

26 October 1990

CANADA/EUROPEAN COMMUNITIES - ARTICLE XXVIII RIGHTS

*Award by the Arbitrator*  
(DS12/R - 37S/80)

In document DS12/3, contracting parties were informed that Canada and the European Communities had agreed to have recourse to arbitration in respect of their dispute on the interpretation of the negotiating rights under the bilateral agreements of 29 March 1962 on wheat. Contracting parties were also informed that Mr. Gardner Patterson, former Deputy-Director General of GATT, had agreed to act as Arbitrator.

Reproduced hereunder is Mr. Patterson's award which was transmitted to the parties concerned on 16 October 1990.

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AWARD BY ARBITRATOR

In the case of the dispute between Canada and the European Economic Community on the issue of Canada's ordinary and quality wheat rights dating from the Article XXIV:6 negotiations Canada concluded with the Community on 29 March 1962 and the quality and ordinary wheat agreements concluded between the parties on the same day.

I

On 16 July 1990, Canada and the European Economic Community notified the Director-General they had agreed to have recourse to the Arbitration procedures as provided by the Mid-Term Agreement on Dispute Settlement on the outstanding issue of Canada's ordinary wheat and quality wheat rights dating from the Article XXIV:6 negotiations that Canada concluded with the Community on 29 March 1962 and the quality and ordinary wheat Agreements concluded between the parties on the same day.

The parties agreed that Mr. Gardner Patterson be requested to act as arbitrator in this matter.

The parties agreed that the questions to be examined were:

"Does Canada maintain through the Bilateral Agreement of 29 March 1962 with respect to quality wheat all the negotiating rights provided for in Article XXVIII?"

"What kind of rights under the General Agreement does Canada maintain through the Bilateral Agreement of 29 March 1962 on ordinary wheat?"

Each party submitted an initial written statement dated 27 July 1990. A second written statement replying to the other party's first submission was made on 14 September 1990. Oral discussions were held with the Arbitrator on 5 October 1990.

There was no dispute as to the fact that Canada's negotiating rights with regard to wheat were as an INR holder and principal supplier.

The texts of the two agreements are as follows:

"AGREEMENT WITH RESPECT TO QUALITY WHEAT"

Agreement entered into with respect to quality wheat (Common External Tariff Item Number ex 10.01) between the European Economic Community (hereinafter called the Community), the Member States of the European Economic Community (hereinafter called the Member States) and the non-European Economic Community countries signatory to this agreement (hereinafter called the Third Countries).

Considering that the national wheat tariffs of the Member States will be unbound and that the Common Tariff for wheat is not being bound, the Community and the Member States subscribe to the following obligations:

A. Until the putting into operation of the Common Agricultural Policy on wheat (application of a levy or levies to imports):

- (i) The national wheat tariffs of Member States as bound on September 1, 1960 shall not be increased.
- (ii) No new system or measures to restrict or regulate imports shall be introduced and in continuing existing measures within national systems the Member States shall endeavour to avoid any adverse change in the level of imports.

B. From the date of the decision of the Community to introduce the common policy for wheat until completion of negotiations with the Third Countries:

- (i) Negotiations shall commence as soon as the EEC Council of Ministers has decided to introduce the common policy for wheat and at the latest by June 30, 1963.
- (ii) The Community undertakes to enter into negotiations on the subject of the consequences on imports from Third Countries of the common agricultural policy to be applied. It does not exclude negotiation on the maximum level of the levy or levies. This negotiation shall take into account the importance of international trade in wheat and shall be such as to provide for the evolution of this trade with the Community under fair and reasonable conditions.
- (iii) The negotiations shall deal with quality wheat.
- (iv) The negotiations shall be in accordance with the procedures of Article XXVIII of the GATT. In these negotiations the Third Countries shall have all the contractual rights held by them on quality wheat on September 1, 1960.
- (v) Consultations shall take place if imports from non-EEC Contracting Parties show any appreciable decline in any period below the average of the corresponding period of the last three years. If the decline is related to the implementation of the common policy for wheat the Community and the Member States will take appropriate measures to remedy the decline.

