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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Technical Barriers to Trade

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THE AGREEMENT'S APPLICABILITY TO PROCESSES AND PRODUCTION METHODS

Paper by the Delegation of the United States

Introduction

1. The delegation of the United States notes that, as a result of its request at the 22 July 1980 meeting of the Committee, it was agreed that the Committee would discuss the general issue of the applicability of the dispute settlement provisions of the Agreement to processes and production methods (PPM's). In preparation for this discussion, the GATT secretariat was requested to prepare a factual background paper on the negotiating history of this issue. The secretariat paper is contained in TBT/W/15 of 2 September 1980. At the November meeting of the Committee, the United States delegation made some initial remarks on the secretariat paper and on the issue in general. The United States delegation also indicated that it would be circulating to the Committee in writing further comments on this issue. This paper presents those comments as well as a proposal on how the Committee should proceed in dealing in the future with the issue of the applicability of the code to PPM's.

The basic United States position

2. The United States has already stated that it believes that Article 14.25 was purposefully included in the Agreement so that PPM's could be the subject of complaints under the dispute settlement provisions of the Agreement. PPM's are 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. In this regard, the United States delegation has previously stated that the United States formulated proposals during the final negotiations on the Agreement that would have specified those provisions of the Agreement to which PPM's would be subject, but did not press these proposals on the understanding that complaints could be brought under the Agreement whenever trading problems resulted from PPM's. We believe that any interpretation of Article 14.25 that is restrictive and limits a signatory's ability to complain about PPM's would be clearly contrary to understandings reached during the MTN.

3. The United States believes this issue is of utmost importance to the future effectiveness of the Agreement. We are concerned about the Agreement's coverage of both agricultural and industrial products. A wide range of standards-related problems affecting non-agricultural as well as agricultural products would be outside the scope of the code if all PPM's are not covered. These problems could potentially create trade barriers as severe as those created by product standards drafted in terms of the characteristics of a product. For example, we have become aware recently that the manner in which automobile safety glass is manufactured can affect its acceptability by our trading partners. Again, the issue is not whether the product is equivalent to another similar product, but rather whether it was produced in a particular way. Without some means of subjecting the way standards drafted in terms of PPM's are prepared, adopted and applied to certain international principles, we are allowing practices that could significantly affect international trade to go unchecked. Surely that was not the intention of the original drafters of the Agreement when they set about their work in 1971.

Processes and production methods as trade barriers

4. The Agreement aims at establishing principles for standards-related activities, with a view to limiting their trade-impeding potential, without hampering the ability of signatories to protect human health and safety, animal or plant life or health, etc. Thus, while the Agreement does not limit the signatories' ability to promulgate their own regulations for domestic use, it discourages countries from using regulations that restrict trade and implicitly promotes, whenever possible, the acceptance of other signatores' regulations that satisfactorily provide equivalent protection.

5. The manner in which regulations are drafted to ensure the acceptability of products varies greatly. For some products, standards prescribing the characteristics the final product must have are most suitable; for other products, standards prescribing the process which must be followed in producing the final product are preferable. The terms in which the standards are drafted, however, does not affect either their usefulness for ensuring acceptability, nor their potential for creating trade barriers.

6. If trade issues involving PPM's are to be avoided in the future, it is necessary that each signatory provide guidance to their health and safety regulatory officials on the preparation, adoption and application of PPM's. Instructions that such regulations are subject to the obligations of the

Agreement, i.e. that they do not create unnecessary obstacles to international trade, would serve as the basis for such guidance. While exporting countries would be expected to meet health and safety objectives, importing countries should be encouraged to accept health measures used by exporting countries that provided equivalent protection. Importers and exporters would benefit from the assurance that the dispute settlement procedures of the Agreement would be available in the case of any dispute.

7. Both theory and fact indicate that both types of standards are equally in need of the international principles prescribed by the Agreement. There is little doubt that this was the understanding at the time the negotiations on the Agreement were finalized in late 1978.

Negotiating history of Article 14.25

8. The United States delegation would like to thank the GATT secretariat for preparing the fine factual history of the negotiations on Article 14.25, presented in document No. TBT/W/15. We have ourselves undertaken research on the article's background, and have information that expands upon and further clarifies the items introduced in the secretariat's paper.

9. From the point of view of the United States, it is clear that negotiations surrounding Article 14.25 were aimed at finding a way to subject technical specifications drafted in terms of PPM's, rather than the final characteristics of a product, to the objectives of the Agreement. It was for this reason that the definition of the term "standard", used by the subgroup at its first meeting in May 1975 (paragraph 3, TBT/W/15), was revised, according to a suggestion from the Nordic delegation, only four months later to include "processes, conditions of growth and product methods which must be met to ensure health and safety" (paragraph 4, TBT/W/15). The United States had a proposal at that time, with very similar language: "With regard to food products, it (the term 'standard') also includes specifications as to processes and to conditions of growth and production to the extent these must be met in order to protect human health, safety or the environment." Clearly, our intent was to cover PPM's when compliance with health and safety reasons was required. We had emphasized "health and safety" because it was recognized that these concerns were the major reason for preparing, adopting, and applying regulations in the first place. We had centred on required PPM's because they usually have a greater possibility of creating significant obstacles to international trade.

