GENERAL AGREEMENT ON
TARIFFS AND TRADE

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Committee on Technical Barriers to Trade

DRAFT MINUTES OF THE MEETING HELD ON 22 JULY 1980

Chairman: Mr. D. Newkirk

1. The Committee on Technical Barriers to Trade held its fourth meeting on 22 July 1980.

2. The agenda of the meeting was as follows:

A. Requests for observer status

3. The Chairman recalled that some requests for observer status were pending before the Committee and noted that a decision was required at this meeting regarding the request from Mexico.

4. The representative of the United States said that his authorities were still consulting with Mexico on its requests for observer status in various committees. However, pending the result of such consultations his delegation would not object to Mexico being invited to observe this meeting of the Committee, while reserving the right to revert to the matter at a future meeting.

5. The Committee agreed to invite Mexico to observe its present meeting.

B. Statements on implementation and administration of the Agreement

6. The Chairman called attention to the written statements which had been circulated since the last meeting of the Committee and to the status of acceptances circulated in TBT/W/5/Rev.2.

7. The representative of Finland said his delegation considered the information on implementation submitted by delegations very important and valuable and welcomed the new submissions recently made.

8. The representative of the United States expressed concern that some signatories had not yet submitted the information requested and hoped in particular that those delegations that had made oral announcements at the last meeting would soon circulate relevant information as GATT documents.

9. The representative of Spain said that the Agreement was currently being examined at the legislative and executive levels in his country. The text of the Agreement was now before parliament for ratification. A working group had recently been set up to analyze and co-ordinate the activities of all the administrative and other agencies responsible in the field of standards. He hoped to be able to communicate the results of this work to the Committee soon after the summer recess.

10. The representative of Austria said that the Agreement had been in force for three weeks in his country but that the implementation process had started much earlier. There were still some points of detail to be cleared with the Austrian authorities before a written statement could be circulated but he hoped to be able to do so in the next few weeks.

11. The representative of the European Economic Community said that the situation in the Community was somewhat complex due to the fact that both the Community and the member States were signatories to the Agreement, but implementation was moving forward. At Community level, the necessary implementing legislation had been adopted; this was also the case in some member States, while in others the necessary procedures were on the verge of completion. The representative of Italy said that the Italian statement on implementation would be sent shortly to the secretariat for circulation. He then read out the contents of the Italian statement. The representative of Denmark also said that the text of the Danish statement was ready and would soon be circulated. The representative of Belgium said that the Belgian parliament was presently in session and it was hoped that the Agreement would be ratified relatively soon. In any case, there was no obstacle to adoption of the necessary implementation procedures at the technical level and this process was following its normal course.

12. The representative of Hungary recalled that the Agreement had been in force since 24 May for Hungary. Some measures were still needed to ensure the technical co-ordination of different agencies responsible for standards and as soon as these were taken his delegation would be in a position to submit a written statement. This was expected to be done within one month.

13. A number of questions were posed concerning statements already circulated by some signatories, to which the replies are set out below.

14. The representative of Hong Kong said that all technical regulations, standards and certification systems applicable in Hong Kong were in conformity with the requirements of the Agreement. Hong Kong did not have a national system of regulations, standards or certification requirements. There were nevertheless certain indigenous measures which had been taken for the purposes mentioned in the latter part of Article 2.2 of the Agreement and which were embodied in the various chapters of the law of Hong Kong. There were nine relevant ordinances concerning building, dangerous drugs, dangerous goods, radiation, pharmaceuticals and poisons, road traffic, telecommunications, food hygiene, alcohol and hydrocarbons. Responsibility for the operation of regulations and standards lay fully in the hands of the government. There was only one government body responsible for such action and no non-governmental bodies were involved in the elaboration of standards. As a result, the provisions of Articles 3, 4, 6 and 8 were not pertinent to the Hong Kong situation. Internal measures taken within government departments were sufficient to ensure adequate implementation of the Agreement. All the necessary measures for this purpose had already been taken. As to the future, authority to adopt new standards would continue to lie solely in the hands of the government, which would remain in a position to ensure continuous implementation of the Agreement without any need for changes in existing legislation.

15. The representative of Japan said that draft regulations were as a rule published in the official government gazette called Kampo. In certain cases

such publication did not take place, however, and his delegation would soon inform the Committee of how the Japanese authorities intended to deal with such cases. Regarding the comment period, the Japanese Government would follow the recommendation of the Committee as far as possible. The name and address of the agency to get in touch with for purposes of consultations under Article 14 was the First International Organization Division, Economic Affairs Bureau, in the Ministry of Foreign Affairs. There were still some internal problems to be solved before the enquiry point could be designated, but the relevant information would be supplied as soon as possible. Finally, he would enquire whether information accompanying test data needed to be translated into Japanese, and would inform the Committee accordingly.

16. The representative of New Zealand said that he would seek clarification on the expected date of implementation of the Agreement in New Zealand and would inform the Committee.

17. The Chairman noted that the Committee had had a useful exchange of information and clarifications on the statements submitted in writing. He urged those signatories who had not yet done so, to submit similar statements as soon as possible. The item should be retained on the agenda for future meetings in order to give signatories an opportunity to discuss new information submitted and to seek any clarifications on such submissions.

C. Annual review

18. The Chairman recalled arrangements for annual review agreed at the last meeting and circulated in Annex III of TBT/M/3. According to these arrangements the secretariat would prepare a factual document on which the review

would be based and parties would submit to the secretariat information not already available. Parties to the Agreement should consider what information they could supply to the secretariat to assist it in its work and delegations would be asked to go over this information with the secretariat, which would begin consultations with them on Monday 15 September. In order to enable governments to prepare adequately for the review, the factual document would be sent to delegations on 1 October.

