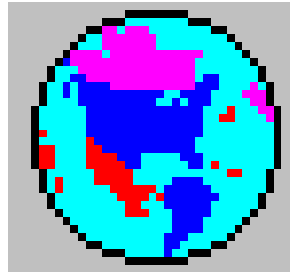


**THE LAW OF
REGIONAL ECONOMIC INTEGRATION
IN THE AMERICAN HEMISPHERE**



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Unit V

**Quantitative Restrictions and
Measures Equivalent to Quantitative Restrictions**

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Guiding Questions

Reflect on the following questions while/after reading the material:

1. *Analyze the relationship between GATT Articles XI and III taking into consideration the Interpretative Note Ad Article III. What are the functions of Article XI? Does it achieve those functions? Would the distinction between GATT Articles XI and III be critical? (Think of Article XX (General Exception))?*
2. *Could one defend a different relationship between GATT Articles XI and III such that any measure preventing the market access of foreign goods falls under Article XI, even if applicably indistinctly to imports and foreign goods? (If familiar, compare with the free movement of goods under the EC Treaty – Articles 25, 28, 29, 90 EC.)*
3. *Japanese Semi-Conductors*
 - a. *What economic interests of participating and third countries are involved in connection to so-called voluntary export restraints (VERs)? Why were they seldom challenged in the GATT dispute settlement system?*
4. *Japanese Leather (optional reading)*
 - a. *Consider para. 60 of the panel report: is such flexibility desirable? Should a judicial body like a panel or a political body like the Dispute Settlement Body exercise such a function?*
 - b. *Reflect on the relationship between actual trade effects, potential trade effects and effects on competitive opportunities of imports.*
5. *Tuna/Dolphin*
 - a. *Which GATT discipline ought to apply to national rules governing production methods (not product characteristics) of both imports and domestic goods: Article III or Article XI?*
 - b. *To what extent does the application of such rules to imports constitute an extraterritorial exercise of governmental authority? (See Shrimp-Turtle in Unit 1)*
 - c. *The two Tuna/Dolphin reports which have expressed themselves in favor of the application of Article XI were never adopted. Why do you think this product/process distinction received widespread support among trading countries and legal scholars? What trade and non-trade issues are at stake? Would such distinction stem from a pro-trade bias embedded in the GATT?*

1. Legal Text

NAFTA Article 309: Import and Export Restrictions

1. Except as otherwise provided in this Agreement, no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT, including its interpretative notes, and to this end Article XI of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made a part of this Agreement.

2. The Parties understand that the GATT rights and obligations incorporated by paragraph 1 prohibit, in any circumstances in which any other form of restriction is prohibited, export price requirements and, except as permitted in enforcement of countervailing and antidumping orders and undertakings, import price requirements.

3. In the event that a Party adopts or maintains a prohibition or restriction on the importation from or exportation to a non-Party of a good, nothing in this Agreement shall be construed to prevent the Party from:

a) limiting or prohibiting the importation from the territory of another Party of such good of that non- Party; or

b) requiring as a condition of export of such good of the Party to the territory of another Party, that the good not be re-exported to the non-Party, directly or indirectly, without being consumed in the territory of the other Party.

4. In the event that a Party adopts or maintains a prohibition or restriction on the importation of a good from a non-Party, the Parties, on request of any Party, shall consult with a view to avoiding undue interference with or distortion of pricing, marketing and distribution arrangements in another Party.

5. Paragraphs 1 through 4 shall not apply to the measures set out in Annex 301.3.

GATT 1994 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. Japanese Semi-Conductors

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

Under the old GATT, contracting parties often preferred to conclude so-called Voluntary Export Restraints (VERs) to protect a domestic industry against imports rather than resorting to safeguards under GATT Art. XIX. Many of these agreements were voluntary only in a formal sense. The following dispute gives a good illustration of the desired and undesired economic effects of VERs on the participating and third countries. Another interesting aspect of the case is the GATT relevance of governmental versus private action.

24 March 1988

JAPAN - TRADE IN SEMI-CONDUCTORS

*Report of the Panel adopted on 4 May 1988
(L/6309 - 35S/116)*

(...)

II. BACKGROUND

A. Developments leading to the Japan/US Arrangement in Semi-conductor trade

10. The United States and Japan are the largest producers and exporters of semi-conductors. The United States was the largest producer during the 1970's, but Japan became increasingly important as both a producer and exporter of semi-conductor products at the beginning of the 1980's. In 1981, its exports exceeded those of the United States for the first time. In February 1983, the United States' industry began to express concerns to the Government of the United States about the lack of access of non-Japanese companies to the Japanese market and possible unfair trade practices of Japanese companies in the US market.

11. On 14 June 1985, the United States Semi-conductor Industry Association filed a petition under Section 301 of the Trade Act of 1974 against the Government of Japan, alleging that Japan was restricting access to the domestic semi-conductor market for United States producers. This industry-wide action was followed by several complaints brought under the anti-dumping law. On 24 June 1985, an anti-dumping petition concerning 64K DRAMs from Japan was filed by Micron Technology Inc. Also, on 30 September 1985, a petition concerning the alleged dumping of EPROMs from Japan was filed by Intel Corporation, Advanced Micro-Devices, Inc. and by National Semi-conductor Corporation. Finally, on 6 December 1985 the United States Department of Commerce initiated an anti-dumping investigation to determine whether DRAMs of 256K and above from Japan were sold at less than fair value. Protracted negotiations between the governments of Japan and the United States led to the conclusion of a bilateral agreement in September 1986.

12. On 2 September 1986, Japan and the United States formally concluded an Arrangement concerning Trade in Semi-Conductor Products (hereinafter called "the Arrangement") which was subsequently notified to the GATT on 6 November 1986 in document L/6076. The Arrangement was linked to the suspension of anti-dumping procedures initiated in the United States against imports of certain categories of Japanese semi-conductors and to the suspension of the Section 301 proceedings on access to the Japanese market for US-made semi-conductors.

B. Main provisions of the Arrangement

13. The Arrangement contains three main sections. The first section relates to market access. It provides that the Government of Japan will impress upon the Japanese producers and users of semi-conductors the need to aggressively take advantage of increased market access opportunities in Japan for foreign-based firms which wish to improve their actual sales performance and position. Specifically, the Government of Japan will provide further support for expanded sales of foreign-produced semi-conductors in Japan through the establishment of an organization which will provide sales assistance, quality assessment, research fellowship programmes, exhibitions, etc., for foreign semi-conductor producers, and through promotion of long-term relationship between Japanese buyers and foreign producers including joint product development programmes. (...)

14. The second main section of the Arrangement contains three sub-sections dealing with prevention of dumping. (...) The second sub-section provides that, in order to prevent dumping, the Government of Japan will monitor cost and prices on a list of semi-conductor products¹ exported to the United States. (...) This sub-section also provides that if any monitored product is being sold or exported at prices less than company-specific fair value, the Government of the United States may request immediate consultations. Based on monitoring and/or consultation, the Government of Japan will take appropriate actions available under laws and regulations in Japan to prevent such exports to the United States. The third sub-section relates to monitoring of third-country markets. It is stated that both governments recognize the need to prevent dumping in accordance with relevant provisions of the GATT and encourage respective industries to conform with the above principles. It is also stated that in order to prevent dumping, the Government of Japan will monitor, as appropriate, cost and export prices on the products exported by Japanese semi-conductor firms from Japan to certain markets.²

(...)

D. Movement of prices in certain semi-conductors

(...)

29. The EEC contended that the price increase in early 1987, contrary to what had been forecasted by Dataquest, an international industry analyst (also used by the United States), was explained by MITI production and price control activities. Japan maintained that pricing was a decision by businessmen based on commercial considerations. Especially in the period following the conclusion of the Arrangement, pricing was affected by many factors such as trade issues with the United States, EEC anti-dumping investigations, industry's intention to avoid below cost pricing, recovery of balanced supply and demand relations and reduced supply capacity.

¹(a) Memory Devices: MOS SRAM, ECL RAM; (b) Microprocessors: 8 bit configuration, 16 bit configuration; (c) Microcontrollers: 8 bit configuration; (d) ASICS: GATE ARRAYS, STANDARD CELLS; (e) ECL LOGIC.

²Japan has stated that as an administrative matter, it monitors exports to all but the most insignificant markets. Exports are being monitored to countries accounting for 97 per cent of Japanese semi-conductor exports. These markets presently are: Brazil, Canada, China, France, Germany F.R., Hong Kong, Ireland, Italy, Republic of Korea, Malaysia, Mexico, the Philippines, Singapore, Sweden, Taiwan and the United Kingdom.

