4 October 1978

EUROPEAN COMMUNITY PROGRAMME OF MINIMUM IMPORT PRICES, LICENCES AND SURETY DEPOSITS FOR CERTAIN PROCESSED FRUITS AND VEGETABLE

Report of the Panel adopted on 18 October 1978
(L/4687 - 25S/68)

I. INTRODUCTION

1.1. The Panel's terms of reference were established by the Council on 15 July 1976 (C/M/115, pages 4 and 5) as follows:

> "To examine the United States complaint concerning the minimum import price for tomato concentrates and the systems of licel3ETBT1 0 0 1 240.48 5771o

1.4. In the course of its work the Panel held consultations with the European Communities and the United States. Background arguments and relevant information submitted by both parties, their replies to questions put by the Panel, as well as relevant GATT documentation served as a basis for the examination of the matter. In addition, Australia, having requested Article XXIII:1 consultations with the Community concerning the same measures (L/4322), submitted a written presentation to the Panel outlining Australia's interest in the matter and supporting the United States allegation th

	[1]
Peas	
Beans in pod	
Raspberries	

[1]From 1 January 1978

2.8. The foregoing provisions of Article 4 of Council Regulation (EEC) No. 1927/75 were replaced by identical provisions contained in Article 10 of Council Regulation (EEC) No. 516/77, which became effective on 1 April 1977. The foregoing Annex was replaced by an identical Annex IV to Council Regulation (EEC) No. 516/77.

2.9. Council Regulation (EEC) No. 1931/75 of 22 July 1975 fixed, for tomato concentrates with a dried extract content of 28 to 30 per cent, in immediate packaging of not less than 4 kgs., a minimum import price of 60 units of account per 100 kgs., and a special minimum price of 40 units of account per 100 kgs. These prices included customs duties and were applied from 1 September 1975 until 30 June 1976. Council Regulation (EEC) No. 1197/76 of 18 May 1976 raised the minimum price to 64 units of account and raised the special minimum price to 48 units of account for the period from 1 July 1976 until 30 June 1977. Council Regulation (EEC)

CCT heading No.	Description of goods	Amount in u.a./100 kgs. net
ex 20.02 C	Peeled tomatoes	0.5
ex 20.02 B	Peaches in syrup	0.5
ex 20.06 B	Tomato juice	0.5
20.02 A	Mushrooms	1.0
ex 20.06 B	Pears	0.5
08.12 C	Prunes[1]	1.0
ex 20.02 G	Peas	0.5
ex 20.02 G	French beans	0.5
ex 08.10 A)		0.5
ex 08.11 E)		0.5
ex 20.03)	Raspberries	0.5
ex 20.05)		0.5
ex 20.06 B II)		0.5
		Amount in u.a./100 kgs. including immediate packings
ex 20.02 C	Tomato concentrates	1.0

[1]From 1 January 1978

2.13. Article 6 of this Commission Regulation established the amount of the security for import licences, with advance fixing of the levy, for each product as follows:

CCT heading No.	Description of goods	Amount in u.a./100kgs. net
ex 20.06 B	Peaches in syrup	0.75
ex 20.07 B	Tomato juice	0.75
ex 20.06 B	Pears	0.75
ex 20.03)		1.10
ex 20.05 C I)		2.00
ex 20.05 C II)	Raspberries	0.75
ex 20.06 B II)		0.75

2.14. Article 7 of this Commission Regulation established the additional security to enforce the minimum import price for tomato concentrates at 10 units of account per 100 kgs., including immediate packings. This Article further stated that the additional security would be released:

(a) in respect of quantities for which the party concerned had not fulfilled the obligation to import;

(b) in respect of quantities imported for which the party concerned furnished proof that the minimum price, or as the case may be the special minimum price, had been respected.

