

JAPAN - RESTRICTIONS ON IMPORTS OF CERTAIN
AGRICULTURAL PRODUCTS

*Report of the Panel adopted on 2 February 1988
(L/6253 - 35S/163)*

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2.1.2 Article 52 of Japan's Foreign Exchange and Foreign Trade Control Law (Law No. 228, 1949) requires importers to obtain import licences where the Government has so provided by Cabinet Order. The Import Tr

the quota is determined and published twice a year, in May and November but the volume or value of imports to be permitted for individual items within the quota is not published. At various times in the past the Government of Japan has moved items from the miscellaneous quota to a planned quota.

2.1.8 Import licences are issued either to end-users, including wholesalers and retailers, or to trading companies receiving orders from end-users. Most allocation is to trading companies. Allocation is made on an individual application basis. If the importation of the product is not considered to pose problems for the existing demand-supply relationship, allocation of the requested amount is made. In other cases, the amount deemed adequate to meet the demand-supply situation for the product is allocated, with consideration taken of the import performance of the applicant. Licences are issued to newcomers for most of the products under this category of quota; for corned beef, other prepared and preserved meat or meat offals, and single strength juices, licences are not issued except to existing importers of that product.

TABLE 2.1

Classification of Import Quota by Product

CCCN No	Name of item	Classification of Import Quota				Reference
		Planned import quota	Miscellaneous import quota	Special quota for Okinawa	Specific purpose quota ¹	
04.02	Milk and cream preserved, concentrated or sweetened	0	0	0	0	The item subject to MIQ is, prepared whey powder for use of processing prepared milk powder for infants. Evaporated milk and sweetened
04.04	Processed cheese			0	0	
07.05	Dried leguminous vegetables	0		0		
11.08	Starch and insulin	0	0	0		
12.01	Groundnuts	0		0		
16.02	Prepared or preserved meat of bovine animals	0	0	0		
17.02	Other sugar and syrup		0			
20.05	Fruit purée and pastes	0	0			
20.06	Prepared or preserved pineapple	0				
20.06	Fruit pulps	0				
20.07	Fruit juices, excluding certain juices	0	0		0	
20.07	Tomato juice	0		0		
21.04	Tomato ketchup and tomato sauce	0		0		
21.07	Food preparations not elsewhere specified (excluding preparation of rice and seaweed)		0			

2.1.9 A Special Quota for Okinawa has been established based on the particular circumstances of that prefecture, and the quota is determined on the basis of the supply/demand situation of Okinawa. The products imported under the Special Quota for Okinawa have to be consumed in that prefecture. The allocation methods and procedures for the Okinawa quota are the same as those for the planned quota, with the quantity for each quota item announced twice annually, in June and November. The quota is allocated to traders for most items, but some raw materials for processing are allocated to users. Newcomers are eligible to apply for allocation of most quota items. A special quota for specific purposes has been established for such uses as international shipping, airlines and hotels for foreign tourists. It is generally allocated to trading companies with prior import experience and with requests from end users. Table 2.1 indicates whiETBT1 0 0 1 242.16 6ETBT1 0 0 1 286.8 1 0 0 1 227.52 654.96 Tm/F8

2.2.2 Since 1979, MAFF has also instructed the Central Dairy Council, a national organization composed of all prefectural designated milk producer organizations, to set a National Target Quantity for raw milk production and to determine the measures to enforce the limitations on milk production. The target quantity for raw milk is then allocated through the prefectural designated milk producers organizations to individual farmers. The dairy farmers deliver their raw milk to the prefectural organizations, which then sell it to manufacturers for processing and distribution as either liquid "drinking milk" or processed dairy products. The same measures on manufacturing milk apply to production in Okinawa, and the national target amount for raw milk as set by the Central Dairy Council includes raw milk produced in Okinawa. However, the production of raw milk in Okinawa is not sufficient to meet the prefecture's demands for drinking milk, and there is actually ~~no excess~~ for manufacturing purposes. The raw milk National Target Level, the /F8 11 Tf(National) TjET0d1.44 629.04 Tm/F8 11 Tf(demand

TABLE 2.2

Dairy Products

(Unit: '000 tons)

Fiscal year	1982	1983	1984	1985	1986	1987
National Quantity Target (raw milk)	6,573	6,889	7,089	7,289	7,060	6,988
National Ceiling Quantity (manufacturing milk)	1,930	2,150	2,220	2,300	2,300	2,100
Actual production of raw milk	6,848	7,086	7,200	7,436	7,358	
Actual production of manufacturing milk	2,136	2,364	2,439	2,693	2,487	
Evaporated milk						