Therefore, simple comparison of actual data with the forecast formulated by Dataquest on the basis of past data was not meaningful. The United States explained that prices of semi-conductors were affected by the elasticity of demand for the final product, for example, computers. Prices also fluctuated over the course of the year, depending on the time of contracts negotiated. The product life cycle of a particular type of semi-conductor, exchange fluctuations, and the initiation of anti-dumping investigations, and significant worldwide increases in downstream product demand were all factors which also influenced prices.

(...)

IV. MAIN ARGUMENTS BY PARTIES TO THE DISPUTE

A. The Third Country Market Monitoring

(a) General

33. The EEC stated that the purpose of the export monitoring provision was clear. The implementation of the Arrangement had increased prices in the US market, thus placing US users at a disadvantage vis-à-vis their competitors in third countries and measures to increase prices artificially in those countries were therefore taken to the detriment of users in those countries. On the other hand, US producers and exporters of semi-conductors would, in the absence of such measures, remain exposed to reported Japanese dumping in markets other than the United States. (...) The EEC also rejected the explanation given by the United States that the provision on Third Country Market Monitoring was necessary in order to avoid circumvention of the suspension agreement by exports from Japan to the United States through third country markets. This argument would imply that all contracting parties could apply export controls in respect of any product of their choice to all destinations in order to prevent circumvention and dumping on any one single market, and could do so with the agreement of only one contracting party, instead of with all parties concerned.

34. To implement the Third Country Market Monitoring provision, an export licensing system was used for the monitoring according to which licences were issued to applications which respected certain price guidelines, i.e. a minimum price fixed for individual products. Since Japan and the United States directly produced, or controlled through overseas manufacturing plants, a pre-dominant share of world semi-conductor production, the government-mandated export price control would lead to a situation in which importing countries would be forced to pay a price for such imports in excess of what normal conditions of competition would imply.

This situation could force, induce or permit Japanese producers to exercise quantitative export limitations which could subject foreign competitors producing competing final products to considerable uncertainty and risks in their production plan or even prevent them from producing at all. The Community had been informed by some Japanese manufacturers that MITI was putting pressure on them through administrative guidance to restrict overall export volumes of certain semi-conductors, resulting in severe reduction of supplies, delays in the granting of export licences and other disruptions with potentially serious consequences.

35. The EEC went on to state that the Japanese administrative guidance not only controlled export prices and export volume, but also production volume and other aspects in relation to exports.

In the Japanese Position Paper mentioned above, it was stated that "Japan exercised administrative guidance to achieve production cutbacks and adopted more stringent export licensing practices with a

view to aiding the US efforts over and above Japan's obligations under the Arrangement ... In February 1987, MITI exercised administrative guidance to the companies to reduce production during the first quarter of 1987 by 23 per cent below fourth quarter 1986 levels. (...)

36. The Japanese Position Paper provided further insights into the operation of the Third Country Market Monitoring System. (...) In other words, information regarding third markets would be exchanged between the two parties with a view to proving that Japanese export prices had increased by the amount defined by the United States Government as being necessary to bring such prices up to the "fair market value" set for the US market by the US Department of Commerce. This, according to the EEC, clearly showed that the Japanese authorities had not been merely "watching" and passively issuing export licences but had acted in response to the restrictive purpose behind the Third Country Market Monitoring System.

37. Japan stressed that monitoring was mere watching. In cases when exports were made at prices "extremely lower" than the cost, MITI might present the facts and communicate its concern to the manufacturer. MITI's requests for dumping to be stopped were not export restrictions. No export licence had ever been denied to any application because of inappropriate pricing. (...) The supply and demand forecasts issued by MITI served only as a guideline to manufacturers, whereby MITI expressed its expectations that it was desirable to avoid over-production which far exceeded actual demand. The relationship between price and supply and demand in the semi-conductor industry was characterized by a learning curve effect in the sense that an increase in production and productivity brought about a sharp decline in costs. In these circumstances, the possible decrease in prices was liable to create a high expectation of demand expansion, leading to capacity investment, over-production and excessive competition over market shares. These conditions of over-production and excessive competition might promote a price war and destabilize the balance between demand and supply. On the other hand, if low-priced products were exported and regarded as dumped, or if low domestic prices prevented an increase in imports of foreign semi-conductors, international cooperation might be harmed. MITI's efforts to request manufacturers to align their production levels to reflect the real demand and to prevent dumping had not had a restrictive effect on exports, but were made with the objective of contributing to international co-operation.

(...)

41. The EEC asked how mere watching by MITI could effectively ensure the prevention of dumping. Even if the measures taken by MITI were not binding in a legal sense, they were binding in a practical sense and were restrictive. Besides, if monitoring were mere watching, then there would be no need for the setting up of an entire system for that purpose, nor would there be any need to conclude a formal international agreement to that effect.

42. Japan reiterated that none of the measures was legally binding. The Japanese society was not so feudalistic that non-binding requests by government would be accepted readily and administrative guidance by MITI did not always work. If the semi-conductor manufacturers were to pursue their own profits and ignored MITI's concern, the whole dumping prevention mechanism would collapse. However, these manufacturers were fully aware that dumping would not be beneficial on a long-term basis. They had learned lessons from the disputes with the United States. They had realized that excessive competition using below-cost pricing was undesirable and that avoiding such situations would benefit not only themselves but also the world's semi-conductor industries in the long-run. The monitoring system was needed in the light of the present status of the industry. Although monitoring by MITI was limited in scope, it was still meaningful because MITI represented a neutral and objective figure overseeing the entire industry while taking into account cost and prices among competing companies in Japan. Monitoring also helped to stamp out suspicion among companies

that others were cheating or resorting to dumping. It contributed to the establishment and maintenance of a healthy competitive environment.

(...)

(c) Article XI

49. The EEC considered that the Third Country Market Monitoring System was incompatible with the provisions of Article XI relating to export restrictions. Firstly, the Arrangement had a restrictive intent in that the purpose of the Third Country Market Monitoring System was to artificially raise Japanese export prices through government intervention. This intent was explicitly acknowledged in the Japanese Position Paper in which the Japanese authorities had emphasized their determination to implement more stringent export licensing practices "to prevent below-cost exports". Secondly, the restrictive effects of the licensing system were universally recognized, not only by EEC users and importers, but by those in other importing countries like Australia, Canada or Hong Kong, and even by the United States. (...) It was irrelevant under Article XI whether the Government of Japan would subject the granting of export licences to the observance by exporters of the "fair market value" defined for the US market or of other criteria such as the avoidance of exports below-cost. The fact was that controls with price and quantitative effects had been imposed on the exports of semi-conductors, violating Article XI.

50. Japan maintained that monitoring of semi-conductor exports by the Japanese Government was indeed merely watching cost and export prices. Monitoring was not intended to prohibit or restrict trade, nor did it in practice produce such results. There were no minimum price requirements. It was also contrary to the facts to say that export restrictions, production controls or artificial price increases existed. Through monitoring, Japanese companies were encouraged to prevent dumping, but this would only happen through a voluntary decision of the company concerned. The encouragement by the Japanese Government was not legally binding by any means, and there was no penalty even if the company did not comply with such encouragement.

Companies were expected to refrain from dumping of their own will, taking into consideration factors such as the likelihood that importing countries would introduce anti-dumping measures which would adversely affect their business. Such voluntary actions of the companies were irrelevant to the provisions of Article XI which dealt with actions by governments.

(...)

VII. FINDINGS

(...)

A. The Third Country Market Monitoring

99. The Panel considered the following facts as central to its examination of this part of the EEC's complaint. After having concluded the Arrangement with the United States concerning Trade in Semi-Conductors, the Japanese Government:

- requested Japanese producers and exporters of semi-conductors covered by the Arrangement not to export semi-conductors at prices below company-specific costs;

- collected data on company and product-specific costs from producers; introduced a statutory requirement, reinforced by penal servitude not exceeding six months or a fine not exceeding ¥ 200,000, for exporters of semi-conductors to report data on export prices;
- systematically monitored company and product-specific cost and export price data on semi-conductors which were sold for export to certain contracting parties other than the United States;
- instituted quarterly supply and demand forecasts and communicated to manufacturers its concern about the need to accommodate their production levels to the forecasts as compiled by MITI.

