RICE TRADE ISSUES BETWEEN JAPAN AND THAILAND

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I. INTRODUCTION

Thailand, the largest rice exporting country in the world[1], had expected new rice market opportunities when the Japanese market was liberalized by the Uruguay Round. However, Thailand was unsatisfied with the Japanese rice market access, claiming that the Japanese rice import regime lacked transparency. In particular, Thailand argued that Japan used de facto country specific quotas to determine the in-tariff quota in its minimum access regime. The alleged "country specific quota" prevented Thailand from attaining a market share in the Japanese import rice market, as it should have been able to do. [2]

Is the allegation above warranted? Was the Japanese rice import regime in 2001 [3] --the so-called minimum access regime— legal under the World Trade Organization (WTO) law? This thesis purports to examine this claim under the WTO legal order of which Japan and Thailand are Members.

In particular, this thesis will examine the Thai argument that the Thai quota under the Japanese Simultaneous Buy/ Sell (SBS) rice import system was too low because there was discrimination by the Japanese authority, favoring Australian or

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[1] Thailand exported approximately 31% of the world rice export in 2001, according to *Data Book for Rice and Wheat.* Worth emphasized here is that Thailand produces long-grain rice, which is a type of rice that is not preferred by the Japanese consumers as their table rice in their tradition meals. *Data Book for Rice and Wheat (Beibaku Data Book)* (Tokyo: Zenkoku Tanpo Shokuryou Kensa Kyoukai (National Rice and Foodstuff Research Institute), 2003).

[2] List of Request Regarding The Expansion and Facilitation of Japan's Imports, Royal Thai Embassy to Japan.

[3] Fiscal year 2001 is the latest year with available data on which this thesis can rely; hence this thesis examines the Japanese rice import regime at the point of the year 2001.

US rice over Thai rice. The Thai claim was that *it was the way the regime operated, not the regime itself* that was in violation of the WTO law. Was the way the Japanese operated their rice import regime in 2001 in violation of the WTO law? If yes, of which Article of what Agreement in the WTO law was this Japanese rice import regime in violation?

One possible Japanese counterclaim to the Thai claim regarding the SBS system is that the Thai quota under the SBS system was low because the SBS system reflected the real business demand. Japan argues that the low Thai rice quota was the result of low demand for Thai rice. The Japanese consumers who prefer short-grain rice from other countries such as the United States and Australia do not popularly accept Thai rice, which is mainly long-grain rice. The Japanese claim is that this consumer preference showed in the statistics of imports by country, and it is not that the Japanese authority deliberately controlled the country-specific quota in this SBS system. How should Thailand answer to this counterclaim?

This is a very complex legal issue. It is important to examine these allegations and counterclaims previously stated through the WTO's legal point of view. The first necessary step is to understand the feature and characteristics of the Japanese rice import regime.

II. FACTUAL ASPECTS.

1. Product coverage of the dispute

According to Japan's Schedule of tariff concessions (XXXVIII)[4], "Rice" includes not only un-milled and milled rice, but also rice flour and other rice products, and food products that contain more than 30 percent rice by weight. However, for the sake of the simplicity of the case, this thesis limits the product category only to rice, which is defined as follows:

"Rice" hereafter means the products under the definition of category by Japan's official custom statistics, which classify rice variously, as below.

HS Numbers	Commodity
1006	Rice
1006.10	Rice in the husk
1006.20	Husked (brown) rice
1006.30	Semi-milled or wholly milled rice
1006.40	Broken rice

Schedule XXXVIII-Japan Part I- Most- Favoured- Nation Tariff, Section I- Agricultural Products, Section I- B Tariff Quotas.

2. Japan's Schedule of Concessions

Japan's Schedule of Tariff Concessions (XXXVIII) provides for the entry of

[4] Schedule XXXVIII-Japan Part I- Most- Favoured- Nation Tariff, Section I- Agricultural Products, Section I- B Tariff Quotas, Tariff Item Number: 1006, Goods Schedule, Members' Commitments, select Japan (accessed March 7, 2004); available from http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm

rice and its worked and/or prepared products with minimum access opportunities rising from 379,000 metric tons in milled rice basis (the equivalent of four per cent of base period domestic consumption) in 1995 to 758,000 metric tons in 2000 unless Japan seeks to cease the application of this special treatment. The bound tariff is 0 per cent. Import is also subject to mark-up of up to 292 yen per kilogram.

On 1 April 1999, Japan invoked section A, paragraph 2 of Annex 5 and ceased to apply special treatment with respect to rice, the designated product. Japan announced that it would lower annual market access increases in 1999 and 2000 from 0.8 per cent of base period consumption to 0.4 per cent, while Japan specified a tariff of 351.17 yen per kilogram for fiscal year 1999 and 341 yen per kilogram for fiscal year 2000 and 2001.

3. The Japanese Rice Import Regime [5]

The Japanese rice import regime is usually called minimum access import regime. Minimum access regime is the import regime exclusively established for rice in the case of Japan.[6] This import regime allows a certain amount of foreign rice to be imported to Japan at the tariff rate of zero.[7] Other than through this minimum access, foreign rice can be imported freely into Japan. However, it would be subject

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[5] This thesis intentionally composes Factual Aspects from the perspective of Thai exporters

[6] For Japan, minimum access was allowed to cover only rice. Israel, the Republic of Korea, and the Philippines also introduced minimum access to deal with several products.
WTO Mandated Negotiations on Agriculture (accessed 18 April 2004); available from http://www.intracen.org/worldtradenet/docs/information/referencemat/wtomandneg.pdf

[7] This regime is still in place as of March 18, 2004.

to a prohibitive tariff rate of 341 yen per kilogram (as of 2001).

How big is this minimum access? As of fiscal year 2001, and from 2001 until another agreement is made, Japan has an obligation under the Agreement of Agriculture (AoA) in the WTO to provide rice imports with its annual "minimum access" opportunities, or 682,000 metric tons per year at the tariff rate of zero.[8]

The legal explanation of this "minimum access" is provided by the WTO as follows:

> In case of minimum access, the applicable duty was required to be low or minimal, low that is either in absolute terms or, at least, in relation to the "normal" ordinary customs duty that applies to any imports outside the tariff quota. These tariff quotas, including the applicable tariff rates and any other conditions related to the tariff quotas, are specified in the schedules of the WTO Members concerned.[9]

Minimum access, together with the Japanese agreement to set the applicable duty for minimum access at zero, enabled exporters to export rice to Japan without paying any tariff. Thailand, as a member of the WTO, would be entitled to the right of access as stated within the WTO Agreement, and therefore could expand its rice exports to Japan.

However, there's a twist to the story. Since the WTO law made a distinction between "inside" and "outside" the minimum access, theoretically not everyone will

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[8] However, rice import is subject to the import mark-up not to exceed 292 yen per kilogram (to be explained later)

[9] *Agriculture: Explanation, Market Access* (accessed March 2, 2004); available from http://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#special_treatment

However, Japan initially did not have to establish the tariff quotas for rice, although it did transform the regime into tariff quota system in 1999. Annex 5 of the AoA, Special Treatment with respect to Paragraph 2 of Article 4, which exclusively governs Japanese rice import regime, grants a special WTO legal right to the regime so that it does not need to be "converted into ordinary custom duties."

be "inside" or have access to this minimum access. There exists, then, a possibility that Thai exporters might not be qualified for minimum access.

Therefore, the critical question for Thai rice exporters is "how can I know that my rice export will be qualified within minimum access so that I do not have to pay for tariffs?" The answer to this simple question is complicated because there are three different channels for imported rice to get into the Japanese market. One has to understand all of them to answer the question. Out of those three, two are the so-called minimum access channels that allow for exporters to avoid paying a tariff.

The following explains the three ways to export rice to Japan.

1- Exports under Tariff or Over-quota Exports

This is a simple way to export rice into the Japanese market, but it is not business-feasible. By paying a tariff rate of 341 yen per kilogram, any entity could freely export rice to Japan.[10] This was not the best option for major exporters because the tariff rate of 341 yen per kilogram was prohibitively high.

Even some exporters from Thailand and the United States were able to export their rice to be used in the food service industry, for consumption as food by resident foreigners in Japan, and for test purposes;[11] however, according to trade statistics,

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[10] Although it was the obligation of the importers to pay for the tariff, the cost will be eventually transferred to the exporters.
[11] *The Japan External Trade Organization (JETRO) Marketing Guidebook for Major Imported Products*, 74 (accessed 1 February 2004); available from http://www.jetro.go.jp/ec/e/market/index.html#category1 select rice.

imports with tariffs comprised just 294 metric tons out of the rice import total of 645,675 metric tons[12] in 2001. This is because there was virtually no chance that any entity paying the over-quota tariff could compete with Japanese rice in the Japanese rice market.[13] The price of imported rice after this tax would be more expensive than Japanese domestic rice that did not have to pay for the tariff. Given Japanese consumers' preference for Japanese domestic rice, the lost price advantage for imported rice was directly linked to the loss of sales and hence market share. Therefore, exporters avoided going through this channel.

2- Through the Ordinary Market Access (OMA) or General Bidding Method within the Minimum Access

Since the first option was not business-feasible, exporters needed to seek alternative channels to export. One of the options that exempted exporters from a tariff was to export through the OMA. However, one could import rice into the Japanese market through the OMA only if the Japanese Food Agency chose to grant access to him or her.

Who or what organization in the Japanese government made the decision as to who would be granted the access to this minimum access? The answer is the Food

[12] Hisao Fukuda, John Dyck, and Jim Stout, *Rice Sector Policies in Japan*, 13 (accessed 18 April 2004); available from www.ers.**usda**.gov/publications/rcs/ mar03/rcs030301/rcs0303-01.pdf
[13] This also can be shown by the comparison with sales results from the SBS system, the import system to be explained later. See for detail "Rice Tariffications in Japan: What does It Mean for Trade?", *Agriculture Outlook*, April 1999, Economic Research Service/USDA, 14.

Agency (Shokuryou Chou). The Food Agency, the State Agency under the Ministry of Agriculture, Forestry and Fisheries of Japan (MAFF) acted as the sole importer for this import channel. It chose the suppliers, the volume, and the types of rice. The next question is how the Food Agency chose the suppliers or the exporters. What criteria were exporters to fulfill in order to be selected?

Relating to the inquiries above, i.e. how the Food Agency chose the qualified rice exporters for this OMA channel[14], the General Food Policy Bureau of the MAFF (the organization that took over the role of the Food Agency after the Food Agency was resolved on 11 June 2002[15]) vaguely responded as to how the Food Agency made the decision regarding rice imports: "The MAFF *took into consideration of tendency of domestic demand, export capacity of exporting country, and price in the international rice market* when it made a decision regarding the OMA imports."[16]

This statement does not explain much. In fact, this author could not find any existing Japanese domestic law that gives any answer to this question, and the General Food Policy Bureau of the MAFF, in response to personal inquiries, did not point out any particular law either. This thesis therefore assumes that the result of the OMA trade was not caused by any law, but by ad hoc decisions by the MAFF

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[14] Personal inquiries, responses received through electronic mail on 15 March 2004.
[15] *Yomiuri News Scoop, BSE* (accessed 18 April 2004); available from http://www.yomiuri.co.jp/features/kgbs/200206/kg20020612_01.htm
[16] Personal inquiries, responses received through electronic mail on 15 March 2004.

bureaucrats. The statistics leading to this conclusion are as follows.

One crucial hint for exporters in this regard is how the past had been before 2001. What does the past performance of the OMA suggest about the exporters? As of 2001, rice imported through this OMA channel consisted mainly of long-grain rice, for which substantial demand was expected in food processing.[17] Very little of the rice imported by the Food Agency through this OMA channel was consumed as table rice in Japan. Industrial use, feed use, and food aid exports have been the primary uses of the OMA imported rice.

These statistics contain important information. From them, combined with the statement by the MAFF above, one can derive that in addition to normal business requirements such as prices and demand-supply relations, there were some additional de facto requirements for the exporters in order to be qualified for access to the OMA. The additional de facto requirements are as follows:

a. Exporters had to consider the tendency of domestic demand in the Japanese rice market in the normal course of trade, as stated in the MAFF bureaucrat's statement. But in this OMA case, that alone would not be enough. To be exact, the domestic demand for exporters to consider has to be the same as the domestic demand as the Food Agency had in mind. Again, as a matter of fact, the

[17] JETRO Marketing Guidebook for Major Imported Products, 73.

exporters almost had to export long-grain rice, which is a certain type of rice that was perceived by the Food Agency to answer to its domestic demand.

b. It is better if the exporters were from a country that was perceived by the Food Agency to possess export capacity. This derives from the previous statement by the General Food Policy Bureau, saying it took into consideration "the export capacity of the exporting country". Moreover, the statistics show us that the Food Agency tended to export a certain share of its OMA from certain countries over a period of time.[18] For example, for a period of seven years from the beginning of the system in 1995 until 2001, the United States had a range of OMA share from 45.3-51.8%, Thailand 22.3-28.8%, and Australia 15.8-21.4%, respectively. De facto, this OMA seemed to suggest the existence of country-specific quotas, even though there is no legal notion regarding that.

These de facto additional requirements created problems because they distorted rice trade. There was nothing much that exporters could do by themselves to fulfill these de facto requirements. As for the first additional requirement, it is difficult for rice exporters to make a business plan to export only long-grain rice based only on an unstable ad-hoc administrative, not law-based, decision. Moreover, as for the second requirement, it is also difficult for the exporters because it is

[18] Hisao Fukuda, John Dyck, and Jim Stout, 14.

impractical for exporters to change their countries of origin in order to be able to export rice to Japan, once their countries' de facto quota was filled.

3- Through the Simultaneous Buy/ Sell (SBS) within the Minimum Access

Another tariff-exempted import channel is the Simultaneous Buy / Sell (SBS) system. This is more complicated than the above two. In short, in order to export through the SBS, exporters needed to have a business contact with either Japanese government-designated importers or Japanese government-registered wholesalers.

This is a complicated requirement because even though the Food Agency was legally the sole importer in the SBS system, it practically acted on behalf of the government-designated importers. In other words, it was the government-designated importers that decided in detail what kind of rice and from whom the rice was to be bought. How did this work?

