

IN THE MATTER OF

CANADA'S LANDING REQUIREMENT FOR

PACIFIC COAST SALMON AND HERRING

Final Report of the Panel

Panel Members*

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October 16, 1989

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I. INTRODUCTION

1.01 The Panel was established by the Canada-United States Trade Commission under Chapter 18 of the Free Trade Agreement between Canada and the United States (hereafter "FTA") in accordance with an exchange of letters between the United States Trade Representative, Carla A. Hills, and Canada's Minister for International Trade, John C. Crosbie, dated May 23 and May 29, 1989.

1.02 In their exchange of letters, the Parties agreed on the following schedule:

- June 1, 1989 -- panel selection completed
- June 9, 1989 -- U.S. files initial brief
- June 23, 1989 -- Canada files reply brief
- July 6, 1989 -- hearing
- July 13, 1989 -- Parties file supplemental briefs
- August 4, 1989 -- initial panel report completed
- August 14, 1989 -- Parties objections filed
- September 1, 1989 -- final report completed

In all other respects, it was agreed that the provisions of Article 1807 of the FTA were to apply.

1.03 On June 8, the Parties agreed that the Panel should be composed of Jim H. Branson, Robert E. Hudec, Waldo E. Johnson, Donald M. McRae (Chair) and Frank Stone. Milos Barutciski was appointed by the Chair as assistant to the Panel. The United States brief was duly filed on June 9 and the Canadian brief on June 23. The hearing was held in Ottawa from July 6 to 8. The Parties submitted their supplemental briefs on July 13 and 17. Prior to the hearing the Panel submitted written questions to the Parties and then submitted further written questions on July 10 and July 19. Replies were received from the Parties on July 25.

1.04 The Panel subsequently requested an extension of the time limits and the Parties agreed as follows:

September 5, 1989 -- initial panel report completed

September 29, 1989 -- final report completed

1.05 On September 5, the Panel filed its initial report with the Parties whose comments were submitted to the Panel on September 15. The participants were saddened to learn of the death of Panel member Wally Johnson on September 14. On September 21, the Parties requested the Chair to rule on whether Canada had the right to appoint a panelist to replace Dr. Johnson. The Chair ruled (Annex A) that Canada did have the right to appoint a replacement panelist and on September 28, Canada appointed Donald D. Tansley to the Panel. The Parties indicated that they wished to receive the final report by October 16. On October 10, the Chair advised the Parties, pursuant to Part V:3 of the Model Rules of Procedure for Chapter 18 Panels, that notwithstanding the appointment of a replacement panelist, the matter would not be reheard.

II. BACKGROUND

2.01 Prior to April 25, 1989, pursuant to regulations under the Canadian Fisheries Act,¹ the export from Canada of unprocessed herring and of unprocessed sockeye and pink salmon was prohibited. This prohibition went back as far as 1908 in respect of herring and sockeye salmon, although it had been removed for some period in the case of sockeye and introduced at different times for pink, coho and chum salmon and then removed again for coho and chum. In late 1986, the

¹ R.S.C. 1985, c.F-14, as am.

United States complained to the Council of the General Agreement on Tariffs and Trade (GATT) that this "processing in Canada" requirement violated the provisions of the GATT, and on November 4, 1987, a panel constituted under Article XXIII:2 of the GATT concluded that "the export prohibitions on certain unprocessed salmon and unprocessed herring were contrary to Article XI:1 and were justified neither by Article XI:2(b) nor by Article XX(g)."²

2.02 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.³ At the same time, it was stated that the "Government of Canada believes that our conservation and management goals cannot be met unless we continue to have a landing requirement".⁴ The United States responded that such a requirement would seem to be "designed to have the same effect as the GATT illegal export restrictions."⁵

2.03 On April 25, 1989, Canada revoked its regulations prohibiting the export of unprocessed herring and unprocessed sockeye and pink salmon. At the same time, new regulations were introduced under the Fisheries Act⁶ requiring the landing in Canada of all roe herring, sockeye and pink salmon caught commercially in Canadian waters (species that were subject to the previous "process in Canada" rule) and the landing in Canada of all coho, chum and chinook salmon caught

² Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (L/6268) 20 November 1987, para.5.1.

³ Letter of Canadian Minister for International Trade, Pat Carney, to United States Trade Representative Clayton Yuetter, March 21, 1988, Canadian Submission, Annex A.

⁴ Ibid.

⁵ Letter of United States Trade Representative Clayton K. Yuetter to Canadian Minister for International Trade John C. Crosbie, dated May 2, 1988. United States Submission, Annex S.

⁶ Pacific Herring Fishery Regulations, amendment, SOR/89-217, Canada Gazette Part II, Vol.123, No.10, pp.2384-2385; Pacific Commercial Salmon Fishery Regulations, amendment, SOR/89/219, Canada Gazette Part II, Vol.123, No.10, pp.2390-2391.

commercially in Canadian waters (species that were not subject to the previous "process in Canada" rule). Under these regulations, salmon and roe herring must 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. The regulations provide for the completion of catch reports, the reporting of landings by landing station operators to the Department of Fisheries and Oceans, (DFO) and for on-site examination and biological sampling by DFO officials at landing stations.

2.04 The difference of view between the two governments on this landing requirement was not resolved through consultations and in advising the United States of the adoption of the new regulations the Canadian Minister for International Trade indicated that the matter could only be resolved in accordance with the GATT or the FTA by reference to the dispute settlement procedures of either of these agreements.⁷ The United States response on May 23, 1989 led to the creation of this Panel.

III. TERMS OF REFERENCE

3.01 The exchange of letters between the Parties of May 23 and 30, 1989, sets out the terms of reference for the Panel as follows:

⁷ Letter of Canadian Minister for International Trade, John C. Crosbie to United States Trade Representative Carla Hills, dated April 25, 1989. Supplementary Canadian Submission, Annex E.

The issue before the panel shall be whether the landing requirement is incompatible with Article 407 of the FTA and, if so, whether the requirement is a measure subject to an exception applicable under Article 1201. To resolve that issue, the panel shall consider whether the landing requirement is a measure prohibited by GATT Article XI (which FTA Article 407 incorporates in the FTA) and, if so, whether the requirement is subject to an exception under GATT Article XX (which FTA Article 1201 incorporates into the FTA).⁸

⁸ GATT Article XI is headed "General Elimination of Quantitative Restrictions". Paragraph (1) provides as follows:

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 contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article 407 of the FTA, which incorporates implicitly GATT Article XI, is headed "Import and Export Restrictions". Paragraph (1) provides:

Subject to the further rights and obligations of this Agreement, the Parties affirm their respective rights and obligations under the General Agreement on Tariffs and Trade (GATT) with respect to prohibitions or restrictions on bilateral trade in goods.

GATT Article XX, which is headed "General Exceptions" provides:

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 the 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;

....

Article 1201 of the FTA, which is headed "General Exceptions" provides:

Subject to the provisions of Articles 409 and 904, the provisions of Article XX of the General Agreement on Tariffs and Trade (GATT) are incorporated into and made part of this Part of this Agreement.

IV. FACTUAL ASPECTS

4.01 The landing requirement which is the subject of this dispute relates to salmon and roe herring caught in the Canadian fishing zone off British Columbia.

1. Salmon

4.02 Five species of salmon inhabit North American waters on the Pacific coast: sockeye, pink, chinook, coho and chum. All five species are found in British Columbia waters where there are approximately 4,500 individual stocks. The salmon begin their life cycle in fresh water streams, rivers, lakes, artificial hatcheries and spawning channels, and then migrate to the ocean where they feed and mature. Depending on the species, salmon will spend one or more years in the ocean following which they return to their place of origin to spawn and die.

