

1 July 1983

PANEL ON QUANTITATIVE RESTRICTIONS AGAINST
IMPORTS OF CERTAIN PRODUCTS FROM HONG KONG

*Report of the Panel adopted on 12 July 1983
(L/5511 - 30S/129)*

I. Introduction

1. At the request of the delegation of the United Kingdom on behalf of Hong Kong the Council established the Panel on 1 October 1982, with the following terms of reference (C/M/161, item 7):

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United Kingdom on behalf of Hong Kong in document L/5362 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2".

The composition of the Panel was as follows:

Chairman: Mr. R. Hochörtler
Members: Mr. A.J. Dumont
 Mr. D. Greenfield

2. The Panel met on 17 December 1982, 3 February, 16 March, 11 April, 19 April, 10 May, 16 May, 1 June, 12 June, 15 June and 20 June 1983.

3. In the course of its work the Panel consulted with the delegations of the European Community and the United Kingdom on behalf of Hong Kong (hereafter referred to as Hong Kong). Arguments and relevant information submitted by both parties, replies to questions put by the Panel as well as all relevant GATT documentation served as a basis for the examination of the matter.

4. During the proceedings the Panel provided the parties adequate opportunity to develop a mutually satisfactory solution in the matter before it.

5. The Panel urged the parties to respect the need for confidentiality and requested them not to release any papers or make any statements in public regarding the dispute.

II. Factual aspects

6. The case before the Panel concerned quantitative import restrictions maintained by France on the following product categories:

- (1) knitwear other than of cotton, man-made fibres, and wool (ex 60.04, ex 60.05 A);
- (2) clothing other than of cotton, man-made fibres, and wool (ex 61.01, ex 61.02, ex 61.03);
- (3) umbrellas (ex 66.01);
- (4) radios and radio parts (85.15 A ex III and 85.15 C);
- (5) pleasure and sports boats for marine use (89.01 ex B);
- (6) compound optical microscopes (ex 90.12);

(7) toys and toy parts (ex 97.03);

(8) electronic watches with piezo - electric quartz crystal regulating device (ex 91.01).

7. The French Decree of 30 November 1944, which is the fundamental text for French foreign trade regulations, lays down, inter alia, that

"Article 1. The entry of foreign goods into France under whatsoever customs régime shall be permitted only subject to production of an individual import permit issued by the Central Import and Export Licensing Service in the conditions laid down by the provisionally applicable law of 22 February 1944;

Article 2. General derogations may nevertheless be authorized; they shall be published in the "Journal officiel" in the form of notices to importers."

The text of the law referred to in the Decree (Law No.98 of 22 February 1944) was supplied to the Panel.

8. Restrictions on all categories had been maintained de jure since 1944 even though certain adaptations had been made by way of a régime without quantitative limitations ("régime sans limitation de quantité") usually referred to as the SLQ régime, even though this expression had not been utilized in all cases. If, during certain periods the import régime of certain products had been made more flexible, these imports had always been subject to the delivery of licences. The SLQ régime was described as a system which concerned imports of products subject in principle to quantitative restrictions but for which no quota amount had been set either in quantity or value, permit applications being granted on request. It could be defined as a suspension - which was provisional and could be revoked at any time - of strict quota limitation. At the present time, radio parts, boats and microscopes are subject to the SLQ régime. With respect to electronic watches, a previous SLQ régime was replaced by a quantitative quota restriction on 23 October 1981 consistent with the basic legal situation in France.

9. The European Community informed the Panel that for all the eight items, bilateral quotas or in some cases (boats, microscopes, radio parts) a SLQ-régime was maintained with regard to Hong Kong. For six items (knitwear, clothing, umbrellas, radios, microscopes and toys), general restraints were also maintained for a specific group of countries, except in certain cases where specific quotas or a SLQ-régime applied. For two items (boats and watches) general restraints were also maintained for all third countries except in certain cases where specific quotas or a SLQ régime applied.

10. All the product categories had been subject to consultations; the quantitative restrictions on the first seven product categories had been subject to informal talks prior to 1970 and following the introduction of quantitative restrictions on quartz watches, Hong Kong and the Commission of the European Communities had held Article XXIII:1 consultations on the measures examined by the Panel. Following those consultations, the French authorities unilaterally, with the exceptions of umbrellas and quartz watches, either increased quotas applicable to Hong Kong, or relaxed the import régime by introducing a SLQ régime. However, the matter had not been settled to the satisfaction of the Hong Kong authorities, which sought recourse to Article XXIII:2 as set out in L/5362 dated 3 September 1982.

