RESTRICTED
L/5198
22 December 1981
Limited Distribution

# GENERAL AGREEMENT ON TARIFFS AND TRADE

## UNITED STATES - PROHIBITION OF IMPORTS OF TUNA AND TUNA PRODUCTS FROM CANADA

## Report of the Panel

### I. Introduction

1.1 In a communication dated 21 January 1980 and which was circulated to contracting parties, the Government of Canada complained that an action taken by the Government of the United States on 31 August 1979 to prohibit imports of tuna and tuna products from Canada was discriminatory and contrary to the obligations of the United States under the GATT and impaired benefits accruing to Canada under the GATT. The Government of Canada at the same time requested, pursuant to Article XXIII:2, the establishment of a panel to examine the compatibility with the General Agreement of the United States prohibition of imports of tuna and tuna products from Canada (L/4931).

1.2 The Council discussed the matter at its meeting of 29 January 1980, when the representative of Canada expressed the hope that the matter could still be resolved satisfactorily between the parties concerned. If no solution could be reached, however, he also hoped the Council would be prepared to establish a panel at its next meeting. The representative of Peru supported the Canadian request for a panel (C/M/138).

1.3 As no solution was reached, the Council again discussed the matter at its meeting of 26 March 1980, when the representative of Canada renewed his request for a panel to be set up and the representative of Peru renewed his support for the Canadian request. The representative of the United States recalling that the action had been taken according to the United States Fisheries Conservation and Management Act of 1976, stated that his delegation did not see any need for a panel to be

established as further efforts were being made to resolve the issue, but he would not oppose the setting up of a panel. The Council agreed to establish a panel with the following terms of reference:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Canada relating to measures taken by the United States concerning imports of tuna and tuna products from Canada (L/4931), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings as provided in Article XXIII."

The Council furthermore authorized the Chairman of the Council to nominate the Chairman and members of the Panel in consultation with the two parties concerned (C/M/139).

1.4 Accordingly, the Chairman of the Council nominated the following:

Chairman: H.E. Ambassador A. Auguste (Trinidad and Tobago)
Members: Mr. T.H. Chau (United Kingdom, Hong Kong Affairs)
Mr. J.-D. Gerber (Switzerland)

(C/M/141).

1.5 Subsequently, at the Council meeting on 10 November 1980, the Chairman informed the Council that H.E. Ambassador A. Auguste had been transferred from Geneva and was no longer available to serve as Chairman of the Panel. He further informed the Council that following consultations with the two parties, Mr. P.K. Williams (United Kingdom) had assumed the Chairmanship of the Panel (C/M/144).

1.6 In the course of its work the Panel heard statements by representatives of Canada and the United States. Background documents and relevant information submitted by both parties, their replies to the questions put by the Panel as well as relevant GATT documentation served as a basis for the examination of the matter subject to the dispute.

II. Factual Aspects

2.1 On 31 August 1979, the United States prohibited imports from Canada of tuna and tuna products[1]. This action followed the seizure of 19 fishing vessels and the arrest by Canadian authorities of a number of United States fishermen, engaged in fishing for albacore tuna within 200 miles of the West Coast of Canada without authorization by the Canadian Government, in waters regarded by Canada as being under its fisheries jurisdiction and regarded by the United States as being outside any State's tuna fisheries jurisdiction.

2.2 The United States prohibition was imposed pursuant to Section 205 (Import Prohibitions) of the Fishery Conservation and Management Act of 1976. The Panel was informed that Section 205 provided, inter alia, that if the Secretary of State determined that any fishing vessel of the United States, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea was recognized by the United States, being seized by any foreign nation as a consequence of a claim of jurisdiction which was not recognized by the United States, the Secretary of the Treasury should immediately take such action as may be necessary and appropriate to prohibit the importation of fish and fish products from the foreign fishery involved.

2.3 The Panel was further informed that, in the circumstances specified above, the United States Government must prohibit imports of all fish and fish products of the particular fishery involved from the country taking the action. Since the United States did not recognize the Canadian claim to jurisdiction over tuna in waters in which the vessels were seized, Section 205, therefore, required imposition of the actions taken. The Panel was also informed that the Secretary of State had discretion under the law to recommend a broader import prohibition on other fish or fish products from the foreign nation concerned, but this discretionary authority was not exercised in this case. The Executive Branch of the Government had no authority to waive application of

---

1 United States - Federal Register Vol. 44 p.53118 (12 September 1979).

provisions contained in Section 205. However, the legislation provided that if the Secretary of State found that the reasons for the imposition of any import prohibition under this section no longer prevailed, the Secretary of State should notify the Secretary of the Treasury who should promptly remove such import prohibition.

