Lobsters from Canada

USA 89-1807-01

FINAL REPORT OF THE PANEL

The Panel:

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Thomas A. Clingan, Jr.
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1 INTRODUCTION

1.1 This report has been prepared by a panel of experts established under the U.S.-Canada Free Trade Agreement ("FTA") to assist the Governments of Canada and of the United States to resolve a dispute over the trade between them in live lobsters harvested in Canada.

1.2 The two governments referred the dispute to the Canada-United States Trade Commission under Chapter 18 of the FTA in accordance with an exchange of letters between the United States Trade Representative, Carla A. Hills, and Canada's Minister for International Trade, John C. Crosbie, dated January 18 and 27, 1990).

1.3 In their exchange of letters, the Parties agreed that a panel should be established to prepare a report and that the task should be done according to an accelerated schedule as follows (as amended):

January 30	Panel selection completed
February 1	Canada files initial brief
February 21	United States files reply brief
March 5	Oral hearing
March 13	Parties file supplementary briefs
April 18	Initial Panel report submitted to Parties
April 30	Parties' objections filed
May 21	Final report issued

1.4 In all other respects, Canada and the United States agreed that the procedures of Article 1807 of the FTA and of the Model Rules of Procedure for Chapter 18 Panels were to apply.

1.5 The Parties also agreed that the Panel would be composed of Bernard Norwood (Chair), Thomas A. Clingan, Jr., Robert E. Latimer, Simon V. Potter, and Mary Beth West.

1.6 The Parties' briefs were filed and the oral hearing of a day and a half was held in Washington in accordance with the agreed schedule. The Panel met for deliberations in Washington and Ottawa and has prepared this Final Report for submission to the Parties for comments under the established timetable.

2 TERMS OF REFERENCE

2.1 On December 12, 1989, the United States enacted an amendment to the Magnuson Fishery Conservation and Management Act (the "Magnuson Act") to prohibit, among other things, the sale or transport in or from the United States of whole live lobsters smaller than the minimum possession size in effect under U.S. federal law ("sub-sized lobsters"). By that amendment (the "1989 amendment" or "U.S. measures"), lobsters originating in foreign countries or in states having minimum lobster size requirements smaller than the minimum limits imposed by U.S. federal law are prohibited, with effect from December 12, 1989, from entering into interstate or foreign commerce for sale within or from the United States.

2.2 The complete text of section 307(1)(J) of the Magnuson Act is as follows:

> It is unlawful --
>
> (1) for any person --
>
> (J) to ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live lobster of the species Homarus americanus, that --
>
> (i) is smaller than the minimum possession size in effect at the time under the American Lobster Fishery Management Plan, as implemented by regulations published in part 649 of title 50, Code of Federal Regulations, or any successor to that plan, implemented under this title;
>
> (ii) is bearing eggs attached to its abdominal appendages; or
>
> (iii) bears evidence of the forcible removal of extruded eggs from its abdominal appendages [16 U.S.C. 1857 (1)(J)].[1]

[1] The 1989 amendment is sect. 8 of the 1989 National Oceanic and Atmospheric Adminstration Ocean Coastal Programs Authorization Act, Pub. L. No. 101-224, sect. 8, 103 Stat. 1905, 1907 (1989) (to be codified at 16 U.S.C. sect. 1857 (1) (J)).

2.3 This 1989 amendment to the Magnuson Act was the latest of numerous initiatives by federal and state governments in the United States to ensure effective management of U.S. fishery stocks in general and, in particular, to implement a coherent, integrated management program of U.S. lobsters. Until the 1989 amendment, lobsters harvested in federal waters could not be sold in interstate commerce if they failed to meet federal minimum size requirements, but Canadian lobsters could. Someone found selling sub-sized lobsters could, until the amendment, avoid conviction by showing evidence of purchase of the lobster from a jurisdiction, such as Canada, which did not impose the U.S. federal minima.

2.4 In December 1989, Canada advised the United States that the application of a minimum lobster size requirement to Canadian lobster exports to the United States was a GATT-illegal import prohibition.[2]

2.5 The difference of view between the United States and Canadian governments on the application of U.S. minimum lobster size requirements to Canadian exports was not resolved through consultations.

2.6 Canada and the United States, in their exchange of letters, agreed on terms of reference for the Panel. They said that the questions to be considered by the Panel were as follows:

> (1) Is section 307 (1)(J) of the Magnuson Fishery Conservation and Management Act making it unlawful for any person to ship, transport, offer for sale, sell or purchase, in interstate or foreign commerce any whole live lobster of the species Homarus americanus that is smaller than the minimum possession size in effect at the time under the American Lobster Fishery Management Plan inconsistent with the obligations of the United States under Article 407 of the FTA, which incorporates GATT Article XI?

[2] Canada does not challenge the Magnuson Act prohibitions (sections 307(1)(J)(ii) and (iii)) on the marketing of egg-bearing or "scrubbed" lobsters (that is, lobsters bearing evidence of the forcible removal of extruded eggs), the harvesting of such lobsters being also prohibited in Canada.

(2) If the answer to the foregoing question is affirmative, is the measure subject to an exception applicable under Article 1201 of the FTA which incorporates Article XX of the GATT?

It is understood that in agreeing to have the Panel examine the consistency of the Magnuson Act amendment with Article 407, and hence GATT Article XI, the United States is not precluded from arguing that the legislation in question is properly within the terms of, and consistent with, the national treatment provisions of the FTA and the GATT.

Further, pursuant to FTA Article 1807 (5), the United States has requested that, in the event the Panel makes an affirmative determination on issue (1) and a negative determination on issue (2), the Panel in addition present findings based on the Parties' submissions as to the degree of adverse trade effect of the amendment, if any.

3 FACTUAL BACKGROUND

3.1 The applicable species

3.1.1 The U.S. minimum lobster size requirement, which is the subject of this dispute, relates only to the species of crustacean "American lobster".[3]

3.2 The American lobster

3.2.1 The American lobster is widely distributed over the continental shelf of the Western North Atlantic Ocean. Along in-shore waters, the American lobster ranges from Labrador to Virginia and, along the outer continental shelf and slope, it ranges from Georges Bank to North Carolina. The American lobster is only found in Canadian and U.S. waters.

3.2.2 In the United States, there are two major areas of harvest: the in-shore waters of coastal States from Maine to New Jersey out to a depth of 40 to 100 meters and the continental margin from Corsair Canyon to Cape Hatteras (Rhode Island to North Carolina) in depths of 100 to 600 meters. In Canada, there are three major areas of harvest: the Gulf of St. Lawrence along the coasts of New Brunswick and Nova Scotia and around Prince Edward Island (which accounts for 55 percent of Canada's landings), the Gulf of St. Lawrence along the coasts of Quebec, and the Atlantic coasts of Nova Scotia, New Brunswick, and Newfoundland.

3.2.3 Available U.S. statistics indicate that approximately 75 to 85 percent of total U.S. lobster harvest comes from waters under the jurisdiction of the various States, principally Maine with close to 60 percent of all U.S. lobster landings; the remaining 15 percent to 25 percent are harvested in the fisheries conservation zone under

[3]The only other clawed crustacean called "lobster" on international markets is the Homarus gamarus, which is the European lobster.

federal jurisdiction. State laws regulate in-shore catches of lobster up to 3 miles from the coast line ("in-shore harvest") while federal jurisdiction applies to catches in the exclusive economic zone, 3 to 200 miles off-shore ("off-shore lobster harvest").

3.2.4 According to the biologists, the American lobster grows by shedding its external shell, a process called "molting". American lobsters molt about twenty to twenty-five times between hatching and sexual maturity and generally reach U.S. legal, commercial size after five to seven growing seasons, depending on water temperature. Lobster growth occurs only at the molting stage.

3.2.5 Water temperature has a differential effect on the time lobsters will take to attain sexual maturity and reproductive capacity. It may take a lobster up to 10 years to attain sexual maturity in cold waters and only five years in warmer waters, where the lobster molts more frequently. Thus, reproductive maturity will occur at a smaller size in warmer waters.

3.2.6 Water temperature maxima and averages vary from area to area along the U.S. and Canadian coasts. In the Gulf of St. Lawrence region, temperatures are higher than in Nova Scotia waters and much higher than in Gulf of Maine waters. Biological samples show that, at 50 percent maturity, the average lobster size is 76 mm (3 inches) in the warm Gulf of St. Lawrence waters, 92 mm (3 5/8 inches) in the cool oceanic Nova Scotia waters, and 105 mm (4 inches) in the cold Gulf of Maine waters.

3.2.7 The stock structure of American lobsters therefore varies from one harvest region to the other depending on water temperature. There is a view that lobster migrations tend to be local and generally occur laterally between in-shore and off-shore waters due to seasonal variations in water temperature. Mature lobsters having reached reproductive maturity travel an average of 18 kilometers per year while those that have not travel only 7 to 8 kilometers yearly. However, it has been observed that larger lobsters sometimes migrate longer distances than is commonly believed, including across the maritime boundaries between the United States and Canada.

3.3 The industry

3.3.1 The U.S. lobster industry is concentrated in the harvesting and marketing of live lobster. As far as the Canadian catch is concerned, 52 percent goes to the lobster processing industry, which produces frozen, and canned lobster meat, frozen whole lobsters, and frozen lobster tails.

3.3.2 Before 1950, the U.S. lobster fishery remained essentially a shoal-water, coastal trap fishery. Since then, the lobster fishery has expanded to off-shore waters and a new fishery has developed with deep water trap fishery along the continental shelf off Southern New England. Off-shore lobster fishery in the United States takes place mostly from Rhode Island down to North Carolina.

3.3.3 There are two principal types of lobstermen in the United States. In the in-shore fishery, less cash investment is needed and there are lobstermen who fish full time for lobsters, others for whom lobstering is a regular but seasonal part of a diverse fishing enterprise, and finally those who are part-time fishermen with other employment. In the off-shore fishery, the participation is limited to serious, full-time operators who carry on other fishery activities at the same time. In the off-shore fishery, lobstering requires major investment and the use of expensive vessels.

3.3.4 Both the U.S. and the Canadian lobster industry have been growing rapidly in recent years, mostly in the harvesting sector.[4] Canada's growth in harvesting has been accompanied by some decrease in fishing "input." From 1950 to 1980, total landing inventories in the United States increased by about 40 percent.

3.3.5 In 1988, total landings of American lobster in major ports in the United States were 14,462 metric tonnes ("tonnes"), valued at US$95.4 million. (In information submitted subsequent to the hearings, Canada stated that more complete U.S.

[4]Canada declares that the processed lobster industry is rather static and is virtually a no-growth market.

data showed substantially higher landings for all of the United States.) Maine has been the leading lobster-producing State with about half the volume of total landings.

3.3.6 By comparison, overall Canadian lobster landings were approximately 40,392 tonnes in 1988. Of this quantity, 48 percent or 19,619 tonnes were sold in the live lobster market, 14,528 of which were exported to the United States.

3.3.7 U.S. lobsters are consumed domestically. According to 1988 figures, the United States exports only about 2,500 tonnes of lobster per year (live weight),[5] valued at US$23.5 million. However, U.S. imports account for 45 to 50 percent of total domestic consumption of lobsters in the United States.

3.3.8 Most Canadian lobster is exported to the United States, where 74 percent (by volume) of Canadian live lobster is sold.[6] In 1988, out of 80 million pounds of lobster harvested in Canada, 56 million were exported to the United States live, canned, or frozen. The live lobster exports totalled almost 32 million pounds (14,528 tonnes) with a total export value of C$192 million. However, according to preliminary U.S. data, Canadian exports of live lobsters to the United States declined by about 2,000 tonnes in 1989.

3.3.9 It is estimated by Canada and the United States that the proportion of total lobster landings in Canada which are below the U.S. federal minimum lobster size requirements will be between 8.0 percent and 8.4 percent in 1990, 12.1 percent and 12.4 percent in 1991, and 16.1 percent and 16.9 percent in 1992. However, Canada asserts that, since all lobsters within the range of 3 3/16 inches to 3 1/4 inches (81.0 mm to 82.5 mm) are sold live, the proportion of live lobsters legally harvested from Canadian waters which do not meet the U.S. federal minimum size requirement and which would have

[5]These figures include all lobsters and not only American lobsters.

[6]Only 10.7 percent of Canadian lobster landings were consumed unprocessed in Canada in 1988.

entered the live market in the United States will reach 18 percent in 1990, 26 percent in 1991, and 34 percent in 1992.

3.4 Processing and marketing

3.4.1 Approximately 87 percent of the U.S. domestic catch is marketed live or freshly cooked at the point of final sale. The remaining portion is marketed as fresh or frozen meat. Since lobster landings are seasonal and do not necessarily coincide with market demand, the lobster industry has developed holding capacity mechanisms to supply the market efficiently in live lobsters. Marketing is done through five types of pounds, which are used for extended storage of live lobsters and serve to level the marketing periods of slack supply or demand. These are tidal pounds, crates or cars, inside pounds, tank houses, and dry-land pounds.

3.4.2 The distribution chain for live American lobster consists of several steps. First, the lobsterman sells his catch to a dealer or a buyer. Secondly, the dealer then sells his stocks to a wholesaler, unless the dealer is a wholesaler himself. Finally, wholesalers and brokers market their stocks either to retail outlets or to restaurants.

3.4.3 As far as Canadian exports to the United States are concerned, the live lobsters shipped by air, which are stored in tank houses or dry-land pounds, are graded by size and are "culled" before shipping. Canadian lobsters shipped by land to the United States are held in tidal pounds, crates, or cars and inside pounds. According to Canada, the typical Canadian lobster shipment to the United States is sorted in Canada by size to meet prescribed U.S. buyer demands; according to the United States, Canada typically sends lobster shipments in unsorted 100-pound crates.

3.5 Legislative background

3.5.1 There has been intensive lobster harvesting in recent years and a large increase in the fishing effort. It was estimated in 1983 that only a tiny fraction (from 1 to 6 percent) of U.S. lobsters in the most-exploited areas avoided capture before reaching

reproductive capacity. Scientists in both Canada and the United States have voiced alarm that this small percentage might be insufficient to avoid a catastrophic stock collapse although Canadian scientists believe Canadian stocks are now healthy.

3.5.2 The current prevailing characteristic of the U.S. lobster fishery in all in-shore waters is therefore heavy dependence on newly "recruited" lobsters; 80 to 90 percent of the catch in the more heavily exploited areas in the Gulf of Maine and in Southern New England is composed of the new recruiting year class.

3.5.3 In view of this, the United States decided to adopt a range of conservation and management measures regarding its lobster industry.

3.5.4 In the 1980s the U.S. federal government, in coordination with the major lobster-producing States and the recommendation of the New England Fishery Management Council ("NEFMC"), began looking for measures to increase the minimum harvest size for lobsters in order to safeguard the U.S. lobster population.

3.5.5 At the federal level, the United States first introduced a federal lobster size requirement with the adoption in 1985 of the American Lobster Fishery Regulations ("Federal Regulations") under the Magnuson Act. The federal minimum size requirement, set at 3 3/16 inches (81.0 mm), was established on the basis of the 1983 American Lobster Fishery Management Plan prepared by NEFMC.

3.5.6 Among the other measures proposed by NEFMC in 1983 to protect the lobster population, and included in the Federal Regulations since, were:

. A schedule of further increases in the minimum lobster harvesting size;

. A total ban on marketing egg-bearing lobsters;

. A total ban on marketing "scrubbed" lobsters, which are lobsters with visible evidence of eggs having been forcibly removed;

. A total ban on marketing "V-notched" lobsters, that is, lobsters bearing a V-shaped notch on the right flipper next to the middle flipper or any lobster which is mutilated in a manner which could obliterate such a mark (lobster fishermen in Maine voluntarily V-notch egg-bearing lobsters and return them to the sea and are prohibited from harvesting V-notched lobsters or from obliterating their V-notches);

. Changes in trap construction.[7]

3.5.7 In 1987, the U.S. Commerce Department amended the Federal Regulations to incorporate NEFMC's 1987 recommendations to increase the 3 3/16 inches federal minimum lobster size requirement by 1/8 inch (3.2 mm) in four stages. This four-step, five-year increase is as follows:

Jan. 1, 1988-Dec. 31, 1988: 3 7/32 inches (81.8 mm)

Jan. 1, 1989-Dec. 31, 1990: 3 1/4 inches (82.5 mm)

Jan. 1, 1991-Dec. 31, 1991: 3 9/32 inches (83.3 mm)

Jan. 1, 1992 and onward: 3 5/16 inches (84.1 mm)

[7]The Canadian regulatory system, which is a purely federal matter, also includes a range of management measures such as minimum lobster size requirements varying from 2 1/2 inches to 3 3/16 inches (63.5 to 81.0 mm) to reflect regional differences in growth rates related to temperature cycles, licenses for fishermen and boats, fishing seasons, restrictions on trap numbers and size, and a total ban on possession of egg-bearing and "scrubbed" lobsters.

3.5.8 The amended Federal Regulations prohibited the possession and marketing of sub-sized lobsters harvested in off-shore waters, which are subject to federal jurisdiction. The Federal Regulations also required any fisherman holding a state lobster permit endorsed for lobstering in federal waters to observe the more restrictive federal requirements for minimum lobster size.

