20 November 1987

CANADA - MEASURES AFFECTING EXPORTS OF UNPROCESSED HERRING AND SALMON

Report of the Panel adopted on 22 March 1988
(L/6268 - 35S/98)

1. INTRODUCTION

1.1 On 3 September and 27 October 1986, the United States and Canada held consultations pursuant to Article XXIII:1 on regulations maintained by Canada which prohibit the exportation or sale for export of unprocessed herring and pink and sockeye salmon. As these consultations failed to result in a satisfactory resolution, the United States, in a communication dated 20 February 1987, requested the CONTRACTING PARTIES to establish a panel to examine the matter under Article XXIII:2 (L/6132).

1.2 The Council, at its meeting on 4 March 1987, agreed to establish a panel on the matter and it authorized the Chairman of the Council to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/207).

1.3 On 15 April 1987, the Council was informed that agreement had been reached on the following terms of reference and composition of the Panel (C/M/208):

A. Terms of Reference

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States relating to Canada's measures affecting exports of unprocessed herring and salmon (L/6132), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings as provided for in paragraph 2 of Article XXIII."

B. Composition

Chairman: Mr. János Nyerges

Members: Mr. Timothy Groser
Mr. Arne Sivertsen

1.4 The Panel met with the parties on 18 June and 10 July 1987. It submitted its report to the parties to the disputes on 4 November 1987.

2. FACTUAL ASPECTS

2.1 Sub-section 34(j) of the Canadian Fisheries Act of 1970 provides:

"The Governor in council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations … (j) respecting the export of fish or any part thereof from Canada …"[1]

[1]The Fisheries Act, Can. Rev. Stat. 1970, C.F-14, Sub-section 34(j) (as amended).

2.2 Promulgated under this authority, the Regulations Respecting Commercial Fishing for Salmon in the Waters of British Columbia and Canadian Fisheries Waters in the Pacific Ocean (Pacific Commercial Salmon Fishery Regulations) provide in paragraph 6:

> "6. No person shall export from Canada any sockeye or pink salmon unless it is canned, salted, smoked, dried, pickled or frozen and has been inspected in accordance with the Fish Inspection Act …" [1]

2.3 Promulgated under the same authority, the Regulations Respecting Fishing for Herring in Canadian Fisheries Waters on the Pacific Coast (Pacific Herring Fishery Regulations) provide in paragraph 24(1):

> "Subject to sub-section (2), no person shall export or attempt to export from the Province any food herring, roe herring, herring roe or herring spawn on kelp unless:
>
> (a) it is canned, salted, dried, smoked, pickled or frozen; and
>
> (b) it has been inspected by an inspector designated pursuant to section 17 of the Fish Inspection Act …"[2]

2.4 Export regulations on fresh and newly salted herring and salmon were initially introduced for the Province of British Columbia in 1908.[3] The regulations on herring have continued to be in force without interruption since 1908. In the case of salmon, the regulations of 1908 only covered sockeye salmon. There were no restrictions on exports of salmon under the Fisheries Act from 1935 to 1949, although exports were controlled under the Export and Import Permits Act during the wartime period. In 1949, the regulations were amended to incorporate again sockeye salmon as well as pink and coho salmon. The ban on exports of coho salmon was later removed and sockeye and pink salmon are currently the only salmon species subject to export regulations.

2.5 Governmental measures for conservation, management and development of salmon and herring stocks in the waters off British Columbia also date back to the early decades of this century. Measures to this effect have been based on the specific biology of each of the species under control. This has led, over the years, to a series of national and bilateral efforts which have been embodied, inter alia, into various bilateral and multilateral treaties and conventions relating to fisheries in these waters.

2.6 Sockeye and pink salmon and herring fisheries represent the largest share of the West Coast fishery of Canada. These species supply a dominant share of Canada's West Coast processing sector, giving employment to almost five-sixths of the workers in the British Columbia fish processing industry.

3. MAIN ARGUMENTS

(a) Abstract

3.1 The United States claimed that the export restrictions maintained by Canada on unprocessed sockeye salmon, pink salmon and herring were inconsistent with the obligations of Canada under Article XI of the General Agreement. They were not justified under any of the exceptions provided for in that Article nor under those of Article XX.