What was the SBS system? The SBS system was a bidding system to be held by the Food Agency. The Food Agency would specify the overall amount of rice to be imported at that specific bidding according to its plan, and allowed government-designated importers and government-registered wholesalers to submit joint bids. The government-designated importers determined the type of rice, suppliers, etc., because they specified what the import mark-up[19] would be, as well as the quantity

[19] Mark-up is the difference between the price at which the Food Agency pay on behalf of the importers to the exporters and the price at which the importers pay to the Food Agency to get the rice.

and type of rice involved in their bids. The Food Agency then conducted a closed auction and selected those bids that maximized its mark-up, as long as the mark-up did not exceed 292 yen per kilogram. Government-designated importers that won the auction would get its specified rice with the price and the amount that they submitted in their bids. The Food Agency imported the rice and resold it to the government-designated importers. This was how the SBS system worked.

Most of the SBS rice consisted of short-grain rice, which in comparison to long-grain rice was a far more popular staple food item in Japan.[20] Therefore, one requirement to use this channel is that, de facto, exporters needed to export short-grain rice, for which the demand in Japanese market was high. However, this requirement exists in a normal trade environment, since it is the normal commercial requirement that exporters or suppliers need to answer to the exact type of demand in the importing markets. Every detail seemed to be decided by market forces and it seemed that there was no other de facto requirement in addition to the normal business requirement that the exporters needed to satisfy to be qualified to export through the SBS system.

However, this author would argue that the initial observation above is not the case. It was the considerably strict legal requirement of the government-designated

In practice, the mark-up had always been varied by type of rice below 292 yen since mid-1995.

[20] JETRO Marketing Guidebook for Major Imported Products, 73.

importers that distorted trade. Importers that wanted to be qualified to import through the SBS system in March 2002[21] needed to satisfy the following requirements:

a. Have a track record of at least 10,000 metric tons in rice import/ export over the previous three years;
b. Be a corporation organized in Japan, with capital of at least 1 billion Yen (or an approximate amount of $7,550,000);
c. Fulfill other qualifications as indicated by the Food Agency.

From these legal requirements for government-designated importers, there came to exist two additional de facto requirements for the exporters to be able to be qualified in the SBS system.

a. The exporters needed to export only to the limited number of large-scale importers. There were only 44 importers that were qualified as the SBS importers as of March 2002. The requirements for the government-designated importers on their capital and past performance made it inevitable that the importers were large-scale firms. This shut out a possibility of exports through small or medium importing firms or restaurants, which would have difficulty satisfying the requirements for the government-designated importers.

[21] This thesis was not able to find the requirements as of 2001.

b. If the number of the government-designated importers was small, the Food Agency could have had practical control over the importers. There was a high possibility that "other qualifications as indicated by the Food Agency" could have been used to pursue the Food Agency's policy that preferred one country's rice to the other.[22]

III. ALLEGED VIOLATED LEGAL RULES

How could minimum access be discriminatory against Thai rice exporters and violate WTO legal rules? From the facts of the OMA and SBS described above, there is indeed a high possibility that both OMA and SBS could be discriminative to rice exporters and also violate WTO legal rules. This thesis will focus on discriminative aspects of the import regime from the perspective of Thai rice exporters.

Alleged legal violations are as follows:

A. Possible Violation of Annex 5 and Article IV: 2 of the Agreement on Agriculture (the AoA), Annex 5: *Special Treatment with respect to Paragraph 2 of Article IV*; Article IV: 2: *Market Access*. Since Annex 5 of the AoA is the law that supported the Japanese rice import regime, this thesis will examine whether or not the regime

[22] However, it is beyond the scope of this thesis to examine whether there had been a non-arm-length relationship between the Food Agency and the government-designated importers.

fulfilled its obligation under Annex 5 of the AoA. Also Article IV: 2 of the AoA regulate market access regarding to agriculture products. Hence, there is a need to examine whether any aspect of the regime violates this Article.

B. Possible Violation of Article III: 2 of the Agreement on Import Licensing Procedures (the Licensing Agreement), *Non-automatic Import Licensing.* Article III of the Licensing Agreement regulates non-automatic import licensing. Since there were import licensing procedures involved in OMA and SBS system, if those licensing was considered as non-automatic, there is a possibility of a violation of Article III: 2 of the Licensing Agreement, since Article III: 2 prohibits trade-restrictive or -distortive effects created by licensing.

C. Possible Violation of Article II: 1 of the Agreement on Technical Barriers to Trade (the TBT Agreement), *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies.* The Japanese rice import regime de facto distinguished between long-grain and short-grain rice. Long-grain rice was mainly imported through the OMA system, while short-grain rice was mainly imported through the SBS system. This long-grain/short-grain distinction might be considered a "technical regulation" within the TBT Agreement. If the treatment between the two systems was not identical and if domestic rice and import rice were like products, there is a possibility that this alleged technical regulation is in

violation of Article II: 1 of the TBT Agreement. The Article specifies that no less favorable treatment should be accorded to like import products.

D. Possible Violation of Article III: 1 and Article III: 4 of the General Agreement onTariffs and Trade 1947, as amended (the GATT Agreement), *National Treatment on*

Internal Taxation and Regulation. Article III of the GATT Agreement establishes the obligation of "national treatment" among Members. National treatment obligation is an obligation that each Member has to treat like products from all Members no less favorably than its domestic products. As this thesis will demonstrate shortly, the distribution channel for imported rice in the Japanese domestic rice market could be considered to be "less favorable treatment" than its domestic rice, assuming that domestic rice and import rice are like products.

E. Possible Violation of Article I: 1 of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *General Most-Favored-Nation Treatment.* Article I creates the Most-Favored National treatment obligation or the so-called MFN obligation. One might argue that the Japanese rice import regime treated long-grain rice from Thailand less favorably than short-grain rice from other origins such as the United States and Australia. Assuming that both types of rice are like products, there is a legal possibility that this Article I: 1 is violated.

F. Possible Violation of Article XVII: 1 (b) of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *State Trading Enterprises.* The Japanese government notified the WTO that the Food Agency was a state trading enterprise in the meaning of Article XVII of the GATT Agreement. Therefore the Food Agency was subject to the provisions of Article XVII. Article XVII: 1 (b) states that state trading enterprises have to make decisions regarding purchases and sales involving imports or exports "in accordance with commercial considerations". There are some allegations that the Food Agency did not make its decision "in accordance with commercial considerations;" hence there is a legal possibility that the Japanese rice import regime violated this Article.

IV. ORDER OF VIOLATED LEGAL RULES TO BE EXAMINED

This section will explain why this thesis examines the individual alleged violated legal Articles in the order described in the last section. The WTO legal order comprises of multiple Agreements. Basically, all articles in any WTO laws that are in any aspect relevant to these allegations can apply. When there exists an inconsistency between laws, however, it is a custom that judges in the Dispute Settlement Body, i.e. the WTO panel or the Appellate Body (the AB), will interpret relevant laws so that there will be no conflict between them.

Nevertheless, specificity prevails.[23] This means that a law that is specified clearly to be the governing law in a given matter will be given consideration first. Hence, one should look to what is specifically spelled out in the Japanese Schedule for rice, the Agreement on Agriculture (the AoA).

To this end, there exists a need to examine Annex 5 of the AoA first, which authorizes the creation of the minimum access regime in this case, especially because there is some uncertainty as to which specific Articles in the AoA govern the Japanese rice import regime. This is because even though the Japanese Schedule specifies that rice would be treated according to the Special Treatment specified in Annex 5 of the AoA, on 1 April 1999, Japan invoked section A, paragraph 2 of Annex 5 and ceased to apply special treatment to rice. What are the consequences of this invocation of section A? What articles still apply and what do not?

This thesis will address these questions as well as whether or not the Japanese rice import regime fulfilled the requirements of Annex 5 of the AoA. Also since Annex 5 refers to paragraph 2 of Article IV of the AoA, and states that it will apply after special treatment, Annex 5 ceases to apply. Hence, this thesis will examine the possible violation of Article IV: 2 of the AoA.

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[23] In Latin, "lex specialis derogat generali", this is from Canon Law, which is the law of the Church. According to *Code of Canon Law,* Canon Law 53 states, "If decrees are contrary one to another, where specific matters are expressed, the specific prevails over the general..." Canon Law is a part of customary international law.
Canon Law Society of America, *Code of Canon Law* (Canon Law Society of America, 1999).

However, the AoA is not the only relevant WTO body of law in this case. This thesis proposes that there are at least another three bodies of WTO law that govern this case. They are the Agreement on Import Licensing Procedures (the Licensing Agreement), the Agreement on Technical Barriers to Trade (the TBT Agreement), and the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement).

This thesis will address the issue of violations of the non-GATT Agreements first, in the order of Article III: 2 of the Licensing Agreement and Article II: 1 of the TBT Agreement. After the non-GATT Agreement violations are addressed, this thesis will proceed to examine possible violations under the GATT Agreement, Article III and then Article I.

The reason why this thesis analyzes Article III before Article I is because of the commonality of the like products problem within the two Articles. This thesis will cite the Panel Report on *EC-Bananas (US)*, in which the Panel applied the same likeness standard of Article III to Article I. Therefore, this thesis will examine the like products for the purpose of Article III first and use that concept of like products also for the purpose of Article I.

Finally, this section will conclude by considering the possible violation of Article XVII: 1 (b) of the GATT Agreement regulating the conducts of state trading

enterprise, in this case, the Food Agency.

In sum, the order of violated legal rules to be examined in section 5 will be as following:

1. Claim under Annex 5 and Article IV: 2 of the Agreement on Agriculture (the AoA), Annex 5: *Special Treatment with respect to Paragraph 2 of Article IV*; Article IV: 2: *Market Access*.
2. Claim under Article III: 2 of the Agreement on Import Licensing Procedures (the Licensing Agreement), *Non-automatic Import Licensing.*
3. Claim under Article II: 1 of the Agreement on Technical Barriers to Trade (the TBT Agreement), *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies.*
4. Claim under Article III: 1 and Article III: 4 of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *National Treatment on Internal Taxation and Regulation.*
5. Claim under Article I: 1 of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *General Most-Nation-Nation Treatment.*
6. Claim under Article XVII: 1 (b) of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *State Trading Enterprises.*

V. INDIVIDUAL LEGAL RULES ANALYSIS

1. Claim under Annex 5: *Special Treatment with respect to Paragraph 2 of Article IV* and Article IV: 2: *Market Access* of the Agreement on Agriculture (the AoA)

   (a) How the Japanese system complies or does not comply with the rule.

Is the regime exceeding the scope of authorization by the AoA? What could the Japanese authorities do, what limits do they have under Annex 5 of the AoA, which established the regime?

Japan partially liberalized its rice market to imports under its WTO agreement obligation in the Uruguay Round agriculture negotiation in December 1993. Minimum access has been a part of this obligation. To understand what exactly the obligation of Japan was in the case of rice products, one has to look at Japan's Schedule of Tariff Concessions (hereinafter, Schedule).

According to Japan's Schedule of Tariffs, rice is to be exclusively treated under Special Treatment specified in Annex 5 of the Agriculture on Agreement[24] (specified in the Schedule as ST-Annex 5).

Annex 5 Section A Paragraph 1 (e) states:

> Minimum access opportunities in respect of the designated products correspond, as specified in Section I-B of Part I of the Schedule of the Member concerned (which is rice in the case of Japan), to 4 per cent of base period domestic consumption of the designated products from the beginning

[24] John H. Jackson, William J. Davey, Alan O. Sykes, Jr., *2002 Documents Supplement to Legal Problem of International Economic Relations*, Fourth Edition. (USA: West Group, 2002), 117.

> of the first year of the implementation period and, thereafter, are increased by 0.8 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period.

Hence, Japan's legal obligation[25] in the first year of the Uruguay Round Agriculture Agreement (Japanese fiscal year 1995[26]) was to import 379,000 metric tons in milled rice basis (the equivalent of four per cent of base period domestic consumption) under this minimum access framework. This quantity would increase over time at the rate of 0.8 per cent to the quantity of 758,000 metric tons in 2000, the final year of the Uruguay Round commitment. Japan imported rice according to this commitment until Japanese fiscal year 1998, with imports reaching 606,000 metric tons (milled basis), or 6.4 per cent of the base period consumption.

However, on April1 1999, in accordance with section A, paragraph 2 of Annex 5[27], Japan announced that it would lower annual market access increases in 1999 and 2000 from 0.8 per cent of base period consumption to 0.4 per cent, while

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[25] However, the Japanese government's official understanding is that, since there might be the case that the export capacity of the exporting countries were not able to answer to the import demand of Japan, the fact that the quota under the minimum access system is not filled does not constitute the violation of the Japanese obligation under the WTO law. *The common understanding of the Japanese government regarding the legal characteristics of rice under the Uruguay Round Agreement on Agriculture*, The Budget Committee of the Shugiin, the Lower House of the National Diet of Japan, 27 May 1994.

[26] Japanese fiscal year begins on1 April and ends on 31 March of the next calendar year, in this case, it means the period of 1 April 1995- 31 March 1996.

[27] Section A, paragraph 2 of Annex 5 states:

> At the beginning of any year of the implementation period of a Member may cease to apply special treatment in respect of the designated products by complying with the provisions of paragraph 6. In such a case, the Member concerned shall maintain the minimum access opportunities already in effect at such time and increase the minimum access opportunities by 0.4 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period. Thereafter, the level of minimum access opportunities resulting from this formula in the final year of the implementation period shall be maintained in the Schedule of the Member concerned.

Japan specified a tariff of 351.17 yen per kilogram for fiscal year 1999 and 341 yen per kilogram for fiscal year 2000 and 2001.

Rice imports within minimum access is also subject to "mark-up"[28] because the "other terms and conditions" in Japan's Schedule of Concession states: "The in-quota tariff rate for the products described in column 1 shall be applied subject to the condition that an import mark-up, as defined in Note Ad Article XVII, paragraph 4(b) of the GATT 1994, in an amount not to exceed 292 yen per kilogram may be c…"[29]

In sum, from all of these Japanese obligations under the WTO system, as of fiscal year 2001, Japan had a WTO legal obligation to import through its annual minimum access opportunities 682,000 metric tons of rice per year at the tariff rate of zero but could charge the import mark-up not to exceed 292 yen per kilogram. Other than under this minimum access framework, rice could be imported freely into Japan subject to the tariff rate of 341 yen per kilogram. This is the obligation that the Japanese had to fulfill.

