

International and Regional Trade Law: The Law of the World Trade Organization



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Unit V: Quantitative Restrictions and Measures Equivalent to Quantitative Restrictions

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Supplementary Reading

For a complete overview with respect to the law on quantitative restrictions under the GATT we suggest the following reading:

Raj Bhala, Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, 2005, 339-450.

Pieter van den Bosche, The Law and Policy of the World Trade Organization, 2005, 441-457.

John H. Jackson et al., Legal Problems of International Economic Relation, 4th ed. 2002, 387-414.

John H. Jackson, The World Trading System, 2nd ed. 1997, 153-155.

Guiding Questions

Reflect on the following questions while reading the material:

What is the relevance of the determination whether a measure falls under Art. III or Art. IX GATT? What are the consequences for the law of justification of each determination respectively?

Could one defend a different relationship between GATT Articles XI and III such that any measure preventing the market access of foreign goods falls under Article XI, even if it applies indistinctly to imports and domestic goods? (If familiar, compare with the free movement of goods under the EC Treaty – Articles 25, 28, 30, 90 EC.)

1. Legal Text

Article XI* GATT

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
2. The provisions of paragraph 1 of this Article shall not extend to the following:
 - (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
 - (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
 - (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; or
 - (ii) to remove a temporary surplus of the like domestic product, 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, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
 - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (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.

Article III* GATT

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Interpretative Note Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

(...)

2. Relationship between Art. III and Art. XI

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

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

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

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

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

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

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

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

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

"... The Panel noted that this package-size requirement, though implemented as a listing requirement, was in fact a requirement that did not affect the importation of beer as such but rather its offering for sale in certain liquor-board outlets. The Panel therefore considered that this requirement fell under Article III:4 of the General Agreement, which required, inrer alia, that contracting parties accord to imported products '... treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal ... offering for sale ...'. The Panel found that the imposition of the six-pack configuration requirement on imported beer but not on domestic beer was inconsistent with that provision."

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

"The Panel which had examined in 1988 the practices of the Canadian liquor boards had analysed the restrictions on access to points of sale under Articles III:4 and XI:1 of the General Agreement. While that Panel had found these restrictions to be inconsistent with Canada's obligations under Article XI:I, it had also pointed

out that it 'saw great force in the argument that Article III:4 was also applicable to State-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada'. The present Panel, noting that Canada now considered Article III:4 to be applicable to practices of the liquor boards, examined this issue again.... The Panel found that, by allowing the access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities denied to imported beer. For these reasons the present Panel saw great force in the argument that the restrictions on access to points of sale were covered by Article III:4. However, the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:I or Article III:4 because Canada was not invoking an exception to the General Agreement applicable only to measures taken under Article XI:1 (such as the exceptions in Articles XI:2 and XII) and the question of whether the restrictions violated Article III:4 or Article XI:1 of the General Agreement was therefore of no practical consequence in the present case".

The Panel also examined minimum prices maintained for beer in certain provinces of Canada.

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

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

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

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

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

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

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

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

* * *

3. U.S. – Tuna/Dolphin

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

Which GATT discipline ought to apply to national rules governing production methods (not product characteristics) of both imports and domestic goods: Article III or Article XI?

To what extent does the application of such rules to imports constitute an extraterritorial exercise of governmental authority?

United States – restrictions on Imports of Tuna

Report of the Panel submitted to the Parties on 16 August 1991 (unadopted), DS21/R, 3 September 1991

Chairman: Mr. András Szepesi; Members: Mr. Rudolf Ramsauer, Mr. Elbio Rosselli

5. FINDINGS

A. Introduction

5.1. The Panel noted that the issues before it arose essentially from the following facts: the Marine Mammal Protection Act (MMPA) regulates, inter alia, the harvesting of tuna by United States fishermen and others who are operating within the jurisdiction of the United States. The MMPA requires that such fishermen use certain fishing techniques to reduce the taking of dolphin incidental to the harvesting of fish. The United States authorities have licensed fishing of yellowfin tuna by United States vessels in the ETP on the condition that the domestic fleet not exceed an incidental taking of 20,500 dolphins per year in the ETP.

5.2. The MMPA also requires that the United States Government ban the importation of commercial fish or products from fish caught with commercial fishing technology which results in the incidental killing or incidental serious injury of ocean mammals in excess of United States standards. Under United States customs law, fish caught by a vessel registered in a country is deemed to originate in that country. As a condition of access to the United States market for the yellowfin tuna or yellowfin tuna products caught by its fleet, each country of registry of vessels fishing yellowfin tuna in the ETP must prove to the satisfaction of the United States authorities that its overall regulatory regime regarding the taking of marine mammals is comparable to that of the United States. To meet this requirement, the country in question must prove that the average rate of incidental taking of marine mammals by its tuna fleet operating in the ETP is not in excess of 1.25 times the average incidental taking rate of United States vessels operating in the ETP during the same period. The exact methods of calculating and comparing these average incidental taking rates have been specified by regulation.

