Appendixes

Appendix A
Some Trade Disputes Pertinent to Trade/Environment Interactions

Contents

[1] All but two of these disputes resulted in GATT's adoption of the dispute resolution panel's report. The sixth listed dispute, the so-called tuna/dolphin dispute, has yet to be considered by the GATT Council. In the last dispute, concerning beef hormones, the United States unsuccessfully sought to convene a panel under the Standards Code.

Ch. 2 and the annex to ch. 2 give background on GATT that may be helpful in reading these case summaries, including a discussion of GATT Article xx.

The case summaries in this appendix are provided for the reader's convenience. By providing these summaries, OTA does not mean to take any position on how these cases should be interpreted.

GATT Disputes

1. United States: *Prohibition of Imports of Tuna and Tuna Products From Canada (1982)*[2]
Complaining Party: Canada

The impetus of this dispute was Canada's seizure of 19 U.S. tuna boats caught fishing inside Canada's 200-mile fisheries zone. The United States retaliated by prohibiting the importation of all types of tuna and tuna products from Canada pursuant to section 205 of the Fishery Conservation and Management Act of 1976. These events were part of a broader disagreement between Canada and the United States relating to jurisdiction over Pacific fisheries.

The GATT Panel first determined that the U.S. import ban constituted a quantitative "prohibition" for purposes of the general proscription against quantitative trade measures in GATT. Article X: 1. The panel determined that the ban did not fall under the exception in Article XI:2(c) for limits on agricultural and fisheries imports in connection with domestic production restrictions, even though the United States had limited the catch by U.S. boats of some species of tuna (e.g., Pacific and Atlantic yellowfin, and Atlantic bluefin and bigeye). The exception did not apply because:

(i) The ban applied to the catch of species (e.g., albacore and skipjack) whose domestic production-the United States had not limited;

(ii) The ban was continued even after the limitation on the domestic catch of Pacific yellowfin tuna was ended; and

(iii) While Article XI:2(a) (quantitative measures to relieve food shortages) and Article XI:2(b) (quantitative measures for grading and classification) cover both "prohibitions" and "restrictions," Article XI:2(c) extends only to "restrictions." The U.S. ban was a prohibition.

The panel then considered the United States' claim that its measure fell within the general exception in Article XX(g) for measures relating to the conservation of natural resources. Referring first to the limitations in Article XX's preamble (see annex to ch. 2), it noted that the United States "might not necessarily" have discriminated against Canada in an arbitrary or unjustifiable manner since it had taken similar actions for similar reasons against Costa Rica, Ecuador, Mexico, and Peru. Furthermore, according to the panel, the U.S. action did not constitute a "disguised restriction on international trade" because it "had been taken as a trade measure and publicly announced as such. "

This latter finding is important because it makes part of Article XX's preamble hollow.[3] If publicly announcing a measure is all that it takes to overcome the limitation against a "disguised restriction on international trade," then the limitation offers little help in screening or curbing protectionist trade restrictions posing as safety or environmental initiatives-thus perhaps bringing pressure to bear to interpret the individual paragraphs of Article XX restrictively. This interpretation of the 'disguised restriction" language was essentially followed in a 1983 GATT case, United States: *Imports of Certain Automotive Spring Assemblies.*[4]

The remainder of the panel's report was fairly straightforward. The panel noted that both Canada and the United States had agreed that tuna stocks constituted an "exhaustible natural resource" in need of conservation management for purposes of GATT Article XX(g). However, to fall within the ambit of Article XX(g), the United States needed to have acted in conjunction with restrictions on domestic production or consumption. The panel noted that the U.S. import ban on *all* tuna and tuna products from Canada went far beyond its restrictions on domestic catches of certain tuna species. Moreover, the United States offered no evidence of any restrictions on domestic consumption of tuna or tuna products. The panel concluded that the U.S. embargo did not meet the requirements of Article XX(g) and so was a prohibited quantitative restriction under Article XI:l.

2. United States: *Taxes on Petroleum and Certain Imported Substances (" Superfund Act") (1987)*[5]
Complaining Parties: Canada, European Economic **Community,** Mexico

Canada, Mexico, and the EC brought this case against the United States over the Superfund Amendments and Reauthorization Act of 1986 (SARA). As part of its reauthorization of the U.S. program to clean up hazardous waste sites, that statute provided for:

(i) A change in an existing excise tax on petroleum, which resulted in a higher tax rate on imported petroleum than domestic;

(ii) A continuation of an excise tax on certain "feedstock" chemicals; and

(iii) A new excise tax on certain imported substances produced or manufactured from such taxable feedstock chemicals.