2.2.4 The "designated products", i.e. butter, sweetened condensed whole milk, sweetened condensed skimmed milk, and skimmed milk powder, are subject to a price stabilization system. LIPC conducts buying and selling operations of these products in order to ensure stable prices at the stabilization indicative price levels established by MAFF. When the prices of these products exceed or are likely to exceed the set levels, LIPC also has the exclusive right to import and sell these products and others (whole milk powder, whey powder, butter milk powder) under state trading procedures. However, imports of skimmed milk powder for stockfeed or school lunch programs, as well as whey powder for feed use, can be imported by traders other than LIPC within the import quota system.

2.2.5 There are no government measures applied directly to the production of dairy products other than raw and manufacturing milk. Japanese production of

TABLE 2.3

Dried TABLE

2.4.2 Starch and insulin (11.08 ex) imports into Japan are subject to a planned quota. In addition, imports for processing into special use (i.e., explosives, building material, etc.) are included in the Miscellaneous Import Quota, whereas imports into Okinawa are part of that specific quota. Imports under the Planned Quota are allocated to users (manufacturers), those under the MIQ to users and trading companies, and those under the Okinawa quota to trading companies. Allocation to newcomers is permitted under all quotas. The planned quota amounts are announced twice annually, with the timing of the announcement depending on the planned end-use of the imported starch and insulin. The quota for imports for processing into sugar is usually announced in April and October; for processing into chemical seasoning, during the latter part of April or early May and again in the latter part of October or early November; and the quota for imports for the production of modified starch is usually announced in August and February. The total value of the Miscellaneous Import Quota (including starch and insulin for special use) is announced in May and November; the special quota for

TABLE 2.5

Groundnuts

TABLE 2.6

Prepared Beef

(Unit: '000 tons)

Fiscal year	1982	1983	1984	1985	1986
Domestic production: of beef	483	505	539	556	

are not exceeded. Under the Regulation on Acreage Reduction of Unshu-Mikan Orchards, implemented in FY 1979, MAFF sets annual target acreage for these oranges which is then allocated to individual farmers through producer organizations. The Government also subsidizes producers for the costs of extracting Unshu-Mikan tree roots and of converting to other fruit plants. The Regulation on Control of Production of Apple Juice (implemented in FY 1986) requires prefectures to submit an annual shipping plan of apples for juice which must be approved by MAFF. Farmers who cultivate and ship in excess of the target

TABLEAU 2.7.1 (cont.)

Fruit products

(Unit:

TABLE 2.7.2

Fruit Juices

(Unit: tons or kilo liter)

Items	Kind of quota	1983	1984	1985	1986
Concentrated grape juice	Planned quota (FY)	3,500t	3,500	4,000	4,500
	Actual imports (CY)	3,200t	3,364	4,106	4,280
Concentrated apple juice	Planned quota (FY)	-	2,000t	6,500*	3,000
	Actual imports (CY)		141t		

2.7.3 Imports of fruit purée and paste (20.05 ex) made from grapes, apples, pineapples, peaches, or certain citrus are subject to a planned quota, with the exception of fruit purees and pastes for baby food, which are included in the Miscellaneous Import Quota. All products were previously included in the MIQ but were recently assigned planned quotas. In 1984, purees and pastes made from prunes, berries and tropical fruits were exempted from the quota restriction altogether. Allocation of import permits under the planned quota is generally made to trading companies, and allocation to newcomers is permitted. Fruit pulp (20.06 ex), made from grapes, apples, pineapples, peaches, or certain citrus is also subject to a planned quota. The quota is allocated to trading companies, and allocation to newcomers is permitted. Table 2.7.1 indicates both quota and

TABLE 2.8

Pineapples

Fiscal year	1982	1983	1984	1985
Growing area (Unit: ha.)	2,870	2,470	2,230	2,260
Target growing area ¹	R	R	R	R
Production of pineapple (Unit: tons)	51,500	44,300	35,900	41,100
for processing ² (Unit: tons)	48,100	41,300	33,100	38,000
				(Unit: 10,000 cases)
Actual production of canned pineapple (incl. made from frozen pineapple imports)	105 (157)	97 (155)	82 (152)	87 (167)
Import quota - preserved pineapple	90	90	90	90
Actual imports - preserved pineapple	89	83	85	91

¹Target growing area set at 2,260 ha. for each year from FY 1986 - FY 1990

²Target of shipping for canning (FY 1986) 31,000 tons

Actual volume of shipping 30,100 tons

R = Restriction of new planting

2.8.2 Prepared and preserved pineapple (20.06 ex) is imported under a planned quota, which is allocated to trading companies based on their past performance; allocation to newcomers is not permitted. Table 2.8 indicates the actual levels of imports, as well as the planned quota level.

