

23 January 1981

EUROPEAN ECONOMIC COMMUNITY -
IMPORTS OF BEEF FROM CANADA

RECOURSE TO ARTICLE XXIII:2 BY CANADA

Report of the Panel adopted on 10 March 1981
(L/5099 - 28S/92)

I. Introduction

1.1 In March 1980, the Council (C/M/139, p. 23) was informed by Canada that Canada had made several oral and written representations to the European Economic Community concerning access to the EEC market for Canadian high quality grain fed beef under a 10,000 tons levy free tariff quota, included within a global tariff quota of 21,000 tons contained in the EEC schedule of concessions annexed to the Geneva (1979) Protocol, and established as part of the MTN settlement. If the matter of Canadian access to this tariff quota were not resolved in the very near future, Canada would request the Council at its next meeting to establish a panel under Article XXIII:2 to investigate the matter.

1.2 At its meeting of 18 June 1980 (C/M/141, p. 15), the Council agreed to establish a Panel with the following terms of reference:

"To examine the compatibility with the General Agreement of the EEC regulations pertaining to the implementation of the levy free tariff quota for 10,000 tons of fresh, chilled or frozen high quality grain fed beef, and to make such findings as will assist the CONTRACTING PARTIES in making recommendations and rulings as appropriate."

1.3 The Chairman of the Council was authorized to nominate the Chairman and members of the Panel in consultation with the two parties concerned. On 9 October 1980, the Chairman of the Council informed the Council of the agreed composition of the Panel (C/M/143, p. 11).

Chairman: Mr. K. Berger (Permanent Mission of Norway, Geneva).

Members: Mr. E. Contestabile (Office Fédéral des Affaires économiques extérieures, Palais Fédéral, Berne).
Mr. C.A. Rego Santos-Neves (Permanent Mission of Brazil, Geneva).

1.4 In the course of its work, the Panel held consultations with Canada and the European Economic Community. Information and arguments submitted by both parties, their replies to questions put by the Panel as well as relevant GATT documentation served as a basis for the examination of the matter.

II. Factual aspects

2.1 The following is a brief description of the factual aspects of the EEC's regulations concerning the implementation of the levy free tariff quota as the Panel understood them.

2.2 During the Multilateral Trade Negotiations the EEC granted a concession on "high quality cuts" of fresh, chilled or frozen meat of bovine animals under tariff heading 02.01 in the form of a global levy free tariff quota of 21,000 tons (product weight) at a tariff of 20 per cent ad valorem. Within this global quota a concession concerning 10,000 tons of high quality grain fed, fresh, chilled or frozen beef was granted.* According to a footnote to the concession "Entry under this sub-heading is subject to conditions to be determined by the competent authorities."

*EEC Schedule of Concessions annexed to the Geneva (1979) Protocol -Schedule LXXII, Part 1, Tariff Number 02.01 AII(a) and 02.01 AII(b).

2.3 Subsequently, the EEC set in motion implementation of the concession for the year 1980 through Council Regulation (EEC) No. 2957/79 of 20 December 1979 and Commission Regulation No. (EEC) 2972/79 of 21 December 1979.

2.4 Council Regulation No. 2957/79 opened the tariff quota for 1980, putting the tariff at 20 per cent whereas detailed rules of application were provided for in Commission Regulation No. 2972/79. This latter provided inter alia for a quota of "10,000 tons, product weight, of fresh, chilled or frozen meat falling within sub-heading 02.01 AII(a) and 02.01 AII(b) of the Common Customs Tariff and answering the following definition:

'Carcasses or any cuts from cattle not over 30 months of age which have been fed for 100 days or more on a nutritionally balanced, high energy feed concentration ration containing no less than 70 per cent grain and at least 20 pounds total feed per day. Beef graded USDA "choice" or "prime" automatically meets the definition above.' (Article 1(1)(d)).

2.5 The Regulation further provided for rules concerning a certificate of authenticity, valid three months, and, for the meat referred to in Article 1(1)(d), an import licence. The certificate of authenticity was to be valid only if it was completed and endorsed by one of the issuing authorities listed in Annex II which in the case of meat referred to in Article 1(1)(d) was the "Food Safety and Quality Service (FSQS) of the United States Department of Agriculture (USDA)" with the mention "for meat originating in the United States, answering the definition in Article 1(1)(d)". Article 7 of the Commission Regulation provided that "The quantities of meat referred to in Article 1(d) which may be imported every quarter under the tariff quota shall be determined during the final month of each preceding quarter."