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[2] **United States**: *Prohibition of Imports of Tuna and Tuna Products from Canada*, **Report of the Panel, GATT, BISD 29 Supp. 91 (1982). Note that the official GATT title for a panel report leaves out the name of the complaining country; it lists only the name of the country whose practices were under scrutiny. Unless otherwise noted, all panel reports are cited to** GATT's *Basic Instruments and SelectedDocuments (BISD). The* **citation in this footnote is to the** 29th Supplement volume, page 91.

[3] See Charnovitz, "Exploring the **Environmental Exceptions in GATT Article XX,"** *Journal of World Trade,* **1991, vol. 25, pp. 37,47-48.**

[4] **United States:** *Imports of Certain Automotive Spring Assemblies,* **Report of the Panel, GATT, BISD 30Supp. 107 (1983).**

[5] **United States:** *Trees on Petroleum and Certain Imported Substances,* **Report of the Panel, GATT, BISD 34 Supp. 136 (1987).**

The three complainants claimed that the new excise tax differential between imported and domestic petroleum was inconsistent with the obligations to treat imported and domestic products alike ("national treatment obligation") set forth in GATT Article 111:2. The EC also maintained that the new excise tax on certain imported substances made from taxable feedstock chemicals was not a proper border tax adjustment under GATT (see ch. 4 for a discussion of border tax adjustments). This was the only time that a GATT dispute panel had addressed the legitimacy of a border tax adjustment scheme intended to further environmental objectives.

The EC claimed the purpose of the new excise tax was to tax polluting activities occurring in the United States and to finance environmental programs benefiting only U.S. producers. The EC contended that the Organisation of Economic Co-operation and Development's (OECD) Polluter Pays Principle required the United States to tax just products of domestic origin because only their production gave rise to environmental problems in the United States. The threefold U.S. response to the EC's argument was that the purpose of the tax was irrelevant to its eligibility for border tax adjustment; that GATT did not incorporate the Polluter Pays Principle; and that, even if it did, the Polluter Pays Principle applies only to pollution incident to production, not pollution incident to disposal. The EC also challenged the new excise tax as inconsistent with the national treatment obligations of GATT Article 111:2 because there was no equivalent tax burden imposed on like domestic products. Finally, the EC claimed the national treatment obligations of GATT Article 111:2 were violated by the SARA provision authorizing a penalty of 5 percent of the appraised value of an imported substance against importers who fail to furnish information necessary to determine the amount of tax to be imposed.

The panel concluded that the tax differential between imported and domestic petroleum was indeed inconsistent with the national treatment obligations of Article 111:2. It rejected the United States' contention that the minimal impact of the differential did not nullify or impair benefits accruing to Canada, Mexico, and the EC on the grounds that Article 111:2 protected expectations about the competitive relationship between imported and domestic products rather than expectations about export volumes.

As for the eligibility of the excise tax on feedstock chemicals for a border tax adjustment on downstream imports, the panel noted that:

> [GATT's] tax adjustment rules . . . distinguish between taxes on products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes. Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment.[6]

Thus, the key for the panel was that the excise tax was levied directly on products rather than the purpose of the tax. If it had been a tax not directly levied on products, such as social security or payroll taxes, then it would not have been eligible for border tax adjustment. The purpose of the tax, whether to raise revenue, to correct environmental problems, or to serve some other purpose, was irrelevant in the panel's view.

The panel pointed out, however, that the Working Party on Border Tax Adjustment agreed that the provisions of GATT on tax adjustment only prohibited contracting parties from having a *greater* tax on imported products than on like domestic ones; a country is free to charge the same tax, a lower tax, or none at all:

> Consequently, if a contracting party wishes to tax the sale of certain domestic products (because their production pollutes the domestic environment) and to impose a lower tax or no tax at all on like imported products (because their consumption or use causes fewer or no environmental problems), it is in principle free to do so. [GATT's] rules on tax adjustment thus give. . . [but do not oblige the] party the possibility to follow the Polluter-Pays-Principle. . . .

Noting that its mandate was to examine the case solely "in the light of the relevant GATT provisions,' the panel refused to consider the consistency of SARA's revenue provisions with its environmental objectives or with the Polluter Pays Principle. The panel suggested that if the EC wanted to pursue these points, the proper forum was the then moribund 1971 GATT Working Group on Environmental Measures and International Trade (see ch. 2).

