

28 April 1978

CANADA - WITHDRAWAL OF TARIFF CONCESSIONS

*Report of the Panel on Lead and Zinc adopted on 17 May 1978
(L/4636 - 25S/42)*

I. INTRODUCTION

1. The Panel was established by the Council on 12 November 1976 with the following terms of reference (C/M/117, paragraph 15):

"To examine the matter referred by the European Economic Community to the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXIII, relating to the withdrawal by Canada of tariff concessions under Article XXVIII:3 (L/4432 and SECRET/224/Add.4) and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or rulings provided for in paragraph 2 of Article XXIII."

2. The Chairman of the Council informed the Council of the following composition of the Panel on 2 March 1977 (C/M/119, paragraph 20):

Chairman: Mr. Ukawa (Japan)

Members: Mr. Greig (New Zealand)
Mr. Hagfors (Finland)

3. The Panel met on 17 January, 17-18 February, 21-22 April and 24 November 1977 with the Parties, and in closed session on 6 May, 10 and 24 October, 14 November 1977 and on 19 April 1978.

4. In the course of its work the Panel heard statements by representatives of the European Economic Community and Canada. Background documents and relevant information submitted by both parties, their replies to questions put by the Panel as well as all relevant GATT documentation served as a basis for the examination of the matter.

5. During the proceedings, the Panel attempted to bring about a compromise between the two parties in the matter before it.

II. FACTUAL ASPECTS

6. The European Economic Community had in December 1972 invoked Article XXVIII:5 in order to reserve the right to modify its schedule of concessions during the forthcoming three-year period of validity of the concessions. In December 1974 the Community notified in GATT that it wished to enter into negotiations with interested parties in order to modify the specific duties on unwrought lead and unwrought zinc (ex 78.01 and ex 79.01), both of which had been bound in the Dillon Round at a rate of 1.32 units of account per 100 kgs. The object of the negotiations was to convert the specific duties of the items concerned to ad valorem rates of duty. Negotiations took subsequently place with Australia and Canada which had notified their interest in the matter. In addition, consultations were held with Norway and South Africa. Informal contacts, with a first exchange of statistics and discussion of data, took place between the negotiating partners during February 1975. Substantive negotiations were conducted in the following months and lasted until November 1975, with the first formal offer by the Community to Canada put forward at the end of June 1975. In December 1975 the Community submitted to the CONTRACTING PARTIES a final report on the negotiations which had resulted in agreement with Australia while no settlement had been arrived at with Canada. New rates of duty of 3.5 per cent ad valorem on both lead and zinc, as agreed with Australia, were introduced by the Community on 1 January 1976.

7. Canada notified to the CONTRACTING PARTIES in May 1976 that it considered the final offer of the Community, which had subsequently been implemented, to be unsatisfactory especially on zinc. It also notified, as provided for in paragraph 3 of Article XXVIII, the withdrawal of the bindings in the Canadian schedule of concessions on the following tariff items: canned meats, liqueurs, vermouth, aperitifs and cordial wines, and wire of iron and steel. No changes have until now been made in the actual rates of duty of these items. The trade coverage of the Canadian withdrawals was equivalent to the annual average figure for Canada's total exports to the Community of zinc in the period 1973-75. The final Community ad valorem rate on lead was not contested by Canada.

III. MAIN ARGUMENTS

A. European Economic Community

8. The objective of the European Economic Community for the renegotiation was to arrive at new ad valorem rates of duty on unwrought lead and zinc which were the fair and reasonable equivalents of the bound specific duties. The intention was not to increase the margin of protection afforded to Community producers. As regards the procedure, a GATT Working Party had recommended that, in general, normal Article XXVIII procedures should be followed in negotiations of this type (BISD, 3S/127), and in the opinion of the Community there was no precedent for treating a conversion from specific rates of duty to ad valorem rates differently from any other negotiation conducted under Article XXVIII to modify tariff concessions. There were also a number of precedents of negotiations of this type in the 1950's, which gave no indication that a base period different from the usual three-year period should be considered. Accordingly the calculation of ad valorem equivalents of the specific rates of duty should be based on recent statistics for the most recent three-year period in the usual way. The years 1971-73 were in the Community's view the appropriate base period for the negotiations, since these years were the most recent ones for which statistics were available prior to the beginning of the negotiations. The Community considered that there was no precedent in Article XXVIII negotiations for bringing forward the base period to incorporate statistical data becoming available after negotiations had begun. The Community had however indicated that it was willing, in a desire to adopt a reasonable approach, to take account of the trends in trade and in prices in 1974. It had been made clear, however, that this attitude did not mean that the Community accepted that the formal base period for negotiations should be changed, and the Community's view was that it had a right to follow the normal GATT procedures until such time as the CONTRACTING PARTIES made a decision to the contrary. To have taken a different view, or to have gone further than it did in taking account of 1974 trends would have amounted to a unilateral surrender of the Community's GATT rights.

