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Contents

<i>Preface</i>	<i>page</i> ix
<i>Editorial note</i>	xii
<i>Members of Editorial Advisory Board</i>	xv
<i>Table of abbreviations</i>	xvi
<i>Tables of cases reported</i>	xix
<i>Digest</i>	xxvii
<i>Table of treaties</i>	lii
 I.A GATT PANEL REPORTS	 1
United States – Prohibition of Imports of Tuna and Tuna Products from Canada	3
United States – Taxes on Petroleum and Certain Imported Substances	17
Canada – Measures Affecting Exports of Unprocessed Herring and Salmon	37
United States – Restrictions on Imports of Tuna (Tuna/Dolphin I)	48
United States – Restrictions on Imports of Tuna (Tuna/Dolphin II)	80
United States – Taxes on Automobiles	115
 I.B WTO PANEL AND APPELLATE BODY REPORTS	 165
United States – Standards for Reformulated and Conventional Gasoline	167
United States – Import Prohibition of Certain Shrimp and Shrimp Products	234
 I.C SUMMARIES OF OTHER GATT/WTO PANEL AND APPELLATE BODY REPORTS	 347
Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes	349

EC Measures Concerning Meat and Meat Products (Hormones)	355
II.A CANADA–USA FTA PANEL REPORTS	397
In the Matter of Canada’s Landing Requirement for Pacific Coast Salmon and Herring	399
Lobsters from Canada	430
II.B SUMMARY OF OTHER CANADA–USA FTA PANEL REPORT	487
In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec	489
III JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES	501
Case 172/82 Syndicat National des Fabricants Raffineurs d’Huile de Graissage and Others v. Groupement d’Intérêt Economique ‘Inter-Huiles’ and Others	503
Case 240/83 Procureur de la République v. Association de Défense des Brûleurs d’Huiles Usagées	527
Case 302/86 Commission of the European Communities v. Kingdom of Denmark	544
Case C-169/89 Criminal Proceedings against Gourmetterie Van den Burg	559
Case C-182/89 Commission of the European Communities v. French Republic	576
Case C-2/90 Commission of the European Communities v. Belgium	591
Case C-405/92 Etablissements Armand Mondiet SA v. Armement Islais SARL	620
Case C-41/93 French Republic v. Commission of the European Communities	654
Case C-131/93 Commission of the European Communities v. Federal Republic of Germany	671
Case C-284/95 Safety Hi-Tech Srl v. S&T Srl	688
<i>Appendices Treaty extracts</i>	727
<i>Index</i>	765

United States – Prohibition of Imports of Tuna and Tuna Products from Canada (Canada v. United States of America)

GATT Panel

Panel Report circulated 22 December 1981, adopted 22 February 1982 (Amb. A. Auguste (Trinidad and Tobago), *Chair* (later replaced by P. K. Williams (UK)); T. H. Chau (UK, Hong Kong Affairs), J.-D. Gerber (Switzerland), *Panellists*)

International economic law – GATT – whether US import prohibition on Canadian tuna and tuna products contrary to GATT Articles I, XI and XIII – import prohibition contrary to GATT Article XI

International economic law – GATT – GATT Article XX – whether US import prohibition on Canadian tuna and tuna products justified

– GATT Article XX chapeau – as similar action taken against other contracting parties, measures not necessarily arbitrary or unjustifiable – as publicly announced, measures not constituting disguised restriction on international trade

– GATT Article XX(g) – whether measures made effective in conjunction with restrictions on domestic production or consumption

Conservation – tuna fisheries – whether US action justified under GATT Article XX(g)

Treaties – Canada–USA Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, 1981 – effect of conclusion of treaty on GATT dispute settlement proceedings

Powers and procedures of tribunals – power of GATT Panel to adjudicate concerning measures no longer in effect – relevance of GATT Panel's findings and conclusions – relevance only for trade aspects of matter under dispute – no intention to have any bearing on other aspects of dispute including those concerning questions of fisheries jurisdiction

SUMMARY *The facts* On 31 August 1979 the US Customs Service issued a notice prohibiting immediately the entry for consumption, or withdrawal from warehouse for consumption, of tuna or tuna products from Canada.ⁱ That action followed the seizure of nineteen fishing vessels and the arrest by Canadian authorities of US fishermen engaged in fishing for albacore tuna within 200 nautical miles of the west coast of Canada without authorisation of the Canadian Government, in waters regarded by Canada as being under its fisheries jurisdiction and regarded at the time by the USA as being outside any state's tuna fisheries jurisdiction.

The US prohibition was imposed pursuant to Section 205 of the Fishery Conservation and Management Act 1976. That Act granted the US Government the authority to assert and exercise jurisdiction over certain living resources within its 200-nautical-mile zone, not including tuna. Section 205 provided that if the Secretary of State determined that any of four situations existed, the Secretary was required to certify that determination to the Treasury Secretary (i.e. the Customs Service), who in turn was required to take such action as necessary and appropriate to prohibit importation into the USA of all fish and fish products from the fishery involved. The four situations included the seizure of any fishing vessel of the USA by any foreign nation as a consequence of a claim of jurisdiction not recognised by the USA. At the time, the USA did not recognise the jurisdiction of coastal states over highly migratory species including specifically tuna.