General Understandings

- (i) While this agreement is in force, the Community and the Member States undertake to consult at any time with the Third Countries regarding its operations.

- (ii) The Third Countries do not in any way limit their rights under GATT, or otherwise, to press for the removal or adjustment of systems or practices of the Member States which have the effect of limiting the possible purchase or importation of wheat from such Third Countries."

"AGREEMENT WITH RESPECT TO ORDINARY WHEAT

Agreement entered into with respect to ordinary wheat (ex 10.01 of the Common External Tariff).

Canada, the European Economic Community and its Member States agree as follows:

- A. Until the putting into operation of the Common Agricultural Policy for ordinary wheat (application of the levy or levies), the Member States undertake not to modify their national import systems in such a way as to make them more restrictive.
- B. Upon adoption of the agricultural policy for ordinary wheat, the Community undertakes to enter into negotiations with Canada on the situation of exports of these products by Canada.

The negotiations provided for under this paragraph will take place on the basis of the negotiating rights which Canada held under the General Agreement for these products as of September 1, 1960.

- C. The parties signatory to this agreement in no way limit their rights under the GATT or on any other basis.

Done at Geneva this twenty-ninth day of March 1962, in the English and French languages, both authentic."

The written submissions and the oral discussions made it clear that the answer to the questions to be examined rests on the answers to three subsidiary questions. First, what is the relationship, if any, between these Agreements and the GATT? Second, do the Agreements confer on Canada all the rights, or their equivalent, provided for in Article XXVIII. Third, if they do, does Canada still possess those rights, or have they lapsed due to the passage of time?

II

THE AGREEMENT ON QUALITY WHEAT

In May 1959 the CONTRACTING PARTIES to the GATT organized a Tariff Conference, one of the aims of which was to "negotiate the existing concessions, in conformity with Article XXIV of the GATT, following the creation of the European Economic Community." In the framework of this Conference, Canada and the European Economic Community entered into negotiations in 1960, 1961 and 1962 under Article XXIV:6. Serious difficulties arose in the negotiations on wheat. Among the complications was the fact that the application of the CAP to wheat had not been finalized so Canada could not make an informed assessment of the effect of the Community's unbinding of the member States' tariffs. The Canadian delegate on 27 July 1961 wrote the Community stating, inter alia, that Canada's: "... willingness to terminate the Article XXIV:6 negotiations with or without reservations must be conditional on a satisfactory agreement with respect to wheat ...".

In the event, the hoped-for agreement on concessions for wheat had not been reached by the spring of 1962, and on 29 March 1962 the two parties concluded the bilateral agreements reproduced above.

On the same date they formally notified the GATT secretariat in a joint letter that they had concluded their Article XXIV:6 negotiations. The report attached to the letter provided a list of all the negotiated concessions. The two Agreements on wheat were also attached.

Since 1962, Canada and the European Economic Community have, on several occasions, engaged in negotiations under this Agreement, or agreed to defer resumption of the negotiations for a period. No settlement has yet been reached.

Given the fact that wheat exports to the European Economic Community are of great importance to Canada, given the fact that it was not known in 1962 what the import restrictions on wheat would be under the CAP, and given the fact that the parties were under considerable pressure to conclude the XXIV:6 negotiations, given these facts and the safe assumption that the parties were fully versed and competent in GATT matters and were acting in good faith, on the basis of these considerations I reach the conclusion that the purpose of these agreements was to place Canada in a legal position equivalent to the one she would be in if the time-limits of Article XXVIII did not apply. Otherwise, I see no reason for Canada to have signed them.

A.

A strongly contested issue is the relationship between these Agreements and the GATT, and whether Canada may bring a claim based on a bilateral agreement under the multilateral procedures of the GATT.