3.5.9 The 1987 amendment to the Federal Regulations presumed lobsters to have been harvested in U.S. federal waters or in violation of more liberal state laws; however, this presumption could be rebutted by the dealer with evidence that the lobsters were harvested either in state waters by a vessel not holding a federal permit or outside U.S. jurisdiction, that is, in Canada. A valid shipping certificate or bill of lading would indicate whether the harvested lobsters were taken in state or Canadian waters.

3.5.10 According to a representative of both the State of Maine and the NEFMC, the NEFMC had wanted the 1987 Federal Regulations amendments to impose a flat ban on possession of all sub-sized lobsters whatever their origin. However, because the Commerce Department advised it could not impose a minimum size requirement outside its federal jurisdiction, NEFMC's formal request stopped short of asking for a total prohibition.[8]

3.5.11 Concurrently with the adoption and amendments of the Federal Regulations, the major lobster-producing states have also enacted measures applicable to lobsters caught in coastal waters, including minimum lobster size requirements and other bans on the marketing of certain categories of lobsters.

3.5.12 Maine, the largest lobster-producing state, led the effort to raise the minimum lobster size and adopted in 1986 a four-step, five-year increase in minimum lobster size identical to the 1987 Federal Regulations amendments. Other major lobster-

[8]In a letter dated November 1987 filed by Canada at the oral hearing, the U.S. Department of Commerce assured Canada that the 1987 amendment to the Federal Regulations would not impede the importation of lobster legally harvested from Canadian waters.

producing states[9] followed Maine and increased their minimum lobster size requirements, previously set at 3 3/16 inches, sometimes with a one-year lag behind Maine and the federal lobster plan. Therefore, following the 1987 amendments to the Federal Regulations, almost all jurisdictions in the United States had introduced a possession and marketing ban on sub-sized lobsters. By early 1988, only about 3 percent of lobsters harvested in state and federal waters escaped the application of the federal minimum lobster size requirement, mainly in New Hampshire and New Jersey.

3.5.13 In 1987, NEFMC asked for the elimination of the rebuttable presumption available to state-harvested and Canadian lobsters and requested prohibition in the U.S. market of any sub-sized lobster, whatever its origin. In 1987, NEFMC did not obtain these objectives. In 1989, it asked for the prohibition and considers that it obtained it (with the qualified exemption of some state-harvested lobsters).

3.5.14 The 1989 amendment therefore extended the prohibition on the marketing of sub-sized lobsters to lobsters harvested in foreign countries and to lobsters harvested in states having minimum lobster size requirements lower than the Federal Regulations and either marketed in interstate commerce or harvested by fishermen with federal permits and did away with the rebuttability of the presumption that the lobster was illegally harvested. The 1989 amendment only applies to whole live lobsters and excludes frozen and canned lobsters, because the United States says, these are clearly labelled and readily identifiable according to origin.

3.5.15 The question for this Panel is whether the 1989 amendment constitutes a prohibition or restriction on the importation of Canadian lobster in conflict with U.S. obligations under GATT Article XI.

[9]Rhode Island, Maine, and Massachusetts account for 90 percent of U.S. lobster harvesting.

3.5.16 The legislative history of the 1989 amendment to the Magnuson Act indicates that there were three underlying objectives to extending the prohibition to imported sub-sized lobsters.

3.5.17 First, the 1989 amendment was expected to facilitate the enforcement and management of the federal program. According to U.S. enforcement officials, it was hard to catch violators under the Federal Regulations that went into effect in 1987. Unscrupulous lobster dealers might obtain fraudulent documentation to show Canadian origin of the lobsters or use, time after time, the same bills of lading or certificates attesting to the Canadian origin of sub-sized lobsters. Between 1987 and 1989 there were relatively few convictions involving falsified documents or fraudulent re-use of originally legitimate documents.[10]

3.5.18 Secondly, the 1989 amendment was expected to strengthen the conservation of U.S. lobster stocks by removing the lure of the already illegal market for sub-sized U.S. lobsters.

3.5.19 Thirdly, the 1989 amendment was expected to redress a perception of unfairness in the application of the federal size minima only to U.S. lobsters; there was among many American lobstermen a sense of being forced to comply with minimum lobster size requirements which were not required of Canadian lobstermen, a situation perceived as a competitive imbalance.

3.5.20 Though the 1989 amendment could, as its terms make clear, be enforced at any point within the United States, it is the intention of the American authorities that it will be enforced mainly at the dealer level while only limited spotchecks will occur directly at the border. Though U.S. Customs Service has no explicit mandate to enforce the 1989 amendment, the U.S. Department of Commerce could request the

[10] One U.S. witness stated at the Panel's hearing that, for the field office in which he was employed, there were a maximum of three convictions since February 1987 (Transcript, vol. I, pp. 178-179).

Customs Service's cooperation and Customs would have the discretion to offer that cooperation.

4 MAIN ARGUMENTS OF THE PARTIES

4.1 General

4.1.1 Canada

4.1.1.1 Canada requested the Panel to find that the 1989 amendment to section 307(1)(J) of the United States Magnuson Act ("1989 amendment") violates, FTA Article 407, which incorporates GATT Article X1:1. In Canada's view, this law constitutes a restriction on importation in violation of Article XI.

4.1.1.2 Canada argued that none of the exceptions allowed by the GATT are applicable. Specifically, Canada argued that the 1989 amendment is not a conservation measure falling under the exception of GATT Article XX(g), but rather is a trade restriction which the United States is attempting to disguise as a conservation measure.[11]

4.1.1.3 In addition, Canada disputed the United States' contention that Article III of the GATT applies to the measure. Canada argued that Article III constitutes a means to protect imported goods from discrimination on the domestic market, but not a means to block their importation[12]. Using Article III in the fashion proposed by the United States would, in Canada's view, render Articles XI and XX practically meaningless.

4.1.1.4 As a result of United States' violation, Canada claimed the loss of a lobster market worth approximately $127 million over the next three years.

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[11]Opening statement of Canada by Serge April, p. 4; Supplemental Submission by Canada, 13 March 1990, para. 13.

[12]Opening statement of Canada by Serge April, p. 6.

4.1.2 United States

4.1.2.1 The United States argued that Canada bears the burden of proving that the 1989 amendment is a trade restriction in violation of FTA Article 407 and GATT Article XI. It was the U.S. position that Canada had not met this burden because the measure falls, instead, under GATT Article III. Because the United States and Canadian lobsters are subjected to identical minimum carapace length requirements, the United States contended that the law represents an "internal measure", subject to Article III, rather than a restriction applied solely to importation, subject to Article XI.[13]

4.1.2.2 According to the United States, if the Panel finds that the United States measure properly falls under Article III, the Panel's work is finished because Canada has elected to base its challenge solely on Article XI. However, in case the Panel were to find the 1989 amendment in violation of Article XI, as Canada alleges, the United States argued that the amendment falls within the exception of Article XX(g).[14]

4.1.2.3 Finally, in its discussion of trade effect, the United States pointed out that because no statistics are kept on percentages of lobsters of various sizes shipped to the United States from Canada, any calculation would be speculative at best. The United States also contended that the Canadian estimates of the trade effect are excessive and that the question of trade effect cannot be answered without consideration of options available in third-country markets and possible long-term benefits to Canada of increasing the minimum carapace length. Considering such options, the United States estimated that the 1989 amendment is unlikely to have more than a very minor adverse trade effect in the short term and is likely to be of net commercial benefit to Canada in the medium and long term.[15]

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[13]United States Submission of 21 February 1990, p. 9 ("U.S. Submission").

[14]United States Written Summary of Oral Arguments on Article XX(g) and Trade Effects, pp. 1-2.

[15]U.S. Submission, p. 14.

4.2 Article XI

4.2.1 Canada

4.2.1.1 Canada argued that the U.S. measures were measures on importation contrary to GATT Article XI:1 and that the burden of proof then fell on the United States to demonstrate that it met the requirements of any applicable exceptions. In Canada's view, the United States has not met its burden of justifying the 1989 amendment under Article XX (g).

4.2.1.2 Canada argued that the 1989 amendment is a trade restriction within the meaning of FTA Article 407, which incorporates GATT Article XI:1. Article XI:1 places an absolute ban on all measures that prohibit or restrict the importation of products. The 1989 amendment, according to Canada, effectively restricts the import of Canadian lobster at the border in violation of Article XI:1.[16]

4.2.1.3 Canada argued that the 1989 amendment is a de jure breach of Article XI. Canada pointed out that the amendment specifically prohibits the transportation and sale of small lobsters in "foreign commerce." Canada alone exports this species of lobster to the United States, and thus only Canada's exports are affected. Canada claimed that the clear purpose of the 1989 amendment is to prohibit the importation of live small Canadian lobsters. To support this argument, Canada cited Senator Cohen's statement as he introduced the amendment: "Current Federal law only prohibits the harvest of undersized lobsters in the U.S. waters. It does not prohibit their importation."[17]

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[16]Canadian submission of 31 January 1990 ("Canadian Submission"), p. 5.

[17]Canadian Presentation at the Oral Hearing, p. 13 (citing H.R. 1668, 101st Cong., 2nd Sess., 135 Cong. Rec., S16,136 (1989)). See also the letter, dated 6 November 1987, from Richard Roe, the Director of the Northeast Region of the United States National Marine Fisheries Service, to Blair G. Hankey, Counsellor, Canadian Embassy, same source, Appendix F. In the letter, Mr. Roe informs Mr. Hanley that the "nation-wide prohibition or non-conforming lobsters will not impede the importation of lobsters legally harvested from Canadian waters into the United States".

4.2.1.4 In addition, Canada argued that the 1989 amendment constitutes a de facto violation of the GATT. Canada stated that prior to implementation of the amendment, the United States imposed no federal size limits on the importation of Canadian lobster as long as it could be shown by bills of lading that the lobster were caught legally in Canada. The 1989 amendment completely prohibits live small lobsters from entering the United States. Furthermore, because interstate trade of small lobsters is understood by Canada to be insignificant in the light of the NEFMC's estimation,[18] and intra-state trade in small lobsters is exempt from the 1989 amendment, Canada argued that the 1989 amendment is, in fact, directed at Canadian imports in violation of Article XI. Moreover, Canada argued, it is unfair to restrict Canadian live lobster because, for environmental reasons, those lobster mature at an earlier age and enjoy a comparative advantage over U.S. lobster.[19]

4.2.1.5 Canada contended that the Article XI ban on import restrictions has been interpreted broadly by FTA and GATT Panels. It saw four examples. In the Tomato Concentrate case, an EEC measure setting a minimum price for imported products was held an import restriction in violation of Article XI.[20] The Japan - Trade in Semi-Conductors case held a complex administrative structure inconsistent with Article XI:1, on the basis that the complex measures exhibited the "rationale as well as the essential elements of a formal system of export control."[21] The Liquor Boards Panel found internal practices concerning listing/delisting requirements and availability of points of sale of goods to be "import restrictions" in violation of Article XI:1.[22] Finally, the

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[18]Same source, p. 13 (citing Annex D of the U.S. Submission of February 21, 1990, Letter of November 9 from James Warren, Chairman, New England Fisheries Management Council to Senator George Mitchell).

[19]Opening statement of Canada by Serge April, p. 5.

[20]EEC - Programme of Minimum Import Prices (the "Tomato Concentrate" case), L/4687, 4 October, 1978.

[21]Japan - Trade in Semi-Conductors L/6309, 24 March 1988, paras. 104-106.

[22]Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing agencies, L/6304, 5 February, 1988.

FTA Panel in the Salmon and Herring case stated that interpretations of Article XI should be broad enough so that the Article accomplishes its basic purpose.[23]

4.2.1.6 In Canada's view, the broad scope of Article XI makes it fundamental in the operation of the Free Trade Agreement between Canada and the United States. Canada claimed that the intention of the drafters of GATT was to reduce tariff restrictions and "ensure that governments did not erect other non-tariff impediments in their place to protect domestic industries."[24] Since 1947, Canada has been entitled to a U.S. tariff binding of zero in the case of lobster.[25] Because the 1989 amendment restricts foreign commerce, and Canadian lobster exports to the United States have been adversely affected, Canada argued that the amendment is prohibited by Article XI.

4.2.2 United States

4.2.2.1 The United States said that under GATT precedent Canada, as the moving party in the dispute, had the burden of proving that the 1989 amendment was inconsistent with Article XI. In the view of the United States, because the 1989 amendment does not fall under Article XI, no exception under Article XX need be invoked. The United States argued that Article III rather than Article XI governs laws like the 1989 amendment, which is an "internal measure" requiring identical minimum carapace lengths for both imported and domestic lobsters.

4.2.2.2 The United States offered three reasons in support of its argument. First, according to the United States, Article XI does not cover measures applying to both imports and like domestic products. Article XI applies, instead, to "non-

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[23]Canadian submission, p. 6 (citing In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the FTA Panel, October 16, 1988, para. 6.07).

[24]Canadian Presentation at the Oral Hearing, p. 14.

[25]Same source, p. 14.

tariff `border measures' applying exclusively to imports."[26] The fact that the measure may be applied at the border is irrelevant, as shown by the interpretative note to Article III. Indeed, the United States argued that the inclusion of the term of art "in interstate and foreign commerce" reflects the intent of drafters to invoke the Commerce Clause powers of Congress rather than an attempt to direct the measure toward trade protection.[27]

4.2.2.3 Second, the United States argued that application of Article XI to this case would create an undesirable precedent. According to the United States, Article XI has never been applied by any GATT Panel to a measure covering both imports and domestic products. The United States asserted that the cases cited by Canada can be distinguished from the present case; the measures in the Tomato Concentrate and Liquor Boards cases[28] applied exclusively to imports, and the Japan Semi-Conductors[29] case dealt with Japanese government measures applying to exports. None of the cases suggests that Article XI covers measures applying equally to imports and domestic products. Moreover, the United States argued that by challenging the 1989 amendment under Article XI, Canada was implicitly asking the Panel to bar governments from imposing equal restrictions on domestic and foreign products whenever doing so would have the effect of restricting imports.

4.2.2.4 Finally, the United States contended that the 1989 amendment is subject to Article III and therefore cannot fall under the provisions of Article XI because the two Articles are mutually exclusive.

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[26]U.S. Submission, p. 10 (emphasis in original).

[27]Transcript of Proceedings, Volume I (March 5, 1990), pp. 197-198; see also U.S. Submission, p. 11.

[28]EEC - Programme of Minimum Import Prices (The Tomato Concentrate case), L/4687, 4 October, 1978. Import, Distribution and Sale of Alcoholic drinks by Canadian Provincial Marketing Agencies, L/6304, 5 February, 1988.

[29]Japan - Trade in Semi-Conductors L/6309, 24 March 1988.

4.3 Article III

4.3.1 United States

4.3.1.1 As noted above, the United States argued that Article III rather than Article XI is the GATT provision under which the United States measures fall. Based on the thesis that Articles XI and III cannot apply to the same measure, and on Canada's limitation of the terms of reference to Article XI, the United States contended that a determination favoring application of Article III would end the Panel's consideration of the case.

4.3.1.2 The United States pointed to GATT interpretative note *Ad* Article III to support its argument that the measures introduced by the 1989 amendment are internal even though they may be applied at the time or point of importation. *Ad* Article III makes clear that a measure affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products may be applied to an imported product at the time of importation without affecting its status as an internal measure under Article III. The United States contended that the literal language of the interpretative note makes it obvious that Article III, rather than Article XI, covers measures like the 1989 amendment, which applies to both imported and domestic products. Whether the measure is applied at the border or after the product has crossed the border is irrelevant. All countries have internal laws that can be enforced at the border.[30]

4.3.1.3 Canada's challenge to the 1989 amendment, according to the United States, implicitly asks this Panel to prohibit restrictions affecting domestic and foreign products equally if those restrictions have the effect of restricting imports. However, in the United States' view, uniform treatment is exactly what the GATT and FTA

[30]U.S. Submission, p. 11. The United States argued that Canada had, in fact, admitted the relevance of Article III by arguing that restriction of Canadian lobster imports was "unfair" because Canada enjoyed a comparative advantage (Transcript of Proceedings, Vol. I, 5 March 1990, p. 31-32).

promote.[31] The United States argued that to prohibit the application to imports of measures that do not discriminate between domestic and imported goods would be counter to the GATT and the FTA, since such a prohibition would require treatment favorable to imports.

4.3.1.4 Because the terms of reference are limited to consideration of Article XI, the United States did not address in depth the consistency of the United States measures with Article III. It was nonetheless the United States' position that the 1989 amendment is plainly nondiscriminatory and, thus, consistent with Article III's national treatment requirement.