Section 205 was invoked in connection with seizures of US vessels fishing for tuna within the 200-nautical-mile zones of Canada, Costa Rica, Ecuador, Mexico, Peru and the Solomon Islands.

On 16 October 1979 Canada requested consultations with the USA concerning the import prohibition. After consultations failed to settle the matter Canada requested the establishment under the General Agreement on Tariffs and Trade, 1947 ('GATT')ⁱⁱ of a GATT panel, and a Panel was established on 26 March 1980.

In its submissions to the Panel Canada argued *inter alia* that the US prohibition of 31 August 1979 on imports of tuna products from Canada was a quantitative restriction on importation inconsistent

ⁱ 44 Fed. Reg. 53118.

ⁱⁱ General Agreement on Tariffs and Trade, Geneva, 30 October 1947.

with US obligations under GATT Article XI.ⁱⁱⁱ Canada argued that the prohibition also discriminated in violation of the most-favoured-nation clause in GATT Article I and the ban on discriminatory administration of quantitative restrictions in GATT Article XIII. The USA considered its action fully justified under GATT Article XX(g) which provided a general exception from other GATT obligations for measures relating to the conservation of exhaustible natural resources.

During the course of the panel proceedings, Canada and the USA entered into negotiations and on 26 May 1981 concluded a bilateral Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges.^{iv} After an interim agreement had been reached in August 1980, the USA lifted the prohibition on imports of tuna and tuna products from Canada, with effect from September 1980. The Panel then met with the parties to ascertain their attitude toward the continuation of its work; the USA doubted the necessity or desirability of continuing, while stating that it would continue to cooperate. Canada reiterated its view that the threat of embargoes under Section 205 still existed.

The GATT Panel Report was circulated on 22 December 1981. The GATT Council adopted the Report at its meeting on 22 February 1982.

Held by the GATT Panel

Conclusions The US embargo on imports of tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980 was not consistent with the provisions of GATT Article XI. The US representative had not provided sufficient evidence that the import prohibition complied with the requirements of GATT Article XX and notably sub-paragraph (g) of that article (para. 4.15).

On the necessity for a full Panel Report While in prevailing GATT practice, when a bilateral solution had been reached to a dispute the panel had confined its report to a brief description of the case indicating that a solution had been reached, in the present case the Panel decided to present a complete report because Canada had not accepted the bilateral Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, 1981, as a solution to the GATT

ⁱⁱⁱ For the text of relevant GATT provisions see Appendix I.

^{iv} Canada–USA, Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, Washington, 26 May 1981.

dispute or to the damage sustained, the threat of future action under Section 205 remained, and the USA had declared its willingness to cooperate (para. 4.3).

On GATT Article XI (1) The US decision of 31 August 1979 to prohibit the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Canada constituted an import prohibition contrary to GATT Article XI:1 (para. 4.4).

(2) The USA had not presented any defence of the import prohibition under GATT Article XI:2. However, the Panel observed *sua sponte* that the import prohibition was not excused by the exception in GATT Article XI:2(c) for 'import restrictions on any agricultural or fisheries product . . . necessary to the enforcement of governmental measures which operate . . . to restrict the quantities of the like domestic product permitted to be marketed or produced'. While the purpose of the Fishery Conservation and Management Act was *inter alia* to manage fish stocks, and the USA had applied catch limits on some species of tuna, the import prohibition applied to some species for which there was no US catch limitation (e.g. albacore and skipjack) and it was maintained when restrictions on the catch were no longer maintained (e.g. Pacific yellowfin tuna in 1980). The Panel also felt that the reference in GATT Article XI:2(c) to 'restrictions' could not justify the application of an import prohibition (paras. 4.5–4.6).

On GATT Article XX(g) (1) The Panel examined the US action against the *chapeau* of GATT Article XX and noted that as similar actions had been taken against other countries under Section 205 for similar reasons, the selective action taken against Canada in the present case might not necessarily have been arbitrary or unjustifiable, and as the action was taken as a trade measure and publicly announced as such, it should not be considered to be a disguised restriction on international trade. It was therefore appropriate to examine the US action in the light of the specific types of measures contained in GATT Article XX, notably GATT Article XX(g) (para. 4.8).

(2) Both Parties considered tuna stocks to be an exhaustible natural resource in need of conservation management, and both Parties were participating in international conventions aimed *inter alia* at a better conservation of such stocks. GATT Article XX(g)

however required that measures be made effective in conjunction with restrictions on domestic production or consumption. The US import restrictions applied to all imports from Canada of tuna and tuna products, but restrictions on domestic production (catch) had so far been applied only to Pacific yellowfin tuna and to Atlantic yellowfin tuna, not to any other species of tuna such as albacore. No evidence had been provided that the USA had ever restricted domestic consumption of tuna and tuna products. Thus, the US import prohibition could not be justified under GATT Article XX(g) (paras. 4.9–4.12).

(3) The Panel could not find that that particular action (imposed in response to the Canadian arrest of US tuna vessels) would in itself constitute a measure of a type listed in GATT Article XX (para. 4.13).