As for the excise tax's alleged inconsistency with the national treatment obligations of Article 111:2, the panel observed that paragraph 2(a) of Article II provides that a tariff concession (that is, an agreement to limit a tariff on a particular product to a particular level) does not prevent the levying of a charge *equivalent* to an internal tax imposed on a like domestic product or on an article from which the imported product has been manufactured or produced in whole or in part. The panel cited the following example given by the drafters of GATT in explaining the word "equivalent" as used in the aforementioned provision:

> If a charge is imposed on perfume because it contains alcohol, the charge to be imposed must take into consideration the value of the alcohol and not

[6] In reaching its conclusion, the panel referred to the report of the 1970 Working Party on Border Tax Adjustments, BISD 18 Supp. 100 (1970).

> the value of the perfume, that is to say the value of the content and not the value of the whole" (EPCT/TAC/PV/26, page 21).

Thus, the panel concluded that the tax was not inconsistent because the imported substances were produced from chemicals subject to an excise tax in the United States, and the tax rate was determined in principle in relation to the amount of these chemicals used and not in relation to the value of the imported substance. If the excise tax had been levied on the appraised value of the imported substances themselves, the panel probably would not have found it consistent with Article 111:2.

Finally, the panel considered SARA's penalty provision. Under that provision, an importer failing to furnish sufficient information on an imported product composition to determine the proper tax could then be subject to a penalty tax of 5 percent of the appraised value of the imported substance. Since that rate was higher than the excise tax U.S. Customs might otherwise levy, the panel believed it was not in conformity with the national treatment obligations of Article 111:2. However, SARA permitted the Secretary of the Treasury to prescribe by regulation, in lieu of the 5 percent rate, a rate that would equal the amount that would be imposed if the substance were produced using the predominant method of production. Taking the U.S. Government's word that in all probability the 5 percent penalty would never be applied, the panel concluded that the existence of the penalty rate provisions as such did not constitute a violation of U.S. obligations under GATT.

This has implications for any border tax adjustment that Congress might consider to "level the playing field" for U.S. companies with regard to environmental standards. Such a program could require importers (and thus their foreign suppliers) to provide substantial data on process and product methods (PPMs) involved in the production of the imported goods (see ch. 4). The Panel report in this case suggests that an *ad valorem* penalty to force the production of such data, at least one that bore no relation to any actual difference in environmental standards, would run afoul of U.S. obligations under GATT. This could limit the GATT--consistent measures available to secure the information for the program to work efficiently and fairly.

3. **Canada:** *Measures Affecting Exports of Unprocessed Herring and Salmon (1988)*[7] **Complaining Party: United States**

The basic issue in this case was the GATT consistency of Canada's prohibitions on the export of certain unprocessed herring, herring roe, and pink and sockeye salmon ("unprocessed herring and salmon"). Canada did not dispute that such prohibitions were inconsistent with the terms of GATT Article XI:l, which provides that GATT members shall not institute or maintain prohibitions on the exportation of any product destined for the territory of any other member. However, Canada invoked as justifications for the prohibitions two exceptions in GATT:

(i) Article XI:2(b) permitting "export prohibitions . . . necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade. '

(ii) Article XX(g) permitting any measure "relating to the conservation of exhaustible natural resources . . . made effective in conjunction with restrictions on domestic production or consumption.'

With regard to Article XI:2(b), Canada argued that its prohibitions were necessary to prevent the export of unprocessed herring and salmon not meeting its quality standards for these fish. The panel noted, however, that the prohibitions applied to all unprocessed herring and salmon, not just substandard specimens. The panel therefore found that the export prohibitions could not be considered as "necessary" to the application of standards with the meaning of Article XI:2(b).

Canada also argued that the export prohibitions were necessary to enable Canadian processors to develop a superior quality fish product for marketing abroad and to maintain their share of the Japanese market for herring roe. The panel found that the export prohibitions could not constitute regulations necessary for marketing under Article XI:2(b). The reason: the panel interpreted Article XI:2(b) to permit only export restrictions designed to promote sales of the *restricted product, while* here restrictions on the unprocessed product were designed to promote sales of the processed product.

The panel then considered whether Article XX(g) justified the export prohibitions. The panel agreed with the parties that salmon and herring stocks are "exhaustible natural resources" and that Canada's limitations on the harvesting of such stocks were "restrictions on domestic production" within the meaning of Article XX(g). The panel then examined whether the export prohibitions were "relating to" the conservation of salmon and herring stocks and whether they were made effective "in conjunction with" Canada's harvesting limitations. It interpreted these terms as requiring that the measure be "primarily aimed at" such conservation and "primarily aimed at" rendering effective such domestic restrictions. The Panel then determined that Canada's

[7] *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon,* **Report of the Panel, GATT, BISD 35 Supp. 98 (1988). For further information on this case and the related case decided by a dispute settlement panel convened pursuant to the U.S.-Canada Free Trade Agreement, see T.L. McDorman, "International Trade Law Meets InternationalFisheries Law: The Canada-U.S. Salmon and** *Herring Dispute,* **"** *Journal of International Arbitration,* **December 1990, pp. 107-121.**

export prohibitions were neither primarily aimed at the conservation of salmon and herring stocks nor primarily aimed at rendering effective the restrictions on the harvesting of salmon and herring. This was because the export prohibitions did not limit access of domestic processors and consumers to salmon and herring supplies at all, and only limited the access of foreign processors and consumers to the unprocessed product.