The wording of the Agreements makes no mention of the link between them and the Article XXIV:6 negotiations. Nor were they formally notified to the other contracting parties as was the text of the successfully negotiated concessions. The Protocol concluding the XXIV:6 negotiations does not mention the bilateral agreements or otherwise state that there was any unfinished business on cereals. The EC asserts these facts are clear evidence that these are bilateral agreements that were neither negotiated or concluded in the framework of the GATT.

There is, however, much evidence that these Agreements were negotiated in the context of the 1960-62 Article XXIV:6 negotiations. They were attached to the formal letter attesting to the conclusion of those negotiations. The EEC itself has at various times linked the Agreement on Quality Wheat to the XXIV:6 negotiations. For example, in a 22 May 1979 exchange of letters headed "Negotiations Commerciales Multilaterales" (in itself significant) it is stated: "Canada and the Commission of the European Communities agree to meet in 1982 with a view to examining the question of the disposition of the outstanding matter concerning Canada's exports of quality wheat to the EEC arising out of the exchange of letters which resulted from the GATT Article XXIV:6 Negotiations (italics supplied) of 1962 and 1975." In a 12 May 1978 letter to the EEC Commission, Canada stated, inter alia, "the 1960 to 1962 and 1973 to 1975 Article XXIV:6 Negotiations between Canada and the EEC resulted in a 1962 interim Agreement with Respect to Quality Wheat ...". This assertion was not, apparently, questioned by the EEC. Further evidence of the link between the Agreement and the XXIV:6 negotiations was the statement in a January 1979 "proposal" in which the EC stated "cet accord est une partie intégrante des obligations de la Communauté et des Etats membres sous le GATT et remplace les droits du Canada pour le blé et l'orge résultant des négociations au titre de l'article XXIV:6 avec la Communauté de 1960 à 1962 (tel qu'exposé dans l'Accord du 29 mars 1962 sur le blé de qualité) ...".

I conclude from these complex set of considerations that the Quality Wheat Agreement was negotiated - concluded - in the context of the XXIV:6 negotiations.

In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT. An exception is warranted in this case given the close connection of this particular bilateral agreement with the GATT, the fact that the Agreement is consistent with the objectives of the GATT, and that both parties joined in requesting recourse to the GATT Arbitration procedures.

B.

What Article XXVIII rights, or their equivalent, if any, does the Agreement confer on Canada?

What substantive rights are conferred by paragraph B(iv) of the Quality Wheat Agreement which, as noted, states that "The negotiations shall be in accordance with the procedures of Article XXVIII of the GATT" and that in these negotiations "(Canada) ... shall have all the contractual rights held by her on quality wheat on September 1, 1960"? The European Economic Community argues that this provision refers not to any rights - in particular any withdrawal of concession rights - but only to procedural matters, and that only for guidance. The negotiations provided for here, the Community states, are simply the "... normal negotiations on evolution of trade as in the case of a bilateral agreement". The Community also argues that recognition and acceptance of this procedure does not imply recognition of GATT negotiating rights. The Community maintains that the very purpose of such a bilateral agreement is to substitute bilateral rights for the previous multilateral rights and this paragraph merely provides a "conventional commitment" to take into account Canada's trade interests.

It has been argued that this interpretation is supported by paragraph B(v) of the Agreement which provides, inter alia, that consultations shall be held if imports from non-Community contracting parties show any appreciable decline below the average of the previous three years, but no mention is made that such consultations shall be conducted in the context of Article XXII, XXIII or XXVIII.

In support of the thesis that the Agreement clearly extend her GATT rights (or their equivalent), the Canadians cite the Note Verbale of the European Economic Community dated 23 December 1983 which included the following statements: "The Services of the Commission, in the light of the request of the Canadian authorities for a further extension and given that the meeting held in June 1983 reached no solution on the matter, confirm that Canada's GATT rights with respect to quality wheat shall be extended to the end of 1984." On 21 November 1984 the Commission agreed that the negotiating rights of Canada were extended beyond 31 December 1984.