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3.3. The representative of the European Communities stated the opinion that the minimum import price and associated additional security system for tomato concentrates was indeed a measure falling within the purview of Article XI:1. He stated that the mechanics and the objective of the system showed that the measures applied,he

Article XI:2(c)(i) and (ii)

3.6. The representative of the European Communities argued that the minimum import price and associated additional security system for tomato concentrates qualified for the exemptions offered by Article XI:2(c)(i) and (ii) from the provisions of Article XI:1.[1] He argued that this system had been established to prevent supplies from coming from third countries at prices which could adversely affect the existence, in the fresh tomato market, of a system of intervention prices which resulted in the withdrawal of fresh tomatoes from the market and the limitation of marketing and production of tomato concentrates.

3.7. The representative of the United States presented the view that the minimum import price for tomato concentrates could not be justified as an exemption allowed under Article XI:2(c)(i) and (ii). He noted that Article

"the term 'in any form' in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restrictioe

the Communities contentions. He argued that this was the case in particular for tomato concentrates which could be marketed in different packings.

3.15. In summary, he argued that the functioning of the Community market for fresh tomatoes implied a sound market situation for tomato concentrates. But, he argued, as the international market was subject to such fluctuations that it was not possible to guarantee an adequate domestic price level, and in view of existing regulations regarding fresh tomatoes, it was necessary to take action in order to ensure the proper operation of intervention measures which had a restrictive effect on domestic marketing. He stated that the minimum import price system had been selected on the grounds that it was a more flexible measure than, for instance, quantitative restriction, and made it possible to attain the desired objective.

3.16. With regard to the provisions of Article XI:2(c)(i), the representative of the European Communities argued that the Community system fell within the purview of this paragraph because of the intervention system for fresh tomatoes limited the marketing and production of tomato concentrates as follows:

- the fact that intervention prices for fresh tomatoes were fixed at a level about half of the normal market price involved a considerable market risk for producers and limited production correspondingly;

3.19. He drew attention to the interpretation of the word "restrict" in the Analytical Index[1] and argued that, given the fact that

3.22. With respect to the provisions of Article XI:2(c)(ii), the representative of the European Communities stated that intervention prices for fresh tomatoes were fixed at relatively low levels (emergency prices about one half the cost of production) and that, where market prices fell below such levels, provision had been made for the withdrawal of products from the market by producer organizations such as co-operatives. He argued that, in their capacity of representing the producers, those organizations always had to make use of that facility, which had until now moreover relieved the member States of having to make use of their similar rights of intervention. He stated that all such withdrawals were financed by the Agricultural Guidance and Guarantee Fund. With regard to the utilization of these withdrawals, he stated that the regulation concerned provided that these would be distributed free of charge, either in the fresh state or in the form of concentrates, to charitable organizations or school canteens, or would be destroyed.

3.23. He stated that, during the 1975/76 season, 136,000 tons of fresh tomatoes or 2.81 per cent of total Community production, representing 20,600 tons of tomato concentrates, were withdrawn from the market and, during the 1976/77 season, when production was adversely affected by bad weather, withdrawals amounted to 21,000 tons (the total production figure was not yet available), which represented 3,500 tons of tomato concentrates. He further stated that, it should be underlined that any concept linked to quantitative limitation could not be related to past production, but to potential production which was extremely difficult to quantify, although such quantification should in principle be beyond dispute, given that the intervention price was fixed at a level corresponding to one

3.27. With regard to the definition of the term "like product" as found in Article XI:2(c)(i) and (ii), the representative of the United States drew attention to the interpretation[1] in the Analytical Index which stated that this term did not mean a competing product and refer[illegible]as made to the [illegible]ition of the League of Nations: "practically identical [illegible]another product". He noted that in [illegible] discussion of this term, John Jackson [illegible]treatise on the law of GATT, commented on the concept of "like product" as follows:

"It appears that when used in Article VI and in Article XI, paragraph 2(c),

3.32. In summary, the representative of the European Communities argued that prices for tomato concentrates in the Community market were affected by the intervention system applied in the fresh tomato market which showed that the provisions concerned fell well within the requirements of Article XI, paragraph 2(c)(i) and (ii), which authorized import measures necessary to the enforcement of measures which operated to restrict the quantities of a domestic product being marketed or to remove a temporary surplus by making this surplus available to certain groups of domestic consumers free of charge. In conclusion, he stated the Community opinion that the system of minimum import prices with security deposit which it had established was inconsistent with the provisions of the General Agreement.