4.03 Salmon migrate considerable distances in the Pacific Ocean -- in some cases up to several thousands of miles. The migratory routes of salmon from British Columbia, Alaska and Washington overlap both within and outside the 200 mile economic zones of Canada and the United States. Salmon originating in several Canadian rivers enter the ocean in the United States, and salmon originating in each country pass through and are harvested in the waters of the other. As a result of these migration patterns, each country's fishermen regularly intercept salmon originating in the other country's waters.

4.04 Until 1985, the two countries dealt with the interception problem of Fraser River sockeye and pink salmon through a bilateral agreement, the Fraser River Convention. In 1985, that Convention was replaced by the Pacific Salmon Treaty which applies to all Pacific salmon species and stocks which are subject to interception by the other party or which affect the management of the stocks

of the other party. The Treaty establishes the obligation of each Party to "conduct its fisheries and its salmon enhancement programs so as to: (a) prevent overfishing and provide for optimum production; and (b) provide for each Party to receive benefits equivalent to the production of salmon originating in its waters" (Article III:1). The Treaty also requires that the parties co-operate in management, research and enhancement in fulfilling these objectives.

4.05 Salmon in British Columbia waters are harvested by purse seines, gillnets and troll (hook and line) gear. Net fisheries (purse seines and gillnets) are generally located in inshore areas whereas troll gear is generally used further offshore. Although the species composition of catch differs as between the three main gear types, all types are capable of catching all five species of salmon.

4.06 Salmon fisheries are highly regulated in both Canada and the United States and participants must be licensed by relevant government authorities. Although there are some differences in detail, in each country government fisheries managers regulate season openings and closings, allocate areas to particular gear types and set allowable harvest levels on the basis of fishing plans developed annually.

4.07 Fishing plans are prepared in advance of each season with a view to maximizing harvest levels while conserving stocks in the long term. The pre-season plans are prepared on the basis of historical data gathered during previous seasons, including catch statistics and the results of biological sampling. Planning is complicated by the different catch rates and species composition for each gear type and area. Since salmon from many different stocks are harvested in most fisheries, the plans are generally designed to maximize harvest of abundant stocks and minimize harvest of depleted or threatened stocks.

4.08 Once a season is opened, government fisheries managers monitor catch rates and composition by gathering information from various sources. Fleet size and capacity is closely monitored for each area. Catch estimates by species, weight and number are obtained through periodic radio communications ("hails") with harvesters on the fishing grounds and tenders collecting harvests from fishing vessels. In-season landings are verified by communication with landing station operators and processors as well as on-site inspections of landings by fisheries officials. Biological sampling is carried out both on the fishing grounds and at landing sites. The information gathered from these sources is used by fisheries managers to make in-season adjustments to the fishing plan and to close or extend seasons accordingly.

4.09 After a season ends, fisheries officials update in-season catch estimates using the complete set of catch and landing reports which have by that time become fully available. They perform extensive analysis of the tags and biological samples taken during the season. This data is then used in conjunction with historical data from previous seasons to establish fishing plans for the following season.

2. Herring

4.10 Pacific herring is harvested primarily for the roe which is marketed principally in Japan. Herring spend their entire life cycle in salt water. Every spring, the herring migrate from offshore areas to spawn in near shore areas. Otherwise, they display relatively limited migratory patterns. Herring caught in Canadian waters generally remain within the Canadian two-hundred mile fishing zone and thus Canadian stocks are not intercepted by United States fishermen nor are United States stocks intercepted by Canadian fishermen. Unlike the salmon fishery, which is composed of approximately 4500 stocks, the roe herring fishery targets on relatively few stocks.

4.11 Herring fisheries are located on or near the spawning ground and are prosecuted with both purse seines and gillnets. Due to the high concentration of fish during the spawning season, herring are extremely vulnerable to overharvesting. Herring fisheries are therefore strictly regulated in both Canada and the United States.

4.12 Fishing plans are prepared in advance of each season on the basis of historical data and pre-season surveys. The plans determine what areas will be opened and estimate the allowable catch level for each area and gear type. Test fishing is conducted on the fishing grounds immediately prior to the season in order to monitor the roe-to-fish-weight ratio. The season is opened when the optimum ratios of roe to fish weight occur (at least ten per cent). Herring fisheries last a very short time - from minutes to hours for a purse seine fishery and up to several days for a gillnet fishery.

4.13 During the herring season fisheries officials monitor catch rates closely. Fleet size and capacity are determined by on-site inspection of the fishing grounds. Fishermen and tender operators provide periodic catch estimates by radio ("hails") and fisheries officials make occasional on-site inspections of fishing and tender vessels. Due to the extremely short duration of purse seine fisheries, landing data are not used to make in-season management decisions. In the case of gillnet fisheries, which can last up to several days, Canadian fisheries officials verify and use landing data, to the extent it becomes available, to make in-season management decisions.

4.14 On the basis of the information gathered during the season, fisheries officials determine when the allowable catch rates have been attained and close the fisheries accordingly. After the season is closed, hailed catch estimates are verified against landing data and coded wire tags and biological samples taken during the season are analysed. This information is used in conjunction with

historical data for the purpose of preparing fishing plans for the following season.

V. ARGUMENTS OF THE PARTIES

1. Article XI:1

5.01 The United States argued that the Canadian landing requirement is an export restriction contrary to Article XI. Although, in the United States view, "the new herring and salmon regulations are carefully worded to avoid the appearance of creating direct export prohibitions or restrictions", their "clear effect is to restrict exports".⁹ Indeed, the United States argued, the impact of the landing requirement is solely on exports since herring and salmon purchased by Canadian processors must of necessity be landed in Canada in any event. The United States argued that a requirement to land in Canada constitutes a restriction because it imposes additional burdens on United States 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 and reloading. In the view of the United States, all of these factors combine to place United States processors at a competitive disadvantage in relation to their Canadian counterparts and to deny them the potential benefits from the elimination of the "process in Canada" rule.

5.02 Canada argued that the landing requirement is not a prohibition or restriction on the "exportation" or "sale for export" of herring and salmon to the United States within the meaning of Article XI. United States buyers are

⁹ United States Submission, p.18.

free to procure unprocessed salmon and herring under the same terms and conditions as Canadian buyers. Article XI, in Canada's view, forbids only border measures that prohibit or restrict trade or other measures that discriminate between domestic sales and sales for export. The landing requirement is not a border measure nor does it discriminate between domestic and export sales. Canada also argued that in practice the landing requirement will not impose additional burdens on United States processors. Canada considered United States arguments in this regard to be speculative and not based on evidence. Canada pointed to Canadian experience which, it claimed, shows that off-loading onto trucks or water tenders for re-shipment to a processing plant is very common without economic loss through delay or product deterioration from extra handling.

2. Article XX(g)

5.03 The United States argued that the Canadian landing requirement serves no useful conservation objective and hence it cannot be regarded as "primarily aimed" at the conservation of the herring and salmon stocks, as Article XX(g) interpreted by the GATT Panel on Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, requires. In the United States view, the context in which the landing requirement was established and the extension of it to the previously unrestricted stocks of coho, chum and chinook, are evidence of the lack of a scientific purpose in the landing requirement. The rejection by Canada of United States proposals to provide the information to be obtained from landing by alternative less trade-restricting means is said to be a further indication that the landing requirement does not have a real conservation objective. The United States also argued that Canada's data-collection justification had been rejected by the GATT Panel and that rejection is equally applicable here, that Canada relies on data provided by the United States under the Pacific Salmon

Convention and on data exchange with the United States on other fisheries, and that in any event Canada does not get and does not need access to 100% of the catch for biological sampling purposes. In these circumstances, according to the United States, the Canadian landing requirement is a disguised restriction on international trade.