2.6 Subsequent to Article 7 of the Commission Regulation, further Commission Regulations were issued at the end of each quarter of 1980 fixing for each quarter in question, the quantities of high quality beef "which may be imported under special conditions".

2.7 By the end of October 1980, 742.7 tons of the high quality beef referred to in Article 1(1)(d) of Commission Regulation (EEC) No. 2972/79 had been imported by the EEC from the United States whereas the quantities that could have been imported were fixed at zero for the first quarter, 5,000 tons for the second quarter, 5,000 tons for the third quarter and 9,257 tons for the fourth quarter of 1980.

III. Main arguments

3.1 In the course of its examination of the matter before the Panel, the Panel received written submissions from Canada and the European Economic Community and also heard oral presentations by representatives of the parties. The following is a summary of the arguments put forward:

3.2 The representative of Canada stated that the Government of Canada had made written representations on several occasions in 1979 and 1980 to the EEC and pursuant to Article XXII:1 consultations were held between the EEC and Canadian officials several times in order to provide access for Canadian beef meeting the product specifications set out in Article 1(1)(d) of Commission Regulation (EEC) No. 2972/79 on terms equivalent to those applied for the same quality of beef from the United States. In these representations Canada demonstrated that it was willing to and could certify on an individual shipment basis that certain grades of Canadian beef met the specifications required for access under this tariff rate quota.

3.3 The Canadian representative further noted that, under the request and offer procedures adopted by Group Agriculture in the Multilateral Trade Negotiations, Canada had requested from the EEC the maximum possible tariff reduction as well as a reduction and binding of the levy for fresh chilled or frozen bovine meat. The Canadian representative also stated that Canada did not put forward any

observations or requests for clarification during the four month review period for Schedule LXXII and its notes because it is clearly stated in that Schedule that a global quota was being bound on a MFN basis subject to certain product specifications being met. He further stated that the Multilateral Trade Negotiations were conducted on a MFN basis as called for in the Tokyo Declaration recognizing that indirect benefits might accrue to suppliers who may not be directly involved in negotiations between the importing country and the initial negotiating country. In addition, the Canadian representative pointed out that the Tokyo Declaration called for the negotiations to "be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity, while observing the most favoured nation clause" rather than on the basis of reciprocity on a strictly bilateral or individual sector basis.

3.4 During the consultations the EEC had been informed that as part of the MTN settlement between Canada and the United States, the latter agreed to accept Canadian grades A2, A3 and A4 as meeting the definition of high quality beef eligible for entry under TSUS 107.61. Beef entering under this tariff classification must meet the specifications in regulations issued by the United States Department of Agriculture for "prime" or "choice" beef.

3.5 The representative of Canada further stated that in the opinion of the Canadian authorities the EEC had implemented the 10,000 ton levy free tariff rate quota for high quality grain fed beef in a manner not consistent with Articles I and II of the General Agreement by setting out discriminatory conditions.

3.6 The exclusion of Canadian beef grades A2, A3 and A4 from Article 1(1)(d) of Commission Regulation (EEC) No. 2972/79, was, in the opinion of Canada, not consistent with the obligations of the EEC under Article I, paragraph 1 of the General Agreement. Furthermore, the representative of Canada said that the manner in which the quota was implemented was also inconsistent with the provisions of Article II, paragraph 1(a) since beef from the United States was permitted entry while the same quality of beef from Canada was not, thus according less favourable treatment to Canada. Referring to admissible terms or conditions in a concession, he said that in Canada's opinion, it was legitimate to give a very specific and technical product description whereas rules and formalities which when implementing the concession discriminated against certain countries were not permitted.

3.7 Canada was of the opinion that, the manner in which the EEC concession was implemented, in violating certain provisions of Articles I and II, constituted prima facie nullification of benefits accruing to Canada from an EEC concession, bound under the General Agreement, within the meaning of Article XXIII of the General Agreement.

3.8 The representative of the European Economic Community said that the regulations referred to by Canada were adopted following a concession granted by the EEC during the Multilateral Trade Negotiations. That concession was negotiated with the United States of America, subject to conditions. He said that the bovine meat sector in any country was one of the most sensitive agricultural sectors; that agreement on import advantages had always been a matter of long and difficult negotiations; and that only under conditions of mutual benefit and/or freely accepted disciplines had such advantages been accorded. The concession granted by the EEC met those conditions.

