

GENERAL AGREEMENT ON  
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Committee on Technical Barriers to Trade

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THE UNITED STATES' COMPLAINT AGAINST THE UNITED KINGDOM  
CONCERNING THE UNITED KINGDOM'S DISCRIMINATORY  
APPLICATION OF EC DIRECTIVE 78/50

Information and Background Material  
Supplied by the Delegation of  
The United States

The attached additional information and background material has been supplied by the delegation of the United States pursuant to the Committee's request at its meeting on 19 June 1980.

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The EC Directives - Differences in health requirements among the Member States hindered trade in poultry meat within the European Community (EC) after a common organization of the market for poultry meat had been established in 1967. With a view toward minimizing those differences by approximating the health provisions of each of the individual Member States, the EC Council issued a basic intra-Community Directive on health problems affecting trade in fresh poultry meat (71/118/EEC) on February 15, 1971.

Article 14 of the Directive prohibited spin-chilling of poultry as of January 1, 1976. The prohibition was based on the view that the spin-chilling process as practiced in the EC was not giving satisfactory hygiene results (EC plants did not have continuous inspection or other means of insuring adequate hygiene).

Article 14 of 71/118 was later amended by EC Directive 75/431 of July 24, 1975. The new Directive postponed the prohibition until 18 months after the EC Commission submitted a report on chilling processes which should be exempted from the prohibition.

The Commission undertook such a study in 1975. The Member States were invited to designate expert scientists to participate. Since the so-called "spin-chiller" process had undergone some recent changes, it along with other immersion techniques was included in the study. Five immersion chillers were tested. One of these was a Gordon-Johnson-Stevens through-flow chiller similar to the type in common use in the United States. Of the four remaining immersion chillers three were counter-current, and one was a "drag" chiller. Air chilling was also evaluated.

The results ("Evaluation of the Hygienic Problems Related to the Chilling of Poultry Carcasses," Commission of the European Communities, Information on Agriculture, Number 22) did not show any significant difference from a hygienic standpoint among the immersion chilling systems when the systems were operated properly. . The report states that the final decision whether some types of immersion chilling systems are or are not acceptable, should not only be related to hygiene but also to considerations of an economic nature, such as uptake of extraneous water, the application of alternative chilling procedures, and their cost of installation and operation. No mention was made anywhere in the report of the "through-flow" system being less desirable than the "counter-flow" system. However, the highest amounts of chill water were used in the "through-flow" immersion system and considerable amounts of ice were added to the chill water of this system. One expert felt that it was not normal practice to use such large quantities of water. In fact, U.S. "through-flow" immersion systems use less than half the six liters/carcass used by the test system.

EC Council Directive 78/50/EEC of December 13, 1977, is based on a report of the Commission to the Council. This report was derived from the study discussed above. Directive 78/50 amends the Post Mortem Health Inspection section (Chapter 5 of Annex 1) of the basic Directive (71/118) to permit the immersion chilling of poultry carcasses, but only if the carcasses are constantly propelled by mechanical means through a counterflow of water. Directive 78/50 further specifies the amount of water to be used in the immersion chiller based upon the weight of the poultry carcass and the temperature of the water at the entry and exit points of the immersion chiller.

Directive 78/50 also replaces Article 14 of the basic Directive with a new Article 14 which prohibits the chilling of fresh poultry unless by the counterflow immersion system from February 15, 1979. The Member States are, however, permitted to grant derogations for poultry carcasses obtained and intended for marketing in their territory until August 15, 1982, provided that such derogations are requested before February 1979. Member States making use of the derogation must permit poultry to enter their territory from another Member State making use of the same derogation.

The basic Directive states in the preamble that the provisions of the Directive should be adopted, after a transitional period during which they will apply only to intra-Community trade, to poultry meat marketed within the Member States themselves. No mention is made of the treatment of imports from third countries in the preamble. However, Article 15 of the basic Directive permits Member States to apply provisions to imports from third countries which are "at least equivalent" to those of the Directive, until the EC develops Community provisions concerning such imports.