100. Up to 10 November 1987 the cost and price data had been reviewed within the framework of the screening of exports for COCOM purposes. An export licence for semi-conductors had been granted only after the Japanese Government had examined the information on costs and export prices. As a result of this monitoring, export licences had been granted with delays, sometimes amounting to several months. As of 10 November 1987 the COCOM screening and the monitoring of costs and export prices had been administratively separated. Producers and exporters of semi-conductors were now still obliged to supply the Government with information on costs and export prices before shipment and the Government still examined this information systematically, but the granting of the export licence within the framework of the COCOM regulations was no longer dependent on the examination of costs and prices.

(...)

102. The Panel understood the main contentions of the parties to the dispute on the consistency of the measures set out in paragraph 99 with Article XI:1 of the General Agreement to be the following. The EEC considered that such measures constituted restrictions on the sale for export of semi-conductors at prices below company-specific costs through measures other than duties, taxes or charges within the meaning of Article XI:1. Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished. The Government's measures to avoid sales at dumping prices were not legally binding and therefore did not fall under Article XI:1. Exports were limited by private enterprises in their own self-interest and such private action was outside the purview of Article XI:1.

103. As for the export approval system, the EEC did not ask the Panel to examine the COCOM export controls as such but the delays in the issuing of export licences resulting from the monitoring of costs and export prices. The EEC considered that these delays constituted restrictions on exportation made effective through export licences within the meaning of Article XI:1. Japan maintained that the delays in the granting of export licences resulting from the monitoring of costs and export prices had occurred for purely administrative reasons and did not constitute restrictions within the meaning of Article XI:1, since no export licence had ever been denied for reasons related to export pricing.

104. The Panel examined the parties' contentions in the light of Article XI:1, the relevant part of which stated that:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas ..., export licences or other measures, shall be instituted or maintained

by any contracting party ... on the exportation or sale for export of any product destined for the territory of any other contracting party".

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.

105. 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.

106. The Panel then examined the contention of the Japanese Government that the measures complained of were not restrictions within the meaning of Article XI:1 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.

107. 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. It noted that the CONTRACTING PARTIES had addressed a case relating to the interpretation of Article XI:2(c) in the report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253). Under Article XI:2(c), import restrictions might be imposed if they were necessary to the enforcement of "governmental measures" restricting domestic supplies. The complaining party argued in the earlier panel proceedings that some of the measures which Japan had described as governmental measures were in fact "only an appeal for private measures to be taken voluntarily by private parties" and could therefore not justify the import restrictions. Japan replied that "to the extent that governmental measures were effective, it was irrelevant whether or not the measures were mandatory and statutory", that the governmental measures "were effectively enforced by detailed directives and instructions to local governments and/or farmers' organizations" and that "such centralised and mutually collaborative structure of policy implementation was the crux of government enforcement in Japan" (L/6253, paragraph 29). The Panel which examined that case had noted that "the practice of 'administrative guidance' played an important rôle" in the enforcement of the Japanese supply restrictions, that this practice was "a traditional tool of Japanese government policy based on consensus and peer pressure" and that administrative guidance in the special circumstances prevailing in Japan could therefore be regarded as a governmental measure enforcing supply restrictions. 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.

108. 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.

109. 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.

110. On the first criterion, the Panel considered the background against which the measures operated. The Panel noted that the Government of Japan had formally concluded in September 1986 an Arrangement with the Government of the United States, one of the main provisions of which was for the Japanese Government to monitor costs and export prices to third country markets in order to prevent dumping. Following bilateral consultations, the Government of Japan assured the United States in April 1987 that it had taken "appropriate action to ensure that Japanese semi-conductor exports are being sold at not less than their costs in third country markets".

In the light of this, the Panel considered that at least by April 1987, there would certainly have been no doubt in the minds of relevant Japanese producers and exporters that the Japanese Government had made an undertaking to the United States to ensure that a certain class of sales did not take place. They would also have known that any such action would have led to the Government of Japan being unable to fulfil a commitment which it had given to the United States, and therefore would have adverse consequences for Japan. They would also have been aware that the Government had the fullest information available to identify any producers or exporters selling at prices below costs.

111. The Panel considered that, in the above circumstances, the Japanese Government's measures did not need to be legally binding to take effect, as there were reasonable grounds to believe that there were sufficient incentives or disincentives for Japanese producers and exporters to conform. The Panel did not consider that these circumstances were, of themselves, sufficient to ensure compliance. Indeed, events showed that despite the existence of the Arrangement, a certain number of Japanese producers and exporters had pursued their original course of production and sales. What was required to ensure compliance were additional Government measures.

112. The Panel went on to consider the second criterion regarding the manner in which the measures operated in this case. To begin with, the Panel noted the Japanese Government's own description of its measures as provided to the United States in its Position Paper of April 1987, notably that "Japan exercised administrative guidance to achieve production cut-backs and adopted more stringent export licensing practises" and that "actions have been taken aimed at reducing supplies and squeezing out grey market transactions". It referred also to the measures taken as "recently-ordered production cut-backs", and that "the measures (i.e. those relating to production and export administration) taken by the Japanese Government have as their exclusive purpose and effect avoiding below cost sales of semi-conductors in third country markets".

113. The Panel further examined the structure and elements of the measures adopted. It noted that Japanese producers were required to submit detailed information on costs on a regular basis. It also noted the importance of the statutory requirement for exporters to supply information on export prices and of the heavy penalties attached for failure to comply with that requirement. The objective of identification in the monitoring measures was clear. For instance, in cases where the exporter was not a producer, the origin of the transaction had to be declared and identified. The Panel noted that

this gave the Japanese Government a comprehensive basis for precise identification of the source of any below cost pricing. It also observed that any producer or exporter would have been aware that the Japanese Government would be in a position to have this information. The preparedness of the Japanese Government to request, and to continue requesting, for below cost sales to cease was also evident.

114. The Panel examined the operation of the supply and demand forecasts. It noted that MITI had instituted regular meetings of the Supply and Demand Forecasts Committee, involving producers, upon which its forecasts were drawn up. The Panel considered that the Government of Japan played a decisive role in the entire operation. Indeed it was stated by Japan that "the Japanese Government, in consideration of large inventories of products, made an attempt to restore balance in supply and demand." Thus in the first and second quarters of 1987, the Government of Japan compiled the supply and demand forecasts "to get production levels reflective of actual demand". The Panel recalled the statement quoted in paragraph 112 above concerning the production cut-backs and the avoidance of below cost sales of semi-conductors in third country markets.

On the basis of these, the Panel considered that the Government of Japan had intervened to facilitate the reduction of the production levels of semi-conductors through the operation of the supply and demand forecasts. The Panel further considered that if Japanese producers and exporters were subject to any measure restricting the exportation or sale for export of semi-conductors, they would have to adjust their production levels accordingly. The Panel therefore considered that the operation of the supply and demand forecasts had facilitated the reduction of the production levels, strengthening the effectiveness of the other measures adopted.

115. The Panel then considered whether the operation of the measures was essentially dependent on Government action. The complex of measures was, in the Panel's view, so dependent. The period between September 1986 and January 1987 gave an interesting indication of how Japanese firms were disposed to operate where they were subject to less constraint. It was apparent that they had been prepared to produce and sell up to a quantity which included what was later termed "false demand" in the context of the revised supply or demand forecast in February 1987. The Panel considered that the disposition to produce and sell was what the Government of Japan by its complex of measures intended to control, by the strengthening of the monitoring measures, lowering of the minimum export amount requiring an export licence to 50,000 yen, requests to producers not to export at prices below company-specific costs, and the revisions of the supply and demand forecasts.

116. The Panel also considered that the series of statements quoted in paragraph 112 above were relevant in this context. In addition to these, the Panel noted that Japan had stated in the proceedings of the Panel that "although monitoring by MITI was limited in scope, it was still meaningful because MITI represented a neutral and objective figure overseeing the entire industry while taking into account costs and prices among competing companies in Japan. Monitoring also helped to stamp out suspicion among companies that others were cheating or resorting to dumping".

Japan had further stated that "if the semi-conductor manufacturers were to pursue their own profits and ignore MITI's concern, the whole dumping prevention mechanism would collapse", and that "the administration presents (firms) with objective facts and considerations and others that are usually not obtainable by one firm alone". The Panel considered that these statements concerning the way in which the Government exercised its authority were a further confirmation of the fact that the Government's involvement was essential to the prevention of sales below company-specific costs.

