

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/Spec/12
11 March 1982

Special Distribution

Committee on Subsidies
and Countervailing Measures

STATEMENT BY THE SPOKESMAN FOR THE COMMISSION
OF THE EUROPEAN COMMUNITIES

(Interpretation of Article 9)

I. By a communication dated 24 February 1982 (SCM/Spec/10), the Community requested that a matter of general interpretation, relating to Article 9 of the Subsidies/Countervailing Measures Code, be brought before the Committee, because of problems arising from the United States interpretation of that provision, and the consequences for application of the Code to agriculture.

Indeed, on two occasions the United States has put forward its own interpretation of Article 9 to dispute the lawfulness of Community export refunds on products that it does not consider to be primary products:

- (i) In the case of pasta, the United States requested the Community to enter into consultations under Article 12 of the Code without even citing the existence of any injury (and with good reason, because according to United States sources, Community exports represent about 3 per cent of its domestic market and there are practically no United States exports).
- (ii) This is also the case for flour which it recently disputed as being a "primary product", after having obtained the establishment of a panel to examine its complaint against the Community which was based in particular on Article 10 of the Code, thereby implicitly recognizing that flour is a primary product since that article applies specifically to primary products.

Other agricultural products will probably also be brought into question in the near future, whether vis-à-vis the Community or any other contracting party, since the very restrictive interpretation given by the United States of the primary product concept, based essentially on the degree of processing, could exclude any agricultural product that has undergone any processing at all from the coverage of Article 10 of the Code and Article XVI:3 of the General Agreement. This is all the more to be feared in that the United States has not concealed its strong desire to do away with special treatment of agricultural products so as progressively to place them in the same position as industrial products under the Code. It is now clear that the United States intention is to start on this fundamental modification of the Code forthwith, by means of complaints that do not seek a remedy to any real injury, but solely recognition of tendentious interpretations of the provisions of the Code regarding agricultural products in order to modify the régime - which it considers reprehensible - established in respect of them by the General Agreement itself and by the Code.

In these circumstances, it is clear that the question of interpretation of Article 9 goes far beyond the subject of any particular dispute; and one can reasonably think that such disputes have been raised for the sole purpose of requesting an interpretation that is seemingly innocuous since it concerns one or two individual products, but which in fact, by constituting a precedent, is of capital importance for application of the Code, since from one day to the next it excludes virtually all agricultural products from the coverage of the special régime.

The problem concerns all the contracting parties, both as regards the principle of modification of the Code by means of an interpretation requested on the occasion of disputes, and as regards the actual question of excluding processed agricultural products from the coverage of the special régime established by the General Agreement and confirmed by the Code.

That is why the Community considers it necessary that the signatories, acting collectively, should exercise their authority to make an authentic interpretation as to the meaning of Article 9 of the Code, and in particular the primary product concept, so as to prevent any proliferation of complaints designed to bend that article, and so as to safeguard the proper operation of the Code which is being seriously impaired by these attempts to alter the meaning of its essential provisions.

Accordingly, the Community is asking the Committee to make a clear determination as to the meaning and scope of Article 9, in particular on the one hand the criteria to be used in determining the concept of primary products as referred to in that Article, and on the other hand the conditions for granting subsidies on primary products (in the natural state, processed or incorporated).

II. Article 9 is entitled "Export subsidies on products other than certain primary products" and its paragraph 1 reads as follows: "Signatories shall not grant export subsidies on products other than certain primary products."

It follows clearly that the primary products referred to in this Article can benefit from export subsidies (naturally within the limits fixed by Article 10 of the Code, which specifically concerns them).

First of all, it should be noted that the Code is a code on interpretation of Articles VI, XVI and XXIII of the General Agreement and that consequently, failing any express stipulation to the contrary, its provisions must be interpreted in the same sense as the like provisions embodied in those three articles of the General Agreement.

It is therefore possible to refer to the interpretations given in the context of Article XVI of the General Agreement as they result from case-law, statements or practices established in the past.

Now, the concept of "primary products" and the special régime in respect of them were introduced at the time when Section B of Article XVI was adopted.

As a result:

- (1) as regards the concept of "primary product", this defined by means of a note to Article XVI:B, paragraph 2, reading as follows: "For the purposes of Section B, a 'primary product' is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." Although the definition was fairly vague, it undoubtedly covered a certain number of processed products without the degree of processing being stipulated, the only decisive consideration was the customary character of such processing for marketing in international trade.

On this basis a number of contracting parties, including States that have not become members of the Community such as the United States of America, then established or maintained export subsidies on processed agricultural products. So that a practice has indeed developed of defining certain processed agricultural products as being primary products, and to the extent that practically none of those practical definitions has been disputed by any contracting party, a right-creating customary practice has come into being.

- (2) as regards the specific character of subsidization of primary products, it is appropriate to note that in 1960 the CONTRACTING PARTIES, acting collectively, adopted a "Declaration prohibiting export subsidies on products other than primary products".