And they did so. Japan did fulfill its WTO obligation by importing the quantity of rice specified to be imported within the minimum access. Japan did put

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[28] Legal definition of mark-up is stated in Note Ad Article XVII, paragraph 4(b) of the GATT 1994 as, "The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost."

[29] The original sentence is incomplete.

mark-up within 292 yen per kilogram, and allowed all rice to be imported freely if the tariff of 341 yen per kilogram is paid.

However, this does not necessarily mean that Japan's acts are legal under the WTO law. Japan did what it had to do but the issue here is how Japan did it. Neither the Schedule nor the Annex 5 states how in detail the Japanese had to carry out its WTO obligation summarized in the above paragraph, hence it is in the Japanese discretion to establish the import regime that is capable to perform the task of fulfilling its WTO obligation.

What kind of institutions did the Japanese put in place to do the task? The Japanese government continued to maintain its existing state-controlled rice trade regime under the Food Agency.[30] In maintaining its state-controlled regime, the Japanese government had an understanding that it was legal to do so as it clarified in the Budget Committee of the *Shugiin*, the Lower House of the National Diet of Japan on 27 May 1994.[31] There has been no objection from other members of the WTO in this regard.

Japanese domestic law now determines how the Japanese would fulfill its

[30] Even though there had been no substantial rice imports in the period before the UR excluding some exceptions.
[31] *The common understanding of the Japanese government regarding the legal characteristics of rice under the Uruguay Round Agreement on Agriculture*, The Budget Committee of the Shugiin, the Lower House of the National Diet of Japan, 27 May 1994.

WTO obligation by its Food Agency.[32] In 1995, in order to adapt its domestic legal system to the new WTO international obligation, the Japanese Diet passed the new law, the Law Concerning Stabilization of Supply and Demand and Prices for Leading Foodstuff (hereinafter, the Foodstuff Law).[33]

Under this new Japanese Foodstuff Law, implicitly the Food Agency had the sole right to import rice within the minimum access regime. The Foodstuff Law uses the term "Government" as the actor. Paragraph 1, Article 60 of the Foodstuff Law authorizes the Japanese government to purchase import rice via the OMA channel. The Japanese equivalent of the term OMA was not mentioned in the Article. The Article simply states, "Government can purchase rice grain…. through import."[34]

Article 62 of the Foodstuff Law established the SBS system with more detail. Paragraph 1 of Article 62 empowers the Government to carry out the SBS system, while expressing the term SBS in Japanese.

Thus, both channels of import for the minimum access, the OMA and the SBS were created by the Foodstuff Law to fulfill the Japanese WTO obligation. One undeniable observation at this point is that the Foodstuff Law does not entail the

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[32] One should be careful that even though the determination as for how the Japanese government will fulfill its WTO obligation can be and is done by the Japanese domestic law in this case, it is still in the Japanese WTO obligation to make its domestic law not to be in violation with its obligation under WTO law.
[33] *The Law Concerning Stabilization of Supply and Demand and Prices for Leading Foodstuff* (*Shuyou shokuryou no jukyuu oyobi kakaku no antei ni kansuru houritsu*), (accessed 18 March 2004); available from http://nougyou.hourei.info/nougyou69.html
[34] Paragraph 2 of the Article states that the Government can delegate the purchase to other entity, if necessary.

specific detail of how these both OMA and SBS import channels would be administered. The Foodstuff Law gave the Japanese executive branch, the Food Agency of the MAFF, both legal authority to administer the import and wide discretion as to how to administer the regime, particularly in the OMA case. This thesis submits that there is nothing in this vaguely defined Foodstuff Law, the Japanese domestic law that governs the minimum access regime, which is in violation of either Annex 5 of the Agreement on Agriculture or the Japan's Schedule of Concession in the UR.

However, this does not mean that the minimum access regime of Japan is legal under the WTO legal order. Japan de facto granted the minimum access to the OMA only for exports of long-grain rice. Japan has been alleged to operate the OMA as a de facto country-specific quota, since there had been a considerable fixed range of share for major supplying countries that had not been changed since the inception of the minimum access regime. Japan restricted the SBS exports only through a small number of large-scale importing firms, which could be easily subject to the control of the Food Agency. These all contributed to the restriction in imports of rice from Thailand.

Next, let us look at the main text of the Agreement on Agriculture (the AoA). Is the Japanese rice import regime legal under other Articles of the AoA? To answer

that question, one has to clarify which specific articles in the AoA govern rice. Even though the Japanese Schedule specifies that rice will be treated under Special Treatment specified in Annex 5 of the AoA, on 1 April 1999, Japan invoked section A, paragraph 2 of Annex 5 and ceased to apply special treatment with respect of the designated products, rice. The consequences of this action were as following:

A. Japan is required to comply with the provisions of paragraph 6 of Annex 5.

Paragraph 6 of Annex 5 states the following:

> Border measures other than ordinary customs duties maintained in respect of the designated products shall become subject to the provisions of paragraph 2 of Article 4 with effect from the beginning of the year in which the special treatment ceases to apply. Such products shall be subject to ordinary custom duties, which shall be bound in the Schedule of the Member concerned and applied, from the beginning of the year in which special treatment ceases and thereafter, at such rates as would have been applicable had a reduction of at least 15 per cent been implemented over the implementation period in equal annual installments. These duties shall be established on the basis of tariff equivalents to be calculated in accordance with the guidelines prescribed in the attachment hereto.[35]

B. Japan is required to maintain the minimum access opportunities already in effect at such time and increase it by 0.4 per cent of corresponding domestic consumption in the base period per year for the remainder of the implementation period. Thereafter, Japan has to maintain this new level of minimum access opportunities in the final year of the implementation period.

[35] It is not the purpose of this thesis to examine whether Japan calculated the tariff in accordance with guidelines prescribed in the Attachment to Annex 5 or not.

The above requirements tell us what became applicable for rice at the point from the year 2001 is provision of paragraph 2 of Article 4 of the AoA. Annex 5 still applied but only partially in the restricted aspects as specified above.

What information does Article 4: 2 of the AoA contain? Article 4: 2 itself does not mean much. It simply states, "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties,[36] except as otherwise provided for in Article 5 and Annex 5." In this case, rice was not designated in the Japanese Schedule with the symbol "SSG" as being the subject of a concession in respect of which the provisions of Article 5 may be invoked; therefore Article 5 does not apply. Of course, Annex 5 was revoked and ceased to apply. Hence, Japan is required to convert its rice import customs into ordinary customs duties as qualified in footnote 36.

Did Japan fulfill this requirement? Yes, it did. Japan allowed rice to be imported unconditionally to the country with a specified tariff of 351.17 yen per kilogram for fiscal year 1999 and 341 yen per kilogram for fiscal years 2000 and 2001. This tariffication of rice imports is a perfect converting into ordinary customs

[36] These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

duties as specified in footnote 35. This thesis concludes that Japan did not violate Article 4 (2) of AoA, since the article does not contain much detail.

As for obligation B, Japan was also required by section A, paragraph 2 of Annex 5 to maintain the minimum access standards of Japanese fiscal year 1998 and to increase the minimum access opportunities by 0.4 per cent of corresponding domestic consumption in the base period year for the remainder of the implementation period, and to maintain that level thereafter.

Japan did carry out all of its obligations above. Therefore, Japan did not violate its obligation either under Annex 5 or Article 4 (2) of the AoA.

2. Claim under Article III: 2 of the Agreement on Import Licensing Procedures (the Licensing Agreement), *Non-automatic Import Licensing.*

(a) Arguments

Assuming that the government-designated importers in the SBS system are non-automatic importing licensees and therefore are covered by the Licensing Agreement, one might argue that rule of requirements for the government-designated importers was in violation of Article 3 (2) of the Licensing Agreement. This is because the requirement could be perceived as having trade- restrictive or –distortive

effects on imports additional to those caused by the imposition of the restriction[37] (in this case, the quota within the minimum access[38]).

Licensing in the SBS system can be perceived as trade-restrictive or –distortive because it requires importers to have had at least 10,000 metric tons in rice import/ export over the previous three years, to be corporations organized in Japan, and to have capital of at least 1 billion Yen (or approximately $7,550,000). All these requirements allowed only a small number of importers to import and hence resulted in trade-restriction or trade-distortion. It therefore is reasonable to argue that these requirements put on the government-designated importers are in violation of Article III: 2 of the Licensing Agreement, which states:

> Non-automatic licensing shall not have trade-restrictive or –distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.

(b) Components of a Violation

This thesis argues that the Licensing Agreement applies in this case but the Japanese cannot be found in violation of the Agreement. The legal analysis is the following arguments:

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[37] Article III: 2 Non- automatic Import Licensing, the Licensing Agreement.

[38] One might be able to make an argument that practically minimum access administered by the Food Agency was a tariff rate quotas and then from paragraph 244 of the *EC-Poultry*, the panel rejected the European defense that it was unclear whether the Licensing Agreement applied to tariff rate quotas, therefore it is possible that the minimum access might be perceived by the Panel as a practical tariff rate quotas and covered by the Licensing Agreement.

(i) Are the government-designated importers in the SBS system the importing licensees and therefore are covered by the Licensing Agreement?

One can argue that the answer is "yes". From Japan's notification under Article 7.3 of the Licensing Agreement[39] to the Committee on Import Licensing on 20 November 1996, Japan arguably required licensing in the sense meant in the Licensing Agreement for rice imports into Japan.[40]

(ii) Were the licenses non-automatic?

To be able to apply the Article 3 (2) of the Licensing Agreement, a case has to be made that the import licensing, with the assumption that the government-designated importers were the licensees, was non-automatic. Non- automatic is defined as import licensing not falling within the definition of automatic licensing contained in paragraph 1 of Article 2 of the Licensing Agreement.[41] Does the

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[39] Article 7 (3), the Licensing Agreement, *Review*, states, "Members undertake to complete the annual questionnaire on import licensing procedures promptly and in full."

[40] *WTO Trade Topic- Import Licensing Gateway*, G/LIC/N/3/JPN/1 (accessed 3 April 2004); available from http://www.wto.org/english/tratop_e/implic_e/implic_e.htm

There was no notification of the same type until the year of 2002, when Japan excluded rice from the list of licensing. Japan must have had reasons and clarified them in the exclusion. However, those reasons are beyond the scope of this thesis. This thesis analyzed the system at the point of the year 2001; therefore it bases its argument on the notification of the year of 1996.

[41] According to Article 3 (1) Non- automatic Import Licensing, the Licensing Agreement, automatic licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirement of paragraph 2 (a).

> Paragraph 2 (a): automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing. Automatic licensing procedures shall be deemed to have trade- restricting effects unless, inter alia:
> (i) any person, firm or institution which fulfills the legal requirements of the importing Member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licenses;
> (ii) applications for licenses may be submitted on any working day prior to the customs clearance of the goods;
> (iii) applications for licenses when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of

administration of the licensing for government-designated importers fulfill the requirement in paragraph 2 (a) in the footnote 40? One has to prove that the answer to the question above is "no" to apply this Article.

Due to lack of available information, this thesis is not able to answer the question. However, this thesis will note that the Japanese government intended to make this licensing automatic, since it specified in the notification to the Committee on Import Licensing cited above that "no application shall be refused if the standard criteria (e.g. the period of application, the eligibility of application, the documentation for application) complies to the procedures."

Another significant question is, "does one of the requirements for the SBS government-designated importers, *other qualifications as indicated by the Food Agency*, make the import licensing non-automatic because it means that approval of the application is *not* granted in all cases?" Let us assume for now that this licensing rule makes the licensing non-automatic.

However, one has to bear in mind that the Licensing Agreement does not apply to the import-licensing rule itself; it applies only to the application and administration of import licensing procedures since in *EC-Bananas III (AB)* case, the Appellate Body states:

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10 working days;

> By its very terms, Article 1 (3) of the Licensing Agreement clearly applies to the *application* and *administration* of import licensing procedures, and requires that this application and administration be "neutral… fair and equitable". Article 1(3) does not require that import licensing rules, as such, to be neutral, fair, and equitable. Furthermore, the context of Article 1(3)- including the preamble, Article 1 (1) and, in particular, Article 1(2) of the Licensing Agreement- supports the conclusion that Article 1(3) does not apply to import licensing rules.[42]

Is it possible to argue that the rule that requires *other qualifications as indicated by the Food Agency* is de facto an *application and administration of import licensing procedure*? The answer has to be "yes" to create a legal possibility that Japan was in violation of the Licensing Agreement.

Nevertheless, this thesis proposes that it is reasonable to argue that the interpretation in the previous paragraph stretches too far. Hence, this thesis submits that one cannot hold the Japanese in violation of this Licensing Agreement, even though their import licensing rules for the government-designated importers might not be "neutral, fair, and equitable". This is because, after all, the Licensing Agreement applies to import licensing procedure but not the licensing rules themselves.

3. Claim under Article II: 1 of the Agreement on Technical Barriers to Trade (the TBT Agreement), *Preparation, Adoption and Application of Technical*

[42] Original footnote for paragraph 197 of *EC- Bananas III (AB)*.

Regulations by Central Government Bodies.

(a) Arguments

One may argue that the de facto[43] distinction for short-grain rice to be imported through the SBS and long-grain rice to be imported through the OMA system is a technical regulation meant in the TBT Agreement; therefore this rice issue is covered under the Agreement.

Article 2 (1) of the TBT Agreement states:

> Member shall ensure that in respect of technical regulations[44], products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

One might argue that the distinction of short-grain rice and long-grain rice is a technical regulation that accords treatment less favorable to long-grain rice than that accorded to like products of national origin and to like products originating in any other country, i.e. short-grain rice.

(b) Component of a Violation

(i) Like products? and (ii) Less favorable treatment?