(...)

B. Prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico

Categorization as internal regulations (Article III) or quantitative restrictions (Article XI)

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

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

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

The Note Ad Article III provides that:

"Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III:1] which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in (Article III:1), and is accordingly subject to the provisions of Article III".

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

consistently with that Note in the case of imported tuna at the time or point of importation. The Panel examined this question in detail and found the following.

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

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

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

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

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

5.14. The Panel concluded from the above considerations that the Note Ad Article III covers only

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

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

³⁶ BISD 18S/97, 100-101, para. 14.

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

5.15. The Panel further concluded that, even if the provisions of the MMPA enforcing the tuna harvesting regulations (in particular those providing for the seizure of cargo as a penalty for violation of the Act) were regarded as regulating the sale of tuna as a product, the United States import prohibition would not meet the requirements of Article III. As pointed out in paragraph 5.12 above, Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.

(...)

5.18. (...) The Panel therefore found that the direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the MMPA under which it is imposed were inconsistent with Article XI:1.

4. Japan – Trade in Semi-Conductors

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

Under the GATT 1947, contracting parties often preferred to conclude so-called Voluntary Export Restraints (VERs) to protect a domestic industry against imports rather than to adopt safeguards under GATT Art. XIX. Many of these agreements were voluntary only in a formal sense. The following dispute gives a good illustration of the desired and undesired economic effects of VERs on the participating and third countries. Another interesting aspect of the case is the GATT relevance of governmental versus private action.

VERs are now prohibited by Article 11 of the Agreement on Safeguards.

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

Chairman: H.E. Mr. J. Lacarte-Muró; Members: Mr. C. Falconer, Mr. J. Greenwald

(...)

II. BACKGROUND

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

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

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

12. On 2 September 1986, Japan and the United States formally concluded an Arrangement concerning Trade in Semi-Conductor Products (hereinafter called "the Arrangement") which was subsequently notified to the GATT on 6 November 1986 in document L/6076. The Arrangement was linked to the suspension of anti-dumping procedures initiated in the United States against

imports of certain categories of Japanese semi-conductors and to the suspension of the Section 301 proceedings on access to the Japanese market for US-made semi-conductors.

B. Main provisions of the Arrangement

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

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

15. The Third section contains general provisions on periodic and emergency consultations, on the conditions of amending and terminating the Arrangement, and on the preservation of GATT rights and the interests of third countries. The duration of the Arrangement is five years, ending on 31 July 1991.

(...)

D. Movement of prices in certain semi-conductors

(...)

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

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

29. The EEC contended that the price increase in early 1987, contrary to what had been forecasted by Dataquest, an international industry analyst (also used by the United States), was explained by MITI production and price control activities. Japan maintained that pricing was a decision by businessmen based on commercial considerations. Especially in the period following the conclusion of the Arrangement, pricing was affected by many factors such as trade issues with the United States, EEC anti-dumping investigations, industry's intention to avoid below cost pricing, recovery of balanced supply and demand relations and reduced supply capacity. Therefore, simple comparison of actual data with the forecast formulated by Dataquest on the basis of past data was not meaningful. The United States explained that prices of semi-conductors were affected by the elasticity of demand for the final product, for example, computers. Prices also fluctuated over the course of the year, depending on the time of contracts negotiated. The product life cycle of a particular type of semi-conductor, exchange fluctuations, and the initiation of anti-dumping investigations, and significant worldwide increases in downstream product demand were all factors which also influenced prices.

(...)

IV. MAIN ARGUMENTS BY PARTIES TO THE DISPUTE

A. The Third Country Market Monitoring

(a) General

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

34. To implement the Third Country Market Monitoring provision, an export licensing system was used for the monitoring according to which licences were issued to applications which respected certain price guidelines, i.e. a minimum price fixed for individual products. Since Japan and the United States directly produced, or controlled through overseas manufacturing plants, a pre-dominant share of world semi-conductor production, the government-mandated export price control would lead to a situation in which importing countries would be forced to pay a price for such imports in excess of what normal conditions of competition would imply. This situation could force, induce or permit Japanese producers to exercise quantitative export limitations which could subject foreign competitors producing competing final products to considerable uncertainty and risks in their production plan or even prevent them from producing at all. The Community had been informed by some Japanese manufacturers that MITI was putting pressure on them through administrative guidance to restrict overall export volumes of certain semi-conductors, resulting in

severe reduction of supplies, delays in the granting of export licences and other disruptions with potentially serious consequences.