A fundamental point to be noted is that when that Declaration was adopted, the United States accepted it "With the understanding that this Declaration shall not prevent the United States, as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not itself a primary product), which has been produced from such primary product, if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary product, if exported in primary form, consumed in the production of the processed product."

It clearly results that for the United States, at that time, the meaning of the prohibition of export subsidies on products other than primary products must be interpreted as allowing export subsidies to be granted on a primary product when the latter is incorporated in another product provided they bear only on the primary-product component incorporated.

Even if there were some protests when the United States applied this interpretation to industrial products which had nothing to do with processed agricultural products (such as textiles), it is a fact that

in regard to processed products some contracting parties which had accepted the Declaration also followed that interpretation in practice by granting export subsidies on certain processed agricultural products without claiming that the subsidized product was a primary product, but by reason of the fact that the subsidy was granted only on the primary-product component incorporated.

There again, decades passed without that practice being questioned, and for agricultural products it came to be a right-creating custom ("creative righting").

In any case, the fact remains that for many years the United States was applying this interpretation of the Declaration prohibiting export subsidies on products other than primary products; and having never formally denounced that Declaration, the United States has no grounds for suddenly denying its benefit to other contracting parties in the very legal area where the unilateral interpretation of the United States has generated legitimate rights and interests.

For several years past, the Community, for its part, has been notifying to the contracting parties the existence of Community export refunds on primary products exported either as such or after incorporation in another product; accordingly, the validity of that interpretation never having been disputed, in particular on the part of the United States, it considers itself to have acquired and accepted rights that cannot be brought into question, in particular by the United States.

III. In these circumstances, the only question to be settled in order to clarify the meaning and scope of Article 9 of the Code is whether the Code has modified the interpretations established for the application of Article XVI of the General Agreement.

It should be pointed out that since the Code is an instrument subordinate to and dependent on the General Agreement, any modification of interpretations previously established by the General Agreement cannot be presumed but must be expressly stipulated.

In this connection, one finds that:

- (1) As regards the concept of "certain primary products" the Code, through Note 29, gives it the same meaning as the expression "primary products" in the interpretative note to Article XVI, though with the exception of minerals and derived products, which it deletes specifically.

Accordingly, except in respect of minerals, the Code does not make any innovation in regard to the Article XVI concept of a primary product, to which it makes express reference; it follows that all interpretations and practices established in respect of primary products, except minerals, are entirely and automatically carried over into the Code and previously acquired rights are maintained.

- (2) As regards the meaning and scope of the Article 9 prohibition, one can see the similarity between the text of Article 9:1 and that of the "Declaration prohibiting export subsidies on products other than primary products" adopted in 1960 by the CONTRACTING PARTIES.

Consequently, it cannot be presumed that Article 9 was intended to modify, with the exception of the specific reference to minerals, the interpretations and practices established previously for application of the 1960 Declaration. It follows that Article 9 must be interpreted like the 1960 Declaration as allowing the grant of export subsidies on primary products even when the primary product is incorporated in another product provided that the subsidy bears only on the primary-product component incorporated.

The United States was at the origin of this interpretation and accordingly has absolutely no grounds for denying its benefit to other contracting parties.

For its part, the Community which for very many years has been granting export refunds on primary products, on the basis of the existing interpretation of the 1960 Declaration, and which has never expressed any desire to cease doing so, affirms that it accepted Article 9 of the Code on the basis of that interpretation deriving from a constant practice. Any other interpretation of the meaning and scope of that Article would be an abuse of the good faith in which the Community subscribed to that commitment, and would have extremely harmful consequences for the proper application and future of the Code.

IV. Furthermore, the Community wishes to draw the attention of the signatories to the other prejudicial consequences of the new United States interpretation.

Indeed, this new interpretation which contradicts previously existing interpretations and practices is based on four criteria, as may be seen particularly from the paper presented to the Panel in the "flour" case.

Those criteria are: ratio between international trade volume for agricultural products in the natural state or processed, existence of special factors relating to sanitary, technical or storage considerations, extent of processing, and added-value in relation to the product in the natural state.

If one takes into account that, on the basis of these criteria of which none, except perhaps the first, is stipulated in the interpretative note to Article XVI, the United States is trying to exclude from the primary-product concept products such as flour or pasta which are marketed in substantial volume in international trade, have undergone technically simple processing and represent a much smaller added-value than many other products (products based on meat, cheeses, etc.), it follows that virtually all agricultural

products which have undergone any processing at all are threatened. Without doubt this would be a very important modification of the commitments entered into by the contracting parties.

Furthermore, the criteria put forward by the United States are in themselves very imprecise; there is no indication either of the minimum quantity of processed product necessary for the primary-product classification, of the degree of processing nor of the maximum added-value. In practice, it would be impossible to determine with any certainty the appropriate classification of many processed agricultural products such as fish meal, cheeses, corned beef, etc.

Such a situation would therefore be a permanent source of uncertainty that would give rise to many disputes and this would be extremely prejudicial to harmonious application of the Code.