10. The discussions on the definitions for the Agreement were quite time-consuming and complicated. As a way of expediting these discussions, we agreed to a revised definition of "standard", provided that the sub-group agree to revert to the following suggestions to complete the phrase, "for the purpose of this code, 'technical specifications' includes:". Either, under hypothesis A, one of three phrases:

(1) Which must be met to ensure health and safety; or

(2) In so far as they are necessary to achieve the final product desired; or

(3) In so far as they affect the characteristics of the final product;

or under hypothesis B, the phrase: "It may also include processes and production methods."

11. These two hypotheses were indeed included in the compendium of proposals that accompanied the draft code (paragraph 5, TBT/W/15). The United States favoured the second proposed phrase in hypothesis A - "In so far as they are necessary to achieve the final product desired." However, we introduced all of these as United States proposed language in an attempt to promote a satisfactory resolution of this issue. At that time, the delegate from the European Community expressed support for language that would include processes necessary to achieve the final product desired - a stance in agreement with the United States. Thus, in May of 1976 we proposed the language included in the second part of paragraph 5 of the GATT secretariat's paper.

12. It is interesting to note that the language included in the final draft of 14.25, "characteristics of products", first appears at this point. The phrase was suggested as an alternative to "final product desired", and is directly linked to the need to connect the obligations of the Agreement to all measures that affect the final composition of products already covered by the Agreement.

13. The debate over the definitions section of the Agreement continued for almost another year before the sub-group was able to agree to a compromise suggestion from the Nordic delegation. It was in the spirit of compromise and further progress on the Agreement that the United States agreed to these definitions, including the one for "standard" (paragraph 7, TBT/W/15), although it excluded specific reference to PPM's. We believed, at that time, that all delegations were aware of the importance we placed on this issue, and were in

substantial agreement with us. The task at hand, then, was to work out mutually acceptable language. Thus, in the "scope of the code" section of the code, we included the language that stated, "process and production methods should be subject to the provisions of the code when they are directly related to the characteristics of products", (MTN/NTM/W/95, 20 May 1977). Once again, we were making it clear that PPM's that cannot be separated from the final product desired should be subject to the Agreement. The reaction of the EC at this point was to suggest that PPM's be covered, "if they are indispensable to arrive at the final product". Although this was never made as a formal proposal by the EC, it showed their substantial agreement with our goal, adding only the element of the mandatory nature of the PPM.

14. As a result of our efforts, at the next meeting of the sub-group after we made this proposal, it "... was agreed that a way should be found of ensuring that obligations of the code are not circumvented by the drafting of technical specifications in terms of processes and production methods rather than in terms of the characteristics of performance of products" (paragraph 8, TBT/W/15). This was not the proposal of any single delegation, but an agreed statement of the Committee as a whole. It was quite clear to the United States that the sub-group had agreed to resolve the issue of the Agreement's applicability to PPM's by including those PPM's that circumvent the obligations of the Agreement.

15. The "way that needed to be found" mentioned in the agreed language above was devised by the Nordic delegation in its proposal that became the final language of Article 14.25 (paragraph 9, TBT/W/15). The sub-group agreed that the Agreement's dispute settlement mechanism, Articles 13 and 14, could be used in cases where an adherent considered that the obligations of the code are being circumvented - circumvented by PPM's that substitute for specifications of the final characteristics of the product - the final product desired - but are not written in terms of the product's characteristics. Although the United States still was not satisfied with the agreed definition, we did not push the issue because we had a basic understanding with other delegations that our interpretations of the article were the same. In response to our suggestion during the fall of 1978 that related Article 14.25 to specific substantive provisions of the Agreement that could not be circumvented by the drafting of PPM's instead of standards, the EC suggested that additional changes were not necessary.

Not necessary, we believed, because we agreed that all of the Agreement's obligations should not apply equally to PPM's; we agreed that only those PPM's that related to the final characteristics of products should be covered; and, we agreed that we could interpret the final language of Article 14.25 to cover our concerns. It was understood that any party had the right to complain through code Article 14 when a basic code right had been nullified or impaired by another party's drafting PPM's in lieu of technical specifications stated as final characteristics of a product.

Proposal for the Future

16. The United States believes that final resolution of the extent to which the dispute settlement provisions of the Standards Code covers PPM's should be one of the topics to be addressed during the three-year annual review of the Agreement called for in Article 15.9. In the interim period, before the beginning of this review, the GATT secretariat should maintain an inventory of PPM's, notified to it by code signatories, that create technical barriers to trade. Such PPM's may concern both agricultural and industrial products. In addition, we believe that for the more interesting and important cases, the GATT secretariat, with the assistance of the signatories, should develop case studies on how the code's coverage of PPM's could lead to the elimination of trade barriers. In order to monitor the evolution of this work, the United States believes that the issue of PPM's should be kept on the agenda for future meetings of the Committee.