5.04 Canada argued that as it is an essential component of its conservation regime for herring and salmon, the landing requirement is "primarily aimed" at the conservation of the stocks in question. The right to conserve and manage these resources is, Canada argued, a right that derives from its status as a coastal state recognized under the international law of the sea as embodied in the 1982 Convention on the Law of the Sea, and the right to require the landing of the catch is linked to conservation under that Convention. Canada argued that in fact a landing requirement provides the best information for conservation purposes in that it is inherently more accurate than "hailed" information; it allows for consistent verification and enforcement measures, and it provides access to 100% of the catch for biological sampling purposes. Canada rejected the view that it should be required to rely on the United States for the data it needs for conservation purposes, citing specific instances where such data could not be relied on, and arguing that there are practical impediments to enforcement where information is obtained or even gathered by Canadian officials from within the United States.

VI. THE ARTICLE XI:1 ISSUE

6.01 The text of Article XI:1 is as follows:

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 another contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

6.02 The United States argued that Article XI:1 should be given its simple and straightforward meaning -- it enjoins "prohibitions or restrictions" on "exportation or sale for export". In accordance with existing GATT decisions,¹⁰ the United States argued, a measure need not refer directly to exports; in order to fall within Article XI:1, it need only have the effect of restricting exports. The United States claimed that the Canadian landing requirement has the effect of placing costs on export sales of unprocessed herring and salmon that are not borne by most domestic buyers, thereby placing many United States buyers at a competitive disadvantage. Such a competitive disadvantage, in the view of the United States, constitutes a "restriction" within the meaning of Article XI:1. According to the United States, while the landing requirement could also be viewed as a restriction on "exportation" it is certainly a restriction on the "sale for export" of such products.

¹⁰ The United States cited EEC Programme of Minimum Import Prices, L/4687, BISD 25th Supp. p. 68; EEC Quantitative Restrictions Against Imports of Certain Products from Hong Kong, L/5511, BISD 30th Supp. p. 129 and Japan - Trade in Semiconductors, L/6309.

6.03 Canada argued that Article XI:1 forbids restrictions on "exportation" -- in Canada's words the "act of exporting". However, the landing requirement does not regulate the act of exporting; it requires that all fish be landed without distinction between fish destined for domestic buyers or fish destined for export buyers. In Canada's view, the GATT decisions relied on by the United States are irrelevant because they deal either with imports or with measures closely related to an export licensing scheme. Canada further argued that a landing requirement is not the type of measure covered by Article XI:1. A reading of that article in accordance with the normal canons of interpretation, according to Canada, requires "other measures" covered by the article to be limited only to those of the same genus as "quotas" or "licences" which are specifically mentioned in Article XI:1. Furthermore, as United States buyers are able to procure unprocessed herring and salmon on the same terms and conditions as Canadian buyers, then there is no restriction on "sale for export" contrary to Article XI:1. Finally, Canada argued that the landing requirement did not constitute a de facto restriction on trade because the United States had failed to discharge the burden of proving that there was any trade impact.

6.04 In the course of the proceedings, the Panel asked the Parties whether the distinction between border measures and internal measures, which applied in the case of imports under Article XI.1,¹¹ had any relevance to exports under that article. After considering the arguments of the Parties on this issue, the Panel concluded that the "border measures-internal measures" distinction did not apply to export restrictions under Article XI:1. First, although there is an obvious parallel between the word "importation" and the word "exportation", Article XI:1

¹¹ The distinction was applied in the panel report in Canada -Administration of the Foreign Investment Review Act, L/5504, BISD 30th Supp. p.140 (1984), at 5.13-5.14 (pp.162-163). The distinction was also recognized, and somewhat qualified, in the panel report in Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, L/6304, (5 February 1988), at 4.23-4.26 (p.48).

does not use the word "exportation" alone. It refers to "prohibitions or restrictions ... on the exportation or sale for export of any product." Thus, even if "exportation" was to refer to the act of exporting at the border alone, the concept of "sale for export" extends the coverage of Article XI:1 to restrictions imposed at an earlier stage of the process, before the act of exportation itself.

6.05 Second, there is a good reason for the broader coverage in Article XI:1 in respect of exports, which does not apply in the case of imports. Internal or non-border restrictions placed on imports are regulated elsewhere in the GATT under Article III. That article does not apply, nor could it readily be made to apply, to exports. While an import retains its distinct character as an import throughout its commercial life, and is identifiable as such, an export does not exist as an export until it is committed to the export process. In the Panel's view, the reference to restrictions on "sale for export" in Article XI:1 was designed to deal with this earlier phase of the process and to cover restrictions imposed on goods destined for export even though the restriction does not take effect at the border.¹²

6.06 The Panel concluded, therefore, that there was no justification for applying the "border measures-internal measures" distinction to export restrictions under Article XI:1. The issue before the Panel was whether the landing requirement constituted a restriction on "sale for export" regardless of whether it was an internal or a border measure. If the landing requirement was found to be a restriction on "sale for export", then there would be no need to decide whether it constituted a restriction on "exportation".

¹² In this connection, although neither Party raised the point, the Panel noted that Chapter Four of the FTA, into which Article XI is incorporated, is headed "Border Measures". However, the Panel concluded that this title was not intended to serve the substantive task of restricting, for the purposes of the FTA, the range of application of GATT provisions incorporated therein.

6.07 On the question of the scope of the term "restriction" under Article XI:1, the Panel was not convinced that the reference to "other measures" in the definition was limited to a genus confined by the words "quotas, import or export licences". The common genus of these measures might well be that they constitute a restriction on trade. Further, the ordinary meaning of an amplifying phrase introduced by the word "whether" is to affirm the inclusive rather than the limited nature of the term. In this regard, the Panel noted that the definition of "restriction" in Article 410 of the FTA, which is applicable to all of Chapter Four and thus relevant to the interpretation of Article XI:1, elaborates the meaning of restriction to include "permits" and "minimum price requirements" as well as quotas and licences. Moreover, GATT interpretations of Article XI:1 support a liberal approach¹³ stressing that the article should be interpreted broadly enough to accomplish its basic purpose.¹⁴

6.08 Canada argued that the only measures that can be regarded as "restrictions ...on the ... sale for export" under Article XI:1 are those that actually provide for different treatment of domestic sales and export sales. The Panel noted that such an approach would create a significant limitation on the scope of GATT obligations regarding exports. It would allow governments to impose measures that in fact place heavier commercial burdens on exports than on domestic products, provided only that the form of the measure itself was neutral. The Panel noted that no such limitation is made in the parallel GATT obligation regarding imports in Article III:2 and III:4.

¹³ One recent GATT Panel has interpreted the term "other measures" as being broad enough to encompass restrictive internal measures taken by a state trading monopoly: Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, L/6304, (5 February 1988), paras. 4.23-4.26.

¹⁴ Japan - Trade in Semi-conductors, L/6309 (24 March 1988), paras 104-106; Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, L/6216, BISD, 34th Supp. p.83 (1987), para. 5.11.

