

27 September 1989

CANADA - IMPORT RESTRICTIONS ON ICE CREAM AND YOGHURT

*Report of the Panel adopted at the Forty-fifth Session of the
CONTRACTING PARTIES on 5 December 1989
(L/6568 - 36S/68)*

INTRODUCTION

1. On 7 September and 7 October 1988, the United States and Canada held consultations pursuant to Article XXII on quantitative restrictions imposed by Canada on imports of various ice cream and yoghurt products. As these consultations did not result in a satisfactory resolution of the matter, the United States, in a communication dated 8 December 1988, requested the CONTRACTING PARTIES to establish a panel to examine the matter under Article XXIII:2 (L/6445).

2. The Council, at its

also authorized the Chairman of the Council to designate
the Chairman and members of the panel in consultation with the parties concerned (C/M/227).

Terms of Reference

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in document L/6445 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

3. On 3 April 1989, the Council was informed that agreement had been reached on the following composition of the

With the exception of the last product (yoghurt), the other items will hereinafter be referred to as "ice cream".

6. A notice to importers, dated 25 March 1988, stated that import permits were required for any

' quota allocations only if they are used.

Milk Supply Management in Canada

8. Canada restricts the importation of a number of dairy products in conjunction with its domestic milk supply management programme. This supply management programme has two distinct elements, provincial measures with respect to the production and marketing of fluid milk (raw milk from the cow used for processing into fresh table milk and fresh cream) and joint federal-provincial programmes with respect to industrial milk (raw milk used for processing into other dairy products).

9. The market for fluid milk, which accounts for approximately 38 per cent of total Canadian raw

is counted against the farmer's individual industrial milk quota. A farmer receives a higher return for fluid milk than for industrial milk. The provincial milk marketing boards oversee allocation of the milk to processors. The receipts from the marketings are assigned to two separate pool accounts - a fluid pool account and an industrial pool account. Each month a farmer receives a statement from the board showing the part of his deliveries under his fluid quota which have been used in the fluid market and the part of his deliveries which have been charged to his industrial quota. If any of the raw milk delivered by the farmer is also in excess of his industrial quota, it is not eligible for direct federal payments and an over-quota levy is imposed on this milk. The marketing board deducts the levies and transport and administration charges, and pays the net amounts from both pools to the farmer.

12. Canadian production of total raw milk, industrial milk, ice cream and yoghurt, as well as import levels of ice cream and yoghurt, are given in the following table. The United States is the principal foreign supplier of ice cream and yoghurt to Canada.

TABLE

Canada: Milk, Ice Cream & Yoghurt Production and Imports
(metric tons)

	1982	1983	1984	1985	1986	1987	1988
Ice cream Imports ¹	808	471	315	496	297	243 ²	411 ³
Ice cream Production ⁴	165,947	175,319	169,499	175,891	185,237	179,341	183,075
Yoghurt Imports ⁵	115	118	194	158	192	330	1,141 ⁶
Yoghurt Production ⁷	42,736	47,180	53,193	61,243	70,255	87,567	89,726
Industrial Milk Production ⁸	5,119,502	4,775,264	5,013,281	4,789,424	4,762,176	4,783,873	5,006,795
Total Raw Milk Production ⁸		7,448,541	7,688,667	7,479,167	7,522,065	3,589,522	7,826,916

¹Source: Statistics Canada, Imports by Commodities and Countries CITC Detail, for 1982-1987. Includes ice cream, ice cream novelties, ice cream mix liquid, ice cream mix dry.

²Published by Statistics Canada as 457 tons. All customs entries were audited and it was found ice cream mix imports were overstated by 214 tons.

³Statistics Canada Imports by Commodity and by Country of Origin (H.S. 2105.00.00.10 and H.S. 2105.00.00.20). Special Trade Relations Bureau import permits issuance for Jan. 29 - Dec. 31 1988 amounted to 349 tons.

⁴Source: Agriculture Canada, Dairy Market Review 1986, 1987 using Statistics Canada Data. Statistics Canada confirms that ice cream mix production is best measure of ice cream production in Canada. Conversion factor 1 litre ice cream mix = 1.10 Kg.