3.9 Moreover, that concern was brought to the attention of the EEC's partners in GATT, since the footnote to the second item - meat of bovine animals: "high quality" cuts - under paragraph 4 of the Introductory Notes to Schedule LXXII expressly mentioned that:

"The implementation of this concession will follow strictly, as far as dates are concerned, that applied by the Community's partners in the same sector."

3.10 The representative of the European Economic Community further stressed that Canada did not put forward any observation, not even a request for clarification, during the review exercise concerning Schedule LXXII and its Notes, which lasted for four months, whereas on other points it presented observations which led to rectifications and it even requested that concessions in its favour should be incorporated in the Schedule. What is more, at no time in the Multilateral Trade Negotiations - including the final phase when there were close contacts between the Community and Canada during which lists of priorities were exchanged and negotiated - did Canada make any request concerning high-quality meat of bovine animals.

3.11 He further said that Canada was not unaware that the EEC was engaged in negotiations with the United States on a concession concerning high-quality meat. Other GATT contracting parties, interested in exporting high-quality meat to the Community, were careful, in the framework of the Multilateral Trade Negotiations, to enter into negotiations with the Commission in time, so as to secure the benefits of a very specific concession in this sector when the mutual concessions were finalized. During the negotiations, the Community could not but note that by its passive attitude Canada showed a certain disinterest in the subject.

3.12 He observed that a small number of developed countries "participants" in the negotiations were expecting indirect benefits for themselves deriving from concessions paid for by others, without necessarily always making sure to contribute their share to the maintenance of an even balance between their rights and obligations. Such an attitude was in contradiction with the Tokyo Declaration of 14 September 1973 (document MTN(73)1) and in particular its paragraph 5, which reads as follows:

"The negotiations shall be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity, while observing the most-favoured-nation clause, and consistently with the provisions of the General Agreement relating to such negotiations. Participants shall jointly endeavour in the negotiations to achieve, by appropriate methods, an overall balance of advantage at the highest possible level ...".

In making this observation, he said that he was not questioning Canada's motives. He had to note, however, that, especially as regards the agricultural sector, the direct and indirect benefits to the EEC offered by Canada were clearly inferior to the direct and indirect benefits to Canada offered by the Community.

IV. Findings and conclusions

4.1 (a) The Panel examined the conformity of the EEC regulations with the provisions of Article I, paragraph 1. In this connection the Panel noted that paragraph 1 provided for most-favoured-nation treatment of like products irrespective of their origin.

(b) The Panel further noted: in order to implement the high quality grain fed beef concession that the EEC had granted during the Multilateral Trade Negotiations, the EEC Commission issued detailed rules for the importation of this meat; Commission Regulation (EEC) No. 2972/79 specified in its paragraph 1(d) of Article 1, the quality of meat to be imported under this concession, and provided that "beef graded USDA 'choice' or 'prime' automatically meets the definition above."¹

¹Article 1, paragraph 1(d) reads: "10,000 tons, product weight, of fresh, chilled or frozen meat, falling within sub-headings 02.01 A II (a) and 02.01 A II (b) of the Common Customs Tariff and answering the following definition: Carcasses or any cuts from cattle not over thirty months of age which have been fed for 100 days or more on a nutritionally balanced, high energy feed concentration ration containing no less than 70 per cent grain and at least 20 pounds total feed per day. Beef graded USDA 'choice' or 'prime' automatically meets the definition above."

(c) The Panel also noted: the suspension of the import levy for the meat in paragraph 1(d) was subject to a certificate of authenticity, valid only if completed and endorsed by the appropriate issuing authority listed in Annex II; the "Food Safety and Quality Service (FSQS) of the United States Department of Agriculture (USDA)" was the only authority listed as certifying agency for the meat in question, it being specified that this agency was empowered to certify "meat originating in the United States, answering the definition of Article 1(1)(d) "an import licence was needed for the meat referred to in Article 1(1)(d) of the Regulation.

(d) The Panel also noted the assertion by Canada that it could certify that the meat Canada proposed to export to the EEC under this quota, met the exact product specifications required for access.

