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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Technical Barriers to Trade

Original: English/ French

STATEMENT OF THE EUROPEAN COMMUNITIES ON THE COVERAGE AND APPLICABILITY OF THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE AND RECENT UNITED STATES STATEMENTS IN THAT REGARD

The attached statement has been supplied by the European Communities pursuant to the Committee's request at its meeting on 19 June 1980.

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1. As a first remark, the European Communities would like to refer to the first statement made by the United States delegation on the occasion of the last meeting of this Committee on 17 June 1980 in which they referred to consultations they held with the EEC on 3/4 June last "pursuant to Articles 14.1 and 14.2 of the Agreement on Technical Barriers (hereinafter referred to as the Agreement).[1] From the start the EEC would like to make it quite clear that we never accepted consultations with the United States on that basis; we hadinformal discussions with the United States on 3/4 June but it was indicated very clearly to them on that occasion that we did not accept their request to consult on the basis of Articles 14.1 and 14.2. A letter was subsequently sent in reply to their written request in which the EEC position in regard to those consultations is set out. The United Kingdom Government also replied to the United States request for consultations in a letter dated 9 July 1980 in which it rejected the request on the same grounds. Copies of these letters are contained in Annex 1.

Nor was there any discussion of United Kingdom statutory instrument 1979, Number 693 on 3/4 June. The United States declaration states (bottom of page 2) that no solution to the problem emerged from the 3/4 June consultations. Quite so, and indeed it would have been difficult to imagine a solution emerging as there was no discussion of "the problem".

The discussion of 3/4 June focussed almost entirely on the question of applicability of the Agreement to the United Kingdom statutory instrument 1979, Number 693, and to EEC directive 71/118 (as amended by EEC directive 78/50)[2]. they concern process and production standards, they are not covered by the Agreement in the view of the EEC.

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[1] This statement was entitled "United States statement - United Kingdom discriminatory action against United States poultry". The United States delegation made a second statement "on Article 14.25" of the Agreement on the same occasion, which is referred to later in this paper.

[2] EEC Directive 71/118 is contained in the Official Journal of the European Communities No. L 55 of 8 March 1971; amending directive 78/50 is contained in O.J. No. L 15/28 of 19 January 1978.

2. We believe the Agreement is not applicable for two reasons; the text of the Agreement itself clearly shows it was intended to exclude process and production specifications from coverage and the history of the negotiations clearly shows the same intention.

(a) The text of the Agreement

(i) The text of the Agreement unequivocally reflects the result of the negotiations. In this connexion we wish to refer initially to the definitions. The basic definition of "technical specification" states that it is "a specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions". This means that the Agreement only covers specifications which lay down characteristics of a product and not specifications which lay down rules for the manufacture or processing of that product, i.e. it covers a specification which lays down the necessary ingredients of say, a drug, but does not cover specifications setting the rules for manufacture of that drug, such as the hygiene requirements in the factory that makes them.

A process and production specification may result and be intended to result in a product with certain characteristics, and a product may not be capable of being produced in conformity with a specification laying down characteristics of a product unless certain process and production methods are used, but the distinction retained in the Agreement is a clear and well known one and corresponds to a real need to use one method of standardizing rather than another in connexion with differing situations and problems.

The Agreement itself makes the distinction very clearly in Article 14.25 where it distinguishes between requirements drafted in terms of process and production methods rather than in terms of characteristics of products.

(ii) Secondly, Article 14.25 was included, because process and production specifications were not covered. Because they were not, however, it was necessary to include a right to challenge a signatory who circumvented his obligations under the Agreement by drafting his specifications in terms of process and production methods rather than in terms of the characteristics of a product, thus escaping the obligations of the Agreement altogether. Article 14.25 gives other signatories the right in such a case to go before the Committee on Technical Barriers and challenge this circumvention. In the event of a complaint under Article 14.25 a decision of the Committee would however only bear on the fact of circumvention; the Committee could decide whether the signatory had intentionally avoided his obligations by drafting his specifications in terms of process and production methods when it was

customary or more appropriate to do so in terms of characteristics (e.g. in the case of machinery). The Committee could then require the signatory, if it found against him, to redraft his specifications in terms of characteristics; the reformulated specification would then become subject to the obligations of the Agreement (if it also caused a problem).

(iii) The United States statement dated 17 June 1980 on Article 14.25 suggests that process and production methods "were not explicitly covered in the operative provisions of the Agreement since several delegations did not want to subject them to all of the Agreement's procedural requirements". Article 14.25 itself however does not make this distinction between procedural and other requirements. It simply says the dispute settlement procedures can be invoked under certain conditions. Their interpretation might have some validity if in fact the dispute settlement provisions themselves distinguished between procedural and other requirements and one could not invoke those provisions in regard to the procedural obligations. This is not the case; a signatory can in fact invoke the dispute settlement procedures of the agreement in regard to the procedural requirements, e.g. failure by a signatory to notify specifications (when drafted in terms of characteristics of course).