On March 21, 1988, Canada advised the United States that it would accept the adoption by the GATT Council of the report of the GATT Panel and would act to remove the export restrictions. At the same time, it stated that it believed its conservation and management goals could not be met without a landing requirement.

In April 1989, Canada revoked its regulations prohibiting the export of unprocessed herring and salmon. At the same time, Canada introduced new regulations requiring the landing in Canada of: 1) all roe herring, sockeye, and pink salmon caught commercially in Canadian waters (species that were subject to the previous "process in Canada" rule), and 2) all coho, chum, and chinook salmon caught commercially in Canadian waters (species that were not subject to the previous 'process in Canada" rule). Under these regulations, salmon and roe herring had to be off-landed at a licensed "fish landing station" in British Columbia or onto a vessel or vehicle ultimately destined for such a landing station.

After consultations on these new regulations failed to resolve the matter, the United States decided to seek a dispute settlement panel to hear the dispute under the provisions of the Canada-U.S. Free Trade Agreement. The decision of that panel is described in case 8 below.

4. United States: *Section* 337 *of the Tariff Act of 1930 (1989)*[8]

Complaining Party: European Economic Community

This case concerned section 337 of the Tariff Act of 1930, which relates to unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sales including the importation or sale of goods that infringe on valid U.S. patents. As such, this dispute did not involve environmental measures. However, the panel's interpretation of the word "necessary" in GATT Article XX(d) (excepting from GATT's obligations measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement") has implications for how future panels might interpret the word "necessary" in GATT Article XX(b).[9] That provision provides an exception from GATT's obligations for measures 'necessary to protect human, animal or plant life or health."

The panel noted that the parties agreed that, for the purpose of Article XX(d), section 337 could be considered as measures "to secure compliance with" U.S. patent law. The conformity of U.S. patent law with GATT was not in question. **Thus, the** issue considered by the panel was the necessity of the section 337 system to enforce U.S. patent law.

The panel concluded that a GATT member cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure that is not inconsistent with other GATT provisions is available. By the same token, it said that, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

Applying these guidelines to the issue before it, the panel stated that its interpretation of the word "necessary" did not mean a GATT member could be asked to change its substantive patent law or its desired level of enforcement of that law, provided such law and such level of enforcement are the same for imported and domestically produced products. However, if a GATT member could reasonably secure that level of enforcement in a manner not inconsistent with other GATT provisions, it would be required to do so.

The panel rejected the United States' argument that it should consider whether section 337 as a system is "necessary" for the enforcement of U.S. patent laws rather than whether the individual elements of section 337 are "necessary." To do so, the panel said, would permit GATT members to introduce inconsistencies that are not necessary simply by making them part of a scheme containing elements that are necessary. In the view of the panel, what has to be justified as "necessary" under Article XX(d) is each of the inconsistencies that is found to exist with another GATT article.

This decision suggests that any environmental measure for which justification is sought under Article XX(b) is likely to incur considerable scrutiny by a GATT dispute settlement panel. Some scrutiny of a measure's necessity would seem desirable: if measures to protect life or health were given carte blanche under GATT, Article XX(b) could become a smoke screen for trade barriers. However, the decision's language could leave environmental measures open to considerable second-guessing. Even for

[8] *United States: Section 337 of the Tariff Act of 1930,* **Report of the Panel, GATT, BISD 36 Supp. 345 (1989).**

[9] **The panel in a subsequent case involving access of U.S. cigarettes to Thailand's market in fact relied on this case in interpreting the "necessity" requirement in Article XX(b). See the description of Thailand:** *Restrictions on Importation of and Internal Taxes on Cigarettes,* **Report of the Panel, GATT, BISD 37 Supp. 200 (1990), elsewhere in this appendix.**

reasonable measures undertaken with good intentions, it might often be possible in hindsight to find some way that the environmental objective could have been achieved with less trade disruption. Also, it is not clear that a GATT Panel would have the expertise to know if alternative actions would achieve the environmental objective. For example, if a problem is urgent, certain actions (such as negotiating an international environmental agreement) might take too long.