6.09 In considering the Canadian argument, the Panel noted that the landing requirement was not merely a general measure that happened to have an adverse impact on exports. An important reason for the specific rule requiring that all salmon and herring be landed in Canada (as distinct from the rules requiring inspection and reporting) was to make exports more amenable to data collection and this, in fact, is its principal effect. The Panel concluded 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 Article XI:1 if it has the effect of imposing a materially greater commercial burden on exports than on domestic sales. In the view of the Panel it was not necessary to demonstrate the actual trade effects of such a measure. As a practical matter there cannot be data to show what would have happened without the measure and GATT decisions have not required such proof.¹⁵ What has to be shown is that the measure has altered the competitive relationship between foreign and domestic buyers.

6.10 The basic United States argument with regard to the competitive disadvantage of the landing requirement was that a substantial proportion of potential exports to the United States would be required to take steps that would not be required in the case of sales to Canadian buyers. Canadian buyers would be able to land at their chosen processing plant or at a location most convenient to that processing plant. The United States did not deny that some export buyers might find it economically advantageous to land in Canada and ship by truck from there; the problem was that exports had to be landed in Canada whether economically advantageous or not. The United States argued that many export buyers would find it economically advantageous to ship directly from the fishing grounds to United States landing sites by water; for these buyers, the landing

¹⁵ Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, L/6216, BISD, 34th Supp, p. 83 (1987) para. 5.10-5.11; see also United States - Taxes on Petroleum and Certain Imported Substances, L/6175, BISD 34th Supp. p. 136 (1987) para. 5.1.9.

requirement would impose the extra expense of landing, unloading and reloading at a Canadian landing station.

6.11 The Panel agreed that while the landing requirement affects both Canadian and United States buyers, the burden on export buyers of having to make an unwanted landing would be additional to the burden of inspection and reporting which is imposed on all buyers. Moreover, while there was no actual data on the proportion of export buyers for whom direct transport by water would be most advantageous, the Panel was persuaded that the proportion would be significant. Water transport is the only means available to export buyers from Alaska. Export buyers from the State of Washington do have the alternative of truck transport, but even in this case the proportion of export purchases shipped directly by water is likely to be significant. The evidence of Canadian landing practice submitted to the Panel showed that a substantial majority of Canadian buyers land their catch directly at their processing plants.¹⁶ There is no reason to assume that a similar proportion of United States buyers would not do the same.

6.12 Both Parties devoted a considerable part of their written submissions and oral argument to demonstrate, on the part of the United States, the nature and extent of the additional costs on United States buyers, and on the part of Canada, that the costs were insignificant. Neither side was able to demonstrate what the actual costs to United States buyers would be. Based simply on the steps that export buyers would be required to take--landing in Canada, unloading and loading for reshipment to the United States --the Panel was satisfied that the cost of complying with the landing requirement would be more than an

¹⁶ See Canadian Responses to Additional Questions from the B.C. Salmon and Herring Panelists, 25 July 1989.

insignificant expense for those buyers who would have otherwise shipped directly from the fishing ground to a landing site in the United States.¹⁷

6.13 In sum, although the evidence presented made it difficult to assess the impact of the landing requirement with any precision, and although it was clear that the landing requirement would not be a commercial burden for some export buyers, the Panel was satisfied that a considerable number of potential export buyers would find direct shipment by water more economical, and that for most of these buyers the extra expense of making an unwanted landing in Canada would be significant. Accordingly, the Panel concluded that, as presently constituted, the Canadian landing requirement is a restriction on "sale for export" within the meaning of GATT Article XI:1.

6.14 One Panel member did not consider the evidence adequate to support the Panel's conclusion as to the significance of the burden imposed by the landing requirement, but was of the view that, on the basis of all the evidence, the landing requirement was a restriction within the meaning of Article XI:1. Another Panel member did not believe that existing GATT rules or previous GATT decisions provide a clear basis for reaching a judgment in the present case as to whether the landing requirement constitutes a restriction within the meaning of Article XI:1, and was not prepared to make a decision on this issue. This member was of the view that the consistency of landing requirements with GATT rules raises conceptual issues that may deserve further consideration by the GATT Contracting Parties.

¹⁷ The United States also argued that there would be an additional cost to United States exporters from the deterioration in the quality of the fish from the extra handling involved. Canada argued that modern handling techniques limited or eliminated any such loss of quality from handling. While it appeared to the Panel plausible that in some circumstances a loss of quality could occur, the Panel found it unnecessary to resolve this issue and does not rely on it in its finding.

VII THE ARTICLE XX(g) ISSUE

1. The Appropriate Legal Standard

7.01 Article XX(g) provides that nothing in the General Agreement shall be construed to prohibit 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,

provided that such conservation 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.

Canada argued that, even if the landing requirement were found to violate Article XI:1, it is nevertheless excused by this provision. The United States disagreed.

7.02 The Parties are in agreement that, since Article XX(g) is an exception to the obligations of the General Agreement, Canada has the burden of demonstrating the application of this provision. They also agree that several of the criteria of Article XX(g) have been satisfied and are not in issue: (1) it is agreed that the fish subject to the landing requirement are an "exhaustible natural resource" within the meaning of Article XX(g); (2) it is agreed that Canada's restrictions on the amount of such fish taken by domestic fishermen satisfies the requirement in paragraph (g) that domestic production of the resource be restricted; (3) it is agreed that the first proviso stated in the preamble to Article XX is not in issue, there being no claim that the landing requirement involves arbitrary or unjustifiable discrimination between foreign countries.

7.03 The Parties are agreed that the issues in dispute are:

- (1) whether the landing requirement satisfies the condition stated in paragraph (g) that it be a measure "relating to the conservation of" the exhaustible natural resources in question; or, conversely,
- (2) whether the landing requirement is a "disguised restriction on international trade" in contravention of the second proviso stated in the preamble to Article XX.

7.04 The Parties have also agreed on the general meaning of the criteria in issue. Both accept the interpretation given by the GATT Panel in its 1987 report on the GATT consistency of Canada's former export prohibition which provided:

4.6 The Panel noted that some of the subparagraphs of Article XX state that the measures must be "necessary" or "essential" to the achievement of the policy purpose set out in the provision . . . 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 exhaustive (sic) natural resources. The Panel concluded for these reasons 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 the conservation of an exhaustible natural resource to be considered as relating to" conservation within the meaning of Article XX(g). The Panel, similarly, considered that the terms "in conjunction with" in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective "in conjunction with" production restrictions if it was primarily aimed at rendering effective these restrictions.¹⁸

¹⁸ Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, L/6268, (20 November 1987), at para. 4.6 (p.15) (emphasis added).

As the quoted text indicates, the prohibition against "disguised" restrictions on international trade stated in the preamble to Article XX is in essence just the opposite face of the requirement in paragraph (g) that trade-restricting conservation measures must in fact have a true conservation purpose.

7.05 The Panel began by examining the purpose and meaning of the GATT Panel's conclusion that Article XX(g) measures must be "primarily aimed at" conservation. The Panel recognized that Article XX(g) exists to ensure that the provisions of the GATT do not prevent governments from pursuing their conservation policies. In this regard, the Panel acknowledged that the conservation of natural resources encompasses broader environmental concerns reflecting both economic and non-economic interests. The Panel was conscious of the relevance of such concerns to the interpretation and application of Article XX(g) and of the need to allow governments appropriate latitude in implementing their conservation policies. It was not the intention of Article XX(g) to allow the trade interests of one state to override the legitimate environmental concerns of another.

7.06 However, the Panel also recognized that to achieve its broad objective, it is not necessary that Article XX(g) exempt from prohibition every measure that has a conservation-promoting effect. The only measures that Article XX(g) protects are those that are part of a genuine conservation programme. The "primarily aimed at" test is meant to determine whether this condition has been met.

