18 April 1989

EUROPEAN ECONOMIC COMMUNITY - RESTRICTIONS ON IMPORTS OF DESSERT APPLES - COMPLAINT BY CHILE

Report of the Panel adopted on 22 June 1989
(L/6491 - 36S/93)

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Note: "Tons" refers to metric tons throughout this report.

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were:
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in an earlier panel report in 1980.[1] Despite a number of amending regulations since 1980 the essential features of the system established under Regulation 1035/72 have not changed. At the internal level, therefore, the main elements of the market continue to be:

Producer Groups, which are a basic structural element;

Quality Standards, which apply both to the marketing of Community products and to imports;

Prices and Intervention System. Before the start of each marketing year, the EEC Council of Ministers fixes a basic price and a buying-in price under Article 16 of Regulation 1035/72. The basic price is a guide price which determines the buying-in and withdrawal prices, explained below. It is fixed for quality class I of certain pilot varieties, and applies for the period August through May. For the 1987-88 marketing year, the basic prices were fixed as follows (ECU/100 kg.):

August	26.51	November

production outlook.) The member states, through their local representatives, verify that withdrawals have taken place and grant

Licensing

2.9 On 3 February 1988, in Commission Regulation No. 346/88 (published in Official Journal L 34 of 6.2.1988), the EEC Commission introduced a system of surveillance through import licensing of (dessert) apple imports from outside the Community valid until 1 September 1988. Characteristics of this system were:

- import subject to issue of licence by the importing member state;
- surety deposit (1.5 ECU/100 kg. net) with refund conditional on import;
- import licences valid for one month from date of issue;
- licences issued on fifth working day after request lodged (this provision applied as from 22.2.1988).

2.10 The licensing system was modified by two subsequent Commission Regulations. Regulation 871/88 of 30 March 1988 (OJ L 87 of 31.3.88) extended, inter alia, the validity period of the licences to 40 days with the proviso that no licence would be valid after 31 August 1988. Regulation 1155 of 28 April (OJ L 108 of 29.4.1988) extended, on a trader's request, the 40-day validity period to licences requested before 31 March 1988 and issued from that date.

Suspension of licences

2.11 By Regulation 962/88 of 12 April 1988 (OJ L 95 of 13 April) the EEC Commission suspended the issue of import licences for (dessert) apples originating in Chile for the period 15 to 22 April 1988. Any applications pending on 18 April were to be rejected and the relevant securities released.

2.12 The basis in Community law referred to in the preamble to this Regulation was (inter alia) Reg. 2707/72, which lays down "the conditions for applying for fruit and vegetables". In this case the Commission stated that import licence applications from Chile exceeded the traditional quantity of imports. The preamble went on:

> "Whereas since the existence of substantial stocks and withdrawals and of prices considerably lower than those in the previous marketing year on the markets of

2.15 The "reference quantities" fixed for suppliers other than Chile in Reg. 1040/88 were:

South Africa	166,000 tons
New Zealand	115,000 tons
Australia	11,000 tons
Argentina	70,000 tons
Other countries	17,600 tons

2.16 Regulation 1515/88 of 31 May 1988 (OJ L 135 of 1.6.88) amended the import licence application and issue forms and procedure in order to ensure that imports were consigned from the country of origin. The stated intent was to ensure that the "equitable distribution" of import quantities was properly applied.