5. Thailand: *Restrictions on the Importation of and Internal Taxes on Cigarettes (1990)*[10] Complaining Party: United States

Thailand prohibited imports of cigarettes except under a license issued in accordance with its 1966 Tobacco Act. It had not granted a license for 10 years. In addition, until just before the panel heard the dispute, Thailand had maintained higher excise taxes on imported cigarettes than on domestic ones.

Thailand defended its action in part under GATT Article XX(b), which provides an exception from GATT obligations for measures "necessary to protect human, animal or plant life or health. " Thailand argued that its trade restrictions were "necessary" to: 1) make effective a domestic program to control smoking, and 2) protect its citizens from U.S. cigarettes, which had additives that might make them more harmful than Thai cigarettes.

This case was thus a further exploration of the term ''necessary,' which had been addressed first (in the context of Article XX(d)) in the panel report on United States: *Section* **337** *of the Tariff Act of 1930 (1989)* **(case 4** above). Following the reasoning in the earlier case, the panel found that the Thai actions were not "necessary" within the meaning of Article XX(b) since Thailand could have employed other means that were compatible with GATT to protect public life and health. Those other means included requiring greater disclosure of cigarettes' composition, banning cigarette advertisements, banning the use of certain additives, controlling price and retail availability, and establishing uniform taxes that did not discriminate between imported and domestic cigarettes.

In this **case,** the parties agreed the panel could consult with the World Health Organization (WHO) on technical matters. On the one hand, WHO acknowledged that in Latin America and Asia the opening up of closed markets dominated by a public tobacco monopoly had led to a rise in consumption. On the other hand, it believed that excise taxes to increase cigarette prices could fully offset the increased demand.

6. United States: *Restrictions on Imports of Tuna, Report of the Panel (1991)*[11] Complaining Party: Mexico

As of March 1992, the panel report had not yet been considered for adoption by the GATT Council, and the parties were attempting to settle the case, without a formal GATT decision. This case is discussed in detail at the beginnin g of chapter 2, and in chapter 3 in the section "Trade Measures and GATT.'

7. United States' Controversy With the European Community Over Beef Hormones

This dispute has not been the subject of a formal GATT dispute settlement panel report. However, it is an example of the potential for trade conflict over differences in product standards relating to environmental and public health or safety concerns.

In December 1985, the European Community adopted the "Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action (EC Hormone Directive) .12 When this prohibition ultimately went into effect on January 1, 1989, the EC banned the importation of all beef treated with growth hormones.[13] As a result, the United States lost an export market valued at approximately $145 million per year.[14]

The United States protested the adoption of the EC Hormone Directive, maintaining that it was not based on scientific evidence and so was a disguised barrier to trade. In January 1987, the United States requested consultations on the measure under the provisions of the GATT Standards Code.[15] When consultations failed to resolve the matter, the United States attempted to invoke the

10 Thailand: *Restrictions on Importation of and Internal Taxes on Cigarettes,* **Report of the Panel, GATT, BISD 37 Supp. 200 (1990).**

11 GATT Doc. *21/R* (Sept. 3,1991).

12 Council Directive 85/649,28 O.J. Eur. Comm. (No. L 382) 228 (1985).

13 The 1985 EC Hormone Directive was scheduled to become effective on January 1, 1988. A procedural challenge to the directive before the Court of Justice of the European Community led to it being declared null and void in 1987. However, the unaltered text of the nullified directive was readopted by the EC Council following a different procedure in March 1988. Council Directive 88/146, 311 O.J. Eur. Comm. (No. L 70) 16 (1988). This is the measure that became effective on January 1, 1989.

14 See ''The U< S.-EC Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade," *North Carolina Journal of International Law and Commercial Regulation, vol. 14, No.* 1, winter 1989, p. 135. Other articles on this dispute include Holly Hammonds, "A U.S. Perspective on the EC Hormones Directive," *Michigan Journal of International Law,* vol. 11, spring 1990, PP. 840-844, and Werner P. Meng, "The Hormone Conflict Between the EEC and the United States Within the Context of GATT,'' *Michigan Journal of International Law,* vol. 11, spring 1990, pp. 818-843.

15 Agreement on Technical Barriers t. Trade, *opened for signature* April 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616 (1979). Both the United States and the EC are signatones of this agreement.

Code's formal dispute settlement provisions. Among other things, it requested the establishment of a technical experts group pursuant to Article 14.9 of the Code to examine whether the EC Hormone Directive had any scientific basis and whether it could have been drafted as a technical product standard (prohibiting beef with hormone residues) as opposed to a production standard (prohibiting beef grown with hormones). One of the EC arguments against the applicability of the Code to the dispute was that the Code does not cover processing and production standards.