⁵Source: Statistics Canada, Imports by Commodities and Countries, CITC Detail, for 1982-1987

⁶Statistics Canada Imports by Commodity and by Country of Origin indicates 1141 tons (H.S: 0403.10). Special Trade Relations Bureau import permit issuance for Jan. 29-Dec. 31, 1988 amounted to 1,212 tons.

⁷Source: Agriculture Canada, Dairy Market Review 1986, 1987 using Statistics Canada data. Conversion factor 1 litre yoghurt = 1 Kg.

⁸Source: Agriculture Canada, Dairy Market Review 1986, 1987 using Statistics Canada data. Conversion factor 1 litre milk = 1.02969 Kg.

MAIN ARGUMENTS

General

13. The United States considered that the Canadian restrictions

Article XI:2(c)(i)

18. The United States stated that the language of Article XI:2(c)(i), its interpretive note, the relevant drafting history, and prior panel reports adopted by the CONTRACTING PARTIES made it clear that the exception for products subject to a domestic supply management system was very narrow. It was designed to provide for the limited use of otherwise outlawed measures, such as quotas and licenses, in circumstances where the restrictions on imports of like products were necessary for the enforcement of governmental measures to protect unorganized producers from the vagaries of the weather. It was not intended to, and did not, provide a blanket derogation for the agricultural sector generally or the dairy sector in particular; nor did it authorize policies of agricultural self-sufficiency or permit contracting parties to protect domestic producers or processing industries from international competition.

19. Canada argued that Article XI:2

21. Although the United States agreed with Canada that its measures were restrictions rather than prohibitions, it maintained that Canada could not demonstrate that all of the other Article XI:2(c)(i) requirements had been satisfied.

22. Canada agreed that it had to provide evidence that it had fulfilled the conditions of Article XI:2(c)(i). Canada had fulfilled this obligation and considered that there was a burden on both parties in

less than would be the case without the governmental controls. Farmers

a dairy product as a product manufactured wholly or mainly from milk. Both ice cream, which was

Still perishable

32. With regard to perishability, Canada observed that few other products were as perishable as raw milk, which had to be processed within hours of its receipt and was incapable of being stocked. It was also the common understanding that ice cream and yoghurt were perishable products and they were treated as such by the industry and by consumers. Without constant, specialized handling they would spoil within hours. Under appropriate storage conditions the shelf life of yoghurt was approximately three weeks and that of ice cream produced to Agriculture Canada specifications, only three months. There was no basis for the US argument that the processed product had to be as perishable as the primary product in order to be considered as "still perishable". In the Canadian view, to accept the US argument would be to deny the application of the term "in any form" to virtually all the dairy

Directly competitive

35. Canada considered that imported ice cream and yoghurt, if uncontrolled, would displace domestically produced ice cream and yoghurt. This in turn would result in a lower demand for industrial milk. What had to be examined was the effects of the imports

Canadian milk production ..."⁴ This assertion of the true policy of Canada undermined the undocumented explanations based upon changes in the United States dairy programme. Finally, the United States maintained that the Report of the Working Party on Canadian Import quotas on Eggs was irrelevant. It also noted that the Working Party did not render any conclusion with respect to whether the quotas on imports of eggs met the requirements of Article XI:2(c)(i).

Public Notice

42. Canada stated that the decision to place ice cream and yoghurt on the Import Control List was announced on 19 January 1988 by the Ministers of International Trade and Agriculture. The changes to the Import Control List were published on 28 January 1988 and details were sent to importers and foreign missions in Canada, and the contracting parties were officially notified (L/6462). Quota levels were not announced in 1988 due to ongoing consultations with the largest supplying country - the United States. The levels for 1989 were announced in a Notice to Importers circulated 17 January 1989. One quota was established for the various ice cream products as this provided the importer with greater flexibility in determining exactly which items to import, thus encouraging a fuller utilization of the quota.

43. The United States observed that the requirement in Article XI:2(c)

Furthermore, Canada had made no provision which would

SUBMISSIONS BY OTHER CONTRACTING PARTIES

The European Community

52. The European Community considered that the measures applied by Canada on imports of ice cream and yoghurt were incompatible with its obligations under the General Agreement, in particular Article XI. It observed that Canada must provide the proof that it had fulfilled all the necessary conditions for an exception under Article XI:2(c)(i), and did not believe that Canada had met the requirements that: (a) the domestic measures and import restrictions applied to like or directly competing products; (b) that ice cream and yoghurt were covered by Canadian governmental measures; or (c) that the import restrictions were necessary to the enforcement of domestic measures.