For the sake of the analysis, let us assume that short-grain rice and long-grain rice are like products and this technical regulation accorded treatment less favourable

[43] Note that there is no de jure distinction in this regard. Japan did not specify such a distinction in its Schedule. There are no Japanese domestic laws that explicitly authorize the distinction. The problem of whether de facto distinction would suffice to make a case will be discussed later.

[44] Note that this Article does not cover “standards”, therefore there exists no need to consider “standards” for the analysis of this Article.

to long-grain Thai rice.[45]

(iii) Technical regulation or not?

This thesis argues that the TBT Agreement does *not* apply in this case, because this requirement of being technical regulation is not satisfied. The simple reason is that because the distinction that short-grain rice goes through the SBS and long-grain rice goes through the OMA is not a "regulation" meant in the TBT Agreement.[46]

What, then, are "regulations" meant by the TBT Agreement? Annex 1 of the TBT Agreement explains the definition of the term regulations and standards as follows:

> *Technical regulation*
> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which *compliance is mandatory* (Emphasis Added). It may also include or deal exclusively with terminology, symbols, packaging, making or labeling requirements as they apply to a product, process or production method.

It is required here that "compliance is mandatory" to be a "technical regulation". This notion was reinforced by *EC-Asbestos*. Paragraph 8.57 of *EC-Asbestos* articulates the requirement of "technical regulations." It states: "taking into

[45] Both assumptions here will be discussed in depth in Claim under Article III: 1 and Article III: 4 of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement).
[46] The reason the TBT Agreement does not apply in this case is not that the TBT Agreement does not apply to agricultural products, in this case, rice. Article 1 (3) of the TBT Agreement states, "All products, including industrial *and agricultural* products, shall be subject to the provisions of this Agreement."

account the terms of the definition considered within the context and in the light of the object and purpose of the TBT Agreement, a measure constitutes a ’technical regulation’ if: (*inter alia*) (c) compliance is mandatory.

This thesis argues that compliance was not mandatory in this case. The measure did not require that importers in the system import only short-grain rice. For the SBS system, the Food Agency set the requirements that only large-scale importers could satisfy so that only they could import. The Food Agency did not "lay down product characteristics or their related processes and production methods" to require the large-scale importers to import only short-grain rice. Large-scale importers could have imported Thai long-grain rice if they had wanted. It is just not in their business interest to do so.[47]

In short, the Food Agency did not set any mandatory requirement for the government-designated importers to import only short-grain rice in the SBS system. This thesis concludes that since there is no mandatory compliance required for the importers in the SBS system to import only short-grain rice, this de facto distinction of import channels between short-grain rice and long-grain rice was not a "technical regulation" meant in the TBT Agreement. Hence, Article 2(1) of the TBT Agreement will not apply in this case.

[47] Although there was a demand for Thai long-grain rice in niche market, such as for Thai restaurants. Small/medium importers could have responded this demand, if they could have joint the SBS system. Under the regime in 2001, this demand could be responded only by imports that had to pay for tariffs.

4. Claim under Article III: 1 and Article III: 4 of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *National Treatment on Internal Taxation and Regulation.*

Upon examination in detail of violation of specific Articles in the GATT Agreement, this thesis purports to clarify the reason that the GATT Agreement still applies in the WTO legal order, where the GATT no longer exists. The GATT Agreement itself was terminated as of 1 January 1996 but the text was incorporated by reference into the General Agreement on Tariffs and Trade 1994 (hereinafter, the GATT 1994). Also, the Agreement Establishing the World Trade Organization did put the GATT 1994 in its Annex 1A. Therefore, despite all legal complexity, legally the GATT Agreement is binding on all Members of the WTO.

The GATT Agreement is the main body of law in the WTO legal order. It comprises of 38 articles that govern relations in the field of trade and economy between the WTO Members. This thesis selects and examines articles that are perceived to be relevant to this issue.

Let us proceed to legal analysis of Article III: 1 and Article III: 4 of the GATT Agreement.

(a) Arguments

As previously stated, Article III of the GATT Agreement establishes the obligation of "national treatment" among Members. National treatment obligation is an obligation that each Members has to treat like import products from all Members no less favorable than its domestic products. The term "treatment" means broadly of internal measures, after import products pass the customs into the country. National treatment obligation was established so that the tariff concession values agreed in the WTO Schedule of Concession could not be decreased by subsequent internal measures created by Members.

Various Panels also confirmed that the purpose of Article III: 4 is to "provide equal conditions of competition once goods had been cleared through the customs".[48] Article III is composed of ten paragraphs. There are two paragraphs in particular that are relevant to this case. Paragraph 1 and paragraph 4 are written as follows:

Article III: 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.

Article III: 4

[48] Paragraphs 11-13 of *Italian Agricultural Machinery*; paragraphs 5.11-5.14 of *US- Section 337*; paragraph 6.6 of *Canada- FIRA*; paragraph 620 of *Korea- Beef*.

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable 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.

In sum, Article III: 1 is a "general principle set forth" for other paragraphs of the Article including paragraph 4 and has to be given a meaning, while Article III: 4 prescribes non-tax regulations.[49] The interpretation that paragraph 4 constitutes specific expression of the overarching, "general principle" set forth in Article III: 1 is confirmed by paragraph 93 of *EC-Asbestos (AB)*, as it states:

> As we have previously said, the "general principle" set forth in Article III: 1 "informs" the rest of Article III and acts "as a guide to understanding and interpreting the specific obligations contained" in the other paragraphs of Article III, including paragraph 4. Thus, in our view, Article III: 1 has particular contextual significance in interpreting Article III: 4, as it sets forth the "general principle" pursued by that provision**.**

How, then, did the Japanese treat import rice less favorably than its domestic rice? Let us look at the SBS system. Even though in the SBS system, exporters were de facto restricted to export to only a small number of large-scale importing firms, which could be easily subject to the control of the Food Agency through "other qualifications as indicated by the Food Agency". This relationship between the Food Agency and importers might lead to a violation of national treatment

[49] This notion will become crucial when the Panel proceeds to analyze the term "like products" in Article III: 4, as to be illustrated in the arguments later in this thesis.

obligation or MFN obligation.[50] However, this thesis was not able to verify this allegation.

Another core problem within the SBS system is that the export/import was possible only through large-scale importers. This means that exporters in the SBS system did not have an access to the real small scale of end-users such as the industrial users, or table rice consumers. What does this mean to Thai rice exporters?

This situation did not look good especially for Thai rice exporters. This thesis does not purport to argue the obvious fact that the Japanese consumers prefer short-grain rice to long-grain rice. It is certain that the Japanese consumers prefer short-grain rice to long-grain rice for their traditional meals. But does this fact inevitably lead to the Japanese counterclaim introduced in the introduction part of this thesis? The Japanese counterclaim was that low Japanese demand for long-grain rice demonstrated itself in the low Thai quota in the SBS system and there was nothing that Thailand could do about it. Was Thailand incapable of doing anything from the business point of view?

This thesis argues that there is a flaw in the logic underlying this Japanese counterclaim. It is true that the Thai could not do much under the SBS system as of

[50] Note again that it is not the purpose of this thesis to examine whether there had been a non-arm-length relationship between the Food Agency and the government-designated importers.

2001 to improve its share of quota, but it is unclear whether the Thai could or could not have done much in a freer SBS system.

The Japanese counterclaim basically argues that because the Japanese consumers did not prefer Thai long-grain rice in 2001, there existed low demand for Thai rice and therefore no substantial imports from Thailand. But this logic does not lead to the conclusion that there was no need to make the SBS system freer.

If the system were freer, there would be a possibility that Thailand could gain more preference from the Japanese consumers for its long-grain rice. If Thai rice exporters could export their long-grain rice through medium or small scale importers, such as Thai restaurants, into the Japanese rice market, the Japanese consumer would be more exposed to the Thai long-grain rice.[51] As a result, there might be some change in preference in a certain group of consumers.

However, this change in preference was not possible under the SBS system in 2001 because Thai rice could be exported only through large-scale government-designated importers. These large-scale importers were reluctant to import Thai long-grain rice because it was not popular to mass consumers at that time. But from statistics regarding over-quota rice imports that were not exempted from tariffs, Thai rice was on the top of the list of rice that had been imported with tariffs. This shows

[51] It is true that medium/small importers could import Thai rice into the Japanese market only if they paid tariffs. However, since the tariff rate was prohibitively high, this option is not business feasible.

that there was a certain level of demand for Thai rice in the Japanese market. Although the demand might have been small and only in the niche market at the time, one cannot deny the possibility that it could be accepted more by the Japanese consumers with its low price if it could be imported through the SBS system.

The lost opportunity by Thai rice to have access to the demand by medium and small companies in the Japanese market hence has a significant negative impact on the potential of the product in the market. Thai rice was literally shut out from its demand in the Japanese market since the only way for Thai rice to get into the Japanese market is through the purchasing of the Food Agency through the OMA system. The OMA system was governed by the Japanese Government's decisions that Thai rice would be used primarily for industrial use, and would not be sold as table rice to general consumers.

This thesis concludes this argument part by emphasizing that Thai rice lost its trade opportunity to be tried by Japanese consumers in their rice market under the SBS system in 2001. In sum, this is because the business demand meant in the SBS system were large-scale importers only and not medium/small importers or users of rice product. This constitutes a possible violation of Article III: 1 and Article III: 4 of the GATT Agreement. The Japanese rice import regime treated import rice less favorably than its domestic rice by its structure of the SBS import system.

(b) Component of Violation

How does one prove a violation of Article III: 4? The Panel in *Korea-Beef* states in its Report that:

> Article III: 4 is violated if the Complaining parties demonstrate (i) that imported and domestic products are "like"; (ii) that the measure at issue is either a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (iii) which provides to import products a treatment less favorable than that accorded to like domestic products.[52]

This thesis will analyze the violation through the following three requirements.

(i) Whether imported and domestic rice are "like products"?

One needs to examine whether imported rice and domestic rice are like products. Domestic rice in Japan is short-grain rice, while imported rice comprises of both short-grain rice and long-grain rice from various countries such as Thailand, the US, Australia and the People's Republic of China. Since imported rice includes long-grain rice as well, this thesis will examine whether domestic short-grain rice and imported long-grain rice are like products or not.

How does one determine like products for the purpose of Article III: 4? More specifically, which characteristics or qualities are important in assessing likeness of products? To what extent products must share qualities or characteristics to be like

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[52] Paragraph 617 of *Korea-Beef*.

product? From whose perspective should "likeness" be judged?[53]

There is no concrete standard in the WTO legal order to determine the concept of like product. Also there is no distinction regarding long-grain/short-grain rice in column 7 ("other terms and conditions") of the Japanese Schedule for rice. This could be interpreted that the Japanese did not presuppose that they were different products, but this alone will not be sufficient to conclude that they are like products.

Let us look at how the Panel or the AB dealt with this "like product" issue in real cases. In *Japan-Alcoholic Beverages*, the Panel ruled that Vodka and Shochu are like products, because of their commonality of end uses and their sharing of most physical characteristics.[54] Using this standard, are not short-grain rice and long-grain rice like products as well, since they are both rice and their end-use is primarily consumption as table rice?

Even various Panels clearly confirm the practice under the GATT 1947 that assessing whether imported and domestic products are "like" has to be done on a case-by-case basis.[55] It still seems reasonable that one can argue that the requirement of commonality of end uses and sharing of most physical characteristics

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[53] These analytical problems were also illustrated in paragraph 92 of *EC-Asbestos.*
[54] Paragraph 6.23 of *Japan-Alcoholic Beverages*.
[55] See for example, paragraph 18 of the Working Party Report on "Border Tax Adjustments", L/3464, BISD 18S/97; paragraph 5.1.1 of *US- Petroleum*; paragraphs 5.25-5.26 of *US-Malt Beverages.*

is satisfied in this short-grain/long-grain rice case as well.

Unfortunately, it is not that simple. In *Japan-Alcoholic Beverages*, what considered is "like products" for the purpose of Article III: 2 but not for the purpose of Article III: 4 that this thesis is arguing for its violation in this case. What is the difference between Article III: 2 and Article III: 4? Roughly, one can say that Article III: 2 regulates "internal taxes or other internal charges of any kind" or the so-called "fiscal regulation", while Article III: 4 prescribes the so-called "non-fiscal regulation".[56]

Since the non-availability of unplanned shipment channel does not constitute "internal taxes or internal charges of any kind" meant in Article III: 2, the Article does not apply in this case, and hence the standard for like products from the *Japan-Alcoholic Beverages* case will not directly apply in this case.

Does it apply indirectly either? No, it does not. In paragraph 96 of a subsequent case of the *EC- Asbestos (AB)*, the AB reached the conclusion that "the "accordion" of "likeness" stretches in a different way in Article III: 4 (from Article III: 2)."[57] Therefore, the conclusion of likeness between vodka and Shochu is of no

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[56] The term "fiscal regulation" and "non-fiscal regulation" are introduced formally in paragraph 99 of *EC- Asbestos (AB)*.

[57] The brief reason of the conclusion of the difference between the two Articles is stated in the same paragraph as following:

> In construing Article III: 4, the same interpretive considerations do not arise, because the "general principle" articulated in Article III: 1 is expressed in Article III: 4, not through two distinct obligations, as in the two sentences in Article III: 2, but instead through a single obligation that applies solely to "like products". Therefore, the harmony that we have attributed to the two sentences of Article III: 2 need not and, cannot be replicated in interpreting Article III: 4. Thus, we

use in this case.

However, fortunately enough, *EC- Asbestos (AB)* addresses this issue of like product for the purpose of Article III: 4. *EC- Asbestos (AB)* confirms in paragraph 88 and paragraph 89 of the Report that, the term "like products" for the purpose of Article III: 4 must be interpreted "in light of the context, and of the object and purpose, of the provision at issue (i.e. Article III: 4)", hence the interpretation of the term "need not be identical, in all respects, to those other meanings".

Also, as stated previously in this thesis, the AB confirms that the general principle set forth in Article III: 1 "informs" the provision, and therefore the term "like product" in Article III: 4 must be interpreted to give meaning to the principle laid down in Article III: 1.[58] What is this principle in Article III: 1? The purpose of Article III: 1 is to ensure the equality of competitive conditions between import products and domestic products, once import products pass customs, as the AB emphasizes at the end of paragraph 98 of *EC-Asbestos (AB)* that "The contracting parties recognize that internal… should not be applied to imported or domestic products *so as to afford protection to domestic production*."