Finally The Panel stressed that its findings and conclusions were relevant only for the trade aspects of the dispute and were not intended to have any bearing whatsoever on other aspects including those concerning questions of fisheries jurisdiction (para. 4.16).

There follows

GATT Panel Report, circulated 22 December 1981, adopted

22 February 1982 (extracts)

7

Note concerning subsequent US legislation

16

**GATT Panel Report, circulated 22 December 1981, adopted
22 February 1982 (extracts)**

I. INTRODUCTION

1.1 In a communication dated 21 January 1980 and which was circulated to contracting parties, the Government of Canada complained that an action taken by the Government of the United States on 31 August 1979 to prohibit imports of tuna and tuna products from Canada was discriminatory and contrary to the obligations of the United States under the GATT and impaired benefits accruing to Canada under the GATT. The Government of Canada at the same time requested, pursuant to Article XXIII:2, the establishment of a panel to examine the compatibility with the General Agreement of the United States prohibition of imports of tuna and tuna products from Canada (L/4931).

1.2 The Council discussed the matter at its meeting of 29 January 1980, when the representative of Canada expressed the hope that the matter could still be resolved satisfactorily between the parties concerned. If no solution could be reached, however, he also hoped the Council would be prepared to establish a panel at its next meeting. The representative of Peru supported the Canadian request for a panel (C/M/138).

1.3 As no solution was reached, the Council again discussed the matter at its meeting of 26 March 1980, when the representative of Canada renewed his request for a panel to be set up and the representative of Peru renewed his support for the Canadian request. The representative of the United States recalling that the action had been taken according to the United States Fisheries Conservation and Management Act of 1976, stated that his delegation did not see any need for a panel to be established as further efforts were being made to resolve the issue, but he would not oppose the setting up of a panel. The Council agreed to establish a panel with the following terms of reference:

To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Canada relating to measures taken by the United States concerning imports of tuna and tuna products from Canada (L/4931), and to make such findings as will assist the Contracting Parties in making recommendations or rulings as provided in Article XXIII.

The Council furthermore authorized the Chairman of the Council to nominate the Chairman and members of the Panel in consultation with the two parties concerned (C/M/139).

1.4 Accordingly, the Chairman of the Council nominated the following:

Chairman: H.E. Ambassador A. Auguste (Trinidad and Tobago)

Members: Mr. T.H. Chau (United Kingdom, Hong Kong Affairs)
Mr. J.D. Gerber (Switzerland)

(C/M/141).

1.5 Subsequently, at the Council meeting on 10 November 1980, the Chairman informed the Council that H.E. Ambassador A. Auguste had been transferred from Geneva and was no longer available to serve as Chairman of the Panel. He further informed the Council that following consultations with the two parties, Mr. P.K. Williams (United Kingdom) had assumed the Chairmanship of the Panel (C/M/144).

1.6 In the course of its work the Panel heard statements by representatives of Canada and the United States. Background documents and relevant information submitted by both parties, their replies to the questions put by the Panel as well as relevant GATT documentation served as a basis for the examination of the matter subject to the dispute.

II. FACTUAL ASPECTS

2.1 On 31 August 1979, the United States prohibited imports from Canada of tuna and tuna products.¹ This action followed the seizure of 19 fishing vessels and the arrest by Canadian authorities of a number of United States fishermen, engaged in fishing for albacore tuna within 200 miles of the West Coast of Canada without authorization by the Canadian Government, in waters regarded by Canada as being under its fisheries jurisdiction and regarded by the United States as being outside any State's tuna fisheries jurisdiction.

2.2 The United States prohibition was imposed pursuant to Section 205 (Import Prohibitions) of the Fishery Conservation and Management Act of 1976. The Panel was informed that Section 205 provided, *inter alia*, that if the Secretary of State determined that any fishing vessel of the United States, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea was recognized by the United States, being seized by any foreign nation as a consequence of a claim of jurisdiction which was not recognized by the United States, the Secretary of the Treasury should immediately take such action as may be necessary and appropriate to prohibit the importation of fish and fish products from the foreign fishery involved.

2.3 The Panel was further informed that, in the circumstances specified above, the United States Government must prohibit imports of all fish and fish products of the particular fishery involved from the country taking the action. Since the United States did not recognize the Canadian claim to jurisdiction over tuna in waters in which the vessels were seized, Section 205, therefore, required imposition of the actions taken. The Panel was also informed that the Secretary of State had discretion under the law to recommend a broader import prohibition on other fish or fish products from the foreign nation concerned, but this discretionary authority was not exercised in this case. The Executive Branch of the Government had no authority to waive application of provisions contained in Section 205. However, the legislation provided that if the Secretary of State found that the reasons for the imposition of any import prohibition under this section no longer prevailed, the Secretary of State should notify the Secretary of the Treasury who should promptly remove such import prohibition.

2.4 The United States import prohibition affected imports under TSUS items ex 110.10 (fresh, chilled or frozen tuna), 112.30 and 112.34 (canned tuna, not in oil), 112.90 (canned tuna, in oil), and 113.56 (canned tuna in bulk, not in oil). United States imports of tuna and tuna products from Canada for the years 1976–1979 are shown in Table 1.