III. Main arguments

(a) General

11. Hong Kong considered that the quantitative restrictions maintained by France against Hong Kong were contrary to the GATT because (a) they were not justified under any specific article of the GATT, including Article XI:2, and were, therefore, in breach of Article XI:1 which specifically forbade quantitative import restrictions; and (b) they discriminated against Hong Kong and were, therefore, in contravention of France's obligations under Article I which provided for most-favoured-nation treatment and Article XIII which forbade the discriminatory administration of quantitative restrictions. Hong Kong subsequently withdrew part of the complaint, stating that it was no need for the Panel to make a finding on whether or not the French quantitative restrictions were in conformity with Article I.

12. In the view of the European Community, in order to judge the compatibility of these restrictions with the provisions of GATT, it was not enough to limit examination to a purely legal exercise. All restrictions with which the Panel was concerned, were "residual restrictions", i.e. measures for which liberalization had not been possible in the OECD programme of liberalization of the 1950s. Account must be taken of historical and general factors as well as the specific economic and social situation in each sector, e.g. weak industrial structures and technological adjustment; threat of serious injury to domestic production and employment through increases in imports and competition with low-priced foreign products; sectorial trade imbalances and declining shares of the domestic market; in some cases also risk of circumvention of quotas established for similar goods. The EC submitted documentation to the Panel dealing with such factors as they affected each of the products in question. The EC maintained that judgement that would be isolated from any economic consideration and from the real factors of commercial policy, would be contrary to the pragmatic approach that was traditional in GATT. It was stated that any condemnation of the quantitative restrictions under reference on the basis of provisions of the General Agreement would not be justified and would be unfair given that these restrictions represented only a very small part of the overall problem of residual restrictions. In the light of this situation, the Community believed that it was more useful to pursue a case-by-case approach which would allow the economic implications of each restriction to be examined individually and thus to confirm that these restrictions were necessary to deal with problems at economic and social levels.

13. Hong Kong believed that this argument was invalid because the wording of Article XI made it clear that, with the exception of the measures described in paragraph 2 of that Article - which the EC did not claim as a justification for the French quantitative restrictions in question - all "prohibitions or restrictions other than duties, taxes or other charges" were forbidden. There was no provision that there might be exemptions on economic or social grounds. In the case of Article XIII, it was also clear that the provision for the non-discriminatory administration of quantitative restrictions was compulsory and that there was no provision for exemptions on economic or social grounds. The economic and social considerations introduced by the EC were irrelevant to the Panel's terms of reference; the Panel had to limit its examination to purely legal considerations. Hong Kong added that Article XIX seemed to be the only GATT provision under which the economic factors introduced by the European Community might be relevant. However, the EC had not invoked Article XIX in the present case.

14. The European Community, in response to this argument, held that the terms of reference could not be interpreted in a manner so as to exclude consideration of those elements which had, over time, influenced the application of relevant GATT provisions. The Panel could only discharge its obligations by examining the issue before it in the light of all relevant GATT provisions, and all other relevant discussions which had taken place in GATT. The terms of reference of GATT panels were nearly always formulated in a non-specific way, it being generally understood that all relevant matters were

taken into account. If this interpretation of terms of reference of GATT panels was not generally accepted, it would lead in the future to great difficulties in the formulation of terms of reference of panels. The Community considered therefore that the limited interpretation by Hong Kong of the terms of reference was not founded and that social, economic and circumstantial factors should be taken into account as relevant factors.

