18 November 1987

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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1. INTRODUCTION

1.1 The United States held consultations with Japan under Article XXIII:1 regarding restrictions on imports of certain agricultural products on 11 July 1983 and 8 and 9 September 1983 (L/6037). As no satisfactory settlement was reached, the United States requested the CONTRACTING PARTIES to establish a panel to examine the matter. The Council agreed to establish the Panel on 27 October 1986, and authorized the Chairman to draw up its terms of reference and to designate its Chairman and members in consultation with the parties concerned (C/M/202).

1.2 On 27 February 1987 the Council was informed of the terms of reference and composition of the Panel (C/145):

Terms of Reference

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in document L/6037 and to make such findings, including those on the question of nullification or impairment, as will assist the contracting parties in making the recommendations or in giving the rulings provided for in Article XXIII:2.
>
> In examining the matter, the Panel may take into account all pertinent elements including the Council's discussion on the matter at its meeting on 27 October 1986."

Composition

Chairman:	Mr. Sermet R. Pasin
Members:	Mr. Johannes Feij
	Mr. Sándor Simon

1.3 The Panel met with the parties on 7 and 8 May, 23 June and 5 October 1987, and with interested third parties on 8 May 1987. It submitted its report to the parties to the dispute on 30 October 1987.

2. FACTUAL ASPECTS

2.1 General

2.1.1 The case before the Panel concerned import restrictions maintained by Japan on certain products contained in the following lines in the Japanese tariff:

04.02	Milk and cream, preserved, concentrated or sweetened;
04.04	Processed cheese;
07.05	Dried leguminous vegetables;
11.08	Starch and insulin;
12.01	Groundnuts;
16.02	Meat of bovine animals, prepared or preserved in airtight containers;
17.02	Other sugars and syrups not containing added flavouring or colouring;
20.05	Fruit puree and pastes;
20.06	Fruit pulp and pineapple, prepared or preserved;
20.07	Fruit and vegetable juices, excluding certain juices;
21.04	Tomato ketchup and sauce; and,
21.07	Food preparations not elsewhere specified (excluding preparations of rice and seaweed).

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 Trade Control Order (Cabinet Order No. 414 of 1949, as amended) implements this authority and establishes administrative responsibilities. It provides that the Minister of International Trade and Industry shall designate and publish items and countries of origin of goods for which advance authorization of import must be obtained. However, before designating a product, he is to obtain consent of the Minister concerned with jurisdiction over that product; in this case, the Minister of Agriculture, Forestry and Fisheries. The list of categories under import quota is published in MITI Notification No. 170 of 1966 (as amended), and also published in "KANPO" (Government Notification), "MITI Notification" and "TSUSHOKOHO" (Trade Bulletin) of JETRO, respectively. Imports of all the products in this dispute are subject to import quotas under the Import Trade Control Order and this Notification. Procedures for import licensing are set forth in the Import Trade Control Regulation (MITI Ordinance No. 77 of 1949, as amended).

2.1.3 The Control Order and the Control Regulation provide that, for products on the import quota list, the importer must apply to the Ministry of International Trade and Industry (MITI) for allocation of the import quota. MITI carries out this allocation in consultation with the Minister with jurisdiction over the product and issues a certificate of import quota allocation. Within four months thereafter, the importer must forward the certificate of quota allocation to an authorized foreign exchange bank which automatically issues a certificate of import approval. The import approval is valid for six months. Import quota allocations are not transferable.

2.1.4 Japanese import quotas are classified into the categories of Planned Import Quota, Miscellaneous Import Quota, Special Quota for Okinawa, and Other Quota for Specific Purpose. The import announcements published every half year specify which type of quota is applied to each item.

2.1.5 The Planned Import Quota is the quota system most commonly used for agricultural products. The size of the quota is determined on the basis of supply/demand estimates for each item. The size of each import quota is set in principle twice a year, and the announcement of the quota is made in each half of the fiscal year when the demand/supply estimates become available. The timing of the announcements differs depending on the item involved and may vary from year to year for any one item. Following announcement of the quotas, applications are accepted for two weeks, then simultaneously reviewed. Quota allocations are generally made within two to four weeks after the deadline date for applications, and are given either to traders or users.

2.1.6 Allocation to users is generally for semi-processed items imported by industrial users for further processing. The quota is mainly allocated to manufacturers or their associations, based on their processing capacity and other factors. Allocation to traders is made for consumer products and other items whose end-users are difficult to identify. The quota is allocated to trading companies with a record of importing agricultural and marine products, based on their past import performance, and to newcomers for some items. For some products, if there is quota remaining after allocation to historical importers, new importers and users, the residual quota is allocated on a first-come-first-served basis. In this situation, applicants must present a contract with a foreign exporter. Failure to import will not necessarily result in loss of the allocation the subsequent year. The first-come-first-served allocations are made whenever an application has been received, generally following a two-week processing period.

2.1.7 The Miscellaneous Import Quota covers all items to which the methods of the Planned Import Quota are not considered applicable. This quota includes a range of items which consist of miscellaneous sorts of articles, items whose commodity categories have not been explicitly established, or items whose import quantity is minimal. For this quota only the total value in US dollars is announced, not the volume nor the amount of quota for each product in the Miscellaneous Import Quota. The size of

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 condensed milk are subject to the specific use quota
04.04	Processed cheese			0	0	
07.05	Dried leguminous vegetables	0		0		
11.08	Starch and insulin	0	0	0		The item subject to MIQ is that for special use
12.01	Groundnuts	0		0		
16.02	Prepared or preserved meat of bovine animals	0	0	0		The item subject to planned import quota is boiled beef. The item subject to special quota for Okinawa is canned beef
17.02	Other sugar and syrup		0			
20.05	Fruit purée and pastes	0	0			The item subject to Miscellaneous import quota is fruit purée and paste for baby food
20.06	Prepared or preserved pineapple	0				
20.06	Fruit pulps	0				
20.07	Fruit juices, excluding certain juices	0	0		0	The item subject to planned quota is concentrated apple juice, grape juice, pineapple juice and non citrus fruit juice. The item subject to Miscellaneous import quota is fruit juice, excluding orange and pineapple juice. Single strength orange, pineapple grape and apple juice are subject to the special use quota
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			

[1]A quota for specific purposes has been established for such uses as international tourist hotels, shipping vessels travelling between Japan and foreign countries and for airlines.

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 which type of quota applies to each item under consideration.

2.1.10 The following is a brief description of the relevant domestic production programs of Japan and of the import restrictions applied to the specific items of this dispute. The various items have been grouped according to their relevant product categories. Prepared and preserved milk and cream (04.02), processed cheese (04.04 ex), lactose (17.02 ex), and food preparations, not elsewhere specified, mainly consisting of dairy (21.07 ex), are grouped as "dairy products". Starch and insulin (11.08); glucose and other sugars and syrups, with the exclusion of lactose (17.02 ex); and food preparations, not elsewhere specified, mainly consisting of sugar (21.07 ex) are considered under the heading of "starch and sugar products". Fruit puree and pastes (20.05 ex), fruit pulp (20.06 ex) and fruit juices (20.07 ex) are grouped as "fruit products", whereas prepared and preserved pineapple is discussed separately. Tomato juice (20.07 ex) and tomato ketchup and sauce (21.04 ex) are considered as "tomato products". The other products of the dispute, i.e. dried leguminous vegetables (07.05 ex), groundnuts (12.01 ex) and prepared or preserved bovine meat (16.02 ex), are each considered individually.

2.2 Dairy Products

2.2.1 The 1965 Law Concerning Temporary Measures on Deficiency Payments for Manufacturing Milk Producers provides for deficiency payments to producers of manufacturing milk and for a National Ceiling Quantity on ** manufacturing milk eligible to receive this deficiency payment. The deficiency payment is not paid for milk produced in excess of the National Ceiling Quantity, which is determined annually by the Ministry of Agriculture, Forestry and Fisheries (hereinafter "MAFF") on the basis of supply and demand estimates. MAFF provides the funds for the deficiency payment to the Livestock Industry Promotion Corporation (hereinafter "LIPC"), which pays it through the prefectural designated milk producers organizations to the individual farmers based on the use for which the raw milk has been sold. The actual unit amount of the deficiency payment, or producer compensation grant, received by any producer is the difference between the "guaranteed price" and the "standard trading price" of the milk used for manufacturing the specified milk products (butter, skimmed milk powder, sweetened condensed whole milk, sweetened condensed skimmed milk, whole milk powder, sweetened milk powder, evaporated milk and skimmed milk for calf feed. The government sets both the "guaranteed price" and the "standard trading price" (as well as the "stabilization indicative prices" for the so-called "designated products" i.e. butter, skimmed milk powder, sweetened condensed whole and skimmed milk) each fiscal year. The guaranteed price for manufacturing milk is set so as to maintain production in districts where a majority of the milk produced is directed towards manufacturing. In essence, the production costs in Hokkaido, with some adjustments regarding farmers own labour costs and land costs, are used as the base for the calculation. The standard trading price for manufacturing milk is based on the value of the sale price of major milk products (or stabilization indicative price for the designated products), with the average manufacturing and handling costs deducted. The unit value of the deficiency payment was 15.08 yen/kg in FY 1987, reflecting the difference between the guaranteed price of 82.75 yen/kg and the standard trading price of 67.67 yen/kg. The deficiency payment system does not cover milk used for producing "fresh products" such as yogurt or cream; these are included in the "drinking milk" system.

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 National Ceiling Quantity (manufacturing milk), as well as the actual production levels of raw milk and manufacturing milk are given in Table 2.2.

2.2.3 The Central Dairy Council imposes a penalty of 40 yen/kg on raw milk produced in excess of the national target quantity and reduces the quota allocated to the offender in the following year. In addition, milk produced in excess of the target quantity is disposed of either for stockfeed or used in the school lunch program. Therefore, a farmer who produces milk in excess of his allocated target quantity, in addition to paying the 40 yen/kg penalty and having his production quota subsequently reduced, receives only a price of 20/30 yen/kg for his excess milk. This is in contrast to the approximately 100-110 yen/kg price (including deficiency payment) the farmer receives for drinking milk and manufacturing milk within the National Ceiling Quantity.

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	- Production	2.9	2.6	2.2	2.4	2.2	
	- Import quota:[1]	0.17	0.21	0.27	0.20	0.15	
	- Okinawa quota	1.5	1.5	1.5	1.5	1.5	
	- Total import	0.5	0.4	0.5	0.4	0.3	
Sweetened condensed milk	- Production	53.6	48.2	50.4	49.5	49.3	
	- Import quota[1]	0.02	0.05	0.06	0.03	0.02	
	- Total import	0.0	0.0	0.1	0.0	0.0	
Skimmed milk powder	- Production	131.5	154.2	155.3	181.5	183.7	
	- Import quota:[2]	102.17	89.86	97.73	95.83	79.41	
	- Okinawa quota	0.81	0.78	0.87	0.77	0.37	
	- Total import	92.7	92.4	90.3	104.5	91.0	
Whole milk powder	- Production	34.1	35.7	34.8	35.5	31.6	
	- Import quota	0.0	0.0	0.0	-	0.0	
	- Total import	0.0	0.0	0.0	0.0	0.0	
Prepared whey and Crude lactose	- Production	4.4	4.4	5.0	4.9	N/A	
	- MIQ permitted amount	11.91	11.87	11.73	10.81	10.58	
	- Total import	11.2	10.8	12.5	12.6	11.3	
Whey powder (fiscal year)	- Production	9.6	11.4	11.2	10.4	11.9	
	- Import quota[3]	12.2	16.1	16.4	15.9	11.9	
	- Total import	14.5	15.1	14.5	15.7	14.1	
Processed cheese	- Production	63.3	64.6	65.6	63.8	65.2	
	- Import quota[4]	0.3	0.3	0.3	0.3	0.3	
	- Total import	0.1	0.1	0.1	0.1	0.0	
Natural cheese	- Production	16.2	19.1	18.6	19.7	23.9	
	- Total import[5]	71.6	74.9	80.7	79.5	84.7	
Refined lactose	- Production	-	-	-	-	-	
	- Total import[5]	72.8	69.9	74.7	71.8	76.2	
Dairy food preparations	- Production	N/A	N/A	N/A	N/A	N/A	
	- MIQ permitted amount	4.29	4.31	6.34	7.73	8.57	
	- Total import	4.13	4.16	5.48	5.15	N/A	

[1]Special use quota only (international vessels and tourist hotels).
[2]Includes planned quota, Okinawa quota, other quota for special use.
[3]Planned quota.
[4]Quota for Okinawa, special use quota (international vessels and tourist hotels) only.
[5]Not subject to quota.

Note: 0.0 indicates less than 100 tons
- indicates nil

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 evaporated milk, sweetened condensed milk, skimmed milk powder, whole milk powder, prepared whey, whey powder, natural and processed cheese, and dairy food preparations is given in Table 2.2.

2.2.6 Imports of preserved, concentrated or sweetened milk and cream (04.02), except prepared whey, evaporated milk and sweetened condensed milk, are subject to a planned quota and some to a special quota for Okinawa. Prepared whey powder for processing into prepared milk powder for infants is included in the Miscellaneous Import Quota (hereinafter "MIQ"). Quotas permit the importation of evaporated milk only into Okinawa and for special use in hotels and shipping vessels; imports of sweetened condensed whole milk are limited to the latter special use quota. The import quota levels (permitted quota allocation under the MIQ) are established for various products within this category and are indicated on Table 2.2. N° import quotas have been allocated in recent years for whole milk powder. Quota allocations are made to LIPC and end-users under the planned quotas, to end-users and trading companies under all other quotas. Allocation to newcomers is permitted for all such products. The quotas are usually announced in June and November.

2.2.7 Processed cheese (04.04 ex) imports are permitted only under a special quota for Okinawa and a quota for specific purposes and are not permitted for the general Japanese market. The quota for specific purposes has two categories, one for international shipping vessels travelling between Japan and foreign countries, and the other for international tourist hotels. The volume of the special quota is usually announced in June and November. Allocation of import licenses is made to trading companies for both types of quota; allocation to newcomers is permitted.

2.2.8 Lactose, not containing added sugar and less than 90 per cent by weight of lactose (17.02 ex), otherwise known as "crude lactose", is included in the MIQ. Allocation of quota for this product is made primarily to manufacturers, and import levels are indicated in Table 2.2. There is no Japanese production of "crude" lactose. Imports of refined lactose (more than 90 per cent by weight of lactose) are not restricted. Food preparations not elsewhere specified, mainly consisting of milk ingredients (21.07 ex), referred to as dairy food preparations, are imported under the MIQ. Quota allocations are made to end-users and to trading companies; allocation to newcomers is permitted. Permitted import quantities in recent years are indicated on Table 2.2.

2.3 Dried Leguminous Vegetables

2.3.1 Measures concerning production of dried leguminous vegetables have been in force since 1960. Production has declined since 1960, although cultivation increased from 1981 to 1983. In 1984, MAFF, acting under the authority provided by the Agricultural Basic Law to adjust supply and demand, issued a directive on Planned Production of Legumes in Hokkaido to the governor of that prefecture. Hokkaido produces 80 per cent of total domestic production and ships 90 per cent of total domestic shipments. MAFF establishes target cultivation area for total dried leguminous vegetable production in Hokkaido for five consecutive years, based upon the draft target plan of cultivation submitted by Hokkaido in cooperation with the cooperatives and taking account of short and long-term supply and demand estimates

and price trends of legumes. The initial target area is reviewed and revised every year in light of the previous year's production level. The cooperatives then apportion targeted cultivation area to individual farmers, and are responsible for reporting any excess cultivation and generally for marketing farmer is dried leguminous vegetables. The MAFF directive establishes that farmers whose cooperatives report them in two consecutive years as exceeding target area may be penalized by removal from the list of those eligible to receive subsidies or loans from the government or from Hokkaido prefecture. Small red beans account for over half of dried leguminous vegetable production in Japan; French beans are also produced in significant quantities. Table 2.3 indicates target and actual cultivated acreage in Hokkaido and in Japan, and actual production of dried leguminous vegetables.

2.3.2 Imports of dried leguminous vegetables, excluding green beans (07.05 ex) are subject to planned quotas and to a special quota for Okinawa. The planned quotas are established for each of four categories of dried leguminous vegetables: small red beans, peas, broad beans, French beans and others. The quota for Okinawa is not divided into categories. The planned quotas are calculated in volume, then converted and published in terms of dollars. A minimum level equivalent to 120,000 tons for the quota, including the Okinawa quota, was established in FY 1984. Quota allocations are made to trading companies; newcomers may receive allocations only of the Okinawa quota. Established quota levels and actual imports under each quota are indicated in Table 2.3.