2.17 The measures noted above expired on 31 August 1988 as specified.

TABLE I

EEC Apple Production, Withdrawals and Stocks
(Community of Ten)

EEC Marketing Year	('000 tons)				
	1983/84	1984/85	1985/86	1986/87	1987/88

TABLE II

EEC-10: Imports of Dessert Apples
(tons)

	1984	1985	1986	1987	1988 (Quotas)
CHILE	97,820	86,963	151,088	158,755	142,131
(% of southern hemisphere total)	(25.2%)	(21.5%)	(33.5%)	(32.3%)	(28.1%)
ARGENTINA	52,932	64,338	32,181	52,190	70,000
	(13.6%)	(15.9%)	(7.1%)	(10.6%)	(13.8%)
SOUTH AFRICA	157,467	147,327	164,210	169,457	166,000
	(40.6%)	(36.4%)	(36.4%)	(34.5%)	(32.9%)
AUSTRALIA	2,238	10,278	6,156	8,637	11,000
	(0.6%)	(2.5%)	(1.4%)	(1.7%)	(2.1%)
NEW ZEALAND	77,275	95,614	97,331	102,481	115,000
	(19.9%)	(23.6%)	(21.6%)	(20.8%)	(22.8%)
Southern Hemisphere total	387,732	404,520	450,966	491,520	504,000
All imports total	515,223	497,930	517,232	524,900	521,731

TABLE II (a)

Imports as Percentage of EEC Production

Year	1984	1985	1986	1987	1988 (Quotas)
Southern Hemisphere	6.2	5.5	7.1	6.7	7.9

3. MAIN ARGUMENTS

Article XI

3.1 Chile stated that the EEC's restrictions on imports of dessert apples were clearly contrary to Article XI:1. It noted that it was incumbent on the contracting party invoking an exception under the General Agreement to demonstrate that it was fulfilling all of the requirements laid down by that exception. This had been confirmed as regarded Article XI:2 by a recent panel decision.[3]

3.2 The European Economic Community maintained, as it had done in its notification to contracting parties (L/6337), that its measures concerning Chilean apples were taken in conformity with Article XI. It did not argue that the measures were consistent with Article XI:1, but that they involved a justified use of the exemption from the terms of that provision allowed, on certain precise conditions, under Article XI:2. The EEC argued that it had satisfied the conditions as previously interpreted, in particular by a Panel on a similar case.

3.3 The findings of the Panel on "EEC Restrictions on Imports of Apples from Chile" (L/5047), adopted by the Council on 10 November 1980, without reservation by the two parties, were the starting point for the EEC. The parties in that case had been the same, and the matter

in light of the

reports. The Community's withdrawal programme was clearly a "governmental" measure in the sense of Article XI. It was established by Community regulation and connected to the basic and buying-in prices fixed each year by EEC Ministers. It was financed by the Community through the member

3.16 Chile also argued that the EEC's import restrictions were not "necessary to the enforcement" of the claimed governmental supply control measures. It stated that the level of imports had no influence on the quantities of EEC apples withdrawn from the market. The Chilean apples sent to the EEC were generally

3.20 The EEC recalled the findings of the 1980 Panel on the question of whether the import restrictions were "necessary to the enforcement" of the Community's marketing restrictions:

> "The Panel considered that although the EEC measures occurred outside the EEC domestic production season, imports could have affected the possibilities for the disposal or release of EEC apples out of intervention onto the EEC market at that time."

Thus, the EEC argued, it was clear the Panel considered that its import restrictions had been necessary to the enforcement of the internal marketing restrictions.

Te448372.72 The EEC maintained that its measures were, likewise, necessary. 616.0 Tm/F8 11 Tf(or) Tj3ETBT1 0

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3.30 The EEC indicated that there could be no question but that by publishing Regulation 1040/88 the EEC had given public notice of the quantity of the product permitted to be imported during a specified future period. The EEC also rejected the claim that there had been a "secret quota". There had been a suspension of Chilean import licences pending the calculation of the quota. The 8-day difference between these two actions had been necessary to protect the rights of other suppliers under Article XIII.

3.31 Chile

the case of Chile. Yet in the absence of any published quota there had been no

"…
2. Any new or intensified restrictions

which had forecast exports of 199,000 metric tons - that is, only 1,000 metric tons less than Chile's forecast - had received a quota of almost 24,000 metric tons more than Chile.

