

# GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

W.7/22/Add.2  
20 October 1952

Special Distribution

Original: English

## PANEL ON COMPLAINTS

### TREATMENT OF IMPORTS OF SARDINES (BRISLING)

#### Statement by the German Delegation

As it was stated by the Note L/36 of the German Delegation, dated 1 October 1952, as well as by the statement given by Mr. Hagemann before the CONTRACTING PARTIES on 9 October 1952, the Federal Republic of Germany regrets not to be in a position to apply the most-favoured-nation clause to the imports of sardines on the one hand and to small herrings or sprats on the other hand.

There are many reasons for which we are obliged to hold this point of view, and, Mr. Chairman, I should be very grateful if I might give a short summary of these reasons.

In order to give a better survey I should like to divide these reasons in three categories:

- 1) from the point of natural science,
- 2) from the legal point, both from the national and the international aspect,
- 3) from the economical point.

1. From the scientific point of view there is a clear difference between the products concerned. This difference exists in three respects:

#### a) Zoological respects

The products concerned belong to different species of the clupeoid family. The sardines belong to the species *Clupea pilchardus*, whereas herrings and sprats belong to the species *Clupea harengus* or *Clupea sprattus* respectively. I refer to a passage of the standard work of Ehrenbaum "Manual of Deep Sea Fishery of Northern Europe" Volume 2, 1936, page 24: "The sardine-like oil preserves produced in masses in Norway are no genuine sardines but brislings, sprats or herrings".

#### b) Biological respects

The sardine on the one hand and the herring or sprat on the other hand have different ways of living; their conditions of living differ, f.i. with regard to food as well as with regard to the temperature of the water. The sardines are living exclusively in the Bay of Biscay

and along the Northern coasts of Africa, the herrings and sprats which are used as raw material for preparing the Norwegian products, live in the Scandinavian waters.

c) Physiological respects

Also in this respect there is a clear difference. The flesh of the sardine is fat and tender. It absorbs the oil perfectly. Contrary to this, the flesh of brislings is of lean and dry consistency. In the case of brislings the oil may be considered rather a means of preserving the fish.

2. Now from the legal point of view

At first I should refer to the legal side as far as our own country is concerned. Here, there is a decision of the High Court, called Reichsgericht, of the year 1920. It may be added that this sentence was based on our Unfair Competition legislation. The comments on this sentence are the most conclusive document for judging the present case from the German point of view. Still today, the before-mentioned sentence is binding on the German legislation, and the substantiation set forth even covers the present conditions. We heard by the Norwegian delegate in his statement given before the CONTRACTING PARTIES that the exports of his country to Germany stated in 1880. In this document you will find that the imports of French sardines in oil to Germany had started already in 1820. You will see furthermore in which form, step by step, Norway, in designating her export products, tried to arrive at the definition "sardines". Originally, the Norwegians used to mark their products as "smoked sprats in oil", then as "Norwegian smoked sardines", later on as "Norwegian sardines", and finally as "sardines in oil". This tendency did not succeed in the German market. The sentence of the Reichsgericht decides clearly that in Germany the designation "sardines" is to be applied exclusively to *Clupea pilchardus*, and makes a clear distinction between the different items. May I be permitted to draw your attention, in studying this document, to the fact that in the period concerned, i.e. about 1920, there existed no German inland production either of preserved sardines or of preserved small herrings or sprats. You will see then that there are no motives of competition involved.

Corresponding to the above-mentioned decision of the Reichsgericht, in the German legislation there are to be found other passages which attest that the designation "sardines" is limited exclusively to *Clupea pilchardus*. I refer for instance to the "Ordinance on Food Marking", and especially to Article (2), paragraph 2, according to which the designation "sardines" means exclusively *Clupea pilchardus*.

In this connection it may be of special interest to you to get some details of the meeting of the Comité International de la Conserve within the Food and Agriculture Organization of the United Nations in Bruxelles in October 1949. At this meeting the delegates of France, Portugal, Spain, Morocco, Belgium and the Commonwealth demanded the F.A.O. to find a way in order to restrict the designation "sardine" on an international basis exclusively to the species *Clupea pilchardus*.

At the same meeting it has been pointed out that in accordance with the legislation of different countries it would be illegal or unfair competition, or even deception, if a commodity would be called sardine which had not been produced from the species of *Clupea pilchardus*.