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[1] CRC 1978 Ch. 823 Canada Gazette, Part II, November 8/78, p. 3900.
[2] Canada Gazette, Part II, May 2/84, p.1693.
[3] P:C: 1076 (8 June 1908).

3.2 Therefore, the United States considered the matter to be a case of prima facie nullification or impairment of benefits accruing to it under the General Agreement. The United States requested the Panel to recommend that Canada eliminate these export restrictions and that Canada shall refrain from substituting for these measures any other measure having equivalent effect under commercial conditions prevailing in the industry. The United States also stated that these measures were not justified under the "existing legislation" clause of the Protocol of Provisional Application.

3.3 Canada indicated that the measures under review by the Panel were an integral and longstanding component of Canada's overall West Coast fisheries conservation and management régime. As such, these measures were entirely justified under Article XX(g).

3.4 Moreover, Canada operated strict quality and marketing regulations on the three species subject to the export measures in question. These standards had been necessary to maintain Canada's reputation for safe, high-quality fish products. The export measures under review are thus also justified under Article XI:2(b) of the General Agreement. Therefore Canada requested the Panel to find these measures to be consistent with Canada's obligations under the General Agreement. Since Canada considered its export measures to be covered by Articles XX(g) and XI:2(b), it had not dealt with further lines of argumentation, such as the Protocol of Provisional Application. Canada stressed that the issue of alternative measures raised by the United States in paragraph 3.2 above was clearly outside the terms of reference of the Panel.

(b) The framework of operation of the measures under review

3.5 Canada stated that the restrictions maintained on the exportation of unprocessed sockeye and pink salmon and herring constituted an integral part of a complex and longstanding system of fishery resource management. This system had evolved in response to the Federal Government's domestic and international responsibility for the conservation, allocation, management and development of the sea coast fisheries of Canada. More specifically, the restrictions were an integral part of the conservation and management programme for herring and pink and sockeye salmon. They were not per se conservation measures for the fish species in question, although they had some important conservation effects.

3.6 Canada explained that the conservation measures aimed at preserving and enhancing fragile sockeye and pink and herring stocks had been basically determined by three conditions resulting from the complex biology of these species. These were: (i) the vulnerability of these species to resource depletion which entailed a sophisticated or detailed catch reporting system; (ii) the highly cyclical nature of both fisheries which created complex management problems and a need to provide a steady supply of fish to Canadian processing plants of a resource that had consistently been in short supply; (iii) the sensitivity of these particular species to quality control problems both prior to and during processing. Canada relied on statistical reports from on-shore processing facilities as they provided the most accurate and detailed statistics on the catch for the purpose of monitoring, controlling and restricting domestic production and the carrying out of scientific research related to the conservation programmes.

3.7 Canada argued that the inherent complexity of both salmon and herring management was confirmed by the fact that in spite of continuing management and conservation efforts, stocks and landing of these species had been far below optimum production levels. Thus historically there had been virtually no surplus to Canadian processing capacity available for foreign users of either salmon or herring. Canada stated that different national priorities on fisheries relative to other measures were pursued by Canada and the United States. For example, the United States had dammed the Columbia River, which affected the fishery, while Canada had not dammed the Fraser River. Canada's priority was reflected in the primary importance given to fish in habitat regulations under the Fisheries Act.

3.8 The United States shared Canada's concern and objectives in the area of conservation. However, the United States argued that the issue in this case was not the undeniable right of states to conserve fish in the accepted sense of enhancing stocks and limiting harvest in order to ensure future yield. The issue, rather, was the permissibility of additional measures, trade measures, which prohibit the export of unprocessed fish that have already been harvested.

3.9 The United States disagreed that such trade measures were required by unique conditions arising from the "complex biology" of the restricted species. Numerous other species of fish - including Atlantic herring and chum, coho and chinook salmon - gave rise to closely similar conditions: they were commercially valuable, cyclical, and vulnerable to resource depletion in the absence of an effective catch reporting system. Yet Canada was able to operate effective conservation programmes for these other species without export restrictions of any kind. Likewise, the United States had been able to achieve its conservation objectives for species involved in this dispute without recourse to export restrictions. The United States also noted that it routinely gathers statistics on all landings of fish in United States ports, including landings of fish caught in Canadian waters and exported to the United States. Such data were routinely supplied to Canadian authorities upon request, for Canada's use in its conservation programme. This strongly suggested that currently existing methods of monitoring and data-sharing could be applied to the management of the species at issue without export restrictions.