2.4 The United States import prohibition affected imports under TSUS items ex 110.10 (fresh, chilled or frozen tuna), 112.30 and 112.34 (canned tuna, not in oil), 112.90 (canned tuna, in oil), and 113.56 (canned tuna in bulk, not in oil). United States imports of tuna and tuna products from Canada for the years 1976-1979 are shown in Table 1.

Table 1

United States imports from Canada of Tuna and Tuna Products
1976 - 1979

| Species | 1976 | | 1977 | | 1978 | | 1979 | |
|---|---|---|---|---|---|---|---|---|
| | '000 lbs | '000 US$ | '000 lbs | '000 US$ | '000 lbs | '000 US$ | '000 lbs | '000 US$ |
| Albacore | 320.9 | 180.2 | 0 | 0 | 9.5 | 6.9 | 24.9 | 8.3 |
| Yellowfin | 0.5 | 0.6 | 826.1 | 119.2 | 32.5 | 20.6 | 122.6 | 26.5 |
| Skipjack | 150.0 | 33.8 | 546.4 | 54.7 | 90.4 | 9.0 | 88.2 | 8.8 |
| Other, nes | 1,693.7 | 1,435.3 | 1,375.4 | 1,459.5 | 238.6 | 136.4 | 4.0 | 1.9 |
| Total | 2,165.1 | 1,649.9 | 2,747.9 | 1,633.3 | 371.0 | 172.9 | 239.7 | 45.6 |

Source: US National Marine Fisheries Service

2.5 On 16 October, 1979, Canada sent a note to the United States stating that the action concerning tuna and tuna products from Canada was contrary to the obligations of the United States under the GATT, and, pursuant to the provisions of Article XXIII:1 of the GATT, requesting that the Government of the United States terminated the prohibition immediately. The United States in its reply referred to fisheries consultation which had been held in September 1979 when

agreement had been reached to continued discussions. The United States expressed the hope that continued discussions would result in a mutually satisfactory solution to the problem and that a basis for rescinding the embargo would be found.

2.6 In December 1979, consultations under Article XXIII:1 of the GATT were held between United States and Canadian officials, but these consultations did not resolve the matter. In January 1980, the Canadian authorities, pursuant to Article XXIII:2, requested the establishment of a GATT panel to examine the matter.

2.7 On 29 August 1980, following an interim agreement with Canada on albacore tuna fisheries, the United States Trade Representative informed the secretariat that his authorities had decided to lift the prohibition on imports of tuna and tuna products from Canada. The prohibition was subsequently lifted with effect from 4 September 1980[1].

2.8 The Panel held a meeting on 3 December 1980 with both parties in order to ascertain their attitude to the continuation of its work in light of the lifting of the United States import prohibition and to seek further clarification on the interim agreement referred to in paragraph 2.7 above. At this meeting, the representative of Canada stressed that the possibility of further embargoes being placed on Canadian fishery products continued to exist as long as Section 205 (a) (4) (c) of the United States Fishery Conservation and Management Act of 1976 required the imposition of import prohibitions on fish and fish products in response to actions by Canada to implement its law in areas of Canadian jurisdiction[2] not recognised by the United States.He argued that the Panel should therefore continue its work with the aim of reaching substantive conclusions. The representative of the United States informed the Panel that his authorities doubted the necessity of continuing the case since the measure under examination had been completely eliminated, but stated that his authorities would continue

---

1 United States - Federal Register Vol.45 p.58459, (3 September 1980).

2 The Panel did not enter into the question of whether claims regarding jurisdiction were founded, considering that this question did not fall within the terms of reference of the Panel.

to cooperate with the Panel if the Panel decided to continue the case. Furthermore, both parties informed the Panel of details of the interim agreement. It was stated that this agreement was a step towards negotiations between the two Governments on a bilateral treaty during the coming year. At the end of this meeting, the Panel asked for further information on the negotiation of a bilateral treaty.

2.9 In a letter dated 19 December 1980, responding to the Panel's request for information on negotiations on a bilateral treaty, the representative of Canada reiterated the view that the threat of trade embargoes on fishery products under Section 205 of the Fishery Conservation and Management Act of 1976 still existed.

2.10 Subsequently, in a letter dated 9 January 1981 also reporting on the status of the bilateral treaty negotiations on tuna fisheries, the representative of the United States expressed certain reservations about the necessity or desirability of pursuing the matter in the GATT, while stating that despite its reservation, the United States would cooperate fully with the Panel, should the Panel continue its consideration of the case.

2.11 In a letter to the Chairman of the Panel dated 9 March 1981, the representative of the United States informed the Panel that Canada and the United States had concluded negotiations of the treaty, and that signature of the treaty was expected in the near future. He also noted that the terms of the treaty would ensure that the Pacific albacore tuna fishery was not subject to embargo under Section 205 of the Fishery Conservation and Management Act of 1976.