Therefore the AB concludes in paragraph 99 that "it follows that the word

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conclude that, given the textual difference between Article III: 2 and III: 4, *the "accordion" of "likeness" stretches in a different way in Article III: 4.* (Emphasis Added) However, it is not in the purpose of this thesis to go into detail regarding the interpretation of Article III: 2.

[58] Paragraph 98 of *EC- Asbestos (AB)*.

"like" in Article III: 4 is to be interpreted to apply to products that are in such a *competitive relationship*. A determination of "likeness" under Article III: 4 is, *fundamentally*, a determination about the nature and extent of a *competitive relationship* between and among products." (Emphases Added) This statement has been interpreted to imply economic interpretation of the "likeness" of products under Article III: 4.

However, the determination that one can use economics to determine likeness does not help much, as one of the Members of the Division hearing this appeal made a concurring statement that the line between a "fundamentally" and "exclusively" economic view of "like products" under Article III: 4 may well prove very difficult, as a practical matter, to identify. Hence, it does not seem that one successfully invented the standard to determine "likeness" for the purpose of Article III: 4.[59] So what should one do to solve this "like products" problem?

Let us look at what the AB in *EC-Asbestos (AB)* did to analyze the problem. After addressing definition issue of like products, the AB went back to the Report of the Working Party on Border Tax Adjustments. The AB in paragraph 101 of the Report cites the Report of the Working Party on Border Tax Adjustments and

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[59] At present, there is ongoing effort to discover more specified solution to this like product problem. A well-known "aim and effect" test has been both rejected and implicitly used at the same time in determining likeness in the WTO cases. However, this thesis does not support the use of the test, since it is of the view that it is impossible to clarify the aim of the measures intended by the policy makers.

outlines an approach for analyzing “likeness”. The criteria are as follows:

- The physical properties of the products

- The extent to which the products are capable of serving the same or similar end-uses

- The extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand

- The international classification of the products for tariff purposes

While recognizing that these general criteria are merely a “framework” for analyzing the problem on a “case-by-case” basis, the AB in paragraph 102 notes that each criterion needs to be examined separately. Also, the AB notes, that when examining these criteria, one has to take into account “evidence which indicates whether, and to what extent, the products involved are- or could be- in a competitive relationship in the marketplace”.[60]

This thesis will proceed to analyze the “like products” problem in this particular case based on the information retrieved from *the EC-Asbestos (AB)* identified in the previous paragraph. However, when one looks at each criterion, one will come to the conclusion that, other than the international classification of the products for tariff purposes, the characteristics of the criteria themselves are highly

[60] Paragraph 103 of EC-Asbestos (AB).

subjective. One can argue that products are like or not, depending on how broad or narrow one wants definition of like products to be. In other words, this like products problem is inevitably subject to an ad-hoc decision of the Panel based on those general criteria. To cope with this extreme subjectivity, i.e. to guess what the decision of the Panel would be in this particular case, this thesis will in addition to expressing its limitation in analyzing these criteria as a non-expert opinion, it will look at how the Panel decided the *EC-bananas (US)* case.

Why the *EC-Bananas (US)* case? In sum, because of two reasons stated below:

- A close similarity between rice and bananas. Both products are agricultural products; one might be able to understand the standard of likeness applied in the banana case and one can attempt to apply the same standard to the same agriculture products, rice in this case.
- Like products problem in the *EC-Bananas (US)* case was that specifically in the purpose of Article III: 4, which is the same Article that this thesis is considering for this case.

What does the Panel informs us in the *EC-Bananas (US)* case? The Panel did not explain why all bananas from the European Community (EC), African, Caribbean and Pacific (ACP) countries, Framework on Agreement on Bananas

(BFA) countries and other third countries are “like”, when it states in paragraph 7.62 of the Report:

> Before doing so, we consider whether bananas from the EC, ACP countries, BFA countries and other third countries are “like” products for purposes of the claims made in respect of Article I, III, X, XIII of GATT. The factors commonly used in GATT practice to determine likeness, such as, for example, customs classification, end use, and the properties, nature and quality of the product, all support a finding that bananas from these various sources should be treated as like product. Moreover, all parties and third parties to the dispute have proceeded in their legal reasoning on the assumption that all bananas are “like” products in spite of any differences in quality, size or taste that may exist.

In the next paragraph, paragraph 7.63, the Panel simply proceeded to reach a conclusion that all bananas from the EC, ACP countries, BFA countries and other third countries are “like” products for the purpose of Article III: 4.

As can be seen above, since the Panel, in its reasoning, did not go into detail to examine each criterion to determine the likeness, one cannot directly derive any conclusion as for how to examine the criteria from this case. However, this thesis proposes that indirectly this *EC-Bananas (US)* can help us to solve the like products problem in this long-grain/short-grain rice distinction.

How can the *EC-Bananas (US)* help? This thesis will answer this question while examining each criterion separately with a reference to the *EC-Bananas (US)* case. This thesis takes a position that short-grain rice and long-grain rice are like products.

The physical properties of the products

First of all, one has to clarify that the long-grain/short-grain distinction for rice is an artificial distinction based on one of their physical properties, which is length of a grain of rice.[61] The ecologically-termed equivalent of long-grain/ short-grain rice is indica / japonica rice. Long-grain rice is ecologically called indica rice, while short-grain rice is japonica rice. From this point on, the term long-grain rice is used interchangeably with indica rice, and short-grain rice with japonica rice.

From the physical properties point of view, why are short-grain rice and long-grain rice "like products"? First of all, let us look at genetic diversity, a scientific parameter that informs us of how many types of biologically-defined different agricultural products, such as rice and banana, exist. What is the implicit standard[62] of likeness in this regard in *EC- Bananas (US)*?

What is the genetic diversity of bananas, a product that the Panel concludes all varieties to be like products? The explanation for the diversity in bananas states that "there are hundreds of species of bananas. The greatest diversity is found in home gardens and traditional agriculture, while only <u>a few species are grown by large-scale producers for the export market</u>."[63](Emphasis Added)

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[61] The Japanese General Food Policy Bureau of the MAFF, in its press releases for the bid results in both OMA and SBS system, specifies this distinction of long-grain/ short-grain.
[62] This thesis uses the term "implicit standard" because of the fact that the Panel did not explain the criteria in detail when it reached a conclusion that all bananas are like products.
[63] *Bananas,* (accesses 12 April 2004); available from http://www.the-banana.com/bananas2.htm

In this sense rice is very similar to bananas above, as described in the following: "Worldwide there are about 20 species of rice, while only two rice species are important cereals for human nutrition, *Oryza sativa* (hereinafter, *O. sativa*), grown worldwide, and *O.glaberrima,* grown in parts of West Africa."[64] (Emphasis Added) Moreover, both long-grain/ indica rice and short-grain/ japonica rice that are discussed in this thesis belong to *O. sativa*.

The Panel in the banana case implicitly concludes that even though there are a few bananas at the species level, they are all like products, as it states, "all bananas are 'like' products in spite of any differences in quality, size or taste that may exist" (Emphasis Added).[65] Note that the Panel in the banana case did make a conclusion that "all" bananas are like products and did not compare between "domestic products," i.e. bananas from the EC and "import products," i.e. bananas from other countries. If the same implicit standard applied in the banana case as shown above is to be applied in the long-grain/short-grain rice case, both of which belong to the

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[64] J. L. Maclean, D.C. Dawe, B. Hardy, and G.P. Hettel, ed., *Rice Almanac, Source Book for the Most Important Economic Activity on Earth*, 3rd ed. (Oxon, UK: CABI Publishing, 2002), 3.

[65] Even though in the full sentence in the paragraph 7.62 of the report the Panel states, "Moreover, all parties and third parties to the dispute have proceeded in their legal reasoning on the assumption that all bananas are "like" products in spite of any differences in quality, size or taste that may exist" (Emphasis Added), hence emphasized on the "common assumption by all parties in the dispute". However, there is no explicit requirement for a common assumption in the general criteria to determine like products problem. Even if common assumption are essential, one can argue that Japan and Thailand presumably do have a common assumption that short-grain rice and long-grain rice are like products because:

(i) Japan did not put any distinction regarding long-grain/short-grain rice in column 7 "other terms and conditions" of the Japanese Schedule for rice and

(ii) As will be shown later in the discussion regarding international classification of the products for tariff purposes, Japan again put short-grain rice and long-grain rice in the same classification as "rice".

same species, then they are to be judged as like products.

Secondly, it is true that "over time, the great divide in the rice world of *O. sativa* emerged: that between indica and japonica plant types."[66] Indica rice is long and thin; when cooked, it is usually dry, firm, and fluffy because of its high, starchy amylose content (20-30%). Japonica rice, by contrast, is short and stubby with low amylose content (17-22%); when cooked, the rice is stickier than indica types and tends to be mushy.[67]

However, is this difference between indica and japonica rice less than the difference in quality, size or taste between several types of bananas from the EC, ACP countries, BFA countries and other third countries, which the Panel in *EC-Bananas (US)* disregards?

Banana Wars describes the diversity in species of bananas as follows: "Bananas are heterogeneous products, with the varieties (an equivalent term of species) of bananas produced for local consumption often significantly different in quality from the varieties grown for export."[68] Although it is not in the purpose of this thesis to go further into detail for the physical difference at the level of varieties (species) of bananas, one can see the huge difference in physical properties between

[66] James Lang, *Feeding a Hungry Planet: Rice, Research, & Development in Asia & Latin America*, (Chapel Hill: The University of North Carolina Press), 5.
[67] The percentages of an amylose are from JETRO Marketing Guidebook for Major Imported Products, 80.
[68] Timothy E. Josling and Timothy G. Taylor, *Banana Wars* (Cambridge: CABI Publishing, 2003), 8.

different varieties of bananas.[69]

Since varieties are biologically defined concepts, there is a scientific difference between different varieties. This thesis therefore assumes that fewer species of products mean less scientifically provable differences among products, hence leads to a tendency that the products are more to be judged as like products. Let us apply this scientific standard to both rice and bananas. Commercial bananas have a few species, while commercial rice is composed of two species. Hence, if the Panel considers that all bananas are like products, it is reasonable for the Panel as well to conclude that from scientific point of view that all types of rice are like products.

However, also utilizing this logic, one might argue that commercial bananas are almost exclusively Cavendish bananas.[70] Therefore all bananas in the market are "like products". This characteristic of commercial bananas differs from the case of rice, since both short-grain rice and long-grain rice are sold as commercial rice.

Let us look at the statistics. Cavendish bananas account for approximately 95% of the world market[71], while indica or short-grain rice accounts for 85%.[72] Is 10% big

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[69] It is not in purpose of this thesis to go further into detail of varieties of bananas, however one can see *Bananas, Banana Plant, Banana Tree* (accessed 12 April 2004); available from http://www.bananagarden.com/catalogv3/index.php/cPath/1?osCsid=12c83c858e337b25afb3e60ead1ee930

[70] A variety of banana, with the characteristic as following.
Characteristic of the fruit: Fruit length 8-10 Inches; 21-25 centimeters; Fruit shape Curved (sharp curve); Section of fruit: Slightly ridged; Mature fruit peel color: Yellow; Pulp color at maturity: White

[71] *Industry Statistics, the Australian Banana Growers Council Inc.* (accessed 12 April 2004); available from http://www.abgc.org.au/pages/industry/bananaIndustry.asp.

enough to distinguish and say that all bananas are like products while rice is not? The answer to the above question is subjective. What one can say here is that statistics inform us that the most common type of bananas in the world are Cavendish, and so are indica rice in the case of commercial rice. If the fact that Cavendish bananas account for most of the bananas in the market constitute evidence for the likeness of the products, the fact that indica rice accounts for most rice in the market should be considered so as well.

From all the reasoning mentioned above, this thesis therefore concludes that from the perspective of physical properties of the products, short-grain rice and long-grain rice are like products.

Same or similar end-uses: the extent to which the products are capable of serving the same or similar end-uses

There are two end-uses for edible bananas, for cooking and for dessert.[73] Hence, there will be three types of bananas categorized by their end-uses, cooking bananas, dessert bananas, and cooking and dessert bananas. However, bananas are predominantly consumed as fresh products or as dessert bananas. Cavendish

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[72] JETRO Marketing Guidebook for Major Imported Products, 80.
[73] For more detail, see *Banana Diversity* (accessed 12 April 2004); available from http://www.inibap.org/publications/inibap-factsheets_eng/diversity.pdf

bananas, a type of dessert bananas, account for 95% of the market.[74] Defining the extent to which the products are capable of serving the same or similar end-uses is subjective. However, one can argue that the major types of bananas in the market are capable of serving the same or similar end-uses, as with dessert bananas.

What about rice? There are also largely two uses for rice as well, for industrial use and for individual consumption as table rice. However, both uses of rice depend highly on culture. This thesis will limit its examination of the uses of rice to within the Japanese cultural context. Let us take a look at uses of rice illustrated by the JETRO in its *Marketing Guidebook for Major Imported Products.*[75]

For individual consumption as table rice, japonica or short-grain rice is "steamed for use as a primary food; also used in Sushi and rice balls, etc". On the other hand, indica rice is "<u>suitable</u> for use in pilaf, Chinese Pilaf and paella dishes; also used in Chinese rice noodle." (Emphasis Added)

For industrial uses, both short-grain rice and long-grain rice can be used in processed rice foods, rice crackers, soybean paste, soybean paste, sake, alpha (pre-processed) rice flour, and cereal flour.