It is worth noting that, in addition to the EC's study, another group also reported on the microbiological effectiveness of the spin-chilling technique of poultry chilling. In its Report of the Eleventh Session of the Codex Committee on Food Hygiene (ALINORM 76/13, November 1974), the Codex Alimentarius Commission noted (paragraph 39)

... the Committee deliberated at some length concerning the potential hygienic hazards possibly associated with "spin-chillers". It was pointed out by some delegations that subjecting poultry carcasses to a common water bath could allow cross contamination.

40. Other delegations felt, however, that potential hygienic hazards may not be of the magnitude once feared and that considerable research in this area is currently underway. Preliminary data from such research indicates that "spin chillers even appear to play an important role in reducing Salmonella contamination and further suggested that any regulations specifically forbidding the use of "spin chillers" should be held in abeyance until there is sufficient scientific and technical information available upon which to base such a decision.

By 1976, the Commission, in its Recommended International Code of Hygienic Practice for Poultry Processing (CAC/RCP 14-1976) had concluded (4.2.4.7) that spin-chilling was acceptable. What is noteworthy among the Commission's findings is that it does not anywhere conclude that a counter-flow type of spin-chiller is superior to a through-flow type, or any other type. This was the same conclusion reached by the EC itself in its Report discussed above.

U.S.-EC Communications - On December 12, 1978, the United States delivered a note to the EC Commission requesting a six-month extension from the February 15, 1979 date of prohibition. The EC Commission's Standing Veterinary Committee met January 26, 1979 to consider the U.S. request and found that it was not acceptable. The Commission also noted at this time that a Member State granting a derogation to its own poultry processors needs to make its own determination concerning imports from third countries.

On February 12, 1979, the U.S. Embassy in London received a telex from the U.K.'s Ministry of Agriculture, Fisheries and Food (MAFF). The message stated "Washington is being advised that we are proposing to leave unchanged for a limited time our existing standards under the imported food regulations relating to imports of poultrymeat from the United States. There is thus no immediate threat to U.S. exports to the U.K." The United Kingdom also notified the EC Commission that it would be applying the derogation allowed under Directive 78/50.

On November 21, 1979, MAFF wrote to the Food Safety and Quality Service (FSQS) of the U.S. Department of Agriculture (USDA), stating that "Directive 78/50 on immersion chilling requirements was implemented on July 18, 1979 when the poultry meat (hygiene amendment) regulations came into force. From that date, although derogations will be available until 1982 for certain plants serving the domestic market, all of our trade immersion chilled poultry meat, both import and export, with other Member States has been in compliance with the counterflow and other requirements of the Directive. In these circumstances we require that imports to this country from the United States should meet the same requirements." MAFF also stated "no disruptions of trade should occur as a result of implementation of either Directive" (i.e. red meat and poultry Directives). Further, "those U.S. plants currently not in compliance, but wishing to modify plants in order to retain eligibility will have a reasonable amount of time in which to effect the necessary changes."

In November and December of 1979 a Technical Advisor to MAFF visited U.S. poultry plants in connection with a trip to inspect red meat operations. A follow-up Note Verbale from the British Embassy in Washington was sent to the U.S. State Department on January 18, 1980, stating that Her Majesty's Government wished to receive at an early date a list of U.S. poultry plants that met the requirements of EC Directives 71/118 and 78/50, as well as the EC's Third Country Meat Directive. We protested that red meat plants

were willing to make the necessary changes, but they needed more time. Our request for an extension to September 1 was granted by the United Kingdom for red meat plants. To clarify the poultry situation a USDA team visited the United Kingdom during March 24-27, 1980. After visiting four U.K. poultry plants and observing the chilling techniques employed, the team met with officials of MAFF and was told that a list of eligible U.S. plants for both frozen and cooked product, had to be presented to the U.K. no later than April 7 for publication in the London Gazette, and that after May 1 only poultry from these plants on the list would be allowed entry into the U.K. After the team returned, the U.S. protested this unreasonable deadline and on April 3 the deadline was pushed back two weeks to April 21, but the May 1 deadline for entry of poultry into the U.K. remained in effect. In addition MAFF stated that U.K. internal regulations for cooked poultry meat were not yet in effect (although they are to be shortly) and that cooked product from the U.S. did not have to comply with the requirements of Directive 78/50 at this time.