3.10 The United States was aware that most fishermen, whether from the United States or Canada, sell their salmon and herring to processors in their own country and in their own region. This was because of the difficulty of keeping the fish fresh on long ocean trips from region to region. However, in the border region there was a sound commercial basis for bilateral trade in unprocessed fish. Canadian processors were free to cross the border and to purchase United States-caught salmon and herring. They could therefore extend their production runs and decrease their unit cost by making purchases from fishermen in the adjacent areas across the border when the fishing season was open and/or at a peak in those areas. However, similar efficiencies were foreclosed to the United States processors and exporters owing to the Canadian export restrictions.

3.11 The United States argued that this situation clearly suggested that the purpose and effect of Canada's export restrictions was not to conserve resources or ensure product quality. Rather, the purpose was to protect Canadian processors and help maintain employment in British Columbia. This purpose was amply attested in official Canadian publications. According to the United States, the Canadian Department of Fisheries and Oceans had reported in 1980 that the export restrictions were in place for the purpose of "promoting jobs for Canadians (by increasing the amount of processing done in Canada)." The United States believed that trade restrictions imposed for this purpose were not in conformity with the General Agreement. As indicated in the 1950 Working Party Report of Quantitative Restrictions:

> "… the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchases of its materials, or by reducing the supply of such materials available to foreign competitors or by other means."[1]

3.12 Canada agreed with the United States that there was a sound commercial basis for bilateral trade in unprocessed herring and salmon but only under conditions of stocks surplus to Canadian requirements. In contrast to the Canadian situation where shortages prevailed, the United States' resource base for salmon was marked by a situation of abundance. With regard to citations by the United States of official Canadian publications, Canada emphasized that these were taken out of context since a clear reading showed that they emphasized the multipurpose nature of the regulations.

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[1]GATT/CP.4/33/Add.1, page 4.

3.13 Canada maintained that the fact that the United States lacked similar export restrictions on salmon and herring was not relevant since the General Agreement, in this case the provisions of Article XX(g), only required that Canada demonstrate its measures related to conservation, not that they were "essential" or even "necessary".

3.14 The United States replied that the United States experience in conserving these species without comparable export restrictions was clearly relevant as one indicator, among others, of the primarily trade-restrictive purpose and effect of the restrictions maintained by Canada.

(c) Article XI:2(b)

3.15 The United States maintained that Canada's regulations prohibiting the exportation of unprocessed sockeye and pink salmon and herring constituted a breach of paragraph 1 of Article XI, which specifically forbids export restrictions.

3.16 Canada did not contest that the measures it maintained on exports of unprocessed salmon and herring were of the type falling within the purview of Article XI. Canada considered, however, that these measures were specifically permitted under paragraph 2(b) of that Article which allows:

> "… export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade".

3.17 Canada argued that unprocessed sockeye and pink salmon and herring were "commodities" within the meaning of Article XI:2(b). The regulations at issue in this dispute deal specifically with "standards" and "marketing". Their necessity was entirely determined by the particular factors prevailing in the trade of these products. In the case of sockeye and pink salmon, the export restriction on frozen fish, except No. 1 grade frozen fish, was necessary to maintain the market niche created for reliable supplies of high-quality canned and frozen products. Canada's efforts to develop high-standard salmon products distinctive from United States salmon products could also be appreciated by the very considerable premium price paid for Canadian products over United States products on overseas markets.

3.18 In the case of herring, the export restriction on unprocessed herring was necessary to maintain the market niche created by Canadian industry in Japan for Canadian herring roe with superior taste and texture. This niche was in fact occupied solely by Canada, since only Canadian exporters were able to commit to deliver adequate supplies of high-quality herring roe, a commitment which was only possible through the export restriction ensuring adequate supplies to Canadian roe processing operations.

3.19 The United States contested Canada's view that the objective of preserving a "market niche" for Canadian products, as opposed to non-Canadian products, was a legitimate purpose of a trade measure under Article XI:2(b). That clause clearly indicated an intention that government marketing standards and regulations should facilitate overall trade in commodities. By contrast, the concept of protecting an international "market niche" for Canadian producers implied an objective of promoting Canada's export trade at the expense of foreign competitors.