2.9 Tomato Products

2.9.1 Tomatoes for processing are distinct in terms of varieties, characteristics, cultivation, harvesting and distribution methods from tomatoes produced in Japan for fresh consumption. Tomatoes for processing use are not used for direct table consumption but only for the production of tomato products. Tomatoes for direct table consumption are not used for processing in Japan. The

2.9.2 Tomato juice produced in Japan is "fresh pack" juice made from fresh tomatoes. After extraction of the juice, the resulting tomato puree is generally further processed into ketchup or sauce by the same processing plant.

2.9.3 Imports of tomato juice (20.07 ex) and tomato ketchup and tomato sauce (21.04) are subject to planned quotas and to special quotas

3. MAIN ARGUMENTS

3.1 General

3.1.1 The United States considered that the quantitative restrictions maintained by Japan on these twelve categories of agricultural products were contrary to the GATT because (i) they were not justified under any specific article of the GATT including Article XI:2; and (ii) the administration of the restrictions was inconsistent with Article X and Article XIII. Before 1963, these quotas had been maintained as balance-of-payments measures under Article XII; since that time, however, they lacked any GATT justification. This infringement of specific provisions of the GATT constituted a case of prima facie nullification or impairment of benefits accruing to the United States (BISD 26S/210-218).
The United

3.2.3 The United States recalled that the Note Ad Article XI:2(c) stated "The term 'in any form' in this paragraph covered 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 restrictions on the fresh product ineffective". All foods deteriorated over time, but the rate of deterioration depended more heavily on storage conditions, the quality of the food processing and the quality of the product that was processed than on time itself. The United States noted that the US National Bureau of Standards defined "perishable" packaged foods as those with a significant risk of spoilage, loss of value or loss of palatability within 60 days of the date of packing. The US Institute of Food Technologists' Expert Panel on Food Safety and Nutrition considered dried legumes, nuts and grains, many dried-baked products such as cereals and pasta, all canned foods, salt and sugar as having a shelf life long enough to be considered "shelf-stable, non-perishable", Furthermore, the need for observance of proper storage conditions did not make a product perishable. Article XI:2(c)(i) was aimed at those products whose perishability precluded farmers from holding their production off the market until prices could stabilize. New freezing, canning, freeze-drying and other technologies now made it possible to space out the marketing of sudden large crops. There was thus, from a policy standpoint, increasingly less justifiability to Article XI:2(c)(i) import restrictions. Furthermore, the United States maintained that imports of a perishable processed product could not be restricted unless imports of the fresh product were also restricted. Justification under Article XI:2(c) (i) of nearly all the products was barred by one or more of the following reasons: the product was not in an early stage of processing, nor was it perishable; the product did not compete directly with the fresh product from which it was made; free importation of the processed product would not undermine domestic supply restrictions on the fresh product; or there were no import restrictions on the fresh product.

3.2.4 Japan noted that the drafting history of Article XI:2(c) reflected recognition of the specific characteristics of agriculture. In the Havana Conference, discussions were not only concerned with proposals to narrow the scope of the exceptions, but also with proposed amendments to broaden the scope. In this regard, Japan noted that Article XI:2(c)(i) was established in close relation with the agricultural policies of the countries concerned in the initial GATT negotiations and therefore did not precisely reflect the current situation and specific characteristics of agriculture in each country in the world. Japan considered it indispensable to understand precisely the actual situation both in production and consumption which necessitated the production restrictions. The import quotas at issue were not maintained for the purpose of protecting domestic producers or domestic processing industry of agricultural products, but rather with a view to ensuring the implementation of domestic governmental measures for restriction on production or marketing of the products. All products at issue satisfied the necessary conditions of "agricultural product, imported in any form" as provided for by the Note Ad Article XI:2(c). With respect to the term "in any form", Japan believed that the preservation period of foods had become longer than it used to be and some processed products could be stored for a long time because of the development of freezing and cold storage technology, and in this respect, constraints on trading patterns arising from the nature of perishability were disappearing gradually. However, constraints on trading patterns still existed in the sense that traders had to bear high costs to preserve products for a long time because consumers evaluated products preserved for a long period as being of low quality. It was for this reason that the term "in any form" shT1 0 0 1 177.6 232.56 Tm373.2 232.56 Tm/F