2.12 With a letter to the Chairman of the Panel also dated 9 March 1981, the representative of Canada sent to the Panel a copy of the aide-memoire received from the United States' authorities which confirmed that, if in an area in which the United States was exercising

fisheries jurisdiction, Canada should attempt to exercise jurisdiction not recognised by the United States Government[1] by seizing a United States vessel, the United States Government would automatically be required by Section 205 of the Fishery Conservation and Management Act of 1976 to embargo Canadian fish products from the fishery involved.

2.13 In a letter to the Chairman of the Panel dated 9 June 1981, the representative of the United States confirmed that on 26 May 1981 Canada and the United States had signed the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges. This Treaty would replace the interim agreement of August 1980.

2.14 In a letter to the Chairman of the Panel dated 7 August 1981, the representative of the United States confirmed that on 29 July 1981 the Treaty had entered into force, upon exchange of instruments of ratification between the two parties on that date.

## III. Main Arguments

### (a) General

3.1 The representative of Canada stated that the United States prohibition of 31 August 1979 on imports of tuna products from Canada was inconsistent with the obligations of the United States under the General Agreement, specifically Articles I, XI and XIII. He argued that the United States prohibition constituted *prima facie* a nullification of benefits accruing to Canada of concessions included in Schedule XX and bound under Article II. The United States prohibition of imports of tuna and tuna products was clearly inconsistent with the obligation of the United States under Article XI:1 not to institute or maintain prohibitions or restrictions other than duties, taxes or other charges on the importation of any product of the territory of any other contracting party. The discriminatory nature of the United States prohibition was a clear violation of the requirements of Articles I and XIII that no prohibition be applied on the importation of any product of the territory of any other contracting party unless the importation of

---

1 The Panel did not enter into the question of whether claims regarding jurisdiction were founded, considering that this question did not fall within the terms of reference of the Panel.

the like product of all third countries was similarly prohibited or restricted. He furthermore argued that it had been established by the CONTRACTING PARTIES that in cases where there was an infringement of the provisions of the General Agreement the action would, prima facie, constitute a case of nullification or impairment.[1]

3.2 He also stated that annual Canadian exports of the products concerned averaged US$ 1.2 million during the period 1976-1978.

3.3 Referring to the consultations held under Article XXIII:1, the representative of Canada stated that, in the course of those consultations, the delegation of the United States did not dispute that the United States trade measure on tuna imports from Canada was inconsistent with the GATT and indicated that the United States was prepared to negotiate compensation or even to consider compensatory withdrawal of concessions by Canada. It was the Canadian view, however, that compensation would not represent a satisfactory adjustment of the matter.

3.4 The representative of Canada stated that the action under consideration was taken by the United States in relation to domestic legislation which was specifically tailored to migratory tuna species in order to conform to the commercial interests of a powerful West Coast tuna fishery lobby. He also stated that the important principle involved in this trade dispute was whether or not a contracting party should have the right to disregard obligations under the GATT in order to use trade measures to bring bilateral pressure to bear on non-trade issues.

---

1 BISD 11S/100

3.5 The representative of the United States noted that without prejudice to the United States position concerning the provisions of the GATT invoked by Canada, the United States considered its action fully justified under Article XX(g) of the GATT, which provided an exemption from other GATT obligations for measures relating to conservations of exhaustible natural resources. He argued that the United States import prohibition on tuna and tuna products was not discriminatory as similar measures had been taken for similar reasons against imports from other countries (e.g. Costa Rica and Peru). He went on to state that the action taken by the United States was in no way motivated by trade considerations as it applied to trade flows valued at only about US$175,000, out of total United States imports of tuna and tuna products of about US$330,000 million in 1978.

3.6 The representative of the United States expressed the view that the dispute under consideration by the Panel was mainly concerned with fishery problems, and, in particular, with the need for a rational international conservation and management programme for tuna stocks. In this connexion, he said that, during the consultations held under Article XXIII:1, his Government, in consideration of the very small trade involved, had indicated its willingness to consider compensation rather than engage in lengthy arguments over respective GATT positions. He could not accept, however, that an offer to consider a trade settlement to avoid complicating a fishery issue should in any way prejudice the position of the United States before the Panel.

(b) Justification under Article XX (g)

3.7 The representative of the United States argued that the measures imposed by the United States restricting the import of tuna and tuna products from Canada were justified under Article XX (g) and met each element necessary to constitute an action authorized under the Article.

3.8 He explained that the first element in showing the measures were

justified under Article XX (g) was that the subject was an exhaustible natural resource. In this respect, there was little question that tuna stocks were potentially subject to over-exploitation and exhaustion. According to a preliminary listing by the United States National Marine Fisheries Service albacore tuna was under intensive use, as was yellowfin tuna in the Atlantic. Yellowfin tuna in the Pacific was described as being in imminent danger and both Atlantic and Pacific stocks of bluefin tuna were described as being in imminent danger and perhaps depleted.