3.20 The United States further emphasized that the word "necessary" had been strictly construed in the GATT Working Party Report on Quantitative Restrictions, which had established that "the maintenance or the application of a restriction which went beyond what would be necessary to achieve the objectives defined in paragraph 2(b) or 2(c) of Article XI would be inconsistent with the provisions of that Article".[1]

[1]BISD 3S/189, paragraph 67.

3.21 The United States maintained that Canada had not advanced any plausible justification for characterizing its restrictions as "necessary" quality controls or marketing measures within the meaning of Article XI:2(b). The restriction maintained by Canada on unprocessed fish could not be considered "necessary", or even rationally related, to any conceivable marketing, product quality or standards for processed products. Defects in the quality of fish products occurred almost exclusively in processing. In any case, the responsibility to ensure quality of processed fish products lay exclusively with the processor and the country of the processor and/or consumer. Furthermore, it was generally impossible to ascertain whether fish products marketed under a processor's label were originally purchased from domestic or foreign fishermen. Thus, Canada could protect its "quality reputation" in foreign markets only by careful supervision and testing of fish that had been processed in Canada. Canada could not enhance that reputation by restricting exports of fish that would be processed elsewhere.

3.22 Canada replied that, unfortunately, the quality reputation of Canadian fish products did not depend exclusively on the quality of Canadian-processed products. For instance, the impact of botulism scares in the United States had led to declines in Canadian salmon sales, notwithstanding the quality of the Canadian products. Nor could Canada agree with the view that "the responsibility to ensure quality of processed fish products lay exclusively with the processor …". Under Canadian law, this was a longstanding mandatory government responsibility under the Fish Inspection Act, which covered exports and imports of fish and applied internationally as well as interprovincially. Other countries used grading standards to promote a high-quality export product.

3.23 The United States did not see the relevance of Canada's argument that "the impact of botulism scares in the United States had led to declines in Canadian salmon sales". Botulism was a process-induced hazard. Previous botulism scares had been caused by United States processing plants using United States-caught fish (since Canadian fish exports were restricted). Their impact on Canadian sales merely proved that such scares lead to a general (and temporary) fear of canned salmon products per se, without distinction as to source. In this light, it was obvious that Canada's export restrictions had had no effect, and could not have had an effect, on the likelihood of such scares or their impact on Canada's sales.

(d) Article XX(g)

3.24 Canada maintained that its export measures on unprocessed sockeye and pink salmon and unprocessed herring were fully consistent with the provisions of Article XX(g). The Panel on United States Prohibition of Imports of Tuna and Tuna Products from Canada (hereinafter referred to as the Tuna Panel)[1], in making its findings relating to Article XX(g), applied four tests to the United States embargo against Canada. The Tuna Panel considered whether measures were: (1) applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination; (2) a disguised restriction on international trade; (3) relating to the conservation of exhaustible natural resources; and (4) made effective in conjunction with restrictions on domestic production or consumption. Canada considered that the Tuna Panel did not dispute that the United States import prohibition satisfied the "relating to" test in Article XX(g). Canada also believed that it had demonstrated that its measures bore a more direct relation to conservation than did the United States measures at issue in the Tuna Panel. Furthermore, unlike the United States embargo which the Tuna Panel had found not to have been made effective with restrictions on domestic production, Canada considered that its export restrictions fully satisfied each of the tests of the Tuna Panel. Canada stressed that it considered the report of that Panel as a relevant and direct precedent in the examination of the matter at issue in this case.

[1]BISD 29S/91.

3.25 Canada maintained that its export measures were not "a disguised restriction on international trade". They were trade measures, i.e. export restrictions in terms of Article XI:1, and were publicly announced. However, they served a range of purposes, an important one of which was to support conservation of the resource. These measures served ultimately to increase overall trade, since they help to provide the statistical foundation for the Canadian conservation programme and to even out cyclical variations in salmon and herring resource production at the harvesting level. Moreover, the existence of the regulation provided the security by which further investment could be made in enhancing the resource base of both salmon and herring stocks. They were applied on an m.f.n. basis, therefore not discriminating "between countries where the same conditions prevailed".