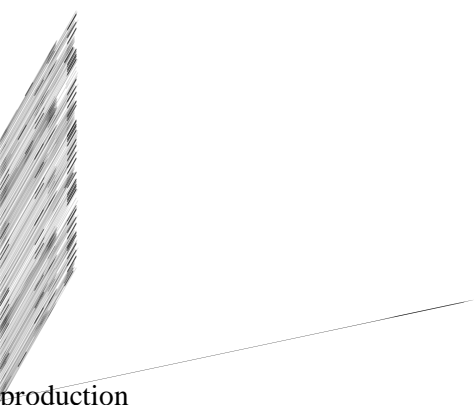
3.2.9 The United States emphasized that import restrictions could not go beyond what was necessary to achieve the objectives of Article XI:2(c)(i). This criterion limited the use of import quotas on downstream products.

3.3

(p. 12, London Report). The London draft for the Charter specifically

3.4.2 Japan considered that it was not proper to discuss import amounts on the basis of each individual dairy

3.4.4 Japan emphasized that import quotas were not intended to protect the processing industry of dairy products, but were maintained solely for the purpose of enforcing the production control of raw



Dried Leguminous Vegetables

3.4.7 The United States observed that the supply management scheme for dried leguminous vegetables was implemented exclusively through administrative guidance, and was thus voluntary and optional. Any restraints only applied to Hokkaido, thus leaving about 20 per cent of production completely unrestricted. The Japanese program offered no incentives to control production and imposed no penalties on non-participation. Acreage had been declining over time, and the decreases in production since the 1984 introduction of planting restrictions were not appreciably different from the prior existing trend. Acreage had actually increased in the 1980-1985 period. The United States also maintained that an effective supply control program should be concerned with the actual quantity produced and not just the cultivated area. Increased yields per hectare could offset

3.4.12 Japan indicated that the long term trend of demand for dried beans was declining or stagnant because the caloric intake per person in Japan was approaching its maximum limit. The elasticity of demand for dried beans against income or price was negative, so declines in price would not result in increased demand. Yet, in spite of this sluggish demand and recent bumper crops, Japan maintained a minimum import quota which resulted

processing and, as previously noted, were not perishable. Glucose was the product of sophisticated food chemistry and was produced by a small number of producers. It was not primarily a sweetener, whereas sugar was, and it was not interchangeable with sugar in beverages. The United States recalled that imports of sugar into Japan were not subject to quota. Food preparations containing added sugar included such products as cookies and baked goods. There was no relation between starch production and a product's having

price, and agreed with the statement by Japan that in the absence of import quotas imported starches would replace Japanese production. Maintenance of this import quota

balance of about one to two in the future. Japan pointed out that the rate of price-increase of groundnuts was not higher than other foods, and considered that long-term declines in consumption were due to the caloric intake per person in Japan approaching its maximum limit, as well as consumers' preference for varied and less fatty foods. The United States share in the Japanese imports increased from 0 per cent in 1965 to 48 per cent in 1985, and Japan believed that the import restriction was not damaging the United States interests. Imports of processed groundnut products were not expected to increase in the future as the imported products were inferior in quality to domestically processed ones, and their prices had begun to decline.

Beef Products

3.4.23 The United States observed that there were no governmental measures to restrict beef production in Japan as required by Article XI:2(c) (i); the Livestock Products Price Stabilization Law provided for maintenance of prices five times world levels through stringently restricting imports. Prepared and preserved beef were not in an early stage of processing nor still perishable. Furthermore, the restrictions were capricious, covering beef products if prepared in one way but not in another. The quota for beef products was less than one percent of total beef imports and a fraction of domestic consumption; the share of imports relative to production was held to well below that which would prevail in the absence of restrictions. The United States noted that there was unfilled demand for meat products, as evident from the increasing demand for non-quota substitutes and increased imports following quota liberalization for other meat products. The quota was so restrictive and allocated in such uneconomical amounts, that it was common for an importer to pay a number of quota holders a substantial premium to import on his behalf. The United States also questioned why imports of prepared beef products, other than boiled beef and canned beef, were subject to the miscellaneous quota rather than a planned quota; if the demand was hard to estimate, they should not be subject to a quota at all. In addition to the general