[For reasons of convenience the footnotes in this report have been renumbered to run consecutively]

¹ United States – Federal Register Vol. 44 p. 53118 (12 September 1979).

Table 1 *United States Imports from Canada of Tuna and Tuna Products 1976–1979*

Species	1976		1977		1978		1979	
	'000 lbs	'000 US\$	'000 lbs	'000 US\$	'000 lbs	'000 US\$	'000 lbs	'000 US\$
Albacore	320.9	180.2	0.0	0.0	9.5	9.6	24.9	8.3
Yellowfin	0.5	0.6	826.1	19.2	32.5	0.6	122.6	26.5
Skipjack	150.0	33.8	546.4	5.47	90.4	9.0	88.2	8.8
Other	1,693.7	1,435.3	1,375.4	1,459.5	238.6	136.4	3.0	1.9
Total	2,165.1	1,649.9	2,747.9	1,633.3	371.0	172.9	239.7	45.6

Source: US National Marine Fisheries Service.

2.5 On 16 October 1979, Canada sent a note to the United States stating that the action concerning tuna and tuna products from Canada was contrary to the obligations of the United States under the GATT and, pursuant to the provisions of Article XXIII:1 of the GATT, requesting that the Government of the United States terminate the prohibition immediately. The United States in its reply referred to fisheries consultation which had been held in September 1979 when agreement had been reached to continued discussions. The United States expressed the hope that continued discussions would result in a mutually satisfactory solution to the problem and that a basis for rescinding the embargo would be found.

2.6 In December 1979, consultations under Article XXIII:1 of the GATT were held between United States and Canadian officials, but these consultations did not resolve the matter. In January 1980, the Canadian authorities, pursuant to Article XXIII:2, requested the establishment of a GATT panel to examine the matter.

2.7 On 29 August 1980, following an interim agreement with Canada on albacore tuna fisheries, the United States Trade Representative informed the Secretariat that his authorities had decided to lift the prohibition on imports of tuna and tuna products from Canada. The Prohibition was subsequently lifted with effect from 4 September 1980.²

2.8 The Panel held a meeting on 3 December 1980 with both parties in order to ascertain their attitude to the continuation of its work in light of the lifting of the United States import prohibition and to seek further clarification on the interim agreement referred to in paragraph 2.7 above. At this meeting, the representative of Canada stressed that the possibility of further embargoes being placed on Canadian fishery products continued to exist as long as Section 20(a)(4)(c) of the United States Fishery Conservation and Management Act of 1976 required the imposition of import prohibitions on fish and fish products in response to actions by Canada to implement its law in areas of Canadian jurisdiction³ not recognized

² United States – Federal Register Vol. 45 p. 58459, (3 September 1980).

³ The Panel did not enter into the question of whether claims regarding jurisdiction were founded, considering that this question did not fall within the terms of reference of the Panel.

by the United States. He argued that the Panel should therefore continue its work with the aim of reaching substantive conclusions. The representative of the United States informed the Panel that his authorities doubted the necessity of continuing the case since the measure under examination had been completely eliminated, but stated that his authorities would continue to co-operate with the Panel if the Panel decided to continue the case. Furthermore, both parties informed the Panel of details of the interim agreement. It was stated that this agreement was a step towards negotiations between the two Governments on a bilateral treaty during the coming year. At the end of this meeting, the Panel asked for further information on the negotiation of a bilateral treaty.

2.9 In a letter dated 19 December 1980, responding to the Panel's request for information on negotiations on a bilateral treaty, the representative of Canada reiterated the view that the threat of trade embargoes on fishery products under Section 205 of the Fishery Conservation and Management Act of 1976 still existed.

2.10 Subsequently, in a letter dated 9 January 1981 also reporting on the status of the bilateral treaty negotiations on tuna fisheries, the representative of the United States expressed certain reservations about the necessity or desirability of pursuing the matter in the GATT, while stating that despite its reservation, the United States would co-operate fully with the Panel, should the Panel continue its consideration of the case.

2.11 In a letter to the Chairman of the Panel dated 9 March 1981, the representative of the United States informed the Panel that Canada and the United States had concluded negotiations of the treaty, and that signature of the treaty was expected in the near future. He also noted that the terms of the treaty would ensure that the Pacific albacore tuna fishery was not subject to embargo under Section 205 of the Fishery Conservation and Management Act of 1976.

2.12 With a letter to the Chairman of the Panel also dated 9 March 1981, the representative of Canada sent to the Panel a copy of the aide-memoire received from the United States' authorities which confirmed that, if in an area in which the United States was exercising fisheries jurisdiction, Canada should attempt to exercise jurisdiction not recognized by the United States Government⁴ by seizing a United States vessel, the United States Government would automatically be required by Section 205 of the Fishery Conservation and Management Act of 1976 to embargo Canadian fish products from the fishery involved.

2.13 In a letter to the Chairman of the Panel dated 9 June 1981, the representative of the United States confirmed that on 26 May 1981 Canada and the United States had signed the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges. This treaty would replace the interim agreement of August 1980.