(b) Article XI

15. The European Community argued that Article XI did not constitute an absolute prohibition on all residual restrictions and could not be applied in an absolute manner. The Article covered "other restrictions" and export restrictions; yet these provisions had never been implemented. When the text of Article XI had been established, quantitative restrictions were general and widespread under balance-of-payments provisions and were considered the major obstacle to international trade. The OECD programme of liberalization in the beginning of the 1950s had clearly showed that there were genuine problems for a number of countries in eliminating quantitative restrictions totally. Therefore, a residual number of these quantitative restrictions had remained in force, in some cases justified for balance-of-payments reasons (Article XII), in others without invocation of any of the exceptions specifically foreseen in the General Agreement. Such quantitative restrictions, or "residual restrictions" had subsequently been subject to a series of examinations, consultations and negotiations in GATT, where underlying economic and social factors had been taken into account. Examples were the Working Group on Residual Restrictions in 1965 (product-by-product approach), the Joint Working Group on Import Restrictions in 1970 (consultations to examine nature, need and purpose of quantitative restrictions and their effects on trade), and the Tokyo Round (request and offer procedure). This proved, according to the EC, that quantitative restrictions had become a general problem and had gradually come to be accepted as negotiable, and that Article XI could not and had never been considered to be a provision prohibiting residual restrictions irrespective of the circumstances specific to each case. The EC maintained that this trend was well illustrated by the statement by the Chairman of the CONTRACTING PARTIES at the closing meeting of the Ministerial session (document SR.38/9). Furthermore, the restrictions in question represented only one facet to a problem that was much broader in scope. Recent GATT experience had revealed a whole series of actions and measures that were not directly covered by the provisions of the General Agreement in the strict sense, and which had perhaps not been envisaged by its authors. Leaving aside the fact that the contracting parties had developed in practice a certain attitude of tolerance in regard to existing quantitative restrictions, but outside the framework of specific provisions, it was suggested that the Panel could not ignore that the General Agreement was an international agreement which had to be interpreted on the basis of generally accepted principles and practices of international law. An important principle of international law, namely "the law-creating force derived from circumstances" could not be ignored by the Panel, on the sole ground that no GATT article provided for such a principle.

16. Hong Kong submitted that the fact that the prohibition laid down in Article XI:1 had not been observed by some contracting parties, could not have the effect of rendering it less absolute. Discussions and negotiations in the GATT in the area of quantitative restrictions had not changed the existing GATT provisions relevant to this subject and it was an established understanding that negotiations were without prejudice to the legal status of the measures subject to negotiation or to the rights and obligations of GATT contracting parties. If this understanding were to be called into question, contracting parties would have grave inhibitions in entering into any further multilateral work in the GATT on illegal measures. As to the argument that the quantitative restrictions in question represented only a small part of the overall problem of residual quantitative restrictions, Hong Kong believed that this was not relevant because the terms of reference of the Panel did not call for an examination of the overall problem. If reference to the existence of other measure identical or similar to the measures under complaint was to be accepted as a defence, Article XXIII would become inoperative immediately. Reference had been made to orderly marketing arrangements (OMAs) or voluntary export restraints (VERs), but, since they had the effect of quantitative restrictions they were expressly forbidden under

Article XI, paragraph 1. Discussions in the GATT on how such arrangements should be treated in the future were in any case without prejudice to the question of their legality and were in no way relevant to the Panel's deliberation on the present complaint which dealt with unilaterally imposed quotas. The argument that the law was made by facts could only have some validity in the absence of an existing law expressly prohibiting a certain act. In the present case Article XI was such an existing provision. The EEC argument in this respect was an attempt to create new GATT rules. The creation of new GATT rules was within the sole jurisdiction of the CONTRACTING PARTIES and was entirely outside the terms of reference of the Panel. If the principle advanced by the European Community were to be accepted by the CONTRACTING PARTIES, a situation would arise in which there could be no certainty as to the validity of the rules of the GATT, and in which the GATT would become unworkable. Finally, Hong Kong recalled its own statement at the closing session of the Ministerial Meeting, which had been supported by one other delegation and not further qualified by the Chairman or any other delegation and which had held that the Chairman's statement referred to by the European Community had no status in juridical terms.

17. The European Community recalled that the French restrictions were of a residual character and that this régime had been in existence for a long time without Article XXIII ever having been invoked in regard to the products concerned. This was an indisputable indication that the contracting parties had adopted a tolerant attitude that was tantamount to tacit acceptance of the situation. No complaint had been filed by Hong Kong until 1982, whereas the fundamental nature of the régime in France had not changed for the past twenty-five years and such a complaint could have been made at any time. This indicated that the European Community's partners had had no legal problem so long as administration of the quotas under reference had been deemed equitable and the régime had involved no excessive trade obstacles. It was only after the régime applicable to the specific sector of quartz watches had been intensified that the Hong Kong authorities had decided to argue from principle.