From the point of tariff classification I may draw your attention to the following facts:

The term "like products" has been the subject of discussions both in the Economic Committee of the League of Nations and in the Preparatory Committee of the United Nations for the Havana Charter. No firm definition was arrived at. It was merely expressed that it had to be decided in each particular case, which products were deemed to be like products, that however, the very classification of products under different items excluded in itself the treatment of such goods as like products.

You will find this passage on page 4 of the Abstract from the Report of the Twelfth Meeting of the Preparatory Committee of the International Conference on Trade and Employment, held in London in November 1946. This paper is of high interest from the point of view of our Delegation. You will find there a remarkable example: in the case of wheat, the words "like product" would mean only wheat of other countries and not other cereals.

Another example you will find in the Summary Report of the Third Committee on "Commercial Policy" of the United Nations Conference of Trade and Employment held at Havana in December 1947, under the chairmanship of Mr. Wilgress. In this paper it is stated that automobiles are not "like products", irrespective of the fact, whether they are weighing less or more than 1500 kilos. A concession granted in the category of those weighing less than 1500 kilos would have to be granted to the other countries for automobiles only in the same category. The other category, i.e. the automobiles weighing more than 1500 kilos would not be affected.

And last but not least there should be mentioned the Brussels Customs Tariff nomenclature of 1949 in the preparatory work of which Norway took part as a member of the Study Group for the European Customs Union. In this nomenclature you will find separate sub-items for sardines, for herrings and for sprats under the Tariff No. 16.04.

This nomenclature was the basis of the new German Customs Tariff and there were no protests made against this classification during the negotiations at Torquay.

As I stated before, the Preparatory Committee of the United Nations for the Havana Charter came to the conclusion that the very classification of products under different items - that is the German case of preserved fish - excluded in itself the treatment of such goods as like products.

The different classification just intends to give the individual items a specific economic destiny as well as to deal with them in separate tariff negotiations.

This principle is also confirmed by the report of a Working Party of the General Agreement on Tariffs and Trade on the question of Australian subsidies on Ammonium Sulphate (GATT Document CP.4/39 of 31 March 1950, paragraph 8).

So far the summary from the legal point of view. You may come to the conclusion that the German treatment of preserved fish is in accordance with international practice, and that is the reason why a number of other countries, too, apply a different treatment to the products concerned, just as does Germany. As far as I could find out, this is the case in France, India, Finland and amongst the countries which do not belong to the GATT, Spain and Argentine.

3. And now a very few remarks about the economical situation

As it was already stated in Document L/36, in the Federal Republic traders and consumers distinguish clearly between herrings and sprats preserves and sardines. The products are not considered to be direct competing products or substitutes. A consumer who asks for sardines, really does want to obtain sardines and he does not take brislings or silds as a substitute, and viceversa. The individual products have their own, entirely separated markets.

In judging the subject under discussion, I feel that the interpretation held by the importing countries concerned should be decisive. It may well be possible that in other countries there exist diverging conceptions and accordingly, diverging practices. That is also the reason why there cannot be a uniform opinion among the contracting parties.

The opinion held in Germany finds a clear confirmation by the German import statistics. The share of the Norwegian preserves in relation to the Portuguese sardines was in pre-war years between 5 and 6 percent, in 1936 it did not even exceed 3,7 percent. In view of the rather slowly developing commercial relations, it does not seem suitable to rely on the first post-war years for comparative purposes. The recent development, however, i.e. that of the first months of the year 1953, when the different rates already were in force, demonstrates that the share of the Norwegian products has again attained the traditional rate of 6 percent. It results from these figures, contrary to the Norwegian opinion, that there is no direct competition existing between the products, each of the products concerned having its own market in Germany.

So I may conclude that from the different aspects, natural science, legal and also economical points of view, the German attitude will be justified. Sardines on the one hand and small herrings and sprats on the other hand, are not "like products" in the sense of the GATT. Neither can it be recognized that as a consequence of the concession made to Portugal with regard to sardines, the concessions made to Norway for small herrings and sprats were nullified or impaired in the sense of Article XXIII of the GATT.

The German position finds a further confirmation by the method of acting of the Norwegian Delegation during the Torquay negotiations. In the wishes expressed with regard to the German Customs Tariff, the Norwegians themselves asked for a different treatment of preserved herrings (20%) and of preserved sprats (25%), a treatment which was granted to them in the framework of the contract.

May I, in conclusion repeat the fact stated already by Mr. Hagemann before the CONTRACTING PARTIES, namely that during the Torquay negotiations the Delegation of the Federal Republic of Germany did not express any official assents concerning the "like treatment" of the above-mentioned products.