2.4 Starch and Sugar Products

2.4.1 The Agricultural Products Price Stabilization Act (hereinafter referred to as "the Price Act"), enacted in 1953, aims at assuring the minimum selling price of potatoes and sweet potatoes. In 1965, MAFF regulation "Adjustment of domestic production of potato starch and sweet potato starch", based on the Price Act, established a target for national potato and sweet potato starch production which is allocated to Prefectures. This measure requires the governors of prefectures producing potatoes and sweet potatoes for starch to elaborate production programs for potatoes, sweet potatoes, potato starch and sweet potato starch, according to the allocated quantity, and these programs must be approved by MAFF. Under the regulation, these programs are based on the national production target level, converted to acreage of, potatoes and sweet potatoes on the production target to starch processors and potato growers. Prefecture governors enforce the production restrictions on farmers producing these products. In addition, every year the federations of starch processors are required to submit their rules adjustment programs for MAFF approval. The "Outline of sales adjustment of agricultural products based on the [Price] Act", issued by MAFF, stipulates that Government approval of sales adjustment programs is to be granted only when the quantity indicated in the programs is deemed appropriate with regard to the demand for starch and to the production programs previously mentioned. The Price Act stipulates that the Japanese Government is to purchase the quantity of potato starch and sweet potato starch offered by producer federations when these are engaged in sales adjustment programs and the farmer's selling price of potatoes and sweet potatoes to the federations is above the level of prices fixed by the Price Act, when it is deemed necessary to prevent the price of starch from dropping below an appropriate level. Federations of producers not complying with the target production and sales programs are excluded from the government purchase program during periods of price declines, Table 2.4 indicates the target and actual production levels of potatoes, sweet potatoes, potato starch, sweet potato starch and all starches in Japan. Approximately 60 per cent of the potato starch and sweet potato starch produced in Japan is used for the production of "mizu-ame" (a viscous sweetener) and other sugars for Use in confectionery products and beverages.

TABLE 2.3

Dried Leguminous Vegetables

(Unit: '000 tons)

Crop Year (CrY-Oct.-Sept.) or Fiscal Year (FY)	1965	1970	1982	1983	1984	1985	1986
Target planting acreage Hokkaido ('000 ha.) (CrY)					70.0	63.0	57.3
Actual planting acreage Hokkaido ('000 ha.) (CrY)	131.8	115.2	65.1	71.0	69.4	59.4	52.6
Total actual planting area ('000 ha.) (CrY)	234.6	182.2	97.1	101.9	99.4	87.9	80.2
Domestic production ('000 tons) (CrY)	279.0	254.6	157.7	98.2	173.1	145.2	131.7
Planned import quota[1] (FY)	173.5	154.8	112.5	117.3	122.6	120.1	116.9
Okinawa quota[2]			3.7	3.7	3.7	3.7	3.7
Total actual imports[3]	148.3	153.8	143.7	143.9	124.9	119.4	131.9
Small red beans							
- Quota			28.7	33.7	27.8	11.1	23.5
- Imports			36.2	37.5	31.4	10.2	25.4
Peas							
- Quota			18.0	18.7	17.2	22.4	19.4
- Imports			21.2	25.0	19.6	22.6	26.0
Broad beans							
- Quota			16.2	12.9	13.1	16.1	15.8
- Imports			15.1	15.8	11.5	15.4	15.1
French beans and others							
- Quota			49.6	52.0	64.5	70.5	58.2
- Imports			71.2	65.6	62.4	71.2	65.4

[1]Planned quota is published in dollars converting from volume.
[2]Okinawa quota is not divided for 4 categories.
[3]Import quota and actual imports do not necessarily coincide, due to time lags, etc.

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 Okinawa is announced in June and November. Modified starches are not subject to quota. Quota levels and actual imports are given in Table 2.4. Imports of glucose and other sugars (17.02 ex) and of food preparations not elsewhere specified, mainly consisting of sugar (21,07 ex), are subject to the Miscellaneous Import Quota. In both categories, quota allocations are made to users (manufacturers) and to trading companies, and newcomers may receive quota allocations.

TABLE 2.4

Starch and Insulin, Glucose and Sugar Products

(Unit: '000 tons)

Starch year (Oct.-Sept.)	1965	1970	1983	1984	1985
Planted area - Total ('000 ha.)	469	288	193	195	196
Production of potatoes and sweet potatoes	9,011	6,175	4,945	5,107	5,254
- of which used for starch	3,670	2,313	1,872	2,008	2,078
Largest production level - potato and sweet potato starch	700	500	400	400	400
Actual production - Potato and sweet potato starch	800	474	358	400	410
Total starch production	1,159	N/A	N/A	N/A	2,260
Starches					
Import quota[1] (FY)	5.0	43.7	136.2	144.4	150.8
Actual imports[1] (CY)	4.0	41.0	93.0	129.0	124.0
Glucose and other sugars					
Production			130	128	129
Permitted imports (FY)			0.031	0.033	0.060
Actual imports (CY)			0.004	0.007	0.021
Sugar food preparations					
Permitted amount (FY)			2.90[2]	0.51	0.45
Actual imports[2] (CY)			0.96	0.75	1.54

[1]Include MIQ and Okinawa quotas and imports

[2]Include items consisting of sugar less than 50 per cent by weight, liberalized in 1984

2.5 Groundnuts

2.5.1 Measures concerning groundnut production have been in force since the 1960's. Area planted to groundnuts has declined since that time. Production measures were reinforced in 1984 as programs to reduce rice cultivation increased farmers' interest in peanut production. Under the Agricultural Basic Law, MAFF directed the Principal Groundnut-Producing Prefectures Liaison Council (composed of eight prefectures accounting for 94 per cent of total domestic production) to implement restrictive measures on the production of groundnuts. Before the annual seeding period, MAFF determines the desired planting area for the eight prefectures, based upon cultivation plans submitted by the eight prefectural governments, in cooperation with producer associations, and taking account of long-term supply/demand projections and short-term trends such as groundnut prices. The Government's decision regarding target planting area is then given to the Liaison Council, and subsequently to the member prefectures and to the agricultural associations and cooperatives. The associations and cooperatives then apportion total targeted cultivation area for each prefecture to individual farmers. Cooperatives are responsible for reporting any excess cultivation and generally for marketing farmers' groundnuts. Guidelines are also set by MAFF and the governments of the eight prefectures, which are authorized by the Agricultural Cooperative Law to supervise agricultural cooperatives. In the case of farmers whose cooperatives report them in two consecutive years as exceeding their target area, the MAFF directive indicates that such measures may be taken as removing the farmer from the list of those eligible to receive subsidies or loans from the Government or from the prefecture. The target cultivation area as well as actual cultivation area and production levels in Japan are indicated in Table 2.5.

2.5.2 Groundnuts (12.01 ex) are subject to a planned quota and to a special quota for Okinawa. The quota is allocated to trading companies, based on their past performance. Allocation of the Okinawa quota to newcomers is permitted. A minimum import quota of 55,000 tons was established in FY 1984. The actual annual import quota, as well as actual imports, are indicated in Table 2.5. Processed groundnuts are not subject to import restrictions.

2.6 Beef Products

2.6.1 The Law Concerning Price Stabilization of Livestock Products established a price stabilization scheme for beef with the aim of expanding domestic beef production and consumption. The price stabilization system is operated by the Livestock Industry Promotion Corporation (LIPC) , which purchases domestic beef at central wholesale markets whenever the price of beef falls, or is likely to fall, below the minimum stabilization price, and which sells domestic as well as imported beef whenever the price exceeds, or is likely to exceed, the maximum stabilization price. LIPC also releases beef to the market when the price of beef is within the stabilization range in its efforts to stabilize the production and consumption of beef. Data on Japanese production of beef and beef products is contained in Table 2.6.

TABLE 2.5

Groundnuts

(Unit: '000 ha.)

Calendar Year	1965	1970	1983	1984	1985	1986
Target planting area (8 prefectures)				27,3	26,8	25,3
Actual planting area (8 prefectures)	59,3	55,7	27,8	26,9	25,1	22,7
Actual planting area - Nationwide (CrY: Oct.-Sept.)	66,5	60,1	29,7	28,7	26,8	24,3

(Unit: '000 tons)

Production - In-shell:	136,6	124,2	49,4	51,3	50,5	46,6
- Shelled:	80,7	78,3	31,2	27,4	31,9	29,4
Import quota[1] (FY)	27,0	54,0	62,4	56,0	58,0	55,3
Actual imports[1]	25,1	59,0	59,8	62,9	57,2	56,5

[1]Shelled. Includes Okinawa quota of 1,000 m.t./year.

TABLE 2.6

Prepared Beef

(Unit: '000 tons)

Fiscal year	1982	1983	1984	1985	1986
Domestic production:					
of beef	483	505	539	556	559
of prepared beef products	148	159	154	153	N/A

(Unit: tons)

Planned quota (boiled beef)	4,700	4,700	4,700	4,700	4,500
Actual imports of boiled beef	4,362	4,154	4,009	4,422	N/A
MIQ allocations	2,524	2,554	2,825	2,870	2,920
Actual imports under MIQ	2,301	2,474	2,318	2,394	N/A
Okinawa quota (canned beef)	1,100	1,100	1,100	1,100	1,100
Actual imports into Okinawa	935	716	787	643	N/A

2.6.2 LIPC maintains monopoly rights, based on the Livestock Products Price Stabilization Law, to import beef, whereas some categories of beef and beef products may be imported by users and traders. The tariff category to meat of bovine animals, prepared or preserved (16.02 ex) , includes a wide range of products such as seasoned beef, boiled beef, canned beef, etc. With respect to these products, a planned quota has been established for boiled beef, canned beef enters Okinawa under its special quota, and all other prepared beef products are included in the Miscellaneous Import Quota (MIQ) . Allocation of the Planned Quota, Okinawa Quota and MIQ, is made to LIPC, end-users and traders based on their past performance. The import quotas ("permitted imports" under the MIQ) and actual import amounts are indicated in Table 2.6.

2.7 Fruit Products

2.7.1 Under the Fruit Growing Industry Promotion Special Measures Act, the Government has promulgated the Basic Policy for Fruit-Growing Industry Promotion, which determines target levels of production in line with the long-term prospects of demand for fruit. The Regulation on long-Term Prospects of Demand of Fruit and various directives by MAFF on control of new plantings of citrus, apples, grapes, peaches and pineapples, require the establishment of production plans in accordance with the Government's policy. Programs to control new plantings were introduced in FY 1974 for Unshu-mikan (oranges), in 1981 for grapes, in 1982 for pineapples and peaches, and in 1984 for apples. For apples and grapes, the prefectures are to prepare planting programs for five consecutive years in line with the target national acreage proposed by MAFF, and report the actual planting acreage every year. For peaches, the target planting acreage is established directly by MAFF. Okinawa prefecture establishes the target planting area for pineapple at a level not exceeding the 1985 planted acreage and subject to MAFF approval. The governors of the prefectures give guidance to municipal and local authorities and to farmers' co-operatives to ensure that the target planting programs of each prefecture

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 amounts may be deleted from eligibility for government subsidies or loans.

2.7.2 There is no differentiation in Japanese production of fruits destined for fresh consumption or for processing. More than 75 per cent of Japanese production of most fresh fruits are consumed fresh, with the notable exceptions of Unshu-mikan oranges (30 per cent processed), and pineapples (essentially all processed, no more than 10 per cent into juice, remainder canned). Data on target and actual planted acreage, production of fresh fruit and of various fruit products is given in Table 2.7.1.

TABLE 2.7.1

Fruit products

(Unit: ha.)

Calendar year		1982	1983	1984	1985	1986
Planting acreage:						
Apples	- Target			R	R	54,700
	- Actual	53,100	53,900	54,300	54,400	54,700
Grapes	- Target	L	L	L	L	28,400
	- Actual	29,600	29,300	28,800	28,400	28 000
Peaches	- Target	L	L	16,100	16,100	16,100
	- Actual	16,300	16,100	15,700	15,300	15,000
Pineapples	- Target	L	L	L	L	2,260
	- Actual	2,870	2,470	2,230	2,260	2,160
Unshu-,,,mikan	- Target	127,000	120,000	118,000	115,000	111,000
	- Actual	125,900	120,700	116,400	115,000	108,400
Other, citrus[1]	- Target					
	- Actual	49,300	49,900	50,080	49,900	49,640

(Unit: '000 tons)

Production of: (Crop years)					
Apples	925	1 048	812	910	986
Grapes	338	324	310	311	301
Peaches	228	237	216	205	219
Pineapples	52	44	36	41	37
Unshu-mikan	2,864	2,859	2,005	2,491	2,168
Other citrus[1]	808	871	801	800	806

(Unit: tons)

Fruit purée and paste::					
Production[3]		1,701	9,720	7,113	9,208
Planned quota (FY)		3,000	2,000	2,000	2,000
MIQ allocation[2]		-	112	-	4
Imports[3]		585	656	1,023	1,167

TABLEAU 2.7.1 (cont.)

Fruit products

(Unit: ha.)

Calendar year	1982	1983	1984	1985	1986
Fruit pulp:					
Production[3]		5,204	2,529	2,279	3,604
Import quota (FY)		5,072	2,000[4]	2,000[4]	2,000[4]
Imports		2,979	995[4]	959[4]	974[4]
Fruit juice:					
Production of juice of:[5]					
Apples	18,544	28,352	18,516	31,148	29,865
Grapes	1,231	1,601	1,106	883	919
Pineapples	1,953	2,217	2,155	2,055	2,207
Peaches	2,282	2,629	1,495	1,190	1,158
Total domestic production	24,010	34,799	23,272	35,276	34,149
Planned import quota (FY)[6]		4,500	6,500	11,500	8,000
MIQ permitted amount		2,738kl	2,666kl	3,179kl	4,412kl
Imports		3,200	3,603	9,632	7,458

[1]Other citrus includes Natsu-mikan, Navel orange, Hassaku and Iyokan
[2]No applicant for quota in 1983 or 1985
[3]Figures include those products liberalized in 1984
[4]Figures exclude those products liberalized in 1984
[5]Equivalent to one-fifth concentration
[6]Including minimum quotas for apple and grape juices

R = Restriction of new planting

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	5,206	3,149
Concentrated pineapple juice	Planned quota (FY)	-	-	-	500t
	Actual imports (CY)				
Concentrated other non-citrus juice	Planned quota (FY)	1,000t	1,000	1,000	1,000
	Actual imports (CY)	-	98t	340	29
Juice excluding orange and pineapple	Miscellaneous quota (FY)	2,000kl	1,600	1,500	1,600
Concentrated berry juice for manufacturing use	Miscellaneous quota (FY)	2,000kl	1,200	1,200	1,296
Fruit juice for baby food	Miscellaneous quota (FY)	430kl	782	1,373	1,516
Grape juice	Other quota for specific purpose (FY)	2kl	4	4	9
Apple juice	Other quota for specific purpose (FY)	-	-	-	16
Pineapple juice	Other quota for specific purpose (FY)	306kl	282	299	267

*Included emergency quota of 5,500 tons.

Note: 1. Import quota and actual imports do not necessarily coincide, due to time-lags.

2. Although all the actual allocation of MIQ or other quota for specific purpose are utilized, actual imports are not statistically available on an annual basis.

3. Concentrated juices other than berry juice for manufacturing use are equivalent to 1/5 concentrate.

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 actual import levels.

2.7.4 Fruit juices (20.07 ex, excluding citrus and tomato juice), are subject to various types of quotas. Concentrated juice of apples, grapes, pineapples and other non-citrus fruits are subject to a planned quota. Planned quota allocations are made to users, and newcomers are granted allocations. Other, non-concentrated fruit juices (except orange and pineapple juice) , as well as fruit juices for baby food use and concentrated berry juice for manufacturing use, are included in the Miscellaneous Import Quota. Single-strength orange, pineapple, grape and apple juice are subject to a special quota for hotel, shipping and airline use only. Announcement of the planned quota is usually made in February for concentrated apple juice (1,000 ton minimum annual quota since 1984); in January for grape juice (3,500 ton minimum annual quota since 1984); in December for pineapple juice, and in July for other non-citrus juices. The MIQ allocations are made to end users and trading companies, and allocation to newcomers is permitted only for juice for baby food use and for concentrated berry juices for manufacturing purposes. Import quotas and actual imports of the various types of fruit juices are given on Table 2.7.2. There are no restrictions on the importation of fresh fruits, other than oranges and tangerines, into Japan.

2.8 Preserved Pineapple

2.8.1 Pineapple production in Japan occurs almost exclusively in Okinawa Prefecture, and over 90 per cent of the pineapple production is destined for processing (primarily canning) as opposed to fresh consumption. Imported frozen pineapple is also canned in Japan. Pineapple production has been subject to the Basic Policy for the Fruit Growing Industry Promotion. In FY 1982, MAFF provided administrative guidance to the Governor of Okinawa to restrict new planting. Directives issued by MAFF in FY 1986 on "Guidance to be Given Immediately in Planting of Fruit Trees", "Production control of canned pineapples" and "Stabilization of Demand and Supply of Canned Pineapples" urge the Governor of Okinawa to establish a planting plan for five year periods, with target cultivation acreages, and to report the results every year. This target cultivation acreage is allocated through municipalities and Agricultural Cooperative Associations to producers or groups of producers. In addition, since FY 1986 the Governor and concerned associations have been required to submit annual shipping targets of raw pineapple for canning for government approval. Farmers who cultivate and ship in excess of the target amount may be deleted from the list of those eligible to receive subsidies or loans from the government. Target and actual cultivated area for pineapple, as well as pineapple and canned pineapple production, are indicated in Table 2.8.

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

[1]Target growing area set at 2,260 ha. for each year from FY 1986 - FY 1990
[2]Target 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 "Execution of Projects for the Production Control of Vegetables for Processing Use and Processed Vegetable Products", issued in 1981 by MAFF, deals with restrictions on plantings of tomatoes for processing use. Processors are also to restrict the production of tomato juice, tomato ketchup and tomato sauce. MAFF determines target production levels for two categories of tomato products: tomato juice, and tomato ketchup and sauce. These desired production levels are communicated through the National Council for Production Control of Tomato for Processing and Processed Tomato Products to agricultural cooperatives and tomato processors. The cooperatives make contracts with the processing plants with regard to their cultivation acreage and prices. Tomato processors are obliged to buy all the tomatoes produced in the contracted areas. Should a farmer ship out tomatoes produced from an area in excess of the allocated cultivation area, the trading prices of all tomatoes already shipped out by his agricultural cooperative will be reduced by 30 per cent.