117. All these factors 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.

118. The Panel then reverted to the issue raised by the EEC concerning the delays of up to three months in the issuing of export licences that had resulted from the monitoring of costs and export prices of semi-conductors destined for contracting parties other than the United States. It examined whether the measures taken by Japan constituted restrictions on exportation or sale for export within the meaning of Article XI:1. It noted that the CONTRACTING PARTIES had found in a previous case that automatic licensing did not constitute a restriction within the meaning of Article XI:1 and that an import licence issued on the fifth working day following the day on which the licence application was lodged could be deemed to have been automatically granted (BISD 25S/95). The Panel recognized that the above applied to import licences but it considered that the standard applicable to import licences should, by analogy, be applied also to export licences because it saw no reason that would justify the application of a different standard. The Panel therefore found that export licensing practices by Japan, leading to delays of up to three months in the issuing of licences for semi-conductors destined for contracting parties other than the United States, had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI:1.

(...)

VIII. CONCLUSIONS

132. On the basis of the findings set out above, the Panel reached the following conclusions:

A. The requests not to export semi-conductors at prices below company-specific costs to contracting parties other than the United States which the Japanese Government addressed to Japanese producers and exporters of semi-conductors, combined with the statutory requirement for exporters to submit information on export prices and the systematic monitoring of company and product-specific costs and export prices by the Government, backed up with the use of supply and demand forecasts to impress on manufacturers the need to align their production to appropriate levels, 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. The Panel suggests that the CONTRACTING PARTIES recommend that Japan bring its measures relating to the sale for export of semi-conductors to contracting parties other than the United States into conformity with the General Agreement.

B. The delays of up to three months in the issuing of export licences that resulted from the monitoring of costs and export prices of semi-conductors destined for contracting parties other than the United States constituted restrictions on exportation inconsistent with Article XI:1. The Panel suggests that the CONTRACTING PARTIES note that Japan had changed in November 1987 its export procedures to avoid such delays.

(...)

3. Thai Cigarette

The Thai Cigarette case mainly deals with the justification of Thailand's measures under GATT Art. XX and will reappear later in the course. Here, it intends to provide an example of a straightforward violation of GATT Art. XI.

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

5 October 1990

THAILAND - RESTRICTIONS ON IMPORTATION OF AND INTERNAL TAXES ON CIGARETTES

*Report of the Panel adopted on 7 November 1990
(DS10/R - 37S/200)*

(...)

II. FACTUAL ASPECTS

A. Restrictions on imports

6. Under Section 27 of the Tobacco Act, 1966, the importation or exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco and tobacco is prohibited except by licence of the Director-General of the Excise Department or a competent officer authorized by him. Section 4 of the said Act defines tobacco as "cigarettes, cigars, other tobacco rolled for smoking, prepared shredded tobacco including chewing tobacco". Licences have only been granted to the Thai Tobacco Monopoly, which has imported cigarettes on only three occasions since 1966, namely in 1968-70, 1976 and 1980.

(...)

III. MAIN ARGUMENTS

(...)

B. Article XI:1

16. The United States argued that since 1966 Thailand had implemented an import licensing régime for cigarettes which was inconsistent with Article XI. The Thai Tobacco Monopoly had imported cigarettes on only three occasions and the Government refused to consider import licence applications from any other entity. (...)

VI. FINDINGS

(...)

B. Restrictions on the Importation of Cigarettes

(i) Article XI:1

67. The Panel, noting that Thailand had not granted licences for the importation of cigarettes during the past 10 years, found that Thailand had acted inconsistently with Article XI:1, the relevant part of which reads:

"No prohibitions or restrictions ... made effective through ... import licences ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...".

(...)

4. U.S. – Tuna/Dolphin

The two Tuna/Dolphin disputes, the first of which is reprinted below in excerpts, started the confrontation between the GATT (WTO) and interests of environmental protection. The following excerpts are confined to the question of which GATT regime applies to rules governing production methods rather than characteristics of products themselves: Art. III or Art. XI. Although these reports were never adopted and the question remains contentious today, the panel's approach appears to be the majority opinion. Reflect on the benefits and disadvantages of the panel's distinction from a policy perspective.

UNITED STATES – RESTRICTIONS ON IMPORTS OF TUNA

Report of the Panel submitted to the Parties on 16 August 1991 (unadopted)

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

5.9. The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III:4. (...)

5.10. The Panel noted that the United States had claimed that the direct import embargo on certain yellowfin tuna and certain yellowfin tuna products of Mexico constituted an enforcement at the time or point of importation of the requirements of the MMPA that yellowfin tuna in the ETP be harvested with fishing techniques designed to reduce the incidental taking of dolphins. The MMPA did not regulate tuna products as such, and in particular did not regulate the sale of tuna or tuna products. Nor did it prescribe fishing techniques that could have an effect on tuna as a product. This raised in the Panel's view the question of whether the tuna harvesting regulations could be regarded as a measure that "applies to" imported and domestic tuna within the meaning of the Note Ad Article III and consequently as a measure which the United States could enforce consistently with that Note in the case of imported tuna at the time or point of importation. The Panel examined this question in detail and found the following.

5.11. The text of Article III:1 refers to the application to imported or domestic products of "laws, regulations and requirements affecting the internal sale . . . of products" and "internal quantitative regulations requiring the mixture, processing or use of products"; it sets forth the principle that such regulations on products not be applied so as to afford protection to domestic production. Article III:4 refers solely to laws, regulations and requirements affecting the internal sale, etc. of products. This suggests that Article III covers only measures affecting products as such. Furthermore, the text of the Note Ad Article III refers to a measure "which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation". This suggests that this Note covers only measures applied to imported products that are of the same nature as those applied to the domestic products, such as a prohibition

on importation of a product which enforces at the border an internal sales prohibition applied to both imported and like domestic products.

5.12. A previous panel had found that Article III:2, first sentence, "obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products".³⁴ Another panel had found that the words "treatment no less favourable" in Article III:4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products, and that this standard has to be understood as applicable to each individual case of imported products.³⁵ It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products.

5.13. The Panel considered that, as Article III applied the national treatment principle to both regulations and internal taxes, the provisions of Article III:4 applicable to regulations should be interpreted taking into account interpretations by the CONTRACTING PARTIES of the provisions of Article III:2 applicable to taxes. The Panel noted in this context that the Working Party Report on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, had concluded that

" . . . there was convergence of views to the effect that taxes directly levied on products were eligible for tax adjustment . . . Furthermore, the Working Party concluded that there was convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for adjustment, [such as] social security charges whether on employers or employees and payroll taxes."³⁶

Thus, under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes). Consequently, the Note Ad Article III covers only internal taxes that are borne by products. The Panel considered that it would be inconsistent to limit the application of this Note to taxes that are borne by products while permitting its application to regulations not applied to the product as such.

5.14. The Panel concluded from the above considerations that the Note Ad Article III covers only those measures that are applied to the product as such. The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III.

5.15. The Panel further concluded that, even if the provisions of the MMPA enforcing the tuna harvesting regulations (in particular those providing for the seizure of cargo as a penalty for violation of the Act) were regarded as regulating the sale of tuna as a product, the United States import prohibition would not meet the requirements of Article III. As pointed out in paragraph 5.12 above, Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States

³⁴ Panel report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

³⁵ Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted 7 November 1989, BISD 36S/345, 386-7, paras. 5.11, 5.14.

³⁶ BISD 18S/97, 100-101, para. 14.

to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.

(...)

5.18. (...) 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.

5. The Concept of Non-Tariff Barrier (NTB)

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Multilateral Approaches to Market Access Negotiations Countries

No: TPRD-98-02

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Keywords: WTO, market access, trade negotiations, tariffs, non-tariff measures.

JEL codes: [F13]

Abstract: Market access negotiations in merchandise trade at the multilateral level cover tariffs and non-tariff measures (NTMs). While tariffs have been substantially reduced in earlier rounds, they remain high in certain areas and further reductions involve a number of complex technical issues. Some formulae approaches, not used in the Uruguay Round, seem more favourable to developing countries. Elimination or phased reductions of NTMs in agriculture is one of the main areas for further market access negotiations in trade in goods. However, most NTMs are now the subject to negotiations on the rules under which they may be applied, e.g. in the areas of contingency protection and technical barriers to trade.

(...)

III. Non-tariff measures

A Issues

59. In the context of market access negotiations, non-tariff measures mainly refer to import restraints as well as production and export subsidies. (Export restraints, also NTMs, are not discussed here). Within these broad categories, there is a large variety of NTMs and they have many different effects.³ These include price and quantity effects on trade and production, as well

³ For a detailed discussion, see Laird and Yeats (1990). UNCTAD uses a classification of over 100 such measures - including tariffs with a discretionary or variable component

as on consumption, revenue, employment, and welfare effects. These occur both in the country applying them as well as in other countries, directly and indirectly affected by them. NTMs may overlap with tariffs and are often used with other reinforcing NTMs, e.g., domestic price support schemes need to be supported with import measures and any resulting surpluses need subsidies to be exported.

