... thThe 197ehp4()1.8(p4(9t sat7.8(p4(9t8(p4(,(f)-.7.6(o)-036 y/Tf60]aD)1.2(n3.3(str) -1ich006 -1.2036)-036 (Somceru006 -1

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

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

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. E

2. Waivers under Article XXV:5

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".

"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 Round[211] 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 restrictions[214]; 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 main(h)-1.2(e Ii)

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, 217, 218, 223, 272, 280, 301, 313, 318

Havana

Discussion:	E/CONF.2/C.3/SR.10, 12, 14, 16, 18, 19, 37, 41