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 for Okinawa. Prior to 1983, these products were included within the Miscellaneous Import Quota. A separate quota exists for tomato juice, whereas tomato ketchup and sauce are aggregated in another quota (see Table 2.9 for quota levels and actual imports) . Quotas are allocated to users and to trading companies, and allocation to newcomers is permitted. There are no import restrictions on fresh tomatoes. Imports of tomato paste and puree were exempted from quota restrictions in 1972.

TABLE 2.9
Tomato juice, ketchup and sauce

Fiscal year	1980	1981	1982	1983	1984	1985	1986
Planted area for tomatoes for processing:							
Target (ha.)		4,300	3,200	2,400	2,200	2,200	
Actual (ha.)	5,288	4,270	3,180	2,329	2,004	2,162	
Tomatoes for processing ('000 tons)	360	280	220	130	140	140	
							(Unit: tons)
Tomato juice							
Production: Target		165 000	125 000	125 000	125 000	125 000	
Actual	187,300	160,000	123,900	110,900	110,300	121,000	
Import quota:				3 090	4 635	5 150	5 150
of which Okinawa				464	690	690	690
Actual imports (CY)*				141	71	230	113
Tomato ketchup and sauce							
Production: Target		185,000	185,000	185,000	175,000	160,000	
Actual	160,000	170,000	179,500	182,900	173,000	154,900	
Import quota (ketchup and sauce)				3,000	4,500	5,000	5,000
of which Okinawa				1,100	1,660	1,660	1,660
Actual imports* (CY) Ketchup				1,066	1,253	1,312	1,659
Sauce (CY)				602	471	455	435
Import of ketchup and sauce combined				1,668	1,724	1,767	2,094

*Includes into Okinawa

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 States also held, as subordinate points, that the failure of Japan to publish adequate and timely information on quota volume or value was inconsistent with Articles X and XIII, and that the import quotas were not administered in a reasonable manner as required by Article X:3. The United States requested the Panel to recommend that Japan take action immediately to eliminate all of its quantitative restrictions on the imports of these twelve categories of products.

3.1.2 Japan did not refute that quantitative restrictions were applied to the twelve items in question but maintained that these were justified exemptions from the general prohibition on quantitative restrictions under the provisions of Article XI:2 or Article XX(d) . In addition, all the relevant laws, regulAtions and administrative rulings were published in such a manner as to he consistent with the requirements of Articles X:1 and XIII:3, and the administration of the quotas was in full conformity with Article X:3. The claim of prima facie nullification or impairment of benefits accruing to the United States was unfounded as there existed no contravention of the relevant GATT articles in relation to those import restrictions. Furthermore, there was no proof of actual nullification or impairment supported by facts or statistics for individual items. In addition, Japan noted that other relevant factors, including the practices of other countries and the special characteristics of the agricultural sector, needed to be considered. Japan, therefore, requested the Panel to reject the United States' request.

3.2 Article XI

3.2.1 Japan did not contest that the restrictions applied to the agricultural products in question were quantitative restrictions in terms of Article XI:1. Japan considered, however that with the exception of prepared beef products (16.02 ex), in each and every case these quantitative restrictions were exempt from the prohibition contained in Article XI:1 by virtue of the provisions of Article XI:2(c)(i).

3.2.2 The United States did not consider that Japan's import quotas could be justified under the carefully circumscribed series of exceptions provided by Article XI:2. Any exceptions to the ban on quantitative restrictions had to be construed as narrowly as possible, and all criteria for such an exception had to be met. The negotiating history of Article XI:2(c)(i) indicated that it was intended as a means of dealing with temporary oversupply problems, yet all of the quotas in question had been in place for over 40 years. The United States believed that Article XI:2(c)(i) did not exempt quantitative restrictions imposed to protect domestic support prices. Japan limited supplies to raise prices rather than setting a price support level, with the result that the burden of price support was effectively shifted from the government to the import market. Furthermore, Article XI:2(c) was not intended to provide a means of protecting the domestic processing of agricultural products but rather to serve the particular problems of a multitude of Small and unorganized farmers and fishermen. It was thus applicable only with respect to agricultural or fisheries products imported in any form, and only where, import restrictions were applied to the fresh product.

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 h-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" should be interpreted on the basis of criteria credible to those in the trade, not just by mechanical criteria such as changes in quality. Japan also pointed out as an example that the relation between potatoes for starch and starch was the same as that between sugar cane and raw sugar, which was undoubtedly an agricultural product. Furthermore, the Panel report regarding "EEC Programme of Minimum Import Prices, Licenses and Vegetables" (L/4687) could provide significant precedent in examining the perishability on a certain range of products. As for the United States claim that import restrictions on the fresh agricultural product was a prerequisite to the import restriction on the processed form of such product, Japan considered that the term "the restriction on the fresh product" in the Note Ad Article XI:2(c) referred to the governmental measure on the fresh product to restrict its domestic production or marketing. In the case of import restrictions on the processed agricultural product where import of the fresh product was not restricted, the absence of import restrictions on the fresh product did not nullify the domestic production restriction on these fresh products due to high transportation cost, etc.

3.2.5 The United States recalled that the rationale for Article XI:2(c)(i) import restrictions was that they were ancillary to a domestic scheme which restricts production or marketings. Article XI:2(c) (i) required that there be "governmental measures which operate … to restrict the quantities of the like domestic product permitted to be marketed or produced …" The United States cited the Havana Reports with regard to interpretation of the word "restrict": "the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have obtained in the absence of restrictions." Since the purpose of these limitations was to preserve the relationship between imports and domestic products, the United States argued that "in the absence of restrictions" meant in the absence of both domestic production controls and import controls. For many of the twelve items, production had not been effectively controlled. In many cases, the Japanese measures focused on planted acreage rather than on production per se, but new technologies, improved varieties and the vagaries of weather all resulted in fluctuating and often increasing production levels despite acreage limitation. The United States also noted that Japan's calculations of potential production were over simplistic. The calculations did not consider the effects of price on production, ignored alternative production choices, and were often based on data from periods in which trade was restricted. It argued that what was being restricted, therefore, was not real production but an optimistic projection of what production could be. Furthermore, the "governmental measures" maintained by Japan were in many cases non-legally binding administrative guidance. In legal terms, they were only an appeal for private measures to be taken voluntarily by private parties. Restriction amounts were decided in cooperation with producer organizations. Persistent inquiries and bilateral consultations had not uncovered any document with concrete guidelines directed to farmers and specific sanctions for not following the guidelines. Since compliance was voluntary, production had often increased, or failed to decline, while imports were being restrained. In addition, the United States noted that although the import restrictions had been in place for over 40 years, in most cases the measures affecting domestic production were very recent.

3.2.6 Japan replied that the United States interpretation of effective restriction of production was unfounded. The drafting history of Article XI:2 did not support the view that "in the absence of restrictions" in this place meant in the absence of both domestic production controls and import controls. Furthermore, to the extent that governmental measures were "effective" it was irrelevant whether or not the measures were mandatory and statutory. In order to restrict the volume of production, it was sufficiently effective to reduce cultivation area, a fundamental element for production. The Japanese governmental measures, particularly those relating to agricultural policy including production restrictions, were effectively enforced by the detailed directives and instructions to local governments and/or farmers' organs. They were followed exactly by farmers supported by the appropriate penalties in case of non-compliance and by the full cooperation of local governments and farmers organizations as well as through the self-disciplinary functioning of rural agricultural communities. Such centralized and mutually collaborative structure of policy implementation was the crux of government enforcement in Japan.

3.2.7 The United States stressed that the domestic supply management scheme had to concern the "like product" of the restricted imports. A product could not be considered a "like product" merely because it was a competing product. Nor did "like product" refer to an article industrially processed from the fresh primary product And stored in a non-perishable form. Glucose and other sugars were thus not like products to starches or potatoes; fruit juices were not like products to fresh fruit produced primarily for fresh consumption; canned pineapple was not a like product to fresh pineapple.

3.2.8 Japan noted that all Japanese import restrictions were established on the basis of a like product link with fresh products under production and/or marketing restrictions as further explained in its item by item arguments. Japan did not claim an "upstream/downstream" relationship as the definition of a like product relationship, but noted that the established interpretation of "the like product" had not yet been found, except in some limited cases. The spirit of the legislation as well as the market realities, such as the purpose of use, economic value, and direct substitutability of the product, should be taken into account in judging the realm of like product relations.

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. For example, import restrictions on tomato ketchup and sauce exceeded the level necessary to secure enforcement of production controls on the fresh product because there were no import controls applied to earlier processed forms of the product.

3.2.10 Japan agreed that import restrictions on processed products should not exceed the level of restrictions actually necessary for enforcement of governmental measures restricting production or marketing of the primary product. All the Japanese import restrictions on processed agricultural products were in parallel with the enforcement of actual restrictive measures on domestic production.

3.2.11 The United States noted that the last paragraph of Article XI:2 explicitly required that any restrictions applied under Article XI:2(c)(i) could not be such as would reduce the total of imports from all sources relative to the total of domestic production which might reasonably be expected to exist in the absence of restrictions. In determining this proportion, due regard should be paid to the proportion prevailing in a previous representative period and to any special factors influencing the trade. The United States also noted that because the Japanese measures had been in place for such a long time, the relative efficiency of producers and other "special factors" (including advanced technology, new products, and high quality branded products) were more important than historic performance in determining appropriate market shares. For those commodities whose domestic support prices were above world levels, growth in unrestricted exports to Japan could be expected until the Japanese support price and the world price converged. Elimination of Japanese quotas on other agricultural products had been followed by significant increases in imports. The United States further maintained that the Japanese approach did not view imports as a natural and welcome source of competition, but relegated them to the role of residual supplies when domestic supplies fell short, or as supplies of raw materials in the most basic form possible. Where there were unfilled quotas, particularly in spite of large gaps between Japanese and world prices, it merely indicated all the more the profoundly disruptive effect of quotas on import trade. The Japanese import restrictions held the share of imports from all sources below that which would prevail in the absence of restrictions, thus changing the competitive relationship between imports and domestic production (a relationship protected by Article XI). Article XI:2 further required that advance public notice be given of any quota, to reduce to a minimum the inevitable commercial uncertainty and consequent damage to trade generated by a quota.

3.2.12 Japan observed that because the quotas in question had been maintained since Japan's accession to the GATT, it would be non-conclusive and difficult to calculate objectively 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. There was no evidence, considering the lack of competitiveness of most of the United States products, that the United States export share of the Japanese market would meaningfully increase if the quotas were eliminated. There were, indeed, many products for which imports had declined following liberalization. Adequate market access was provided for all the products in question, as evident from the rate of unfilled quotas. Furthermore, the frequent establishment of minimum quota levels assured that imports were not considered as residual supplies.

3.2.13 The United States also considered that the rationale for Article XI, like the rationale for Article III, is to protect expectations regarding the competitive relationship between imports and domestic products. Article XI applies regardless of whether there is a negotiated tariff concession; Article XI:1 does not mention trade effects, but categorically bans quantitative restrictions. The distortion caused by import quotas -- particularly quotas as long-standing as these -- was recognized by the Panel on Japanese Measures on Imports of Leather, which stressed that the existence of a quantitative restriction should be presumed to cause nullification or impairment, not only because of any effect if had on the volume of trade but also because of the commercial uncertainty and cost generated thereby. Following the reasoning of the recently-adopted Panel decision on United States -- Taxes on Petroleum and Certain Imported Substances, measures inconsistent with Article XI would result in ipso facto nullification or impairment of benefits accruing to the United States under the General Agreement."

3.3 State-trading Operations

3.3.1 Japan noted that sweetened condensed whole milk, sweetened condensed skimmed milk, whole milk powder, skimmed milk powder, whey powder, buttermilk powder, and beef were subject to monopoly trading by LIPC. LIPC was a state-trading enterprise under Article XVII. It could be considered as a marketing board, although it was not so named. LIPC was independent from the government and autonomously conducted its routine business. Government approval of other aspects of its operations were necessary to ensure that it adequately fulfilled the purpose of the law. With regard to beef, Japan noted that the existence of some exceptional cases in which beef was not imported by LIPC (i.e. for Okinawa use, school lunches, etc.) did not affect the monopolistic nature of the LIPC's beef import operations. LIPC fell within the purview of a state trading enterprise described in paragraph 1(a) of Article XVII since LIPC had been granted the special privileges of import monopoly on "designated dairy products" as well as on "beef", by law. Japan noted that the general principles of non-discriminatory treatment applied to the LIPC's operation. It considered the United States' assertion that LIPC's operation should be subject to the obligation of Article III (National Treatment) to be groundless.

3.3.2 The United States observed that in practice LIPC actually imported only about 50 per cent of Japanese beef imports, including bovine internal organs, and had no role at all in the importation of prepared and preserved beef. The import restrictions on the beef category at issue (16.02) consisted of an import quota under the authority of the Import Trade Control Order. In addition, LIPC was so closely controlled by the Ministry of Agriculture, Forestry and Fisheries that it must be considered a part of the government itself and thus subject to the provisions of Article III rather than Article XVII. However, even if it were a state-trading enterprise in terms of the General Agreement, it was nonetheless subject to Article XI, especially in as much as it laid down regulations governing private trade.

3.3.3 Japan indicated that it had a different interpretation of the relationship between Article XI:1 and a state-trading monopoly, based on the drafting history of state-trading provisions. The London Draft of the Charter of the International Trade Organization required that state-trading be conducted, as far as possible, under the same conditions as private trading. There was an obligation of non-discrimination and of negotiation of maximum margin. The latter was expanded in the Geneva Draft to oblige negotiation of a maximum import duty or another mutually satisfactory arrangement. In addition to those obligations, the US, London, New York , and Geneva drafts all stipulated the obligation of a state-trading monopoly to "import such quantities of the product as will be sufficient to satisfy the full domestic demand". In Japan's view, it was through this obligation to import a certain level, rather than obliging the prohibition of quantitative restrictions, that the drafters foresaw removing the restrictive effects on imports of products subject to state-trading monopolies. At the Geneva session it was said that:

> "… if the monopoly does not satisfy domestic demand it will be in a position, as it were, automatically to apply quantitative restriction. It does not need to do anything beyond that. Therefore, … it is necessary, if you are to prevent a kind of quantitative restriction being applied almost automatically by monopoly, to lay down that the monopoly shall satisfy domestic demand".

These particular provisions (obligations to negotiate protective margins and to satisfy domestic demand) were not incorporated into the General Agreement, which provides for non-discriminatory treatment, recognition of the importance of negotiations to reduce obstacles to trade by state-trading enterprises, and obligations to notify products subject to state-trading and import mark-ups. Since the GATT did not stipulate the obligation of state-trading monopolies to satisfy domestic demand laid down in the drafts of the International Trade Organization, which corresponded to the obligation to abolish quantitative restrictions in the cases of private trade, Japan maintained that prohibition of quantitative restrictions as provided for in paragraph 1 of Article XI of the GATT did not apply in the case of a state-trading monopoly.

3.3.4 The United States stated that note ad Articles XI, XII, XIII, XIV and XVIII clearly indicated that the operation of a quantitative restriction through a state-trading enterprise did not make it any less a restriction nor any less subject to Article XI. If this arrangement were found to be GATT consistent, Japan would be able to do through LIPC what it could not legally do by import quota. The Note cited reflected that the drafters of Article XI were aware of, and wished to prevent, the possibility of such nullification of Article XI:1 through state trading. Furthermore, in the event of any conflict, the specific Note Ad Articles XI, XIII, XIV, XV and XVIII would prevail over any general exception provisions in Article XX."

3.3.5 Japan did not agree with the United States claim that the note ad Article XI was meant to impose obligations on a member state to eliminate the quantitative restrictions as stipulated in Article XI:1 of the GATT. During the London Session discussions on balance of payments it was recognized that exceptions concerning restrictions on imports under private trade to safeguard the external financial position should be applied mutatis mutandis to the restriction of imports by a state trading organization, (paragraph 6 of Article 26). The wording "by state-trading organizations, etc" was later replaced with "made effective through state-trading operations" with no intention to alter the substance of the meaning. Indeed, the idea behind the provision was amply illustrated by the following statement at the Geneva Session: "If you will look at Article 26 (of the New York Draft) which deals with the problem of balance of payment difficulties, you will see at the end Paragraph 7 it says "Throughout this Section the phrase 'import restrictions' includes the restriction of imports by state-trading enterprises to an extent greater than that which would be permissible under Article 32". In other words, the state-trading enterprise can do just what, under private trading, would be accomplished by means of import restrictions for balance of payments purposes." The Tariff Agreement Committee of the Geneva Conference adopted as the third paragraph of the provision equivalent to Article XI of GATT, a paragraph which differed from the note ad Article XI of GATT only in that it contained no mention of Article XVIII of GATT. This paragraph was later transferred to Annex I (Notes and Supplementary Provisions) of the GATT. Japan thus considered that the note ad Article XI was a provision just to allow an exception for state-trading operations to impose trade restrictions beyond the disciplines stipulated under Article II:4 and XVII in parallel with the admittance for private-trading to be exempted from the obligation under Article XI:1 in case there existed reasons under Article XI:2.