furthermore was not a disguised restriction on trade as the quota was properly applied in terms of the GATT provisions, and was not applied to prepared beef products with a beef content of less than 30 per cent. Japan further stated that the Livestock Products Price Stabilization Law was the law which related to the enforcement of the monopoly beef import operations of the LIPC. This import monopoly was operated in accordance with Article XVII; LIPC made its purchases in a non-discriminatory manner and in accordance with commercial considerations. Furthermore, Japan had notified the contracting parties of this state-trading and also of the import mark-up on beef. The provisions of Article II:4 did not apply to the importation of beef because it was not in the Japanese Schedule to the General Agreement. Japan emphasized that tariff category 16.02 included a wide range of products, many of which were virtually identical to beef, such as seasoned beef. The liberalization of importation of these products would render meaningless the price stabilization system for livestock. In addition, Japan considered the enforcement of import restrictions for these prepared beef products necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of the GATT, and those relating to ... the enforcement of the quotas operated under paragraph 4 of Article II and Article XVII ...". Furthermore, the existing quotas had not been filled and so were more than sufficiently large. The restrictions which the United States claimed to be capricious arose from the difficulty of product identification and from the interpretation of CCCN tariff classifications. The quota allocated for beef products was 4.5 per cent of total beef imports. An international comparison of beef prices as made by the United States was misleading as quality differences and marketing specifications were not taken into account. Japan denied the conjecture that importers would pay a number of quota holders to import on their behalf, because the amount of quota allocated to each quota holder was not uneconomical from a commercial viewpoint. Prepared beef products could not be transferred to the planned quota system as their supply/demand estimates were difficult to make given the miscellaneous nature of the category. Therefore, these products were put together into a quota on a value basis and allocation was made on the basis of individual applications.

Fruit Products

3.4.25 The United States maintained that Japanese measures related to fruit production were not supply management programs which restricted production, but were, at most, measures which monitored the rate of increase in new plantings. There were no domestic programs affecting berries although berry juice was subEture

restrictions on new plantings were imposed. Although apple acreage was greater in 1986 than in 1983, the increase was very small, and planted area was considerably below the potential planting acreage for this fruit. The production restrictions were effectively enforced as excess cultivation was penalized by removing the producer from the list of those eligible for government subsidies or loans, making it difficult for him to continue his farming operation. Although the actual production of fruit did fluctuate due to weather conditions, yield per hectare tended to stabilize over a period of two or three years. Restrictions on acreage were thus effective in controlling production. In addition, Japan had taken no measures whatsoever to increase apple exports. The change-over from Unshu-Mikan oranges would not result in an increase in the area used for the cultivation of other fruits as the total area for other fruits was restricted.

3.4.27 The United States observed that fruit produced in Japan was almost entirely consumed fresh and not processed. Therefore the United States did not believe that free importation of the fruit products would

and canned in Japan, including for consumer use, and concluded that the real purpose of the import quota was to protect the Japanese pineapple canning industry.

3.4.36 Japan noted that the pineapples and canned pineapples produced in Okinawa were inferior in quality to those produced abroad, and that the international competitiveness of the canned pineapples was low and decreasing. However, the import restrictions were carried out as a means of effectively implementing the domestic production controls in light of the declining trend in consumption, and not for the purpose of protecting the pineapple canning industry. Free importation of relatively inexpensive canned pineapples would thus render ineffective the domestic production restriction measures. Imports of fresh pineapples for canning were virtually non-existent because of their bulkiness and high transportation costs. Canned pineapple made in Japan from imported frozen pineapples was inferior to Okinawa canned pineapples, and was sold in large containers for commercial use as opposed to the smaller cans of the higher quality domestic product. It thus satisfied a different field of consumption demand and did not nullify the production controls on raw pineapple and canned products.

3.4.37 The United States considered that

tomatoes, bulk semi-processed tomatoes, tomato paste or tomato puree, the United States could not accept the need for restrictions on further processed products. The free importation of tomato sauce and ketchup would not undermine domestic supply restrictions on fresh tomatoes. The United States held that the quota operated to protect the Japanese processing industry.