3.26 Canada argued that under the terms of Article XX(g), the measures should be "relating to" conservation of "exhaustible natural resources". Therefore, the issue was not whether these measures were conservation measures per se or even whether they were "essential" or "necessary" to the conservation régime. These were requirements which applied only under other Article XX exceptions. What was required under Article XX(g) was that the measures applied should bear a relationship to conservation programmes. Canada stressed that "relating to" could not be read to mean "essential" or "necessary to", terms used elsewhere in Article XX, and General Agreement. Canada recalled that the CONTRACTING PARTIES had agreed in 1982 in respect of a dispute settlement process that "it is understood that decisions in this process cannot add to or diminish the rights and obligations provided in the General Agreement".[1]

3.27 Canada further argued that salmon and herring were "exhaustible natural resources" in the sense of Article XX(g). Both were in need of conservation. Canada operated a conservation régime for salmon and herring which comprised many elements, including: habitat protection, international agreements, maintenance of sufficient harvesting and processing capacity to optimize utilization of the species and maintenance of research and information systems. The measures at issue were an integral part of that research and statistical gathering system.

3.28 Finally, Canada stated that these measures were made effective in conjunction with restrictions on domestic production. Canada operated strict domestic production controls by limiting the amount of fish caught. These controls clearly applied to the particular species for which export regulations were in force.

3.29 The United States agreed that salmon and herring were exhaustible natural resources in need of conservation and that both the United States and Canada limited domestic production of these species. However, the United States disagreed that a measure could not be considered to be a disguised restriction simply because it had been publicly announced. The United States could not accept the Canadian view that an export prohibition on unprocessed salmon and herring could be considered as a "trade enhancement" measure. Furthermore the United States disagreed that a prohibition on the export of these species unless they had been processed in Canada, was a measure legitimately "relating to conservation" within the meaning of Article XX(g). Rather, these restrictions should be properly understood as disguised restrictions on international trade designed to protect and benefit domestic processors. As such, they were clearly outside the scope of Article XX exceptions by virtue of its preamble which, in the United States view, implied that the primary motivation and effect must be conservation rather than trade restriction or distortion.

[1]BISD 29S/16.

3.30 Furthermore, the United States maintained that the report of the Tuna Panel did not support a broad or permissive interpretation of Article XX(g). That report concluded that the United States could not avail itself of that exception since all the requirements of Article XX(g) had not been met. This was hardly a permissive reading of Article XX(g).

3.31 Like Canada and other riparian states, the United States also maintained a complex system of rules and regulations all serving the legitimate and uncontested purpose of limiting harvesting to avoid the depletion of stocks. However, Canada alone imposed an additional requirement that certain species that had already been harvested be processed in Canada before export.

3.32 The United States believed, as indicated by its own experience with these species and Canada's experience with other species, that other reporting methods were already in use, on both sides of the border, which were effective in gathering timely and complete catch data and were legitimate under the General Agreement. Furthermore, United States authorities routinely provided to Canada, upon request and for use in the Canadian conservation programme, full data on United States landings of unprocessed fish of other species exported from Canada. Thus, Canada had ample means already at its disposal to limit catch and to account for fish that had been caught. Export restrictions were neither necessary nor particularly useful for this purpose.

3.33 The United States maintained that many species of fish were commercially important to Canada and were protected from depletion by the skilful efforts of national authorities in managing the resource. Most, if not all, these species fetched premium prices in the United States and third-country markets, raising the risk of over-fishing if conservation measures were not strictly enforced. Therefore, the only coherent and plausible explanation for Canada's export restrictions on unprocessed Pacific herring and sockeye and pink salmon was to be found in that country's frequently stated need to ensure a stable supply of inputs to domestic processors by curtailing supply to foreign processors. Canada's explanation of its reasons for lifting chum and coho salmon restrictions simply confirmed the United States view that the export measures were promulgated and maintained for trade-related reasons rather than conservation purposes.

3.34 Canada maintained that it had cited evidence to demonstrate that also other countries, including the United States, applied export restrictions. Canada further stated that the possibility of alternative regulatory measures, such as existed in the United States, was not relevant since the General Agreement did not require countries to have identical measures, only that the measures relate to conservation. In addition, Canada stressed that Article XX(g) required that a measure be "related to" conservation and not that conservation was its primary purpose or effect. The intent of that Article was clearly to cover measures which had trade-restrictive aspects.