7.07 In the Panel's view, the "primarily aimed at" test should be applied on the basis of the objective qualities of the measure concerned. A measure such as the Canadian landing requirement might achieve several effects including both a conservation-promoting and a trade-restricting effect. But even so, this would not exclude the existence of a genuine conservation objective. The measure in

question could be a valuable part of a conservation programme, worth doing for conservation reasons alone. This, in the Panel's view, ultimately is the basis for the test to be applied; if the measure would have been adopted for conservation reasons alone, Article XX(g) permits a government the freedom to employ it.

7.08 In order to apply this test, the Panel considered that it must examine the objective factors that go into a decision to adopt such a measure, including the conservation benefits that the measure itself would produce and whether there is a genuine conservation reason for choosing the actual measure in question as opposed to others that might accomplish the same objective. The Panel also considered that since governments do not adopt conservation measures unless the benefits to conservation are worth the costs involved, the Panel must examine the costs of the conservation measure -- both resource costs and the costs of inconvenience to commercial and other interests affected by the measure -- to determine whether the conservation benefits would in fact have led to the adoption of the measure.

7.09 The Panel recognized that the issue in this case presented a special difficulty as the primary cost factor associated with the landing requirement is the commercial inconvenience to exporters who have to make an unwanted landing, unloading and reloading. In the Panel's view, the purpose of Article XX(g) requires that this commercial inconvenience to exporters be treated in exactly the same way as an equivalent burden on Canadian buyers would be treated. In other words, how genuine the conservation purpose of a measure is, must be determined by whether the government would have been prepared to adopt that measure if its own nationals had to bear the actual costs of the measure. Otherwise, the law of Article XX(g) would require a different test for

conservation measures imposing burdens on exporters than for measures imposing burdens on domestic buyers.¹⁹

7.10 Accordingly, the Panel concluded that in determining whether the Canadian landing requirement would have been adopted for conservation reasons alone, the central issue was whether the conservation benefits of the landing requirement would have been large enough to justify imposing the commercial inconvenience in question. To comply with the trade neutrality required by Article XX(g), the issue must be posed in terms of 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.

7.11 The Panel recognized that the test called for by Article XX(g) required a number of judgments about matters relating to conservation policy. The Panel was aware that each state has the sovereign right to decide upon the particular conservation policies it wishes to employ. But, at the same time, the Panel was required to take account of the obligations that Canada and the United States have accepted, under GATT and the FTA, regarding trade-restricting conservation measures. The preamble to GATT Article XX, which expressly

¹⁹ Concern to assure that Article XX burdens not be imposed on foreign commercial interests alone figured prominently in the drafting of Article XX. In the Geneva meeting of the ITO Preparatory Committee, several delegates proposed drafting a proviso to what is now Article XX(b) requiring that any member applying a restrictive health measure under that provision impose corresponding health-security measures in its own country, so that the exporting country would not "bear the full burden" of the health measure. E/PC/T/A/PV/30 at 8. The delegates eventually deleted the proviso when they were unable to agree on its wording. In doing so, however, they agreed that the prohibition against disguised restrictions on trade stated in what is now the preamble to Article XX would ban any attempt to use the exception in Article XX(b) to burden imports alone without analogous domestic restrictions. *Id.* at 11-15. The same concern for equal burdens is reflected in the central requirement of Article XX(g) that restrictions on foreign trade be accompanied by, and be imposed in conjunction with, restrictions on domestic production or consumption.

prohibits "disguised" restrictions on international trade, is an acknowledgement by the Parties that they will submit the purposes of trade-restricting conservation measures to third-party scrutiny. By directing the application of this provision, the Panel's terms of reference required the Panel to make its own independent evaluation of the conservation justification in question.²⁰

2. The Conservation Rationale for the Landing Requirement

7.12 Canada stated that the conservation objective of the landing requirement is to maintain and improve the quality of the conservation data obtained from commercial catches in its Pacific salmon and roe herring fisheries.²¹ Canada acknowledged that the landing requirement involves a more intrusive methodology than employed in its other Pacific fisheries. It sought to justify this greater intrusion on the ground that the salmon and roe herring fisheries were commercially more important, and more difficult to manage. Upon reviewing all the evidence, the Panel concluded that there is a rational case for distinguishing the salmon and roe herring fisheries. The most persuasive distinction is the relatively greater pressure for overfishing in these

²⁰ The power to look behind a government's representations as to its purpose in enacting a measure was made part of Article XX because of concern that the Article XX exceptions could be abused. See E/PC/T/C.II/32 at 11 (delegate of the Netherlands points out that exceptions such as that in XX(b) "are misused for indirect protection", and recommends amendment to prohibit measures that constitute an indirect protection); E/PC/T/C.II/50 at 7 (summary record shows United Kingdom proposed text of what is now Article XX preamble and said that purpose was "to prevent abuse of the exceptions" of Article XX).

²¹ Canada noted that the data-collection effects of the new landing requirement will in large part be just a continuation of past practice, given that the previous export restriction amounted to a de facto landing requirement giving Canadian fisheries officials access to almost 100% of the Canadian salmon and herring catch. At the same time, however, Canada has called attention to its recent efforts to improve upon existing data collection methods -- improvements that also depend, it argued, on continuing to land 100% of the catch in Canada.

fisheries, due to the greater size and harvesting power of the salmon and herring fleets and the greater economic rewards of overfishing.²²

7.13 The United States made a number of arguments suggesting that the high level of data quality sought by the Canadian landing requirement is simply not useful in view of all other inadequate and less perfect data on salmon and roe herring which Canada accepts, or is forced to accept. Mentioned in this connection were the inadequate data received concerning the important numbers of salmon taken by sports fishermen, the difficulty of monitoring salmon trollers, the practice of allowing tenders to mix catches from different fisheries, and the need to rely on United States data for those of its salmon stocks subject to interception in United States waters. The Panel found it difficult, however, to accept that having better data about one phenomenon is not useful because of data inadequacies elsewhere. Apart from certain specific points made below, the Panel did not find that Canada's general objectives with regard to data quality were excessive.

3. The Landing Requirement's Contribution to Data Collection

7.14 Recognizing that there is a conservation need for high quality data from the salmon and roe herring fisheries, the Panel considered that the central question was whether and to what extent the landing requirement contributed to meeting that need. The Panel did not understand the United States to dispute that a landing requirement is related to the production of higher quality data. The issue raised by the United States was whether there is any conservation reason for choosing a landing requirement applicable to 100% of the catch over

²² Although reference was made to the lack of a landing requirement in Canada's Atlantic fisheries, the information about Atlantic fisheries submitted to the Panel was not sufficient to permit any conclusions to be drawn from that comparison.

alternative methods that are arguably as effective but less trade-restricting. The United States argument was not that Canada is legally required to choose a less restrictive alternative as such. Rather, it claims that having had a choice between employing a landing requirement and a less restrictive method, Canada chose the more restrictive landing requirement for reasons of trade policy rather than conservation. Canada disputed this, arguing that its choice of the landing requirement was based on the inadequacy of alternative methods for collecting data on exports. Thus, the Panel concluded that in order to assess the contribution to data collection made by the landing requirement itself, the Panel must assess the relative contribution that could be made by alternative methods.

(a) Alternatives to a Landing Requirement

7.15 The Panel considered that the first step was to identify which of the alternative data-collection methods were in fact reasonably available to Canada. The United States claimed that Canada could obtain as much high-quality data as it wants from United States sources with no major difficulty. Canada argued that a coastal state cannot be expected to make its conservation regime dependent on cooperation by a foreign state. In Canada's view, data-collection methods dependent on cooperation by the United States must, therefore be excluded from consideration.

