

CANADA - MEASURES AFFECTING EXPORTS OF UNPROCESSED  
HERRING AND SALMON

*Report of the Panel adopted on 22 March 1988  
(L/6268 - 35S/98)*

1. INTRODUCTION

1.1 On 3 September and 27 October 1986, the United States and Canada held consultations pursuant to Article XXIII:1 on regulations maintained by Canada which prohibit the exportation or sale for export of unprocessed herring and pink and sockeye salmon. As these consultations failed to result in a satisfactory resolution, the United States, in a communication dated 20 February 1987, requested the CONTRACTING PARTIES to establish a panel to examine the matter under Article XXIII:2 (L/6132).

1.2 The Council, at its meeting on 4 March 1987, agreed to establish a panel on the matter and it authorized the Chairman of the Council to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/207).

1.3 On 15 April 1987, the Council was informed that agreement had been reached on the following terms of reference and composition of the Panel (C/M/208):

A. Terms of Reference

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States relating to Canada's measures affecting exports of unprocessed herring and salmon (L/6132), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings as provided for in paragraph 2 of Article XXIII."

B. Sivertsen

1.4 The Panel met with the parties on 18 June and 10 July 1987. It submitted its report to the parties to the disputes on 4 November 1987.

2. FACTUAL ASPECTS

2.1 Sub-section 34(j) of the Canadian Fisheries Act of 1970 provides:

"The Governor in council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations ... (j) respecting the export of fish or any part thereof from Canada ..."<sup>1</sup>

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<sup>1</sup>The Fisheries Act, Can. Rev. Stat. 1970, C.F-14, Sub-section 34(j) (as amended).

2.2 Promulgated under this authority, the Regulations Respecting Commercial Fishing for Salmon in the Waters

3.2 Therefore, the United States considered the matter to be a case of prima facie nullification or impairment of benefits accruing to it under the General Agreement. The United States requested the Panel to recommend that Canada eliminate these export restrictions and that Canada shall refrain from

3.8 The United States shared Canada's concern and objectives in the area of conservation. However, the United States argued that the issue in this case was not the undeniable right of states to conserve fish in the accepted sense of enhancing stocks and limiting harvest in order to ensure future yield. The issue, rather, was the permissibility of additional measures, trade measures, which prohibit the export of unprocessed fish that have already been harvested.

3.9 The United States disagreed that such trade measures were required by unique conditions arising from the "complex biology" of the restricted species. Numerous other species of fish - including Atlantic herring and chum, coho and chinook salmon - gave rise to closely similar conditions: they were commercially valuable, cyclical, and vulnerable to resource depletion in the absence of an effective catch reporting system. Yet Canada was able to operate

3.13 Canada maintained that the fact that the United States lacked similar export restrictions on salmon and herring was not relevant since the General Agreement, in this case the provisions of Article XX(g),

3.21 The United States maintained that Canada had not advanced any

3.25 Canada maintained that its

3.30 Furthermore, the United States maintained that the report of the Tuna Panel did not support a broad or permissive interpretation of Article XX(g). That report concluded that the United States could not avail itself of that exception since all the requirements of Article XX(g) had not been met. This was hardly a



3.36 The United States responded that, to its knowledge, no other country applied comparable export restrictions on these species or any other species. Rather, countries implemented conservation programmes through their sovereign authority to limit and require reporting of catch in their territorial waters and Exclusive Economic Zone. The United States further explained that there were no unique conservation problems related to these species, as distinct from other species which were not export restricted. Rather, the selectivity of Canada's export controls reflected the unique concentration of processing jobs in the freezing and canning operations associated with these species. The United States presented evidence suggesting that non-restricted salmon species had accounted for nearly half of Canada's total salmon exports in recent years. Therefore, the United States could not accept Canada's argument that the export restricted species were distinguished by their unique importance in international trade.

3.37 Canada claimed that resource conservation, rather than being a narrow concept dealing just with maintaining physical levels of a resource, should be considered to be a broad concept covering the range of scientific and economic issues arising from resource utilization. In the case of fisheries, the concept of conservation had evolved to include socio-economic as well as biological dimensions which had been embodied into international as well as bilateral agreements and treaties guiding fisheries management. Canada had also made clear that the export restrictions assisted the conservation effort undertaken by the Canadian authorities in that they allowed the Canadian Government to make necessary public expenditure on salmon enhancement with the expectation that economic benefits would continue to flow to all sectors of the fishing industry and not just to the harvesting sector. Canada provided information on the major expenditures involved in its enhancement programme. The largest share of benefits from the salmon enhancement programme accrued to sockeye salmon as a result of lake fertilization techniques. Considerable expenditures on chinook and coho salmon were to mitigate the adverse effects of the harvest of these stocks in mixed stock sockeye and pink fisheries. With regard to herring, Canada noted that it had implemented several stock rebuilding programmes and was actively engaged in the spawn-on-kelpo73.68 434.64 Tm/F8 11 Tf 421.68 Tm/F8 11 Tf(n(spawn-on-kelpo73.68 4rf 421.68

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4.6 The Panel noted that some of the subparagraphs of Article XX state that the measure must be "necessary" or "essential" to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j)) while subparagraph (g) refers only to measures "relating to" the conservation of exhaustible natural resources. This suggests that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures. However, as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The Panel concluded for these reasons that, while a trade measure did

5.3 Canada referred in its submission to international agreements on fisheries and the Convention on the Law of the Sea. The Panel considered that its mandate was limited to the examination of Canada's measures in the light of the relevant provisions of the General Agreement. This report therefore has no bearing on questions of fisheries jurisdiction.