4.17 Chile recalled that Article XIII:2(d) stated in part:

> "… the contracting party concerned shall allot to contracting parties having substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product …"

Chile argued that the EEC had not observed this requirement either.

4.18 Normal GATT practice, it said, was to consider the last three years as a previous representative period unless it could be shown for some reason that one or more of those years was not representative. In 1985, EEC imports from Chile were 86,963 metric tons, which was down from 97,820 metric tons in 1984 and also below the generally upward annual trend of shipments. Chilean exports of apples dropped in 1985 because of the severe earthquake of 3 March that year which damaged the export infrastructure. Chile argued that the earthquake should be considered as a "special factor" and therefore 1985 should not be considered as "representative" nor be included in any calculation of a representative period. If EEC imports of the last two years only were taken into account, this would give a Chilean share of 33

4.21 Analysis of the respective shares of southern hemisphere countries over the last three years showed that there had been discrimination against Chile. Comparing individual 1988 quotas against previous actual performance, the Argentinean quota of 70,000 metric tons represented 141 per cent of its three-year average. In fact the only time the EEC had ever imported anything close to that quota amount from Argentina was seven years before (67,266 metric tons), and there had been a downward trend ever since. Similarly the quotas granted to

4.29 Independently of the decisions the Panel would come to about the specific points above, the EEC suggested that, in view of the complexity and difficulty of the concept of "special factors", it might be wise to adopt a practical solution which would allow the contracting party using quantitative restrictions to rely in principle on the average of the previous three years and for other contracting parties to accept that reliance on this period created a presumption of conformity with the requirements of Article XIII. Where other special factors which were claimed to modify this average, the party which wished to rely on them should then have the burden of proving that one or other such factor should be considered.

4.30 Chile [illegible] the EEC's s1 475.BT1 0 0 1 395.76 667.9 0 1 4 667.92 Tm/F8 11 Tf89.6 745.68 Tm/F8 11 T

4.32 To counter any impression that there was close [redacted] betwe
hemisphere countries, and that in its actions the Com
southern hemisphere countries, Chile stated that the sole
with export forecasts was to co-operate in the provision of information. Th
on a confidential basis. In no case did it prejudge export quantities or const
was no process of consultation, still less of negotiation, but solely unilatera
in which Chile had always co-operated. There was thus no reason for th
of special factors or argue that they were so complex that the requirements
redefining. There had been no such reciprocal co-operation from the EEC
Chile alone but also other suppliers who had previously refused to enter into a
agreement, which Chile argued would also have been GATT-illegal.

5. Article I

5.1 Chile argued that the Community's import quotas were discriminatory and
most-favoured-nation treatment and of Article I of the General Agreement.

5.2 The EEC argued that, as this was a question of the administration of qua
it was appropriate that it should be examined not under Article I but solely under
was the "lex specialis" (c.f. para. 4.1 of the 1980 Panel's report).

6. Article X

6.1 Chile argued that the licensing and request system on dessert apple imports i
EEC on 6 February (Commission Regulation Nos. 346/88, 871/88 and 1155/88) an
arrangements by the member states putting this into effect were not "published pro
manner as to enable governments and traders to become acquainted with them" as
Article X:1 (first sentence) nor administered in a "uniform, impartial and reasonable mann
under Article X:3(a). In particular Chile maintained, concerning Article X:1, that the
of a licensing system as late as February 1988, with licences expected to be issued a li
weeks after publication of the initial regulation, gave member states scant time

6.6 The EEC noted that the imposition of import quotas and the allocation of licences was the object of Community legislation through a regulation. Under Article 189 of the Treaty of Rome, a regulation had general scope, was binding in its entirety, and was directly applicable in all member

to foreign external debt should have been taken into consideration by the EEC before it closed the principal market for the exports of a product of great importance to Chile.