18. Hong Kong replied that it had constantly and consistently maintained that the French quantitative restrictions were inconsistent with the GATT; as formally recorded in the reports of the Joint Working Group on Import Restrictions. It had exercised great restraint in not asking for the establishment of a panel until it had exhausted all other possibilities of effecting a satisfactory adjustment on a bilateral basis. French quantitative restrictions against imports of certain products from the United States had been the subject of a complaint and a Panel report which had been adopted by the CONTRACTING PARTIES in 1962 and formed part of GATT's case law. Although only one item was also currently the subject of Hong Kong's complaint, both complaints concerned so-called "residual restrictions" once justified by France under Article XII but since 1960 no longer covered by any GATT justification. The 1962 Panel had informed the CONTRACTING PARTIES (BISD 11S, pages 94 and 95) that the French Government "did not contest that the restrictions under consideration were contrary to Article XI of the General Agreement" and it had stated that:

"the maintenance by a contracting party of restrictions inconsistent with Article XI after the contracting party had ceased to be entitled to have recourse to Article XII constituted nullification or impairment of benefits to which other contracting parties were entitled under GATT and the effects of such nullification or impairment were aggravated if such maintenance of restrictions was continued for an extended period of time".

Hong Kong further stated that since the European Community had not taken a position as to whether the measures before the present Panel were, on a purely juridical basis, inconsistent with Article XI, the only conclusion that could be drawn was that the Community did not deny that this was the case.

19. The European Community, in a reply, reiterated that in its view the matter before the Panel could not be considered in an isolated legal context without regard to the evolutionary process - described most recently in document NTM/W/2 - involving economic, social and historical aspects, as well as unilateral measures, not only in the area of quantitative restrictions. Noting that item 85.15C was not stated (in document L/5362 of 3 September 1982) as being part of Hong Kong's original request, the EC believed that all items examined by the 1962 Panel were different from the items of the current Panel.

(c) Article XIII

20. The European Community underlined that none of the restrictions under reference applied solely to Hong Kong. Overall, there were two separate categories of restrictions: a first category of a global character (applicable to all GATT countries) and a second more restrictive category (applicable to a limited number of countries). The EC referred to the facts as set out by it in paragraph 9 above.

21. Hong Kong pointed out that paragraph 1 of Article XIII provided, inter alia, that no restriction be applied by any contracting party on the importation of any product from another contracting party unless the importation of the like product of all third countries was similarly restricted. Even if some of the restrictions in question were applicable to all GATT countries, the EC was still not exempt from observing the rules for the non-discriminatory administration of quantitative restrictions provided for in paragraph 2 of Article XIII. In any case, it was Hong Kong's understanding that, even where France theoretically applied "global" quotas, it in practice discriminated against Hong Kong in application because the so-called "global" quotas were non-specific in quantity and specific quotas were applied to selected suppliers only.

(d) Concluding arguments

22. Hong Kong stated that:

- (a) the quantitative restrictions maintained by France against Hong Kong products were not consistent with Articles XI and XIII of the GATT;
- (b) as a result of France's failure to abide by its obligations under Articles XI and XIII, benefits accruing to Hong Kong under the GATT had been, and continued to be, nullified or impaired; and
- (c) that the CONTRACTING PARTIES should recommend that the Government of France immediately terminate all quantitative restrictions currently maintained against Hong Kong.

23. In the view of the European Community, the arguments which it had put forward and the situation which it had described should be taken into account in regard to the statement that the restrictions constituted a nullification or impairment of benefits accruing to Hong Kong. The Panel was faced with a complex problem where one could not disregard a well-known legal principle - "the law-creating force derived from circumstances" - which had led to a de facto situation that was clearly distinct from the formal objectives of the General Agreement and from international developments since that instrument had been drawn up.

IV. Findings and conclusions

24. The Panel considered the matter referred to it by the CONTRACTING PARTIES in connection with the request made by the Government of the United Kingdom on behalf of Hong Kong regarding quantitative restrictions maintained by the Government of France, and carried out an examination in accordance with the terms of reference as expressed in paragraph 1 of this Report.

25. The Panel noted that restrictions on all categories of product covered by the complaint had been maintained de jure since 1944, by virtue of French Decree of 30 November of that year. The Panel also observed that the said Decree had not been notified to the GATT as being covered by the Protocol of Provisional Application of the General Agreement on Tariffs and Trade. From time to time certain adaptations have been made, on the basis of a licensing system, including restrictions applicable to a number of countries, bilateral quotas, and an SLQ régime without quantitative limitation.