4.3.2 Canada

4.3.2.1 Canada claimed that if Article III is relevant to this case at all, the United States was misapplying it. Canada claimed that "the `object and purpose' of Article III [was] the avoidance of protectionist internal taxes or administrative measures that discriminate against imported products."[32] Canada noted a distinction in Articles III and XI based on the use of the words "imported" and "importation," respectively. In Canada's view, Article III's use of "imported" covers products which can enter the country but may be required to comply with national regulations, such as labelling. Article XI's use of "importation" covers products that are in the process of being brought in, but are not yet in the importing country. *Ad* Article III also refers to "imported" products. Canada contended that the use of the word "imported" in *Ad* Article III means that the products concerned are ones that will be allowed into the country. Canada distinguished the current case from the situation contemplated by Article III and the interpretative note, pointing out that live small Canadian lobsters are prohibited entry into the United States.

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[31]U.S. Submission, p. 12; Transcript, Vol. I, pp. 235 - 236, 5 March 1990.

[32]Canadian Presentation at the Oral Hearing, March 5, 1990, p. 20, citing Article 31 of the Vienna Convention on the Law of Treaties for the proposition that Article III must be interpreted in good faith, according ordinary meaning to the terms in light of its object and purpose.

In Canada's view, "[t]hese lobsters can in no way be considered `an imported product' subject to the terms of Article III."[33]

4.3.2.2 Canada also argued that the drafting history and cases make clear the distinct functions of Articles III and XI. As noted by the United Kingdom delegate at the London Conference:

> We need to make sure that internal taxation cannot be so manipulated as to evade the intentions and bindings of . . . tariff rates. We need also to make sure that internal regulation cannot be so manipulated as to circumvent the intentions of the provisions which we are about to suggest in the matter of quotas and quantitative regulation [GATT Article XI].[34]

4.3.2.3 Canada cited the Liquor Boards case as an example of application of Article XI to a measure covering both imports and domestic products. According to Canada, the Panel in that case examined both discriminatory internal taxes or other charges, and other restrictions covering point of sale and listing requirements. Even though these measures applied internally, the Liquor Boards Panel ruled that they were import measures inconsistent with Article XI:1.

4.3.2.4 Canada compared the measures implemented by the 1989 amendment to those examined by the Panel in Canada -Administration of the Foreign Investment Review Act (FIRA)[35] case. The FIRA Panel stated that the GATT "distinguishes between measures affecting the `importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III".[36] Noting

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[33]Same source, p. 21.

[34]Canadian Presentation at the Oral Hearing, p. 21 (quoting from Preparatory Committee of the International Conference on Trade and Employment, U.N. Economic and Social Council, EPCT/C.II/PV/10, 19 November 1946) (editorial changes made by the Canadian Presentation).

[35]Canada - Administration of the Foreign Investment Review Act, L/5504, 25 July 1983.

[36]Same source, para. 5.14

that purchase undertakings do not prevent importation as such, the Panel "reached the conclusion that they are not inconsistent with Article XI:1."[37] Because the 1989 amendment in effect prevents the importation of goods, Canada argued that it acts as an import restriction falling under Article XI rather than Article III.

4.3.2.5 Although Canada maintained that the U.S. measuress are governed by Article XI, it nonetheless argued that the application of the 1989 amendment and state laws deny Canada national treatment in violation of Article III:4. As an example of alleged discrimination, Canada said that the 1989 amendment does not apply to intra-state trade in the United States. New Jersey and Delaware, for instance, have shorter carapace length minimums than the federal limit. Canadian lobsters of the same size are nevertheless banned from entering the United States.

4.4 Article XX

4.4.1 United States

4.4.1.1 As mentioned above, the United States denied that it had the burden of proving that an exception to Article XI was applicable, since the 1989 amendment is fully consistent with GATT Article III. In the United States' view, considering the applicability of Article XX was unnecessary. However, the United States contended that if the Panel were to hold the amendment violative of Article XI, the Panel should find Article XX(g) applicable.

4.4.1.2 According to the United States, Article XX(g), which excepts government measures related to conservation of exhaustible natural resources, establishes a balancing test to determine whether "a measure `relates to conservation' or is a `disguised restriction on international trade.'"[38] The United States cited the FTA Panel

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[37]Same source.

[38]United States Written Summary of Oral Arguments on Article XX(g) and Trade Effects, p. 1.

report in the Herring and Salmon case for the application of Article XX(g) in a situation similar to the present one. As specified in the report, a measure must satisfy four conditions in order to qualify for an Article XX(g) exemption:

1) The measure must relate to an exhaustible natural resource;

2) Domestic production or consumption of the product must be limited;

3) The measure may not create arbitrary or unjustifiable discrimination between foreign countries; and

4) The measure must be primarily aimed at conservation.[39]

The United States argued that the amendment meets all the conditions. First, lobsters are a natural resource that can be exhausted by overfishing. Second, United States domestic production of lobsters is limited by a series of state and federal measures. Third, the amendment applies equally to foreign and domestic lobsters. Finally, the amendment is a law enforcement measure designed to prevent harvesting of small lobsters in the United States.

4.4.1.3 The Salmon and Herring Panel constructed two tests to determine whether a measure is "primarily aimed at conservation". First, the Panel sought to determine whether the measure provided real conservation benefits and, in particular, whether a genuine reason existed for choosing the actual measure or whether other measures might have accomplished the same objective. Second, the Panel sought to determine whether the measure would have been adopted had the nationals of the country adopting the measure been forced to bear its costs.

[39]Same source, p. 2 (citing In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the FTA Panel, 16 October 1989 at para. 7.02) (emphasis in the United States Written Summary).

4.4.1.4 The United States argued that the 1989 amendment provides genuine conservation benefits and, therefore, meets the first test. To support this argument, the United States claimed that the amendment eliminates the harvest of sub-sized lobsters in the American fishery by taking away any financial incentive at the market place. In addition, the United States argued that the amendment was carefully drafted to avoid undue trade restrictions, while serving as an important conservation measure. The United States contended that no practicable alternative to the measures implemented by the amendment exists, noting that the rebuttable presumption itself had been tried but was considered unsatisfactory by U.S. enforcement authorities and arguing that other measures, such as increased shore patrols and better documentation of Canadian shipments, would not necessarily address U.S. enforcement concerns.

4.4.1.5 In the United States view, the 1989 amendment meets the second test because United States nationals have been bearing the costs of the minimum size requirements alone since 1988. In fact, the United States stated that the costs to United States firms are higher than the costs to their Canadian counterparts because United States firms may not sell sub-sized lobsters anywhere in the world, while third-country markets are open to small Canadian lobsters.

4.4.2 Canada

4.4.2.1 Canada argued that exceptions to GATT obligations must be narrowly construed,[40] and that the United States had not met its burden of proving that the 1989 amendment falls within Article XX(g). Canada contended that the 1989 amendment is a disguised restriction on international trade, adopted in response to the perception in the U.S. Congress that American lobstermen were at a competitive disadvantage.[41] The United States response to political concerns resulted in prohibition of importation of Canadian small live lobster.

4.4.2.2 Although Canada agreed that lobsters are an exhaustible natural resource, Canada nonetheless maintained that the amendment is not primarily aimed at conservation. Canada stated that the 1989 amendment was not directed at the catch in United States waters and did nothing to add to the conservation measure already in place. Because the 1989 amendment bans only Canadian lobsters, Canada argued it was not directed at the catch of lobsters in United States waters.

4.4.2.3 Canada noted further that while the 1989 amendment makes possession of live small Canadian lobsters illegal, it does not affect lobster in United States intra-state trade. Because no direct relation exists between conservation of lobster in U.S. waters and the 1989 amendment, Canada found the measure not "primarily aimed" at conservation.

4.4.2.4 Canada responded to the United States' argument that the 1989 amendment is necessary for enforcement of the United States conservation scheme by pointing out that lobster imports from Canada arrive by road or air, not where United States lobster are brought to shore. In Canada's view, the 1989 amendment deals with the

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[40]Canadian Presentation at the Oral Hearing, p. 16 (citing Canada - Import Restrictions on Ice Cream and Yoghurt, L/6568, 27 September 1989, para. 59; Japan - Restrictions on Imports of Certain Agricultural Products, L/6253, 18 November 1987, para. 5.1.3.7; and EEC Restrictions on Imports of Apples, L/6513, 9 June 1989, para. 5.13).

[41]Same source, p. 17.

enforcement problem in the most trade restrictive way possible and places the burden of the United States' enforcement efforts on Canada. Canada claimed that the clear meaning of Article XX is that GATT exceptions "cannot be used to justify the most trade restrictive approach to deal with a domestic situation."[42]

4.4.2.5 Finally, Canada argued that no effective restrictions exist on the production of lobster in the United States. Canada pointed to the lack of uniform size restrictions among the individual states and the federal government. Because state laws governing the catch of lobster within the 3-mile territorial sea can be changed regardless of federal law, Canada contended that the United States does not impose effective conservation measures concerning lobster.

4.5 Trade effects

4.5.1 Canada

4.5.1.1 Based on an independent assessment prepared by a Canadian accounting and management firm, Canada argued that implementation of the 1989 amendment over the next three years will cost Canada's lobstermen $127 million.[43] This calculation was based on estimates of the volume and value of lobsters that would be harvested in Canada in 1990-92, based on the average growth in the Canadian harvest from 1986-88; the quantity and value of Canadian lobsters available for the live market in 1990-92, also based on the percentage destined for the live market in 1986-88; the quantity and value of live lobsters expected to be exported to the United States in 1990-92 based on the base period; and an estimate of the percentage of the live catch available for fresh consumption that falls below the United States minimum size limits for 1990-92.

[42]Same source, p. 19 (citing United States - Section 337 of the Tariff Act, L/6439, 16 January 1989, para. 5.26).

[43]Same source, p. 26.

4.5.1.2 Canada argued that trade effects could be even greater than $127 million, as the 1989 amendment may cause an increase in Canadian lobster prices to cover extra culling for the United States' market. Increased price, in turn, might reduce the export market. Additionally, any increased supply of small fresh live lobsters could depress the price of lobster in Canada and in third countries.

4.5.2 United States

4.5.2.1 The United States claimed that the Canadian estimate of trade effect is too high because it is based on the notion that small lobsters will continue to be harvested and simply discarded. Using that assumption, the United States claimed that a more realistic figure would lie between C$11.1 million and C$23.7 million annually.

4.5.2.2 More importantly, according to the United States, the 1989 amendment presents Canadian firms with viable options for marketing lobster. Specifically, the United States listed four options for Canadian firms in responding to the amendment:

a) Allow the small lobsters to remain in the water to increase in size and reproduce;

b) Freeze, cook, or can small lobsters and sell them in the United States, Canada, or abroad;

c) Sell small lobsters in Europe or Japan:

d) Market small lobsters in some combination of b) and c).

The United States believed that should Canada choose option "a", the 1989 amendment is unlikely to have more than a very minor adverse trade effect in the short term and is likely to be of net commercial benefit to Canada in the medium and long term. Canada would endure some short-term losses, but in 10 years, "the . . . benefits could be C$3.1 million

per year". Should Canada choose options "b", "c", or a combination, the United States expected the net losses over the first three years to be C$4.7 million annually, and the net losses in the long term (30 years) not to exceed C$5.7 million annually.[44] The United States argued that without consideration of these options, the trade effects, if any, imposed on Canada by the 1989 amendment cannot be determined.

4.6 Remedies

4.6.1 Canada acknowledged the difficulty its calculations of trade effects present, but argued that GATT and FTA preference is for withdrawal of the offending measure. For support, Canada cited the recent Superfund case in which a GATT Panel "emphasized that the benefits protected were not expectations on trade volumes, but expectations regarding certain competitive conditions".[45] In addition, Canada pointed out that Article 1807:8 of the FTA provides:

> Whenever possible, the resolution shall be non-implementation or removal of a measure not conforming with this agreement . . . or failing such a resolution, compensation.[46]

For these reasons, Canada asked that the 1989 amendment be withdrawn.

4.6.2 The United States requested that the Panel make no specific recommendations regarding ways to achieve conservation results, but rather rule on the specific issue at hand. If the Panel finds that there is no violation of Article XI, such a finding would sustain the United States' position. If the Panel should rule otherwise, the

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[44]United States Written Summary of Oral Arguments on Article XX(g) and Trade Effects, p. 16-17.

[45]Same source (citing United States, Taxes on Petroleum and Certain Imported Substances, L/6175, June 1987); see also same source, p. 25, n. 45 and accompanying text.

[46]Submission by Canada, 31 January 1990, p. 7 (deletions made in Canadian presentation). Canada stated: "A decision by the Panel that the United States must remove the measure is the correct resolution of this dispute."

United States requested that the Panel simply state that the 1989 amendment is in violation of Article XI, that it is not saved by Article XX, and that the trade effects are of a certain amount. The United States requested that the Panel not suggest any kind of alternative regime that might be applicable for the United States.[47]

[47]Transcript of Proceedings, Vol. I at 231, 5 March 1990.

5 WHAT IS NOT COVERED

5.1 Certain aspects of the Magnuson Act, as well as particular aspects of the FTA disputes settlement procedures were not before the Panel. These limitations were set by the Parties in formulating the terms of reference for the Panel and were further noted by the Parties during the proceedings.

5.2 The terms of reference confined the Panel's task to reporting on the question of the applicability or nonapplicability of FTA Article 407 and GATT Article XI to the Magnuson Act, as amended in 1989, and, in the event of certain findings, on the related questions of the applicability of the GATT exception in Article XX (g) and of possible trade effects. As confirmed during the proceedings, the Panel's assignment did not call for recommendations relating further to the possible resolution of the dispute.

5.3 Also, in any analysis the Panel was to give to the applicability of Article III, it was not to proceed to a subsequent determination of the possible consistency or inconsistency of the U.S. measures with the "national treatment" requirements of Article III.

5.4 Finally, the Panel's consideration also excluded consideration of the laws and regulations of individual states regarding the marketing of lobsters under stipulated size, as well as the treatment of egg-bearing or "scrubbed" lobsters.

6 CONTRASTING VIEWS ON THE POSSIBLE APPLICABILITY OF ARTICLE XI

6.1 The two Parties had directly opposing views on the applicability of Article XI and Article III.

6.1.1 Canada based its case on Article XI, asserting that the U.S. measures were inconsistent with U.S. obligations under that Article. It said that Article III was irrelevant. The United States said that Article XI was irrelevant and said that the measures were of a type that would come under Article III. It went on to say that it was not proceeding further to argue that, as internal measures subject to Article III, the measures were in conformity with the "national treatment standard" of that Article, although it believed they were in conformity with that rule.

6.1.2 Canada argued that the U.S. measures were restrictions on importation, that is, that they were in form or in effect measures prohibiting the entry of sub-sized Canadian lobsters into the United States and therefore came under the ban in Article XI against quantitative restrictions ("QRs") applied at the border. Canada argued that the measures were not internal measures under Article III, either because they were applied at the border or had the same effect as measures applied at the border. In contrast, the United States argued that the measures did not protect domestic production and were covered by Article III, because -- whether applied internally or at the border -- they applied equally to domestic and imported lobsters. The United States viewed the interpretative *Ad* Article III as dispositive in that it declares that nontariff trade barriers (NTBs) of any kind, including QRs, as well as internal taxes and other charges, of the kind referred to in Article III:1 may be imposed at the time or point of importation.

6.2 The relative treatment of imported and domestic products is a key to GATT rules.

6.2.1 The treatment of an imported product relative to the treatment of a like domestic product is important in applying many GATT rules. Indeed, it is essential to a discussion of GATT rules applicable in the case here at hand. But the question of that treatment is separate from the definitional, and consequent jurisdictional, question of whether a measure applicable to imported goods is a border or an internal measure.

6.2.2 What the Panel confronted, in respect to the question of whether Article XI or, alternatively, III applied concerned a) the coverage and the substantive rule of Article XI but b) only the coverage and not the substantive rule of Article III. This difference in its terms of reference caused the Panel some concern over a certain lack of balance in the question it was asked to answer.

6.3 The Panel arrived at differing views.

6.3.1 The Panel arrived at differing views as to whether Article XI applied to the U.S. measures. It believed that it would be preferable in the circumstances to present its analysis, findings, and conclusions on the two views. The conclusions are discussed in the following sections, first, as Article XI being inapplicable and, then, as Article XI being applicable.

6.3.2 The views of the majority of members are identified as those of "the Panel"; the differing views are attributed to "some members of the Panel" or "the minority".

6.3.3 With regard to the possible application of Article XX(g) as an exception to Article XI and the evaluation of information on possible trade effects, the Report presents views that stem from the position, here held by the Panel minority, that Article XI is applicable.

7 THE MAJORITY VIEW: THAT ARTICLE XI IS INAPPLICABLE -- AND ARTICLE III IS APPLICABLE

7.1 What are the key provisions of the amended Magnuson Act, Article XI, and Article III?

7.1.1 The Magnuson Act, as amended in 1989, makes it unlawful, as previously noted in this Report, for any person

> to ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live lobster of the species Homarus americanus

that are below a stipulated size.[48]

7.1.1.1 The pertinent part of Article XI (incorporated into the FTA by Article 407) is set forth in paragraph 1 of that Article, and reads:

> No prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

Several exceptions, conditions, and interpretations are applicable to the basic rule of paragraph 1. In essence, Article XI says that contracting parties shall not impose on imports (and exports in some cases) any QRs. The only exception to Article XI that the Panel has been asked to consider is Article XX (g).[49] The exception in Article XX (g) relates

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[48]The terms of reference state the question to be answered by the Panel in terms of "section 307(1)(J) of the Magnuson Fishery Conservation and Management Act," that is, of the law in force after the amendment. As noted elsewhere in this Report, Canada argued the question in terms of the 1989 amendment in contrast to the legislation that was in force prior to the amendment. The Magnuson Act, or the amendment itself, was variously referred to in the written and oral presentations.