60. NTMs are difficult to quantify, costly to administer, costly to consumers, costly to exporters (in terms of lost trade), inefficient ways of creating jobs, lack transparency, are inherently discriminatory, and are most intensively used against developing countries and transition economies. They also drive a wedge between world prices and domestic prices, so that domestic firms are relatively unaffected by price trends on world markets and have little incentive to adopt new technologies or modern business practices. Domestic prices are often determined by the degree competition, or the lack thereof, in the home market.

61. The Uruguay Round made considerable headway in eliminating or reducing the use of NTMs, as well as in setting guidelines for the use of those which are still allowed. An overview of pre- and post Uruguay Round NTMs by broad type and sectoral coverage in Canada, the European Communities, Japan and the United States is given in Tables 5 and 6. The two outstanding features of these tables are the elimination of NTMs in agriculture, principally through tariffication, and the continued application of export restraints in the area of textiles and clothing. However, the tables look at import measures only and do not capture the importance of domestic supports and export subsidies in the area of agriculture.

62. For developing countries, the most important areas where changes took place in relation to market access were in relation to the use of voluntary export restraints (VERs), the start of the phase-out of restraints under the WTO Agreement on Textiles and Clothing, and the breakthroughs reflected in the WTO Agreement on Agriculture. These approaches are indicative of the techniques of negotiation for improved market access for products covered by NTMs.

63. For example, it was decided to prohibit explicitly the use of voluntary export (quantitative) restraints (VERs) in industry (other than textiles and clothing) and agriculture, and the remaining VERs are to be eliminated by the end of 1999. Apart from the fact that they covered more trade than other measure, VERs, used instead of Article XIX safeguards, had become a threat to the credibility of the GATT system, the prohibition under Article XI being ignored by all major GATT contracting parties. This prohibition on VERs was achieved at the expense of some "flexibility" being introduced into the application of safeguards, allowing discrimination among suppliers in exceptional circumstances. However, even when VERs are eliminated there will remain voluntary export price restraints (VEPRs), which often occur as a negotiated outcome of anti-dumping cases. Given the equivalence between these measures (with exporters capturing the rents in both cases), it is inconsistent economically that one be banned while the other be condoned. This issue could usefully be addressed in future negotiations.

64. For more than 40 years the developing countries' single most important export, textiles and clothing, were restricted on a discriminatory basis under the MFA and the earlier Short- and Long-term Cotton Textiles Agreements. These restraints are now being progressively phased out under the WTO Agreement on Textiles and Clothing. There are mixed feelings among developing

countries about the MFA elimination for two reasons. Constrained exporters must be expected to lose some of quota rents afforded by the MFA, but the country-specific quota system also provided a form of protection for less efficient exporters against the more efficient to whom quotas could not be transferred. (There have already been reports of Bangladesh losing out to China in some areas).

65. Subject to special safeguards, the phase-out of the MFA and the gradual integration of the textiles and clothing sector within the normal WTO rules is being effected over a 10 year period under the supervision of a Textiles Monitoring Body (TMB). A minimum of 16 per cent of total 1990 volume of imports covered by the MFA were due to be integrated into the WTO in 1995. At least another 17 per cent of the value of 1990 imports will be integrated following the third year of the phase-out period. An additional minimum of 18 per cent will follow after the seventh year, while the remaining 41 per cent will be brought under WTO rules at the very end of the phase-out period. Each phase-out is intended to include products from four different groups: tops and yarn, fabrics, made-up textiles, and clothing.

66. Quota restrictions are being expanded by the amount of the prevailing quota growth rates plus 16 per cent annually for the first three years. A further expansion of 25 per cent will take place in the subsequent four years, and an additional 27 per cent in the final three years. These annual growth rates may be adjusted if it is found that member countries are not complying with their obligations.

67. In the Major Review of the Implementation of the Agreement on Textiles and Clothing in the First Stage of the Integration Process, held in February 1998, a number of concerns were raised, including the back-loading of the integration process (holding off the more difficult adjustments till last), the exceptionally large number of safeguard measures in use, more restrictive use of rules of origin by the United States, tariff increases, the introduction of specific rates, minimum import pricing regimes, labelling and certification requirements, the maintenance of balance of payments provisions affecting textiles and clothing, export visa requirements, as well as the double jeopardy arising from the application of anti-dumping measures to products covered by the agreement.

68. The WTO Agreement on Agriculture, one of the main achievements of the Uruguay Round, brought the agricultural sector under more transparent rules and sets the stage for a progressive liberalization of trade in the sector. Among the main achievements were (i) tariffication (or elimination) of NTMs based on 1986-88 prices, the full binding of the new tariffs by developed and developing countries and phased tariff reductions, (ii) reductions in the level of domestic support measures (except for "green box" and *de minimis* amounts), and (iii) reductions in outlays on export subsidies and the volume of subsidized exports. The main exceptions to tariffication were rice and, for developing countries, some staple foods, where minimum access commitments apply. Special safeguards (increased duties) can be triggered by increased import volumes or price reductions (by comparison with average 1986-88 prices expressed in domestic currency). There is also a "peace" clause, intended to constrain the use of anti-subsidy actions until 2003.

69. Apart from these specific areas covered by the market access negotiations in the Uruguay Round, a number of important NTMs were covered in rules negotiations. These include contingency protection (safeguards, anti-dumping, countervailing), technical barriers (including

sanitary and phytosanitary measures), TRIPS, TRIMs, import licensing, state trading and rules of origin. These are covered by other papers at the conference.

70. One important area of rules relates to the use of subsidies, which are covered by the WTO Agreement on Subsidies and Countervailing Measures (SCM) and the Agreement on Agriculture. These rules distinguish between domestic and export subsidies and provide for differential treatment of agriculture and manufactured products. Some subsidies, notably export subsidies, are prohibited, while others are “actionable” or “non-actionable”, whether in the WTO or through countervailing actions. There are notification requirements for all specific subsidies, i.e., subsidies that are targeted to particular enterprises, industries or regions, as well as for export subsidies and import-substitution subsidies. The WTO Agreement on Agriculture also prohibits the use of export subsidies, except in conjunction with product-specific reduction commitments, and defines the conditions under which certain types of domestic subsidies (“green box”, “blue box” or “S&D box”) are exempt from reduction commitments. In this area, the emphasis on de-linking of supports from production was an important new approach to rural incomes.

71. WTO rules on NTMs were extended in the Uruguay Round to cover trade-related investment measures (TRIMs). In particular, the TRIMs Agreement prohibits measures that (i) require particular levels of local sourcing by an enterprise (i.e., local content requirements); (ii) restrict the volume or value of imports which an enterprise can buy or use to the volume or value of products it exports (i.e., trade balancing requirements); (iii) restrict the volume of imports to the amount of foreign exchange inflows attributable to an enterprise; and (iv) restrict the export by an enterprise of products, whether specified in terms of the particular type, volume or value of products or of a proportion of volume or value of local production.

72. Among the most important TRIMs in practice are the local content and trade-balancing requirements, which are extensively used in developing country automotive industries. Developing countries which notified their TRIMs are allowed to maintain them until the end of 1999, when they are to be dismantled. The abolition of TRIMs will promote a more neutral trading and investment environment in those countries and a more efficient allocation of scarce resources. The automotive industries in a number of countries are pressing their governments to seek an extension of the period in which to adjust to the new trading environment, but since the Uruguay Round WTO members have been much more reluctant to grant waivers to the main rules.

(...)

6. Relationship between Art. III and Art. XI

(WTO, Analytical Index: Guide to GATT Law and Practice (Vol. I) (1995))

(...) The 1984 Panel Report on "Canada - Administration of the Foreign Investment Review Act" notes that

"The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous. Moreover, the exceptions to Article XI:1, in particular those contained in Article XI:2, would also apply to internal requirements restricting imports, which would be contrary to the basic aim of Article III. The Panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI. For these reasons, the Panel, noting that purchase undertakings do not prevent the importation of goods as such, reached the conclusion that they are not inconsistent with Article XI:1".

The 1987 Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances" provides that

"The general prohibition of quantitative restrictions under Article XI and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of other contracting parties. Both articles are not only to protect current trade but also create the predictability needed to plan future trade".