53. With regard to the first point, the Community noted that industrial milk, and yoghurt and ice cream, were not like products. Although the latter were usually manufactured from milk, they included many other components, such as sugar, fruit, cocoa and so forth. The tariff classification for yoghurt included it with "dairy products", whereas ice cream was considered under "miscellaneous edible preparations", further reflecting the fact that, for the consumer, these products were not interchangeable with milk in their use. The Community also observed that ice cream and yoghurt were final consumption goods, ready to be marketed, and were thus not products "in an early stage of processing". In addition, there was no evidence that consumers might replace purchases of milk by purchases of yoghurt or ice cream, and so these products could not be considered as directly competitive with

FINDINGS

Introduction

57. The Panel noted that the issue before it concerned restrictions maintained by Canada on imports of yoghurt and various ice cream products. The Panel observed that the quotas applied by Canada were prohibited by Article XI:1. This was not contested by the parties; at (S)EJ/WT/01/47, the Panel found that such measures could be justified under Article XI:2(c)(i), and if so, whether the restrictions were administBT 1 0 0 1 474.72 6

any change in the burden of proof could have consequences equivalent to amending Article XI, seriously affecting the balance of tariff concessions negotiated among contracting parties, and was therefore outside the scope of the Panel's mandate.

60. The Panel also noted that there existed dissatisfaction with Article XI:2(c)(i) and that its revision was under discussion. The focus of this provision was limited to a fresh product restricted by the domestic measures and the competition this product faced from imports. The provision was not designed to address the difficulties of a domestic processing industry that, as a consequence of the domestic restrictions on the fresh product, faced higher raw material costs, maift

- the contracting party applying restrictions on importation must give public notice of the total quantity or value of the

product subject to domestic supply restrictions.¹⁰ The Japanese Agriculture Panel had considered that this differentiation would be lost if a product in its original form and a product processed from the original one were to be considered to be "like" products within the meaning of Article XI:2(c). This Panel concurred with that observation. It further noted that there was T1 236.16 731.28 Tm/F8 11vual230.64 744 7

implication of the US argument that any consumer-ready processed product could not be considered as in an early stage of processing. Drinking milk, having been pasteurized and homogenized, was a "processed", consumer-ready product, yet it would be

of direct competition was that a buyer was basically indifferent if faced with the choice between one product or the other and viewed them as substitutable in terms of their use. Only limited competition

Governmental Measures to Restrict Domestic Production

77. The raison d'être of Article XI:2(c)(i) is to permit the operation of governmental measures that restrict the quantity of some fresh agricultural product permitted to be produced or marketed. The drafters indicated that "to restrict" means to "... keep output below the level which it would have attained in the absence of restrictions".¹² Proposals to make the regulation of production, through price stabilization programmes, an accepted criterion were rejected.¹³ The Panel further observed that other than requiring a governmental measure, Article XI:2(c)(i) did not specify how the production or marketing restriction was to be imposed.

78. Canada had described in detail its domestic milk marketing programmes, noting that the programmes covered all producers and all milk produced in Canada. Canada argued that over quota levies, which resulted in returns below the farmer's cash cost of production, ensured that production did not exceed the established market sharing quota. According to Canada, existing excess capacity for production indicated that in the absence of the government restrictions production would be higher. It presented econometric analyses indicating that the increase in production would be on the order of 31 to 39 per cent. The United States argued that the only limitation on fluid milk sales was what the market could bear, and there was no penalty for producers exceeding their fluid milk "quota". Furthermore, the United States contended that the method of calculating support payments on in-quota milk was such as to perhaps provide some financial incentive to overproduce. In fact, in the past six years, total industrial milk production had consistently exceeded the established Market Sharing Quota.

79. The Panel recalled that the requirement was for the effective restriction of production, not merely its regulation. A major element of the requirement of restricted production was that the measure, regardless of how operated, had to reduce production below the level it would otherwise have attained. The Panel observed that this concept was difficult to apply in pra4 0 1 371.52 486.48 Tm/F8e/F8 11 Tf(difficult) Tj4

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