[49]Article XI:2 contains three exceptions, one of which concerns agricultural or fisheries products. Those exceptions are subject to several conditions specified in the Article. Neither Party to the present dispute pointed to that set of exceptions as being relevant. In the light

to measures an importing country is allowed to take for conservation of exhaustible natural resources. Its possible relevance is discussed in detail later in this Report.

7.1.2 Article III enters the analysis pursuant to the terms of reference, in which the Parties agreed that

> the United States is not precluded from arguing that the legislation in question is properly within the terms of, and consistent with, the national treatment provisions of the FTA and the GATT.

Article III, in summary, prohibits the use of any form of NTB to afford protection to domestic production. The NTBs include all "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products." This no-protection principle is supported by an explicit ban on the use of such measures in a discriminatory manner against imported products, whether imposed on them at the time they are at the border or after they have entered the commerce of the importing country. Although Canada framed its complaint in terms of Article XI, Article III was a part of the question posed and was discussed extensively by both Parties in their written and oral presentations.

7.1.3 Article III sets forth the *principle* of nondiscrimination or equal treatment or, more precisely, "national treatment" between imported and domestic products. As set forth at the outset of Article III in paragraph 1 (and incorporated into the FTA by Article 501), the provision reads as follows:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production.

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of argumentation and the terms of reference, they were not considered by the Panel as possible exceptions in the event Article XI was determined applicable in the present dispute.

An interpretative note (*Ad* Article III) declares:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

7.1.4 Paragraph 4 of Article III expresses the no-protection principle in the following terms:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[50]

7.1.5 These GATT principles, implementing rules, and interpretations are to be accepted by the Parties to the present dispute. FTA Article 501, which incorporates Article III into the FTA, is set forth in an FTA chapter entitled "National Treatment" and reads as follows:

> Article 501: Incorporation of GATT Rule
>
> 1. Each Party shall accord national treatment to the goods of the other Party in accordance with the existing provisions of Article III of the *General Agreement on Tariffs and Trade* (GATT), including its interpretative notes, and to this end the provisions of Article III of the GATT and its interpretative notes are incorporated into and made part of this Part of this Agreement.

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[50]The remaining sentence of Article III:4 concerns differential transportation charges, a subject not relevant to the present proceeding.

Paragraph 1 of Article III sets out the basic no-protection principle of the Article. Paragraph 4 presents the rule concerning the application of all NTBs -- that is, all laws, regulations, and requirements -- pertinent to the present dispute. Other paragraphs of Article III treat aspects not directly relevant to the issue here at hand, for example, paragraph 2 dealing with internal taxes or other internal charges and other paragraphs dealing with "mixing" requirements.

2. For purposes of this Agreement, the provisions of this Chapter shall be applied in accordance with existing interpretations adopted by the Contracting Parties to the GATT.

7.2 Articles XI and III represent the basic classifications of measures applying to foreign goods.

7.2.1 Article XI and III -- and in some respects, Article II, as will be explained -- are the principal GATT provisions that need to be examined in order to answer the initial question facing the Panel.[51]

7.3 Contrasting Article XI and III by the term "border/internal" may obscure the "competition" requirement and be misleading.

7.3.1 Much of the debate as to whether Article XI or Article III is applicable to the U.S. measures on Canadian lobster was expressed in terms of differentiating between "border" and "internal" measures. The rather uneven references to a "border/internal" classification threatened to obscure the "no-protection" or "competition" principle in Article III, to confuse the comparison between Article XI and III, and to lead to possibly erroneous conclusions regarding the applicability of each of these fundamental Articles of the GATT.

7.3.2 Article XI is the principal GATT Article containing the general ban against the use of QR's to limit importation. The measures that are banned are those that would be applied to goods at the point or time of importation, the measures often being

[51]The GATT does include articles additional to XI and III that specify QR rules, or exceptions to QR rules, applicable to foreign goods when they are presented at the border of an importing country or are in the internal commerce of the importing country. As illustrations, GATT Article XII deals with quantitative restrictions on imports applied because of need to safeguard the balance of payments. Article IV presents "special provisions" for internal quantitative regulations relating to exposed cinematographic film, such as those taking the form of "screen quotas." However, these additional QR provisions are essentially particularized rules that can be regarded as subclassifications of those in Articles XI and III and need not enter into the analysis here. Indeed, they have not been raised by the Parties in their submissions.

referred to as "border" measures. The Article itself contains exceptions, such as that for certain QRs on agricultural and fisheries products. Article XI is incorporated into the FTA by Article 407, which is in a chapter entitled "Border Measures".

7.3.3 Article III is the principal GATT Article limiting the use of "border" and "internal" measures on imported goods. The rule of "national" treatment that it specifies to carry out the competition principle noted earlier bars a country from extending internal measures to imported goods in a way that bears more onerously on the imported products than on the like domestic products. The basic principle and operating rules of Article III are framed in terms of safeguarding a competitive relationship for an imported product -- whether the measures are applied to the imported product at the "border" or in the "internal" market. Article III is incorporated into the FTA by Article 501, which is in a chapter entitled "National Treatment".

7.4 The actual classification terminology is stated in Articles XI and III.

7.4.1 The language Articles XI and III use in stating the conditions on what importing countries may do to limit the importation or the internal marketing of imported goods differs in describing the stage of commerce at which the measures on imported goods is aimed.

7.4.2 Article XI:1 is written in terms of

> prohibitions or restrictions . . . instituted or maintained . . . on the importation of any product . . . .

7.4.3 Article III:1 (as well as III:4) is drafted in terms of

> . . . laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products . . . .

Ad Article III, the interpretative note, concerns measures "of the kind referred to in paragraph 1" that are "collected or enforced in the case of the imported product at the time or point of importation."

7.4.4 In some circumstances, the distinction between border and internal is pertinent to the interpretation of a GATT rule, whereas in other circumstances, the GATT rules do not distinguish between measures imposed on foreign goods when they are at the border of the importing country from measures imposed on foreign goods when they have already crossed the frontier and have been assimilated to the internal commerce of the importing country. Article III is one such case. Where there is no need to distinguish between the latter two stages of distribution, this section of the Panel's Report follows the GATT practice of referring to the foreign goods simply as "imported."

7.5 Are the U.S. measures formulated as internal or border measures?

7.5.1 The Panel sought clarification of the statutory phraseology in the Magnuson Act, as amended, "interstate or foreign commerce" to ascertain whether that would indicate action at the border, as well as internally.[52] The United States replied that the language did not mean that intervention was to be made at the border, although there was authorization to permit the measures to be applied there. Rather, the term "interstate or foreign commerce" is embedded in U.S. constitutional law and, in common with much other legislation, was used in the statute formally to assert the jurisdiction that the American federal government has to regulate commerce. Moreover, it said, any examination of the statute in the context of the present proceeding would be the same whether the phrase was or was not included in the statute.

7.6 What is the U.S. policy on where the measures will be imposed?

[52]As noted earlier, the legislation now in force declares that "It is unlawful . . . for any person . . . to ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live lobster of the species Homarus americanus . . . " below stipulated sizes.

7.6.1 Although U.S. authorities are empowered under the amendment to enforce the minimum size limits at various points in the internal distribution chain, the United States said enforcement activity was expected to take place (as had already been the case) on board the lobster fishing vessels or, preferably, at the points of landings and at the lobster pounds or similar facilities where the lobsters are sorted and kept alive for further distribution. Enforcement on vessels while at sea is not the U.S. administrators' first preference, since illegally undersized lobsters can be jettisoned in the face of approaching enforcement officers or hidden in the lobster fishing vessel.

7.6.2 As for the lobsters' physical movement in U.S. commerce, their crating was alleged to present enforcement difficulties. Lobsters sometimes are commingled in size when in the crates in which they are shipped. The American authorities indicated it was feasible to verify compliance with a minimum size standard only when lobsters arrived at pounds or holding tanks and were uncrated or at later stages of distribution, particularly at restaurants or supermarkets. Therefore, for enforcement concerning U.S.- and Canadian-origin lobsters, surveillance would be at lobster pounds or other places where they were culled for further distribution.[53]

7.6.3 While the measures could be applied at the border or internally, it was the intention, expectation, and current policy to apply the U.S. measures internally.

7.7 Are the U.S. measures actually applied internally or at the border?

7.7.1 The Panel looked further at the measures to determine whether, in practice, they are being applied to Canadian lobsters at the border or in the U.S. domestic market. As of the time the Panel was carrying out its assignment, there was little experience with the U.S. measures. The Magnuson Act had been in effect for many years, but the amendment that is the subject of the present proceeding had become effective only in December 1989.

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[53]Canadian authorities asserted that the "typical" lobster shipment is sorted in Canada "according to size to meet prescribed U.S. buyer demands" (Supplemental Submission by Canada," March 13, 1990, para. 3).

7.7.2 In reporting to the Panel on administrative and enforcement policies and activities under the Magnuson Act as amended, as well as under the Act prior to the amendment, United States authorities said that enforcement takes place at various stages of economic activity within the U.S. domestic market and not at the border. The United States reported that its customs administration had declared specifically that, while it would cooperate with other U.S. enforcement authorities, it would not be intervening with any enforcement measures at the border.

7.7.3 Canada had a contrary understanding about the actual enforcement of the U.S. measures. In the light of its understanding that they were being imposed at the border,[54] it said the measures constituted a "trade restriction" or "import restriction" and therefore came under Article XI. The United States said that the measures were being applied alike to Canadian and domestic lobsters and that this practice had the critical consequence of bringing them under Article III.

7.7.4 The Panel considered that the best information available on the application of the measures in the short period since the Magnuson Act amendment had been in force was that they were being applied after the Canadian lobsters had entered the United States and that the American authorities had indicated their current and expected future practice to apply them as internal measures. The Panel accepted the U.S. report on the facts of its administration of the U.S. measures on Canadian lobsters, that is, that they are being applied in the U.S. internal market.

7.7.5 The Panel noted that enforcement might at times entail the cooperation of U.S. customs officers. Although the United States reported that those officers would not be stopping any shipments at the border, enforcement might be

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[54]"They are measures imposed at the border. That is our understanding. And therefore, they fall within Article XI of the GATT, in our view" (Transcript, March 6, 1990, Morrissey, p. 129). In its written presentation at the Oral Hearing, Canada said:

> The amendment applies specifically to shipments and transport in "foreign commerce". Therefore the United States has effectively restricted the import of Canadian lobster at the border (para. 45).

considered as entailing some measure of activity at the border. The Panel considered that even if the measures were imposed fully at the border, the measures would apply to domestic and Canadian lobsters, and would therefore be nonprotectionist measures of the kind covered by Article III.

7.8 Does the trade effect of a measure determine whether it is covered by Articles XI or III?

7.8.1 As between Articles XI and III, the Panel considered whether the effect on trade attributed to a measure imposed on imported products determines whether the measure is covered by one of these Articles rather than the other.

7.8.2 Both Articles express principles and set forth specific rules to limit the use of measures that affect the trade of the importing country. Essentially, Article XI prohibits certain techniques for limiting the quantity of foreign goods that may be imported (or domestic goods that may be exported); Article III bans the use of a wide range of measures that can affect the internal marketing, and consequently the importation, of foreign goods.

7.8.3 The trade effects on Canadian lobsters will not differ if the U.S. measures are determined to fall under one of these Articles rather than the other. Whether as Article XI measures on importation or as Article III measures on internal marketing, the U.S. limits on Canadian lobsters will have identical effects: imports of sub-sized lobsters will be zero.[55]

7.8.4 Likewise, failure to meet the requirements of either Article III or Article XI could force consideration of a readjustment of mutual obligations and benefits. That

[55]That U.S. enforcement of the measures only in the internal market would allow Canadian lobsters into U.S. territory only to have them prevented from entering the internal market is not realistic and does not alter the conclusion that the U.S. measures, whether under Article XI or III, or enforced at the border or internally, will lead to zero imports of undersized lobsters.

is, the readjustment would have to be considered if as an Article XI measure, Article XX (g) did not provide any exception, or if as an Article III measure, the national treatment requirement of that Article had not been met and Article XX provided no exception. However, a determination of either of these possible violations would be subsequent to, and not in place of, the determination as to which Article applies.

7.8.5 As noted in the following section, Article III does not distinguish between the intensity or the effect of the measures it covers. It refers to "laws, regulations, and requirements affecting" internal marketing of foreign products. As paragraph 7.9.4, below, makes clear, a marking or packaging criterion can make sales just as difficult as a size specification or an internal quantitative limit or requirement on sales. It is nearly impossible to draw lines on the continuum of the effects of regulatory measures imposed on the internal sale, transportation, and marketing of goods. Accordingly, the Panel concluded that the effect of the U.S. measures on trade between the Parties in Canadian lobsters does not determine whether Article XI or III is applicable.

7.9 In deciding possible coverage under Article XI or III, does it matter that the measures are a prohibition rather than a restriction?

7.9.1 The Panel considered whether the fact that a measure applied to an imported product as a prohibition to its internal marketing (whether applied at the border or internally) called for a determination different from that concerning a lesser measure, that is, a measure restricting but not prohibiting the marketing of the product.

7.9.2 For determining coverage, neither Article XI:1 nor III distinguishes measures in terms of their intensity. Article XI:1 deals explicitly with "prohibitions or restrictions" on importation. Article III -- in paragraph 1 (the basic principle of nonprotection), in paragraph 4 (the national treatment rule applying to NTBs and other measures), and in *Ad* Article III (the interpretation concerning the imposition of internal measures at the border) -- does not explicitly differentiate between prohibitions and restrictions. The coverage of Article III is stated, in part, as "laws, regulations and requirements affecting" the internal marketing of foreign products.

7.9.3 Some provisions of the GATT do distinguish between prohibitions and restrictions. In particular, some of the exceptions in Article XI to the ban laid down in paragraph 1 of that Article make this distinction. Although those particular exceptions are not relevant to the present dispute, it is pertinent to note the apparent intentions of the drafters of the Agreement. Article XI:2 (a) and (b) set rules for "prohibitions and restrictions," whereas (c) sets a rule for "[i]mport restrictions." It appears, where the drafters believed it necessary to make a distinction between prohibitions and restrictions, they did so. In the case of Article III, the degree of intensity of a permissible measure applied to imported goods is to be determined by the degree of intensity of the measure as it applies to like domestic goods.

7.9.4 The degree to which the marketing prospects for an imported product would be "affected" might be greater under a prohibition than under a restriction, but the imported product would still be "affected." Moreover, a restriction imposed on the internal marketing of an imported product, depending on the circumstances, could be just as fatal commercially as a prohibition. Putting an annual import quota on widgets at 10,000 units when trade has been 80,000, or requiring a marking or packaging specification, can make sales just as difficult -- or impossible -- as setting a quota at zero.

7.9.5 Accordingly, the Panel considered that, for determining the possible application of Article XI:1 or Article III, the relative intensity, or absoluteness, of a measure (notably, a prohibition or a restriction) would not itself determine under which of these GATT provisions the measure would fall. Further, they believed that a measure imposed on imports, otherwise eligible for coverage under Article III, would not be disqualified from that coverage because it was a prohibition rather than a restriction. Conversely, a measure does not escape the coverage of one of these provisions or the other by being partially limiting rather than totally limiting. (Consistent with this view, the trade effects of the measure might or might not differ depending on the degree of restrictiveness, but that aspect concerns the separate issue of nullification or impairment of benefits and of a trade effects assessment.)

7.10 Other prohibitions and restrictions presently embraced under Article III

7.10.1 In testing each of the two alternative interpretations -- that Article III or that Article XI applies to the U.S. measures -- the Panel took note of the treatment of certain prohibitions and restrictions that each Party imposes in its own country on marketing various products and that were cited by the Parties in the proceeding. Although both countries were understood to impose many such measures, one list, submitted for illustrative purposes, identified a half dozen as internal Canadian marketing restrictions.[56]

7.10.2 The import counterpart of some of these measures would presumably be permitted by one of the general exceptions listed in Article XX, for example, any that could be justified as necessary to protect human, animal, or plant life or health. But many such prohibitions or restrictions affecting imported goods clearly would not. The internal marketing counterparts of these measures therefore would not be permissible under GATT if they were to fall under Article XI. Article III, on the other hand, was structured to permit governments to impose internal regulatory measures, subject to the national treatment standard, whether or not such measures met the specific exceptions of Article XX. A regulatory measure which falls within an Article XX exception may be discriminatory. Otherwise the demanding nonprotection, national treatment standard of Article III, in conjunction with the nullification and impairment provisions of GATT, protects foreign products from discriminatory treatment with regard to regulatory measures other than quantitative restrictions imposed on importation at the border. If this were not the case, governments would actually be forced to give foreign products more favorable treatment than that given to their own products with regard to internal regulations not falling squarely within an Article XX exception.