2.14 In a letter to the Chairman of the Panel dated 7 August 1981, the representative of the United States confirmed that on 29 July 1981 the treaty had

⁴ BISD 25S/49.

entered into force, upon exchange of instruments of ratification between the two parties on that date.

III. MAIN ARGUMENTS [omitted]

IV. FINDINGS AND CONCLUSIONS

4.1 In accordance with its terms of reference as set out in paragraph 1.3, the Panel focused its work on an examination of the measures taken by the United States concerning imports of tuna and tuna products from Canada, in the light of relevant GATT provisions. It noted, however, that the dispute was part of a wider disagreement between Canada and the United States mainly related to fisheries and that the trade aspect constituted a part of a broader complex.

4.2 In the course of its work and in accordance with established practice,⁵ the Panel consulted regularly with the parties and repeatedly encouraged them in light of developments taking place to reach a mutually acceptable solution to the dispute. In this connection, the Panel noted that following continued bilateral discussions between the parties, an interim arrangement on albacore tuna fisheries between Canada and the United States was reached in August 1980. It also noted that the United States subsequently lifted the prohibition on imports of tuna and tuna products from Canada, with effect from 4 September 1980. The Panel furthermore noted that subsequent negotiations between the parties resulted in the establishment of the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges which was signed on 26 May 1981 and ratified on 29 July 1981. This treaty replaced the interim agreement of August 1980.

4.3 In light of these developments the Panel noted that according to prevailing GATT practice when a bilateral settlement to a dispute had been found, panels had usually confined their reports to a brief description of the case indicating that a solution had been reached.⁶ However, it also noted that in the past, panels had on occasion presented a complete report even if the measure giving rise to the dispute had been disinvoked.⁷ It furthermore noted that the representative of Canada did not accept that the results obtained bilaterally constituted a satisfactory solution or settlement in terms of paragraph 17 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,⁸ and that he argued that the damage caused by the action which gave rise to the dispute had not been satisfactorily repaired, and that the threat of the United States taking action under Section 205 of the Fishery Conservation and Management Act of 1976 continued to exist. He therefore requested the Panel to present a substantial report on the case. The Panel noted that the Canadian Embassy, in a diplomatic note to the Department of State of the United States (No. 423,

⁵ BISD 26S/210.

⁶ BISD 25S/107; BISD 26S/320; L/5140; L/5155; L/5192.

⁷ BISD 25S/49.

⁸ BISD 26S/213.

Washington DC, August 21, 1980), indicated that the arrangements concerning fisheries for albacore tuna off the Pacific coasts of Canada and the United States were without prejudice to action brought before the GATT regarding import prohibition on tuna and tuna products. The Panel also noted that the representative of the United States, although expressing serious doubts about the usefulness of establishing a comprehensive report when a conciliation on the dispute had been achieved, nevertheless declared himself willing and ready to provide his full cooperation if the Panel wanted to establish a comprehensive report. The Panel consequently felt that in this particular case it had to consider itself what type of report it should present to the Council and decided to proceed with its work and establish a complete report.

4.4 The Panel started by examining the complaint by Canada that the United States import prohibition on tuna and tuna products from Canada was contrary to Article XI. The Panel noted the provisions of Article XI:1.⁹ It found that the United States Government decision of 31 August 1979¹⁰ to prohibit with immediate effect the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Canada constituted a prohibition in terms of Article XI:1. The Panel, therefore, examined the legal basis of the United States import prohibition on tuna and tuna products from Canada in light of the exceptions to the provisions of Article XI:1 listed in Article XI:2.

4.5 The Panel noted that the decision of the United States Government was based on Section 205 of the United States Fishery Conservation and Management Act of 1976. The Panel was informed that the purpose of the Fishery Conservation and Management Act of 1976 was to ensure that certain stocks of fish were properly conserved and managed, to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of such additional agreements as necessary. It furthermore noted that Section 205 of the Fishery Conservation and Management Act of 1976 contained provisions designed to discourage other countries from seeking to manage tuna unilaterally and from seizing United States fishing vessels which were fishing more than 12 miles off their coasts.

4.6 The Panel also noted that the United States had applied limitations on the catch of some species of tuna (e.g. Pacific and Atlantic yellowfin and Atlantic bluefin and bigeye), during the time the import prohibitions on tuna and tuna products from Canada had been in force. The Panel found, however, that even if an import restriction could, at least partly, have been necessary to the enforcement of measures taken to restrict the catches of certain tuna species, an import

⁹ 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party' (BISD Volume IV, page 17).

¹⁰ United States – Federal Register, Vol. 44, No. 178 (12 September 1979).

prohibition on all tuna and tuna products from Canada as applied by the United States from 31 August 1979 to 4 September 1980 would not sufficiently meet the requirements of Article XI:2, firstly because the measure applied to species for which the catch had not so far been restricted in the United States (such as albacore and skipjack) and secondly because it was maintained when restrictions on the catch were no longer maintained (e.g. Pacific yellowfin tuna in 1980). Furthermore the Panel noted the difference in language between Article XI:2(a) and (b) and Article XI:2(c), and it felt that the provisions of Article XI:2(c), could not justify the application of an import prohibition.¹¹

4.7 The Panel noted that the representative of the United States based his arguments concerning the justification for the action taken against imports of tuna and tuna products from Canada entirely on Article XX(g).¹² The Panel therefore proceeded to an examination of the arguments presented in respect of this Article by both the representatives of the United States and Canada.