3.35 Canada argued that the question of whether conservation measures could be effectively maintained on other species without the necessity for export restrictions was not relevant to the issue of whether such export restrictions bore a relationship to the conservation programme for salmon and herring. Moreover, the selectivity of the Canadian controls was instead a clear indication that the export regulations were aimed at addressing specific and unique fisheries management and conservation problems. Canada's treatment of other types of West Coast salmon underlined this fact. Export controls on chum and coho salmon were lifted following the declining importance of these species in international trade. In contrast, the species still subject to export controls constituted the main fisheries of the West Coast of Canada and were therefore of most concern in terms of both ensuring stringent conservation measures and adequate supplies. Canada stressed that the export regulations were an integral and longstanding part of a system aimed at maintaining compliance with domestic production controls. The complete and thorough statistical data obtained through Canadian processing plants was used to determine whether conservation limits had been adhered to and to enforce penalties against fishermen that exceeded catch limits. The existence of the most reliable and comprehensive data base possible was also considered by Canada to be of vital importance for fisheries biologists to predict future stock sizes and establish conservation goals for subsequent fishing seasons.

3.36 The United States responded that, to its knowledge, no other country applied comparable export restrictions on these species or any other species. Rather, countries implemented conservation programmes through their sovereign authority to limit and require reporting of catch in their territorial waters and Exclusive Economic Zone. The United States further explained that there were no unique conservation problems related to these species, as distinct from other species which were not export restricted. Rather, the selectivity of Canada's export controls reflected the unique concentration of processing jobs in the freezing and canning operations associated with these species. The United States presented evidence suggesting that non-restricted salmon species had accounted for nearly half of Canada's total salmon exports in recent years. Therefore, the United States could not accept Canada's argument that the export restricted species were distinguished by their unique importance in international trade.

3.37 Canada claimed that resource conservation, rather than being a narrow concept dealing just with maintaining physical levels of a resource, should be considered to be a broad concept covering the range of scientific and economic issues arising from resource utilization. In the case of fisheries, the concept of conservation had evolved to include socio-economic as well as biological dimensions which had been embodied into international as well as bilateral agreements and treaties guiding fisheries management. Canada had also made clear that the export restrictions assisted the conservation effort undertaken by the Canadian authorities in that they allowed the Canadian Government to make necessary public expenditure on salmon enhancement with the expectation that economic benefits would continue to flow to all sectors of the fishing industry and not just to the harvesting sector. Canada provided information on the major expenditures involved in its enhancement programme. The largest share of benefits from the salmon enhancement programme accrued to sockeye salmon as a result of lake fertilization techniques. Considerable expenditures on chinook and coho salmon were to mitigate the adverse effects of the harvest of these stocks in mixed stock sockeye and pink fisheries. With regard to herring, Canada noted that it had implemented several stock rebuilding programmes and was actively engaged in the spawn-on-kelp developmental programme.

3.38 The United States denied the validity and relevance of Canada's stock enhancement programmes as justifications for the export restrictions at issue here. The United States noted that Canada has no enhancement programmes on herring and, according to Canada's own submissions, only 7 per cent of expenditures on salmon enhancement are focused on the export-restricted species. Thus, there appeared to be little correspondence between Canada's export restrictions and the structure of its enhancement efforts. In addition, the United States argued that many nations, including the United States and Canada, had found means to undertake successful enhancement programmes without the need for export restrictions. Also, the accepted practice of states, as embodied in numerous treaties and agreements, had always been that the expense of stock enhancement entitled enhancing countries to "benefits" in the form of increased catch rights for their fishermen, without any exclusive rights for domestic processors. Finally, it was inappropriate to allocate burdens or benefits of stock enhancement to processors since, in the absence of export restrictions, processors had wide flexibility to draw on the enhanced stocks of other nations - whereas fishermen were largely limited to fishing in their own country's waters.

3.39 Canada indicated that as in the dispute examined by the Tuna Panel, "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".[1] The current disagreement concerning salmon and herring was also "mainly related to fisheries" and "a part of a broader complex." Canada had noted the long history of bilateral relations between Canada and the United States on Pacific fisheries matters, such as related international agreements including the 1952 International Convention for the

[1]BISD 29S/105.

High Seas Fisheries of the North Pacific, as amended in 1979 and 1986, and the 1985 Treaty between the Governments of Canada and the United States concerning Pacific salmon. Canada had also noted the relevance of principles applying to fisheries conservation, and relevant measures as embodied in various provisions of the United Nations Convention on the Law of the sea.