7.16 The Panel recognized that Canada and the United States are already committed to an extensive cooperative relationship, under the Pacific Salmon Treaty, in the management of transboundary salmon fisheries, and that as a practical matter they cannot effectively manage these fisheries without such cooperation. Nevertheless, in view of the rights and obligations of a coastal state with regard to fisheries management under the law of the sea, and particularly in view of the level of friction that tends to characterize international relations in fisheries matters around the world, the Panel could

not accept the contention that GATT Article XX(g) required such cooperation. The Panel agreed with Canada's position that a state could not be obliged to make its fisheries conservation and management regime dependent on cooperation with another state.

7.17 Consequently, in identifying reasonable alternatives, the Panel excluded several kinds of cooperative arrangements suggested in United States arguments. The Panel excluded arrangements depending on active cooperation by United States officials in performing Canadian-requested functions such as sampling, inspection or documentation, arrangements relying on the use of United States data as a primary source, and arrangements relying on United States enforcement of Canadian laws or enforcement of its own laws at Canada's request.

7.18 At the same time, however, the Panel also concluded that governments would not be justified in excluding from consideration any and all arrangements involving some transborder element. The issue in each case should be whether the transborder element is within the effective control of the government in question. The Panel was persuaded that other means of collecting data on exports that did not require reliance on United States cooperation were available to Canada. The Panel was not called upon to judge which of several possible alternatives would be optimal, but in its view the following elements could be considered as typical of the possibilities:

- . Canada could exempt exports from the landing requirement conditional upon compliance with requirements that would serve the same or similar data-collection functions. For example:

- . Vessels wishing to haul fish directly to export markets could be required to register in advance with area managers, and to give notice of intended purchase, including the buyer and the place of landing.

. Such vessels could also be required to present appropriate undertakings assuring prompt transmission of landing data.

. Exemption from the landing requirement could also be dependent on undertakings from the export buyers themselves -- for example, that the buyers would transmit true copies of their national landing reports (or Canadian landing reports, or both), that they would admit and cooperate with Canadian inspectors, and that they would comply with other relevant laws and regulations applicable to Canadian buyers.

. Canada could require that export vessels report before leaving the ground, giving catch data and exact destination, and make themselves available for on-board inspection of catches or cargo by Canadian officials.

. Canada could sanction violation of these undertakings (and protect itself from further violations) by refusing to allow violators to be excused from the landing requirement in the future.

. Canada would also have effective jurisdiction against vessels used for direct export, all of which must by law be of Canadian registry.

(b) The Contribution of the Landing Requirement and of the Alternatives

7.19 In the light of these alternatives, the Panel endeavoured to make some assessment of the extent to which the quality of the data yielded by a landing requirement applying to 100% of the catch would be superior to the quality of data that could be obtained by alternative methods. In order to do this the

Panel considered the three principal elements of the data collection process advanced by Canada as the reasons for the landing requirement:

- . The ability to perform statistically valid biological sampling;
- . The ability to deter false reporting of catch data by fishermen and fish buyers; and
- . The ability to obtain information needed for effective in-season management.

In addition, the Panel also considered the administrative advantages that might be claimed for the present landing requirement.

(i) Biological Sampling

7.20 Canada argued that valid biological sampling data requires that Canadian inspectors have access to 100% of the catch, and that exports must be landed in Canada in order to provide such access. Canada's position rests on the theory of random sampling which requires that all parts of the population to be sampled have an equal probability of being sampled. The United States argued that good statistical practice does not require access to 100% of the population if there is no logical reason to believe that the missing part is nonrepresentative. The United States claimed to follow this practice in its own biological sampling, stating that it did not seek access to sample salmon and roe herring exports from Alaska to Canada -- exports which represent roughly 3% and 10-17% respectively of the Southeast Alaska catches.

7.21 After considering the arguments of the Parties, including answers to supplemental questions and supporting authorities provided, the Panel concluded

that Canada's insistence on the necessity of access to 100% of the catch was not supportable. It was not disputed that the theory of random sampling does accept the validity of data based on less-than-100%-access if the part withheld from access is otherwise representative of the whole. The authorities cited to the Panel also tended to support the view that judgments about representativeness can be made on the basis of logical analysis.²³ No reason was offered for believing that the fish in vessels destined for export would differ in any systematic way from the general population caught in the same fishery or in the same sampling stratum, nor was any other example cited of a biological sampling programme requiring 100% access.

7.22 The Panel recognized, however, that the risk of error cannot be excluded when part of the population is not available for sampling, and that the risk increases with the size of the missing part. The Panel agreed that at some percentage that risk would become too large to be acceptable, but deferred any attempt to quantify that percentage until it had analyzed the other data collection functions.²⁴

²³ See J. Gulland, Manual of Methods for Fish Stock Assessment, Part 1: Fish Population Analysis in FAO Manuals in Fisheries Science, No. 4 (1969) pp.23-24; see also J. Gulland, Manual of Sampling and Statistical Methods for Fisheries Biology, Part 3: Sampling the Catch in FAO Manuals in Fisheries Science No. 3 (1966) p.14.

²⁴ Canada placed considerable emphasis on the need for stratification of sampling -- the practice of sometimes dividing the populations to be sampled into smaller sub-populations according to characteristics such as the dates fished, the gear used, and the sub-area within which the fishery took place. With certain catch populations being divided into smaller sub-populations, there would be a greater chance that unlanded exports might be concentrated in a particular sub-population, with the result that the size of the export share could rise to a point where it was too large to omit from sampling altogether. Some members of the Panel were of the view that the most reasonable manner of handling such exceptional cases would be by sending inspectors to the export destination to sample the requisite number of vessels, as Canada already does in the case of West Coast groundfish exports, rather than imposing a landing requirement on all export vessels. The majority of the Panel took the position that, however reasonable this might be, Canada could not be required to rely on being able to conduct inspection activities in a foreign state.

(ii) Deterrence of False Reporting

7.23 The Parties agreed that fishermen have several incentives to under-report catches. While sales documents governing payment for the fish create a first line of defence against such under-reporting, both Parties acknowledged that buyers and sellers can sidestep that defence if buyers are willing to commit fraud by making under-the-table payments for unrecorded fish. The Parties agreed that further enforcement is needed to deter such fraud and that the key to deterrence is a credible threat of discovery and subsequent sanctions.

7.24 Canada argued that a landing requirement produces the most credible threat for a Canadian fisherman, because even though not every vessel is inspected by a government inspector, every vessel is subject to the risk of such inspection. Canada contended that an equivalent threat would not be created for vessels permitted to go directly to the United States because the United States does not rely on spot checking by officials as a detection device, and, even if discovery does occur, Canada would be dealing in a foreign jurisdiction which creates many barriers to legal prosecution.

7.25 The Panel was not persuaded that, at least where export levels were low, allowing exports to depart without landing would create a significant difference in deterrence. Without any need to rely on enforcement in a foreign jurisdiction, Canada has the power to monitor unlanded exports on its own, and to sanction false reporting; Canada can require that traders seeking to be excused from a landing requirement undertake substitute arrangements for adequate data-collection; and Canada has the power to sanction violations of these undertakings by refusing to allow violators to be excused from the landing requirement in the future. Canada also has effective jurisdiction over vessels used for direct export.

7.26 The Panel was also not persuaded that there would be a meaningful decline in deterrence because of particular United States detection methods. Deterrence depends on the subjects' perceptions of the likelihood of being caught. That likelihood is provided by the investigations, prosecutions and convictions that do occur in the United States, where law enforcement maintains a visible presence.