3.4.46 Japan considered that the import restrictions were necessary to the enforcement of the governmental measures which restricted the quantities of the products produced, and did not operate to protect the processing industry. Seven plants in which 140,000 tons of tomatoes, for processing use were processed in 1980, had closed. Potential productivity of the closed plants had not been shifted to other plants. Import restrictions on tomatoes for direct table consumption were not necessary because they were not used for processing. There was no import of tomatoes for processing use, because the tomatoes for processing use were transported to the processing-factory immediately after harvest, where they were squeezed, strained and processed into fresh-packed tomato juice. Tomato juice was not made from tomato puree or tomato paste. In Japan, the tomato puree which was the by-product of juice processing was used to produce ketchup and sauce. Production and import restrictions on ketchup and sauce were maintained so as not to nullify the production restrictions on tomatoes for processing use. The increase in imports of tomato puree and paste was the result of providing due consideration to import access, and did not nullify domestic production restrictions on tomatoes for processing as the puree and paste was not used for the production of tomato juice. On the contrary, increased imports of puree and paste resulted in decreased domestic production, which necessitated even stronger restriction on domestic production of tomatoes for processing use.

3.4.47 The United States claimed that its trade interests were damaged under the quota. Tomato sauce and ketchup were highly brand-identified and United States quality products were already recognized in the Japanese market. However, the quota volume was too restrictive to allow development of the

3.5 Articles X and XIII

3.5.1 The United States recalled that according to Article X:1, all laws, regulations and administrative rulings pertaining to requirements,

hindered the normal planning and market forecasting by agricultural exporters to the Japanese market. The operation of Japan's agricultural import restrictions was unreasonably complicated: some of the twelve products of the dispute were imported within the planned quota, others under the Miscellaneous Import Quota (MIQ), and yet others under both, depending on the specific item involved within a four-digit CCCN category. Allocation of the MIQ was made only to trading companies which had orders from end-users and which had previous importing experience, effectively excluding newcomers from importing and thus limiting potential import growth. Full utilization of the MIQ was impeded by the quantity of quota allocations to persons who did not use them. There was no transparency with regard to which importers or which products received an allocation. The MIQ was partially determined by the previous year's total MIQ imports, so under-utilization of the quota tended to lead to reduced future quotas. The United States particularly noted difficulties resulting from the denial of licenses to import such products as frozen yogurt

3.6 Other Issues Before the Panel

3.6.1 Japan recalled that the Panel's terms of reference required that it take into account all pertinent elements. In Japan's view these included the historical realities in the GATT and the Uruguay Round. A majority of contracting parties maintained protective measures on agricultural products which varied according to their own social and economic circumstances as well as their agricultural condition and environment. It was particularly noteworthy that a number of the products under review by the Panel were subject to United States import restrictions maintained under the 1955 Waiver on United States Import Restrictions on Agricultural Products. It should not be considered as a generally accepted approach to insist on total elimination of a small number of remaining import restrictions on agricultural products without careful consideration of the economic and social importance of these measures. In spite of such various constraints on Japan's agriculture as limited agricultural land area, a large number of farm households and small farm size, liberalization of agricultural imports had been pursued over the years, and the number of products subject to import restrictions had been drastically reduced. Those products still subject to restriction were either the nation's important primary products or specific crops essential for maintaining regional economic development. Japan was the largest net importer of agricultural products in the world, and the best customer for United States agricultural products. As a result, Japan's food self-sufficiency had consistently declined over the past two decades to the lowest level among industrial countries. In agriculture there existed legitimate "specific characteristics" which could not be governed solely by economic efficiency. Japan stressed as particularly relevant points in this term: the changing supply and demand situation in the international food market; assurance of a certain level of sustainable domestic agricultural production; sound development of rural agricultural economies and sound rural agricultural communities for the nation's stability. The objective of establishing new GATT rules on trade in agriculture in the Uruguay Round reflected the situation in this sector, and it was unjust for the Japanese import quotas on these twelve items to be

not consider that Japan maintained the measures or restrictions on domestic production necessary to meet the requirements of an exception und

applicable to all the products in question, and then proceeded to a product-by-product examination, and then to the examination of other issues before the Panel.

5.1 Article XI:2(c)(i)

5.1.1 Text and Notes

The part of Article XI relevant in this dispute reads as follows:

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

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

.....

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted;

.....