9. The question had been raised whether in different circumstances statistics for Community-Canada trade for part of 1974 might have been available when negotiations had begun. The factual situation was that no Community statistics for 1974 were available until mid-1975. Even if such data had been ready at an earlier date, the Community's view was that it could not be reasonably expected in any circumstances that statistics for the full year 1974 would have been available as a basis for negotiations initiated in the GATT in December of that year and begun with trading partners in March 1975. On the basis of the average figures in the three-year period 1971-73 the ad valorem equivalents for all Community imports were 4.59 per cent for lead and 3.55 per cent for zinc (for Canada: 4.46 per cent and 3.56 per cent). These rates were put forward to the main suppliers, i.e. Canada and Australia, as a basis for negotiation. The Community had later in the negotiations made an improved offer, i.e. a new rate of 4 per cent for lead and 3.5 per cent for zinc. In the continuing absence of agreement the Community had made a final offer at the end of the negotiations of 3.5 per cent for both products in an effort to reach a compromise solution. Taking both products together the Community considered this a fair and reasonable compromise, a view which in the Community's opinion was shared by Australia since that country had accepted the offer. Neither had the countries with which consultations had been held raised any objection to this solution. It was pointed out that these rates of duty took account of recent trends to the extent possible and had been calculated on the basis of 1971-74 averages on imports from Canada - 3.92 for lead and 3.28 for zinc - weighted by the trade in the two products.

10. In making its final compromise offer, the Community in its view had offered a reasonable solution to its suppliers and, in so doing, had fulfilled its obligations of Article XXVIII:2 to "endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations". The withdrawal of concessions carried out by Canada therefore constituted in the Community's view an unjustified impairment of the Community's right. Even if any withdrawals were considered appropriate, the extent of the retaliation went far beyond what could be justified in any circumstances. In its withdrawals, Canada had not taken account nor given due credit for the fact that the duty on zinc had been rebound by the Community, even though it had been rebound at a higher level than Canada considered fair. In addition Canada had based its decision to retaliate solely on an assessment of the zinc negotiations which, on the basis of any recent three-year period, would have resulted in an equivalent duty rate significantly higher than 3.5 per cent.

B. Canada

11. Canada stated that while it could share the Community's view as to the applicability of Article XXVIII to negotiations involving conversion of specific duties into ad valorem duties, there were no GATT provisions or precedents which supported the Community's contention that a three-year base period was required in all such negotiations and there were precedents for periods of other than three years, including the most recent Article XXIV:6 negotiations between the Community and Canada in which a two-year base period was used. Determination of the base period was, in the Canadian view, a matter for negotiation and agreement by the parties concerned rather than for unilateral selection. A three-year base period had, in Canada's opinion, been used only for the determination of principal or substantial supplier rights, which had not been an issue in these negotiations since Canada was recognized from the beginning by the Community as having principal supplier rights. Use of a base period that took historical prices into account which bore no relationship to the realities of the trade at the time of conversion was in Canada's view neither valid nor relevant to the present-day value of the concession. The use of such a basis could only result in a conversion which led to an immediate increase in the incidence of the duty given the trend towards rising prices over time. In the Canadian view, this result was not consistent with the requirements of Article XXVIII:2 to maintain a general level of concessions "not less favourable to trade than that provided for in this Agreement prior to such negotiations". In the final analysis the real test was not a matter of whether or not the rates were consistent with calculations derived from the base period, the test for consistency with GATT requirements was whether or not the Community's GATT obligations to Canada had been made less favourable to trade as a result of modifications in the lead and zinc concessions. From the Canadian perspective it was inescapable that a tariff modification was less favourable to trade when it resulted in an increase in the incidence of duties. It was the Canadian position that a conversion based on 1974 prices would have been more consistent with the requirements of Article XXVIII:2. In consequence, Canada had in July 1975 proposed rates of 2 per cent ad valorem on zinc and 2.5 per cent on lead, based on the ad valorem equivalents of the specific rates of duty for 1974. This year was in Canada's view the most recent year for which statistics were available during the negotiations which had been opened only in July 1975 after Canada had indicated, in February 1975, its wish to take part in the negotiations.

12. The ad valorem rates of duty offered and subsequently implemented by the Community could in the Canadian view, in the case of zinc, only be justified in terms of historical prices, which neither reflected the current ad valorem equivalent of the specific rate nor reasonable expectations for the future. In making its final offer the Community had taken some account of 1974 prices for lead while it had not taken any account at all of the price increases in 1974 in the case of zinc. The rate of 3.5 per cent ad valorem represented in Canada's opinion an immediate and substantial increase in duties collected. Even if the Community's final offer on lead and zinc had been satisfactory to Australia, whose main interest was in lead, it should be borne in mind, in Canada's opinion, that zinc was a much more

important item for Canada than for Australia. The difference between the Canadian and Australian position was therefore that Canada had to stress the importance of its access to the Community on both zinc and lead. This was the reason why Canada had considered that the final offer of the Community had failed to provide adequate compensation on zinc, even taking the improved offer on lead into account.