3.3.6 The United States argued that if Japan wished to raise the drafting history of the Havana Charter, it should also be noted that in Article XXIX of the General Agreement, contracting parties had undertaken to observe, to the fullest extent of their executive authority, the general principles of Chapters I to VI inclusive and Chapter IX of the Charter pending their acceptance of it. Thus, even though certain provisions of the Charter had not been explicitly carried over to the General Agreement. It was pertinent in this connection that one of the provision applied through Article XXIX was Article 31:5 of the Charter, alluded to by Japan, which provided that "with regard to any product [subject to an import monopoly], the monopoly shall, wherever this principle can be effectively applied and subject to the other provisions of this Charter, import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product, account being taken of any rationing to consumers of the imported and like domestic product which may be in force at the time.

3.3.7 Japan observed that Article XX(d) also provided an exception to Article XI for state-trading operations. Article XX(d) stipulated that: "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures … 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 …" It was at the London session of the Preparatory Committee that the origin of this provision appeared. At that session, "there was general agreement that restrictions or prohibitions on private trade might be imposed in order to protect the position of state-trading enterprises …"

(p. 12, London Report). The London draft for the Charter specifically stipulated an exception to its Article 25 on the General Elimination of Quantitative Restrictions as follows:

"(2) The provisions of paragraph (1) shall not extend to the following:

(g) Import and export prohibitions or restrictions imposed on private trade for the purpose of establishing a new or maintaining an existing monopoly of trade for a state-trading enterprise operated under Articles 31, 32 and 33."

At the Geneva session, this paragraph regarding the exception allowed for the enforcement of state-trading monopolies was transferred to Article 37(g) of the New York Draft, i.e. the origin of the current GATT Article XX(d). On the basis of this drafting history, Japan considered that Article XX(d) was a provision confirming that import and export prohibitions or restrictions on private trade were inevitable in order to establish a new or maintain an existing monopoly of trade for a state-trading enterprise, and that such prohibitions or restrictions were allowed as an exception to the GATT.

3.3.8 The United States argued that if an import restriction maintained by LIPC was prohibited by Article XI:1 and not justified under Article XI:2, Article XX(d) could not be invoked as a means of enforcement of it. Article XX(d) on its face only applied where there were import monopolies, not any other form of state-trading related restrictions. However, Article XX(d) could not be used to enforce a GATT-inconsistent import monopoly such as one inconsistent with Article II:4. Use of Article XX(d) in this manner to enforce at the border measures that were in themselves GATT-inconsistent, was clearly inconsistent with the requirements in the preamble of that article. No other party maintaining import restrictions through state-trading agencies had ever attempted to make this argument; waivers under Article XXV. Acceptance of the interpretation espoused by Japan would permit any government to restrict imports or exports of any agricultural or industrial product as long as the restriction was operated through a state-trading enterprise. The United States urged the Panel to reject this line of argument.

3.4 Product-Specific Arguments

Dairy Products

3.4.1 The United States observed that imports of processed cheese were not permitted into Japan except for the hotel trade and a small quota for Okinawa. This amounted to a prohibition of imports for the general Japanese market inconsistent with Article XI:2(c)(i). Furthermore, Japan did not maintain an effective supply management program limiting the production of milk and milk products. The government program covered only milk for processing and not total milk production, and had no mechanism to prevent the diversion of milk from one use to the other. Both milk production and national quota levels had increased every year except 1986, and milk production had consistently exceeded the national target levels both for total milk production and milk for processing under the deficiency payment scheme. Japan's hypothetical projections of production potential were statistically invalid, omitting such relevant factors as feed costs, capital costs, and the fact that Japanese support prices were almost three times higher than the world price. The prefectural organizations distributed the full amount of payment from fluid milk, processed milk in quota, and processed milk out of quota in a lump sum payment to the producer cooperatives, which passed these payments on to farmers on an average basis. N° individual farmer could perceive the financial consequences of his over production. The occasional dairy cow culling program financed by the LIPC had no requirements for producers to stay out of milk production for any period of time, and so operated to finance the replacement of less productive cows with higher producing ones.

3.4.2 Japan considered that it was not proper to discuss import amounts on the basis of each individual dairy product because of their mutual substitutability and reversibility. In the context of the requirement under Article XI:2(c), all the imported milk products should be treated as a whole in terms of milk equivalent. In 1986 the milk equivalent of imported dairy products amounted to 51% of the domestic manufacturing milk production plus the milk equivalent of imports. The National Ceiling Quantity under the deficiency payment for manufacturing milk and the target quantity system that allocated the whole production of raw milk, had been effectively enforced to restrict to a large extent the production potential of raw milk in Japan. As for the National Ceiling Quantity, in FY 1986 the amount was maintained at the same level as previous years and decreased in FY 1987, while the amount of the target quantity was decreased in two consecutive years, FY 1986 and FY 1987. Potential milk production had been projected on the basis of production from FY 1975, when the influence of the oil crisis had diminished, to FY 1978, just before production controls based on target levels were implemented. These estimates were double-checked by those obtained if potential production were calculated on the basis of estimated number of herds and estimated yield. Therefore, estimates of production potential were adequately accurate. Taking account of the decreased feed and capital costs, and the reduced support price from 1979 to 1986, would result in an even greater production potential. Potential milk production had risen rapidly due to increased productivity and producers' aspirations to expand production. The ceiling quantity for deficiency payments had been established at about one half of potential production, and as a result, actual production was much lower than potential production for manufacturing milk. The National Ceiling Quantity had scarcely been increased and was reduced in FY 1987. Manufacturing milk produced in excess of the ceiling quantity was not eligible for the deficiency payment and the low prices thus received for this milk virtually prohibited its continued production. Even the most efficient producers would have difficulty in covering their production costs without deficiency payments. Furthermore, the surcharge on excess production and reduction of the subsequent quota allotment operated as effective penalties on over production. The actual production of milk in excess of the target and ceiling quantities was insignificant in light of the unexpected stagnation in demand for drinking milk and the ambitious policy goals of limiting production to less than half of its potential level. Judging from these facts, it was apparent that production restrictions had been working effectively.

3.4.3 The United States considered that Japan's import quotas were maintained for the purpose of protecting the domestic processing industry. Processed cheese, lactose, non-fat dry milk and dairy food preparations could not be considered as products in an early stage of processing and still perishable. Processed cheese had a shelf-life of up to 24 months under refrigeration and could be maintained longer in frozen storage. Properly stored, lactose (whether crude or refined) would maintain its quality without deterioration for years. Furthermore, processed cheese was not subject to any form of domestic supply management. There were no import quotas on natural cheese, which was equally a milk product, and the "necessity" of import controls on processed cheese was thus questionable. On the other hand, Japan provided a tariff quota with duty-free access for natural cheese to be mixed with Japanese cheese in the production of processed cheese. The Japanese Government had promoted processed cheese production and subsidized construction of modern processed cheese plants. Lactose was a by-product of the cheese-making process and was not produced in Japan; it did not compete directly with milk, and could not be used in foods and feeds as was most whey powder. It was thus difficult to understand the need for import quotas on that product. Japan had argued that dairy products were reversible and substitutable, but most of such products were not substitutable; for instance, butter could not be used in cattle feed. The United States further observed that very few imports of dairy products were handled through LIPC. In the LIPC "designated" dairy products, imports could take place only if domestic prices were above the stabilization indicative prices. But these latter were set at such high levels that the LIPC had made almost no imports.

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 milk. Milk was perishable and bulky compared to its price, and so it was usually traded in the form of dairy products. Dairy products were thus like products to raw milk. The high degree of reversibility and substitutability between raw milk and dairy products and also among many dairy products made necessary the restrictions on imports of dairy products, to prevent imported dairy products from interfering with domestic restrictions on milk production. For example, by adding water to condensed skimmed milk one got skimmed milk, and by then adding butter one regained raw milk. Reversibility and substitutability of usages, such as between skimmed milk powder and whey powder, also existed. Crude lactose was at the initial phase of processing before they turned into lactose, and it was perishable in the same way as whey powder and skimmed milk powder were perishable. Crude lactose was also essentially identical to whey powder with respect to ingredients, usage and production process, and certain whey powders were under the monopoly control of LIPC. In addition, butter, skimmed milk powder, sweetened condensed whole milk, sweetened condensed skimmed milk, whole milk powder and butter milk powder were also under LIPC monopoly control. Japan stressed that import restrictions on these and other dairy products were essential for the proper operation of the price stabilization scheme and were thus justified under the provisions of Article XX(d). Contrary to the United States assertions the fact that LIPC had not recently imported milk products was due to the enforcement of the severe production restriction on raw milk and not to the level of the stabilization indicative prices. Furthermore, the existence of large imports of dairy products not subject to state trading (such as natural cheese) was evidence only that the range of state-traded items were limited to the necessary minimum in Japan.

3.4.5 The United States noted that the ratio of imports to production had been declining whereas the ceiling quantity was on the rise. Given the acknowledged lack of international competitiveness of Japanese production, in the absence of restrictions on imports and domestic production, imports from all sources would rise significantly. Current United States trade interests centered on they products, processed cheeses, and especially on prepared dairy products such as frozen yogurt mix and ice cream. The United States noted the refusal of MAFF to allocate quota for frozen yogurt mix, and the difficulties experienced by exporters of other dairy products to obtain quota allocations. No imports of processed cheese were permitted except to Okinawa and for very limited special purposes; this amounted to a prohibition on processed imports into the non-Okinawa Japanese market, and it was a settled interpretation that import prohibitions could never be justified under Article XI:2(c)(i). In the absence of import restrictions, the United States considered that its market share for these products would increase substantially.

3.4.6 Japan observed that in view of the reversibility and substitutability of dairy products, it was necessary to examine imports of dairy products as a whole on the basis of raw milk equivalency. And the imported amount of dairy products in milk equivalent terms had been increasing with an upward trend. Import access should be evaluated in terms of the high degree of domestic production controls imposed on total milk production relative to potential production. Whereas domestic production of manufacturing milk was restricted to about half its potential level, imports in milk equivalent terms reached 2.6 million tons in FY1986, almost equal to the restricted production of manufacturing milk. The United States, by contrast, had imposed rigid and extensive import restrictions on dairy products for many years based on a waiver of the GATT and had allocated only a limited access to imports, i.e. in fiscal year 1986, 1.9 per cent of the supply volume of raw milk (production plus the milk equivalent of imports). The corresponding figure for Japan was 26 per cent. Japanese imports of both natural and processed cheese accounted for 80 per cent of the domestic supplies.

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 reduced planting area, and as the Japanese data showed, there could be annual fluctuations in yields per hectare. Furthermore, beans and peanuts had been designated to receive resources that were being shifted away from rice cultivation, and the acreage declines in 1985 and 1986 only reduced the area to what it had been before the subsidized rice diversion program began.

3.4.8 Japan maintained that to effectively restrict the volume of production it was sufficient to reduce cultivation area, a fundamental element of production. Furthermore, as Hokkaido accounted for over 80 per cent of national production and 90 per cent of shipped volume, enforcement of production controls in Hokkaido was sufficient to effectively restrict total Japanese production. Planted area for dried leguminous vegetables had shown substantial declines, not only in Hokkaido but nationwide. Planted area had decreased by 26 per cent following the implementation of controls in 1984 until 1986, in spite of increased potential production as farmers were pressured to shift out of rice production. The production control measures were enforced through a written directive from MAFF on the basis of the Agricultural Basic Law. The initial target of planting acreage was revised every year in consideration of the previous year's harvest and carry-over stocks. The effectiveness of the production controls were further reinforced by the penalties imposed for excess cultivation, as removal from government subsidies or loans raised a farmer's production costs to levels which made continued operation difficult. As a result, the production of legumes in Hokkaido had declined 27 per cent from 1984 to 1986, despite favorable crop conditions.

3.4.9 The United States observed that dried leguminous vegetables were shelf-stable and non-perishable and therefore outside the scope of Article XI:2(c)(i). They further questioned the necessity of import restrictions on dried beans, particularly in light of the liberalization of imports of bean paste, the primary form in which beans were consumed in Japan.

3.4.10 Japan observed that imported and domestic dried leguminous vegetables were identical and were products which had not undergone any industrial processing. They were still germinative and would deteriorate over time. All dried leguminous vegetables were substitutable with each other as raw materials for bean paste despite quality differences. Imports of liberalized bean paste were minimal, primarily for use as a filler material or for lower grade products. Japan maintained that import restrictions were essential for the operation of the domestic supply restriction program.

3.4.11 The United States recalled that although Japanese consumption was actually increasing, import levels fluctuated considerably from year to year and imports were relegated to a residual supply role. The United States further noted that prices in Japan were three and one half times the world level, and that liberalization of imports would result not only in demand increases in response to lower prices, but also in demand for beans for non-traditional uses. Maintenance of this import quota reduced the total of imports from all sources relative to production in comparison to the proportion reasonably to be expected in the absence of restrictions this contravened Article XI:2.

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 in imports providing almost 50 per cent of total supplies. Japan pointed Out that the types of dried beans imported from the United States were not the preferred small red beans, and that their prices in Japan were close to the world level, and that abolition of the four category quota system would result in a decline in imports of French beans and peas from the United States in preference for imports of small red beans.

Starch and Sugar Products

3.4.13 The United States maintained that Japan's supply management programs had been ineffective in restricting production of either potatoes, potato starch, or all starches. Japanese projections of "potential production" were technically flawed as had been earlier indicated. The United States considered that the domestic measures were designed for price support, not production control, otherwise there should be controls on the quantities produced of starch, inulin, glucose, and food preparations containing added sugar. Any decline in the number of potato starch plants did not necessarily reflect the effectiveness of production restrictions, but was rather linked to increased plant size, industrial rationalization, and the increasing competitiveness of other starches. Because the tariff quota system for cornstarch (requiring starch users importing corn starch duty free under tariff quota to purchase quantities of domestic potato starch) obviated the necessity for intervention in the starch market, no producers had actually been excluded from the government program for potato starch.

3.4.14 Japan observed that the production of potato and sweet potato starch had declined considerably from its 800 thousand ton peak level in 1965 until about 400 thousand tons in 1985 as a result of restrictive measures for production and sales by the government. Since then it had been relatively stable, although potential production was estimated to be as high as the 1965 level in light of rising yields per hectare and starch yields, etc. Federations of farmers who did not follow the restrictive production and sales programs were excluded from the government purchase scheme if prices fell below the established minimum levels. As further evidence of the effectiveness of the production controls, Japan noted that the number of potato and sweet potato starch manufacturing plants had declined by more than 90 per cent in the last 25 years. This was not due to industrial consolidation but to the extinction of potato starch manufacturing plants in many prefectures. The percentage of potato starches relative to total starch supplies had declined in twenty years from 69 per cent to 18 per cent. Japan stated that the effectiveness of the governmental measures for production and sales restriction on potatoes and potato starches was clearly evident from the dramatic decreases in quantities produced.

3.4.15 The United States held that starch and inulin, glucose and other sugar preparations were not perishable, primary agricultural products as required by Article XI:2(c)(i). Starches, if properly stored, could retain their quality for food processing purposes indefinitely. Glucose, if properly stored, could also retain its quality without deterioration for years. The sugar containing products under category 21.07 contained many products that were highly processed and/or had a lengthy shelf-life. The United States also questioned the necessity of import restrictions on starch and inulin to protect supply management of potatoes, as starch and inulin did not compete directly with potatoes and sweet potatoes. On the other hand, imports of fresh potatoes were not restricted, although these were storable and tradeable commodities in their unprocessed form. The United States thus considered that the purpose of the quota was to provide import protection for manufacturers. Furthermore, Japan did not restrict imports of modified starch, a product which was therefore displacing crude starch. The United States noted that there was no logical connection between supply management of potatoes and import restrictions on glucose or sugar food preparations containing added sugar. Glucose and food preparations containing added sugar did not compete directly with potatoes or sweet potatoes, were not in an early stage of

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 a sugar content of 50 per cent or more. The United States also observed that in a previous GATT notification, Japan had indicated that the reason for these quotas was to protect sugar producers, not potato producers.

3.4.16 Japan stated that Article XI:2(c) of the GATT was applicable to "an agricultural product, imported in any form,". With respect to an agricultural product which was internationally distributed always in its simply processed form, it was obvious that such a processed product was also an agricultural product. Sugar cane was not transacted internationally as such, but rather in the form of the raw sugar simply processed therefrom. Raw sugar was undoubtedly an agricultural product. Potatoes and sweet potatoes produced for starch were not marketed as such but were immediately taken from the farm to starch plants after harvesting, then ground, washed and dried, and traded only in the form of starch. This was analogous to sugar cane traded only in the form of raw sugar. Therefore, Japan maintained that starch was an agricultural product in the same manner as raw sugar was undoubtedly an agricultural product. It was known that the quality of starch deteriorated in a short time under normal preservation conditions. Imported starch was a like product of the sweet potato and potato starch on which production and sales restrictions were applied, and of potatoes used for starch production which were always marketed in the form of starch. It was essential to restrict the inflow of starch from overseas into Japan as well as to restrict the production and sales of potato starches in order to secure the effectiveness of the severe restriction of production on potatoes used for starch, because all potatoes used for starch were marketed only in the form of starch. Therefore imports of starch were restricted. Japan noted that, in particular, sweet potato for starch was distinct from that for eating as a vegetable in terms of its variety, characteristics, cultivation, harvesting and distribution methods. Sweet potato for starch was not used for eating as a vegetable nor were vegetable-use sweet potatoes used for starch production. There was no actual trade in fresh potatoes for starch production and, therefore, no import restrictions were necessary. Japan further observed that about 60 per cent of its domestically produced potato and sweet potato starch Was used for the production of glucose and other sugars such as "mizu-ame". Japan thus considered that the relationship of glucose and other sugars to potato and sweet potato starches was similar to the relationship between sugar and sugar beet or sugar cane. Glucose and other sugars were made in a simple processing procedure such as decomposing potato or sweet potato starch with acids or enzymes, and mizu-ame was still perishable. These sugars and sugar food preparations were used mainly for confectionery items and beverages, and were usually interchangeable with regard to their usage. Japan thus considered that unrestricted importation of these items would impair the production controls on potatoes, sweet potatoes, and their starches. Japan noted that the present situation was quite different from that at the time of the 1983 GATT notification cited by the United States. "Sugar other than cane sugar or beet sugar" classified under 17.02 and "food preparations consisting of sugar less than 50 per cent by weight" classified under 21.07 were to be imported freely as a result of negotiations with the United States after that notification. In contrast, in the United States sugar food preparations with 10 per cent or more by dry weight of sugar were subject to import restriction, and import of those with 65 per cent or more by dry weight of sugar were prohibited. Modified starches, which were sophistically processed and sometimes used for the production of plastics, were not agricultural products because of the sophisticated processing of the starch and were not perishable; therefore, Japan had liberalized their importation.