35. The EEC went on to state that the Japanese administrative guidance not only controlled export prices and export volume, but also production volume and other aspects in relation to exports. In the Japanese Position Paper mentioned above, it was stated that "Japan exercised administrative guidance to achieve production cutbacks and adopted more stringent export licensing practices with a view to aiding the US efforts over and above Japan's obligations under the Arrangement ... In February 1987, MITI exercised administrative guidance to the companies to reduce production during the first quarter of 1987 by 23 per cent below fourth quarter 1986 levels. Last month, MITI again exercised administrative guidance to the companies to reduce production still further in the second quarter to 32 per cent below fourth quarter 1986 levels." The Position Paper also stated that the Japanese government "has taken steps above and beyond its obligations under the Arrangement in part for the purpose of demonstrating its desire to cooperate with the United States during earlier consultations under the Arrangement." Thus, in November 1986, MITI had invoked the Export Trade control ordinance in order to prevent below-cost exports. Thereafter, in January 1987, Japan lowered the minimum level for export licences from ¥1 million to ¥50,000. In February 1987, Japan increased scrutiny of export licence applications for third country exports in order to prevent grey market sales. In March 1987, the MITI Minister had convened an emergency meeting with the Chairman or President of each of the ten major semi-conductor companies to impress upon them the importance of avoiding dumping in third country markets.

36. The Japanese Position Paper provided further insights into the operation of the Third Country Market Monitoring System. Following US Government's allegations in early 1987 that Japanese semi-conductors were still dumped on third markets, the Japanese Government had made known its readiness to share relevant data with the United States on a reciprocal basis in order to dispel these allegations. In other words, information regarding third markets would be exchanged between the two parties with a view to proving that Japanese export prices had increased by the amount defined by the United States Government as being necessary to bring such prices up to the "fair market value" set for the US market by the US Department of Commerce. This, according to the EEC, clearly showed that the Japanese authorities had not been merely "watching" and passively issuing export licences but had acted in response to the restrictive purpose behind the Third Country Market Monitoring System.

37. Japan stressed that monitoring was mere watching. In cases when exports were made at prices "extremely lower" than the cost, MITI might present the facts and communicate its concern to the manufacturer. MITI's requests for dumping to be stopped were not export restrictions. No export licence had ever been denied to any application because of inappropriate pricing. When MITI had lowered the maximum amount per contract requiring no export approval from ¥1 million to ¥50,000 in January 1987, the number of applications had almost doubled, causing delays in processing applications at the beginning, but the situation had been improved since then. The lowering of the threshold had been necessary because some exporters had tried to circumvent the export licence system by dividing a contract into several smaller consignments. The supply and demand forecasts issued by MITI served only as a guideline to manufacturers, whereby MITI expressed its expectations that it was desirable to avoid over-production which far exceeded actual demand. The relationship between price and supply and demand in the semi-conductor industry was characterized by a learning curve effect in the sense that an increase in production and productivity brought about a sharp decline in costs. In these circumstances, the possible decrease in prices was liable to create a high expectation of demand expansion, leading to capacity investment,

over-production and excessive competition over market shares. These conditions of over-production and excessive competition might promote a price war and destabilize the balance between demand and supply. On the other hand, if low-priced products were exported and regarded as dumped, or if low domestic prices prevented an increase in imports of foreign semi-conductors, international cooperation might be harmed. MITI's efforts to request manufacturers to align their production levels to reflect the real demand and to prevent dumping had not had a restrictive effect on exports, but were made with the objective of contributing to international co-operation.

(...)

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

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

(...)

(c) Article XI

49. The EEC considered that the Third Country Market Monitoring System was incompatible with the provisions of Article XI relating to export restrictions. Firstly, the Arrangement had a restrictive intent in that the purpose of the Third Country Market Monitoring System was to artificially raise Japanese export prices through government intervention. This intent was explicitly acknowledged in the Japanese Position Paper in which the Japanese authorities had emphasized their determination to implement more stringent export licensing practices "to prevent below-cost exports". Secondly, the restrictive effects of the licensing system were universally recognized, not only by EEC users and importers, but by those in other importing countries like Australia, Canada or Hong Kong, and even by the United States. In a report to the President of the United States, dated September 1987, the Semi-Conductor Industry Association had stated that, "through the use of production controls and floor price measures, the Government of Japan has disrupted the pricing and supply of key semi-conductor products. These policies have meant artificially high prices and short supply for US semi-conductor users ...". It was irrelevant under Article XI whether the Government of Japan would subject the granting of export licences to the observance by exporters of the "fair market value" defined for the US market or of other criteria such as the

avoidance of exports below-cost. The fact was that controls with price and quantitative effects had been imposed on the exports of semi-conductors, violating Article XI.