Article VIII

3.33. With regard to the minimum import price and associated additional security, the representative of the European Communities argued that a measure within the purview of Article XI, as was the case in the view of the Community in this instance, could not be inconsistent with other provisions of the General Agreement. He argued that it was not acceptable to view a measure, which was said to be of a non-tariff nature under Article XI, as a violation of Article VIII. He further argued that this would be the case, in particular, if one considered paragraph 2 of Article XI, which authorized exceptions from the provisions of paragraph 1. He argued that, logically, an exception authorized under paragraph 2 of Article XI could not be regarded as a violation of another provision of the General Agreement because such an exception would otherwise have no meaning whatsoever.

3.34. With regard to the additional security to enforce the minimum import price, he argued that this was the most flexible measure to ensure that the minimum import price would be respected. He argued that this instrument could not operate without a risk for the importer if the minimum price was not respected and, that the risk in this case was the possible forfeiture of the security.

3.35. He further argued that paragraph 2 of Article XI authorized the application of restrictive measures such as quotas or minimum prices combined with a prohibition to

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3.44. The representative of the United States noted that Article VIII:3 stated that "no contracting party shall impose substantia

3.48. With regard to the criticism that this commitment bsc2

and were, therefore, of an

3.57. He argued that these security deposits related neither to the cost of services rendered nor to the enforcement of any legitimate system of import administration. He also argued that there was no provision to be found in the Regulations for the refund of the deposits, making it impossible to calculate the likely cost of debt servicing, thus creating an element of unpredictability which served as a barrier to trade.

3.58. The representative of Australia argued that the requirement for, and the direct and indirect costs of securing security deposits, and the more substantial cost resulting from any security deposit forfeitures, constituted charges on imports of a kind specifically proscribed by Article II:1(b), in that they were charges other than ordinary customs duties which were not levied or leviable at the time the items were bound.

3.59. He further argued that, even if these charges were not of a type proscribed by Article II:1(b), there remained the objection that these measures resulted in the total level of charges levied exceeding the levels bound in the Community's GATT Schedule. In the case of canned peaches and canned pears, he argued that the level of customs duties levied on importation into the

3.63. He argued, in a similar manner, that the import certificate and security system for the specified products was an administrative formality which was in accordance with the provisions of Article VIII and therefore, could not at the same time be considered to be inconsistent with the

Article XXIII

3.68. The representative of the United States noted that Article XXIII[1] stated that any contracting party which

3.69. He argued that the cumulative effect of these regulations was to directly and indirectly burden and restrict the trade involved. He claimed that there was not only a direct financial cost arising from the import licence with security deposit requirement but also, an additional administrative burden with an associated cost factor and element of unpredictability imposed on traders, which did not exist when the products were bound in the CommunETB83.68 731.28 Tm/F8 11 Tf(b Tm/F8 11 Tf(but) Tchedule TjETBT1 0

3.73. He then argued that, since there was a prima facie case of nullification or impairment arising from the measures introduced by the Community with regard to the specified processes fruit and vegetable products, it was the Community's obligation to remove the measures in question. He further argued that it was clear GATT practice that any question of the degree of impairment of a concession should

but noted that such exports had always

IV. ANALYSIS AND CONCLUSIONS

(a) Import certificate and associated security system

Article XI:1

4.1. The Panel began by examining the import certificate and associate security system in relation to the Community's obligations under Article XI:1. In this regard, the Panel noted that Article 10 of Council Regulation (EEC) No. 516.77 stated that: "The issue of an import certificate shall be conditional upon the following: - with respect to all products, the lodging of a security to guarantee the undertaking to effect certain imports for as long as the certificate is valid … ". The Panel further noted that, without prejudice to the application of safeguard measures, import certificates were to be issued on the fifth working day following that on which the application was lodged and, that import certificates were to be valid for seventy-five days. The Panel considered that, pending results concerning automatic licensing in the Multilateral Trade Negotiations, this system did not depart from systems which other