As shown above, individual consumption as table rice is a matter of *suitability*. Japanese people generally prefer sticky rice, and many people believe

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[74] *Industry Statistics, the Australian Banana Growers Council Inc.* (accessed 12 April 2004); available from http://www.abgc.org.au/pages/industry/bananaIndustry.asp.
[75] JETRO Marketing Guidebook for Major Imported Products, 80-81.

that the tastiest rice is japonica with an amylose content of 17-19% as the JETRO report states, "rice is evaluated overall in terms of the sweetness of steamed rice (taste), its fragrance (smell), its shiny whiteness (visual appearance), its appropriate stickiness, its appropriate tenderness and palatability (touch)."[76] (Emphasis Added)

Again it is shown here that it is a matter of "evaluation" and "appropriateness", which presumably should be considered within a realm of consumers' preferences, the criterion to be discussed next. Hence, this thesis argues that, excluding a matter of preference, long-grain rice is capable of serving the same or similar end-uses as short-grain rice for the purpose of individual consumption as table rice.

What about rice for industrial uses? Is long-grain rice capable of serving the same or similar end-uses as short-grain rice is? The answer is yes, if again one does not go into the evaluation of "suitability" or "appropriateness", which should be left for the consideration in the next criterion. It is also much more difficult for customers to distinguish between the industrial rice products made of long-grain rice and those made of short-grain rice, especially in case of soybean paste. Moreover, in some cases, long-grain rice serves the same or similar end-uses better than short-grain rice does. For example, long-grain rice is better suited for the production of

[76] JETRO Marketing Guidebook for Major Imported Products, 80.

alpha (pre-processed) rice flour because of its suitability for machining.[77] Thus, this thesis concludes that long-grain rice is capable of serving the same or similar uses as short-grain rice for industrial uses as well.

Consumers' tastes and habits: the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand

This criterion is probably the most subjective one. However, subjectivity is not an acceptable excuse for not examining this criterion, since in paragraph 120 of *EC-Asbestos (AB)*, the AB states:

> The Panel declined to examine or make any findings relating to the third criterion, consumer's tastes and habits, "because this criterion would not provide clear results"…. In any event, we have difficulty seeing how the Panel could conclude that an examination of consumers' tastes and habits "would not provide clear results", given that the Panel did not examine *any* evidence relating to this criterion.

Therefore, one has to consider this highly subjective criterion. One way to consider this criterion is to look at a representative Japanese assessment on their consumers' tastes and habits. This thesis found, after a careful examination of this criterion, that the Japanese preference on rice is diverse and unclear and will become even more so in the future. This is best illustrated in the JETRO report: "however, as

[77] JETRO Marketing Guidebook for Major Imported Products, 80.

culinary tastes diversify, there are changes in rice preference by age and by region (between urban and rural areas). It is expected that Japanese people's preference for sticky rice will diversify in the future."[78]

Since the Japanese preference on rice is highly likely to be more diversified in the future, this thesis will argue that from the point of view of consumers' tastes and habits, there is a high possibility that long-grain rice will be treated as an alternative means to short-grain rice in the medium/long-run.

The international classification of the products for tariff purposes[79]

There is no distinction between short-grain rice and long-grain rice in Japan's Schedule of tariff concessions (XXXVIII). Both are all recognized as "rice." However, as stated previously, this does not lead to a firm conclusion that both products are like products.[80] As the AB states in paragraph 140 of *EC-Asbestos (AB)*, "While this element (tariff classifications) is not, on its own, decisive, it (only) does tend to indicate (whether products are like or not)"

Up to this point, this thesis has examined all general four criteria to determine

[78] JETRO Marketing Guidebook for Major Imported Products, 80.
[79] There does not exist a need to make a comparison with banana within this objective criterion.
[80] For detail reasoning as for why one cannot rely upon the tariff classification in this regard, see *Japan-Alcoholic Beverages (AB)*, pages 21-22.

like products with the standard implicitly applied in the banana case. Next, this thesis will proceed to examine competitive relationship between long-grain rice and short-grain rice, as it is mandated by the interpretation of the AB in paragraph 99 of *EC-Asbestos (AB)*.[81]

Competitive relationship

Is there a competitive relationship between imported long-grain rice and Japanese domestic short-grain rice? What is "competitive relationship" meant in *EC-Asbestos (AB)*, which states a need to examine "competitive relationship" between and among products when determine likeness for Article III: 4? One can argue that the AB in *EC-Asbestos (AB)* links the four general criteria with this concept of "competitive relationship" when it examines each separate criterion.[82] This thesis will use the same approach as the AB does in *EC-Asbestos (AB)*.

First, let us consider the "competitive relationship" between imported long-grain rice and Japanese domestic short-grain rice for industrial uses. This thesis argues that clearly such a relationship existed, based on evidence found in examining the three general criteria:[83]

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[81] See pages 47-48 of this thesis for the detail of paragraph 99 of *EC-Asbestos (AB)*.
[82] See paragraphs 111-141 of *EC-Asbestos (AB)*.
[83] The AB does not consider the last criterion of tariff classification in a connection with competitive relationship between products.

- *From evidences regarding physical properties*: Both rice are used for industrial purpose, it is extremely difficult to tell the difference between the both from the industrial products.

- *From evidences regarding the capability of serving the same or similar end-uses*: Long-grain rice possesses a capability to serve the same or similar uses as short-grain rice in most uses for industrial purpose.

- *From evidences regarding consumers' tastes and habits*: With very subtle difference in tastes, long-grain rice using in industrial products are almost undistinguishable from short-grain rice products.

Therefore, from evidence found in examining the three general criteria, this thesis concludes that there is a clear competitive relationship between imported long-grain rice and Japanese domestic short-grain rice for industrial purpose. This competitive relationship is also confirmed in the JETRO Report as it states, "because of its (Thai long-grain rice) low price, there is a certain level of demand for use in processed rice foods, rice crackers, soybean paste, and cereal flour."[84]

Second, what about the "competitive relationship" between imported long-grain rice and Japanese domestic short-grain rice for individual consumption as table rice? This thesis also argues that such a relationship existed, based on evidence

[84] JETRO Marketing Guidebook for Major Imported Products, 81.

found in examining the three general criteria.

- *From evidences regarding physical properties*: Even though it is undisputable that length of grain of rice and other physical properties such as sweetness of steamed rice (taste), fragrance (smell), shiny whiteness (visual appearance), stickiness, tenderness and palatability (touch) are differences between long-grain rice and short-grain rice, both rice are in a moderate competitive relationship. This is due to the cheap price of imported rice. Clearly there is a trade-off relationship between price (long-grain rice) and preference (short-grain rice).

- *From evidences regarding the capability of serving the same or similar end-uses:* Taking out of the consideration a matter regarding appropriateness or preference, which would be considered in the next criteria, long-grain rice could serve the same or similar end-uses as short-grain rice does, in most cases.

- *From evidences regarding consumers' tastes and habits*: Thai rice failed to gain consumers' support as a food item for individual consumption as table rice in 1993 when it was imported on an emergency basis.[85] However, one also has to consider: "the Japanese culinary preferences diversify. Monthly per-capita (individual) consumption of rice as a staple food has declined from 6.8 kilogram to 5.0 kilogram over the past decade. People are also eating fewer meals at home than before."[86]

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[85] JETRO Marketing Guidebook for Major Imported Products, 81.
[86] JETRO Marketing Guidebook for Major Imported Products, 81.

The diversification of preferences, the decline of rice use for individual consumption, and the decline of the individual consumption within the household itself all lead to the conclusion that Japanese domestic short-grain rice is becoming less dominant in the Japanese consumers' tastes and habits. At the same time this means that there is a high chance for imported long-grain rice to occupy a larger sales share within the Japanese rice market as the previously cited quotation from the JETRO Report shows, "as culinary tastes diversify, there are changes in rice preference by age and by region (between urban and rural areas). It is expected that Japanese people's preference for sticky rice will diversify in the future."[87]

Hence from the evidence regarding consumers' tastes and habits, this thesis finds that there existed a moderate[88] competitive relationship between imported long-grain rice and Japanese domestic short-grain rice.

The competitive relationship between imported long-grain rice and Japanese domestic short-grain rice is supported by evidence on considerations such as: physical properties of the products; products' capability of serving the same or similar end-uses; consumers' tastes and habits; and international classification of the products for tariff purposes. This thesis therefore submits that imported long-grain rice and Japanese domestic short-grain rice are like products for the purpose of

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[87] JETRO Marketing Guidebook for Major Imported Products, 80.
[88] This thesis uses the term "moderate" to show the lower degree of competition between both rice for individual consumption, compared to a clear competitive relationship in the case of industrial use.

Article III: 4.[89]

(ii) Whether the measure at issue is a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use?

The measure at issue in this case is unplanned shipment distribution channel. The Foodstuff law authorized the channel, thus clearly the measure at issue is internal regulation, i.e. law. Also since the Foodstuff law of Japan allows only domestic producers unplanned shipment channel as a new rice distribution channel to reach the customers more directly and economically than import rice, the measure affected the internal sale, offering for sale, purchase, distribution, or use of import rice.

(iii) Whether the measure provides the imported products a treatment less favorable than that accorded to like domestic products?

What does "less favorable treatment" mean here? *Korea-Beef (AB)* helps

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[89] However, as previously stated in this thesis, this like product problem is extremely complex as best described in paragraph 120 of *Japan-Alcoholic Beverages (AB)* as following:

> There will be few situations where the evidence on the "likeness" of products will lend itself to "clear results". In many cases, the evidence will give conflicting indications, possibly within each of four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective of the consumer. A panel cannot decline to inquire into relevant evidence simply because it suspects that evidence may not be "clear" or, for that matter, because the parties agree (according to Canada) that certain evidence is not relevant.

This thesis realizes its limitation in this regard.

answer this question, when it states, "whether or not imported products are treated "less favorably" than like domestic products should be assessed instead by examining whether a measure modified the *condition of competition* in the relevant market to the detriment of imported products".[90] Hence to prove that the difference or the absence of the unplanned shipment channel for import rice was "less favorable", according to *Korea-Beef (AB)*, one has to show that there is a "modification of the condition of competition".

Let us look at how the AB in *Korea-Beef (AB)* raises an example for what a "modification of the condition of competition" is. Paragraph 145 of *Korea-Beef (AB)* best addresses this as follows:

> When beef was first imported into Korea in 1988, the new product simply entered into the pre-existing distribution system that had been handling domestic beef. The beef retail system was a unitary one, and the conditions of competition affecting the sale of beef were the same for both the domestic and the imported product. In 1990, Korea promulgated its dual retail system for beef…. The central consequence of the dual retail system can only be reasonably construed, in our view, as the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same customers served by the traditional retail channels for domestic beef. (Emphasis Added)

In *Korea-Beef (AB)*, there was a change from a unitary beef retail system to a dual one. Before 1990, one could sell both import and domestic beef together, but one could not do so after 1990. This is called the "modification of the condition of

[90] Paragraph 521 of *Korea-Beef (AB)*.

the competition." More important is the consequence of the modification. The consequence of the change was "construed" as "the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to the customers". And it is this "reduction" that establishes "a competitive conditions less favorable for the imported product than for the domestic product", as the AB states:

> The reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, (the intervention of some element of private choice does not relieve Korea of) responsibility under the GATT resulting establishment of competitive conditions less favorable for the imported product than for the domestic product.[91] (Parenthesis Added)

Therefore, from *Korea-Beef (AB)*, one can conclude that in order to prove that any difference in treatment between imported and domestic products is less favorable, one has to show the existence of the "modification of the condition of the competition". In addition, "modification of the condition of the competition" has to be able to be construed as "the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to the customers."

What will be the application of these requirements in the Japanese rice case? What exactly is the alleged "less favorable treatment" in the Japanese rice case? To answer these questions, one has to understand both how the Japanese treated the imported rice once it passes the customs and the standard of comparison, how the Japanese treated its domestic rice in its own market, once it passes the hands of

[91] Paragraph 146 of *Korea-Beef (AB).*

domestic producers.[92]

First, what was the treatment for the imported rice? There were two types of imported rice that could compete with the Japanese domestic rice in the market, OMA rice and SBS rice.[93] After the imported rice passed customs into the Japanese rice market, OMA rice had to go to the government reserve, the duration of which is estimated to be as long as an average of one year. Subsequently, it would be sold to registered wholesalers. Registered wholesalers would then sell the rice to food processors, food service establishments, or registered retailers who resold the rice to general consumers. In case of SBS rice, the rice would not pass the government reserve, but would go directly to registered wholesalers and then follow the same subsequent path as OMA rice.

Second, what was the treatment of domestic rice? This thesis starts from the treatment after the Japanese domestic rice comes out of domestic rice producers' hands. There were roughly two distribution channels available for domestic rice. One was planned shipment rice and the other was unplanned shipment rice.

First, one has to look at the distribution channel for planned shipment rice. After going through government inspection (grading inspection), planned shipment

[92] See excerpt from JETRO Marketing Guidebook for Major Imported Products, 83. This information regarding Rice distribution channels is as of the year 2003. The same information for the year of 2001 was not available.
[93] This thesis will argue that over quota import rice should be ruled out from the consideration here, since due to prohibitively high tariff rates, it is not a business feasible option.

rice had to go through a complicated distribution channel as shown in Appendix I. It had to go through primary and secondary registered shippers, voluntary distributor corporations, government (reserve), registered wholesalers, and registered retailers before it gets to the hands of consumers for the longest way. The same route applied to the food processors, food service establishment as well, except that domestic rice in this case did not have to pass registered retailers. Of course, there was a combination of shorter routes, however domestic rice going through this channel, in average, definitely cost more than rice in the other channel.

Rice in the other channel was called "unplanned shipment rice". Using this channel, rice could be "sold directly by domestic rice producers in local markets or directly to consumers, without going through registered retailers; including household consumption by domestic rice producers".[92] The amount of domestic rice using this channel has been growing steadily over the years. According to the JETRO report, a breakdown of demand volume estimates (presumably in the year of 2001) shows 4.85 million tons for planned shipment rice (including import rice under the minimum access regime), while the remaining 4.45 million tons consisted of unplanned shipment rice. The report goes further to state, "however, sales of voluntarily marketed rice (main portion of planned shipment rice) have been very poor of late, and the proportion of unplanned rice shipments is increasing every

year."[94]

A piece of interesting statistics is when the Food Agency conducted the survey of domestic producers before their shipment in 2001, 35% of the overall producers responded that they were planning to sell their rice as unplanned shipment rice. More importantly, larger scale producers were more interested in utilizing the unplanned shipment distribution channel. It was as high as 62% of more than 5-hector producers that were interested.[95] This shows that large-scale domestic producers used and benefited more from the unplanned shipment channel. What does this change in the Japanese domestic rice distribution system affect the exporters?

