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Edited by Cairo A. R. Robb , With contributions by Amelia Porges , Damien Geradin , General editor Daniel Bethlehem , James Crawford , Philippe Sands

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## GATT PANEL REPORTS

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

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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*)

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*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*Powers and procedures of tribunals – power of GATT Panel to adjudicate concerning measures no longer in effect – relevance of GATT Panel’s findings and conclusions – relevance only for trade aspects of matter under dispute – no intention to have any bearing on other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.<sup>i</sup> 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')<sup>ii</sup> 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

<sup>i</sup> 44 Fed. Reg. 53118.

<sup>ii</sup> General Agreement on Tariffs and Trade, Geneva, 30 October 1947.

with US obligations under GATT Article XI.<sup>iii</sup> 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.<sup>iv</sup> 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

<sup>iii</sup> For the text of relevant GATT provisions see Appendix I.

<sup>iv</sup> 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)

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*Note concerning subsequent US legislation*

16

22 F 1982, 22 D 1981, x

## 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).

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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.

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## II. FACTUAL ASPECTS

2.1 On 31 August 1979, the United States prohibited imports from Canada of tuna and tuna products.<sup>1</sup> 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]

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



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.<sup>2</sup>

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 jurisdiction<sup>3</sup> not recognized

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

<sup>3</sup> 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 Government<sup>4</sup> 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

<sup>4</sup> BISD 25S/49.