4.4. The Panel next examined the obligations which the importer had to undertake when he applied for the import certificate in relation to the Community's obligations under Article VIII. The Panel noted that the importer, when applying for the certificate, must agree to complete the importation within the seventy-five day validity limit of the certificate and, to import the quantity stated on the certificate plus or minus 5 per cent. The Panel further noted that the importer was not required to obtain an import certificate when a contract was signed, but could wait until the product was approaching the Community frontier. The Panel further considered that these obligations, which had to be assumed by the importer, were not onerous enough to violate Article VIII. Therefore, the Panel concluded that the obligations which had to be undertaken by the importer when he applied for the import certificate were not inconsistent with the Community's obligations under Article VIII.

4.5. The Panel then examined the relevant Community Regulations to determine if member States had the authority to arbitrarily suspend import certificates, and, if so, to examine this authority in relation to the Community's obligations under Article VIII. The Panel noted that the United States representative had argued that the uncertainty caused by the arbitrary ability of member States to suspend import certificates was contrary to Article VIII. On examining the relevant Community Regulations, the Panel was unable to find any provision which allowed member States to arbitrarily suspend import certificates which had already been issued. The Panel noted the assertion of the Community representative that an import certificate, once issued, could not be revoked and could not be subject to any subsequent safeguard action. In this connection, the Panel further noted that member States could totally or partially suspend the issuing of new import certificates, pending Community action in response to a request for safeguard action by a member State. The Panel also noted that such a request must be acted upon by the Community within twenty-four hours. The Panel considered that such a short delay would not cause any harmful disruption of trade. Therefore, the Panel concluded that the authority of member States to totally or partially suspend the issuing of import certificates, pending Community action in response to a request for safeguard action, was not inconsistent with the Community's obligations under Article VIII.

Article II

4.6. The Panel next examined the status of the interest charges and costs in connection with the lodging of the security associates with the import certificate in relation to the obligations of the Community under Article II. The Panel noted the arguments by the representatives of the United States and Australia that these interest charges and costs were charges imposed on or in connection with importation

as part of an enforcement mechanism and not as a charge "imposed on or in connection with importation" within the purview of Article II:1(b). As a result, the Panel considered that Article II:1(b) was not relevant, and therefore concluded that the provision

be carried out by importers who had an interest in doing so. He further considered that the system operated in a way to levy an additional charge which raised the price of tomato concentrate imported at a price lower than the minimum price. Therefore, he concluded that the minimum import price system was not being enforced in a manner which would qualify it as a restriction within the meaning of Article XI.

Article XI:2(c)(i) and (ii)

4.10. The Panel then examined the minimum import price and associated additional security system in relation to the provisions of Article XI:2(c)(i) and (ii). The Panel began this examination of considering if tomato concentrate qualified as an "agricultural or fisheries product imported in any form" within the meaning of Article XI:2(c). The Panel noted the interpretative note on page 66 of Basic Instruments and Selected Documents (BISD), Volume IV, which stated "The term 'in any form' in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective." The Panel considered that tomato concentrate was perishable because after a certain time it would decline in quality and value. The Panel considered that tomato concentrate could compete directly with fresh tomatoes in so far as a large number of end-uses were concerned. Therefore, the Panel concluded that tomato concentrate qualified as an "agricultural or fisheries product, imported in any form" within the meaning of Article XI:2(c).