3.9 In his view, the action taken by the United States also fully met the other requirements of Article XX (g) as it was taken in conjunction with measures aimed at restricting domestic production or consumption of tuna, although not specifically that of albacore tuna; it related to conservation of tuna in that it was taken in order to avoid and deter threats to the international management approach which the United States considered essential to conservation of the world's tuna stocks; it did not apply in a manner that arbitrarily or unjustifiably discriminated between countries where the same conditions prevailed, as shown by restrictions maintained against Peru and Costa Rica. Recalling that measures under Article XX must not be used in such a way as to constitute a disguised restriction on international trade, he pointed out that the motivation for United States action was in no way trade related. The trade effect was at most nominal. Figures for United States production and consumption of tuna are given in Table 2.

Table 2

United States: Production and Consumption of Tuna

(in thousand pounds)

| Species | 1978 | 1979 | 1980 |
|---|---|---|---|
| Production | | | |
| Total | 408 878 | 364 476 | 399 432 |
| of which: | | | |
| Albacore | 37 308 | 15 418 | 15 872 |
| Bigeye | 1 283 | 2 934 | 2 277 |
| Bluefin | 13 690 | 14 897 | 7 991 |
| Little tunny | 150 | 126 | 535 |
| Skipjack | 151 596 | 120 104 | 179 443 |
| Yellowfin | 203. 594 | 210 227 | 192 182 |
| Other | 1 257 | 770 | 1 132 |
| Consumption[a/] | | | |
| Total | 721 942 | 716 646 | 664 727 |

a/ Canned tuna only, consumption of fresh tuna is small.

Source: USTR

Table 3

Limitations on Tuna Catch Applied by the United States Pursuant to the IATTC and ICCAT Management Programmes

| Fishing Area | Species | Type of Measure |
|---|---|---|
| Eastern Pacific Ocean | Yellowfin | 1966-78: Catch season closed on various dates; in recent years around mid April<br>1979: Catch season closed on 20 July<br>1980: No closure |
| Atlantic Ocean | Yellowfin | Since 1972: No catch permitted of yellowfin less than 3.2 kg.[a] by weight |
| | Bluefin | (a) Since 1974: No catch permitted of bluefin of less than 6.4 kg.[a] by weight<br>(b) Quantitative limitation by countries based on their respective annual average catches up to 1974. |
| | Bigeye | Since 1974: No catch permitted of bigeye of less than 3.2 kg.[a] by weight |

[a] In size

Source: USTR

3.10 He argued that conservation of global tuna stocks was one of the major objectives of international arrangements in which both Canada and the United States participated, i.e. the Inter-American Tropical Tuna Commission (IATTC)[1] and the International Convention for the Conservation of Atlantic Tunas (ICCAT). He explained that the IATTC dealt with tuna stocks in the Eastern Pacific Ocean, including the stocks of albacore involved in the dispute between the United States and Canada. Limitations on tuna catch applied by the United States are shown in Table 3. He also explained in detail the IATTC conservation recommendations for yellowfin tuna and how these were implemented by the United States through the Tuna Conventions Act. However, for albacore tuna, no IATTC conservation recommendations had yet been adopted.

3.11 The representative of the United States furthermore stated that Canada's seizure of 19 United States tuna vessels significantly impaired the international management approach of the IATTC. By seizing vessels which previously had fished off its coasts without interference when the albacore stocks migrated there, Canada had adopted, a unilateral management approach. Moreover, in the IATTC, Canada had indicated its unwillingness to apply an international management approach to albacore, the only tuna species ever entering its 200-mile fishery zone on the West Coast. In this connection, he recalled that tuna fish,

---

1 Member countries of the IATTC are Canada, Japan, France, Panama, Nicaragua and the United States. Costa Rica and Mexico withdrew from IATTC in 1978 and 1979 respectively. Work on the renegotiation of the IATTC Convention has been going on since 1977. In the course of these negotiations, the United States has expressed the view that the organisation established by the new convention should have, as the old IATTC does, responsibility for all stocks of tuna and tunalike fish in the Eastern Pacific Ocean, including the stocks of albacore which range off the west coast of North, Central and South America. Canada, on the other hand, has indicated that, in her view, the new Convention should establish international arrangements for tropical tuna only, given the special problems involved in that fishery. Temperate tuna (including albacore), should not be covered by the new arrangements on the ground that these species are, in the Canadian view, quite different with respect to distribution and fishing methods.

uniquely among major ocean fish taken for food, was a highly migratory species and because of this highly migratory pattern, unilateral measures could not effectively conserve the world's stocks of tuna. He stated that it was fruitless for one coastal state to limit the catch when a school of tuna was in its waters, if the school would be overfished in another State's water or on the high seas. He considered that unilateral measures would likely to be counter productive to conservation since unilateral measures would discourage international cooperation essential to prevent overfishing of migratory species in areas not subject to restrictions.