A series of three cases in 1988 and 1992 examined the application of Articles III and XI to regulations affecting imported alcoholic beverages in Canada and the United States. The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies" provides that

"The Panel ... concluded that the practices concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1....

"The Panel then examined the contention of the European Communities that the practices complained of were contrary to Article III. The Panel noted that Canada did not consider Article III to be relevant to this case, arguing that the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII made it clear that provisions other than Article XVII applied to state-trading enterprises by specific reference only. The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III.4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed e contran'o by the wording of Article III:8(a)".

The 1992 Panel Report on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies" examined a United States claim that the practice of the liquor boards of Ontario to limit listing of imported beer to the six-pack size while according listings in different package sizes to domestic beer was inconsistent with the General Agreement.

"... 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 of the General Agreement, which required, inrer alia, that contracting parties accord to imported products '... treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal ... offering for sale ...'. 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."

With respect to restrictions imposed by provincial liquor authorities on access for imported beer to points of sale (with respect to which Canada invoked the Protocol of Provisional Application):

"The Panel which had examined in 1988 the practices of the Canadian liquor boards had analysed the restrictions on access to points of sale under Articles III:4 and XI:1 of the General Agreement. While that Panel had found these restrictions to be inconsistent with Canada's obligations under Article XI:I, it had also pointed out that it 'saw great force in the argument that Article III.4 was also applicable to State-trading enterprises at least when the monopoly of the importation and

monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada'. The present Panel, noting that Canada now considered Article III:4 to be applicable to practices of the liquor boards, examined this issue again.... The Panel found that, by allowing the access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities denied to imported beer. For these reasons the present Panel saw great force in the argument that the restrictions on access to points of sale were covered by Article III:4. However, the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:I 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 also examined minimum prices maintained for beer in certain provinces of Canada.

"The Panel first examined whether the minimum prices fell under Article XI:1 or Article III:4. The Panel noted that according to the Note Ad Article III a regulation is subject to the provisions of Article III if it 'applies to an imported product and to the like domestic product' even if it is 'enforced in case of the imported product at the time or point of importation'. The Panel found that, as the minimum prices were applied to both imported and domestic beer, they fell, according to this Note under Article III."

The 1992 Panel on "United States - Measures Affecting Alcoholic and Malt Beverages" examined the listing requirements of state-operated liquor stores in certain US states:

"Having regard to the past panel decisions and the record in the instant case, the present Panel was of the view that the listing and delisting practices here at issue do not affect importation as such into the United States and should be examined under Article III.4. The Panel further noted that the issue is not whether the practices in the various states affect the right of importation as such, in that they clearly apply to both domestic (out-of-state) and imported wines; rather, the issue is whether the listing and delisting practices accord less favourable treatment -- in terms of competitive opportunities -- to imported wine than that accorded to the like domestic product. Consequently, the Panel decided to analyze the state listing and delisting practices as internal measures under Article III:4".

The 1991 Panel Report on "United States - Restrictions on Imports of Tuna," which has not been adopted, examined the relationship between Articles III and XI, and found that the restrictions at issue were governed not by Article III but by Article XI.

"The Panel noted that Mexico had argued that the measures prohibiting imports of certain yellowfin tuna and yellowfin tuna products from Mexico imposed by the United States were quantitative restrictions on importation under Article XI, while the United States had argued that these measures were internal regulations enforced at the time or point of importation under Article III:4 and the Note Ad Article III, namely that the prohibition of imports of tuna and tuna products from Mexico constituted an enforcement of the regulations of the MMPA relating to the harvesting of domestic tuna.

"The Panel examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation, and noted the following. While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favoured-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favourable than that accorded to like products of national origin, consistent with Article III.4. ...

"... The Panel noted that the MMPA regulates the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product. Therefore, the Panel found that the import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed did not constitute internal regulations covered by the Note Ad Article III.

In this connection see also the unadopted panel report of 1994 on "United States - Restrictions on Imports of Tuna".

* * *

7. Comparative Law

7-1. *Dassonville*

This was the first judgment in which the Court of Justice gave an abstract definition of the term "measure having an equivalent effect" in Art. 28 (ex Art. 30). Consider the difference to the WTO's predominant discrimination approach and the political situation as well as the policy implications that may have supported such a broad scope in the mid-seventies.

Judgment:

Procureur du Roi v Benoit and Gustave Dassonville

Case 8/74

Court of Justice

11 July 1974

[1974] ECR. 837, [1974] 2 C.M.L.R. 436

Facts:

[In Belgium, the recognition of designations of origin was subject to a declaration by the Belgian Government. In addition, Belgian law prohibited the importation of spirits bearing a recognized designation of origin unless they were accompanied by a document certifying their right to such a designation. The Belgian government had officially recognized "Scotch Whisky" as a designation of origin.

Gustave Dassonville, a wholesaler doing business in France, and his son, Benoit Dassonville, who managed a branch of the business in Belgium, imported into Belgium from France some "Johnnie Walker" and "Vat 69" "Scotch Whisky." Since France had not required a certificate of origin for "Scotch Whisky," the Dassonvilles did not have a certificate from British authorities. In expectation of importing the whiskey into Belgium, the Dassonvilles attached printed labels with the words "British Customs Certificate of Origin," and added in a hand-written note the number and date of the French excise bond, which was all that was required by French rules.

The Belgian authorities considered the documents insufficient and brought action against the Dassonvilles for violations of Belgian law charging them, among other things, with the failure to have the appropriate documents. The two exclusive importers of "Johnnie Walker" and "Vat 69" also brought a civil action.

The Tribunal de Premiere Instance de Bruxelles requested a preliminary ruling pursuant to Article 177 of the EEC Treaty:]

Decision

1. By Judgment of 11 January 1974, received at the Registry of the Court on 8 February 1974, the Tribunal de Premiere Instance of Brussels referred, under Article 177 of the EEC Treaty, two questions on the interpretation of Articles 30, 31, 32, 33, 36 and 85 of the EEC Treaty, relating to the requirement of an official document issued by the government of the exporting country for products bearing a designation of origin.
2. By the first question it is asked whether a national provision prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.
3. This question was raised within the context of criminal proceedings instituted in Belgium against traders who duly acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby infringing Belgian rules.
4. It emerges from the file and from the oral proceedings that a trader, wishing to import into Belgium Scotch whisky which is already in free circulation in France, can obtain such a certificate only with great difficulty, unlike the importer who imports directly from the producer country.
5. All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.
6. In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connection, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.
7. Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
8. That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.
9. Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

7-2. Cassis de Dijon

In this judgment the Court of Justice applies Art. 28 (ex Art. 30) to a measure which applies indistinctly to imports and domestic products by significantly qualifying the Dassonville formula. Yet, under the Cassis-doctrine, the free movement of goods imposes broadly applicable substantive requirements on national socio-economic measures. Consider to what extent this approach makes harmonization unnecessary.

Judgment:

1. Must the concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be understood as meaning that the fixing of a minimum wine-spirit content for potable spirits laid down in the German Branntweinmonopolgesetz, the result of which is that traditional products of other Member States whose wine-spirits content is below the fixed limit cannot be put into circulation in the Federal Republic of Germany, also comes within this concept?

(...)

6. The national court is thereby asking for assistance in the matter of interpretation in order to enable it to assess whether the requirement of a minimum alcohol content may be covered either by the prohibition on all measures having an effect equivalent to quantitative restrictions in trade between Member States contained in Article 30 of the Treaty or by the prohibition on all discrimination regarding the conditions under which goods are procured and marketed between nationals of Member States within the meaning of Article 37.
8. In the absence of common rules relating to the production and marketing of alcohol -- a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 [citation omitted] not yet having received the Council's approval -- it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.

9. The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.
10. As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with

a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

11. Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.
12. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.

Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

13. As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14. It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced

into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

15. Consequently, the first question should be answered to the effect that the concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in Article 30 of the Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

7-3. Keck

The Keck judgment is one of the very few instances in which the Court of Justice expressly departed from its prior jurisprudence and among the single legal incidents generating the vastest amount of literature. In view of increasingly frequent recourse to ex Art. 30, paras. 16 and 17 reintroduce a discrimination requirement applicable to certain kinds of national measures. Reflect on the situations in which such discrimination could exist.