4.11. The Panel next examined if the minimum import price and associated additional security system for tomato concentrates was "necessary to the enforcement of" the intervention system for fresh tomatoes within the meaning of Article XI:2(c). The Panel noted the report of the ninth session Working Party on Quantitative Restrictions which stated that "… if restrictions of the type referred to in paragraph 2(c) of Article XI were applied to imports during that part of the year in which domestic supplies of the product were not available, such restrictions would be regarded as consistent with the provisions of the Article only to the extent that they were necessary to enforce or to achieve the objectives of the governmental measures relating to control of the domestic product". "… it would be an abuse of intent of the provisions under paragraph 2(c)(i) of Article XI if contracting parties were to apply restrictions to processed products exceeding those 'necessary' to secure enforcement of the actual measures restricting production or marketing of the primary product". The Panel further noted that the minimum import price and additional security system for tomato concentrates was permanent, i.e. in operation year round. The Panel also noted that the intervention system for fresh tomatoes, while being permanently in force, operated only at certain times of the year, i.e. when fresh tomatoes were being marketed in quantities in excess of commercial market requirements. The Panel found that the minimum import price and associate additional security system for tomato concentrates would be "necessary to the enforcement of" the intervention system for fresh tomatoes essentially during those periods when fresh tomatoes were being bought-in by the intervention organizations, and only to the extent that the system satisfied the other conditions contained in Article XI:2(c)(i) and (ii).

4.12. The Panel next examined the concept of "the like domestic product" within the meaning of Article XI:2(c)(i) and (ii), and attempted to determine which Community product should be considered as "the like domestic product" in relation to imported tomato concentrate. Having noted that the General Agreement provided no definition of the terms "the like domestic product" or "like product", the Panel reviewed how these terms had been applied by the CONTRACTING PARTIES in previous cases and the discussions relating to these terms when the General Agreement was being drafted. During this review, the

like domestic product" but was unable to decide if fresh tomatoes grown within the Community would also qualify. As a pragmatic solution, the Panel decided to proceed to determine if the other conditions set forth in Article XI:2(c)(i) and (ii) were satisfied by the Community system, on the basis that "the like domestic product" in this case could be domestically-produced tomato concentrate, fresh tomatoes or both.

4.13. The Panel next examined the Community's intervention system for fresh tomatoes to determine if it qualified as a governmental measure which operated "to restrict the quantities" of fresh tomatoes or tomato concentrates "permitted to be marketed or produced" or "to remove a temporary surplus" of fresh tomatoes "by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level" within the meaning of Article XI:2(c)(i) and (ii). The Panel noted that paragraph 1 of Article 15 of the Council Regulation (EEC) No. 1035/72 provided that: "… producers' organizations or associations of such organizations may fix a withdrawal price below which the producers' organizations will not offer for sale products supplied by their members …" The Panel further noted that this paragraph also provided that: "The disposal of products thus withdrawn from the market shall be determined by the producers' organizations in such a way as not to interfere with normal marketing of the product in question." The Panel also noted that paragraph 1 of Article 19 of Council Regulation (EEC) No. 1035/72 provided that: "Where, for a given product on one of the representative markets referred to in Article 17(2), the prices communicated to the Commission pursuant to Article 17(1) remain below the buying-in price for three consecutive market days, the Commission shall without delay record that the market in the product in question is in a state of serious crisis." The Panel also noted that paragraph 2 of this Article stated that: "Upon such finding the member States shall, through the bodies or natural or legal persons appointed by them for the purpose, buy in products of Community origin offered to them, provided that these products satisfy the requirements of quality and sizing laid down by the quality standards and that they were not withdrawn from the market pursuant to Article 15(1)." The Panel also noted that paragraph 4 of this Article stated that: "Member States for whom the obligation laid down in paragraph 2 presents serious difficulties may be exempted therefrom. In order to claim exemption,

by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level", within the meaning of Article XI:2(c)(i) and (ii).