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[56]Cleaning agents and water conditioners containing nutrients in greater than prescribed concentrations; packaged products unless packaged in a manner prescribed by Canadian regulations; precious metals unless bearing an authorized "mark"; textiles without labels describing the fiber content of the article; fertilizers and feeds, unless registered and conforming to Canadian standards; and peaches, apples, plums, and lobsters below certain minimum sizes (Supplementary Submission by the United States, March 13, 1990, p. 20., n. 6).

7.11 Is there a case history to aid in analyzing the main issue in the present case?

7.11.1 The Panel examined a number of GATT actions that were relevant to the task of judging the appropriate coverage of measures applied to imported goods at the border or internally. The Panel examined also the report in the only other case decided under FTA Chapter 18. The Panel found considerable support in the record for a determination that the U.S. measures applicable to U.S.- and Canadian-origin lobsters are of the type covered by Article III. Of those cases reviewed and cited by one Party or the other in the present proceeding, several supported this interpretation, one was ambiguous, and another was not relevant to the main issue.

7.11.2 In reviewing the case record, the Panel focused on GATT determinations concerning QRs and other NTBs, as well as internal taxes and charges, which had to be classified between those that apply only to importation and those that apply to internal marketing of foreign goods (applied after their importation or to their importation) and also to internal marketing of corresponding domestic products. For the most part, the cases had implications for coverage under Article XI or III, but in some cases -- notably involving measures purporting to be internal taxes or charges -- for coverage under Article II or III.[57]

7.11.3 The reports of GATT panels and working parties that the present Panel drew on were those that had been adopted by the GATT Contracting Parties collectively, either in full session or through their GATT Council of Representatives.

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[57]The pertinent part of Article II reads:

1(b) The products described in Part I of the Schedule . . . shall, on their importation into the territory to which the Schedule relates . . . be exempt from ordinary customs duties in excess of those set forth and provided for therein
. . . Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement . . . .

7.12 An early set of criteria: from a Havana Sub-Committee

7.12.1 The issue of the classification of a trade-affecting measure in the present proceeding has a parallel in the classification issue that confronted governments in the earliest days of the GATT. That early discussion concerned a determination as to whether a particular governmental measure was to come under provisions on "importation" or "internal marketing." Whereas the Panel in the present proceeding focused on the classification question as it involves a nontariff measure on an imported product, the question in that early period concerned import charges.[58]

7.12.2 The issue arose during the deliberations at the Havana Conference of 1947-48 that led to the drafting of the Charter for an International Trade Organization (ITO). It may be recalled that the GATT was to be integrated into the ITO Charter. At the time the Charter was still being negotiated, the GATT contracting parties agreed to observe to the fullest extent of their executive authority the general principles of some of the chapters of the ITO Charter, including those on commercial policy, pending their acceptance of the Charter.[59] Interpretations considered in the course of the negotiation of the Havana Charter, often intended to perfect the language developed in the negotiation of the GATT a few months earlier than the Havana ITO Conference, continue to be applicable to questions arising under the GATT.

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[58]In the present proceeding, Article XI, which concerns QRs, is being contrasted with Article III, which involves taxes and other charges, QRs, and any law, regulation, or other requirement. In that earlier review, Article II, which concerns import duties (bound against increase), was being contrasted with Article III.

[59]Article XXIX of the GATT, entitled "The Relation of this Agreement to the Havana Charter," reads in part as follows:

> 1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.

The commercial policy provisions of the Charter, including the GATT counterparts discussed in the present Report, were contained in Chapter V.

7.12.3 During the Havana Conference, the negotiating countries considered certain charges imposed by Chile, Lebanon, and Syria. Conference records report the consideration that was given to the importation/internal marketing interpretation and, in particular, listed specified criteria for classifying measures. The passage, especially pertinent to the classification issue at hand here, reads as follows:

> The Subcommittee, while not attempting to give a general definition of internal taxes, considered that the particular charges referred to are import duties and not internal taxes because according to the information supplied by the countries concerned (a) they are collected at the time of, and as a condition to, the entry of the goods into the importing country, and (b) they apply exclusively to imported products without being related in any way to similar charges collected internally on like domestic products. The fact that these charges are described as internal taxes in the laws of the importing country would not in itself have the effect of giving them the status of internal taxes under the Charter.[60]

7.12.4 Using the criteria delineated at Havana, the U.S. measures imposed on Canadian lobsters are not measures applying only to imports and thus not covered by Article XI:1. They are not to be regarded as measures falling under the prohibition concerning importation because they are not imposed "at the time of, and as a condition to, the entry of the goods into the importing country" and they are not applied exclusively to imported goods without being related in any way to similar charges collected (or, related to their counterpart, QRs imposed) internally on like domestic products.

7.12.5 Even if the U.S. measures were imposed on Canadian lobsters at the time they crossed the border, they could still be classified as internal measures because of the rule clearly laid down in GATT *Ad* Article III. But the facts in the lobster case and the criteria specified at Havana make it clear that they are not border measures.

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[60]Havana Reports, p. 62, paras. 42-43; E/CONF.2/C.3/A/W.30, p. 2, as reproduced in the GATT *Analytical Index*, Fourth Revision (GATT/LEG/2, section Article III, p. 3).

7.13 GATT Panel Report on the Canadian Foreign Investment Review Act (FIRA).

7.13.1 The GATT Panel on the Canadian Foreign Investment Review Act (FIRA) expressed itself on the issue of mutual exclusivity of Articles XI and III, a position that both Canada and the United States have espoused in the present proceeding.

7.13.2 The FIRA panel was assigned the task of considering a United States-Canadian dispute that involved, among other things, written undertakings which obliged investors in Canada to purchase goods of Canadian origin in preference to imported goods, to purchase Canadian goods in specified amounts or proportions, or to purchase goods from Canadian sources (referred to in the Panel's report as "purchase undertakings").[61]

7.13.3 The United States argued that the purchase undertakings were inconsistent with both Article III (paragraphs 4 and 5) and Article XI, as well as Article XVII (state trading -- specifically paragraph 1(c)).[62]

7.13.4 The GATT Panel drew conclusions regarding Article III, as noted herein below, and Article XI. As to Article XI, it found the purchase undertakings do not prevent importation and therefore those provisions are not inconsistent with Article XI:1.[63]

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[61]Canada - Administration of the Foreign Investment Review Act, Report of the Panel adopted on 7 February 1984 (L/5504), reprinted in GATT Basic Instruments and Selected Documents, Thirtieth supplement (hereafter "BISD", 30S). The aspect of the application of FIRA to exports was also a part of the proceeding, an aspect not further discussed here.

[62]Same source, para. 3.1.

[63]Same source, para. 5.14.

7.13.5 Having stated this conclusion, it went on to say

> The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the "importation" of products, which are regulated in Article XI:1, and those affecting "imported products", which are dealt with in Article III.[64]

The GATT Panel went on further to say that if Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous. Moreover, it reasoned, if Article XI were interpreted to apply to internal measures, the exceptions that Article XI itself contained

> would also apply to internal requirements restricting imports, which would be contrary to the basic aim of Article III.

7.13.6 In the present proceeding, Canada confirmed that it continues to share the view of the GATT Panel in the FIRA case.

7.13.7 The GATT Panel considered the purchase undertakings against Article III. The GATT Panel found those undertakings to be "`requirements' within the meaning of Article III:4".[65] In the light of additional conclusions about the relationship between the measures and the national treatment obligation of Article III (that aspect of the Article being excluded from the present, lobster proceeding), the GATT Panel held them to be in conflict with Article III.[66]

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[64]Same source.

[65]Same source, para. 5.4.

[66]Same source, paras. 5.9 and 5.10. See also conclusions in para. 6.1.
In the present Lobster proceeding, the Canadian representative said that he regarded the FIRA purchase undertakings to have been no restriction at all on the entry of goods into the foreign market, but that foreign companies investing under FIRA had committed themselves to "buy local sources rather than imports," and that therefore the GATT Panel considered the measures to be a breach of Article III:4.

7.13.8 The GATT Panel decision on FIRA is pertinent to the issue of categorizing a measure between Articles XI and III. The distinction it made -- supported then and in this proceeding by Canada -- was clearly stated: GATT distinguishes between measures affecting the "importation" of products, "which are regulated in Article XI:1," and those affecting "imported products, which are dealt with in Article III".

7.14 GATT Panel on U.S. Section 337 Procedures

7.14.1 A GATT Panel reported in early 1989 on a complaint filed by the European Economic Community (EEC) against U.S. measures applied to protect intellectual property, the particular case involving procedures under U.S. patent law. In this GATT proceeding, entitled United States - Section 337 of the Tariff Act of 1930, the dispute centered on GATT Articles dealing with internal measures (Article III) and on a general exception to the GATT (Article XX (d)) but did entail an analysis of the border/internal issue and GATT precedent thereon. The GATT Panel ultimately found that the U.S. Section 337 law to be inconsistent with Article III:4 because, for reasons it detailed, it accorded to imported products alleged to infringe U.S. patents treatment that was less favorable than it accorded, under certain judicial procedures, to like domestic products and that was not permissible under Article XX.[67] However, it is not that finding (on the national treatment issue not embraced by the terms of reference in the present Lobster case) that is of interest here; rather, it is its consideration of the principle underlying Article III as a measure affecting imported goods that is pertinent.

7.14.2 The parties to the Section 337 dispute agreed: (a) that Article III:4 applies to substantive patent law, since such law affects the "internal sale, offering for sale, purchase, transportation or use" of imported and domestic products; (b) that the consistency of the substantive provisions of U.S. patent law with the GATT is not an issue; and (c) that Section 337, when applied in cases of alleged patent infringement, is a means to secure compliance with U.S. patent law in respect of imported products. The parties

[67] United States - Section 337 of the Tariff Act of 1930, Report of the Panel accepted on 16 January 1989 (L/6439), reprinted in BISD 35S, paras. 5.20 and 5.35.

disagreed, however, whether a measure to secure compliance with patent law -- in contrast to the substantive patent law itself -- is covered by Article III:4. The United States believed such measures were covered by Article XX (d); the EEC believed Article III:4 applied and that Article XX (d) provided an exception only after a measure has been found inconsistent with another GATT provisions. The Panel decided to turn to a consideration of the measures in the light of Article III:4 and then to consider an exception under Article XX (d) if they found the measure inconsistent with Article III:4.

7.14.3 When the GATT Panel turned to its examination of Article III:4, it took note of a determination by a previous GATT Panel on the border/internal issue and on the basic principle underlying the differentiation. Having pondered the Article III terminology of "affecting" the internal sale of imported products, the GATT Panel in the Section 337 case said:

> A previous Panel had found that "the selection of the word `affecting' would imply . . . that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market."[68]

7.14.4 The U.S. measures in the present case certainly modify the conditions of competition between U.S.-origin and Canadian-origin lobsters -- and indeed provide the basis for the Canadian complaint about being deprived of a natural comparative advantage and being faced with a restriction on the access to the U.S. market that did not exist before the legislation was enacted.

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[68] Same source, para. 5.10, underscoring added. The GATT Panel Report was cited by Canada in connection with that Government's argumentation about Article XX and GATT exceptions in general (Canadian written submission [March 5, 1990], para. 65).

The quoted material is footnoted in the Section 337 Report to "Panel on Italian Discrimination Against Imported Agricultural Machinery," cited further and discussed herein below.

While both the Section 337 case and the Italian Discrimination Against Imported Agricultural Machinery case considered measures under the substantive requirements of Article III:4, their conclusions offer perspective on the intended scope of Article III.

7.15 GATT Panel on Italian Discrimination Against Imported Agricultural Machinery

7.15.1 In deliberating on a complaint against an Italian law that gave certain credit facilities to purchasers of Italian agricultural machinery but not to purchasers of imported agricultural machinery, a GATT Panel considered how, in principle, Article III is to affect imported goods.[69] The Panel said this in its Report:

> 11. . . . It was considered . . . that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.
>
> 12. . . . In addition, the text of paragraph 4 [of Article III] referred both in English and French to laws and regulations and requirements *affecting* internal sale, purchase, etc., and not laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word "affecting" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.[70]

7.16 Classification of Internal Taxes between Articles Applying to Importation and Article III on Internal Marketing

7.16.1 GATT Panels have made determinations in several cases in which they had to classify taxes between coverage under Article II (in a sense the counterpart for tariffs or charges of Article XI with respect to QRs) and Article III.

7.16.2 In the case of Belgian Family Allowances, the GATT Panel said the levy in question "was to be treated as an `internal charge' within the meaning" of Article

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[69] Italian Discrimination Against Imported Agricultural Machinery, Report [of the Panel] adopted on 23 October 1958 (L/833), reprinted in BISD 7S/60-69.

[70] GATT Panel Report, paras. 11 and 12, underscoring added.

III:2 and not as an import charge within the meaning of Article II:2.[71] The Panel had noted that the levy was collected on products purchased by public bodies for their own use and "not on imports as such" and "that the levy was charged, not at the time of importation, but when the purchase price was paid by the public body."

7.16.3 In the dispute entitled EEC - Measures on Animal Feed Proteins,[72] a GATT panel examined an EEC requirement that traders either purchase a certain quantity of denatured skimmed milk powder or provide a security and a requirement for a protein certificate. It carried out its study under terms of reference that dealt with Article II (bound import tariffs) and Article III. It found that these "administrative requirements, including the protein certificate," were inconsistent with Article III:4 (national treatment on NTBs). On the subsequent determination of "whether the EEC measures should be examined both as internal measures under Article III and border measures under Article II," the GATT Panel reviewed drafting history and application concerning *Ad* Article III, the Havana Sub-Committee criteria, the language of Articles II:2(c) and III, and the decision in Belgian Family Allowances. It concluded "that the EEC measures should be examined as internal measures under Article III and not as border measures under Article II." [73]

7.17 A Case Cited that Is Ambiguous: GATT Panel on Canadian Provincial Alcoholic Beverage Distribution

7.17.1 Canada drew on a GATT Panel Report on Canadian Provincial Liquor Marketing Agencies to say that "internal practices concerning listing/delisting requirements" for alcoholic beverages sold in official, provincial marketing agencies "and the availability of points of sale of a product were judged to be `import requirements'

[71]BISD 1S/60, as quoted in the GATT *Analytical Index*, Fourth Revision, cited above, section on Article III, pp. 7-8.

[72]GATT Panel Report adopted on 14 March 1978 (L/4599), BISD 25S/49-68.

[73]Same source, paras. 4.12 and 4.18.

contrary to Article XI:1."[74] The present Panel finds the GATT Panel's report ambiguous on the classification of measures under Article XI.

7.17.2 In that GATT proceeding, the analysis focused largely on Article XVII, which lays down principles for the behavior of state trading agencies. An interpretative note (located in the GATT before an interpretative note to Article XI) says: "Throughout Articles XI, XII, XIII, XIV, and XVIII, the terms `import restrictions' or `export restrictions' include restrictions made effective through state trading operations." This note apparently was the source of uncertainty in the GATT Panel's deliberations.

7.17.3 The GATT Panel concluded that

> practices concerning listing/delisting requirement and the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state trading operations contrary to Article XI:1.[75]

The GATT Panel noted that Canada believed Article III to be not relevant because "the interpretative note to Articles XI, XII, XIII, XIV and XVIII made it clear that provisions other than Article XVII applied to state-trading enterprises by specific reference only." The GATT Panel then skipped over Article III but seemed to have second thoughts about having done so. The Report said:

> The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the

[74]Canadian Submission of 31 January 1990, p. 15, para. 51.

[75]Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, Report of the Panel adopted on 22 March 1988 (L/6304), reprinted in BISD 35S/37-99.

> distribution in the domestic markets were combined, as was the case with the provincial boards in Canada.[76]

7.17.4 It may be of interest to observe that the GATT Panel reported that Canada, in arguing against the applicability to Article III in that proceeding, had said that its view of the classification question was as follows:

> . . . Article III spoke of "imported" products, i.e. product that had already crossed the border and cleared customs, and the federal legislation in question related to the "importation" of product.[77]

7.17.5 The ambiguous tenor of the GATT Panel's Report in so far as it concerns a classification of measures between border and internal is brought out conspicuously in that Panel's comment about the interpretative note to state-trading rules as they relate to several GATT Articles. The comment is as follows:

> The Panel considered it significant that the note referred to "restrictions made effective through state-trading operations" and not to "import restrictions". It considered that this was a recognition of the fact that in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made in the General Agreement between restrictions affecting importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly.[78]

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[76]Same source, para. 4.26, underscoring added. The Report also concluded

> that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article XVII because it had already found that they were inconsistent with Article XI (GATT Panel Report, para. 4.27).

[77]Same source, para. 3.34.

[78]Same source, para. 4.24, underscoring added.

7.17.6 Thus, the GATT Panel report does not provide the basis for a conclusion that the type of practices involved in the Lobster case should be judged to be import restrictions and subject to Article XI.