The EC blocked the U.S. initiative by calling for the establishment first of a panel of government officials to determine whether the EC was attempting to circumvent the Code. The United States blocked this in turn, and a stalemate resulted over the use of the Code's dispute settlement mechanisms.

In December 1987, President Reagan took unilateral action against the EC Hormone Directive by finding that it was a disguised barrier to international trade and so proclaiming retaliatory increases in import tariffs on certain EC products pursuant to section 301 of the Trade Act of 1974, as amended.[16] He suspended this retaliation for so long as the EC did not implement its directive. The retaliation was triggered on January 1, 1989, when the EC Hormone Directive took effect. In February 1989, the United States and the EC setup a bilateral Beef Hormone Task Force in an attempt to settle the matter or at least keep it from escalating further. These talks resulted in interim measures allowing some U.S. beef imports, and thus a reduction in the additional duties on some EC products. The issue continues to be a major concern in U.S.-EC trade relations.

Besides highlighting the inadequacies in the dispute settlement procedures of the GATT Standards Code (which both the United States and the European Community have attempted to address in the Uruguay Round), the dispute has left open the issue of whether the EC Hormone Directive is an unnecessary barrier to trade. The United States argues that there is no scientific evidence showing that proper application of beef growth hormone poses a threat to human health. The EC counters that there is no scientific evidence providing a guarantee that beef treated with growth hormone is totally risk free. The EC maintains that it should therefore have the right to adopt a precautionary ban on such products to protect its consumers.

Panel Decisions Under the U.S.-Canada Free Trade Agreement

8. In the Matter of: *Canada's Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the Panel (Oct. 16, 1989)*[17]

This case arose in the aftermath of the GATT panel report on *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon* (case 3 above). After the GATT dispute settlement panel found Canada's prohibitions on the export of certain forms of unprocessed herring and salmon inconsistent with GATT, Canada advised the United States that it would accept adoption of the report by the GATT Council and would remove the export restrictions.

In April 1989, Canada revoked those prohibitions, but immediately introduced new regulations requiring the landing in Canada of: 1) all roe herring, as well as sockeye and pink salmon, caught commercially in Canadian waters (species that were subject to the previous "process in Canada" rule); and 2) all coho, chum, and chinook salmon caught commercially in Canadian waters (species that were not subject to the previous 'process in Canada" rule). Under these regulations, roe herring and salmon had to be off-landed at a licensed "fish landing station" in British Columbia or onto a vessel or vehicle ultimately destined for such a landing station, thus preventing direct at-sea sales and direct delivery by Canadian fishermen to U.S. ports.[18] The new regulations provided for the completion of catch reports and other data, as well as on-site examination and biological sampling by Canadian officials at landing stations.

The United States complained that although the new regulations were carefully worded to avoid the appearance of creating direct export prohibitions or restrictions, their clear *effect* was to restrict exports because of the additional burdens on U.S. buyers relating to the extra time involved in transporting the fish, extra cost involved in landing and unloading, possible dockage fees, and product deterioration resulting from off-loading. It noted that the burdens fell solely on exports and thus put U.S. processors at a competitive disadvantage since herring and salmon purchased by Canadian processors must of necessity be landed in Canada in any event.

When consultations between Canada and the United States failed to resolve this matter, the United States had the choice of seeking settlement of the dispute under either GATT or the U.S.-Canada Free Trade Agreement (FTA).[19] It chose to proceed under the latter agreement.

16 Trade Act of 1974, Public Law No. 93. 618, sec. 301, 88 Stat. 1978, 2364 *(1975), as amended, 19* U.S.C. 2411.

17 For additional information, see McDonnan, op. cit., footnote 8.

18 See McDorman, op. cit., footnote 8, p. 116.

19 Done at Washington, DC, Jan-2, 1988; came into force January 1, 1989; reprinted in 27 International Legal Materials (1988), pp. 281-402.

The dispute settlement panel assigned to the case was asked to consider whether the landing requirement was a measure prohibited by GATT Article XI (which FTA Article 407 incorporates into the FTA) and, if so, whether the requirement was subject to an exception under GATT Article XX (which FTA Article 1201 incorporates into the FTA). GATT Article XI prohibits quotas, license requirements, and other "prohibitions or restrictions" (other than tariffs) on, among other things, the "exportation or sale for export of any product destined for" another GATT member, while GATT Article XX lists general exceptions to GATT's obligations, including Article XX(g)'s exception for measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. "

The panel first concluded that even if the term "exportation" in GATT Article XI was to refer to the act of exporting at the border alone, the concept of "sale for export' extends the coverage of Article XI to restrictions imposed at an earlier stage of the process, before the act of exportation itself. Thus, Article XI's applicability did not depend on whether the regulations constituted a border measure or an internal measure. The panel also concluded that the term "restrictions" in GATT Article XI encompassed more than just quotas and licenses for import or export.