4.14. As a result of the conclusions contained in the preceding paragraphs, the Panel concluded that the minimum import price and associated additional security system for tomato concentrates did not qualify for the exemptions provided by Article XI:2(c)(i) and (ii) from the provisions of Article XI:1. Therefore, the Panel concluded that this system was inconsistent with the obligations of the Community under Article XI. One member recalled his earlier conclusion, in paragraph 4.9, that the minimum import price system was not being enforced in a manner which would qualify it as a restriction within the meaning of Article XI. As a result, this member of the Panel considered that Article XI was not relevant, and therefore concluded that this minimum import price system, as actually enforced by the additional security, could not be inconsistent with the obligations of the Community under Article XI.

Article II

4.15. The Panel next examined the status of the interest charges and costs in connection with the lodging of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article II:1(b). The Panel noted the argument by the representative of the United States that the interest charges and costs associated with the lodging of the additional security were charges on or in connection with importation in excess of those allowed by Article II:1(b). The Panel further noted that the minimum import price and additional security system for tomato concentrates had not been found to be consistent with Article XI, nor had any justification been claimed by the Community under any other provision of the General Agreement. The Panel considered that these interest charges and costs were "other duties or charges of any kind imposed on or in connection with importation" in excess of the bound rate within the meaning of Article II:1(b). Therefore, the Panel concluded that the interest charges and costs in connection with the lodging of the additional security associated with the minimum import price for tomato concentrates were inconsistent with the obligations of the Community under Article II:1(b).

4.16. The Panel next examined the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article II:1(b). The Panel noted the argument by the representative of the United States that the forfeiture of all or part of the additional security, if importation took place at a price below the minimum, was a charge imposed on or in connection with importation in excess of the bound rate in violation of

of any kind imposed on or in connection with importation" in excess of the bound rate within the meaning of Article II:1(b). Therefore, he concluded that the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates was inconsistent with the obligations of the Community under Article II:1(b).

Article VIII

4.17. The Panel next examined the status of the interest charges and costs associated with the lodging of the additional security

rate

(c) Nullification or impairment

Article XXIII

4.20. The Panel next examined the import certificate and associated security system and the minimum import price and associated additional security system to determine if there had been any nullification or impairment of any benefit accruing to the United States under the General Agreement within the meaning of Article XXIII. The Panel noted that Article XXIII:1 provided that nullification or impairment could be the result of:

"(a) the failure of another contracting party to carry out its obligations under the Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation."

In accordance with established GATT practice[1], the Panel considered that where measures were applied which were judged to be inconsistent with the GATT obligations of the contracting party concerned, this action would prima facie constitute a case of nullification or impairment.

4.21. The Panel then recalled its previous conclusions with respect to the import certificate and associated security system that no inconsistency with the provisions of Article XI, VIII and II of the General Agreement had been found. Therefore, the Panel concluded that no prima facie case of nullification or impairment existed. The Panel then examined if there had been any damage to trade serious enough to constitute nullification or impairment within the meaning of Article XXIII. The Panel recalled its earlier conclusions that the obligations which the importer had to undertake when he applied for the import certificate were not onerous enough to violate Article VIII. The Panel considered that this system, being a measure which was not inconsistent with the provisions of Article VIII, did not have trade effects which could be considered as a nullification or impairment within the meaning of Article XXIII. Therefore, the Panel concluded that the Community's import certificate and associated security system did not constitute a nullification or impairment of any benefit accruing to the United States under the General Agreement within the meaning of Article XXIII.

4.22. The Panel then recalled its conclusions with regard to the minimum import price and associated additional security system for tomato concentrates that this system was inconsistent with the provisions of Articles XI and II. Noting that the Community had claimed justification of this system under Article XI:2(c)(i) and (ii) only, the Panel concluded that there was a prima facie case of nullification or impairment of benefits accruing to the United States within the meaning of Article XXIII.

[1]For example, Basic Instruments and Selected Documents, Eleventh