3.4.17 The United States noted that since all crude starches were subject to the same import quota, the ratio of imports to production should consider all starches produced in Japan, not just potato starch; on this basis, import share had declined to about 6 per cent for the last five years. In addition, the United States observed that the Japanese domestic price for potato starch was about five times the world

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 reduced the total of import from all sources relative to production in comparison to the proportion reasonably to be expected in the absence of restrictions; this contravened Article XI:2.

3.4.18 Japan noted that whereas the production of potato starches had been declining, import quotas for starch had been increasing, and the ratio of imported starches to potato starches had risen from 8.6 per cent in 1970 to 36.6 per cent in 1985. Import access had been further improved by the 1984 liberalization of imports of food preparations containing less than 50 per cent by weight of sucrose. Japan maintained that the purpose of the import restrictions were not to protect the processing industry but to effectively enforce the restrictive measures on production and sales of potatoes for starch. In fact, the number of potato starch manufacturing plants had declined from 2,657 in 1960 to only 120 in 1985, not because of industrial consolidation but due to the extinction of potato starch manufacturing plants in many prefectures.

Groundnuts

3.4.19 The United States considered that Japan's supply management program on groundnuts was not a "governmental measure" in terms of Article XI:2(c)(i) as it was based solely on administrative guidance. Furthermore, there did not appear to be any mechanism for effective enforcement of the production or marketing limits. The measures were inappropriately applied only to area and not to quantity produced. Reductions in area planted with groundnuts had declined over time not because of any governmental measures, but because of real estate development in the areas surrounding Tokyo. On the contrary, the government had subsidized the conversion of acreage from rice into groundnuts.

3.4.20 Japan noted that the 1984 written directive from MAFF to the Principal Groundnut-Producing Prefecture Liaison Council described precisely the procedures of production control and imposition of penalties. Since the implementation of the current production controls in 1984, groundnut acreage had declined by 18 per cent to 1986. This was in contrast to increased potential production arising from the shift away from rice cultivation and the use of groundnuts in crop rotation schemes. The production restrictions had thus been effective and were further enforced by penalizing farmers exceeding target cultivation areas. The loss of eligibility for government or prefectural subsidies or loans made continued operation difficult. In order to restrict production, Japan maintained that it was sufficient to reduce cultivation area, a fundamental element of production, which was evidenced by the fact that groundnut production had declined by 9 per cent from 1984 to 1986 despite good harvests.

3.4.21 The United States believed that declines in consumption in Japan were due to the artificially high prices maintained for groundnuts in comparison with other snack foods. The substantial and continuing increases in imports of unrestricted processed peanut products indicated the potential demand for groundnuts in Japan. The United States was a leader in the international market for edible peanuts and its trade was damaged by the Japanese restrictions. The United States also recalled Japanese statements that the cost difference between domestic and foreign produced groundnuts was widening, and that domestic groundnuts would be unable to compete with free imports. The United States thus considered that the purpose of the groundnut quota was import protection and price support, not enforcement of domestic supply controls. The proportion of imports from all sources to domestic production would increase substantially in the absence of restrictions, and so the provisions of the last sentence of Article XI:2 were not satisfied.

3.4.22 Japan considered that restrictions on lower priced imports were necessary to the enforcement of the domestic supply management scheme. Nonetheless, Japan had maintained a minimum import quota since FY 1984, even in the face of decreased domestic consumption, and imports accounted for 60-70 per cent of total supplies of shelled groundnuts. Japan aimed to maintain the production to import

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 arguments on state trading in paragraphs 3.3 above, the United States also considered that the specifics of the beef import system were inconsistent with the General Agreement. On general principles, the Note Ad Articles XI, XII, XIII, XIV and XVIII would forbid Japan accomplishing through state trading what it could not do consistent with Article XI; if it were to do so, this would constitute a disguised restriction of international trade inconsistent with the preamble to Article XX. Furthermore, Japan had not met its burden of demonstrating that the criteria of Article XX(d) were otherwise met. Article XX(d) can only be used to enforce laws or regulations which are otherwise GATT-consistent, and refers to the enforcement of import monopolies. However, not only does LIPC not have a monopoly of import trade in beef, but the preserved beef in question is handled entirely by private traders under an import quota. To the extent LIPC is deemed to have an import monopoly in beef, these restrictions clearly increase protection beyond the bound tariff provided in Japan's Schedule for item 16.02-2, prepared and preserved beef in airtight containers that contains vegetables. The United States also noted that if LIPC's operations were deemed to be an import monopoly, then, under Charter Article 31:5 as undertaken to be applied by GATT Article XXIX, LIPC must (wherever possible) import enough beef to satisfy the full domestic demand for imported beef. However, LIPC imports fall far short of demand: the extreme gap between domestic and international price levels testifies to this fact. Article 31:5 does qualify its requirement with the phrase "subject to the Other provisions of this Charter," but although these provisions might include Charter Article 20:2(c)(i), they equally would include Charter Article 20:4. Thus, Japanese import policies administered through LIPC were prima facie inconsistent with Japan's undertakings under GATT Article XXIX.

3.4.24 Japan stressed that it was not seeking to justify the import quota on prepared beef products under the provisions of Article XI:2(c)(i) , but maintained that the import restriction was necessary for the effective operation of the import monopoly of beef by a state-trading enterprise, LIPC, and thus justified under Article XX(d) . The import quota for prepared beef products was applied on a global basis and thus fulfilled the non-discriminatory proviso of the preamble of Article XX. It

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 monopoly of beef imports and eventually undermine the price stabilization system for livestock products. For this reason, Japan considered the enforcement of import restrictions for these prepared beef products as "measures necessary to secure compliance with laws and 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 …". 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 subject to import restrictions; these restrictions were therefore altogether unjustifiable under Article XI. There were no price support programs for any of the fruits in question and no requirements that the government purchase the fruits at any marketed level or trigger price. There were no penalties applied for producing over a stipulated amount. On the other hand, an export incentive program for apples, instituted in 1985, provided incentives for increased production. Furthermore, the government subsidized the conversion from Unshu-mikan oranges to other fruits. There had been a consistent downward trend in production only for pineapples. The area planted to apples had actually consistently increased, whereas the production of other fruits had varied. Japanese production of apple juice exhibited so much year to year variation as to call into question the effectiveness of the cited production control measures for apple juice. Japan had informed another international forum that it forecast further expansion of fruit production and acreage. The most recent Fruit Growing Industries Promotion Fundamental Plan made by MAFF projected substantial increases in production between now and 1995 for most fruit crops. In addition, the Japanese projections of potential production were misleading, as they took no account of alternative cropping options and were based on a period when there were no imports.

3.4.26 Japan held that effective production control measures had been imposed on fruit production. Target cultivation acreages were set below potential production levels as calculated by a semi-logarithmic regression formula, taking account of actual planted acreage. Actual acreage had been below the target levels and, excepting apples, the planted acreage of each fruit in 1986 was below that at the time

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 undermine the domestic measures on fresh fruit. It did not consider the fruit products in question to be "like products" to the fruit for fresh consumption, and noted in particular the differences in Concord grape juice and fresh grapes for table use. Furthermore, concentrated juices were not particularly perishable and were easily stored for a year or more. Except for a few weeks each year When the fresh product was being harvested and marketed, these products did not compete directly with the fresh product. At all other times they served to give consumers' access to products which were not available in fresh form at all, or only at extremely high prices. The United States noted that there were no restrictions on fresh fruit, which was being processed into juice, or on frozen fruit products. Substantial international trade existed in fresh fruits, and there was a growing trade in exports of frozen apples to Japan for processing into juice. The United States believed that the real motivation for the quota was reflected in a Japanese notification to GATT, which stated that the newly developed sector, consisting of comparatively small scale enterprises, had been under difficulty due mainly to massive surplus stocks of Unshu Mandarin orange juice. The real reason for controls on these non-citrus fruit juices was to reduce competition for Unshu-Mikan orange juice.

3.4.28 Japan indicated that there was no differentiation in the production of fruits for fresh use or for processing. The products in question were simply processed by smashing, straining or concentrating, and were regarded as intermediary products to be used in the production of final products such as fruit drinks. They were still perishable as their quality and value would decline after a certain time, similar to the tomato concentrates found to be perishable by a previous panel, and they competed directly with fresh fruit. Japan considered that the imported fruit products and its domestically restricted fresh fruit were practically identical because both were used as raw materials for fruit drink production. Concord grape juice was consumed in the same way as other grape juice and was thus a like product. Restrictions on the importation of these fruit products were, therefore, necessary to ensure the effective implementation of domestic production controls on fresh fruits. The volume of imported fresh fruits and of frozen apples was so small as to not impair or nullify the domestic production controls for fresh fruits.

3.4.29 Contrary to Japanese assertions of stagnant demand, the United States observed that there had been a dramatic increase in imports of fruit juice from 1983 to 1985, at the same time as Japanese production had increased, demonstrating a growing market demand. US exporters, meanwhile, complained that they had potential sales possibilities but were limited by the quotas. Fruit paste, puree and pulp was utilized by the food industry for many things other than the production of fruit juices and drinks, and increasingly for new healthy snack foods where the potential demand in Japan was very high. Thus, import share was being held well below the level which could reasonably be expected to prevail in the absence of restrictions, contrary to Article XI:2. The United States also believed that imports of fruit products for baby food use were of sufficient quantity and predictability as to warrant their removal from the Miscellaneous Import Quota and the establishment of a planned quota. Japanese data regarding the 1985 planned quota for concentrated juices was misleading as the bulk of the quota

that year consisted of an "emergency quota". The United States further noted that late announcements of the Japanese quota increased uncertainty and costs for traders and were unreasonable.

3.4.30 Japan noted that the import quotas for the fruit products in question had been increased each year in spite of reduced or stagnant domestic production and a declining demand for fruits as a whole. Furthermore, import quota levels were set much higher than actual imports. The import quotas for non-citrus juices had also been expanded, and minimum quotas had been established for grape juice, apple juice and other non-citrus juices since 1984. Imports of purees, pastes and pulps made from prunes, tropical fruits and berries had been liberalized since 1984. The total amount of the Planned Quota for concentrated juices had been 11,500 MT in FY 1985, although 5,500 MT had been announced as the minimum import quota. As a result, the proportion of imports to domestic production was 14 per cent for fruit purees and paste, 42 per cent for fruit pulp, and 27 per cent for non-citrus fruit juices in 1985. In addition, Japan noted that close to one hundred new products using the fruit products in question were developed and put on the market every year. As for the announcement of the quota, it usually occurred regularly in the fiscal year.

Preserved Pineapple

3.4.31 The United States maintained that there was no domestic supply management scheme for canned pineapple, and that the production measures applied to fresh pineapples were done on the basis of administrative guidance and legally were thus strictly voluntary. The United States noted that although pineapple production had been declining in the long term, in recent years it had increased and the Government of Japan had projected further increases in the future. This seemed to indicate that either the production restrictions were not effective, or that producers had instead been guided to increase acreage.

3.4.32 Japan repeated that Article XI:2(c)(i) required that restriction measures be effective but not necessarily mandatory. Production controls in Japan applied to both fresh and canned pineapples, and their effectiveness was evident from the drastically reduced acreage planted in pineapples and diminished production of canned pineapples. There had also been a reduction in pineapple processing factories. The acreage and production restrictions were further enforced by the penalties imposed for excess cultivation or shipment, as loss of government subsidies or loans would make difficult further farm management.

3.4.33 The United States held that canned pineapple was not a like product to fresh pineapple. The United States did not consider canned pineapple to be in an early stage of processing nor perishable, as it could be preserved for years without loss of value.

3.4.34 Japan stated that as most of its domestic fresh pineapples were processed into canned pineapples, they were "practically identical" to the preserved and prepared pineapple under quota. Japan considered canned pineapples to be in an early stage of processing as they were merely sliced, dipped in syrup and packed in cans simply for transportation. Furthermore, canned pineapple were still perishable because the flavour, colour and solidity of the pineapple flesh, and colour of the syrup, changed and deteriorated over time. Japanese consumers were very sensitive to the quality of food and regarded canned products with old manufacturing dates as inedible. Imported canned pineapple competed directly with the pineapples produced for processing in Japan.

3.4.35 The United States observed that the absence of import restrictions on fresh or frozen pineapples, products Which would compete much more directly with fresh pineapples, indicated that the quota was not in fact necessary to the enforcement of the domestic supply controls on fresh pineapple. The United States further noted that a significant and increasing quantity of frozen pineapple was imported

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 the quota reduced imports from all sources below the level which would otherwise prevail. The United States recalled that the Japanese processing industry was inefficient, retail prices in Japan were more than twice the US level for canned pineapple and that Okinawa canned pineapples were of lower quality than imports. The quota level had not been increased even though the Japanese data showed an increasing demand for canned pineapple while the relative inefficiency of the Japanese industry was increasing.

3.4.38 Japan observed that the rate of decrease in the domestic production of canned pineapples exceeded the rate of decrease in demand. At the same time, the import quota had been maintained at a steady level, which had exceeded the domestic production level since FY 1984.

3.4.39 The United States held that the quota was operated in such a manner as to discriminate among suppliers. The quota was distributed among 61 quota holders, but only seven holders held about 50 per cent of the quota. The United States alleged that the major quota holders upheld an informal understanding that each would import only from certain countries. Thus the quota holders would not compete against each other to secure supply and could maximize their monopsony power.

3.4.40 Japan responded that there was no requirement for quota holders to import from any specific supplier, as the quota was not allocated by country. The source of imports of canned pineapples was determined by the international competitiveness of exporting countries.

Tomato Products

3.4.41 The United States did not believe that Japan operated a domestic supply management scheme which necessitated import restrictions on tomato juice, ketchup or sauce. The United States did not contest that the production of tomatoes for processing had declined in recent years, but noted that imports of fresh tomatoes or competitive lesser-processed tomato products were not restricted. Imported puree, paste or whole tomatoes could be used for the production of ketchup, sauce or juice. Furthermore, production and marketing of domestic paste, puree and processed whole tomatoes were unrestricted. It thus appeared that the supply of tomatoes for higher processing was not actually being restricted as provided for in Article XI:2(c)(i). The United States considered that although the system might protect tomato producers, the greater benefit was to tomato processors.

3.4.42 Japan stated that with respect to an agricultural product which was distributed internationally always in its simply processed form, it was obvious that such a processed product was also an agricultural product in terms of Article XI:2(c). The report of the Panel regarding the "EEC-Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables"

(L/4687) had concluded that tomato concentrate was an "agricultural product, imported in any form", within the meaning of Article XI:2(c). Tomatoes for processing use were never marketed in the form of the tomato itself but always marketed in the form of tomato products (tomato juice etc.), which were made by simple processing such as crushing and squeezing. Therefore, Japan argued that it was obvious that tomato juice, tomato ketchup and tomato sauce were "agricultural products, imported in any form". Japan further stated that import restrictions on processed tomato products were necessary to enforce the production restriction effectively. Should processed tomato products be freely imported without import restrictions, the governmental restrictive measures on the production of tomatoes for processing use would be nullified. Restrictive governmental measures had been applied not only on the production of tomatoes for processing but also on the production of tomato juice, tomato ketchup and tomato sauce. The production volume of tomatoes for processing use had been reduced by 60 per cent from 360,000 tons in 1980, a year before the beginning of the production restriction, to 140,000 tons in 1985. Acreage had been drastically reduced from 5,300 ha in 1980 to 2,200 ha in 1985 as the restrictions were effectively enforced through contracts between producers and processors and the penalties for over production. A governmental order to the processors effectively implemented the controls on tomato juice, ketchup and sauce. The production volume of tomato juice had been reduced by 33 per cent from 129,000 tons in 1980 to 86,000 tons in 1985. As a result, the number of processing factories had also declined.

3.4.43 The United States stated that tomato ketchup and sauce were not like products with fresh tomatoes. Furthermore, tomato sauce and tomato ketchup were higher-stage processed products and not perishable. In fact, most tomatoes now were "provisionally prepared" by performing immediate basic processing on the ripe tomatoes, and then were held in a provisionally prepared state for up to a year before being further processed into puree, paste, juice, sauce or ketchup. With regard to a previous panel's conclusion that tomato concentrate was perishable, the United States observed that ketchup, tomato juice and sauce were commonly sold ex-shelf to consumers, who were unable to detect a quality difference in ketchup which had been on the shelf six months or a year (necessarily from the same tomato harvest). Thus, the retail value of the product would not decline over a reasonable shelf life or from harvest to harvest.