7.18 A Cited Case that Is Not Relevant: GATT Panel on Tomato Concentrate

7.18.1 Although the Tomato Concentrate case[79] was referred to in the present proceeding as a finding on the relationship between minimum price support programs and Article XI which provided precedent for the minimum size requirement at issue in the current case, the Panel concluded that the case did not provide a basis for analogyzing between a program that sets minimum prices and one that sets minimum sizes as a condition for importation of internal marketing. The critical factor in the GATT Panel's determination (with a dissent) that some aspects of the program were inconsistent with Article XI was the use of an import certificate and of an "additional security" as condition for the issuance of an import certificate and thus as a condition for importation.

7.18.2 In the Tomato Concentrate case, the import licensing and the security deposits used as enforcement devices were discussed by both parties under GATT provisions on "border" measures. Article XI was in question; Article III was not at issue. Thus, the Panel in the present proceeding did not look to this case for precedent on the issue of alternative coverage of Articles XI and III.[80]

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[79] European Community Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, Report of the Panel adopted on 18 October 1978 (L/4687), BISD 25S/68/107.

[80] GATT Panel report in Japan - Semi-Conductors was cited by Canada in support of its view on the need for a broad interpretation of Article XI. As noted in the section immediately following, GATT rules on export measures are broader than the GATT rules on import measures, and interpretations on provisions relating to exports cannot be readily carried over to provisions relating to imports.

7.19 The Irrelevancy of Cases involving Measures on Exports

7.19.1 During the proceedings, some references were made to a GATT decision regarding measures applied to exports. Care must be taken in drawing conclusions from such cases in so far as lessons are sought for principles of applying Article XI in contrast to Article III (or II). Some of the decisions cited for this purpose are not relevant.[81]

7.19.2 Article XI:1 applies to imported and exported goods. With regard to imported goods, it covers measures (QRs) that apply at the border; with regard to exported goods, it covers measures (QRs) that apply at the border and internally.[82]

7.19.3 Article III applies to imported goods only. The Article covers a wide range of measures (internal taxes and charges, QRs, and other NTBs) applied at the border and internally.

7.19.4 This "matrix" of provisions needs to be kept in mind. One reason for so doing is to avoid drawing on GATT interpretations relating to exported goods that do not apply to situations involving imported goods. Another reason is to recognize that the basic principle of Article XI:1 on imported goods applies to measures imposed at the border and that the basic principle of Article III on imported goods (the Article is confined to imported goods) applies to both border and internal measures.

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[81]Cited in this connection was: Japan - Trade in Semi-Conductors, Report of the Panel adopted 4 May 1988 (L/6309), reprinted in BISD 35S/116-163 (Canadian Written Presentation, 5 March 1990, para. 43, n. 24 and para. 51, n. 29).

[82]This difference within Article XI:1 is highlighted in the Report of the FTA Panel on Canada's Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the Panel, October 16, 1989, paragraph 6.05. For a fuller discussion of the FTA Panel's reasoning on the import and export scope of Article XI, see its Report, paras. 6.03 through 6.09.

7.20 Is the Policy Objective of a Measure Relevant to a Classification under Article III?

7.20.1 In determining whether a measure imposed on imported goods is or is not covered by Article III, there is no GATT requirement that the measure have a particular policy objective. That question is pertinent to the present case, since the U.S. measures have been put forward in the framework of a fisheries conservation program. In the case of many exceptions to basic GATT rules, there is such a requirement to determine the purpose of the measures. For example, an exception may be made for a measure to achieve a stated conservation objective or to enforce customs laws or farm price support programs. But that is not the case with determining eligibility under Article III. The tests for coverage turn on what might be regarded as a measure's protective or nonprotective character.

7.20.2 Reporting on a dispute over U.S. taxes imposed on petroleum and certain other substances that were levied under U.S. environmental legislation (the so-called Superfund Act), a GATT Panel stated conclusions about the question of possible policy requirements for a measure to be eligible for border tax adjustment and, consequently, whether it was subject to Article III (and consistent with it).

7.20.3 Regarding U.S. taxes on "certain imported substances," the GATT Panel discussed a U.S. contention that the taxes should be considered a "border tax adjustment," that is, a tax on imports "corresponding in effect to the internal tax on certain chemicals from which these substances were derived," and an EEC contention about the relevance of the policy objective of a tax to a determination of its GATT consistency. Here, the GATT Panel observed that the GATT tax adjustment rules "do not distinguish between taxes with different policy purposes." It went on to say:

> . . . the Panel concluded that the tax on certain chemicals . . . was eligible for border tax adjustment independent of the purpose it served. The Panel therefore did not

> examine whether the tax on chemicals served environmental purposes and, if so, whether a border tax adjustment would be consistent with these purposes.[83]

7.20.4 That interpretation is consistent with the view expressed by an earlier panel in a case concerning Greek internal taxes that a country imposing a measure on imported goods must give attention to whether the measure is "internal" in the sense of Article III (and, not here at issue, whether it accords national treatment) and not to whether it has some particular (good or bad) policy purpose. In the present proceeding, the Panel did confine itself to that narrower, factual, and nonpolicy examination.

7.21 FTA Panel on Canada's Landing Requirement for Pacific Coast Salmon and Herring

7.21.1 In the report that the FTA Chapter 18 Panel submitted in October 1989, those experts concluded that restrictions affecting internal marketing were not covered by Article XI but, rather by Article III. They declared:

> Internal or non-border restrictions placed on imports are regulated elsewhere [than Article XI:1] in the GATT under Article III.[84]

7.22 Conclusions

7.22.1 The Panel concluded that the appropriate principle to be used in determining whether the U.S. measures were covered by Article III was the nonprotection principle of paragraph 1 of that Article. They considered a classification based on the

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[83] United States - Taxes on Petroleum and Certain Imported Substances, Report of the Panel adopted on 17 June 1987, para. 5.2.4, underscoring added, reprinted in BISD 34S/136-166.

See also a GATT Panel Report, adopted 3 November 1952, on a complaint relating to special import taxes initiated by Greece and concerning the irrelevancy of the government's intent to a determination of the applicability of Article III (quoted in the GATT Analytical Index under section (b) of the part on Article III).

[84] FTA Panel Report, cited above, para. 6.05.

border/internal differentiation for purposes of Article III was relevant but subsidiary to the basic principle of avoiding protection of domestic production in the use of internal measures. In this connection, they regarded *Ad* Article III as making a meaningful contribution to the practical application of Article III.

7.22.2 The Panel determined that the U.S. measures imposed on live U.S. and Canadian lobsters were covered by Article III and not by Article XI. In particular, they considered that the measures, as now applied in the U.S. internal market, or as they might be imposed at the border, came within the scope of "laws, regulations requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products." The Panel made no determination as to whether these Article III measures were consistent with the national treatment requirements of that Article, since such a determination was outside the terms of reference laid down by the Parties.

8 THE MINORITY VIEW: THAT ARTICLE XI IS APPLICABLE

8.1 The issue

8.1.1 Canada argued that the 1989 amendment is a border measure imposing a prohibition on imports of Canadian sub-sized lobsters and is therefore in violation of GATT Article XI. The United States argued that the 1989 amendment is rather an internal measure applied to the marketing and sale of sub-sized lobsters and is therefore subject to GATT Article III.

8.1.2 Both GATT Articles XI and III regulate the restraints importing countries may impose on goods of foreign origin.

8.1.3 Some have argued that Article XI deals with border measures while internal measures are subject to Article III. Others have argued that the distinction has to do with whether measures simply tip the scales of competition (Article III) or whether they exclude competition altogether (Article XI). Some members of the Panel consider that these distinctions rely on no specific wording found in Article III or Article XI and can be misleading; helpful as they may be in particular cases, they are not necessarily applicable as general propositions. The critical differences between the two types of measures are illustrated by, on the one hand, the very language of GATT Articles XI and III and, to the extent that language needs assistance, the interpretation given to those provisions by FTA and GATT Panel precedent.

8.1.4 In the view of these members, it is also not logically necessary that a given measure fall only into Article III or Article XI but never both. A measure not prohibited by Article XI might be covered and have to respect Article III but there is nothing logically to exclude the possibility that a measure which appears to fit within Article III and to respect its requirements can nevertheless be prohibited by Article XI. Similarly, of course, a measure may fall into neither Article.

8.2 The language of GATT Articles XI and III

8.2.1 Paragraph 1 of Article XI reads as follows:

> No prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, import or export licenses 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 products destined for the territory of any other contracting party.

That is, Article XI:1 prohibits all measures instituted by a Contracting Party that prohibit or restrict the importation of products from another Party, unless those measures are "duties, taxes or other charges" or unless they are saved by exceptions appearing later in Article XI or elsewhere in the GATT.

8.2.2 Some members of the Panel considered that the language used in Article XI determines the scope of this provision. These members noted that the wording of Article XI:1 refers to "prohibitions or restrictions" made effective through "quotas, licenses or other measures" instituted or maintained on the "importation of any product". In the view of these members, a measure will fall within Article XI if it meets the three following criteria.

8.2.3 First, the measure must be a prohibition or restriction which puts a quantitative limitation (total or partial) on imports. These members agreed with author J.H. Jackson[85] and noted that Article XI (as well as Articles XII through XIV) was drafted for the purpose of eliminating quotas and QRs.

8.2.4 The second criterion suggested by the wording of Article XI is that the prohibitions or restrictions must be made effective through quotas, licenses or other measures. These members examined the interpretation given to these terms in previous FTA and GATT Panels and agreed with the FTA Salmon and Herring Panel that "GATT interpretations of Article XI:1 support a liberal approach stressing that the article should

[85]See J.H. Jackson, World Trade and the Law of GATT, Ch. 13.

be interpreted broadly enough to accomplish its basic purpose".[86] As a matter of fact, these members noted that not only has Article XI been broadly and liberally interpreted by FTA and GATT Panels, but Panels have repeatedly held that a broad and liberal interpretation is necessary if Article XI is to have its intended effect.[87] These members also examined the GATT Panel Report on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies[88], which held that Article XI applied also to restrictions made effective through state-trading operations. These members agree that the term "other measures" is authority enough to give to Article XI:1 an interpretation liberal enough to ensure its application according to the intention of those who drafted it: a measure will not escape Article XI by clever drafting; the Parties to GATT agreed not to resort to certain measures and that agreement must be respected.

8.2.5 Thirdly, these members noted that an Article XI prohibition or restriction must be instituted on the importation of a product rather than on goods already in the internal commerce of the importing country. These members concluded that a prohibitive or restrictive measure must, if Article XI is to apply, take effect before the product enters the commerce of the domestic market, that is, before it can be subject to internal laws and regulations. On that point, these members shared the view of the GATT Panel on the Canadian Foreign Investment Review Act[89], which held that the GATT "distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in

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[86]Canada's Landing Requirements for Pacific Coast Salmon and Herring, 16 October 1989, para. 6.07.

[87]European Community Programme on Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, L/4687, BIDS 25S/68, 4 October 1978, para. 49;
Japan - Trade in Semi-Conductors, para. 106.

[88]L/6304, BISD 35S/37, 5 February 1988, para. 4.25.

[89]Canada - Administration of the Foreign Investment Review Act, L/5504, BISD 30S/140, 25 July 1983, para. 5.14.

Article III".[90] In the FIRA case, the GATT Panel voted that purchase undertakings did not prevent the importation of goods as such, and that, therefore, they were not inconsistent with GATT Article XI.

8.2.6 In sum, in the view of these members of the Panel, the very language of Article XI suggests that a quantitative limitation, whatever its form or wording, will fall within Article XI if its effect is felt before the foreign product enters the commerce of the importing country.

8.2.7 As far as GATT Article III is concerned, these members observed that it imposes a standard of national treatment in respect of internal taxation and regulation. This principle of national treatment requires that imported goods be accorded the same treatment as goods of local origin with respect to matters under a government's control such as taxation and regulation. The general principle is stated at paragraph 1 of Article III and reads:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportion, should not be applied to imported or domestic products so as to afford protection to domestic production.

Article III thus prohibits the contracting parties from using internal taxes or other forms of regulations to discriminate against imported products relative to domestic products.

8.2.8 The wording of Article III differs quite substantially from the language of Article XI. While Article XI is only concerned with "prohibitions or restrictions other than duties, taxes or other charges", Article III has a much wider scope and includes "internal taxes and other internal charges" as well as "laws, regulations and requirements". Article III refers to "regulations and requirements affecting the internal

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[90] See also GATT Panel Report on Canadian Provincial Marketing Agencies, para. 4.23-4.24, and FTA Panel Report on Salmon and Herring, para. 6.04.

sale, offering for sale, purchase, transportation, distribution, or use of products" that should not be applied so as to discriminate against "imported products". In the view of some members of the Panel, a measure will fall within Article III if it meets the three following criteria.

8.2.9 First, the measure must "affect" the internal sale, use or transportation of a product. These members noted that the word "affecting" is not defined in the GATT and concluded that it must therefore be given its usual and common meaning, that is, "to have an effect on, to influence or to produce a change in something".

8.2.10 In addition, these members looked at previous GATT Panel Reports which commented on the selection of the word "affecting" in GATT Article III. In deliberating on a complaint against an Italian law that gave certain credit facilities to purchasers of Italian agricultural machinery but not to purchasers of imported agricultural machinery, the GATT Panel on Italian Discrimination Against Imported Agricultural Machinery[91] noted that, by using the word "affecting" at Article III[92], the drafters intended to cover "not only laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market". GATT Panel Reports on United States-Taxes on Petroleum and Certain Imported Substances[93] and on United States-Section 337 of the Tariff Act of 1930[94] made similar comments.

8.2.11 Use of the word "affecting" in Article III presumes the real or potential existence of internal "sale, use or transportation" of "imported" products in

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[91]L/833, BISD 7S/60, 23 October 1958, para. 12.

[92]The GATT Panel Report dealt with paragraph 4 of Article III, the wording of which is similar to paragraph 1.

[93]L/6715, BISD 34S/136, 17 June 1987, para. 5.1.9.

[94]L/6439, 16 January 1989, para. 5.13.

competition with domestic products. On this reading, Article III necessarily excludes from its scope the complete prohibition of the sale, transportation or use of an imported product. These members of the Panel found that Article III could thus apply only to laws, regulations or requirements influencing or modifying the conditions of internal sale, use or transportation of an imported product, but not to those measures prohibiting completely the sale of foreign goods. These members of the Panel also noted that Article III does not apply to measures "affecting" the internal production of goods.

8.2.12 Secondly, Article III applies to imported products, that is, to products already entered into the market of the importing country. The GATT Panel Report on the Canadian Foreign Investment Review Act makes the same point.

8.2.13 Thirdly, some members of the Panel believe it is noteworthy that, broadly drafted and encompassing as Article III appears, the one thing to which it does not apply is "importation". A measure "affecting" importation itself, rather than what comes after importation, would seem not to be covered by Article III.

8.2.14 The United States relies on the interpretative note to Article III. This note states:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

This note holds that the fact that a measure is enforced at the border is not dispositive of whether it is a border or an internal measure[95]. This does not mean that a measure falls within Article III as soon as it is applied to both imported and domestic products, no

[95]Transcripts of March 5 Hearing, p. 233; Canadian Submission of March 5, p. 18.

matter if it is enforced at the border or internally[96]. The interpretative note does not define what is an internal measure covered by Article III; it only says that an internal measure does not stop being one simply by being enforced at the border. Indeed, this interpretative note seems to stand for the common sense principle that a measure falls within Article III or Article XI, or conceivably both, depending on what it truly is rather than on the manner of its enforcement.

8.2.15 In sum, some members of the Panel consider that a measure will fall within Article III if it is not a prohibition and it applies to foreign products which have entered the domestic market of the importing country and are in competition with domestic products. It will fall within Article XI if it prevents or restricts importation in the first place.

8.3 Precedent regarding the interpretation of GATT Articles XI and III

8.3.1 Some members of the Panel consider that the wording of GATT Articles III and XI provides the basic elements necessary to classify a measure[97]. Nevertheless, they were of the opinion that, in addition to the GATT language, the interpretation given to these GATT Articles by the drafters of the Agreement and by Panel Reports provide helpful comments on the scope of Articles XI and III.

8.3.2 The Panel examined the GATT precedents referred to by the Parties.

8.3.3 Some of the members observed that there is no GATT Panel precedent in which a complete prohibition on the sale, use or transportation of imported products, as is the 1989 amendment in regard to Canadian sub-sized lobsters, was held to fall within Article III.

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[96]U.S. Submission, pp. 10-11; Transcript of March 5 Hearing, pp. 192-195 and 234-234; United States Supplementary Submission, pp. 3-6.

[97]Logically, a measure meeting the definition of both will be prohibited under Article XI; an Article III measure must meet Article III criteria unless it is also captured by Article XI, in which case it is prohibited.

8.3.4 They also noted no Panel precedent in which Article XI was clearly applied to a measure which, as the 1989 amendment under review, applies to both imported and domestic products. Canada argued[98] that the GATT Panel Report on Canadian Provincial Marketing Agencies[99], offered a case in which a measure applied to both imported and domestic products and was held to be in violation of GATT Article XI. However, this GATT Panel Report must be distinguished from the present case since it concerned state enterprises enjoying a monopoly on both importation and distribution of the products in the domestic market. Indeed, the GATT Panel expressly held that the "distinction normally made in the GATT between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance" in such a case "since both types of restrictions could be made effective through decision by the monopoly".