This thesis argues that it would be rational to assume that foreign rice exporters to Japan were the same large-scale producers, or at least their main competitors in the Japanese rice market were the Japanese large-scale domestic producers. But now foreign exporters' main competitors, i.e. domestic large-scale producers, possessed the unplanned shipment channel as an effective business tool, which enabled them to provide their rice to and reach their consumers more directly and more economically. Exporters did not have this option.

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[94] JETRO Marketing Guidebook for Major Imported Products, 82.
[95] The General Food Policy Bureau of the MAFF, *The Report regarding Unplanned Shipment Rice* (Keikakugai Ryuutsuumai ni tsuite), 5 (accessed April 9, 2004); available from www.syokuryo.maff.go.jp/notice/data/ seisanchousei/chosei36.pdf

Therefore, this change signaled to the exporters that they were losing their Japanese rice market to the Japanese domestic producers since they did not possess the option of unplanned shipment channel. Exporters did not have this effective means to reach their Japanese customers, while the Japanese domestic producers--their competitors—increasingly used the channel.

In sum, the major difference between the distribution channel of domestic rice and that of import rice is that there was no unplanned shipment channel available for imported rice. This difference worked against imported rice. Therefore, one might argue that the absence of unplanned shipment rice, which has been increasingly used by domestic producers, was less favorable treatment to like products in the meaning of Article III: 4.

Let us examine the allegation through the point of view of the AB in *Korea-Beef (AB)*. Does the change in the Japanese rice distribution channel "impose a drastic reduction of commercial opportunity to reach, and hence to generate sales to the customers"? This thesis argues that it does. The consequence of the new Foodstuff Law, which established the unplanned shipment channel only for domestic rice, "reduced commercial opportunity to reach, and hence to generate sales to the same customers served by the traditional retail channels." In other words, the consequence in this rice case is identical to the consequence of the change to the dual

retail system in *Korea-Beef (AB)*, even though there exist some minor differences between the two cases (to be addressed later).

In the Japanese rice case, there had been a unitary distribution system before 1995 for both domestic rice and import rice, even though there was no substantial import of rice before 1995. All rice of any kind, regardless of domestic or import origin, had to go through the Food Agency first and then be distributed through the government-regulated channel before ultimately reaching end-users, individual consumers or industrial users.

However, the change or the modification came as the new law came into effect. The Foodstuff Law basically created another new distribution channel for domestic rice. Hence in 2001, there were two distribution channels for domestic rice. One was the traditional channel, which was the planned shipment channel. The other is the so-called unplanned shipment, through which the domestic rice producers could sell their rice products directly to end-users such as individual consumers and retailers such as department stores. The only requirement for the domestic rice producers to utilize the latter was approval from the MAFF, while there were more requirements for actors in the government-regulated channel, as shown in Appendix II.[96]

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[96] Excerpt from JETRO Marketing Guidebook for Major Imported Products, 84. This information regarding Rice distribution channels is as of the year 2003. The same information for the year of

More actors and more requirements for each actor in the traditional domestic rice distribution channel made it more difficult and more costly[95] for producers who used the traditional channel to reach end users, i.e. consumers or industrial users. Statistics also supports this argument. Since 1996, one year after the Foodstuff Law came into effect, the flow of domestic rice through this channel had shown a steady growth over several years. The percentage share of unplanned shipment rice from the whole domestic rice production was 44% in 1996, 45% in 1997, 48% in 1998, 49% in 1999 and 2000. It became higher than the share of planned shipment rice in 2001 when it reached 51% of the share.[97] It was also estimated that proportion of unplanned rice shipments was increasing every year.[98] Absolutely, there was a shift in the domestic rice distribution channel from planned shipment rice to unplanned shipment rice.

Imported rice was treated less favorably in this regard. Imported rice could not be distributed through the unplanned shipment channel. Basically, both OMA and SBS rice had to go through the traditional channel, while domestic producers were shifting their rice to the unplanned shipment channel.

2001 was not available.

[97] Even if one excludes the amount of rice consumed by domestic producers themselves from the unplanned shipment rice, one can still see a steady increase in the share of unplanned shipment rice, which was sold in the market. Supporting data also show that it increased from 27% in 1996 to 28% in 1997; to 30% in 1998; to 32% in 1999; and to 34% in 2000 and 2001.
The General Food Policy Bureau of the MAFF, *The Report regarding Unplanned Shipment Rice* (Keikakugai Ryuutsuumai ni tsuite), 2.

[98] JETRO Marketing Guidebook for Major Imported Products, 82.

This modification "imposed a drastic reduction of commercial opportunity to reach, and hence to generate sales to the customers." When the domestic producers shifted to the unplanned shipment channel, domestic producers gained direct access to consumers more cheaply and received more information regarding consumers' preferences. This is also confirmed by the survey conducted by The General Food Policy Bureau of the MAFF.[99] The survey shows that one of the reasons domestic producers used unplanned shipment is their increasing connection with customers, which leads to product improvement in response to customer preferences.

This modification hence reduced the commercial opportunity of the imported rice to reach, and hence to generate sales to the customers. The modification did reduce the commercial opportunity drastically, since a substantial percentage of domestic rice, some 30% at the lowest estimation, shifted to the unplanned shipment channel in one year and still continues to do so today.

Therefore, with the coming into effect of the Foodstuff Law in 1995, while domestic rice gained two distribution channels to reach the consumers with the additional more effective channel, import rice still was restricted to the previous channel. The consequence of this change or modification is identical with that caused by the modification in *Korea-Beef (AB)*.

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[99] The General Food Policy Bureau of the MAFF, *The Report regarding Unplanned Shipment Rice*, 6.

However, one can raise a counterargument here. The counterargument is that the two cases, the Korea-Beef case and the Japanese rice case are not the same. Let us compare the two cases.

In *Korea-Beef (AB)*, before the change, there existed one channel that dealt with both domestic and product. After the change, it became two channels, each dealing with import and domestic products separately. In the Japanese rice case, before the change, there was also one channel that dealt with both domestic and import products. After the change, it became two channels. The traditional one dealt with both import and domestic products, while the other was available exclusively for domestic rice.

On the other hand, in *Korea-Beef (AB)*, there was a change from a unitary retail system to a dual one. Strictly construed, that was not precisely what happened in the Japanese rice case, and therefore one cannot compare the two. It is also reasonable to argue that there had been virtually no rice import before 1995. When the new law came into effect, it was the introduction of the channel for imported rice. There was no change or modification in the distribution channel, and hence the environment was no less favorable for imported rice.

This thesis argues that that these counterarguments are invalid. First, this thesis will consider a crucial difference between the two cases. In *Korea-Beef (AB),*

after the modification a separate channel was established for both import and domestic products. In the case of Japanese rice, a new channel was created exclusively for domestic products, in addition to the existing channel that was available for both import and domestic rice.

The dual retail system, the separate channel for import and domestic products in *Korea-Beef (AB)*, was not the requirement for less favorable treatment.[100] The requirement will be fulfilled if there is any modification that "imposed a drastic reduction of commercial opportunity to reach, and hence to generate sales to the customers" or not that needed to be considered. Hence, in the Japanese rice case, when another new channel exclusive for domestic product (in addition to the channel that was available for both import and domestic rice in the Japanese rice case), did "impose a drastic reduction of commercial opportunity to reach, and hence to generate sales to the customers", the Japanese treatment shall be considered less favorable for import rice.

Next, this thesis will examine the counterargument that there was no modification, since there had been no substantial import of rice before the legal shift to the Foodstuff Law. It was the Foodstuff Law that created both new rules for imported rice and new rules for domestic rice distribution so that there are two

[100] Paragraph 149 of *Korea-Beef (AB)*.

channels, hence there is no modification in the competitive relationship created by the law itself. The Foodstuff Law just legally authorized the new relationship between import and domestic rice.

This thesis argues that this counterargument is unwarranted. It is incorrect to assume that the Foodstuff Law could authorize a new relationship between imported and domestic rice. The concession in the WTO, including the one regarding Japanese rice, is the result of the negotiation between Members. When Members negotiate, they would have an assumption on their own. In this rice case, this assumption on which the concession negotiation was based, was that the distribution channel of rice would be the same as it had been when the negotiation was held.

It was rational for Thailand to assume that the distribution system in the Japanese rice market would continue in the same way as it had been before 1995, when it negotiated with Japan. This is because it is impossible for Thailand to expect unlimited pattern of possible subsequent changes in the Japanese distribution system and put into the consideration when it negotiated.

This explains why Members need Article III of the GATT Agreement. Article III of the GATT Agreement came into existence because Members agreed that no Member could and should be expected to guess what other Members could do within its internal legal order to change the value of the concession given out

during the negotiations. This Article assumes that Members during negotiations in the WTO make rational assumptions. In this case, it is rational for Thailand to assume that the Japanese rice distribution system would continue to exist more or less in the same way, and that all rice would have to go through the Food Agency controlled channel, i.e. there would be no unplanned shipment channel. Hence, the coming into existence of the unplanned shipment channel, which is a legal modification of competition relations that "imposed a drastic reduction of commercial opportunity to reach, and hence to generate sales to the customers" should be construed as a less favorable treatment to import rice.

This conclusion holds regardless of whether the import quota within the minimum access is fulfilled or not, since the AB in *Korea-Beef (AB)* states:

> The fact that the WTO-consistent quota for beef (the equivalent of the quota within the minimum access for rice) has, save for two years, been fully utilized does not detract from the lack of equality of competitive conditions entailed by the dual retail system (the equivalent of the distribution channel of rice after the change by the Foodstuff Law).[101] (Parentheses Added)

Therefore, this thesis concludes that the unavailability of the equivalent of unplanned shipment channel for import rice under the Foodstuff Law provided to import rice a treatment less favorable than that accorded to like domestic products.

Since this thesis demonstrated as above (i) that imported and domestic rice are "like"; (ii) that the measure at issue is either a law, regulation, or requirement

[101] Paragraph 147 of *Korea-Beef (AB)*.

affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (iii) which provides to imported rice a treatment less favorable than that accorded to like domestic rice, it concludes that the creation by the Japanese Foodstuff Law of the unplanned shipment channel exclusively for domestic rice without equivalent measure for import rice constitutes a violation of Article III: 4 of the GATT Agreement.

5. Claim under Article I: 1 of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *General Most-Nation-Nation Treatment.*

(a) Arguments

This thesis has already suggested that the de facto distinction for short-grain rice to go through the SBS system and the long-grain rice to go through the OMA system does not violate the TBT Agreement. However, is this distinction in violation of Article I: 1 of the GATT Agreement? Article I: 1 establishes the MFN obligation among Members, which is an obligation that countries have to treat the *like product* from any countries in the same manner. Article I: 1 of the GATT Agreement states:

> With respect to custom duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to <u>all</u>

> matters referred to in paragraph 2[102] and 4 of Article III, any *advantage*, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded *immediately and unconditionally* to the *like product* originating in or destined for the territories of all other contracting parties. (Emphasis Added)

This thesis proposes that Thai long-grain rice received less favourable treatment than short-grain rice from other countries by the Japanese rice import regime, because it had to go only through the OMA system and could not de facto go through the SBS system. Therefore it was shut out from the demand by medium and small size business in the Japanese rice market.

(b) Components of a Violation

How has Article I: 1 been applied in the real case? As the Panel in *Indonesia- Automobiles* confirmed the AB in *EC- Bananas III* that in order to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all "like products" from all WTO Members. Following this analysis, there will be three issues to be examined here.[103]

(i) Are benefits from the distinction an advantage, of the type covered by Article I?

(ii) Are the advantages offered to all like products?

(iii) Are the advantages offered unconditionally?

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[102] Paragraph 2 of Article III deals with tax regulation, which does not apply in this case, both tariffication and mark-up levied for rice import is legally authorized by the Japanese Schedule.
[103] Paragraph 14.138 of *Indonesia- Automobiles.*

Before proceeding to address the above three questions, one has to keep in mind that because Article I: 1's MFN obligation applies to internal taxes and sales regulations subject to Article III's national treatment obligation, the scope of the MFN obligation hence depends in part on the scope of Article III.

(i) Are benefits from the distinction an advantage, of the type covered by Article I?

Recall that Article I: 1 refers explicitly to "all matters referred to in paragraph 2 and 4 of Article III". Let us look at Article III: 4. Article III: 4 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable 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. (Emphasis Added)

From emphasis in the above paragraph, one can argue that the requirements for the government-designated importers were restrictive so that only large-scale importers could join the SBS system. Hence, it apparently affected the internal sale of Thai long-grain rice, since it now cost more for Thai rice to get into the country. This decreased their internal sale in the country, lessened its familiarity by the Japanese consumers, and led to less usage by the Japanese.

Therefore, benefits from the de facto distinction of the year 2001 was an advantage, of the type covered by Article I of the GATT Agreement.

(ii) Are the advantages offered to all like products?

To answer this question, one has to answer the following question: Are

short-grain rice and long-grain rice like products? Of course if the answer is yes, they have to be treated the same.

There is no concrete standard on how to determine the like product for the purpose of Article I. Also, there is neither a clear distinction nor a defined relation between the concepts of like product for the purpose of Article I and that for the purpose of Article III: 2 or Article III: 4.

However, there is a clue in *EC-Bananas (US).* Paragraph 7.62 of the Report states:

> Before doing so, we consider whether bananas from the EC, ACP countries, BFA countries and other third countries are "like" products for purposes of the claims made in respect of Article I, III, X, XIII of GATT. The factors commonly used in GATT practice to determine likeness, such as, for example, customs classification, end use, and the properties, nature and quality of the product, all support a finding that bananas from these various sources should be treated as like products.

Since there is no concrete standard, it seems that the Panel applies the same standard for likeness for purposes of Article I and Article III. Since this thesis already made a case that short-grain rice and long-grain rice are like products for the purpose of Article III: 4, therefore it will conclude that they are like products for the purpose of Article I: 1 as well.