13. Canada's action to proceed to withdrawals was in its view fully justified in order to restore the balance of concessions. It had been carefully considered and was intended to represent the legal minimum which would be appropriate in the circumstances. Canada had based its withdrawals on an amount of trade equivalent to the average Canadian exports of zinc to the Community in the years 1973-75. No withdrawals were made in response to the modification of the specific rate binding on lead. Since Canada did not increase any rates of duty, no importation into Canada had been affected negatively by the withdrawals, which contrasted to the Community action. Duty increases on a highly price-sensitive commodity such as zinc would normally also have a substantial effect on trade in comparison to duty changes on the more highly product-differentiated and less price-sensitive items included in the Canadian list of withdrawals.

IV. CONCLUSIONS

14. The Panel based its consideration of the case on Article XXVIII of the GATT which, as both parties agreed, was the applicable provision, inter alia, for negotiations which are undertaken with the aim of converting specific rates of duty into ad valorem rates. In this connection, the Panel considered of special importance paragraph 2 of Article XXVIII which provides that the contracting parties concerned "shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations".

15. The Panel noted that as a general principal, Article XXVIII negotiations had in the past been based on the most recent three-year period for which trade statistics were available, for the purpose of determining principal or substantial supplier rights. It was also the understanding of the Panel that in past negotiations a three-year period had been used as an element in the determination of the value of tariff concessions. The Panel noted on the other hand that no clear precedent could be found as regards the selection of a base period for the purpose of converting specific into ad valorem rates of duty. In the absence of agreement between the parties on an appropriate base period, the Panel held that the general principle of using the most recent three-year period should be applied to this case as well in order to allow account to be taken of cyclical movements and random events.

16. The Panel took note of the fact that the Community had notified other contracting parties in a GATT document circulated on 23 December 1974 of its wish to enter into negotiations in order to modify certain concessions on lead and zinc. It further noted that while informal contacts had taken place between the Community and Canada in February 1975, concrete and substantial negotiations were initiated only thereafter and lasted until November 1975, with the first formal offer by the Community to Canada put forward at the end of June 1975. The Panel therefore concurs with the view expressed by both parties that 1974 was a period prior to the beginning of the negotiations.

17. The Panel does not consider that full statistics for the applicable base period must be available at the very beginning of the negotiations, provided these data become available later in the negotiations and the latter are not unduly delayed. By June 1975, Community statistics (on which Canada had agreed to conduct the negotiations) for the first ten or eleven months of 1974 became available (except for Ireland) for both lead and zinc. The offer of the Community in the negotiations on both lead and zinc, submitted to Canada in late June 1975, should therefore, in the Panel's view, have taken account of trade figures for 1974. The Panel came to the conclusion that a correct and reasonable interpretation of the GATT, in the particular circumstances applying in this case, would be to base the ad valorem equivalents on global trade statistics for the years 1972-74. The Panel, in basing its decision on figures

relating to global Community imports of zinc rather than relating to imports from Canada only, took account of the provision of Article XXVIII:2 which refers to the maintenance of a "general level" of concessions, not less favourable to "trade", formulations which in the view of the Panel clearly indicate the requirement, in the absence of specific agreement between the parties, to base the ad valorem equivalent of a specific duty on total import figures. To take another view would, in the case of two or more principal or substantial suppliers with different price levels, result in different ad valorem rates which is inconceivable under the General Agreement. The 1972-74 figures submitted to the Panel by the Community indicate an ad valorem equivalent of 2.64 per cent for total Community imports of zinc. Consequently, the Panel considers that, as it was not the intention of the Community to modify the scope of the concession, the ad valorem duty rate of the Community for zinc should have been rebound, after conversion, at that level or at the closest round half-percentage point figure, rather than at 3.5 per cent.

18. In the Panel's view, this result would also be appropriate when considering lead and zinc together. Again, basing itself on statistics submitted by the Community, the Panel noted that the trade-weighted ad valorem equivalent for both products together for the years 1972-74 amount to 2.97 per cent, a figure indicating that a rebinding for lead of 3.5 per cent (as implemented by the Community) and for zinc at the lower level, as indicated in the previous paragraph, would have been in conformity with the requirement of Article XXVIII:2 of the GATT.

19. In light of the conclusions reached above, Canada was entitled, in the Panel's opinion, to proceed to a withdrawal of concessions. The Panel, however, was of the view that the withdrawal of concessions should have been less than the equivalent of the total export volume of zinc to the Community as account should have been taken of the rebinding of the Community duty. Also, the right of retaliation should be related to the actual damage suffered by Canada and consequently the withdrawals should have been based on the difference between the ad valorem equivalent of the specific rate calculated on imports from Canada only and the new ad valorem rate. Finally, account should have been taken of the fact that the ad valorem duty on lead had been fixed at a level lower than the incidence in respect of Community imports from Canada. In view of the complexity of assessing the value of tariff binding, irrespective of the rate of duty involved, the Panel abstained from making any quantitative assessment in this respect. In the interest of maintaining the highest possible general level of concessions the Panel finds that the Canadian retaliatory action should be withdrawn; i.e. that the previous Canadian tariff bindings should be re-established as soon as the Community proceeds either to decrease their tariff on zinc or to make tariff concessions on other products of export interest to Canada of an equivalent value.