The panel then rejected Canada's argument that GATT Article XI covers only measures that actually provide for different treatment of domestic and export sales. The panel stated that where the primary effect of a measure is in fact the regulation of export transactions, the measure may be considered a "restriction' within the meaning of GATT Article XI if it has the effect of imposing a materially greater commercial burden on exports than on domestic sales. The Canadian landing requirements, in the panel's view, had such an effect because a considerable number of potential exporters would find the extra expense of making an unwanted landing in Canada to be significant.

The panel did not consider it necessary to demonstrate the actual trade effects of such a measure. It noted that actual data on what would have happened without the measure does not exist, and GATT decisions have not required such proof. It was sufficient, the panel stated, that the measure has altered the competitive relationship between foreign and domestic buyers.

Having concluded that the Canadian landing requirement violated GATT Article XI, the panel next addressed whether the requirement was nevertheless excused by GATT Article XX(g). Both the United States and Canada agreed that the applicable criteria were set out in the GATT panel report on Canada's former export prohibitions on unprocessed salmon and herring (case 3 above). That panel concluded that, "while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be *primarily aimed at* [such] conservation" (emphasis added). In interpreting that test, the panel in the instant case asked whether the Canadian landing requirement would have been adopted for conservation reasons alone; the panel in turn interpreted that question as asking whether Canada would have adopted the landing requirement if that measure had required an equivalent number of Canadian buyers to land and unload elsewhere than at their intended destination.

This required the panel to make its own independent evaluation of the conservation justification in question. It recognized that there might be a need to single out the salmon and herring fisheries for special data collection because they were more important commercially and more difficult to manage. It also agreed that just because Canada was forced to accept imperfect data relating to other aspects of the salmon and herring fisheries did not mean it could not insist on better data when it could be obtained.

However, on balance, the panel concluded that a requirement to land a fleet's entire catch did not contribute to these objectives sufficiently so that Canada would have adopted it if the commercial inconvenience had fallen on Canadian buyers. In its view, the Canadian regulations were thus not primarily aimed at the conservation of an exhaustible natural resource and thus not exempted by GATT Article XX(g). The panel stated that a landing requirement could be considered primarily aimed at conservation if provision were made to exempt from landing that proportion of the catch whose exportation without landing would not impede the data collection process. It noted that this might be as little as 10 to 20 percent of the catch, depending on the actual data and management needs of each fishery or group of fisheries.

9. In the Matter of: *Lobsters From Canada,* Final Report of the Panel (May 25, 1990)

On December 12, 1989, the United States enacted an amendment to the Magnuson Fishery Conservation and Management 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.[20] The minimum size requirement is intended to allow lobsters to reach sexual maturity and thus ensure stocks for the future. By the 1989 amendment, lobsters originating in foreign countries or in states having minimum lobster size requirements smaller

20 The 1989 amendment is section 8 of the 1989 National Oceanic and Atmospheric Administration and Ocean and Coastal Programs Authorization Act, Public Law No. 101-224, sec. 8, 103 Stat. 1905, 1907 (1989) (codified at 16 U.S.C. 1857 (l)(J)).

than the minimum limits imposed by U.S. Federal law were prohibited, with effect from December 12, 1989, from entering into interstate or foreign commerce for sale within or from the United States.

The legislative history of the 1989 amendment reveals three underlying objectives in extending the prohibition of undersized lobsters to cover imports. First, the measure was expected to facilitate the enforcement and management of the Federal conservation program by deterring unscrupulous U.S. lobster dealers from using fraudulent documentation to show Canadian origin of their lobsters. Prior to the 1989 amendment, U.S. dealers were able to avoid action under U.S. conservation by showing that their undersized lobsters came from Canada. Second, the amendment was expected to strengthen the conservation of U.S. lobster stocks by removing the lure of the already illegal market for subsized U.S. lobsters. Third, the amendment was expected to redress a perception of unfairness by U.S. lobstermen that the Federal size requirement put them at a competitive disadvantage in relation to their Canadian counterparts.

In December 1989, Canada advised the United States that it viewed the U.S. ban on undersized imports as inconsistent with U.S. obligations under GATT. It argued that the measure was a quantitative import restriction covered by GATT Article XI, which prohibits, among other things, quotas, license requirements, and other nontariff restrictions or prohibitions on imports. Canada denied that the measure was exempted by GATT Article XX(g), which exempts measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

The United States maintained that the minimum size requirement should be considered an internal measure applying equally to domestic and foreign lobsters rather than a border measure targeted at imports (see the annex to ch. 2). As such, the United States argued that the measure was permitted by GATT Article III, which permits internal regulatory measures as long as they are applied in a manner that does not favor domestic products over imports. Even if GATT Article XI rather than GATT Article III applied, the United States asserted that the measure was a legitimate conservation measure exempted by GATT Article XX(g).