Not to be confused here is that there is definitely a less-defined legal relationship between the like products concept for the purpose of Article III and that for the purpose of Article I than the relationship between Article III: 2 and Article III:

4 established in *EC-Asbestos (AB)*.

Based on the conclusion that long-grain rice and short-grain rice are like products, this thesis argues that advantages are *not* offered to all like products in this case. The reason is apparent because, due to the de facto distinction, Thai long-grain rice could not gain substantial access to the SBS system, while other short-grain rice could.

(iii) Are the advantages offered unconditionally?

What does this unconditional requirement mean? In *Indonesia- Automobiles*, the Panel states in paragraph 14.145 of the Report:

> The distinction as to whether one product is subject to 0% duty and the other one is subject to 200% duty… depends on whether or not PT TPN had made a "deal" with that exporting company to produce that national car… In the GATT/WTO, the rights of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place. The existence of these conditions is inconsistent with the provisions of Article I: 1, which provides that tax and customs duty benefits accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members "immediately and unconditionally."

There is a resemblance between the distinction in this Japanese rice regime case and in *Indonesia-Automobiles*, if one replaces terms in the statement above with the corresponding terms from the Japanese rice regime case. This can be shown as follows:

The distinction as to whether one product is subject to 0% duty and the other one is subject to <u>341 yen per kilogram duty</u>… depends on whether or not <u>government-</u>

designated importers had made a "deal" with that exporting company to import their rice… In the GATT/WTO, the rights of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place. The existence of these conditions is inconsistent with the provisions of Article I: 1, which provides that tax and customs duty benefits accorded to products of one Member (here on rice from the US, Australia)[104] be accorded to imported like products from other Members, Thailand "immediately and unconditionally"." (Emphasis added shows the replaced terms) However, it is not easy to conclude that from the experiment above that the advantages were not offered unconditionally. There can be a counterclaim here as follows: Is the "distinction as to whether one product is subject to 0% duty and the other one is subject to 341 yen per kilogram duty" the purpose of a minimum access system? If the answer is yes, the next question is "Was it rational for Thailand to expect that the existence of the SBS system within the minimum access regime inevitably depends on whether or not government-designated importers had made a "deal" with that exporting company to import their rice? And since the Annex 5 of the AoA lawfully authorized the minimum access itself to which Thailand also agreed, Thailand, being able to expect the fact above should not be able to bring any legal claim in this regard.

[104] Note that there is no need to distinguish between short-grain rice and long-grain rice any more, since this thesis already concluded that they are like products.

The statement above is not warranted. Yes, it is true that Thailand did agree to the AoA that authorized the minimum access for the Japanese rice regime. It is true that the minimum access regime by itself means the distinction between "one product is subject to 0% duty and the other one is subject to 341 yen per kilogram duty". It is also true that the existence of the SBS system within the minimum access regime inevitably "depends on whether or not government-designated importers had made a 'deal' with that exporting company to import their rice", and Thailand should have understood all of this when it agreed to sign the AoA. Thailand did implicitly agree that its rights would be made dependent upon, conditional on, or even affected by, any private contractual obligations in place in the minimum access regime.

But there is one crucial issue that Thailand did not agree on. Thailand perceived that the SBS system would depend on the deal made between the exporting company and government-designated importers. But Thailand did not agree or could not expect at the time that the government-designated importers who would be qualified to join the SBS system would be selected by the requirements that only large scale importers could survive, and as a result of that, there was no substantial import of Thai long-grain rice through the SBS system. Hence Thailand lost its opportunity in the Japanese rice market since those large-scale importers

would not, by their business nature, be interested in importing Thai long-grain rice even though there was a certain level of demand in the market.

In other words, Thailand expected that duty benefits accorded to products of one Member (here on rice from the US, Australia) by the SBS system would be accorded to imported like products from other Members such as Thailand, "unconditionally," but this was not the case in the SBS system. The rights of Thailand in the GATT/WTO were legally made conditional on private contractual obligations in place, but that private contractual obligation were itself again illegally made, conditional on the requirements set by the Food Agency. This thesis argues that the existence of these two-folded conditions is inconsistent with the provisions of Article I: 1.

There is another interesting issue to be emphasized here. Article I: 1 covers not only de jure discrimination but also de facto discrimination,[104] which is a type of discrimination in this case as Paragraph 78 of *Canada- Automotive Industry (AB)* states:

> In approaching this question, we observe first that the words of Article I: 1 do not restrict its scope only to cases in which the failure to accord an "advantage" to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words *"de jure"* nor *"de facto"* appear in Article I: 1. Nevertheless, we observe that Article I: 1 does not cover only "in law" or *de*

[104] Note that it is a de facto discrimination in this case, since there is no law that specifies discrimination against Thai long-grain rice based on its origin.

> *jure*, discrimination. As several GATT panel reports confirmed, Article I: 1 covers also "in fact", or *de facto*, discrimination. Like the Panel, we cannot accept Canada's argument that Article I: 1 does not apply to measures, which, on their face, are "origin neutral."

This thesis addressed the three required questions in order to establish a violation of Article I. It was explained above that benefits from the distinction were an advantage, of the type covered by Article I, the advantages were not offered to all like products, and the advantages were not offered unconditionally. Therefore this thesis argues that the de facto distinction in the Japanese rice regime that made the Thai long-grain rice go through only the OMA system and other short-grain rice go through the SBS system was in violation of Article I: 1 of the GATT Agreement.

6. Claim under Article XVII: 1 (b) of the General Agreement on Tariffs and Trade 1947, as amended (the GATT Agreement), *State Trading Enterprises.*

(a) Arguments and Limitation of Evidence

Since the Japanese government notified to the Working Party on State Trading Enterprises of the WTO that the Government of Japan (the Food Agency) is a state trading enterprise, pursuant to Article XVII: 4 (a) of the GATT and paragraph 1 of the Understanding on the Interpretation of Article XVII[105], one might look at

[105] *New and Full Notification Pursuant to Article XVII: 4 (a) of the GATT 1994 and Paragraph 1 of the Understanding on the Interpretation of Article XVII, Japan* (accessed 15 April 2004); available from
http://docsonline.wto.org/gen_searchResult.asp?searchmode=simple&collections=&restriction_type=&synopsis=&subjects=&organizations=&products=&articles=&bodies=&types=&drsday=&dreday=

Article XVII: 1 (b) of the GATT to examine whether the Food Agency "made purchases or sales involving either imports or exports solely in accordance with commercial considerations" or not.[106] Article XVII: 1 (b) states:

> The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales[106] solely in accordance with commercial consideration, including price, quality, availability, marketability, transportation and other considerations of purchase or sale. (Emphasis Added)

Does the Food Agency "make any such purchases or sales solely in accordance with commercial consideration"? The USDA alleges that it is in the Food Agency's practice to store import OMA rice for approximately one year before releasing it into the distribution system. The USDA also estimates that the Food Agency paid an average of 68,000 yen per metric ton for the imports and sold most of the rice at a lower price or donated it, which means that the Government lost money on this rice. In addition, the cost of storing rice for a year is substantial, especially for brown rice, which is stored in refrigerated warehouses.[107] This evidence leads to the question whether the Food Agency "made any sales solely in accordance with commercial consideration." What is "commercial consideration"

&meet_date=&dpsday=&dpeday=&mh=&c2=%40meta_Symbol&c3=%40meta_Title&c4=%40Doc_Date&o4=%3E%3D&c5=%40Doc_Date&o5=%3C%3D&c6=%40meta_Serial_Num&c8=%40Derestriction_Date&c9=%40Derestriction_Date&q0=&q4=&q5=&q8=&q9=&q2=G%2FSTR%2FN%2F7%2FJPN&q3=&q6=&countries=&q1=&ddsday=&ddeday=&multiparts=on&scndformat=off&ct=DDFEnglish%2CDDFFrench%2CDDFSpanish&search=Search&searchtype=simple

[106] The term "such purchases or sales" here refers to "purchases or sales involving either imports or exports" in paragraph 1 (a) of Article XVII of the GATT Agreement.

[107] "Rice Tariffications in Japan: What does It Mean for Trade?", 15.

meant in this case?

However, before proceeding to analyze the component of violation, this thesis found that there is a limitation to examine this case due to the lack of information. To examine this case, one needs to have an access to information regarding how the Food Agency made decisions regarding particular purchases or sales. This thesis does not possess access to such information and cannot verify the allegations above; therefore it will omit examining this claim under this Article.

VI. CONCLUSION

From the legal analysis of individual WTO legal rules in the above section, this thesis concludes that it found that the Japanese rice import regime at the point of the year 2001 was not in violation of:

- Annex 5 and Article IV: 2 of the AoA;
- Article II: 1 of the TBT; or
- Article III: 2 of the Licensing Agreement.

However this thesis found that the Japanese rice import regime at the point of the year 2001 violated:

- Article I: 1 of the GATT Agreement; and
- Article III: 1 and Article III: 4 of the GATT Agreement.

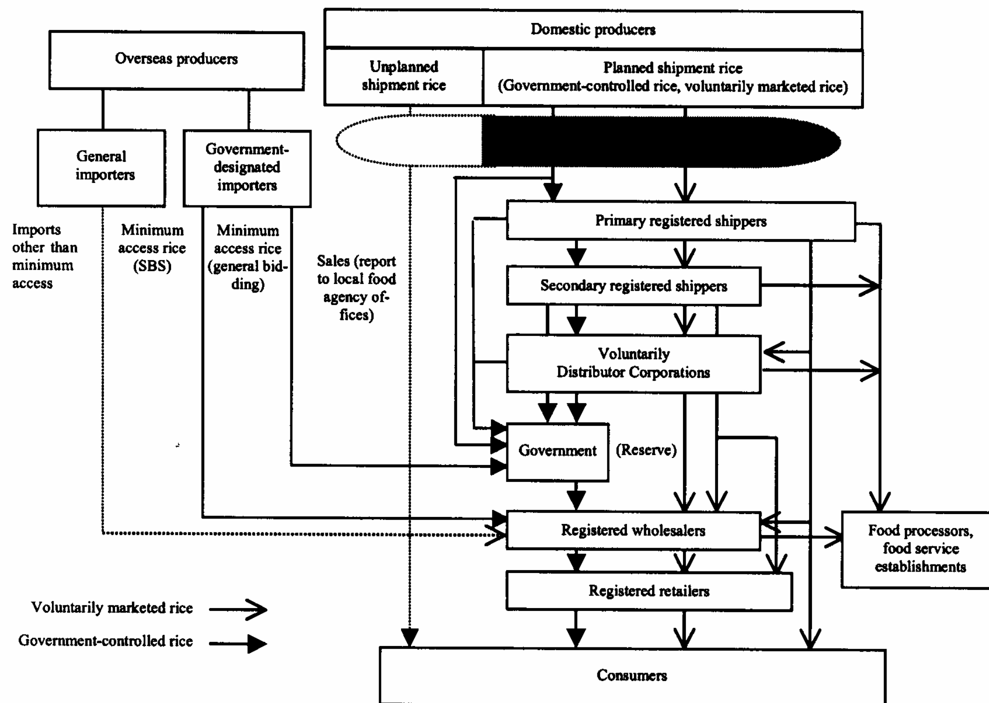
This thesis could not find a conclusion for the violation of Article XVII: 1 (b)

of the GATT Agreement due to the lack of needed information.

This thesis also notes that Japan can invoke Article XX of the GATT Agreement, *General Exceptions* to exempt itself from fulfilling its obligation under the GATT Agreement. However, the burden of proof to show that provisions in Article XX apply in the case will be shifted to Japan.

Appendix I

Fig. 13 Rice distribution channels



Note: With regard to unplanned distributed rice, producers are free to sell rice directly to consumers (so-called "direct shipment rice from producers"). However, producers are supposed to report in advance to the local food agency office the volume they plan to sell and the scheduled date of sale, to make it possible to track the overall volume of rice distributed. In practice, though more and more registered wholesalers and retailers have been carrying unplanned distributed rice in recent times.

Appendix II

Fig. 14 Roles of the stages in the distribution process and qualifications for registration

[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Qualified to participate in bidding for minimum access rice, carries out importation on behalf of the government.	• Corporation organized in Japan, with capital of at least ¥1.0 billion (including Japan subsidiaries of foreign-owned corporations). • Track record of at least an annual average of 10,000 tons in rice import/export over the previous three years • Other qualifications as indicated by the Food Agency.	General bidding import: 22 SBS import: 44
[illegible]	Adopts distribution plans for voluntarily marketed rice, and with the Minister's approval, distributes voluntarily marketed widely and predictably.	• Considered capable of selling at least 20,000 tons annually of voluntarily marketed rice over a wide area of prefectures in Japan. • Agricultural co-ops, consumer co-ops, or other non-profit organizations.	2
[illegible]	Takes possession of planned shipment rice from producers within a prefectural region and ships the rice.	• Shipment contracts with 10 producers or more. • Volume of planned shipment rice = at least 20 tons. • Voluntarily marketed rice contract with a secondary registered shipper within the same region or voluntarily distributor corporation. • Able to secure warehouse space.	2,520
[illegible]	Handles planned shipment rice received from primary registered shipper in set lot sizes.	• Voluntarily marketed rice contract with a primary registered shipper within the same region and voluntarily distributor corporation.	86
[illegible]	Acquires planned shipment rice (including minimum access imports sold by the government) in large-lot sizes and sells to registered retailers, large-scale steamed rice resellers and food processors.	• Expected annual sales volume = at least 4,000 milled rice tons (a) (400 milled rice tons (b) if registered in other prefectures). • Able to utilize milling facilities to produce bagged milled rice.	(a) 391 (b) 1,232
[illegible]	Engages in storefront sales, deliveries and mail order sales of planned shipment rice to consumers in small lot sizes.	• Able to secure retail sales space.	No. of retailers: 94,100 No. of retail outlets: 158,420

Note 1: Qualifications for adherence to law and creditworthiness apply to all. Registrations are all valid for three years. No. of registrants is as of March 2002.

Note 2: The price that serves as an index for transactions involving voluntarily marketed rice is determined by the Voluntarily Marketed Rice Pricing Center, based on bids by registered shippers (sellers) and registered wholesalers and large-scale retailers.