Judgment:

Criminal Proceedings against Keck & Mithouard

Joined Cases C-267 and 268/91

Court of Justice

24 November 1993

[1993] ECR I-6097

DECISION:

1 By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.

2 Those questions were raised in connection with criminal proceedings brought against Mr. Keck and Mr. Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss'), contrary to Article 1 of French law no 63-628 of 2 July 1963, as amended by Article 32 of order no 86-1243 of 1 December 1986.

3 In their defense Mr. Keck and Mr. Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.

4 The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

'is the prohibition in France of resale at a loss under Article 32 of order no 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the common market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

- (a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;
- (b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?'

5 Reference is made to the report for the hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7 Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national Court questions the compatibility with that provision of the prohibition of resale at a loss, in that undertakings subject to it may be placed at a disadvantage vis-a-vis competitors in Member States where resale at a loss is permitted.

8 However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see the judgment in case 308/86 *Ministère public v Lambert* [1988] ECR 4369).

9 Finally, it appears from the question submitted for a preliminary ruling that the national Court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.

10 In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring Court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.

11 By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

12 National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

13 Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14 In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15 It is established by the case-law beginning with 'Cassis de Dijon' (case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another member state meeting the requirements laid down by that state is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

18 Accordingly, the reply to be given to the national Court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a member state imposing a general prohibition on resale at a loss.

Optional Reading

Robert Howse & Donald Regan, The Product/Process Distinction

- *An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 *EUR. J. INT'L L* (2000).

Japanese Leather

The Japanese Leather dispute touches on exceptions from the prohibition of quantitative restrictions and their phasing out. Note also the legal requirement of nullification or impairment in GATT Art. XXIII and its significance in a violation dispute.

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

2 March 1984

PANEL ON JAPANESE MEASURES ON IMPORTS OF LEATHER

Report of the Panel adopted on 15/16 May 1984

(L/5623 - 31S/94)

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

(...)

II. Factual aspects

7. The case before the Panel concerned import restrictions maintained by Japan on the following lines in the Japanese tariff:

- | | |
|-------------|---|
| 41.02-2 | Bovine cattle leather and equine leather, dyed, coloured, stamped, embossed or other, other than parchment dressed (excluding chamois-dressed leather or patent leather; including cattle, horse, buffalo, calf and kip leather, and including both finished leather and semi-tanned leather which includes "wet-blue" leather, i.e. semi-processed chrome-tanned leather, shipped wet, purchased by tanners for further processing); |
| 41.03-2-(1) | Sheep and lamb leather, dyed, coloured, stamped or embossed, other than parchment-dressed (excluding chamois-dressed leather or patent leather); |
| 41.04-2-(1) | Goat and kid leather, dyed, coloured, stamped or embossed, other than parchment dressed (excluding chamois-dressed leather or patent leather). |

8. Article 52 of the Foreign Exchange and Foreign Trade Control Law No. 228 of 1949, as amended), requires importers of products specified under the import quota system to obtain import

licences where the Government has so provided by Cabinet order. This authority was implemented in the Import Trade Control Order (Cabinet Order No. 414 of 1949). The Import Trade Control Regulation (MITI Ordinance No. 77 of 1949) sets forth specific import licensing procedures. Import quotas on leather were imposed under the authority of the above legal provisions in 1952 and still remain in force.

9. Allocation of the global leather quota is the responsibility of MITI which practices a combination of two methods to allocate quotas: (1) the "trader" quota formula based on import records and available to selected firms which have a history of importing; and (2) the "user" quota formula, used to distribute quotas to selected end-users and/or firms that represent them. In the course of the work, Japan explained further the allocation system and its implementation for finished leather as well as wet-blue chrome (see below).

10. A previous Article XXIII complaint by the United States concerning this matter was withdrawn upon the conclusion on 23 February 1979 of a bilateral understanding between the United States and Japan, which came into effect on 1 April 1979. At that time, the two Parties "reserved their rights under the GATT; should the conclusions of the bilateral consultations not be put into practice to the mutual satisfaction of both governments, it was understood that the matter may be further subject to GATT proceedings" (BISD 26S/320-321).

11. New quotas for bovine and equine leather as well as bovine and equine wet-blue chrome were established in Japanese fiscal year 1979 in addition to the quotas existing previously. These new quotas were allocated to countries with a record of substantial supply of hides to Japan, based on the share of supply of raw hides, through bilateral consultations with the countries concerned.

12. The bilateral understanding between Japan and the United States referred to in paragraph 10 expired on 31 March 1982.

13. A number of bilateral negotiations between Japan and the United States were held in 1982, without a new bilateral agreement being reached. A draft drawn up in May 1982, which dealt mainly with wet-blue chrome, was found by the United States Government to be insufficient as a basis for a mutually acceptable understanding. In September 1982, a further proposal was made to alter the licensing system for both finished leather and wet-blue chrome. The Government of the United States considered, however, that there had been no real amelioration of the original situation that had been the subject of its complaint.

14. On 9 November 1982 the United States requested Article XXIII:1 consultations, as notified to the CONTRACTING PARTIES in a communication dated 16 December 1982 (L/5440). Such consultations were held first on 27 and 28 January 1983. As they were not successful in producing a mutually satisfactory solution the United States brought the matter to the CONTRACTING PARTIES in document L/5462 dated 25 February 1983. Before the Panel was established, further Article XXIII:1 consultations were held on 30 March and 12 April 1983.

III. Main arguments

(a) General

15. The United States stated as its basic complaint that the existence of the import quota on leather was inconsistent with the prohibition on quantitative restrictions in Article XI of the General Agreement. Before 1963, these quotas had been maintained as balance-of-payments measures under Article XII; since that time, however, they had lacked any GATT justification and, in

addition, nullified or impaired tariff bindings on leather falling under item 41.02. The only justification offered was the desire, as a matter of Japanese social policy, to protect the jobs of a certain minority population. However, GATT rules made no exception for such a purpose and it would not be in the interest of Japan, the United States or the world trading system if Japan's example in this case were followed by other contracting parties. Because the measures were inconsistent with specific GATT obligations, there was prima facie nullification or impairment of benefits accruing to the United States under the General Agreement, and the attainment of GATT objectives was impeded, within the meaning of Article XXIII:1. In support of its case, the United States quoted paragraph 5 of the Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Annex to the Understanding Regarding Notification, Consultation, Surveillance and Dispute Settlement, see BISD 26S/210-218).

16. The United States also requested that, apart from finding nullification or impairment of benefits accruing to the United States under the GATT, the Panel should suggest that the CONTRACTING PARTIES recommend elimination of the Japanese system of GATT-inconsistent restrictions which consisted of, firstly, the import quota system, and secondly, administrative obstacles intertwined with the quota, which could not be effectively eliminated until the quota was eliminated. As for the administrative aspects, the United States held, as subordinate points, that the failure of Japan to publish the total amount of the import quota and its failure to publish relevant administrative rulings were inconsistent with Articles XIII:3 and X:1 respectively. The way in which Japan administered its quotas on leather, including its refusal to publish the global quota amount or a list of licence holders, was inconsistent with the reasonableness requirements of Article X:3. The effect of these restrictions could be seen in the low level of United States exports to Japan despite continuing efforts by United States leather exporters, whose competitiveness was demonstrated by successful large-scale exports to other East Asian markets.

17. Japan recalled that various developed countries still maintained a considerable number of residual import restrictions for reasons which were specific to each item. From a realistic point of view it did not seem appropriate to seek only a legal judgement on these issues. Japan had made its utmost efforts to liberalize residual import restrictions in general. Leather and leather footwear were the only manufactured items which remained restricted and constituted a hard core, reflecting the extremely difficult conditions of the Japanese leather industry due to complex domestic social problems and its low-level competitiveness. In spite of this, the Japanese Government had expanded the quotas over the years and had, in financial year 1979, sharply increased the amounts of the import quota.

18. Japan added that whether or not Japan's quota system nullified or impaired the interests of United States leather exports depended solely upon whether or not the allocation system and its implementation functioned so as to hinder United States trade. This was not the case. No benefits accruing to the United States under the GATT had been nullified or impaired by Japan. Japan had actually benefited the United States and other countries by opening a large quota for them. This had resulted in the steady increase in United States exports of leather to Japan, even in comparison with the level of exports from other developed countries. The large quota would continue to offer sufficient opportunities for the United States to export to Japan and Japan had proposed further access in efforts to seek a realistic resolution of the matter through bilateral consultations. In Japan's view, the existence of the quotas themselves would not imply that real injury had been caused and that trade interests were impaired.