4.8 The Panel noted the preamble to Article XX. The United States action of 31 August 1979 had been taken exclusively against imports of tuna and tuna products from Canada,¹³ but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru and then for similar reasons. The Panel felt that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable. It furthermore felt that the United States action should not be considered to be a disguised restriction on international trade, noting that the United States prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such. The Panel therefore considered it appropriate to examine further the United States import prohibition of tuna and tuna products from Canada in light of the list of specific types of measures contained in Article XX, and notably in Article XX(g).

4.9 The Panel furthermore noted that both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management and that both parties were participating in international conventions aimed, *inter alia*, at a better conservation of such stocks. However, attention was drawn to the fact that Article XX(g) contained a qualification on measures relating to the conservation if they were to be justified under that Article, namely

¹¹ In Article XI:2(a) and (b) the words 'prohibitions or restrictions' are used while in Article XI:2(c) mention is only made of 'restrictions'.

¹² 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. (BISD Volume IV, pages 37 and 38).

¹³ United States – Federal Register, Vol. 44, No. 178 (12 September 1979).

that such measures were made effective in conjunction with restrictions on domestic production or consumption.

4.10 The Panel noted that the action taken by the United States applied to imports from Canada of all tuna and tuna products, and that the United States could at various times apply restrictions to species of tuna covered by the IATTC and the ICCAT. However, restrictions on domestic production (catch) had so far been applied only to Pacific yellowfin tuna, from July to December 1979 under the Tuna Convention Act (related to the IATTC) and to Atlantic yellowfin tuna, bluefin tuna and bigeye tuna under the Atlantic Tunas Convention Act (related to the ICCAT), and no restrictions had been applied to the catch or landings of any other species of tuna, such as for instance albacore.

4.11 The Panel also noted that the United States representative had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States.

4.12 The Panel could therefore not accept it to be justified that the United States prohibition of imports of all tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980, had been made effective in conjunction with restrictions on United States domestic production or consumption on all tuna and tuna products.

4.13 The Panel also noted that the United States prohibition of imports of all tuna and tuna products from Canada had been imposed in response to Canadian arrest of United States vessels fishing albacore tuna. The Panel could not find that this particular action would in itself constitute a measure of a type listed in Article XX.

4.14 The Panel furthermore noted that the amount of trade in tuna and tuna products affected by the action taken by the United States was relatively small with annual totals varying between US\$172 thousand to US\$1.6 million in 1976–79 according to figures supplied by the representative of the United States. However, as the measure which gave rise to the dispute was lifted after one year, as subsequent negotiations between the Parties had resulted in the establishment of a treaty on albacore tuna fisheries, and as no detailed submission had been made as to exactly what benefits accruing to Canada under the General Agreement had been nullified or impaired, the Panel did not consider the question of possible compensation.

4.15 In the light of the foregoing, the Panel *concluded* that the United States embargo on imports of tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980 was not consistent with the provisions of Article XI. It *did not find* that the United States representative had provided sufficient evidence that the import prohibition on all tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980 complied with the requirements of Article XX and notably subparagraph (g) of that article.

4.16 Finally, the Panel would stress that its findings and conclusions were relevant only for the trade aspects of the matter under dispute and were not

intended to have any bearing whatsoever on other aspects including those concerning questions of fishery jurisdiction.

[Report: GATT Doc. L/5198 obtained from the Dispute Settlement archive of the WTO web site at <http://www.wto.org>; also reported in BISD 29S/91]

Note concerning subsequent US legislation

In 1990, the Fishery Conservation and Management Act, by then known as the Magnuson Fishery Conservation and Management Act, was amended to bring tuna within the 200-nautical-mile zone under US jurisdiction and to recognise foreign states' jurisdiction over tuna within their 200-nautical-mile zones.^v

^v T. McDorman, 'The GATT-Consistency of US Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles', 24 (1991) *Geo. Wash. J. Int'l L. & Econ.* 477.

United States – Taxes on Petroleum and Certain Imported Substances (Canada, European Economic Community and Mexico v. United States of America)

GATT Panel

Panel Report circulated 5 June 1987, adopted 17 June 1987 (M. Cartland (Hong Kong), Chair; C. Manhusen (Sweden), K. Akasaka (Japan), Panellists)

International economic law – GATT – whether measures contrary to GATT Article III – US excise tax on petroleum imposed at higher rate on imports constituting violation of GATT Article III – US tax on certain imported substances derived from taxable chemicals constituting border tax adjustment permissible under GATT Article III – relevance of polluter pays principle – purpose of tax irrelevant to whether tax eligible for border tax adjustment

International economic law – GATT – nullification and impairment – in practice irrefutable presumption of nullification and impairment of benefits resulting from violation of GATT Article III – evaluation of trade effects not relevant