8.4 It was clear that in restricting imports of apples from Chile the Community had paid no regard to the special needs of Chile as a developing country as it was obliged to do under Part IV. It made no conscious and purposeful effort to ensure that Chile secure a share of growth in international trade in apples commensurate with the needs of its economic development. It did not provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, as required under Article XXXVI. Nor did the Community refrain to the fullest extent possible from introducing non-tariff import barriers on apples, which were of

8.8 Chile was acutely aware of the difficulties governments faced in maintaining or adopting liberal trade policies. Of all the contracting parties, only two had bound all of their tariff duties; one of them was Chile. Not only had Chile abided by the standstill commitment, in 1988 it had reduced the tariff level actually applied to less than half of the bound rate: 15 per cent across-the-board. It had not been easy for Chile to do this, given a current external debt of US$19 billion, but it had done so. On the other hand, the European Community, which had far greater resources and a more diversified developed economic base than a small, developing country, had violated its commitment on standstill as well as its obligations 8 1ound

prevailed between Chilean suppliers and other suppliers on the Community market in the absence of such restrictions (BISD 1S/58). Compensation was appropriate since of the other possible recommendations - withdrawal of the restrictions, retaliatory withdrawal of concessions - one was meaningless as the measures had lapsed on 31 August 1988 and the other was a last resort which would not be in Chile's interests or consistent with its liberal trade policy.

10.3 Chile requested that the Panel make a finding of "retroactive prejudice" against it. (This had been discussed in the Uruguay Round Negotiating Group on Dispute Settlement.) The prejudice could be calculated on the basis of the losses and lost opportunities to Chilean exporters which had been demonstrated to the Panel. Chile also requested that the Panel propose that the CONTRACTING PARTIES recommend to the EEC that it take positive measures to compensate Chile for this damage. One possibility for compensation would be an appropriate reduction in the EEC duty rate during the peak period for Chilean apple shipments.

10.4 The EEC considered that Chile's suggested recommendations for compensation would be inappropriate even if the Community had violated a GATT provision. While agreeing that the question of panel recommendations on the question of compensation, and perhaps even retroactive compensation, could merit discussion in the Negotiating Group on Dispute Settlement, the EEC did not see even the possibility of such a recommendation on the basis of existing provisions and practices unless, perhaps, to the extent that a panel had been specifically mandated to do this. The Panel's terms of reference certainly did not allow it to go beyond the framework of the General Agreement, and in particular of Article XXIII:2, and create new obligations.

11. SUBMISSIONS BY OTHER CONTRACTING PARTIES

11.1 Argentina stated that, while the 70,000-ton quota it had been allocated under Regulation 1040/88 was in line with its export potential, the EEC measures as a whole had no basis under Article XI. There was no evidence that they were linked to a reduction in domestic production or to a need to remove a temporary surplus of a like product. Hence they were not justified under any of the criteria set out in Article XI:2 in order to qualify as an exception to Article XI:1. Furthermore Argentina argued that the EEC's consultations with Southern Hemisphere suppliers in the past had already suggested potential restrictions and could be said to have acted as an instrument of restriction through the negative expectations they had aroused among exporters.

11.2 Canada likewise maintained that the EEC measures were contrary to Article XI:1 and not justified

that

Regulation 1035/72 was also discretionary at the level both of member states and of producer organizations. It, likewise, was not effective in limiting marketing - it had been used in 1986/87 to less than half the authorized level.

11.4 Even were these discretionary schemes to be considered "government measures …" in terms of Article XI:2(c)(i), Canada maintained that the import restrictions were not necessary to their

did not limit their quantity, which was what Article XI was about. As the domestic and imported apple markets were not in fact independent, substantial growth in imports necessarily undercut the effect of the domestic supply restrictions. The EEC considered that its

of proving that it has met all of the conditions of that exception.[7] In the present case, therefore, it was incumbent upon the EEC to demonstrate that the measures applied to imports of apples met each and every one of the conditions under Article XI:2(c)(i) and XI:2(c) last paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1. These conditions were:

- the measure on importation must constitute an import restriction (and not a prohibition);

- the import restriction must be on an agricultural or fisheries product;

- the import restriction and the domestic marketing or production restriction must apply to "like" products in any form (or directly substitutable products if there is no substantial production of the like product);

- there must be governmental measures which operate to restrict the

The import restriction must be on an agricultural or fisheries product

12.6 The Panel took account of longstanding GATT practice which classed as agricultural or fisheries products items specified in Chapters 1-24 of the CCCN, and concurred with both parties that the measures involved in this case applied to an agricultural product.

