16 November 1962

CONCILIATION

EXPORTS OF POTATOES TO CANADA

Report adopted on 16 November 1962
(L/1927 - 11S/88)

I. INTRODUCTION

1. The Panel examined, in accordance with the provisions of paragraph 2 of Article XXIII, the question submitted to the CONTRACTING PARTIES by the Government of the United States concerning the application of values for duty on potatoes under the Canadian Customs Act on 16 October 1962. The Panel heard statements from both parties and obtained additional information from them to clarify certain points.

II. FACTS OF THE CASE

2. On 16 October 1962 the Canadian Government introduced a "value for duty" in respect of fresh potatoes imported into Western Canada of Can.$2.67 per 100 lbs. Under the Canadian legislation the difference between the lower export value and the "value for duty" would be levied by the Canadian customs authorities as "dumping duty" if the circumstances described in the legislation below were fulfilled. The United States Government complained against the imposition of this charge which would be levied in addition to a specific duty of Can.$0.375 per 100 lbs which had been granted on 5 April 1957 by Canada as a tariff concession to the United States on potatoes.

III. HISTORY OF THE CASE

3. Due to their geographic location, there was considerable trade in fresh fruit and vegetables between the United States and Canada. Over 60 per cent of agricultural imports into Canada from the United States were made up of products in this group, including potatoes. Because of the variety of climate of the United States and their more southerly location, the season in many parts of that country was advanced on the Canadian production season. At the time Canadian producers were only beginning to market their fruit and vegetables, the United States' season was often at its peak for the season. In order to meet such specific difficulties, which were particularly relevant to the fruit and vegetable trade sector, where the marketing season was often short and changes in supply could result in wide fluctuations in price over a very short period, in 1958 legislation was enacted whereby Article 40A(7)(b) of the Canadian Customs Act provided that "where the market price in the country of export of any fresh fruit or vegetable of a class or kind produced in Canada has, as a result of the advance of the season or the marketing period, declined to levels that do not reflect in the opinion of the Minister their normal price, the value for duty of such fresh fruit or vegetable, when imported into such region or part of Canada and during such period as the Minister may specify, shall be the amount determined and declared by him to be the average value, weighted as to quantity, at which like fresh fruits or vegetables were imported during the three-year period immediately preceding the date of shipment to Canada".

4. The Canadian delegation indicated that this was permissive legislation which

5. Under this provision action had been taken for the first time in August 1961 whereby the value for duty of fresh potatoes imported into Western Canada had been determined at an amount of Can.$2.78 per 100 lbs. The United States Government had made representations to the Canadian Government against such action. The action was withdrawn only on 30 April 1962 towards the end of the marketing season.

6. On 16 October 1962 action was again taken under this provision and the value for duty of fresh potatoes imported into Western Canada was determined at Can.$2.67 per 100 lbs. The Canadian delegation stated that the action was taken because of the fact that potatoes were being imported into Western Canada from the United States at prices as low as Can.$1.13 per 100 lbs., while at the same time prices in the State of Washington ranged from US$1.50 to US$1.80 per 100 lbs. These prices were to be compared with average prices over the preceding three years amounting to Can.$2.54 in the month of September and Can.$2.39 in the month of October. This was a clear case of application of the legislation in circumstances which threatened disruption in the Canadian market. The Canadian delegation stressed that the legislation had been used with the greatest restraint. The question now raised by the United States resulted from only the second application of the relevant Customs Act provision. It had never been applied for the whole of Canada but only for the western part of the country.

IV. ALLEGED INCONSISTENCY OF THE APPLICATION OF "VALUE FOR DUTY" ON POTATOES UNDER THE CANADIAN CUSTOMS ACT WITH THE PROVISIONS OF THE GENERAL AGREEMENT

7. The United States delegation noted that Article VII of the General Agreement included provisions in respect of products subject to charges or restrictions on importation based upon or regulated in any manner by value. Paragraph 2(a) of this Article stated that the value for customs purposes of imported merchandise on which duty was assessed and should not be based on an arbitrary or fictitious value. In their view, the determination of the value for duties on potatoes at the average value, weighted as to quantity, at which potatoes were imported during the three-year period immediately preceding the date of shipment to Canada, constituted a determination based on arbitrary or fictitious value and was consequently

that prices of exported products, as compared with domestic market prices in the United States were such that imports of potatoes from the United States into Canada could not be considered to take place at less than the normal value in the sense of Article VI. Any additional charge on imports of potatoes was consequently in their view inconsistent with the provisions of Article VI. The Canadian representative reiterated that the above market quotations were average prices for a specified quality and did not necessarily relate to the prices of actual imports into Canada.

9. The United States delegation indicated that their Government had negotiated a tariff concession with the Canadian Government under which imports of potatoes were bound under the General Agreement at Can.$0.375 per 100 lbs. United States exports were now faced with a situation under which, apart from the normal customs duty of Can.$0.375, they were subject to an additional amount to make up for any difference between the export value indicated in the customs document and the value for duty determined under the Canadian Customs Act. In their view, the charge of such additional amount constituted an impairment of the concession provided in Schedule V to the General Agreement, as a result of the failure of Canada to carry out its obligations under Article II of the General Agreement.

V. ALLEGED NULLIFICATION OR IMPAIRMENT OF BENEFITS ACCRUING TO THE UNITED STATES UNDER THE GENERAL AGREEMENT

10. The Canadian delegation stated that a representation had been received from the United States regarding the value for [illegible] only a few days before the present session of the CONTRACTING PARTIES [illegible] solve problems of this type [illegible]

14. The Canadian delegation stated that the application of the provisions depended on the movement of prices. The application was announced when crops were being harvested and there was no indication to the producers in advance that the legislation would be applied. The application of a value for duty, therefore, had no effect on potato production. This was confirmed by the fact that in the four western provinces to which the value for duty applied, production in 1961 had increased in only one province as compared with the average of the three preceding years. Production had declined in two provinces and had remained at the same level in one province.

VI. CONSIDERATIONS OF THE PANEL

15. The Panel considered that by its terms of reference it was not called on to examine whether or not the requirement of a reasonable time as laid down in paragraph 2 of Article XXIII had been fulfilled.

16. The Panel, having heard the points of view of the parties concerned, considered that the concept of value for duty as applied presently on imports of potatoes under the Canadian Customs Act was different from the concept of value for customs purposes, which the CONTRACTING PARTIES had in mind in drafting the provisions of Article VII. The Panel, therefore, did not consider that the provisions of Article VII were relevant in the context of its examination.

17. The Panel further considered that there was no basic difference between the price, in the ordinary course of trade, of exported potatoes and potatoes intended for domestic consumption in the United States. The Panel felt that the problem for Canadian potato producers due to imports of potatoes from the United States was caused by specific climatic differences which could in certain years give rise to exceptional difficulties. The Panel concluded that the imposition of an additional charge could not be justified by Article VI of the General Agreement, since the main requirement laid down in paragraph 1(a) of this Article was not fulfilled, namely that the price of the product exported from one country to another was less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

18. The Panel came to the conclusion that the measure introduced by the Canadian Government amounted to the imposition of an additional charge on potatoes which were imported at a price lower than Can.$2.67 per 100 lbs. The Panel considered that this charge was in addition to the specific import duty which had been bound at a rate of Can.$0.375 per 100 lbs. Since no provisions of the General Agreement had been brought forward for