3.12 He also explained to the Panel that the embargo on tuna and tuna products from Canada had been imposed under Section 205 of the Fishery Conservation and Management Act of 1976 and should be seen in relation to laws applicable to the conservation of tuna and efforts made by the United States to promote international cooperation to conserve tuna. Section 205 of the Fishery Conservation and Management Act of 1976 stated the Congress' findings that stocks of many species of tuna were depleted, or threatened with depletion, but that proper management of such species could ensure satisfactory yield. One purpose of the provisions of Section 205 of the Fishery Conservation and Management Act of 1976 was to encourage other countries to cooperate in international conservation of tuna. The provisions imposing an embargo on imports of fish from a country seizing United States fishing vessels were intended to dissuade other countries from claiming unilaterally 200-mile jurisdiction over tuna stocks and from seizing United States tuna vessels under such claims. The United States did not itself claim jurisdiction over tuna in its 200-mile zone.

3.13 The representative of Canada agreed that tuna was an exhaustible natural resource. Although his authorities did not doubt that the United States had a genuine interest in the conservation of tuna stocks he denied that the measures in question were truly triggered by the

United States concerns about conservation, or related in some way to measures to promote or achieve improved conservation. He argued that the specific event which triggered the import prohibition, was not a general concern on the part of the United States about Canadian policies and actions related to the conservation of tuna, but the seizure of a number of fishing vessels and the arrest by Canadian authorities of United States fishermen engaged in fishing for albacore tuna, without authorization, inside Canada's zone of fisheries jursidiction off the West coast of Canada. The United States and one other country were standing alone in not recognizing coastal state jurisdiction over tuna. In this regard it was noteworthy that the United States Comptroller General, in his report to Congress of December 1976, referred to Section 205 of the Fishery Conservation and Management Act of 1976. He was clearly not referring to conservation when he stated that the Act included sanctions (Section 205) designed to deal with the anticipated negative effects of the 200-mile limit on the United States tuna fishery. Conservation was not therefore uppermost in the minds of the original drafters of the provisions that gave rise to the dispute. Rather, it may have been the existence of domestic legislation in Canada and other countries which could have the effect of restricting United States tuna vessels from operating in coastal waters under their jurisdiction. United States legislation was intended, in effect, to be a lever to dissuade Canada and other nations from enforcing their domestic laws to the detriment of commercial interests of the United States tuna industry.

3.14 Moreover, the import prohibition was lifted, not when Canadian conservation policies changed, but when Canadian and United States authorities reached an interim understanding providing reciprocal access for tuna fishermen of each country to waters under the fisheries jurisdiction of the other beyond the 12-mile limit as well as other provisions related to access to ports. There was nothing in the arrangement that related in any way to conservation of albacore or any other tuna species.

3.15 Recalling that Canada had been a member of the Inter-American Tropical Tuna Commission (IATTC) since 1968 and the International Convention for the Conservation of Atlantic Tunas (ICCAT) since 1969 and that Canada has adopted all recommendations of the IATTC, the representative of Canada said that his country did not differ with the United States on the question of international co-operation in the conservation of tuna stock, but rather in the principles and mechanisms by which effective conservation could be achieved. He also noted the fact that the IATTC had never addressed a management regime for albacore tuna and neither could it be demonstrated that the United States prohibition of Canadian tuna imports contributed in any way to improved conservation.

3.16 Although he expressed reservations about dwelling too much on fisheries issues which were not central to this dispute, he furthermore argued that, in order to test the consistency of the United States import prohibition with Article XX(g), it was also essential to establish whether or not the import prohibition was implemented in conjunction with restrictions on domestic production or consumption.

3.17 In this regard, he recalled that the United States action to prohibit imports on all tuna and tuna products from Canada regardless of species was the result of Canadian action against the illegal fishing of albacore tuna only by United States fishermen. Although there were, by means of limitations on the permitted catch, indirect restrictions on the production in the United States of tuna products of species other than albacore, these did not seem to be related in any way to the discriminatory import prohibition of these species from Canada. No domestic measures were applied in the United States which restricted either the production or the consumption of albacore tuna.

3.18 Furthermore, the representative of Canada stated that his authorities regarded the recourse by the United States to the provisions of Article XX(g) as an ex-post facto justification of a trade measure for which there was no justification under the GATT. In the course of bilateral consultations with the United States under Article XXIII, the question of conservation had never been raised by the United States. Indeed, when the United States Government publicly announced its imposition of the trade embargo, it only referred to the action taken by Canadian authorities against United States fishing vessels which had been operating without authorization in Canadian waters.