3.4.44 Japan recalled that tomatoes for processing use were quite distinct from tomatoes, for direct table consumption in terms of variety, characteristics, cultivation, harvesting and distribution methods. In Japanese law, the two types of tomatoes were strictly separated. Therefore, the two types of tomato were quite different agricultural products. Tomatoes for direct table consumption were not used for processing. Tomatoes for processing use were not used for any other purpose, and were always marketed in the form of tomato products (tomato juice etc.) only after being subjected to simple processing. Tomatoes for processing use were therefore "like product" of processed tomato products. In Japan, tomato juice was not concentrated nor was water added, so it was in an earlier stage of processing and still perishable. Ketchup and sauce were simply processed by crushing or squeezing, and by the addition of sugar or other materials to the concentrate which resulted after juice extraction. If taken out of the package, tomato juice, ketchup and sauce were quickly contaminated by micro-organisms and became inedible within one day. Japan argued that it was supported by scientific data that canned tomato juice and plastic tubed tomato ketchup were degraded as time passed by the reduction of the red colour and vitamin C content which were most important factors, therefore these products were still perishable because their quality and value declined after a certain time, as had been found by a previous panel with regard to tomato concentrate. Furthermore, Japan noted that contrary to the US assertion, the tomato concentrate examined by the previous panel was also packaged for direct consumer use as well as for further processing.

3.4.45 The United States maintained that if there were a supply management problem necessitating a quota, it would be logical to have supply constraints on the fresh product, and, if necessary, on the first stage processed product. If it were not necessary to impose restrictions on imports of fresh

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 market. The quota held the share of imports to domestic production to a fraction of one per cent, well below the levels which would prevail in the absence of restrictions.

3.4.48 Japan noted that in spite of reduced consumption, the import quotas for tomato juice and for tomato sauce and ketchup had been changed from the Miscellaneous Import Quota to planned quotas in 1983. The quota levels had also been increased, to secure import access. For tomato juice, the quota was increased from 3,000 kl in 1983 to 5,000 kl in 1985. The quota for tomato ketchup and sauce was also increased, from 3,000 tons in 1983 to 5,000 tons in 1985.

3.4.49 The United States also claimed that the operation of the quota was unreasonable. The quota was released in three ways; through allocation to manufacturers, allocation to newcomers, and on a first-come-first-served basis. This quota was not allocated within two weeks of its announcement but meted out in small quantities on a week-by-week basis. Firms desiring quota application had to reapply for each allocation and present an order for the product each time. Furthermore, approximately 50 per cent of the quota was controlled by Japan's largest ketchup manufacturer, thus inhibiting trade.

3.4.50 Japan observed that the import quota system was reasonable because it aimed to remove those who did not import their allocation and to ensure the import quota for those who actually intended to import. The average period from the close of application to the quota allocations, as well as from the quota announcement to the close of application, was two weeks. The United States' reference to "weekly allocation" did not relate to allocation to users, but to one of the methods of allocation to traders, namely first-come-first-serve. This method was applied in the case where there was a surplus of quota after the allocation to historical importers, new importers and users. Quota allocation was then met out as far as quota remained. Under this allocation method applicants were not required to submit than order from an end user. The import quota actually allocated to Japan's largest ketchup manufacturer was only 5 per cent of the total quota volume in 1986, while the import quota allocated to a leading US exporter of ketchup to Japan was 8 per cent.

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, restrictions or prohibitions on imports or exports "shall be published promptly in such a manner as to enable governments and traders to become acquainted with them". Furthermore, Article XIII:3(b) provided that any contracting party applying an import quota "shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value". Japan failed to meet the requirements of these Articles in terms of transparency, specificity and timing of notice given. The operation of the Miscellaneous Import Quota (MIQ) was particularly non-transparent, and seven of the twelve categories in the complaint were under this quota system at least in part. Japan had not published a complete list of the quota amounts to be allocated to individual items within the MIQ, nor a list of past such amounts. Neither were lists of importers receiving allocations published, even though the amount of the MIQ was determined in part by historical allocations. The United States further noted that for those quotas whose amounts were published, this information was often announced late in the quota period. This created an additional burden on trade, burdens which Article X:1 and XIII:2(c) were intended to prevent.

3.5.2 Japan noted that it met all the publication requirements of Articles X:1, X:3 and XIII:3, as well as of the Licensing Code, in terms of transparency, specificity, adequacy and reasonableness of notice given. Since the miscellaneous nature of the products under the MIQ category did not allow for the quota to be set for each product, they were aggregated into the quota on a value basis. Article XIII:3(b) required contracting parties to give public notice of "the total quantity or value of the product or products …" which permitted the choice of publication of value of a quota for plural products, such as the Japanese Miscellaneous Import Quota. Japanese non-publication of the list of quota holders was permitted under Article X:1, which stated "The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private." In addition, Article XIII:3(a) stated "… there shall be no obligation to supply information as to the names of importing or supplying enterprises". Publication of the names of quota holders could cause unnecessary confusion in the trade of an item, inducing anti-competitive intervention among importers and accelerating attempts to take over control of the quota-holding companies, particularly the smaller ones. Furthermore, the provisions of Article X did not necessarily require contracting parties to publish the results of allocation and publication of the previous year's quota allocation for products imported under the MIQ could possibly reveal the allocation given to each trader in situations where there were only a few recipients of the quota. Traders who wanted to export to Japan could make known their interest to the Japanese public through a JETRO publication ("TSUSHOKOHO") which was usually read by importers.

3.5.3 With regard to the United States argument that the dilatoriness of the quota announcement created a burden on trade since quota size was rarely published for a future period, Japan noted that this referred to the period during which the product was permitted to be imported, which was specified in Japan as ten months following the issuance of an allocation certificate. The half-year period was not a quota period but simply the period for the quota announcements.

3.5.4 The United States noted the requirement of Article X:3 that contracting parties administer all laws, regulations and rulings pertaining to import prohibitions or restrictions in a "reasonable manner". This obligation related both to publication of information regarding a quota and to the administration of the quota. Of particular importance was importer's access to value or volume information to be able to make practical use of the quotas. The lack of such information for products within the Miscellaneous Import Quota indicated unreasonableness. The practice of announcing import quotas at unpredictable times, and not until after the supply and demand situation had been assessed,

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 base, ice cream, dried beef sticks and single-strength apple juice. Furthermore, for certain products the Japanese Government would allocate no quota to newcomers at all; there could be no legitimate reason for this unreasonable interference with trade.

3.5.5 Japan stressed that all information concerning allocation procedures of the Miscellaneous Import Quota was published, including the items which came under the quota, the US dollar value of the overall quota, qualifications for applicants, necessary documents and modalities for quota allocation, time and place for submission of applications and other relevant matters. The size of each import quota was set in principle twice a year, and the announcement of quota was usually made at a regular interval in each half of the fiscal year when the demand/supply estimates were available. Japan noted that quota allocation was a part of the process of governmental adjustment of demand and supply. Additionally, the recommendation adopted on 19 May 1987 by the GATT Licensing Committee did not oblige the members to make an announcement on a fixed date every year or to make an announcement on the same date for all products concerned. The goods necessary in terms of the domestic supply-demand situation had to be imported with certainty, so the quotas for certain products were allocated only to those applicants with past import performance. For these products, professional knowledge on the import and marketing of a certain product were required to make the import operation smooth and certain. Newcomers could receive quota allocation for all the products which did not cause such problems. Hence, under the planned quota, only three items (prepared and preserved pineapple, dried leguminous vegetables, and groundnuts) could not be allocated to newcomers. Japan also observed that a broad commodity classification such as the CCCN 4-digit category did not necessarily meet the requirement of quota classification which was established on the basis of the individual commodity situation. Such practice was very common and similar cases could be found even in the US cheese quotas. In Japan, the items subject to MIQ as well as to planned quota were made public in import announcements. Contrary to the United States statement, the total value of the MIQ had been increasing over time, and was in full conformance with the requirements of the GATT. Those who had not previously received allocations under the MIQ were also eligible for most products, with the exception of canned beef, other prepared or preserved meat products, and natural juices. In addition to requiring technical knowledge, imports of these three items competed directly with those under planned quotas, and the effects of the MIQ allocations had to be taken into account. Nonetheless, the requirement of import performance of 50,000 US$ or more in a previous year was not limited to prior imports of the agricultural products subject to quota but to total imports, so it was not a difficult requirement. Furthermore, since supply and demand estimates were difficult for those items in the MIQ, allocation to trading companies with actual orders from end-users assured that supplies were matched with real demand, and would be available to fulfill this demand. Moreover, quota was allocated for all the products at issue at the 4-digit CCCN level. About half of Japan's domestic demand for milk products was imported, and dried beef sticks and single-strength apple juice were also imported.

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 far 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 singled out for legal judgment without taking into consideration the proceedings and final outcome of the Uruguay Round. In Japan's view, fair and realistic solutions to problems regarding world trade in agriculture, as represented by these twelve items, should be found essentially through the formulation of new rules. Japan believed that the role of a panel was to facilitate the settlement of a particular dispute, and caution was necessary so that the implementation of dispute settlement not procedures did replace the negotiation of new rules, in the Uruguay Round.

3.6.2 The United States noted that every industry and every country had its own particularities, and whereas the social and political circumstances surrounding the quota may have relevance in a negotiation context, previous Panels had decided that such special socio-economic characteristics did not justify the maintenance of import restrictions inconsistent with Article XI. The United States maintained that such factors were not relevant in the matter at hand. The Panel should consider the rules of the GATT, consider the facts, and apply the rules to the facts. The United States rejected any suggestion that dispute settlement in the GATT be deferred pending completion of the Uruguay Round.

4. SUBMISSIONS BY OTHER CONTRACTING PARTIES

Australia, the European Communities and Uruguay all stated their interest as exporters of agricultural products to Japan and said that they were affected by the Japanese regime of quantitative restrictions on imports of these twelve products. They considered that these restrictions were in contravention with the provisions of the GATT, in particular the prohibition on quantitative restrictions in Article XI.

4.1.1 Australia considered that its trading interests had been particularly adversely affected by the restrictions on beef, fruit products, certain dairy products, and starches. However, it considered that it would be in a position to supply increased quantities of a number of the other products in the absence of the restrictions. With respect to those product categories of particular interest to Australia, it did

not consider that Japan maintained the measures or restrictions on domestic production necessary to meet the requirements of an exception under Article XI:2(c). Although Japanese measures were intended to control surplus milk production, the measures also included a new cheese production subsidy designed to increase domestic cheese production. The import restrictions on processed cheese could not, therefore, be justified under Article XI:2(c) as the cheese production subsidy was not a measure designed to restrict the production or marketing of the like product. Furthermore, imports of processed cheese into Japan under quota arrangements had not been increasing in proportion to the increase in Japanese production of processed cheese, reducing the total of imports relative to the total of domestic production of processed cheese.

4.1.2 In addition, Australia was not aware of any Japanese government measures to restrict production of beef or beef products, nor of fruit products. The import quotas on prepared or preserved beef (item 16.02) could not be justified either under Article XVII nor Article XX(d) by the argument that the Japanese Livestock Industry Promotion Corporation (LIPC) was responsible for the main part of the Japanese beef import quota system. The beef products in this category, as well as various other types of beef, were not under the direct control of LIPC.

4.1.3 There was no evidence, in Australia's view, that the Japanese Government took into consideration changes in the relative production efficiency between its domestic producers and foreign producers in determining the size of the import quota as had been agreed by the relevant sub-committee at the United Nations Conference on Trade and Employment, Havana, 1947-1948. Japanese arguments based on special social, economic or cultural factors did not provide a justification for import restrictions in contravention of Article XI:1 as had been established by previous panels. The maintenance of these restrictions in contravention to Article XI resulted in ipso facto nullification or impairment of benefits to which Australia was entitled.

4.2 The European Communities noted their particular concern with the effects of the Japanese quantitative restrictions on their exports of preserved, concentrated or sweetened milk and cream (04.02), processed cheese (04.04 ex), starch and inulin (11.08 ex), fruit puree and pastes (20.05 ex), tomato ketchup and sauce (21.04 ex), and food preparations not elsewhere specified (21.07 ex). Although the Community was a substantial world exporter of these products, it did not hold the same position in the Japanese market owing to the restrictions. The Community was thus suffering economic injury because its exports were penalized by the quantitative restrictions in question. In the view of the Community, Article XVII did not provide exemptions from other obligations of the General Agreement but specified particular obligations applying to state-trading enterprises. This also followed from the Note Ad Articles XI, XII, XIII, XIV and XVIII, which stated that "Throughout Articles XI, XII, XIII, XIV and XVIII, the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations."

4.3 Uruguay pointed out the importance of agricultural products in its total exports. Of particular concern were the Japanese restrictions on prepared or preserved beef (16.02 ex), a major export product for Uruguay. Uruguay's exports of these products to Japan had fallen from $67,000 in 1979 to $3,000 last year. Uruguay considered that the quantitative restrictions by Japan on these agricultural products were inconsistent with that country's obligations under the GATT and prejudicial to developing countries.

5. FINDINGS

The Panel noted that the United States claims that Japan maintains quantitative import restrictions on twelve product categories inconsistent with the general prohibition of quantitative restrictions in Article XI:1 of the General Agreement and that Japan invoked Article XI:2(c) (i) and Article XX(d) to justify the restrictions on these categories. The Panel first examined the general legal considerations

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 contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned."

An interpretative note ad Article XI (which, according to Article XXXIV of the General Agreement, is an integral part of that Agreement) specifies the following:

"Paragraph 2(c)

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

Paragraph 2, last sub-paragraph

> The term special factors includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement."

5.1.2 Drafting History and General Considerations

A provision corresponding to Article XI:2(c) (i) was included in the "suggested Charter for an International Trade Organization of the United Nations" proposed by the United States in 1946. The subsequent negotiations led to a refinement of the proposal but not to any basic changes except for the addition of fisheries products. It was stated that Article XI:2(c)(i) was required because:

> " in agriculture and fisheries you have to deal with the capricious bounty of nature, which will sometimes give you a huge catch of fish or a huge crop, which knocks the bottom out of prices.
>
> You also have the phenomenon peculiar to agriculture and fisheries of a multitude of small unorganized producers that cannot organize themselves. It often happens that the Government has to step in and organize them. But if it does so, it cannot allow the results of its organization to be frustrated by uncontrolled imports." (EPCT/A/PV/19, emphasis added)

The drafters agreed that the exception:

> "was not intended to provide a means of protecting domestic producers against foreign competition, but simply to permit, in appropriate cases, the enforcement of domestic governmental measures necessitated by the special problems relating to the production and marketing of agricultural and fisheries products (Havana Reports, p. 89, emphasis added) .

They also agreed that the exception:

> "should not be construed as permitting the use of quantitative restrictions as a method of protecting the industrial processing of agricultural or fisheries products." (Havana Reports, p. 93, emphasis added)

5.1.3 With this background in mind, the Panel proceeded to a detailed examination of Article XI:2(c)(i). The Panel noted that each of the import controls maintained by Japan for which it invoked Article XI:2(c)(i) had to meet each and every one of the following seven conditions to be covered by that provision.

5.1.3.1 The measure must constitute an import restriction

The Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada" noted that:

> "in Article XI:2(a) and (b) the words "prohibitions and restrictions" are used while in Article XI:2(c) mention is made only of restrictions"

and it therefore concluded that:

> "the provisions of Article XI:2(c)(i) could not justify the application of an import prohibition" (BISD 29S/91) .

5.1.3.2 The import restriction must be on an agricultural or fisheries product

The General Agreement does not define the term "agricultural product". In the past rounds of trade negotiations it was accepted that the products falling under Chapters 1 to 24 in the Customs Cooperation Council Nomenclature could in principle be regarded as agricultural products. In the light of this long-standing practice of the GATT, the Panel decided to use the same concept in the case before it and therefore found that all the products at issue in this case were agricultural products within the meaning of Article XI:2(c) .

5.1.3.3 There must be a governmental measure which operates to restrict the quantities of a product permitted to be marketed or produced

"To restrict" means, according to the drafters, to "keep output below the level which [would have been] allowed in the absence of restrictions". The drafters rejected the proposal that regulation of production, through price stabilization programmes, also be an accepted criterion (EPCT/A/PV/19). They agreed that subsidies were not "necessarily inconsistent with restrictions on production and that in some cases they might be necessary features of a governmental programme for restricting production" (Havana Reports, p. 90). According to the note to Article XI the proportion between imports and domestic production is to be determined by taking into account "special factors" that may have affected or may be affecting the trade in the product concerned. The note specifically excludes from the definition of the term "special factors" changes "artificially brought about by means not permitted under the [General] Agreement", but not changes artificially brought by legal means such as production subsidies or tariff protection granted within the bounds of Article II. It is thus clear that the production restrictions applied under Article XI:2(c)(i) may in principle coexist with production subsidies. This means that it is not necessary to restrict the level of production below the level that would exist in the absence of all government support. It also means that production which exists only because of production subsidies may be effectively restricted by imposing quantitative limits on the availability of subsidies. Other than requiring a governmental measure, Article XI:2(c)(i) does not specify how the production restriction is to be imposed.

It was agreed that:

> "… in interpreting the term 'restrict' for the purposes of paragraph 2(c), the essential point was that the measures of domestic restriction must effectively keep output below the level which it would have attained in the absence of restrictions." (Havana Reports, page 89)

5.1.3.4 The import restriction and the domestic supply restriction must in principle apply to "like" products (or directly substitutable products if there is no substantial production of the like product)

In the preparatory work reference was made to the definition of the term "like products" adopted by the League of Nations which was "practically identical with another product", but it was also stated that the term had different meanings in different contexts and that the exact definition should be left to subsequent decisions. (EPCT/C.II/65, - /A/PV/41 - C.II/36). It was further stated that the words "like products" in Article XI:2(c):

> "definitely do not mean what they mean in other contexts - merely a competing product. In other words, to take an extreme case, if a country restricted its output of apples, it could not restrict importation of bananas because they only compete with them." (EPCT/C.II/PV.12).