50. Japan maintained that monitoring of semi-conductor exports by the Japanese Government was indeed merely watching cost and export prices. Monitoring was not intended to prohibit or restrict trade, nor did it in practice produce such results. There were no minimum price requirements. It was also contrary to the facts to say that export restrictions, production controls or artificial price increases existed. Through monitoring, Japanese companies were encouraged to prevent dumping, but this would only happen through a voluntary decision of the company concerned. The encouragement by the Japanese Government was not legally binding by any means, and there was no penalty even if the company did not comply with such encouragement. Companies were expected to refrain from dumping of their own will, taking into consideration factors such as the likelihood that importing countries would introduce anti-dumping measures which would adversely affect their business. Such voluntary actions of the companies were irrelevant to the provisions of Article XI which dealt with actions by governments.

(...)

VII. FINDINGS

(...)

A. The Third Country Market Monitoring

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

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

100. Up to 10 November 1987 the cost and price data had been reviewed within the framework of the screening of exports for COCOM purposes. An export licence for semi-conductors had been granted only after the Japanese Government had examined the information on costs and export prices. As a result of this monitoring, export licences had been granted with delays, sometimes amounting to several months. As of 10 November 1987 the COCOM screening and the monitoring of costs and export prices had been administratively separated. Producers and exporters of

semi-conductors were now still obliged to supply the Government with information on costs and export prices before shipment and the Government still examined this information systematically, but the granting of the export licence within the framework of the COCOM regulations was no longer dependent on the examination of costs and prices.

101. The Panel noted that the complaint by the EEC started with arguments on Article VI. It decided, however, to examine Article XI before addressing other Articles.

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

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

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

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

The Panel noted that this wording was comprehensive: it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.

105. The Panel noted that the CONTRACTING PARTIES had decided in a previous case that the import regulation allowing the import of a product in principle, but not below a minimum price level, constituted a restriction on importation within the meaning of Article XI:1 (BISD 25S/99). The Panel considered that the principle applied in that case to restrictions on imports of goods below certain prices was equally applicable to restrictions on exports below certain prices.

106. The Panel then examined the contention of the Japanese Government that the measures complained of were not restrictions within the meaning of Article XI:1 because they were not legally binding or mandatory. In this respect the Panel noted that Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting

party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.

107. Having reached this finding on the basis of the wording and purpose of the provision, the Panel looked for precedents that might be of further assistance to it on this point. It noted that the CONTRACTING PARTIES had addressed a case relating to the interpretation of Article XI:2(c) in the report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253). Under Article XI:2(c), import restrictions might be imposed if they were necessary to the enforcement of "governmental measures" restricting domestic supplies. The complaining party argued in the earlier panel proceedings that some of the measures which Japan had described as governmental measures were in fact "only an appeal for private measures to be taken voluntarily by private parties" and could therefore not justify the import restrictions. Japan replied that "to the extent that governmental measures were effective, it was irrelevant whether or not the measures were mandatory and statutory", that the governmental measures "were effectively enforced by detailed directives and instructions to local governments and/or farmers' organizations" and that "such centralised and mutually collaborative structure of policy implementation was the crux of government enforcement in Japan" (L/6253, paragraph 29). The Panel which examined that case had noted that "the practice of 'administrative guidance' played an important rôle" in the enforcement of the Japanese supply restrictions, that this practice was "a traditional tool of Japanese government policy based on consensus and peer pressure" and that administrative guidance in the special circumstances prevailing in Japan could therefore be regarded as a governmental measure enforcing supply restrictions. The Panel recognized the differences between Article XI:1 and Article XI:2(c) and the fact that the previous case was not the same in all respects as the case before it, but noted that the earlier case supported its finding that it was not necessarily the legal status of the measure which was decisive in determining whether or not it fell under Article XI:1.

108. The Panel recognized that not all non-mandatory requests could be regarded as measures within the meaning of Article XI:1. Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors. There was thus a wide spectrum of government involvement ranging from, for instance, direct government orders to occasional government consultations with advisory committees. The task of the Panel was to determine whether the measures taken in this case would be such as to constitute a contravention of Article XI.