3.19 The representative of The United States stated that Article XX(g) applied to measures "relating" to conservation of exhaustible resources, and did not require that the exclusive motivation or effect of such measure necessarily be conservation. Certainly, it was not necessary that every official of the party taking the action always explain the action in terms of its ultimate effect on conservation. Similarly, it was not necessary that the interim agreement specify on its face that its purpose was conservation. The important point was that the effect of the interim agreement was consistent with the international management approach to conservation of tuna. He further stated that the import prohibition satisfied the "relating to" test in Article XX(g), noting that the legislative history of the Fishery Conservation and Management Act of 1976, and Section 205 in particular, showed that conservation was a substantial motive for the measure. He added that the United States did monitor and impose restrictions on the production of tuna of its own industry, and that the import embargo, catch restrictions and other measures taken together comprise the whole of a comprehensive tuna conservation policy, and thus were taken in conjunction with each other.

3.20 The representative of Canada pointed out that there were alternative approaches to conservation. The United States argument was that its view of conservation was the only valid one and the United States had enacted domestic legislation with a provision for trade sanctions as leverage to impose its view on others.

(c) Remarks by the parties on the implications of the lifting of the import prohibition

3.21 Although recalling that the United States import prohibition on tuna and tuna products from Canada had been lifted following the conclusion of an interim agreement on tuna arrangements between Canada and the United States[1], the representative of Canada explained that his authorities continued to attach importance to obtaining a finding on the matter from the CONTRACTING PARTIES.

3.22 He argued that this wish to have the Panel make a substantive conclusion was related to the fact that in August 1980, the United States threatened to implement a discriminatory prohibition under Section 205 of the Fishery Conservation and Management Act of 1976 on imports of salmon from Canada following the arrest by Canadian authorities of a United States salmon fishery boat and that the interim Canada/United States arrangement on tuna only laid the groundwork for a long-term agreement, which had still to be negotiated and which would require United States Congressional ratification. In the absence of a ratified agreement, there remained a risk, that the discriminatory prohibition on imports of tuna from Canada could be reimposed, or indeed extended, to other products, such as salmon, or that a discriminatory prohibition on imports of other fishery products could be imposed as a result of non-trade disputes in other fisheries. Not only was there no long-term agreement with respect to albacore tuna yet in force, but any such agreement would be without prejudice to the respective position of the parties concerning coastal state jurisdiction over highly migratory species[2]. In these circumstances, the possibility remained that the

---

1 Dated 21 August 1980 and running to 1 June 1981, or upon the entry into force of the proposed treaty.

2 On 26 May 1981, Canada and the United States signed the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, which replaced the interim agreement. The Treaty entered into force on 29 July 1981. The Treaty has a minimum duration of 3 1/2 years and thereafter would continue in force subject to one year's notice of withdrawal by either party.

United States could, notwithstanding ratification of a bilateral treaty on albacore tuna, impose, pursuant to Section 205 of the Fishery Conservation and Management Act of 1976, for non-trade reasons, trade measures inconsistent with United States treaty obligations under the GATT.

3.23 He therefore argued that it would be appropriate for the Panel to find that the discriminatory prohibition of imports of tuna and tuna products was contrary to United States obligations and nullified benefits accruing to Canada under the GATT, and to recommend that the Government of the United States take the necessary action to ensure that the Fishery Conservation and Management Act of 1976 would be implemented in a manner consistent with the General Agreement.

3.24 The representative of the United States considered that the lifting of the import prohibition had removed the practical source of complaint by Canada and rendered the dispute before the Panel hypothetical. The salmon issue raised by Canada would have involved different GATT issues and in any event did not result in an embargo on imports. He further stated that the interim agreement and the signature of a long-term treaty represented a solution to the case consistent with GATT dispute settlement procedures and objectives, and that continuation of the case to decision, whatever the decision, would neither improve nor undermine the settlement achieved. Together with the lack of practical benefit from continuation of this case under these circumstances, he argued that his authorities saw considerable risk of creating unintended or unforeseen precedents for the GATT through opinions being expressed on the difficult conservation issues involved in Article XX(g), where national and international standards have changed considerably over the years and continue to evolve.

3.25 He further argued that the GATT panels had not traditionally dealt with hypothetical situations. This case in his view presented a particularly problematic area for action in the light of the removal of the import prohibition. Should the Panel however, decide to continue the case and report fully on the matter to the CONTRACTING PARTIES, the representative of the United Stateas suggested that the Panel should find that the United States action was not inconsistent with the provisions of the GATT as this action was explicitly authorized by the general exceptions listed in Article XX(g). He stated that, despite their reservations, the United States would cooperate fully with the Panel should the Panel continue its consideration of this case.