International economic law – GATT – mandatory nature of measures – mandatory legislation not yet applied subject to scrutiny – non-mandatory legislation not subject to scrutiny

Sources of international law – general principles – polluter pays principle – Organisation for Economic Cooperation and Development ('OECD') polluter pays principle – relevance in GATT proceedings – relevance to border tax adjustment – US tax on certain imported substances produced or manufactured from taxable chemicals – proceeds of tax funding clean up in the USA – purpose of tax irrelevant to whether eligible for border tax adjustment under the GATT

International organisations – OECD – relevance of OECD polluter pays principle in GATT dispute settlement

Waste – US Comprehensive Environmental Response, Compensation and Liability Act 1980 creating ‘Superfund’ Hazardous Substances Trust Fund – US Superfund Amendments and Reauthorization Act 1986 providing a broadened funding package including taxes on petroleum and certain imported substances – whether taxes permissible under the GATT – whether OECD polluter pays principle relevant

Treaties – treaty interpretation – relevance of OECD polluter pays principle to interpretation of GATT

SUMMARY *The facts* During 1985–1986 the US Congress debated the renewal of the hazardous waste ‘Superfund’ legislation (Comprehensive Environmental Response, Compensation and Liability Act, ‘CERCLA’) first enacted on 11 December 1980. CERCLA had authorised a programme to clean up hazardous waste and had created the ‘Superfund’ Hazardous Substances Trust Fund for this purpose. It was funded from general government revenues, excise taxes on petroleum and certain ‘feedstock’ chemicals, and monies recovered through civil suits against parties found responsible for waste clean-up. The Superfund Amendments and Reauthorization Act (‘SARA’) 1986 became law on 17 October 1986. It greatly enlarged the trust fund, expanded Superfund programmes and provided a broadened funding package; it (i) reimposed the excise tax on petroleum at higher rates, (ii) reimposed a tax on certain chemicals at higher rates, (iii) imposed a new tax on certain imported substances produced or manufactured from taxable feedstock chemicals, and (iv) instituted a new broad-based corporate income tax.

The tax on petroleum was imposed on domestic crude oil (including condensate and natural gasoline) at a rate of 8.2 cents per barrel (55 US gallons), and on imported petroleum products (including crude oil, gasoline, refined and residual oil, and certain other liquid hydrocarbons) at 11.7 cents per barrel.

The tax on feedstock chemicals was imposed at the lower of either US \$4.87 per ton for petrochemicals and US \$4.45 per ton for inorganic chemicals, or 2 per cent of the 1980 wholesale price; it applied to chemicals on a list. The tax was imposed on sale by the producer or importer, and was not imposed on sales for export.

The new tax on imported downstream chemicals applied to certain derivatives of the listed feedstock chemicals. The amount of that tax equalled in principle the amount of the tax that would have been imposed on the chemical inputs if the input chemicals had been sold in the USA; importers had to provide sufficient information to enable the tax authorities to determine how much tax to impose. If they did not provide such information, a tax would be imposed at a penalty tax rate of 5 per cent of the value of the product as imported, or a rate, to be set by Treasury Department regulation, which would equal the amount that would be imposed if the product were manufactured using the predominant method of production. The law provided that the tax on imported downstream chemicals would not enter into effect until 1 January 1989.

Immediately after enactment of the law, the European Economic Community ('EEC') and Canada each requested consultations with the USA concerning the tax on petroleum and the tax on certain imported substances. On 10 November 1986 Mexico requested consultations with the USA concerning the tax on petroleum. After consultations failed to settle the matter Canada and the EEC each requested the establishment under the General Agreement on Tariffs and Trade, 1947,ⁱ of a GATT panel. Mexico invoked special procedures for complaints by developing countries adopted in 1966. It was suggested that in the interests of efficacy and expediency, the three complaints be examined by a single Panel and a single panel was established on 4 February 1987.ⁱⁱ The four disputing Parties agreed to the Panel's terms of reference provided that the rights they would have enjoyed in the event of separate panels were not impaired; all complainants received all submissions and all were present at the two Panel hearings.

In their submissions to the Panel, Canada, the EEC and Mexico argued that the tax on petroleum was inconsistent with the national treatment clause in GATT Article III:2,ⁱⁱⁱ which permitted the imposition of an internal tax on imported products, provided

ⁱ General Agreement on Tariffs and Trade, Geneva, 30 October 1947.

ⁱⁱ This was the first example in the history of the GATT of a multiple-complainant panel. The procedural understanding in this case was incorporated in the procedural improvements to GATT dispute settlement adopted in April 1989, and appears in modified form in Article 9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, annexed to the Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994.

ⁱⁱⁱ For the text of relevant GATT provisions see Appendix I.

that like domestic products were taxed directly or indirectly at the same or a higher rate, and nullified or impaired benefits accruing to them under the GATT. The USA confirmed that the tax on petroleum was applied to imported products at a rate that was higher than the rate applied to like domestic products and did not dispute that the tax was inconsistent with GATT Article III:2. Conceding that a *prima facie* case of infringement of GATT obligations would in GATT practice lead to a presumption of nullification and impairment, the USA argued that this presumption could be rebutted by demonstrating an absence of trade effects. The complaining parties argued that the differential did affect their trade and that excusing a violation because it had no trade effect would set a dangerous precedent. They suggested that if the tax differential had no effect there should be no difficulty in removing the discrimination.