(iii) In-Season Management

7.27 Canada informed the Panel that area managers used landing data for in-season management of fisheries of longer duration. The data is used to calculate the total catch that has taken place up to that point, so that managers can make decisions about whether to close a fishery or to make other adjustments. Canada argued that failing to obtain landing data from unlanded exports would impair this in-season management process.

7.28 The Panel was not, however, convinced that the absence of landing reports from unlanded exports would make a significant difference for in-season management at least where export volumes were low. In the Panel's view, none of the evidence supplied by Canada demonstrated that in-season managers required comprehensive data on all landings. Often, the entire catch is not landed at the time of decision, and managers extrapolate from what landing data they have, using CPUE calculations.²⁵ The Panel did not believe that where unlanded export volumes were low, the quality of these extrapolations would be affected

²⁵ CPUE (Catch Per Unit of Effort) is the average catch being made in the particular fishery, during a particular unit of time spent fishing, by that particular type of gear. The size of the total catch can be extrapolated by counting the total number of vessels of each gear type, counting their total days of effort, and multiplying by the relevant CPUE's for the each gear type.

significantly by whether the partial share of the catch being used as the base did or did not include a part of the export share as well. Even where in-season managers are able to have 100% of the catch-to-date landed in time, the Panel was still not persuaded that the quality of their management decisions will be affected by the difference between having an actual landing count of the missing exports, as opposed to a count based on hail reports and/or CPUE data applied to them. The descriptions of in-season management provided by the Parties did not suggest that in-season management decisions turn on such fine degrees of accuracy.

7.29 The Panel also considered that some of its conclusions reached earlier were equally applicable to in-season management. To the extent that deterrence against false reporting helps to ensure accurate hail reports to in-season managers, the earlier conclusion that deterrence would not be significantly reduced in the absence of the landing requirement similarly means that the reliability of hail reports should not be significantly reduced. Likewise, the earlier conclusion that reliable sampling data can be obtained without requiring access to 100% of the catch would apply to sampling for in-season management as well.

(iv) Administrative Advantages

7.30 The Panel also considered whether a landing requirement applicable to 100% of the salmon and herring catch offered other advantages over alternative means of data collection. It concluded that there were a number of administrative or regulatory factors which could well provide the basis for a preference, by fisheries officials, for adopting such a landing requirement instead of alternatives such as those indicated above. The landing requirement has the advantage of being simpler to operate than these alternative data-collection procedures. There are fewer types of behaviour to monitor, and fewer

special arrangements needed. The 100% landing requirement also avoids the need to make as many contentious decisions. Finally, data collection practices based on access to 100% of the catch had become an established way of doing things for Canadian fisheries officials, at least with respect to pink and sockeye salmon and roe herring.

(c) Summary Assessment of the Landing Requirement's Contribution to Data Collection

7.31 The Panel acknowledged that the administrative advantages of a 100% landing requirement would be given some weight in deciding whether to adopt such a measure. In the Panel's judgment, however, such advantages would not have enough importance to be determinative by themselves. In the Panel's view, the actual conservation benefits of the current landing requirement, in terms of data quality, would be the decisive issue.

7.32 After reviewing the three main issues of biological sampling, deterrence and in-season management, the Panel concluded that the contribution of the current landing requirement to data quality would vary according to the volumes of exports that would otherwise not be landed. If such volumes were quite small (and assuming that they were not unrepresentative of the fishery or the sampling stratum involved) then it would be difficult to find any meaningful improvement in overall data quality from what would be obtained if those exports were not required to land. Even at somewhat larger volumes the impact of the landing requirement on the overall level of data quality would depend on just how much importance that particular portion of the data had to the sampling or management functions in question, and, to the extent it was important, on the quality of data available by alternative means if these exports were not landed. On the other hand, the Panel accepted that beyond certain levels in the volumes

of unlanded exports, lack of direct access to those exports could impair the integrity of sampling and management functions.

7.33 The Panel was unable to identify a specific percentage of unlanded exports at which the landing requirement would or would not make a significant difference in data quality. The Panel considered that the need for direct access to unlanded exports would vary according to the nature of the fishery in question. Fisheries which involve many stocks, and particularly those in which the relative composition of stocks varies over the duration of the fishery or in particular sub-areas, would generally require access to a rather high percentage of the total catch. Other fisheries involving relatively few stocks, such as some of the roe herring fisheries, would not require as high a percentage.

7.34 Recognizing that the choice of a particular percentage figure would be to a certain extent arbitrary, nevertheless the Panel considered that it was necessary to give some indication of the quantitative dimensions. After considering the risk of error in each of the three main elements of the data collection process relied on by Canada, the Panel concluded that the 100% landing requirement would seldom have a significant impact on overall data quality in cases where the volume of unlanded exports from a particular fishery would otherwise have been in a range of up to 10-20%.²⁶ In such circumstances, differences between the quality of data obtained under a landing requirement applying to 100% of the catch and the quality that could be obtained under reasonably available alternatives would be rather small. By themselves, such differences would not provide a very strong conservation reason for adopting the landing requirement in lieu of the available alternatives. If, on the other hand, the volumes of unlanded exports were in excess of 10-20% of the catch from

²⁶ Some Panel members considered that the figure should be no higher than 10%; other Panel members considered that it should be at least 20%.

a particular fishery, the Panel was of the view that requiring some or all of those exports to land could have significant conservation benefits.

4. Conclusions

7.35 As the Panel has already noted, the critical question was whether the conservation benefits and other advantages of a landing requirement applicable to 100% of the salmon and herring catch would have been considered large enough to be worth the commercial inconvenience which such a landing requirement imposes. And, as the Panel has stated, conservation benefits must be assessed in terms of both economic and non-economic values accorded to conservation. Likewise, the proper trade-neutral criterion for assessing commercial inconvenience must be whether the 100% landing requirement would have been adopted if the commercial inconvenience imposed on export buyers had been imposed on Canadian buyers.

7.36 The Panel concluded that the answer to the question whether the advantages of a 100% landing requirement outweighed its commercial inconvenience would have depended in the first instance on the volume of unlanded salmon and herring exports expected to occur in each fishery, or group of fisheries, in the absence of a landing requirement. The Panel recognized that the information available at the time the landing requirement was adopted contained little relevant data upon which to base a projection of such exports. Due to the previous export restriction, there was no data at all on past exports of roe herring or pink and sockeye salmon. Exports of the three previously unrestricted species of salmon (chinook, coho and chum) had been less than 1% of the total catch in recent years, but as Canada had suggested to the Panel, this low volume may have been due to the burden of having to separate mixed catches under the previous export

restriction. There was some recent data for United States exports to Canada²⁷ but neither party considered this data probative. The difficulty of projecting unlanded exports in particular was compounded by the evidence that some part of the export trade might choose to land in Canada for economic reasons.

7.37 The Panel was thus obliged to evaluate whether, under such conditions of uncertainty, the commercial burden of the landing requirement would have been imposed on Canadian buyers for the purpose of protecting the data collection process from the risk of substantial volumes of unlanded exports. The Panel found it difficult to reach a conclusion. It recognized that it is never easy to justify imposing tangible burdens for the purpose of avoiding uncertain risks. This particular risk was difficult to measure. The United States cited a number of factors which made it likely that overall exports would be relatively small in the early years, notwithstanding other factors which could cause exports to grow in the middle to long term. On the other hand, the fact that an export restriction had been imposed in the past was some evidence that a meaningful volume of exports was considered possible.