Thus the mere fact that a product is competitive with another does not in and of itself make them like products. As noted in the following paragraph, Article XI:2(c) and the note supplementary to

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

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 was an unexpected excess of supplies of agricultural products that could not be stored under normal conditions until the market had improved (paragraph 5.1.2 above). In discussing the term "in any form", the drafters stated that it was not the intention "… to extend the [import] control … to things like tinned fish and sardines …" and further that "… what we have in mind here is the perishable kind of processed product, not the kind which is capable of being stocked" (EPCT/A/PV/19, emphasis added) . The Panel observed that this requirement had been redrafted in the Havana Charter to read:

> "… imported 'in any form' means the product in the form in which it is originally sold by its producer and such processed forms of the product as are so closely related to the original product as regards utilization that their unrestricted importation would make the restriction on the original product ineffective." (Note to Article 20.)

However, this extension to cover also products which were not perishable was not incorporated into the General Agreement and the condition of perishability therefore remained in force.

5.1.3.5 The import restriction must be necessary to the enforcement of the domestic supply restriction

In relation to this requirement the report of the ninth Session of the Working Party on Quantitative Restrictions (BISD 3S/190) states 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."

The report further states that:

> "… 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 measure restricting production or marketing of the primary product."

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

The last sub-paragraph of Article XI:2 requires that if a contracting party applies an import restriction pursuant to provisions of sub-paragraph (c) , it must give public notice of the total quantity or value of a product permitted to be imported during a specified future period, and of any changes in such quantity or value. This requirement implies that under Article XI:2(c) only those quotas can be applied which define the quantity or value for each product subject to quota.

5.1.3.7 The restriction on imports must not 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

The last sentence of Article XI:2 prescribes the minimum size of the import quotas that contracting parties may establish in accordance with sub-paragraph (c)(i) of that provision. The quotas must be such as not to reduce the total of imports relative to domestic production as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In order to determine the size of the import quota the contracting party thus has to estimate what the amount of domestic production and of imports would be during the quota period in the absence of supply and quantitative import restrictions. The General Agreement states that in making this determination contracting parties shall pay "due regard" to the proportions that prevailed during a previous representative period and to "special factors" that affected or may be affecting the trade in the product concerned. Among the special factors to which due regard should be paid are changes in relative productive efficiency, but not changes resulting from measures not permitted under the General Agreement.

The Panel noted that in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. The Panel further noted that the CONTRACTING PARTIES recognized in a previous case that a contracting party invoking an exception to the General Agreement had the burden of 1. demonstrating that the requirements of the exception were fulfilled.[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

[1]Report 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 contracting party invoking that provision.

5.2 Import Monopolies

5.2.1 Text and Notes

The Panel noted that Japan justified its import restrictions on prepared and preserved beef and certain dairy products on the basis of its monopoly import system for certain beef and dairy products. The parts of the General Agreement relevant in this dispute read as follows:

Note Ad Articles XI, XII, XIII, XIV and XVIII

"Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations."

Article II

"…

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement."

Note Ad Article II at paragraph 4

"Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter."

(Article 31:5 of the Havana Charter reads as follows:

…

"5. With regard to any product to which the provisions of this article apply, the monopoly shall, wherever this principle can be effectively applied and subject to the other provisions of this Charter, import and offer for sale such quantities of the products as will be sufficient to satisfy the full domestic demand for the imported product, account being taken of any rationing to consumers of the imported and like domestic product which may be in force at that time."

Article XX

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same

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 as will be sufficient to satisfy the full domestic demand for the imported product" is thus part of the General Agreement. The Panel could therefore not follow the arguments of Japan based on the assumption that Article 31:5 of the Havana Charter was not included in the General Agreement. The Panel found for these reasons that the import restrictions applied by Japan fell under Article XI independent of whether they were made effective through quotas or through import monopoly operations.

5.2.2.3 The Panel further examined whether Article XX(d) of the General Agreement justified import restrictions made effective through import monopolies. The Panel noted that Article XX(d) permits measures necessary to the enforcement of monopolies. Article XX(d) therefore permits measures necessary to enforce the exclusive possession of the trade by the monopoly, such as measures limiting private imports that would undermine the control of the trade by the monopoly. However, Article XX(d) only exempts from the obligations under the General Agreement measures necessary to secure compliance with those laws and regulations "which are not inconsistent with the provisions of [the General] Agreement". Article XX(d) therefore does not permit contracting parties to operate monopolies inconsistently with the other provisions of the General Agreement. The General Agreement contains detailed rules designed to preclude protective and discriminatory practices by import monopolies (cf.

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 import monopoly inconsistent with Article XI:1 was not covered by Article XX(d).

5.3 Product Specific Findings

The Panel then proceeded to examine the restrictions maintained on each of the items subject of the complaint against the background and drafting history of Article XI:2(c)(i) and Article XX(d) and in light of the considerations noted above. In order for an import restriction to be justified under Article XI:2(c)(i) all of the conditions noted above must be fulfilled. Therefore, in those cases in which the Panel found that one condition was not met, it did not consider it necessary to examine the restriction further in the light of the other conditions, except in those cases in which the unfulfilled condition could be met by changing the administration of the restriction. In these cases the Panel further examined whether such a change in administration would in itself be sufficient to fulfill the conditions of Article XI:2(c)(i).

5.3.1.1 The Panel noted that certain dairy products included in this complaint were subject to an import monopoly and that Japan maintained that import monopoly operations were not subject to the provisions of Article XI:1 and furthermore that restrictions on the importation of all dairy products under consideration by the Panel were necessary to the operation of the import monopoly. On the basis of its considerations in paragraphs 5.2 above, the Panel found that Article XI was also applicable to these dairy products. The Panel thus proceeded to examine the dairy products in question in light of the conditions set out in Article XI:2(c)(i) (paragraph 5.1.3 above).

5.3.1.2 With regard to prepared and preserved milk and cream (04.02), the Panel recalled that for certain products contained in this tariff category, namely evaporated milk (04.02-1), an import quota was available only for imports for use in Okinawa or for use in international tourist hotels and for international shipping vessels travelling between Japan and foreign countries. Imports of sweetened condensed milk (04.02-1) were permitted only for hotel and shipping vessel use. It considered that this resulted in a de facto prohibition of imports of evaporated milk and sweetened condensed milk into the general customs tariff territory of Japan. The Panel recalled a previous panel conclusion that "… the provisions of Article XI:2(c)(i) could not justify the application of an import prohibition" (paragraph 5.1.3.1 above), and found that ruling to be applicable also in the present case.

5.3.1.3 The Panel further observed that prepared whey (04.02-3) for use in processing prepared milk powder for infants was subject to the. Japanese Miscellaneous Import Quota. This single quota contained many and diverse products. The Panel recalled the notification requirement of the last sub-paragraph of Article XI:2 which implies that under Article XI:2(c) only those quotas can be applied which define the particular quantity or value for each product subject to quota (paragraph 5. 1.3.6 above) . The Panel found that import restrictions made effective through a miscellaneous "basket" quota for which only a global value or quantity was announced could not satisfy the requirements of Article XI:2(c).

5.3.1.4 The Panel further examined Whether the establishment of a planned quota for the products contained in the tariff category prepared and preserved milk and cream (04.02) would satisfy the requirements of Article XI:2(c)(i). The Panel, thus examined whether fresh milk for manufacturing use and the products prepared from it, particularly evaporated milk, sweetened condensed milk, skimmed milk powder, whole milk powder, prepared whey, and whey powder were "like products" in the sense of Article XI:2(c)(i), (paragraph 5.1.3.4 above). The Panel recalled that as different requirements were established for restrictions on like products and on the importation of those products processed from a like product, a product in its original form and a product processed from it could not be

considered to be "like products". 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 stage of processing and still perishable, which competed directly with fresh milk and if freely imported would render ineffective the restrictions on fresh milk, as required by the interpretative note to Article XI:2(c). It noted that fresh milk as such was rarely traded internationally because of its bulk and perishability, but rather it was processed into (among other things) the canned, powdered or otherwise prepared milk and cream products in question which rendered it capable of being transported and stocked. The Panel considered that the difficulties regarding transport into Japan of a perishable milk product were such that it was highly unlikely that imports of such a product would of themselves render ineffective the government restriction on the production of fresh milk, nor that restriction of its importation would be necessary to the enforcement of the government program. Thus, although the Panel considered that some of these products might meet some of the requirements of being products in an early stage of processing and still perishable which could compete directly with fresh milk for manufacturing use and whose free importation might render ineffective the domestic measures on fresh milk, the Panel did not find that any of the products under consideration in tariff category 04.02 met all of the conditions of Article XI:2(c)(i), particularly that regarding perishability.

5.3.2.1 The Panel next examined the restrictions applied to processed cheese (04.04 ex). The Panel observed that imports of processed cheese were subject to special quotas which limited their availability only to Okinawa, and to tourist hotel and shipping vessel use. It considered that this resulted in a de facto prohibition on the importation of processed cheese into the general customs territory of Japan. The Panel found that such prohibition was not permitted under the provisions of Article XI:2(c) (i) (paragraph 5.1.3.1 above).

5.3.2.2 The Panel examined whether if a quota were to be established for processed cheese permitting import into the general customs territory of Japan, the other requirements of Article XI:2(c)(i) would be met. The Panel considered that under the definition of "like product" to be applied under that provision (paragraph 5.1.3.4 above) , imported processed cheese and Japanese-produced fresh milk were not "like products". It thus examined whether processed cheese met the requirements of a product "in any form", that is Whether it was a product in an early stage of processing and still perishable, which competed directly with fresh milk for manufacturing use and if freely imported would render ineffective the restriction on the fresh milk. Processed cheese is made by the mixing of one or more natural cheeses with the addition of emulsifying agents and often of flavouring and colouring materials. It is a product not generally intended for further processing. The Panel also noted that processed cheese was capable of being stocked. The Panel further observed that imports of natural cheese into Japan were not subject to quantitative restriction and that substantial quantities were indeed imported. Natural cheese, the principal ingredient in processed cheese, was at an earlier stage of processing than the latter and more likely to compete directly with fresh milk for manufacturing use. The Panel considered that if imports of natural cheese did not render ineffective the domestic restriction on fresh milk for manufacturing use, the imports of a higher processed product could not be considered to do so. It further noted that there was a duty-free tariff quota in effect for natural cheese imported into Japan for use in the production of processed cheese. The Panel thus found that even if imports of processed cheese were permitted into the general customs territory of Japan, restrictions on these imports would not satisfy the conditions of Article XI:2(c)(i) as processed cheese was not an item in an early stage of processing and still perishable which competed directly with fresh milk and whose free importation would render ineffective the restriction on fresh milk.

5.3.3 The Panel then examined the restrictions maintained on lactose (17.02 ex). The Panel noted the restriction was applied only to "crude" lactose and recalled Japan's argument that import restrictions on crude lactose were required because it was virtually identical to whey powder subject to LIPC

monopoly import control. In this regard, the Panel recalled its findings in paragraph 5.2 above. It also observed that lactose was subject to the Miscellaneous Import Quota, and recalled its findings on such restrictions (paragraph 5.3.1.3 above). The Panel then examined whether the establishment of a specific quota for crude lactose would be sufficient for the requirements of Article XI:2(c)(i) to be met. The Panel considered that crude lactose was not "like" fresh milk for manufacturing use within the meaning of that provision, but was a by-product resulting from the production of cheese and other dairy products. As it was virtually indistinguishable from the whey powder examined by the Panel in paragraph 5.3.1.4 above, the Panel considered that its findings with regard to whey powder were equally applicable to crude lactose.

5.3.4 The Panel proceeded to examine the restrictions applied to food preparations, not elsewhere specified, consisting mainly of dairy products (21.07 ex). The Panel noted that these products were also subject to the Miscellaneous Import Quota and recalled its finding on such restrictions (paragraph 5.3.1.3 above) . The Panel further examined whether the establishment of a specific quota for these dairy food preparations would be sufficient to fulfil the requirements of Article XI:2(c)(i). The Panel considered that these items were not "like" fresh milk for manufacturing use but could be processed from fresh milk or other dairy products. The Panel thus examined whether dairy food preparations met the requirements of products "in any form", that is whether, they were products in an early stage of processing and still perishable, which competed directly with the fresh milk and if freely imported would render ineffective the restrictions on the fresh milk. It noted that a large number of items were included in this basket category, only a few of which had been specifically identified, i.e., frozen yogurt base, ice cream powder, prepared milk powder for infants. For this quota to meet the requirements of Article XI:2(c)(i), the Panel considered that all of the products within it would have to meet these conditions. The Panel noticed that many of the products in tariff classification 21.07 were consumer-ready prepared foods as opposed to products which had undergone only initial processing. The Panel thus found that not all of the dairy food preparations under consideration here could be considered as items in an early stage of processing and still perishable which competed directly with fresh milk for manufacturing use, and whose free importation would render ineffective the restrictions on the production of fresh milk.

5.3.5.1 The Panel then reviewed the facts and arguments presented on dried leguminous vegetables (07.05 ex). It noted that imported dried leguminous vegetables were "like" legumes produced in Japan within the meaning of Article XI:2(c) (i) . The Panel then proceeded to examine whether there was a Japanese governmental measure in effect which restricts the quantities of legumes permitted to be produced or marketed in Japan. It noted in this respect the operation of the directive on Planned Production of Legumes in Hokkaido, where virtually all commercial production was concentrated. The Panel considered that restrictions on cultivated acreage, even if they effectively reduced planted area, could not in themselves be considered as restrictions on production or marketing, as increased yields brought about by improved varieties, increased fertilizer use, or improvements in other inputs could result in expanded output even from reduced area. The Panel further recalled that a previous panel[1] had also examined the enforcement of the governmental measures in evaluating their effectiveness. In this regard, the Panel noted that there was no penalty or charge imposed on Japanese producers whose cultivation exceeded the target area, but rather a benefit or subsidy could be withheld from them. The Panel considered that, as indicated by the drafting history of Article XI:2(c)(i), the important factor was not the methods used by governments but their effectiveness. The Panel thus examined the effectiveness of the Japanese measures and found not only that the targets for area reduction had been met and planted area had been reduced, but also that the actual quantity produced had declined since the 1984 directive. The Panel examined the arguments presented by Japan and the United States with

[1]Report of the Panel on EEC Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables (BISD 25S/101).

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 into starch. It found that such restrictions existed only for potatoes and sweet potatoes and potato starches, which represented a minor and declining proportion of total Japanese starch production.

5.3.6.2 The Panel then examined whether the limitation of the import restriction to only potato and sweet potato starches or whether restriction of domestic production of other raw materials for starch processing would be sufficient to meet the requirements of Article XI:2(c)(i). It thus examined whether starches and inulin satisfied the requirements of products "in any form", that is whether they were products in an early stage of processing and still perishable, which competed directly with the fresh product and if freely imported would render ineffective the restrictions on the fresh products. With regard to perishability, the Panel noted that starch was a stable product which was capable of being stocked. The Panel further observed that imports into Japan of the raw materials from which starch could be processed, such as potatoes, corn and manioc, were not restricted and that substantial amounts were actually imported for starch production. The Panel considered that if restrictions on imports of these fresh products were not considered necessary to ensure the operation of restrictions on potato and sweet potato production, then import restrictions on the processed product were not necessary.

5.3.7 With regard to glucose and other sugars (17.02 ex) and food preparations, not elsewhere specified, consisting mainly of sugar (21.07 ex), the Panel noted that these products were also subject to the Miscellaneous Import Quota and recalled its previous finding on such restrictions (paragraph 5.3.1.3 above). The Panel further examined whether the establishment of a specific quota

for these sugars and sugar food preparations would be sufficient to fulfil the requirements of Article XI:2(c)(i). It noted that a large number of items were included in this basket category, only a few of which were specifically identified, i.e., chewing gum and bases for beverages. It also noted that some of the sugars in question could be processed from potato starch, and then used in the production of sugar food preparations. In light of its findings on potatoes and on starches (paragraphs 5.4.6 above), the Panel considered that these products, which were further processed from a processed product, were not in an early stage of processing and still perishable and that import restrictions on these processed product categories could not be considered as necessary to the enforcement of the limitation of production of potatoes and sweet potatoes.

5.3.8.1 With respect to groundnuts (12.01 ex), the Panel noted that groundnuts produced in Japan and imported groundnuts were identical in all respects and were, therefore, like products. The Panel examined the Japanese measures applied to groundnuts to determine Whether these constituted a governmental measure which restricts the quantities of groundnuts permitted to be produced or marketed. It noted in this regard the MAFF directive to the Principal Groundnut-Producing Prefectures Liaison Council regarding limitation of area planted to groundnuts. The Panel considered that restrictions on planted area could not be considered the equivalent of restrictions on production or marketing unless they (1) demonstrably had that effect. Another panel[1] had also examined the enforcement of governmental measures in evaluating their effectiveness. In this regard, the Panel noted that there was no penalty or charge imposed on Japanese producers who exceeded their target cultivation area, but rather they could lose eligibility to receive a benefit in the form of a subsidy or loan. The Panel considered that, as indicated by the drafting history of Article XI:2(c)(i), the important factor was not the methods used in restricting production but their effectiveness. The Panel further found that there were many factors, including the long-standing application of import restrictions, the provision of subsidies or loans for production, the changing pattern of agricultural production, and varieties, cultivation methods and improved yields, which affected historic and current output in often contradictory ways, rendering it virtually impossible to objectively determine what the level of production would have been in the absence of restrictions. The Panel considered, therefore, the actual pattern of quantities produced. It found that production exhibited a long-term trend of decline, and on an in-shell basis, had further declined since the reinforcement of the governmental measures in 1984. The Panel found, therefore, that the Japanese measures in the past had in practice been effective in restricting the quantity of groundnuts produced or marketed. On this basis the Panel considered that it could reasonably be assumed that the current production measures were capable of effectively limiting production.