Regarding the tax on certain imported substances the USA objected to an examination of that tax because it did not go into effect before 1 January 1989, and contended that in any event it constituted a border tax adjustment consistent with GATT Articles II and III. According to the USA, since the principle to be applied in implementing the tax was that the amount of tax to be imposed on the imported substances would equal the amount of tax that would have been imposed on the chemicals used in producing the imported substances if the chemicals had been sold in the USA for equivalent use, the SARA thus imposed the same fiscal burden on imported and like domestic substances. The EEC argued that a tax levied on the sale of a product to finance a specific service rendered by the government for the benefit of domestic producers or made necessary by their activities (in the present case, the tax on certain feedstock chemicals, levied to finance the clean-up of hazardous waste in the USA) was not eligible for border adjustment, since it was a tax imposed on products of foreign producers which neither benefited from that service nor caused it to be needed. The EEC and Canada argued that the pollution caused in the production of imported products did not occur in the USA, and so it was inappropriate to tax their entry into the USA, and equally inappropriate to exempt export sales from such a tax. The EEC also argued that the tax adjustments departed from the Organisation for Economic Cooperation and Development ('OECD') polluter pays

principle and were not necessary to avoid giving foreign products an advantage, as they would have been taxed or regulated in the country of production. The USA replied that the polluter pays principle had not been adopted by all the GATT and it was therefore irrelevant whether that principle had been observed. It argued that environmental policy principles related to trade could be incorporated into the GATT legal system but only by agreement, not by reinterpretation of the existing GATT rules on border tax adjustments. Moreover, the purpose of the taxes imposed under SARA was to raise revenue, not to alter consumer or producer behaviour. Even if the EEC arguments on pollution taxes were accepted, pollution was also generated in the disposal of goods; if under the polluter pays principle taxes were to internalise externalities, environmental taxes had to take the cost of disposal into account, and so it would be appropriate to tax an imported chemical for its cost of disposal. Canada and the EEC also challenged the 5 per cent contingent penalty tax rate.

Australia, Indonesia, Kuwait, Malaysia, Nigeria and Norway submitted views to the Panel as third parties.

The GATT Panel Report was circulated on 5 June 1987. The GATT Council adopted the Report at its meeting on 17 June 1987.

Held by the GATT Panel

Conclusions The US tax on petroleum was inconsistent with GATT Article III:2, first sentence and consequently constituted a *prima facie* case of nullification and impairment and an evaluation of the trade impact of the tax was not relevant for that finding. The Panel therefore suggested that the CONTRACTING PARTIES recommend that the USA bring the tax on petroleum in conformity with its obligations under the GATT. The US tax on certain imported substances constituted a tax adjustment corresponding to the tax on certain chemicals that was in principle consistent with GATT Article III:2, first sentence, and the exaction of the penalty rate provisions as such did not constitute an infringement of GATT Article III:2, first sentence, since the tax authorities had regulatory power to eliminate the need for the imposition of the penalty rate. The Panel therefore recommended that the CONTRACTING PARTIES take note of the statement by the USA that the penalty rate would in all probability never be applied (paras. 5.1.12 and 5.2.10).

On the tax on petroleum (1) The domestic and imported products subject to the tax were like products within the meaning of GATT Article III:2. The determination of whether products were 'like' had to be made on a case-by-case basis; the products concerned were either identical or served substantially identical end-uses (para. 5.1.1).

(2) The tax rate applied to the imported products was 3.5 cents per barrel higher than that on like domestic products, and so the petroleum tax was inconsistent with the first sentence of GATT Article III:2 (para. 5.1.1).

(3) No contracting party had ever successfully rebutted the presumption that a measure infringing GATT obligations caused nullification or impairment of benefits accruing under the GATT; in practice the presumption had operated as an irrefutable presumption (paras. 5.1.6–5.1.7).

(4) GATT Article III obligated contracting parties to establish certain competitive conditions for imported products in relation to domestic products. The benefits under GATT Article III accrued regardless of whether there was a negotiated expectation of market access (in the form of a tariff concession). Since the trade effect of a tax depended not only on whether it was discriminatory but on its absolute level, and a high non-discriminatory tax could affect trade more than the tax at issue, the difference in trade effects between the tax at issue and a non-discriminatory tax could not be determined, and so the Panel could not determine the trade impact caused by non-observance of GATT Article III:2. For that reason, GATT Article III:2, first sentence, could not be interpreted to protect expectations on export volumes; it protected expectations on the competitive relationship between imported and domestic products. A change in that competitive relationship contrary to that provision consequently had to be regarded *ipso facto* as a nullification or impairment of benefits accruing under the GATT (para. 5.1.9).

(5) The Panel therefore declined to evaluate the trade effects of the petroleum tax differential (para. 5.1.10).

On the tax on certain imported substances (1) Since GATT Article III protected expectations concerning the competitive relationship between imports and domestic products, its purpose was not only to protect current trade but also to create predictability. The