3.26 Finally, he noted that the permanent treaty would prevent recurrence of the dispute originally brought before the Panel because under the treaty no situation could arise which would trigger another embargo of the albacore tuna fishery. Furthermore, while outside the terms of reference of this dispute, the possibility of an import embargo involving other fisheries was extremely remote because the United States recognised Canadian jurisdiction over non-tuna species and because the two governments had an understanding to avoid quickly incidents arising out of disputed maritime boundaries.

3.27 The representative of Canada indicated that he did not share the United States contention that the issue under dispute was hypothetical as it related to actual trade measures which had occurred in the past and that a threat of further discriminatory United States import restrictions being imposed, under Section 205 of the Fishery Conservation and Management Act of 1976, on fish or fishery products imported from Canada continued to exist. He alluded to the United States/EEC Panel Report on Animal Feed Proteins[1] as a precedent where a panel had addressed the issue in dispute subsequent to termination of the particular trade measures which had prompted the establishment of that panel.

---

1 BISD 25S/49

## IV. Findings and Conclusions

4.1 In accordance with its terms of reference as set out in paragraph 1.3, the Panel focused its work on an examination of the measures taken by the United States concerning imports of tuna and tuna products from Canada, in the light of relevant GATT provisions. It noted, however, that the dispute was part of a wider disagreement between Canada and the United States mainly related to fisheries and that the trade aspect constituted a part of a broader complex.

4.2 In the course of its work and in accordance with established practice[1], the Panel consulted regularly with the parties and repeatedly encouraged them in light of developments taking place to reach a mutually acceptable solution to the dispute. In this connection, the Panel noted that following continued bilateral discussions between the parties, an interim arrangement on albacore tuna fisheries between Canada and the United States was reached in August 1980. It also noted that the United States subsequently lifted the prohibition on imports of tuna and tuna products from Canada, with effect from 4 September 1980. The Panel furthermore noted that subsequent negotiations between the parties resulted in the establishment of the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges which was signed on 26 May 1981 and ratified on 29 July 1981. This Treaty replaced the interim agreement of August 1980.

4.3 In light of these developments the Panel noted that according to prevailing GATT practice when a bilateral settlement to a dispute had been found, panels had usually confined their reports to a brief description of the case indicating that a solution had been reached[2]. However, it also noted that in the past, panels had on occasion presented a complete report even if the measure giving rise to the

---

[1] BISD, 26S/210

[2] BISD, 25S/107; BISD 26S/320; L/5140; L/5155; L/5192

dispute had been disinvoked[1]. It furthermore noted that the representative of Canada did not accept that the results obtained bilaterally constituted a satisfactory solution or settlement in terms of paragraph 17 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance[2], and that he argued that the damage caused by the action which gave rise to the dispute had not been satisfactorily repaired, and that the threat of the United States taking action under Section 205 of the Fishery Conservation and Management Act of 1976 continued to exist. He therefore requested the Panel to present a substantial report on the case. The Panel noted that the Canadian Embassy, in a diplomatic note to the Department of State of the United States (No. 423, Washington DC, August 21, 1980), indicated that the arrangements concerning fisheries for albacore tuna off the Pacific coasts of Canada and the United States were without prejudice to action brought before the GATT regarding import prohibition on tuna and tuna products. The Panel also noted that the representative of the United States, although expressing serious doubts about the usefulness of establishing a comprehensive report when a conciliation on the dispute had been achieved, nevertheless declared himself willing and ready to provide his full cooperation if the Panel wanted to establish a comprehensive report. The Panel consequently felt that in this particular case it had to consider itself what type of report it should present to the Council and decided to proceed with its work and establish a complete report.

4.4 The Panel started by examining the complaint by Canada that the United States import prohibition on tuna and tuna products from Canada was contrary to Article XI. The Panel noted the provisions of

---

[1] BISD 25S/49

[2] BISD 26S/213

Article XI:1[1]. It found that the United States Government decision of 31 August 1979[2] to prohibit with immediate effect the entry for consumption or withdrawal from warehouse for consumption of tuna and tuna products from Canada constituted a prohibition in terms of Article XI:1. The Panel, therefore, examined the legal basis of the United States import prohibition on tuna and tuna products from Canada in light of the exceptions to the provisions of Article XI:1 listed in Article XI:2.

4.5 The Panel noted that the decision of the United States Government was based on Section 205 of the United States Fishery Conservation and Management Act of 1976. The Panel was informed that the purpose of the Fishery Conservation and Management Act of 1976 was to ensure that certain stocks of fish were properly conserved and managed, to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of such additional agreements as necessary. It furthermore noted that Section 205 of the Fishery Conservation and Management Act of 1976 contained provisions designed to discourage other countries from seeking to manage tuna unilaterally and from seizing United States fishing vessels which were fishing more than 12 miles off their coasts.