26. The Panel first considered the argument that it could only discharge its obligations by examining the issue before it in the light of all relevant GATT provisions and all other relevant discussions which have taken place in GATT. It recognized that situations might exist in which the maintenance of quantitative restrictions would be justified under the relevant GATT provisions. It noted, however, that no such provisions had been invoked by the European Community in the matter. It decided that in such circumstances it was not for the Panel to establish whether the present measures would be justified under any GATT provision or provisions.

27. The Panel considered the arguments put forward by the European Community regarding the social and economic conditions which prevailed in the various product categories under examination. The European Community did not claim any corresponding GATT provision in justification for these arguments. The Panel was of the opinion that such matters did not come within the purview of Articles XI and XIII of the GATT, and in this instance concluded that they lay outside its consideration.

28. With regard to Article XI the Panel considered the arguments advanced by both parties, and summarized above in paragraphs 15-19 of this Report. The Panel acknowledged that there exists quantitative restrictions which are maintained for other than balance-of-payments reasons. It recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties. In fact, contracting parties and in particular Hong Kong have made it clear that the discussions on quantitative restrictions which have taken place in the GATT over the years were without prejudice to the legal status of the measures or the rights and obligations of GATT contracting parties. The Panel observed that, while most of the measures had been notified to the GATT in the past, the measures on watches had not been notified.

29. The Panel considered the argument put forward by the European Communities that the principle referred to as "the law-creating force derived from circumstances" could be relevant in the absence of law. It found, however, that in the present case such a situation did not exist, and the matter was to be considered strictly in the light of the provisions of the General Agreement.

30. It will be apparent that a difference of opinion exists between the parties regarding the inclusion of item 85.15 C amongst the product categories under examination by the Panel. The Panel considered that just as the terms of reference must be agreed between the parties prior to the commencement of the Panel's examination, similarly the product coverage must be clearly understood and agreed between the parties to the dispute. The Panel considered that to allow the inclusion of an additional product

item about which one party had not been formally advised prior to the commencement of proceedings would be to introduce an element of inequity. The Panel appreciates that in this instance the absence originally of item 85.15 C was an error of omission. However as the inclusion of the item is not a matter of crucial importance, and in any case peripheral to its conclusions, the Panel has chosen to disregard it.

31. In view of the above the Panel was able to conclude that all product categories were subject to quantitative restrictions within the meaning of the General Agreement.¹ The Panel noted that Hong Kong, under certain product categories, was subject to an SLQ régime as described in paragraph 8 above. The Panel observed that this régime had been described as a suspension - which was provisional and could be revoked at any time - of strict quota limitation but that the SLQ régime was an import licensing procedure which would amount to a quantitative restriction unless it provided for the automatic issuance of licences² and that the EC itself referred to the products concerned as subject to quantitative restrictions.

32. The Panel further noted that no GATT justification had been advanced for the quantitative restrictions referred to in paragraph 31 above, and concluded that the relevant provisions of Article XI were not complied with.

33. With regard to Article XIII the Panel considered the arguments advanced by both parties, and summarised above in paragraphs 20 and 21 of this Report. It was apparent to the Panel that the French measures were not applied uniformly to all contracting parties (e.g. there is a differentiation between suppliers depending on their categorization in different geographical zones, and in addition the French import régime included various measures which differed in scope and content for different suppliers). The Panel was of the opinion that the evidence presented by the parties raised questions regarding the consistency of the application of the French régime with the provisions of Article XIII. However, the Panel considered it unnecessary to go further into this question as it had already found that the relevant provisions of Article XI were not complied with.

34. In view of the above, the Panel found that there was an infringement of obligations assumed under the General Agreement in Article XI and that this infringement had to be considered prima facie to constitute a case of nullification or impairment of benefits accruing to Hong Kong under the General Agreement. The Panel suggests that the CONTRACTING PARTIES should recommend that France terminate the quantitative restrictions that are the subject of the complaint by Hong Kong.

¹Official Journal of the European Communities, No. L 35 of 9 February 1982 and corrigendum in No. L 189 of 1 July 1982, as well as No. L 103 of 21 April 1983, as annexed.

²BISD 25S, page 95.

[ANNEX from pp. 11 - 21 OFFSET]