The U.S. again protested the unreasonable time frame allowed by the United Kingdom and pointed out the discriminatory aspects of the action. These protests were taken up with Peter Walker, U.K. Minister of Agriculture, on April 17, 1980. Walker said that the April 21 date would not be changed. On April 18, 1980, FSQS/USDA submitted a list of plants to the U.K. which includes 16 cut-up and processing plants along with 5 slaughter plants at this time (June 16). In order to export to the U.K., the cut-up plants have to get their poultry meat from one of the three approved slaughter plants.

U.S.- EC Consultations - The U.S. on May 8 requested consultations with the U.K. and the EC under Article 14.1 and 14.2 of the Agreement on Technical Barriers to Trade. Representatives of the U.S., the U.K. and the EC met in Geneva June 3 to discuss the U.K.'s discriminatory application of the Directive 78/50.

Unfortunately, no solution to this problem emerged from the June 3 consultations. The U.S. Government has, therefore, requested in a letter to its chairman dated June 16, 1980, that the Standards Code Committee investigate this matter with a view to obtaining from the U.K. an agreement to apply its statutory instrument in a non-discriminatory manner.

During these consultations and the Committee meeting on June 19, it became clear that the U.S. and the U.K. and

EC differ in their opinions over whether or not this issue is subject to the dispute settlement procedures of the Code.

The Committee has agreed to reconvene on July 22 to decide this matter. In the interim, signatories have agreed to study the issue. The arguments involved are set forth below to assist them in this regard.

U.S. Case under the Standards Code - The purpose of the Standards Code is to eliminate the use of standards as barriers to trade. It strikes a balance between allowing signatories to adopt regulations to ensure that products meet necessary levels of quality, purity and safety and the potential of those regulations to create barriers to trade. An important issue during the negotiations of the Code was whether or not the Code should apply to agriculture. It is well recognized that, in contrast to industrial standards which are drafted in terms of the characteristics of products, many requirements for agricultural products are drafted as processes and production methods (PPM). Limiting Code coverage to requirements dealing with characteristics of products would exclude most agricultural standards.

During the negotiations some delegations, including the U.S., pressed for complete Code coverage for agriculture. To this end, it was suggested that the definition of technical regulations and standards be expanded to include PPM.

This position was not accepted by some other delegations. Instead it was agreed that certain procedural obligations such as notification and publication should not apply to the adoption, preparation and use of PPM but that the basic Code obligations of Article 2.1, that regulations not discriminate or create unnecessary barriers to trade, should apply. In this regard, the United States formulated proposals during the negotiations that would have specified those provisions of the Agreement to which PPM would be subject, but the United States did not press these proposals on the understanding that complaints could be brought under the Code whenever trading problems resulted from PPM.

In other words, while nothing in the Code prohibits drafting regulations in terms of PPM, countries were not to be permitted to use such regulations to the extent that they resulted in negative effects on trade equivalent to those proscribed by the Code.

The amendment agreed upon was Article 14.25 which provides that the dispute settlement procedures may be invoked when a signatory "considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products."

The EC has argued that the language of 14.25 implies that in order to subject requirements drafted in terms of PPM to dispute settlement procedures, a country must show that the requirements (1) were inappropriately drafted in such terms and (2) were drafted with the intent of evading code obligations.