3.40 The United States strongly disagreed with Canada's assertion that "conservation" should be broadly construed for purposes of interpreting Article XX(g). On the contrary, the preamble to Article XX made it very clear that all the exceptions to that Article should be narrowly construed so as to prevent disguised restrictions on international trade. The United States noted that other international agreements did not modify obligations under the General Agreement. Moreover, these other agreements did not support Canada's broad interpretation of the concept of "conservation". Under these agreements and treaties, benefits deriving from the exploitation of fisheries resources explicitly referred to harvesting, not to subsequent processing. They did not contemplate or imply any authorization for measures which prohibit the export of fish after harvest.

4. FINDINGS

(a) The issue before the Panel

4.1 The Panel noted that the basic issue before it was the following: Canada prohibits the export of sockeye and pink salmon that is not canned, salted, smoked, dried, pickled or frozen (hereinafter referred to as "certain unprocessed salmon") and of food herring, roe herring, herring roe and herring spawn on kelp that is not canned, salted, dried, smoked, pickled or frozen (hereinafter referred to as "unprocessed herring"). The parties to the dispute and the Panel agree that such prohibitions are contrary to Article XI:1 of the General Agreement according to which contracting parties shall not institute or maintain prohibitions on the exportation of any product destined for the territory of any other contracting party. Canada invokes as justifications for the prohibitions two exceptions in the General Agreement: first, Article XI:2(b) permitting "export prohibitions … necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade" and, second, Article XX(g) permitting any measure "relating to the conservation of exhaustible natural resources … made effective in conjunction with restrictions on domestic production or consumption". The United States denies that the export prohibitions are "necessary to the application of standards or regulations" within the meaning of Article XI:2(b) and that they are "related to the conservation of exhaustible natural resources" within the meaning of Article XX(g).

(b) Article XI:2(b)

4.2 The Panel first examined whether the export prohibitions maintained by Canada are justified by Article XI:2(b). The Panel noted that Canada considered it necessary to prohibit the export of certain unprocessed salmon and unprocessed herring to maintain its quality standards for these fish, including the standards for frozen salmon exported from Canada (cf. paragraphs 3.16-3.18 above). The Panel noted that Canada applied quality standards to fish and that if prohibited the export of fish not meeting these standards. The Panel further noted, however, that Canada prohibited export of certain unprocessed salmon and unprocessed herring even it they could meet the standards generally applied to fish exported from Canada. The Panel therefore found that these export prohibitions could not be considered as "necessary" to the application of standards within the meaning of Article XI:2(b).

4.3 The Panel then examined the Canadian contention that the prohibition of exports of certain unprocessed salmon and unprocessed herring was necessary for the international marketing of processed salmon and herring. Canada had argued that, without these prohibitions, Canadian processors would not have been able to develop a superior quality fish product for marketing abroad and would not have been able to maintain their share of the market for herring roe in Japan (cf. paragraphs 3.16-3.18 above). The question before the Panel therefore was thus whether the export restrictions on certain unprocessed salmon and unprocessed herring constituted marketing regulations on processed salmon and herring within the meaning of Article XI:2(b). The Panel noted that this provision referred to "… regulations … for the marketing of commodities in international trade", which suggests that the regulations covered by the provisions are not all regulations that facilitate foreign sales but only those that apply to the marketing as such. The drafters of Article XI:2(b) agreed that this provision would cover export restrictions designed to further the marketing of a commodity by spreading supplies of the restricted product over a longer period of time.[1] During the drafting, mention was made only of export restrictions designed to promote foreign sales of the restricted product but not of export restrictions on one commodity designed to promote sales of another commodity. The broad interpretation of the term "marketing regulation" implied in Canada's argument would have the consequence that any import or export restriction protecting a domestic industry and enabling it to sell abroad would be exempted from the General Agreement's prohibition of import and export restrictions. Such interpretation would therefore expand the scope of the provision far beyond its purpose. The Panel found for these reasons that the export prohibitions on certain unprocessed salmon and unprocessed herring were not "regulations for the marketing" of processed salmon and herring in international trade within the meaning of Article XI:2(b). In the light of the considerations set out above, the Panel concluded that the export prohibitions were not justified by Article XI:2(b).