4.6 The Panel also noted that the United States had applied limitations on the catch of some species of tuna (e.g. Pacific and Atlantic yellowfin and Atlantic bluefin and bigeye), during the time the import prohibitions on tuna and tuna products from Canada had been in force.

---

[1] "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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 product destined for the territory of any other contracting party". (BISD Volume IV, page 17).

[2] United States - Federal Register, Vol. 44, No. 178 (12 September 1979).

The Panel found, however, that even if an import restriction could, at least partly, have been necessary to the enforcement of measures taken to restrict the catches of certain tuna species, an import prohibition on all tuna and tuna products from Canada as applied by the United States from 31 August 1979 to 4 September 1980 would not sufficiently meet the requirements of Article XI:2, firstly because the measure applied to species for which the catch had not so far been restricted in the United States (such as albacore and skipjack) and secondly because it was maintained when restrictions on the catch were no longer maintained (e.g. Pacific yellowfin tuna in 1980). Furthermore the Panel noted the difference in language between Article XI:2(a) and (b) and Article XI:2(c), and it felt that the provisions of Article XI:2(c), could not justify the application of an import prohibition[1].

4.7 The Panel noted that the representative of the United States based his arguments concerning the justification for the action taken against imports of tuna and tuna products from Canada entirely on Article XX(g)[2]. The Panel therefore proceeded to an examination of the arguments presented in respect of this Article by both the representatives of the United States and Canada.

4.8 The Panel noted the preamble to Article XX. The United States action of 31 August 1979 had been taken exclusively against imports of

---

[1] In Article XI:2(a) and (b) the words "prohibitions or restrictions" are used while in Article XI:2(c) mention is only made of "restrictions".

[2] "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". (BISD Volume IV pages 37 and 38).

tuna and tuna products from Canada[1], but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru and then for similar reasons. The Panel felt that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable. It furthermore felt that the United States action should not be considered to be a disguised restriction on international trade, noting that the United States prohibition of imports of tuna and tuna products from Canada had been taken as a trade measures and publicly announced as such. The Panel therefore considered it appropriate to examine further the United States import prohibition of tuna and tuna products from Canada in light of the list of specific types of measures contained in Article XX, and notably in Article XX (g).

4.9 The Panel furthermore noted that both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management and that both parties were participating in international conventions aimed, inter alia, at a better conservation of such stocks. However, attention was drawn to the fact that Article XX (g) contained a qualification on measures relating to the conservation if they were to be justified under that Article, namely that such measures were made effective in conjunction with restrictions on domestic production or consumption.

4.10 The Panel noted that the action taken by the United States applied to imports from Canada of all tuna and tuna products, and that the United States could at various times apply restrictions to species of tuna covered by the IATTC and the ICCAT. However, restrictions on domestic production (catch) had so far been applied only to Pacific yellowfin tuna, from July to December 1979 under the Tuna Convention Act (related to the IATTC) and to Atlantic yellowfin tuna, bluefin tuna and bigeye tuna under the Atlantic Tunas Convention Act (related to the ICCAT), and no restrictions had been applied to the catch or landings of any other species of tuna, such as for instance albacore.

---

[1] United States - Federal Register, Vol. 44 No. 178 (12 September 1979)

4.11 The Panel also noted that the United States representative had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States.

4.12 The Panel could therefore not accept it to be justified that the United States prohibition of imports of all tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980, had been made effective in conjunction with restrictions on United States domestic production or consumption on all tuna and tuna products.

4.13 The Panel also noted that the United States prohibition of imports of all tuna and tuna products from Canada had been imposed in response to Canadian arrest of United States vessels fishing albacore tuna. The Panel could not find that this particular action would in itself constitute a measure of a type listed in Article XX.

4.14 The Panel furthermore noted that the amount of trade in tuna and tuna products affected by the action taken by the United States was relatively small with annual totals varying between US$ 172 thousand to US$ 1.6 million in 1976-79 according to figures supplied by the representative of the United States. However, as the measure which gave rise to the dispute was lifted after one year, as subsequent negotiations between the parties had resulted in the establishment of a treaty on albacore tuna fisheries, and as no detailed submission had been made as to exactly what benefits accruing to Canada under the General Agreement had been nullified or impaired, the Panel did not consider the question of possible compensation.

4.15 In the light of the foregoing, the Panel concluded that the United States embargo on imports of tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980 was not consistent with the provisions of Article XI. It did not find that the United States representative had provided sufficient evidence that the import prohibition on all tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980 complied with the requirements of Article XX and notably sub-paragraph (g) of that article.

4.16 Finally, the Panel would stress that its findings and conclusions were relevant only for the trade aspects of the matter under dispute and were not intended to have any bearing whatsoever on other aspects including those concerning questions of fishery jurisdiction.