4.2 (a) The Panel found that products meeting the description in Article 1(1)(d) of Commission Regulation (EEC) N° 2972/79 were "like products" for the purposes of Article I of the General Agreement. The Panel further found that exports of like products of other origin than that of United States were in effect denied access to the EEC market considering that the only certifying agency authorized to certify the meat described in Article 1(1)(d), listed in Annex II of the Commission Regulation, was a United States agency mandated to certify only meat from the United States.

(b) The Panel further found that the mention "Beef graded USDA 'choice', or 'prime' automatically meets the definition above" could accord an advantage to products of United States' origin in so far as other like products were not mentioned in the same manner. The Panel found, however, that only the practical application of the Commission Regulation would make it possible to judge whether this mention in itself was inconsistent with Article I of the General Agreement.

4.3 The Panel concluded that Commission Regulation (EEC) No. 2972/79 and its Annex II, in their present form had the effect of preventing access of "like products" from other origin than the United States, thus being inconsistent with the most-favoured-nation principle in Article I of the General Agreement.

4.4 (a) The Panel examined the conformity of the EEC regulations with the provisions of Article II, paragraph 1 of the General Agreement. In this connection the Panel noted that paragraph 1 stipulated that "each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for ..." in the "appropriate schedule ...". It also noted that products described in the schedules "shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein."

(b) The Panel further noted: the levy-free tariff quota concerning 10,000 tons of high quality beef was bound in Schedule LXXII of the EEC, Part I, tariff sub-headings 02.01 AII (a) and 02.01 AII (b) at a rate of 20 per cent. In a footnote to the concession it was provided that "entry under this sub-heading is subject to conditions to be determined by the competent authorities "furthermore, in the Introductory Notes to Schedule LXXII the following paragraph was included, pertaining to the concession in question: "the implementation of this concession will follow strictly, as far as dates are concerned, that applied by the Community's partners in the same sector."

(c) The Panel also noted: the concession was implemented by Council Regulation (EEC) No. 2957/79 whereas Regulation (EEC) No. 2972/79 provided detailed rules concerning the application of the import arrangements; the latter regulation provided for quite detailed rules and conditions as concerns formalities to be completed, such as providing a certificate of authenticity and an import licence.

4.5 (a) The Panel found that the European Economic Community had, by virtue of the footnote in the Schedule reserved its right to set conditions for the entry under the levy-free tariff quota in question.

The Panel further found that the right to set conditions was presupposed in Article II: 1(b) of the General Agreement. The Panel found, however, that the words "terms, conditions or qualifications" in paragraph 1(b) of Article II could not be interpreted to mean that countries could explicitly or by the manner in which a concession was administered actually limit a given concession to the products of a particular country.

(b) The Panel further found that the fact that in Annex II there was only one certifying agency for the meat in question and that this agency only certified meat of United States origin in effect prevented access of high quality meat as described in Article 1(1)(d) of Commission Regulation (EEC) N° 2972/79 from other countries.

4.6 Consequently, the Panel concluded that the manner in which the EEC concession on high quality beef was implemented accorded less favourable treatment to Canada than that provided for in the relevant EEC Schedule, thus being inconsistent with the provisions of paragraph 1 of Article II of the General Agreement.

4.7 The Panel noted the reference made by the European Economic Community to the importance of a balance of concessions and also its reference in this regard to paragraph 5 of the Tokyo Declaration. The Panel agreed that the achievement of a satisfactory balance was an important consideration of the participants in a negotiation. However the Panel did not find reason to consider the question of balance between the parties in relation to the matter before it. The Panel found that when a multilateral negotiation under the auspices of the GATT had been completed, the concessions granted would have to be implemented as laid down in the Schedules and on the basis of the relevant provisions of the General Agreement. Therefore, the Panel concluded that considerations pertaining to the balance between concessions could not modify its findings.

4.8 The Panel examined the conformity of the EEC regulations with the provisions of Article XXIII. It noted that nullification or impairment of a benefit accruing directly or indirectly under the General Agreement to a contracting party could be the result of:

- "(a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of the Agreement, or
- (c) the existence of any other situation."

4.9 The Panel found that the infringement of Articles I and II of the General Agreement, referred to in paragraphs 4.3 and 4.6 above, constituted prima facie nullification or impairment of benefits in the sense of Article XXIII, accruing directly or indirectly to Canada under the General Agreement. It proposed, therefore, that the CONTRACTING PARTIES should recommend to the authorities of the European Economic Community to take the necessary steps to make the implementation of the concession consistent with the provisions of the General Agreement.