The import restriction and the domestic supply restriction must apply to like products, in any form (or directly substitutable products if there is no substantial production of the like product).

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

There must be governmental measures which operate to restrict the quantities of a domestic product permitted to be marketed or produced

12.8 The Panel proceeded by examining first whether the EEC did have "governmental" measures consistent with Article XI:2(c)(i), and second whether such measures did operate to restrict domestic supply in terms of the same provision. The Panel noted that the EEC did not claim that it restricted production of apples, but that it effectively restricted their marketing, through a system of market withdrawals carried out mainly by producer groups. The Panel also took note of the argument that these could not be considered "governmental" measures in terms of Article XI:2(c) because of the voluntary basis of the organization and the non-obligatory method of their operation. The Panel recalled that the concept of "governmental" measure had been previously examined on a number of occasions in respect of different articles of the General Agreement. A 1960 Panel, examining the question of whether subsidies financed by non-governmental levy were notifiable under Article XVI, expressed the view that "… the question … depends upon the source of the funds and the extent of government action, if any, in their collection".[10] Another Panel found that the informal administrative guidance used by the Japanese Government to restrict production of certain agricultural products could be considered to be a governmental measure within the meaning of Article XI:2 because it emanated from the Government and was effective in the Japanese context.[11] A third Panel considered that legally non-mandatory measures could constitute restrictions within the meaning of Article XI:1 if "sufficient incentives or disincentives existed for non-mandatory measures to take effect … [and] the operation of the measures … was essentially dependent on Government action or intervention [because in that case] … the measures

authorities was indirect. However, the régime as a whole was established by Community regulations which set out its structure. Its operation depended on Community decisions fixing prices, and on public financing; apples withdrawn were disposed of in ways prescribed by regulation. The Panel therefore found that both the buying-in and withdrawal systems established for apples under EEC Regulation 1035/72 (as amended) could be considered to be governmental measures for the purposes of Article XI:2(c)(i).

12.10 Having made the above finding, the Panel went on to examine whether these governmental measures "operated to restrict the quantities of [EEC apples] permitted to be marketed". The Panel noted that the 1980 Panel had reached the conclusion that:

> "the EEC did restrict quantities of apples permitted to be marketed through its system of intervention purchases by member States and compensation to producer groups for withdrawing apples from the market".[13]

That Panel did not, however, explain the basis for this conclusion. The Panel also noted that a 1978 Panel[14] had come to the opposite conclusion

principles

12.13 The Panel noted that Article XI:2(c)(i) referred to governmental measures which "operating to restrict the quantities" of the domestic products "permitted to be marketed or produced". Given the ordinary meanings of "to permit" (to authorize or allow) and "to market" (to expose for sale in a market or to sell) the wording of the provision suggested in the view of the Panel that the governmental measures must include an effective limitation on the quantity that domestic producers are authorized or allowed to sell. Measures which simply prevented consumers from buying products below certain prices would not appear to be covered by this wording. If the withdrawal of a product from the market without any governmental limitation on the amount that could be sold was included within the purview of Article XI:2(c)(i), the words "permitted to be" would not have any function. The Panel took into consideration, however, the argument that in the official languages of the General Agreement this provision could possibly be interpreted in a way which concentrated more on the market effects than on the government policy direction. It had been argued, for example, that the fact that a quantity of apples had been withdrawn from the dessert apple market as a result of governmental measures amounted, in effect, to a marketing restriction in terms of Article XI:2(c)(i). This interpretation would involve a more flexible reading of "permitted to be marketed". The Panel recalled the legal principle that exceptions were to be interpreted narrowly and considered that this argued against such a flexible interpretation of Article XI:2(c)(i).