Further, it is appropriate to give weight to the generally accepted proposition that the right to withdraw concessions is an integral part of the right to negotiate, which right is not in dispute here. It is worth recording that Article XXIV:6 itself specifies that in the negotiations required by Article XXIV "the procedures set forth in Article XXVIII shall apply". There can be no doubt that here the procedures include the right to withdraw concessions.

The European Economic Community acknowledges that Canada can ab initio invoke Article XXVIII and proceed according to the well-established rules to modify her schedule, including withdrawal of concessions of value to the Community. She states that in any such negotiations the wheat agreements "are of relevance"; in particular, she states that in such a negotiation Canada can "invoke its negotiating rights" as in force on 1 September 1960. If in such negotiations Canada and the Community cannot reach agreement on the compensatory adjustment, the Community states, both Canada and the European Economic Community could invoke the provisions of Article XXVIII:3. But surely Article B(iv) of the wheat Agreement must mean more than that. It is not Canada's wish to modify her schedule: she seeks compensation for modifications of the schedules of the original member States resulting from the introduction of the CAP.

The wording of paragraph B(iv) seems to the arbitrator clear and unequivocal in retaining the equivalent of all of Canada's contractual GATT rights held as of 1 September 1960. These rights were those of an INR holder and a principal supplier. They therefore include the equivalent of all Article XXVIII rights, including the right to withdraw concessions.

C.

The question still remains whether, by formally acknowledging the conclusion in 1962 of the XXIV:6 Negotiations (which followed the procedures of Article XXVIII) Canada lost her right to invoke the provisions of Article XXVIII:3, including the right to withdraw equivalent concessions. This paragraph of Article XXVIII can be invoked only if an agreement cannot be reached. Moreover, there are severe time-limits tied to the exercise of this right to withdraw. These have long since expired so far as the 1960-62 XXIV:6 negotiations are concerned.

However, as noted earlier, I conclude that the very purpose of this bilateral agreement was to put Canada into a legal position equivalent to the one it would be in if the time-limits of Article XXVIII did not apply.

It follows that Canada still maintains a right to withdraw equivalent concessions if the negotiations under the bilateral agreement are not successfully concluded.

In sum, I conclude that Canada maintains through the bilateral Agreement of 29 March 1962 with respect to Quality Wheat all the negotiating rights provided for in Article XXVIII, or their equivalent.

It needs stressing that the time-limits established in Article XXVIII:3 have, inter alia, the purpose of safeguarding the interests of third countries. Should Canada exercise her right to withdraw concessions, she undertakes obligations to compensate third countries having negotiating rights in respect of Canada for the products on which concessions would be withdrawn.

III

AGREEMENT ON ORDINARY WHEAT

It has been argued that all the considerations noted above with respect to the Agreement on Quality Wheat apply to the Agreement on Ordinary Wheat, mutatis mutandis. The situation appears quite different to me. The text of the Ordinary Wheat Agreement was less precise and comprehensive. It speaks only about negotiations and does not specifically mention Article XXVIII rights. More important is the fact that in the nearly three decades between 1962 and 1990 Canada seemingly never requested that the negotiations provided for in the Agreement be pursued, although they did actively negotiate under the terms of the Quality Wheat Agreement. The 1978 and 1984 Canadian proposals for an agreement on quality wheat were not accompanied by companion proposal for ordinary wheat.

No time-limits were set in this Agreement for starting or concluding the negotiations. Nonetheless, a properly functioning multilateral international trading system does require that after a certain period silence must be considered acceptance of a state of affairs or abandonment of a claim. The predictability and stability that are central features of the GATT system require that.

I conclude that by silence for so long on the Agreement on Ordinary Wheat Canada has relinquished any rights under the General Agreement she might have possessed under it in 1962.

Geneva, 16 October 1990