(iv) Any draft of 14.25 which set out to extend the coverage of the Agreement to specifications drafted in terms of process and production methods would have had to be formulated in a way which clearly established that fact. The Agreement, and Article 14.25 in particular, are not drafted this way, however, and the text must, in our view, be given the interpretation we have set out in this paper which is the clear meaning of the Agreement.

(b) History of the negotiations

The question of inclusion of process and production methods was vigorously debated for a long time in the early part of the negotiations and was resolved at a point close to what was expected to be the end of those negotiations (just before July 1978). As the issue had remained unresolved up to then the text did not include (and was not intended to include) any reference to process and production specifications.

The issue was resolved by a Swedish proposal which was accepted and added to the text and is now contained unchanged in Article 14.25 of the Agreement. This proposal reflected an agreement reached in formal and informal discussions that process and production methods would not be covered by the Agreement, except in the sense set out in paragraph 2(a)(ii) above.

This text reflected an agreement clearly reached and understood in the negotiations leading up to July 1978. There was no further discussion of the issue between our delegation and that of the United States till late November, early December of the same year, shortly before the unofficial closing and formalization of the negotiated texts. In that period the United States/EEC delegations had bilateral contacts in which the United States expressed their dismay at the "very limited" nature of the obligation contained in Article 14.25 - i.e. only the fact of circumvention was covered and not process and production specifications themselves - and proceeded to make a series of written proposals to add further obligations to Article 14.25. One of these proposals (dated 1 December 1978) was still in our files and is contained in Annex II.

In their statement of 17 June 1980 on Article 14.25 the United States delegation claimed that it was only intended to exclude process and production methods from the procedural requirements of the Agreement (Articles 2.5 and 7.3). Their proposal of 1 December 1978 clearly indicates that the did not consider that Article 14.25 contained even the most fundamental obligation of the Agreement, i.e. not to create unnecessary obstacles to trade - their proposal attempted to add it to the existing text of Article 14.25.

The United States implicitly recognizes in its paper on Article 14.25 of 17 June 1980 that the text will not bear an interpretation which extends the Agreement's coverage to process and production methods. They state that "the United States formulated proposals during the negotiations that would have specified those provisions of the Agreement to which processes and production methods would be subject".

They did not press these proposals "on the understanding that complaints could be brought under the code whenever trading problems resulted from process and production methods". The EEC has no record of any such understanding and we do not recall the matter ever being raised in informal or formal meetings, in these or any other terms, let alone agreed to, tacitly or otherwise. On the contrary when the European Communities were approached in December 1978, our response was unequivocally negative; if it had been positive the United States proposals of the time would in all likelihood have wound up in the text of Article 14.25. The fact that they did not tells its own story.

More generally we think that on important issues no responsible delegation could have allowed itself to rely on vague "understandings" in the course of the negotiations and particularly not when confronted with clearly expressed contrary views if not outright hostility to the proposals they made.

ANNEX I

Brussels, 25 June 1980

Dear Friend,

I wish to refer to the two letters you addressed to us on 3 June 1980 concerning two measures relating to poultry. The first letter, signed by yourself, concerned the Council Directive of 15 February 1971 as amended. The second letter concerned the United Kingdom Statutory Instrument of 1979 (No. 693, Schedule I, Part II) and was signed by Bruce Wilson.

In both letters you requested consultations in accordance with Article 14.2 of the GATT Agreement on Technical Barriers to Trade on the grounds that benefits accruing to the United States under that Agreement were being impaired.

In the view of the European Communities the Agreement on Technical Barriers does not cover technical specifications drafted in terms of process and production methods. As the Council Directive and Statutory Instrument to which you refer contain a process and production specification the Agreement does not apply. This is abundantly clear both from the text of the Agreement itself and the history of the negotiations.

Accordingly we cannot accept Article 14.2 as a basis for consultations as you requested.

I remain,

Yours sincerely,

Mr. Cruit,
Mission Permanente des Etats-Unis auprès du GATT,
3/5 Avenue de la Paix,
Genève.

9 July 1980

Dear Bruce,

I am writing in reply to your letter of 3 June to Mr. Peter Williams about the action recently taken by my Government concerning the immersion chilling of poultry destined for the United Kingdom market.

My Government is of the view that since the action referred to relates to standards for the processing of such poultry the provisions of the Agreement on Technical Barriers to Trade are inapplicable. My Government considers, therefore, that the benefits accruing to the United States under the Agreement have not been impaired by the action taken.

Yours,

(signed) A.J. Hunt
First Secretary

Mr. S. Bruce Wilson
United States Trade Representative
1-3 Avenue de la Paix
Geneva

ANNEX II

1 December 1978

The dispute settlement procedures set out above can be invoked in cases where an adherent considers that processes and production methods themselves or in their application are circumventing obligations under the code and creating unnecessary obstacles to international trade.