12.14 As to the context in which the provision appears, the Panel noted that the final paragraph of Article XI:2 stipulated that [illegible] Article XI:2(c)(i) only in proportion to domestic production, whether the government has chosen to restrict the quantities permitted to be marketed or those permitted to be produced.

chosen

12.16 The Panel also noted that during the drafting of the provision it had been agreed that the exception under Article XI:2(c)(i):

Article XIII

Non-discriminatory administration of quantitative restrictions

12.20 The Panel recognized that, given its finding that the EEC measures were a violation of Article XI:1 and not justified by Article XI:2(c)(i) or (ii), no further examination of the administration of the measure would normally be required. Nonetheless, and even though the Panel was concerned with measures which had already been eliminated, in view of the questions of great practical interest raised by both parties it considered it appropriate to examine the administration of the EEC measures in respect of Article XIII.

12.21 The first paragraph of the Article established the general obligation of non-discrimination in the administration of quantitative restrictions. The Panel noted that Commission Regulation 984/88 of 12 April 1988 suspended the issue of import licences in respect only of apples originating in Chile, eight days before the publication of import quotas. The Panel found that this measure constituted a prohibition in terms of Article XIII:1, and that it was applied contrary to that provision since the like products of

(1) changes in relative productive efficiency;

(2) the existence of new or additional ability to export; and

(3) reduced ability to export."

It was also agreed at Havana that "changes artificially brought about … by means not permissible under other provisions of the Charter were not to be regarded as special factors for the purposes of paragraph 2(c) and Article 22 [XIII]".

12.24 The Panel further recalled t

12.27 The Panel went on to examine the EEC's treatment of goods en route, in the light of Article XIII:3(b)'s stipulation that "any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry". The Panel also took note of the (non-obligatory) Standard Practices for the Administration of Import and Export Restrictions approved by the CONTRACTING PARTIES in 1950.[20] These state in part that "any new or intensified restrictions should not apply to goods shown to the satisfaction of the control authority to have

Part IV

12.31 The Panel examined the EEC measures in relation to the objectives and commitments embodied in Articles XXXXVI and XXXVII of Part IV of the General Agreement, particularly XXXVII:1(b) which states that "the developed contracting parties shall to the fullest extent possible … refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less developed contracting parties"; and XXXVII:3(c), which requires developed contracting parties to "have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties".

12.32 The Panel found that the EEC's import measures on dessert apples did affect a product of particular export interest to less-developed contracting parties. It noted that the EEC had held consultations with affected suppliers and had amended its regulations, but these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV. Following a careful examination of this issue, the Panel could not find that the EEC had made appropriate efforts to avoid taking protective measures on apples originating in Chile. However, the Panel noted that the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I-III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I-III. As the Panel had found the EEC's import restrictions to be inconsistent with specific obligations of the EEC under Part II of the General Agreement, it therefore did not consider it necessary to pursue the matter further under Article XXXVII.

Standstill

12.33 The Panel regarded the Standstill Commitment of the Punta del Este Declaration as outside its mandate. The Punta del Este Declaration contained commitments in the context of a plan for continuing negotiations whose outcome was yet to be decided. The Punta del Este Standstill commitments had their own special forum - the Surveillance Body established by the Committee on Trade Negotiations - to which any complaint concerning them should be taken. These commitments could therefore not be considered to be obligations within the meaning of Article XXIII:1(a).

Compensation

12.34 The Panel considered carefully Chile's arguments for a recommendation of compensation against the EEC, and the EEC's opposing arguments.

12.35 The Panel observed that it was

The Panel