19. Japan maintained that if the United States appreciated fully the compelling circumstances under which Japan maintained its import restrictions on leather and the earnest efforts which Japan had made to improve access to the Japanese market, it would withdraw its referral of the issue to the

GATT. If the United States took the realistic approach of accepting the proposals made by Japan it would be in a position to see what their effects would be. To ask for unrealistic recommendations did not contribute positively to the spirit of the General Agreement, the aim of which was to expand trade. In compliance with the consensus reached when the terms of reference of the Panel had been established, the Panel should take a more substantive standpoint and ask the United States what specific impairments it claimed. Japan also recalled that the understanding of the Chairman of the Ministerial Meeting held in November 1982 had been (SR:38/9, page 2) that "some governments would require a certain amount of time to fulfil the undertaking", laid down in paragraph 7(i) of the Ministerial Declaration (BISD 29S/11).

(...)

V. Findings and conclusions

40. The Panel considered the matter referred to it by the CONTRACTING PARTIES regarding restrictions maintained by Japan on the import of certain semi-processed and finished leather, in accordance with its terms of reference set out in paragraph 2 above. It considered the arguments put forward by the parties to the dispute, as well as the points made by other delegations indicating an interest in the matter to the extent that these points bore on the case before it.

41. The Panel noted that the approach of the two parties had important differences. The United States approach was based essentially on legal arguments. Its main contention was that the Japanese restrictions were in contravention of Article XI and that, in addition, the restrictions also contravened Articles X:1 and 3 and XIII:3 and adversely affected tariff bindings. Japan's case, on the other hand, rested almost entirely on considerations resulting from the particular problems connected with the population group known as the Dowa people.

42. The Panel first considered the United States' complaint that quantitative restrictions maintained by Japan on the leather in question (see paragraph 7), were inconsistent with Article XI of the General Agreement which prohibits the use of quantitative restrictions.

43. The Panel appreciated the difficult socio-economic situation of the Japanese leather industry and the particularly sensitive problem of the Dowa population. The Panel appreciated the fact that leather and leather footwear were the only manufactured items which were subject to residual restrictions in Japan. This, in the Panel's view, bore witness to the difficulties which were involved in this case. The Panel also noted the fact that Japan had, despite its problems, increased the volume of leather imports permitted under its import régime and had continued to pursue a policy of expanding quotas over an extended period of time.

44. The Panel noted that Article XI:1 prohibits the use of quantitative restrictions. It recognized that situations might exist in which the maintenance of such restrictions would be justified under the relevant GATT provisions. It noted, however, that Japan had not invoked any provision of the General Agreement to justify the maintenance of the import restrictions on leather. The Panel decided that in such circumstances it was not for it to establish whether the present measures would be justified under any GATT provision or provisions. 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 the matter "in the light of the relevant GATT provisions" and these provisions did not provide such a justification for import restrictions. It noted that a panel report¹ adopted by the CONTRACTING PARTIES in 1983 had, in a similar situation, concluded "that [such matters] did not come within the purview of Articles XI

and XIII of the GATT and ... lay outside its consideration". The Panel therefore found that the Japanese import restrictions at issue, made effective through quotas and import licenses, contravened Article XI:1.

45. The Panel noted that Japan had ceased to invoke Article XII regarding balance-of-payments difficulties in 1963. It noted that the Panel report referred to above had also concluded that the fact that "restrictions had been in existence for a long time ... did not alter the obligations which contracting parties had accepted under GATT provisions".² The Panel found this to be valid also in the present case.

46. In accordance with established GATT practice³, the Panel therefore found that the Japanese restrictions on the products under consideration constituted a prima facie case of nullification or impairment of benefits which the United States was entitled to expect under the General Agreement.

47. The Panel noted that its terms of reference in this case explicitly required it "to make findings on the question of nullification and impairment". It also noted that since a prima facie case had been established, according to the established GATT practice⁴, it was up to Japan to rebut the presumption that nullification or impairment had actually occurred.

48. 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 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.

¹Panel report on Quantitative Restrictions against Imports of Certain Products from Hong Kong (L/5511, paragraph 27).

²L/5511, paragraph 28.

³Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD, 26S/216, paragraph 5).

⁴Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD, 26S/216, paragraph 5).

49. The Panel examined the trade figures supplied by Japan in support of this contention, which related to the period from 1978 (before conclusion of the bilateral agreement) to 1982. It noted that these figures showed that, while United States' total exports of bovine and equine leather had increased from about US\$113 million to about US\$213 million, or approximately 88 per cent, its exports to Japan had increased by about 350 per cent, from US\$2 million to about US\$9 million. In comparison, United States' exports to the Federal Republic of Germany and Italy had, taken together, increased from about US\$2.6 million to about US\$8.5 million, i.e. a growth of only 227 per cent, and United States' exports to France and the United Kingdom had actually declined by 36 per cent in the same period from about US\$7.7 million to about US\$4.9 million.

50. On the other hand, the Panel noted that, according to figures supplied by the United States, whilst United States bovine and equine leather exports to Japan had increased by about US\$7 million - more than twice as much as the growth of exports to the four Member States of the European Community referred to - they had increased by about US\$82 million, from about US\$38 million to US\$120 million, to three other East Asian markets taken together¹, each of which, since 1980, had imported more such leather from the United States than had Japan. The Panel also noted that while United States' bovine and equine leather exports to Japan in 1982 represented about 67 per cent of its exports to the four European Community countries, they were equivalent to less than 8 per cent of its exports of such leather to the three East Asian markets.¹ The Panel further noted that United States exports to Japan of the two other leather categories in question, i.e.

sheep and lamb and goat and kid leather, were small and would not change the picture presented above.

51. The Panel then considered the Japanese argument that the quota did not limit United States' exports to Japan because United States' exporters had not filled the large quota opened for them and that the limiting factors were the recession of the Japanese leather market and lack of efforts by United States' suppliers in research and development, in improving quality and in responding to the specific needs of the Japanese market. It also took into account Japan's arguments that the licensing system was not an obstacle.

52. It noted the United States' arguments that its industry had exported the same type of leather to Japan as to any other country, that it could have filled the quota were it not for the accompanying administrative obstacles in the licensing System and that it could have exported more leather than provided for under the quota, if the Japanese régime had not existed.

53. The Panel found that the United States' exports of bovine and equine leather to Japan had increased considerably both in percentage terms and in absolute figures in the period under consideration and that this might be attributed to the relaxation of Japanese restrictions, as Japan had claimed. However, the Panel could not escape the conclusion that the import restrictions were maintained in order to restrict imports, including imports from the United States. It noted that, while the Japanese market was not fully comparable to other markets in East Asia, the evidence relating to these markets still tended to support the view that the Japanese restrictions limited United States' exports of leather to its market.

54. The Panel then turned to the arguments based on the fact that the United States had not filled its quotas. It noted that these consisted of contradictory assertions by the two parties that, by their nature, were difficult to evaluate. It did, however, consider that the fact that the United States was able to export large quantities of leather to other markets, and that other supplying countries had supported the arguments of the United States, tended to confirm the assumption that the existence of the restrictions had adversely affected United States' exports.

¹The People's Republic of China, Hong Kong and the Republic of Korea.

55. 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.

56. The Panel therefore found that the arguments advanced by Japan were not sufficient to rebut the presumption that the quantitative restrictions on imports of leather had nullified or impaired benefits accruing to the United States under Article XI of the General Agreement.

57. The Panel noted that the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles II, X:1, X:3 and XIII:3. In view of the findings set out in the paragraphs above, the Panel found that it was not necessary for it to make a finding on these matters.

58. The Panel noted that some of the delegations which had indicated an interest in the matter before it and which had made statements to the Panel had argued that Japan's import régime on leather contained discriminatory elements and therefore contravened Article XIII:1 and 2. The

Panel did not make a finding on this matter as it had not been raised by the United States and was not, therefore, within its terms of reference. It wishes however to draw the attention of the Council to the fact that this point was raised.

59. On the basis of the findings reached above, the Panel suggests that the CONTRACTING PARTIES recommend that Japan eliminate its quantitative restrictions maintained on the import of the products subject of the United States' complaint (see paragraph 7) and thus conform with the GATT provisions.

60. The Panel noted that Japan had indicated that it would not be possible for it to eliminate its quantitative restrictions on leather immediately. The Panel recognized the difficulties faced by Japan but noted that "the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement".¹ The Panel felt that the Council might wish to consider whether or not Japan should be given a certain amount of time progressively to eliminate the import restrictions in question and, in this context, to consider the factors referred to above, in particular those in paragraph 43.

¹Annex to Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/216, paragraph 4).