8.3.5 Nevertheless, some members of the Panel believe it is of interest that both the restrictions on sale of the imported products and the restrictions on imports made by the provincial marketing agencies were held to be quantitative restrictions prohibited by GATT Article XI. GATT Panel Reports on Japan - Semi-Conductors and EEC - Tomato Concentrate, to which Canada referred in support of its argument, did not involve measures covering both imported and domestic products.

8.3.6 In any event, the fact that a measure applies to both imported and domestic products does not answer the question of its classification. In the view of some members of the Panel, a measure is not necessarily an Article III measure just because, if it were, it meets Article III's requirements.

8.3.7 Some members of the Panel considered whether the mere wording used in the importing country's law or regulation would alone suffice to classify a measure under either Article III or Article XI. For that purpose, they examined the

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[98]Transcripts of March 6 Hearing, p. 21.

[99]GATT Panel Report on Canadian Provincial Marketing Agencies, para. 4.24.

committee report of the Havana Conference[100]. This report established, when commenting on the meaning of "internal tax or charges" referred to in Article III, that the fact that "charges are described as internal taxes in the laws of the importing countries would not of itself have the effect of giving them the status of internal taxes under" Article III of the GATT.

8.3.8 These members also looked at the GATT Panel Report on Semi-Conductors from Japan[101]. This GATT Panel analyzed the structure and elements of the measure, the operation of the supply and demand forecasts and the operation of the measure and concluded that the administrative structure created by the Japanese government amounted to a coherent system restricting trade in violation of Article XI.

8.3.9 Even without this precedent, these members believe one would be hard put to conclude otherwise than that one must look to the substance rather than the simple form or language of a measure to determine whether it constitutes a violation of GATT Articles XI or III. The mere wording used in the importing country's law will not suffice to classify a measure as either a border or an internal measure. (In that respect, GATT Article XX, though relevant to another question, is an explicit enjoinder against "disguised restriction(s) on international trade" and an encouragement to look beyond the mere wording of the legislative measure.)

8.3.10 The United States argued that a measure will only fall within Article XI if it is a government restriction to the entry of foreign goods and if it does not apply as well to domestic products. Some members of the Panel consider that nothing in the wording of Article XI holds explicitly or implicitly that the prohibition or restriction of which it speaks must apply exclusively to importation. On the contrary, they consider that the very wording of Article XI rejects this hypothesis. Were it to prevail, the exception stated at Article XI (2) (c) (i) would be meaningless. Article XI (2) (c) (i) states that a restrictive measure in violation of Article XI will be valid if the existence of import

[100]Havana Reports, p. 63.

[101]GATT Panel Report on Semi-Conductors from Japan, para. 117.

restrictions are necessary to the enforcement of measures which operate to restrict the quantities of like domestic products; this paragraph necessarily presumes the existence of restrictions applied to both imported and domestic products. Interestingly, this use of the word "restrict" was addressed at the 1948 Havana Conference where the committee agreed that, in interpreting the term "restrict", the essential point was that the measure of domestic restriction must effectively "keep output below the level which it would have attained in the absence of restriction"[102]

8.3.11 The principle was also applied in recent GATT Panels on Semi-Conductors from Japan[103] and on Yoghurt from Canada[104].

8.3.12 Furthermore, were the United States' argument to prevail, an importing party could escape the prohibition of Article XI with impunity by prohibiting the sale of any product not produced by the importing party.

8.3.13 Some members of the Panel consider that there is no precedent establishing that an Article XI restriction must apply solely to imported products. GATT precedents in which measures applying to both imported and domestic product were held to fall within Article III concerned measures which clearly established conditions on the sale of the imported products[105] and therefore do not answer the question.

8.3.14 In its supplementary submission, the United States relied on comments made during the deliberations at the Havana Conference. In the deliberations,

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[102]Havana Reports, p. 87, para. 17.

[103]Japan - Trade in Semi-Conductors, L/6309, BISD 35S/116, 4 May 1988, para. 105.

[104]Canada - Import Restrictions on Ice Cream and Yoghurt, L/6568, 27 September 1989, para. 79.

[105]See, for example, GATT Panel Report on EEC - Measures on Animal Feed Proteins, L/4599, BISD 25S/49, 14 March 1978, para. 4.17.

the negotiating countries considered certain charges imposed by some countries and said[106]:

> The Subcommittee, while not attempting to give a general definition of internal taxes, considered that the particular charges referred to are import duties and not internal taxes because according to the information supplied by the countries concerned (a) they are collected at the time of, and as a condition to, the entry of the goods into the importing country, and (b) they apply exclusively to imported products without being related in any way to similar domestic products.

This comment was made with regard to internal taxes and charges and in reference to Article III. Some members of the Panel consider that this comment is not instructive here, though, since "duties, taxes and other charges" are explicitly excluded from the application of Article XI. They believe that the fact that a measure applies to both imported and domestic products is not dispositive even if a measure cannot be covered by both Article III and Article XI. A Government's restrictions which apply to both imported and domestic products, whether enforced at the border or internally are not ipso facto governed by Article III. A measure will be an Article XI prohibition or restriction on its own merit and depending on its application to importation.

8.3.15 Some members considered whether the point of enforcement of a measure is dispositive. The interpretative note to Article III makes it clear that the point of a measure's enforcement will not subtract it from Article III. The United States' argument recited (but not accepted) in the GATT Panel Report on Canadian Foreign Investment Review Act[107] was that the fact that a measure is not enforced at the border is not sufficient for it to escape Article XI; this seems a perfectly reasonable and common sense position, calculated to satisfy the intention of the GATT's drafters.

8.3.16 Furthermore, in the view of some members of the Panel, the enforcement policy of the importing country cannot make a prohibited measure less

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[106]Havana Reports, page 62, para. 42.

[107]GATT Panel Report on Canada - Administration of the Foreign Investment Review Act, cited above, para. 3.13.

prohibited if its practical effect is to prohibit a product from entering a market. That is, it cannot matter to proper classification of a measure that the importing party intends not to avail itself of the power to enforce the measure at the border. A measure will not be prohibited by Article XI because it is applied at the border but rather because it prevents a product from entering the market or commerce of the trading partner.

8.4 Irrelevant considerations

8.4.1 Some arguments advanced against considering the 1989 amendment an Article XI measure raise the specter of other measures finding themselves prohibited after years of respectability. Some members consider that this Panel's mandate is not to consider other measures or to assume that these are imposed or unchallenged because they are of the type covered by Article III. The Panel's mandate is rather to answer the question whether Article XI governs the 1989 amendment. Other measures will be considered on their own merits and in light of all the facts surrounding them; this one must be considered on its own merits.

8.5 Conclusion

8.5.1 In view of the foregoing, in order to determine whether the 1989 amendment is or is not a measure falling within Article XI, some members of the Panel believe the question to be answered is not whether the measure applies to both imported and domestic products or where the measure is enforced. The question, as they view it, is rather the following:

> Is the measure one that prevents a product from entering the domestic commerce of the importing country or is it one imposing conditions to be met by the foreign product before it can be marketed in the country?

8.5.2 These members consider that GATT Panel precedents establish that a measure will be an Article XI measure if its intended effect is to bar a product from entering a country. They examined the GATT Panel Report on EEC - Tomato

Concentrate[108] which concluded that the EEC minimum price obligations resulted in restrictions contrary to Article XI. In the GATT Panel on Semi-Conductors from Japan[109], it was held that an export monitoring system had the intent and the effect of restricting exports in violation of Article XI. They also looked at the GATT Panel Report on Section 337 of the United States Tariff Act where the GATT Panel observed that the practice of the Contracting Parties in applying Article III had been to "base their decisions on the distinctions made by the laws, regulations or requirements themselves and on the potential impact rather than on the actual consequences for specific imported products".[110]

8.5.3 Some members of the Panel therefore concluded that as long as a measure prevents a product from entering a market, it will be covered by Article XI. They noted that in two previous GATT Panel Reports[111] imported products were defined as products having already crossed the border and cleared customs. However, these members of the Panel were of the opinion that, pursuant to the wording of Article XI and to the interpretation given by GATT Panels, the prohibition of importation into the "internal" market does not mean prohibition from entering the physical borders of a country; it rather means prohibition of access to the internal market.

8.5.4 In the view of these members, whether a measure prevents a product from entering a market or imposes conditions on that product's sale within the market will vary according to the facts of each case. A Panel will be aided by looking at the intent of the legislator of the provision in question but that intent will not be determinative. What is determinative is the practical effect of the measure. Therefore, some members of the Panel concluded that Article III governs measures which affect the conditions on which the

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[108]GATT Panel Report on EEC - Tomato Concentrate, paras. 3.1 and 4.9.

[109]GATT Panel Report on Semi-Conductors from Japan, para. 49 and 106.

[110]GATT Panel Report on Section 337, para. 5.13.

[111]GATT Panel Report on Canadian Provincial Marketing Agencies, para. 3.34; GATT Panel Report on Italian Agricultural Machinery, para. 11.

imported product may be sold while Article XI measures prevent the imported product from entering the market at all. Measures couched in terms leading the reader to Article III may in truth and substance and effect be measures which the GATT signatories intended to prohibit by Article XI; that intent must be respected. In any event, it is one thing to make an exporter's competition in the importing country's market prohibitively expensive, by discriminatory requirements, but it is quite another to bar entry into the market; the 1989 amendment fits into the latter category.

8.5.5 Some members consider that it might be argued that the 1989 amendment only imposes a condition on the sale of the Canadian lobster, that it be left in the water long enough to reach American minimum size; this, however, is not a condition or term affecting the sale in the United States of a particular lobster, it is an absolute bar to that sale. It cannot be an answer to Article XI to say that the importing party can bar entry this year to the lobster as long as entry will be regained next year or the year after.

8.5.6 Similarly, in the view of these members, it might be argued that the 1989 amendment only imposes on the imported sub-sized lobster a sort of packaging or processing requirement, that it be tinned or frozen rather than live. Even if the 1989 amendment did allow the transportation into the United States for freezing or canning prior to sale, which it does not, the markets for live, canned and frozen lobster are clearly discrete. The chain of marketing and the retail demand and the end use of live lobster make the market for live lobster a market unto itself. It is from that market that the Canadian sub-sized lobsters have been excluded.

8.5.7 Some members of the Panel consider that the U.S. interpretation of Article III allows any importing country to prohibit the sale of any imported product by prohibiting the sale of like domestic products. This interpretation contradicts the very purpose of GATT Article XI which says that a Party cannot prohibit the importation of any product unless the prohibition fits into the exceptions of Article XI (preventing critical shortages of essential products, application of standards or regulations, restrictions on agricultural or fisheries products) or in the exceptions provided by Article XX (public morals, human health, conservation, etc).

8.5.8 These members consider, as a practical issue of trade policy, that a determination in this case that the U.S. measures do not constitute an import restriction within the meaning of Article XI brings seriously into question the value of the provision in the GATT and the FTA that prohibits the imposition of prohibitions or QRs on international trade except in narrowly defined circumstances. Indeed were it found that in this case Article III applied to the exclusion of Article XI, the U.S. prohibition would simply escape the disciplines in Articles XI and XX in the use of such trade restrictions. It could not be construed that it was the intention of the Contracting Parties to the GATT or the Parties to the FTA that such trade disciplines should be evadable or that a Party could do something one way that it could not do another way.

8.5.9 In view of the effect of the 1989 amendment (effect which is exactly the intent of those drafting it: to exclude Canadian sub-sized lobsters from the American market), and in view of the language of Article XI and of the analysis of GATT Panel precedents, some members of the Panel concluded that the 1989 amendment is prohibited by Article XI. It is a prohibition or restriction on international commerce, in effect on importation. Its intended and practical effect is to deny to Canadian, and some domestic, sub-sized lobsters the access they had to the American market until January of 1990. Whether it is justified for the environmental and enforcement reasons invoked by the United States (GATT Article XI 2 (c) (i) and Article XX (g)) is another question.

9 THE MINORITY VIEW: ASSUMING ARTICLE XI IS APPLICABLE, DOES ARTICLE XX(g) PROVIDE AN EXCEPTION?

9.1 The steps to be taken to examine the application of Article XX(g) in this case.

9.1.1 If it could be determined that Article XI applies and that the measures undertaken by the United States under the Magnuson Act amendment are inconsistent with that Article, it would next be necessary for the minority members of the Panel, who draw that conclusion, to determine whether those measures are subject to an exception applicable under Article 1201 of the FTA, which incorporates Article XX of the GATT. These members thus considered this question. They were of the view that the only exception applicable to this case would be subparagraph (g), relating to the conservation of exhaustible natural resources.[112] These members decided that in approaching the question, the best method would be first to determine the elements to be satisfied under Article XX and then to examine these elements in the light of the information provided by the Parties. In this regard, these Panel members felt that the language of Article XX, as interpreted and applied in the **Salmon and Herring Report**[113] was instructive. In addition they agreed that since Article XX(g) constitutes an exception to a general article, it must be narrowly construed.[114]

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[112]The appropriate language from Article XX is as follows:

> 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; . . . .

[113]In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the FTA Panel, October 16, 1990 (hereinafter Salmon and Herring Report).

[114]Canada - Import Restrictions on Ice Cream and Yoghurt, L/6568 September 27, 1989 para. 59; Japan - Restrictions on Imports of Certain Agricultural Products, L/6253, November 18, 1987, para. 5.1.3.7, and EEC Restrictions on Imports of Apples, L/6513, June 9, 1989,

9.2 The criteria of Article XX(g).

9.2.1 As noted in the **Salmon and Herring Report**,[115] to qualify for an Article XX(g) exemption:

. the measure must relate to an exhaustible natural resource;

. domestic production of the resource must be likewise restricted;

. the measure must not involve arbitrary or unjustifiable discrimination between foreign countries; and

. the measure must be primarily aimed at conservation.

9.3 Burden of proof is on the United States.

9.3.1 As a procedural matter, the minority members of the present Panel noted that the burden of satisfying these elements fell upon the United States because the issue in question constituted an exception to a general rule, that is, the exception would, if found applicable, remove the United States from the provisions of Article XI.[116]

9.4 How fully the criteria were met.

9.4.1 There was no debate that lobsters are an exhaustible natural resource and that, at least facially, the same measures are applied to U.S. lobster, except intra-state lobster, as to Canadian lobster. The task of the Panel, as these members saw it, was thus reduced to considering whether the measures in question were "primarily aimed at"

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para. 5,13.

[115]Same source, para. 7.02, 7.04.

[116]Salmon and Herring Report, para. 7.02.

conservation of U.S. lobsters or, on the other hand, were arbitrary and discriminatory and thus at the very least a "disguised restriction on international trade". The measures complained of were enforcement measures. There was no disagreement among the Panel members that enforcement is an important element of any conservation and management scheme. These members of the Panel also recognized that any such measure might have a conservation objective while at the same time have an impact upon international trade, even a severe one. As noted in the Salmon and Herring Report, the "primarily aimed at" test should be applied on the basis of the objective qualities of the measure concerned, and the question should be whether the measure would have been adopted for conservation reasons alone.[117] These members of the present Panel thus turned to considering whether there was sufficient evidence to be able to conclude that the measures in question were primarily aimed at the conservation of U.S.- origin lobsters.

9.4.2 In applying this test, the Salmon and Herring Panel examined alternative measures that might have accomplished the same objective. In their words, the question was whether "there is a genuine conservation reason for choosing the actual measure in question as opposed to others that might accomplish the same objective".[118] This examination was conducted in that proceeding not because the Panel felt that the party enacting the measure was required to adopt the least restrictive alternative, but rather to evaluate whether the measure was adopted for reasons of trade policy rather than conservation.[119] The minority members of the present Panel believe that such considerations are relevant.

9.5 The United States said the measures were for conservation enforcement.

9.5.1 The nub of the United States argument is that the amendment under consideration was necessary as an enforcement measure. The argument assumes that for

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[117]Same source, para. 7.07.

[118]Same source, para. 7.08.

[119]Same source, para. 7.14.

proper conservation of the resource, a minimum-size requirement must be efficiently enforced and that, absent the new measure, effective enforcement is not possible. The Parties do not dispute that minimum size is one method for conserving the resource since it permits the lobster to reach the egg-bearing stage. Indeed, both Canada and the United States apply, in varying instances, minimum-size regulations.[120] Minimum-size requirements are not the only measures that can be adopted for conservation. Canada, for example, uses measures in addition to minimum-size requirements, such as closed seasons, effort limitation, catch controls, and vessel restrictions, measures not utilized by the United States. Members of the Panel who engaged in examination of the possible application of Article XX(g) conclude that minimum-size is a legitimate conservation requirement.