(c) Article XX(g)

4.4 The Panel then turned to the question of whether Article XX(g) justified the imposition of the export prohibitions on certain unprocessed salmon and unprocessed herring. The Panel noted that both parties agreed that Canada maintains a variety of measures for the conservation of salmon and herring stocks and imposes limitations on the harvesting of salmon and herring. The Panel agreed with the parties that salmon and herring stocks are "exhaustible natural resources" and the harvest limitations"restrictions on domestic production" within the meaning of Article XX(g). Having reached this conclusion the Panel examined whether the export prohibitions on certain unprocessed salmon and unprocessed herring are "relating to" the conservation of salmon and herring stocks and whether they are made effective "in conjunction with" the restrictions on the harvesting of salmon and herring.

4.5 Article XX(g) does not state how the trade measures are to be related to the conservation and how they have to be conjoined with the production restrictions. This raises the question of whether any relationship with conservation and any conjunction with production restrictions are sufficient for a trade measure to fall under Article XX(g) or whether a particular relationship and conjunction are required. The Panel noted that the only previous case in which the CONTRACTING PARTIES took a decision on Article XX(g) was the case examined by the Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada" but that that Panel had found that the party invoking Article XX(g) did not maintain restrictions on the production or consumption of tuna and thus had not been required to interpret the terms "relating to" and "in conjunction with".[2] The Panel therefore decided to analyze the meaning of these terms in the light of the context in which Article XX(g) appears in the General Agreement and in the light of the purpose of that provision.

[1] E/PC/T/A/PV/19, page 8.
[2] BISD 29S/91.

4.6 The Panel noted that some of the subparagraphs of Article XX state that the measure must be "necessary" or "essential" to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j)) while subparagraph (g) refers only to measures "relating to" the conservation of exhaustible natural resources. This suggests that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures. However, as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX(g). The Panel, similarly, considered that the terms "in conjunction with" in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective "in conjunction with" production restrictions if it was primarily aimed at rendering effective these restrictions.

4.7 Having reached these conclusions the Panel examined whether the export prohibitions on certain unprocessed salmon and unprocessed herring maintained by Canada were primarily aimed at the conservation of salmon and herring stocks and rendering effective the restrictions on the harvesting of salmon and herring. The Panel noted Canada's contention that the export prohibitions were not conservation measures per se but had an effect on conservation because they helped provide the statistical foundation for the harvesting restrictions and increase the benefits to the Canadian economy arising from the Salmonid Enhancement Program. The Panel carefully examined this contention and noted the following: Canada collects statistical data on many different species of fish, including certain salmon species, without imposing export prohibitions on them. Canada maintains statistics on all fish exports. If certain unprocessed salmon and unprocessed herring were exported, statistics on these exports would therefore be collected. The Salmonid Enhancement Program covers salmon species for which export prohibitions apply and other species not subject to export prohibitions. The export prohibitions do not limit access to salmon and herring supplies in general but only to certain salmon and herring supplies in unprocessed form. Canada limits purchases of these unprocessed fish only by foreign processors and consumers and not by domestic processors and consumers. In light of all these factors taken together, the Panel found that these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish. The Panel therefore concluded that the export prohibitions were not justified by Article XX(g).

5. CONCLUSIONS

5.1 For the reasons set out in paragraphs 4.2-4.7 above, the Panel found that the export prohibitions on certain unprocessed salmon and unprocessed herring were contrary to Article XI:1 and were justified neither by Article XI:2(b) nor by Article XX(g). The Panel therefore suggests that the CONTRACTING PARTIES recommend that Canada bring its measures affecting exports of certain unprocessed salmon and unprocessed herring into conformity with the General Agreement.

5.2 The United States asked the Panel to suggest that Canada be requested to refrain from replacing the export prohibitions by other measures having equivalent effects. The Panel considered that its mandate was limited to the examination of Canada's present measures and it therefore did not examine whether other measures with equivalent effects would be inconsistent with Canada's obligations under the General Agreement.

5.3 Canada referred in its submission to international agreements on fisheries and the Convention on the Law of the Sea. The Panel considered that its mandate was limited to the examination of Canada's measures in the light of the relevant provisions of the General Agreement. This report therefore has no bearing on questions of fisheries jurisdiction.