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

Paragraph 2,agraph

5.1.3.2 The import restriction must be on an agricultural or fisheries

it regarding "in any form" establish different requirements for (a) restrictions on the importation of products that are "like" the product subject to domestic supply restrictions and (b) restrictions on the importation of products that are processed from a product that is "like" the product subject to domestic supply restrictions. This differentiation would be lost if a product in its original form and a product processed from that product were to be considered to be "like" products with the meaning of Article XI:2(c).

For those products which are not "like" products but are processed from the like product, the term "in any form" also permits import restrictions provided the conditions of the Note Ad Article XI are met, that is:

- (a) the product is in an early stage of processing; and
- (b) still perishable; and
- (c) the processed product competes directly with the fresh product; and
- (d) the product, if freely imported, would tend to make the restriction on the fresh product ineffective.

One of the purposes of Article XI:2(c)(i) was to allow governments to intervene in situations in which there

5.1.3.6 Public notice must be given of the total quantity or value of the quota for each product

¹ The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c)(i) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. The Panel, therefore, examined whether it would be possible to change the burden of proof in such a way that the provision could be resorted to also in such a situation. The Panel noted that one among the possible ways of achieving this aim would be to consider a demonstration that the size of the quota is equivalent to a certain percentage of the quantities marketed or produced in the importing country as a sufficient proof that the proportionality requirement had been met. The Panel however also noted that the practical consequence of such a change in the burden of proof would be to turn the requirement of Article XI:2(c)(i) to fix the size of the import quotas in relation to the reduction in the quantities marketed or produced into a requirement to determine the size of the quota in relation to the quantities actually marketed or produced. The Panel found that the above or any other change in the burden of proof to make Article XI:2(c)(i) operational in the case of long-term import and/or supply restrictions would have consequences equivalent to those of an amendment of this provision and could therefore seriously affect the balance of tariff concessions negotiated among contracting parties. The Panel noted in this context that Article XI:2 - unlike some other provisions of the General Agreement permitting restrictive trade

¹Report of the Panel on Canadian Administration of the Foreign Investment Review Act (BISD 30S/140).

measures, such as Articles XVIII:C, XXVIII or XIX - does not provide for compensation for contracting parties adversely affected by the measures taken under it. The Panel considered for these reasons that the burden of providing the evidence that all the requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the

conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ... the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, ...;"

5.2.2 Drafting History and General Considerations

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

5.2.2.2 The Panel examined this contention and noted the following: Article XIII covers restrictions on the importation of any product, "whether made effective through quotas, import ... licences or other measures" (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term "import restrictions" throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies. The note to Article II:4 of the General Agreement specifies that that provision "will be applied in the light of the provisions of Article 31 of the Havana Charter". The obligation of a monopoly importing a product for which a concession had been granted "to import and offer for sale such quantities of the product

in particular Article II:4, the note to Articles XI, XII, XIII, XIV and XVIII, and Article XVIII . These rules would become meaningless if Article XX(d) were interpreted to exempt from the obligations under the General Agreement protective or discriminatory trading practices by such monopolies. The Panel therefore found that the enforcement of laws or regulations providing for an import restriction made effective through an f(practices) TjETBT1 0 0 1 150.24 693.8c8 11 Tfn(f(practices) TjETBT1 0m/F8 11 Tf(XII,) T

considered to be "like products". The Panel thus found that these prepared and preserved milk and cream products were not "like" fresh milk for manufacturing use in terms of Article XI:2(c) (i) , but were processed from the like product. It thus examined whether they met the requirements of products "in any form", that is, whether these milk products were in an early

monopoly import

respect to the level of output which would have been attained in the absence of restrictions. The Panel considered that in light of the number of contradictory factors which affected historic and current output, including the long-standing application of import restrictions, the provision of subsidies or loans for production, the changing pattern of agricultural production, and improved varieties, cultivation methods and yields, in this situation it was virtually impossible to objectively determine what the level of production would have been in the absence of restrictions. The Panel noted, however, the consistent decline in past production both in the short and longer term, and found that the Japanese measures in the past had in practice been effective in restricting production. On this basis the Panel considered that it could reasonably be assumed that the current production measures were capable of effectively limiting production.

5.3.5.2 The Panel then examined whether the restrictions on imports of dried leguminous vegetables could be considered as "necessary" to secure the enforcement of the production restrictions. In this regard, it noted that the Japanese production restrictions were applied to all categories of dried leguminous vegetables and that the various dried legumes were substitutable in terms of the principal form of their consumption in Japan, namely sweetened bean paste. The Panel, therefore, considered that the restrictions maintained by Japan could be reasonably considered as "necessary" in terms of Article XI:2(c) (i).