109. In order to determine this, the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI:1.

110. On the first criterion, the Panel considered the background against which the measures operated. The Panel noted that the Government of Japan had formally concluded in September 1986 an Arrangement with the Government of the United States, one of the main provisions of which was for the Japanese Government to monitor costs and export prices to third country markets in order to prevent dumping. Following bilateral consultations, the Government of

Japan assured the United States in April 1987 that it had taken "appropriate action to ensure that Japanese semi-conductor exports are being sold at not less than their costs in third country markets".

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

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

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

113. The Panel further examined the structure and elements of the measures adopted. It noted that Japanese producers were required to submit detailed information on costs on a regular basis. It also noted the importance of the statutory requirement for exporters to supply information on export prices and of the heavy penalties attached for failure to comply with that requirement. The objective of identification in the monitoring measures was clear. For instance, in cases where the exporter was not a producer, the origin of the transaction had to be declared and identified. The Panel noted that this gave the Japanese Government a comprehensive basis for precise identification of the source of any below cost pricing. It also observed that any producer or exporter would have been aware that the Japanese Government would be in a position to have this information. The preparedness of the Japanese Government to request, and to continue requesting, for below cost sales to cease was also evident.

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

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

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

116. The Panel also considered that the series of statements quoted in paragraph 112 above were relevant in this context. In addition to these, the Panel noted that Japan had stated in the proceedings of the Panel that "although monitoring by MITI was limited in scope, it was still meaningful because MITI represented a neutral and objective figure overseeing the entire industry while taking into account costs and prices among competing companies in Japan. Monitoring also helped to stamp out suspicion among companies that others were cheating or resorting to dumping". Japan had further stated that "if the semi-conductor manufacturers were to pursue their own profits and ignore MITI's concern, the whole dumping prevention mechanism would collapse", and that "the administration presents (firms) with objective facts and considerations and others that are usually not obtainable by one firm alone". The Panel considered that these statements concerning the way in which the Government exercised its authority were a further confirmation of the fact that the Government's involvement was essential to the prevention of sales below company-specific costs.

117. All these factors led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs. This was exercised through such measures as repeated direct requests by MITI, combined with the statutory requirement for exporters to submit information on export prices, the systematic monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilization in a manner to directly influence the behaviour of private companies. These measures operated furthermore to facilitate strong peer pressure to comply with requests by MITI and at the same time to foster a climate of uncertainty as to the circumstances under which their exports could take place. The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements. The Panel concluded that the complex of measures constituted a coherent

system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States, inconsistent with Article XI:1.

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

(...)

VIII. CONCLUSIONS

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

A. The requests not to export semi-conductors at prices below company-specific costs to contracting parties other than the United States which the Japanese Government addressed to Japanese producers and exporters of semi-conductors, combined with the statutory requirement for exporters to submit information on export prices and the systematic monitoring of company and product-specific costs and export prices by the Government, backed up with the use of supply and demand forecasts to impress on manufacturers the need to align their production to appropriate levels, constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States, inconsistent with Article XI:1. The Panel suggests that the CONTRACTING PARTIES recommend that Japan bring its measures relating to the sale for export of semi-conductors to contracting parties other than the United States into conformity with the General Agreement.

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

(...)

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

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Multilateral Approaches to Market Access Negotiations Countries

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

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

(...)

III. Non-tariff measures

A Issues

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

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

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

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

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

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

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

64. For more than 40 years the developing countries' single most important export, textiles and clothing, were restricted on a discriminatory basis under the MFA and the earlier Short- and Long-term Cotton Textiles Agreements. These restraints are now being progressively phased out under the WTO Agreement on Textiles and Clothing. There are mixed feelings among developing countries about the MFA elimination for two reasons. Constrained exporters must be expected to lose some of quota rents afforded by the MFA, but the country-specific quota system also provided a form of protection for less efficient exporters against the more efficient to

whom quotas could not be transferred. (There have already been reports of Bangladesh losing out to China in some areas).

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

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

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

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

69. Apart from these specific areas covered by the market access negotiations in the Uruguay Round, a number of important NTMs were covered in rules negotiations. These include contingency protection (safeguards, anti-dumping, countervailing), technical barriers (including sanitary and phytosanitary measures), TRIPS, TRIMs, import licensing, state trading and rules of origin. These are covered by other papers at the conference.

70. One important area of rules relates to the use of subsidies, which are covered by the WTO Agreement on Subsidies and Countervailing Measures (SCM) and the Agreement on Agriculture. These rules distinguish between domestic and export subsidies and provide for differential treatment of agriculture and manufactured products. Some subsidies, notably export subsidies, are prohibited, while others are "actionable" or "non-actionable", whether in the WTO or through countervailing actions. There are notification requirements for all specific subsidies, i.e.,