9.5.2 In order for a minimum-size regulation to be effective, it must be enforced. The enforcement system provided for by the amendment in question is the prohibition of transportation or sale in interstate and foreign commerce. The United States argues that this is necessary in order to be able effectively to prohibit U.S. fishermen from taking undersized, illegal lobster. Prior to the passage of the amendment, it was legal for Canada to introduce lobster into the U.S. market that, if caught by U.S. fishermen, would be illegal. Such lobster are legally taken in Canadian waters by Canadian fishermen. The problem was stated to be that the commingling of these Canadian "shorts" with U.S. catches in lobster pounds or holding areas made it possible for U.S. fishermen to commingle illegally taken lobster with legal Canadian lobster of the same size, thereby making it easy to avoid U.S. law. Prohibiting all lobster below U.S. legal limits in interstate commerce eliminates this possibility, thus easing enforcement and, in the U.S. view, enhancing conservation, though the United States did not explain whether enforcement would continue to be hampered by the still legal marketing of undersized but intra-state U.S. lobster.

[120]For Canada: "Canadian Presentation at the Oral Hearing," March 5, 1990, Annex B; For the United States: 50 Subpart B, Management Measures (U.S. Submission, February 21, 1990, Annex C and Canadian Presentation, Annex D)

9.6 The previous conservation system utilized a "rebuttable presumption" of illegality.

9.6.1 Enforcement prior to the implementation of the present measure was through utilization of the "rebuttable presumption" system. Under this system, any "shorts" found were presumed to have been taken in federal waters, thus were illegal. This presumption could be rebutted, however, if the person possessing such lobster could produce appropriate documentation, such as a bill of lading, customs receipt, or similar document demonstrating that the lobsters in question had been shipped either from a state where they were legally taken or from Canada. The United States argued that this system was unsatisfactory because it was possible to falsify documents or repeatedly use valid documents.[121] While there were allegations that there had been cases where lobster illegally taken in U.S. waters were discovered, there was no hard evidence in the record to indicate the level of violations occurring under the "rebuttable presumption".[122] Likewise, the record does not provide much information on ways that might have been tried, or were tried, to tighten up the rebuttable presumption system.[123]

9.6.2 The shift from the "rebuttable presumption" enforcement system in 1989 to a system which prevents lobster from Canada which were permitted under the then existing arrangements, without any apparent discussion of alternative enforcement methods which might be less restrictive on trade, raised doubts in the minds of some members of the Panel regarding the true nature of these new measures. To try to resolve those doubts, these members turned to the legislative history of the Magnuson Act amendment.

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[121]U.S. Submission, February 21, 1990, at 6; Letter to Kenneth Freiberg from John J. McCarthy dated January 19, 1990, U.S. Submission, Annex J.

[122]Transcript, March 5, 1990, at 178, 179, indicating that there had been one to three convictions of "unscrupulous dealers".

[123]Same source pp. 170-175.

9.7 The legislative history.

9.7.1 The history of the amendment and its purposes can be derived from certain exchanges of correspondence during the consideration of the legislation as well as the record of the debates in Congress. These documents are extensive, so illustrative examples only will be referred to. Before doing so, however, it should be noted that the documentation is somewhat contradictory on the issue of conservation versus trade restriction.

9.7.2 There are many references in the history to the conservation objectives of the amendment. For example, on November 17, 1989, Senator Chafee referred to the issue as being "the conservation of the Homarus Americanus, the American lobster".[124] Senator Kerry, of Massachusetts, referring to the amendment, said that "The principal mechanism for achieving conservation is to prohibit the taking of lobsters below a minimum size".[125] And Senator Mitchell observed that "foreign imports are undermining the Federal conservation management system for American lobsters".[126] These statements, and others like them, support the contention that the amendment was designed to be a conservation measure.

9.7.3 The same record, however, indicates that even if there was a conservation objective, another concern was the trade in sub-sized lobsters. For example, Congresswoman Snowe, of Maine, characterized the amendment as ensuring that "American lobstermen will be able to compete in a fair and equal marketplace" and noted that "American lobstermen have become increasingly frustrated at having to compete against the shorter imported lobsters".[127] On September 25, 1989, she said that "For too

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[124]Congressional Record, Daily Edition, November 17, 1989, p. S 16232.

[125]Same source, p. S 16135.

[126]Same source, p. S 12007.

[127]Same source, November 20, 1989, p. H 9171.

long the Canadians and others have been selling lobster in the United States that are smaller than American lobstermen are even allowed to catch. This places our competitors at a distinct advantage in the market place and creates an even larger harvestable resource available to the Canadians". Thus, she said, "lobster prices have fallen to the lowest level in a number of years. This is due to the actions of Canadian lobstermen who have dumped large numbers of undersized lobster on the American market." Congressman Brennan, in an extension of remarks, said that the "American lobstermen cannot compete effectively in a market that is open to foreign, undersized imports".[128] Also, in a letter from Governor John McKernan, of Maine, who had authored previous like legislation, to Senator Mitchell, he makes reference to the value of lobster to the Maine economy and to the fact that Canadian imports were causing price fluctuations.[129] Statements such as these reflect that the objective of the amendment was at least in part trade-protective.

9.8 Were alternatives to the U.S. measures considered?

9.8.1. Next, the minority members of the Panel turned to a consideration of the question of alternative enforcement measures. The United States notes, and properly so, these members believe, that "There is nothing in the FTA or GATT that compels the United States to construct its conservation enforcement program for lobsters in a way that most suits Canada's commercial convenience." The FTA **Salmon and Herring** Panel simply said that the availability of alternative methods of conservation may demonstrate by comparison that the measure chosen does not provide real conservation results.[130] Minority members of the present Panel interpret this to mean that the comparison may be done to show that the measure chosen is or is not primarily related to conservation. While the Parties had been specifically asked to discuss alternative enforcement measures and their impacts, there is little in the record that indicates that this was done, other than a flat statement by the United States that there was no acceptable method.

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[128]Same source, May 10, 1988, p. H 1479.

[129]Submission of Canada, Annex D.

[130]United States Supplemental Submission, p. 11.

9.9 Conclusion

9.9.1. Taking all this into consideration, the members of the Panel who concluded that the U.S. measures were in conflict with Article XI were able to conclude only that the objectives of the 1989 amendment were both of a conservation nature and a trade restriction. Due to the fact that there was no persuasive evidence to support the assertion that the amendment's primary objective was conservation, and the limited discussion of alternatives, these members were unable to draw a conclusion that the amendment was "primarily aimed at" conservation. The United States, for example, did not address the reasons for which its conservation objectives could not be met by special marking of Canadian small lobsters, requirements that lobsters be sorted by size prior to importation into the United States, particular documentary requirements as to sub-sized lobsters of Canadian origin, increased penalties for the possession of sub-sized lobsters, more vigilant enforcement efforts, or possibly other requirements. In other words, some members of the Panel were of the view that the United States had not made the case strongly enough to lead those members to the conclusion that the measures were primarily aimed at conservation.

10 THE MINORITY VIEW: ASSUMING ARTICLE XI IS APPLICABLE AND XX(g) DOES NOT PROVIDE AN EXCEPTION, WHAT ARE THE TRADE EFFECTS, IF ANY?

10.1 Terms of reference

10.1.1 If the U.S. measures were found to be prohibited under Article XI and do not qualify for exception under Article XX(g), then the Panel is asked pursuant to FTA Article 1807.5, to present findings based on the Parties' submissions as to the degree of adverse trade effects, if any.

10.2 The Canadian and U.S. estimates

10.2.1 Canada

10.2.1.1 Some members of the Panel considered that the Canadian approach to estimation was that it sought to calculate the amount of trade, both by volume and value, that could be expected to take place in the absence of the measure and the amount of trade, by volume and value, that would be affected by the continuation of the measures, in order to quantify the adverse effect on trade in live lobsters destined for the U.S. market.

10.2.1.2 The Canadian calculation was based on:

(1) an estimate of the volume and value of lobsters that it was anticipated would be harvested in Canada in 1990, 1991, and 1992 on the basis of the average growth of the Canadian harvest over the three years 1986, 1987, and 1988;

(2) the quantity and value of lobsters available in Canada for the live market in 1990, 1991, and 1992 based on the percentage destined for the live market in the base years;

(3) the quantity and value of live lobsters expected to be exported to the United States in 1990, 1991, and 1992 on the basis of the percentage of the live

lobsters available to the live market that were exported to the U.S. in the base years; and

(4) the percentage of the live catch available for fresh consumption that falls into the minimum size constraints based on biological measurement data as supplied by the Canadian Federal Department of Fisheries and Oceans.

10.2.1.3 On the basis of this methodology, Canada calculated that the volume of trade that would be affected by the continuation of the measure would be 6.3 million pounds in 1990, 9.6 million pounds in 1991, and 13.1 million pounds in 1992. In terms of value of trade that would be affected, the calculation was $28.1 million in 1990, $42.1 million in 1991, and $57.0 million in 1992, with a cumulative total of $127.2 million over the three-year period.

10.2.2 The United States

10.2.2.1 The U.S. calculation of the trade that would be affected was based on:

(1) the 1987 NEFMC's estimate that the measures could be expected to lower U.S. landings by 16.9 percent per year when they were fully implemented (3.5 percent in 1988, 4.3 percent in 1989, 4.1 percent in 1991, and 4.2 percent in 1992,)[131];

(2) information attributed to the Fisheries Council of Canada that virtually all the Canadian lobsters shipped to the United States in recent years met or exceeded the minimum size prevailing in the United States before the U.S. size increase went into effect in 1988;[132]

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[131] Trade Effects section of the U.S. Written Summary of Arguments on Article XX(g), p. 3.

[132] Same source.

(3) the assumption that the size distribution of Canadian live lobsters imported into the United States was no different from the size distribution of U.S. lobster landings;[133] and

(4) the average value of Canadian live lobster exports to the U.S. in 1987, 1988, and 1989.

10.2.2.2 Based on the above analysis, the United States estimates the trade affected to be $11.2 million in 1990, $17.0 million in 1991, and $23.7 million in 1992. The United States also suggested that, in the measurement of the degree of adverse trade effects, the possibility of mitigating the trade "damage" should be taken into account. In this context, the United States referred to:

(1) the opportunity for exploiting alternative markets for small live lobsters in Europe and Japan;

(2) the possibility of processing the lobster in Canada for sale in Canada, the United States, or other markets;

(3) the possibility of diverting to the United States market Canadian live lobsters which meet the minimum size requirements but are destined for the Canadian or third markets; and

(4) the possibility of leaving the lobsters in the water until they grow to the U.S. minimum size requirement.

10.3 Comments and observations

The members of the Panel minority are not able to present findings based on the submissions of the Parties as to the degree of adverse trade effect of the measures.

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[133] Same source.

10.4 The amount of trade affected

10.4.1 These members noted that the question of trade effects arises in this case only in the event that there is a finding that the measure is contrary to the obligations of the United States under the Agreement. In terms of the trade affected, this would require a calculation of the amount of trade that could reasonably be expected to take place in the absence of the measures and the amount of trade affected by the measures.

10.4.2 These members of the Panel accepted that there would be need to take into account any potential future growth in the U.S. market for live lobsters which would be otherwise affected by the measures. However, it had difficulty with the presumption that the growth in exports of such lobsters could be reasonably calculated by estimating the harvest of such lobsters in Canada over the three years 1990, 1991, and 1992 and the overall percentage of Canadian live lobsters going to the United States based on historic data.

10.4.3 In the case of the United States submission, there was no provision for growth in Canadian exports of live lobsters to the United States. Nor could it be assumed, on the basis of information submitted to the Panel, that the harvest of Canadian live lobsters which would be affected by the measure would be the same percentage as the estimated percentage of U.S. lobster harvested prior to 1988 which would be prohibited by the size restraints imposed for 1990, 1991, and 1992 and beyond.[134]

10.4.4 These members of the Panel concluded that in the absence of hard data as to the volume of Canadian exports of live lobster to the United States which were below the minimum size during any representative period, the volume of trade that would be affected by the measures was at best a guestimate.

[134] American Lobster Fishery Management Plan - Final Amendment #2, June 1987, p. 6, which, among other things, indicates that these percentages were "within the range of natural variability in landings" prior to 1988.

10.4.5 Nor was there information in the submissions regarding the demand in the U.S. market for smaller live lobsters. In this context it was noted that U.S. restrictions on imports from Canada was at issue, not the U.S. measures on harvesting and marketing of U.S. lobsters.

10.5 The degree of adverse trade effect

10.5.1 These members of the Panel noted that any measures found to be contrary to the obligations of the Agreement were deemed to have some adverse trade effect in terms of nullification or impairment of any benefit reasonably expected to accrue (that is, unrestricted access to the U.S. market).

10.5.2 At the same time, in considering the degree of adverse trade effect, these members found difficulty with the implication that the market for small lobsters could be considered as a distinct component of the United States market for live lobsters. Accordingly, they felt there was considerable force in the U.S. representative's argument that, since there were no restrictions on imports of live lobster which met the U.S. minimum size requirement, an estimate of the degree of restraint should take into account, in some measure, the scope for expanding Canadian sales of live lobsters into the U.S. market which met the United States minimum size requirement.

10.5.3 These members of the Panel, however, had difficulty with the relevance of United States suggestions as to other means of mitigating the adverse effect of the measure on Canadian live lobster exports to the United States. The essential issue was the restraint on Canadian exports of live lobsters to the United States. It was not a question of measuring the injury to the Canadian lobster industry and the scope for mitigating that injury. Accordingly, some members of the Panel could not accept that alternative market opportunities, such as exports to third countries or to the Canadian processing industry, were relevant to the measurement of the adverse effect of the measure on Canadian exports of live lobsters to the United States. Nor did these members consider that the option of leaving the lobsters in the water could appropriately be included in the

calculation of the degree of adverse effect of the U.S. measures on Canadian exports of live lobsters to the United States market.

11 CONCLUSIONS

11.1 The Panel is not unanimous on the basic question

11.1.1 On the question of whether the Magnuson Act, as amended -- the 1989 amendment -- is in conflict with the obligations of the United States under FTA Article 407, which incorporates GATT Article XI, a majority of three members of the Panel concluded there was no conflict. A minority of two members concluded that there was such a conflict.

11.1.2 For the majority, the Report ends there.

11.1.3 Because of the minority view that there is a conflict, some members of the Panel proceeded to consider whether, by virtue of the conservation exception in Article XX (g), the United States would be in violation of its obligations under Article XI if that Article were applied and if it were, to consider further what, if any, adverse trade effects are being sustained by Canada.

11.1.4 Thus:

the first six sections of the Report may be considered prefatory to the basic question and common to the Panel as a whole;

Section 7 (the view that Article XI is not applicable but that Article III is applicable) is the Panel view as represented by the majority;

Section 8 (the contrasting view that Article XI is applicable) represents the minority view;

Section 9 (the possible Article XX (g) exception) and

Section 10 (the quantification of any adverse trade effects) represent the views of the minority in the event Article XI had been found applicable.

Section 11 reports conclusions and ascribes them either to the Panel, as represented by the majority, or to the minority, as the case may be.

11.2 The view of the Panel as represented by the majority

11.2.1 The majority view is that the U.S. measures are covered by Article III. This view is based on the Panel majority's determinations that the U.S. measures are internal -- affecting the internal marketing of U.S.-origin and Canadian lobsters -- and, consequently, are not subject to Article XI, which, in paragraph 1 sets down a prohibition on measures that apply only to imports and that apply at the time or point of importation. The fact that the United States may shift administration of the measures, in so far as they apply to Canadian lobsters, partially or fully toward imposing them at the time or point of importation would not itself mean that the measures were no longer covered by Article III, imposition at the border being expressly permitted by Article III.

11.2.2 The Panel view, as represented by the majority, is based in part on the conclusion that, in so far as imported goods are concerned, the GATT distinguishes between the principles and obligations in Article XI:1 and those of Article III according to whether governmental measures apply, on the one hand, only to imported goods at the time or point of importation and, on the other hand, both to imported goods (at the border or internally) and to domestic goods.

11.2.3 The Panel, as represented by the majority, did not examine the U.S. measures to determine whether they were being applied consistently with the United States obligations under Article III, notably with the national treatment (or equal treatment) obligations of paragraph 4 of that Article. Such further consideration was beyond the Panel's terms of reference. The majority, therefore, confined its determination to the issue of the coverage of the measures under Article III in contrast to their possible consistency with the substantive provisions of the Article.

11.3 The views of a minority of the Panel

11.3.1 The minority concluded that the 1989 amendment was in conflict with the obligations of the United States under Article XI.

11.3.2 The minority's conclusion that Article XI -- specifically Article XI:1 -- applies was based on its view that the U.S. measures had the effect of totally denying to Canadian live sub-sized lobsters access to the U.S. market.

11.3.3 Proceeding to the question of whether the U.S. measures, determined by the minority to be in conflict with Article XI, were permitted by virtue of the conservation exception in Article XX (g), this same minority concluded that the measures were both of a conservation nature and a trade restriction. From what they regarded as unduly limited information made available to the Panel, these members were unable to draw a conclusion that the amendment was "primarily aimed" at conservation. They considered that the United States had not made the case strongly enough to lead them to conclude that conservation was the primary motivation.

11.3.4 The minority members of the Panel, concluded, next, that, though the U.S. measures have some trade effects, in view of lack of necessary data, an estimate of the volume of trade that would be affected by the measures would at best be a "guestimate."

Respectfully Submitted:

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Thomas A. Clingan, Jr.

_____
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_____
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_____
Mary Beth West