After consultations between Canada and the United States failed to resolve the matter, Canada had the choice of seeking settlement of the dispute under either GATT or the U.S.-Canada Free Trade Agreement.[21] It chose to proceed under the latter agreement.

The dispute settlement panel's report on the matter consists largely of a legalistic examination of the terms and drafting history of GATT's Articles III and XI, which the FTA incorporates. The majority of the panel agreed with the United States that the minimum size requirement was an internal measure permitted by GATT Article III. In reaching its conclusion, the panel apparently did not take into account one way or another an argument made by Canada that its lobsters reach sexual maturity at a smaller size than U.S. lobsters because of differences in water temperature between U.S. and Canadian lobster grounds.

Decisions of the Court of Justice of the European Communities

10. Commission of the European Communities v. Kingdom of Denmark (1989)[22]

At issue was a 1981 Danish regulation providing that gaseous mineral waters, lemonade, soft drinks, and beer could only be marketed in returnable containers, i.e., containers for which there was a system of collection and refilling under which a large proportion of containers used would be refilled. This effectively ruled out plastic or metal containers. Also, except for some limited circumstances, manufacturers could use only containers that the Danish Government had approved.

The Danish system was noteworthy because it went beyond mandating recycling of the containers' material to requiring reuse of the containers. The logistical and administrative burdens of such a system dictate that types of containers be kept to a minimum. That is why the Danish Government said it prohibited most use of nonapproved containers.

Foreign companies perceived these requirements as unfairly disadvantaging them because returning beverage containers for refilling would be more costly for them than for local producers. Moreover, requiring government approval for containers raised the issue whether the Danish Government might limit its approval to a few standard bottle shapes, thus prohibiting foreign companies from using distinctive bottles carrying brand recognition. The Danish regulation was also viewed with suspicion because it did not apply to milk and wine, two products for which Danish producers had little foreign competition.

The European Commission complained that the Danish regulation unduly restricted the free movement of goods among EC member countries contrary to Article 30 of the EC's Treaty of Rome. Initially, the Danish Government tried to mollify the Commission by amending its regula-

[21] Done at Washington, DC, January 2, 1988; came into force January 1, 1989; reprinted in *International Legal* Materials 1988, vo1. 27, pp. 281-402.
[22] Commission *of the* European *Communities* v. *Kingdom of Denmark*, 1988 E. Comm. Ct. J. Rep. *4607,54* Comm. Mkt. L. R. 619 (1989).

tion in 1984 to allow the use of nonapproved containers (except metal) if volume was less than 300,000 liters per producer per annum or if the market was being tested and the new entrant provided for a deposit and return system. However, the Commission continued to object, and in response the Danish Government argued that no further changes in the regulation were necessary and that the measure was justified by the need to protect the environment.

With regard to the deposit-and-return system for empty containers, the court agreed with the Danish Government's position. It noted that protection of the environment is one of the EC's essential objectives, which may as such justify certain limitations on the free movement of goods. Responding to the Commission's argument that there were less restrictive options available to the Danish Government, the court found that the burden of the Danish system on trade was not disproportionate to its environmental benefits.

However, the court did find that requiring foreign manufacturers to use only government-approved containers was disproportionate. Noting that a system for returning nonapproved containers was capable of protecting the environment, the court observed that the volume of bottles at issue would be small in any case owing to the restrictive effect which the deposit-and-return system had on imports. It thus acknowledged that the restrictive effect of the measure would likely be substantial.

This decision is important for a number of reasons. Some observers see it as highlighting how a court or other dispute settlement panel could apply a proportionality test to balance the competing but equally valid objectives of free trade and environmental protection. Some critics argue, however, that the court was too accepting of the Danish law, and that the decision could encourage EC member nations to protect their industries with laws claimed to be necessary for the environment. It bears noting that Denmark has a highly concentrated beer industry. United Brewers, which controls Carlsberg and Tuborg, controls 70 percent of the Danish market for beer.[23] Perhaps encouraged by this case, Germany has fashioned a tough law on recycling of packaging that could also put imported products at a disadvantage.[24]

23 See "The Danish Bottles Case," an unpublished case study prepared by the London Business School and the Management Institute for Environment and Business, Washington, DC, 1991.

24 *Verpackungsverordnung* (Ordinance on the Avoidance of Packaging Wrote), June 12, 1991.