7.38 On balance, the Panel concluded that the conservation benefits and other advantages that would have been derived from a landing requirement applicable to 100% of the salmon and herring catch would not have justified its adoption as a conservation measure. The Panel's conclusion was influenced by two primary considerations. First, while significant volumes of unlanded exports could not be ruled out for all fisheries, on the basis of the existing evidence the probability that unlanded export volumes of that size would occur in a high percentage of salmon and herring fisheries was remote, especially in the early

²⁷ See para. 7.20 above.

years.²⁸ Second, the conservation objectives of the landing requirement could have been accomplished by structuring it in a more selective manner; for example, it could have exempted that proportion of the catch from a particular fishery whose direct export would not impair the integrity of the data collection process for that fishery. Accordingly, the Panel concluded that, because it is applicable to 100% of the salmon and herring catch, the present Canadian landing requirement cannot be said to be "primarily aimed at" conservation and thus cannot be considered a measure "relating to the conservation of an exhaustible natural resource" within the meaning of GATT Article XX(g).²⁹

7.39 The Panel's conclusion does not preclude Canada from imposing more selective landing requirements designed to meet specific data-collection needs. Catch information is vital to Canada's management of its salmon and herring fisheries and landing requirements can play an important role in obtaining that information. Moreover, although data-collection needs can only be determined fishery-by-fishery, the Panel's conclusion does not preclude common landing requirements for groups of fisheries with common data needs or common administrative problems. The conservation measures permitted by Article XX(g) include the administrative flexibility common to government conservation programmes generally.

²⁸ In conjunction with its comments on the Panel's initial report, Canada submitted data on the volume of certain salmon exports that had taken place in the first six months after adoption of the landing requirement. The Panel considered that this information could be relevant in establishing the need for a landing requirement in the fisheries involved, but did not believe that such partial data, which included only certain salmon fisheries on the south coast of British Columbia and which did not include any data on roe herring fisheries, would itself demonstrate a need for the 100% landing requirement at issue in this proceeding.

²⁹One Panel member disagreed with this conclusion and considered that the landing requirement did meet the criterion of being "primarily aimed at" conservation. Nevertheless, he agreed with the views expressed in paragraphs 7.39 and 7.40 and in the final sentence of paragraph 8.02.2.

7.40 In the Panel's view, one way that a landing requirement could be considered "primarily aimed at" conservation would be if provision were made to exempt from landing that proportion of the catch whose exportation without landing would not impede the data collection process. Although any such proportion would have to be determined on the basis of the actual data and management needs of each fishery, or group of related fisheries, the Panel was of the view that the 10-20% range referred to earlier could provide appropriate guidance.³⁹

VIII SUMMARY OF CONCLUSIONS

8.01 The Panel was asked "whether the landing requirement is incompatible with Article 407 of the FTA and, if so, whether the requirement is a measure subject to an exception applicable under Article 1201".

8.02 The Panel's response is as follows:

1. As presently constituted, Canada's landing requirement is a restriction on "sale for export" within the meaning of GATT Article

³⁹After receiving the initial report, both Parties submitted information about individual fisheries in which they considered the landing requirement to be clearly justified or clearly unjustified. The Panel believed its conclusions did not foreclose such claims, but the information available to it did not enable the Panel to reach any conclusion on these claims.

XI:1 and hence prima facie is incompatible with Canada's obligations under Article 407 of the Free Trade Agreement.³¹

2. Because it is applicable to 100% of the salmon and herring catch, the present Canadian landing requirement cannot be said to be "primarily aimed at" conservation and thus cannot be considered a measure "relating to the conservation of an exhaustible natural resource" within the meaning of GATT Article XX(g) and hence not a measure subject to an exception applicable under Article 1201 of the Free Trade Agreement.³² The Panel was also of the view that Canada could bring its landing requirement within Article XX(g) by structuring it along the lines described in paragraph 7.40.

³¹One Panel member was not prepared to make a decision on this issue; see the last two sentences of paragraph 6.14.

³²One Panel member disagreed; see paragraph 7.38, footnote 29.

Respectfully Submitted:

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October 16, 1989

ANNEX A

IN THE MATTER OF

CANADA'S LANDING REQUIREMENT FOR PACIFIC COAST SALMON AND HERRING

Ruling of the Chair on the Question of a Replacement Panelist

Background

By conference call on September 21, 1989, the Parties requested that the Chair rule on whether in view of the death of Dr. Waldo Johnson Canada had the right to appoint a replacement panelist. Written submissions were filed with the Canadian Secretary of the Binational Secretariat on the same day. The Chair consulted the members of the Panel to whom copies of the Parties' submissions had been sent. The Parties were advised by conference call late on September 21, of the Chair's ruling. A written statement of that ruling and reasons were to follow.

Arguments

Canada argued that the matter was determined by Article 1807:3 of the Free Trade Agreement and Part II of the Model Rules of Procedure for Chapter 18 Panels. Article 1807:3 provides that the Panel shall be composed of five members and Part II of the Model Rules provides that in the case of the death of a panel member the place is to be filled in the manner in which the original panel member was appointed. Thus, Canada concluded, pursuant to the Model Rules of Procedure Canada had an obligation to appoint a replacement panelist.

The United States argued that while Canada would have the right to appoint a replacement if a Panel member dies before the Panel has completed its deliberations, the rules should not be read to permit the appointment of a replacement Panel member after the Initial Report of the Panel has been filed. Part II of the Model Rules, in the United States view, deals with the manner of appointing a replacement member, not with the question of whether one is to be appointed. The United States further argued that if in the negotiation of the rules the Parties had put their minds to the particular circumstance that had arisen in this case, they would have concluded that the remaining members of the panel were competent to receive the Parties objections and complete the Final Report. The United States also referred to the potential disruption of a process, which at this stage in its view should be limited to the consideration of the objections of the Parties, by the introduction of a new Panel member and to the delay that this would occasion.

Ruling

That Canada has the right to appoint a new panel member to replace Dr. Waldo Johnson.

Reasons

While neither the Free Trade Agreement itself nor the Model Rules of Procedure deal specifically with the case of the death of a panel member after the filing of the Initial Report of the panel, Part II of the Model Rules does provide for the appointment of a replacement member in the event of death. However, the United States argues that this provision refers only to the manner

of appointment and not to whether an appointment should be made at all. In effect, the United States position is that the Agreement is silent on the matter and therefore the ruling should be based on what it is believed that the Parties would have agreed to if they had addressed their minds during the negotiation of the Free Trade Agreement to the particular circumstances that have arisen here and what makes practical sense.

To view the situation as the United States does would, however, leave a number of unanswered questions about the circumstances in which it would be appropriate to appoint a replacement panel member. The United States appears to draw the line at the filing of the Initial Report, arguing that there should be no replacement of a panel member who dies after that date. Yet even that approach might not be appropriate in all circumstances, for example where the deceased panel member was a member of the majority in a three-two Initial Report. Thus, to adopt the United States view might entail a separate decision in each case on whether a new panel member should be appointed.

In any event, in my view the matter is to be resolved by reference to Article 1807:3 of the Agreement which provides that the Panel shall be composed of five members. There is no provision in the Agreement authorizing the Panel to operate with less than five members and since Part II of the Model Rules does provide for the appointment of a replacement in the event of death, the replacement of a panel member who dies was obviously contemplated. Since the Panel is no longer composed of five members, then, unless the Parties agree otherwise, a new member must be appointed. Accordingly, Canada has the right to appoint a new panel member to replace Dr. Waldo Johnson in accordance with the procedure set out in Part II of the Model Rules.

Donald M. McRae
Chair

26 September 1989