5.3.8.2 The Panel then examined whether the restrictions on imports of groundnuts could be considered as "necessary" to secure the enforcement of the production restrictions. It noted that Japanese groundnuts and imported groundnuts were essentially identical and perfectly substitutable in terms of their use. It further observed that the marketing period for Japanese groundnuts was not limited to a few weeks or months, but was essentially the entire year. The Panel considered that the absence of restrictions on imports of processed groundnut products was not relevant to this consideration. The Panel found, therefore, that the restrictions maintained by Japan on imports of groundnuts could be reasonably considered as "necessary" in terms of Article XI:2(c).

5.3.8.3 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 that 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).

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[1]Report of the Panel of EEC Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables (BISD 25S/101).

5.3.9 The Panel noted the existence of quantitative restrictions on imports of meat of bovine animals, prepared or preserved (16.02 ex). The Panel further observed that Japan did not invoke Article XI:2(c)(i) with regard to this category but considered these restrictions necessary to the operation of the import monopoly for beef. The Panel recalled its findings with regard to this contention as contained in paragraph 5.2 above, and found that Article XI:2(c)(i) was applicable to this product. The Panel observed that certain prepared and preserved beef products were subject to the Miscellaneous Import Quota and recalled its finding on these restrictions (paragraph 5.3.1.3 above). The Panel further found that there did not exist any governmental measures which operated to restrict the production of beef in Japan.

5.3.10.1 The Panel then examined the restrictions applied to fruit purée and paste (20.05 ex), to fruit pulp (20.06 ex) and to certain fruit juices (20.07 ex). The Panel observed that certain fruit purees and paste and fruit juices were subject to the Miscellaneous Import Quota (see paragraphs 2.7.3 and 2.7.4) . The Panel recalled its previous finding on such restrictions (paragraph 5..1.3 above).

5.3.10.2 The Panel also noted that imports of single-strength pineapple, grape and apple juice were subject to a special quota which limited their availability only to hotel, airline and shipping vessel use. It considered that this resulted in a de facto prohibition on the importation of these types of juices into the general customs territory of Japan. The Panel found that such prohibition was not permitted under 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 placed on imports of fruit products under planned quotas were consistent with the provisions of Article XI:2(c)(i). The Panel noted that measures were in place which could affect the production of certain fresh fruits and possibly of apple juice. It considered that imported fruit puree and paste, fruit pulp and fruit juice were not "like" Japanese produced fresh fruit in terms of Article XI:2(c)(i) (paragraph 5.1.3.4 above). The Panel therefore proceeded to examine whether these fruit products met the requirements of products "in any form", that is whether they were products in an early stage of processing and still perishable which competed directly with fresh fruit and of freely imported would render ineffective the domestic restrictions on fresh fruit. The Panel then noted that the information available to it did not permit a finding of whether all the fruit products under consideration were imported in a perishable form, but it observed that some of the products in these categories were not perishable, such as fruit juices and those fruit products entering in a canned form. The Panel further observed that by far the greater proportion of the fresh fruit produced in Japan was consumed in its fresh form and was not processed. Imports into Japan of most fresh fruit, including fresh apples, peaches, grapes and pineapples, were not subject to quantitative restrictions. International trade in fresh apples, grapes and pineapples was substantial and distance to markets did not appear to be a barrier to this trade. Japan actually imported substantial quantities of fresh pineapple, and some, albeit small quantities of fresh grapes and apples. Imports of frozen apples and pineapples suitable for further processing were also unrestricted. The Panel considered that given the proportion of Japanese produced fresh fruit under consideration, other than pineapples, which was consumed fresh and was marketed only during the time and immediately following its harvest, processed fruit products could not be considered to directly compete with the fresh fruit other than possibly during this brief period. Japanese import restrictions, however, were applied all during the year and not just seasonally. The Panel thus found that in light of the proportion of Japanese fresh fruit which was destined for processing, the absence of restrictions on imports of fresh fruit, and the differing uses of fresh fruit and processed fruit products, the quantitative restrictions on imports of the indicated fruit puree and paste, fruit pulp, and fruit juices were not necessary to the enforcement of governmental measures which might operate to restrict the production or marketing of fresh fruit.

5.3.11 The Panel next reviewed the facts and arguments presented with regard to prepared and preserved pineapple (20.06 ex). The Panel did not consider that prepared and preserved pineapple was "like" fresh pineapple in terms of Article XI:2(c)(i) (paragraph 5.1.3.4 above). The Panel thus

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 restrictions on the importation of canned pineapple were not necessary for the operation of the domestic measures for fresh pineapples.

5.3.12.1 The Panel proceeded to examine the restrictions maintained on tomato juice (20.07 ex), tomato sauce and tomato ketchup (21.04 ex). The Panel noted that target levels of production of tomato juice, sauce and ketchup were established as a means to enforce the production restrictions on fresh tomatoes for processing, through the contractual arrangements between growers and processors and penalties for excess shipment of the fresh tomatoes. The Panel considered that under the definition of "like product" under Article XI:2 (paragraph 5.1.3.4 above), fresh tomatoes and these particular processed tomato products were not like products. The Panel then proceeded to examine whether the import restrictions on tomato juice, sauce and ketchup could be justified on the basis of the restriction of production of fresh tomatoes for processing, the like product to that from which they were processed.

5.3.12.2 With respect to tomato juice, the Panel noted that although Japanese-produced tomato juice was "fresh pack" and perhaps was perishable, the Japanese quota made no distinction with regard to whether the imported juice was "fresh pack" or in some other form and the tomato juice actually imported into Japan was primarily canned juice, capable of being stocked. The Panel recognized that tomato juice was a product in an early stage of processing which could compete directly with fresh tomatoes for processing and whose free importation might render ineffective the government measures on fresh tomatoes for processing, however, the Panel found that tomato juice in the canned form primarily imported into Japan was not perishable.

5.3.12.3 With regard to tomato sauce and ketchup, the Panel also noted the long shelf-life of these products when stored under normal conditions. Furthermore, in terms of the normal processing chain of tomato products, tomato juice, tomato paste and ketchup were not normally subject to further processing but rather were consumer-ready products. The Panel also observed that imports of tomato puree and paste (20.02 ex), which were equally processed tomato products and used frequently as inputs into the manufacture of tomato sauce and ketchup, were not restricted. The Panel considered that if unrestricted imports of these earlier stage processed products were not deemed to impair the domestic production restrictions on fresh tomatoes for processing, then imports of higher processed products such as tomato sauce and ketchup would not have that effect. The Panel thus found that tomato sauce and tomato ketchup were not products in an early stage of processing and still perishable, which competed directly with fresh tomatoes and whose free importation would render ineffective the domestic restrictions on fresh tomatoes for processing.

5.4 Other Issues Before the Panel

5.4.1 Other "Pertinent" Elements

The Panel noted that its terms of reference indicated that "… In examining the matter, the Panel may take into account all pertinent elements including the Council's discussion on the matter at its meeting on 27 October 1986". The Panel thus considered the record of the discussion of that meeting

(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 Article XI:2(c)(i) and that such justification had thus far only been challenged in one case. The Panel noted that the requirements of this provision had often been described as rigid and restrictive by Japan and other contracting parties.[1] Because of the difficulty of meeting these requirements a number of contracting parties had invoked other exceptions in the General Agreement or had sought waivers. In this context the Panel noted that Japan had on accession to the GATT notified its import restrictions under Article XII, and after disinvoking this Article in 1963 had notified a number of residual restrictions, which had since been gradually reduced.

5.4.1.2 The Panel also noted that a modification of Article XI:2 has been proposed in the Uruguay Round and that in the Ministerial Declaration of 1986 participants in the Uruguay Round had undertaken the commitment to phase out or bring into conformity all trade restrictive or distorting measures inconsistent with the provisions of the General Agreement or instruments negotiated within the framework of GATT. The Panel noted that it was generally understood that neither this commitment nor the possible modification of provisions of the General Agreement in the course of the negotiations curtailed the rights and obligations of contracting parties under Article XXIII of the General Agreement.

5.4.1.3 The Panel recalled that the purpose of GATT panels to assist CONTRACTING PARTIES in taking a decision under Article XXIII:2 and that according to the Ministerial Declaration of 1982, "it is understood that decisions [in the dispute settlement process] cannot add of diminish the rights and obligations provided in the General Agreement".[2] What was pertinent, therefore, in a panel's conclusions were findings regarding the conformity of the measures under examination with the General Agreement, and their effects on the benefits accruing from the General Agreement. These benefits arose, in part, from the obligations assumed by Japan under the General Agreement. Consequently, the Panel found that Japan's actions could, appropriately, be judged only against its obligations under the General Agreement and not against the practices of others, nor did the Panel consider it appropriate to prejudge the outcome of the multilateral negotiations.

5.4.1.4 As regards the vital role the twelve items under considerations played in Japan's agriculture and regional economies and their underlying social and political as well as economic background, the Panel - while aware of their significance in the Japanese context - found that previous panels had established that such circumstances could not provide a justification for import restrictions under the General Agreement.[3] However, in one respect the Panel took into account the special circumstances prevailing in Japan. This concerns the interpretation of the term "the enforcement of governmental measures" in Article XI:2(c)(i). As indicated in paragraph 5.1.3.3 above, the text of this provision does not specify how the domestic production or marketing restrictions are to be imposed, except that they have to be governmental and the drafting history suggests that the drafters were primarily concerned with the effectiveness of the measures. Although the Panel had some difficulty during its initial proceedings in establishing the exact nature of the domestic restrictions, Japan fully cooperated in providing the necessary detailed information, from which it became clear that the measures did in fact emanate from the government. As regards the method used to enforce these measures the Panel found

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[1]Reflected in AG/W/9/Rev.3, AG/W/14 and various summaries of main points raised at the Committee's meetings.

[2]BISD 29S/16

[3]Report of the Panel on Quantitative Restrictions against Imports of Certain Products from Hong Kong (BISD 30S/129), paragraph 27; and Report of the Panel on Japanese Measures on Imports of Leather (BISD 31S/94), paragraph 44.

that the practice of "administrative guidance" played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgements on the effectiveness of the measures in spite of the initial lack of transparency. In view of the special characteristics of Japanese society the Panel wishes, however, to stress that its approach in this particular case should not be interpreted as a precedent in other cases where societies are not adapted to this form of enforcing government policies.

5.4.1.5 The Panel found, therefore, that the practices of other countries, the existence of multilateral negotiations and the special characteristics of Japanese agriculture, could not, under the circumstances, be considered "pertinent elements" which could be taken into account when considering whether measures taken by Japan were in conformity with Japan's obligations under the General Agreement.

5.4.2 Articles X and XIII

The Panel noted that the United States had, as a subsidiary matter, argued that Japan had also nullified or impaired benefits under Articles X:1, X:3 and XIII:3. Since these provisions dealt with the administration of quotas that may be applied consistently with the General Agreement, the Panel decided that it was not necessary for it to make a finding on these matters with regard to quantitative restrictions maintained contrary to that Agreement.

5.4.3 Nullification and Impairment

The Panel was specifically asked "to make findings … on the question of nullification or impairment". Japan contended that there "was no proof of actual nullification or impairment supported by facts or statistics for individual items". In this respect, the Panel noted the following: the CONTRACTING PARTIES decided in the 1979 Understanding on dispute settlement that a measure inconsistent with the General Agreement was presumed to nullify or impair the benefits accruing under that Agreement.[1] The CONTRACTING PARTIES agreed in two previous cases[2] that Article XI protected expectations on competitive conditions, not on export volumes, and that the presumption that a measure inconsistent with Article XI caused nullification or impairment could therefore not be refuted with arguments relating to export volumes.

6. CONCLUSIONS

6.1 In the light of the findings set out in paragraphs 5.1-5.4 above, the Panel reached the following conclusions on the import restrictions maintained by Japan on the agricultural products subject to this complaint.

6.2 Article XI:1 of the General Agreement provides for the elimination of all import restrictions, including those "made effective through quotas" and those "made effective through state-trading operations" (paragraph 5.2 above). Article XX(d) of the General Agreement permits measures necessary to enforce the exclusive trading rights of import monopolies but not measures applied by such monopolies inconsistently with the other provisions of the General Agreement. The Panel therefore concludes that the import restrictions maintained by Japan are inconsistent with Article XI:1 of the General Agreement independent of whether they are made effective through quotas or through import monopoly operations.

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

[2]Report of the Panel on United States Taxes on Petroleum and Certain Imported Substances (L/6175); and Report of the Panel on Japanese Measures on Imports of Leather (BISD 31S/94)).

6.3 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 the enforcement of governmental 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 the following.

6.4 The Panel notes that Article XI:2(c)(i) does not permit the prohibition of imports but only their restriction. It finds that Japan maintains a de facto prohibition on the importation of evaporated milk (04.02 ex), sweetened condensed milk (04.02 ex), processed cheese (04.04 ex) and certain single-strength fruit juices (20.07 ex) into its general customs territory. The Panel concludes that these prohibitions maintained by Japan are contrary to Article XI.

6.5 The Panel notes that Article XI:2(c)(i) requires the existence of a governmental measure which restricts domestic production. In this regard, the Panel recalls its findings that Japanese production of all starches or the raw materials thereof, the like product to the restricted import, is not restricted. The Panel further recalls that Japan provided no evidence of governmental measures which operate to restrict the production of beef in Japan. The Panel concludes, therefore, that Japanese import restrictions on starches and inulin (11.08) and on prepared and preserved meat of bovine animals (16.02 ex) are not justified under Article XI:2(c) (i).

6.6 The Panel notes that Article XI:2(c)(i) permits restrictions not only on fresh products but also on those processed agricultural and fishery products that are in the early stages of processing and still perishable which compete directly with the fresh product and, if freely imported, would render ineffective the restrictions on the fresh product. It concludes, on the basis of its findings presented above, that the import restrictions maintained by Japan on the following items do not meet all of these conditions and are thus not justified under Article XI:2(c)(i): prepared and preserved milk and cream (04.02), processed cheese (04.04 ex), starch and insulin (11.08), glucose, lactose and other sugars and syrups (17.02 ex), prepared or preserved pineapple (20.06 ex), certain fruit juice and tomato juice (20.07 ex), tomato ketchup and sauce (21.04), and certain food preparations, not elsewhere specified, consisting mainly of milk or of sugar (21.07 ex).

6.7 The Panel observes that import restrictions applied under Article XI:2(c)(i) cannot exceed those "necessary" for the operation of the domestic governmental measure concerned. Such restrictions can thus not normally be justified if applied to imports during that time of year in which domestic supplies of the product are not available (paragraph 5.1.3.5 above). The Panel further considers that a restriction on imports of a processed product can in general not be considered as necessary if importation of more directly competitive forms of the product, i.e. the fresh product (when economically feasible) or earlier-stage products processed from the fresh product, are not also restricted. For these reasons and in light of its findings in paragraph 5.3.10 above, the Panel concludes that Japanese import restrictions on fruit purées and pastes (20.05 ex), prepared or preserved fruit pulp (20.06 ex), and certain fruit juices (20.07 ex) are not justified under Article XI:2(c)(i).

6.8 The Panel recalls that under the last sub-paragraph of Article XI:2(c) a contracting party applying an import restriction must give public notice of the total quantity or value of each product permitted to be imported during a specified future period. This requirement implies that under Article XI:2(c) only those quotas can be applied which define the particular quantity or value for each product subject to quota. The Panel finds that the Miscellaneous Import Quota maintained by Japan precludes the identification of the quantity or value of permitted imports of each product included therein. The Panel

therefore concludes that those import restrictions maintained by Japan through the Miscellaneous Import Quota on prepared whey powder (04.02 ex), starch and inulin for special use (11.08 ex), certain prepared and preserved bovine meat products (16.02 ex), lactose, glucose and other sugars and sugar syrups (17.02 ex), certain fruit purées and pastes (20.05 ex), certain fruit juices (20.07 ex), and food preparations not elsewhere specified mainly consisting of dairy or sugar (21.07 ex), are not justified under the provisions of Article XI:2(c).

6.9 The Panel observes that a further requirement of Article XI:2 is that the restrictions applied can not be such as would reduce the level of imports relative to domestic production below the proportion which would be expected to exist in the absence of restrictions. The Panel notes that the burden of proof that such a proportion has been maintained in principle rests with the country invoking the exception to the General Agreement, and that under the circumstances Japan is not able to provide such evidence with respect to its import restrictions on dried leguminous vegetables (07.05 ex) and on groundnuts (12.01 ex). The Panel concludes, however, that the import restrictions maintained by Japan on these two particular products are otherwise justified under the provisions of Article XI:2(c)(i).

6.10 On the basis of the above conclusions, the Panel suggests that the CONTRACTING PARTIES recommend that Japan eliminate or otherwise bring into conformity with the GATT provisions its quantitative restrictions maintained on the import of the products subject to this complaint.