5.3.5.3 The Panel then considered whether Japan fulfilled the requirements of the last sub-paragraph of Article XI:2, with respect to maintaining the proportion of imports to domestic production as might reasonably be expected to rule between the two in the absence of restrictions. The Panel considered that the burden of proof that this proportionality had been maintained rested with Japan and that such proof had not been provided (paragraph 5.1.3.7 above).

5.3.6.1 The Panel examined the restrictions maintained by Japan on imports of starch and insulin (11.08). The Panel observed that starch and inulin for special use were subject to the Miscellaneous Import Quota and recalled its finding on such restrictions (paragraph 5.3.1.3 above). It observed that the import restrictions were applied to all starches (except modified starch) and inulin and therefore considered that the Japanese "like product" in this case would be all starches produced in Japan. The Panel then examined whether there were governmental measures in effect which operated to restrict the production of all fresh products which could be processed

for these sugars and sugar food

5.3.9 The Panel noted the existence of quotas for beef prepared or preserved (16.02 ex). The Panel considered these quotas with regard to this category but considered them to be a monopoly for beef. The Panel recalled its finding in paragraph 5.2 above, and found that Article XI:2(c)(i) observed that certain prepared and preserved beef was subject to a Quota and recalled its finding on these restrictions that there did not exist any governmental measures in Japan.

5.3.10.1 The Panel then examined the restrictions on fruit pulp (20.06 ex) and to certain fruit juices (20.07 ex) and paste and fruit juices were subject to the Miscellaneous Tariff Provisions (2.7.4). The Panel recalled its previous finding on such

5.3.10.2 The Panel also noted that imports of single-stemmed fruit were subject to a special quota which limited their availability on the market. It considered that this resulted in a de facto prohibition on the importation of the general customs territory of Japan. The Panel found that such measures were in violation of the provisions of Article XI:2(c)(i) (paragraph 5.1.3.1 above).

5.3.10.3 The Panel then examined whether those restrictions on imports under planned quotas were consistent with the provisions of Article XI:2(c)(i). It considered that imported fruit puree and paste, fruit pulp and fruit juice. It considered that imported fruit puree and paste, fruit pulp and fruit juice produced fresh fruit in terms of Article XI:2(c)(i) (paragraph 5.1.3.4 above). It proceeded to examine whether these fruit products v504 421(these) TjE

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examined whether prepared and preserved pineapple met the requirements of a product "in any form", that is whether it was a product in the early stage of processing and still perishable, which competed directly with fresh pineapple and if freely imported would render ineffective the restriction on fresh pineapple. In this regard, the Panel noted that the imported product was primarily canned pineapple. The canning of pineapple enabled it to be stocked for a considerable length of time and therefore rendered it no longer perishable in terms of Article XI:2(c)(i). The Panel then noted that imports of fresh and frozen pineapple were not restricted, and substantial quantities of the latter were imported for processing into canned pineapple. The Panel considered that if imports of frozen pineapple for processing into canned pineapple were presumed not to render ineffective the domestic measures relating to production of fresh pineapples, the importation of the further processed canned pineapple could not have such an effect. The Panel found, therefore, that

(C/M/202, pages 6-9) as well as Japan's arguments regarding the practices of other countries, the status of the multilateral negotiations and the special characteristics of Japanese agriculture.

5.4.1.1 The Panel recognized that quantitative restrictions and other trade barriers were still widespread in international trade in agricultural products but noted that only a few contracting parties had justified their restrictions under

that the practice of "administrative guidance" played an important role.

Article XI:2(c) establishes several exceptions from the general prohibition of quantitative import restrictions for agricultural and fisheries products. Sub-paragraph (i) of that provision permits, inter alia, import restrictions on any agricultural or fisheries product, imported in any form, necessary to enforce government measures which operate to restrict the quantities of the like domestic product permitted to be marketed or produced. To prevent the use of this provision for import restrictions that have the effect of expanding the domestic production of agricultural products or of protecting domestic industries processing such products, Article XI:2(c)(i) imposes a number of strict conditions. The Panel examined the restrictions at issue in the light of these conditions and concluded as follows.

The Panel notes that Article XI:2(c)(i) does not permit the prohibition of imports but only

therefore concludes that those import restrictions maintained by Japan through the Miscellaneous Import Quota on prepared whey powder (04.02 ex), 4.02