Such an interpretation would effectively render the Article meaningless and must be rejected. It is well recognized that agricultural regulations are frequently appropriately drafted in terms of PPM and that proof of intent is virtually impossible. Therefore, to say that PPM are subject to the dispute settlement procedures only when inappropriately drafted and for the purpose of evading the Code, is to say that such requirements are not subject to dispute settlement. An article to this effect would obviously not have accomplished the desired objective and would clearly be contrary to understandings reached during the negotiations.

The wording of 14.25 was carefully chosen. The phrase "drafting...rather than" was intended to make clear the distinction between "technical regulations" which are drafted in terms of product characteristics and are subject to the full range of code obligations, and regulations drafted in terms of PPM which are only subject to complaints regarding the basic obligations. The use of the verb "circumvent" instead of "violate" was similarly a result of the special status of PPM. By its terms, the obligations of the Code "apply" fully only to regulations drafted in terms of product characteristics. Therefore, only such regulations can literally "violate" the Code's obligations. However, while a regulation drafted in terms of PPM which does not comply with a basic code obligation does not "violate" that obligation, it does "circumvent" it. The choice of the verb "circumvent" was not meant to imply specific intent to avoid code obligations.

Thus, to guarantee Code coverage of all cases where regulations adopted to ensure levels of product quality impede trade, as was the drafters intent, it was necessary to allow access to the dispute settlement procedures whenever product regulations do not comply with Code obligations, that is, not only when regulations "violate" but also when regulations "circumvent" Code obligations.

As argued above the U.S. does not think access to the dispute settlement procedures through 14.25 is limited to cases where signatories allege that the terms of the regulation were inappropriate and chosen for the purpose of evading Code obligations. However, assuming arguendo that these allegations must be made, it is clear that they need be no more than that, allegations. The clear language of 14.25 grants access to the dispute settlement procedures whenever a signatory "considers" that certain circumstances exist regarding requirements concerning PPM. This language purposefully tracks that of 14.2 which provides for consultations whenever a signatory "considers" that certain circumstances exist. Just as it cannot be argued that proof of nullification and impairment is a prerequisite to the right to seek consultations so it cannot be said that proof of circumvention is a prerequisite to the right to invoke the dispute settlement procedures under Article 14.25.

U.S. Complaint Against the U.K. - The Government of the United States considers that benefits accruing to the U.S. under the Agreement to Technical Barriers to Trade are being impaired, and that U.S. trade interests are significantly affected, as a result of the discriminatory application by the U.K. of Statutory Instrument 1979, Number 693, Schedule I, Part II contrary to the provisions of Article 2.1 of the Agreement.

The U.K. is presently preventing importation of poultry that does not comply with EC Directive 71/118, as supplemented by EC Directive 78/50 under Statutory Instrument 1979, Number 693, Schedule I, Part II. The U.K.'s action creates different requirements for imported and domestic



poultry. As of May 1, 1980, immersion chilled U.S. poultry meat must come from slaughtering plants that meet the requirements of the Directive (the most restrictive of which are that U.S. plants must only use a "counter-flow immersion chilling" system, along with specified water volumes which in most cases are double what U.S. plants are currently using). All U.K. poultry plants were given the option of a three-and-a-half year derogation in meeting the requirements of this Directive and the majority are taking advantage of this option.

Article 2.1 of the MTN Agreement on Technical Barriers to Trade (Standards Code) states, inter alia, that "... products imported from the territory of any Party shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations and standards." Thus, the treatment of imported products under the EC Directive must be the same as the treatment given to domestic products. Since the U.K. action specifically differentiates the treatment accorded to U.S. poultry, the U.S. Government believes the action unquestionably nullified and impairs a U.S. right under Article 2.1 of the Standards Code.

The U.S. Government does not believe that the U.K. can credibly argue that imported poultry is being denied access to its market for health and safety reasons, since domestic producers can use other than a "counter-flow immersion chilling" system until August 15, 1982 and U.S. producers cannot. Legitimate health and safety issues could be alleged only if a particular "immersion chilling" system were forbidden to be used by foreign and domestic producers simultaneously.