19. The Committee agreed to follow the suggested procedures for the preparation of the annual review.

D. Applicability of Article 14.25 to United Kingdom Statutory Instrument 1979, Number 693, Schedule I, Part II interpreting Community Directives 71/118 and 78/50.

20. The Chairman recalled the discussion which had taken place at the last meeting on this item and the consensus reached in the Committee for taking up the matter at this meeting with a view to determining its competence in the case (TBT/M/3, paragraph 43). Relevant information had been supplied by the parties concerned and circulated to all signatories. Attention was drawn to the procedures for the participation of observers adopted by the Committee at its second meeting. The Committee decided that observers from the IMF, UNCTAD, ISO and IEC would not be present while it deliberated on this item of the agenda.

21. The representative of the United States said that it was fully aware that the item presently under discussion in the Committee was the applicability of Article 14.25 to the United Kingdom statutory instrument, but he wished to recall the discussion that had taken place at the previous meeting (TBT/M/3, paragraphs 34 to 43), in order to provide the necessary background to the present examination of the matter by the Committee. The

matter concerned what the United States considered were the discriminatory effects of a statutory instrument affecting some $10 million worth of United States exports, which had been sharply reduced as a result of the measure. The issue was that the majority of the United Kingdom plants were making use of a derogation to delay implementation of the statutory instrument until 1982, whereas the measure was being applied fully to imports as of now. The United States had held consultations with the European Economic Community and the United Kingdom under Articles 14.1 and 14.2 of the Agreement. The consultations with the United Kingdom had aimed at obtaining the non-discriminatory application of the statutory instrument so as to allow United States producers affected by it to resume exports to that country. The consultations held on 3 and 4 June had not resulted in a satisfactory solution. It was the view of the United States that the Committee was fully competent to examine whether Article 14.25 covered the case which his delegation had presented. They felt that any restrictive interpretation of Article 14.25 would be contrary to the interests of all parties to the Agreement. He asked the Committee to take expeditious action on the issue, since the United States were suffering very serious damage to their trade.

22. The representative of the European Economic Community reiterated the position of his delegation that there had not been and could not have been any consultations under Articles 14.1 and 14.2 of the Agreement, as had in fact been clearly stated in the letters annexed to the statement circulated by the European Economic Community (TBT/Spec.5). He said that informal consultations had indeed taken place on the applicability of the Agreement to the case in point, but that these consultations could not have led to any solution as regards poultry exports to the United Kingdom since this

problem had not been raised in the consultations. United States exporters of poultry were in effect doing well in the United Kingdom market, though this was naturally not the case for United States producers who had not taken the necessary steps to conform with the Community directives. Regarding the applicability of the Agreement, he said that the definitions appearing in the text of the Agreement were quite clear: they referred to product characteristics. Article 14.25, on the other hand, made a clear distinction between product characteristics and processes and production methods (PPM). It was also clear that the code did not apply to PPM except if these were used to circumvent obligations under the Agreement: only in this case was it possible to invoke the dispute settlement procedures. Further, the history of the negotiations of the Agreement showed that Article 14.25 constituted a special rule with a limited field of application and that it was the result of a very long debate on substantive issues. The solution reached was to recognize that if there was a problem posed by measures adopted with the intention of circumventing the Agreement, any party could invoke the dispute settlement procedures, but as the text circulated as Annex II to TBT/Spec.5 made clear, the United States delegation had proposed a formulation of Article 14.25 which would have given more explicit recognition to the applicability of the Agreement to PPM. The divergence of views between the European Economic Community and the United States on this matter had not changed since the time of the negotiations. Nevertheless, the solution in the code did not leave any doubt that only the case of circumvention was covered.

23. The representative of New Zealand, noting that the case at issue had far-reaching implications, said that this was an important first test of the usefulness of the Agreement in tackling difficulties in the trade field,

particularly in agricultural trade. On the substance of the matter, the delegation of New Zealand felt that a prima facie case of discrimination existed as a result as one member country of the European Community treating imports differently from domestic products. A prima facie case had also been made that the obligations of the Agreement were possibly being circumvented in the sense of Article 14.25 and that the necessary prerequisites for the invocation of dispute settlement procedures had been established. Thirdly, the matter was one for the Committee to consider in view of the fact that the two parties concerned had not been able to solve it bilaterally. In New Zealand's judgement, Parties to the Agreement had in principle the right to exhaust all possibilities of recourse under the Agreement whatever the specifics of the case, and the competence of the Committee did not derive from considerations of procedure but from the existence of a specific problem such as the one that had led to the present discussion. In all the MTN Agreements, case law would be the main avenue through which the Agreements could evolve and add their contribution to the trade liberalization objectives being pursued in the GATT.

24. The representative of Finland, speaking for the Nordic countries, said he saw two issues in the matter. First, there was a question whether discrimination existed. Second, if there was discrimination, was the case covered by the Agreement or should it be taken up under other GATT procedures available to the parties? The Nordic countries considered that there was discrimination. Therefore the crucial question became the interpretation of Article 14.25. There were two sources that could be consulted for this purpose: first, the text of the Agreement itself; second, the drafting history of the Agreement. Regarding the latter, the

representative of Finland, quoting from document MTN/AG/W/21 of 26 May 1977, noted that it had been suggested at the time that if PPM were to be covered by the Code, appropriate definitions would need to be inserted in the Agreement. Since no such definitions had been included and no amendments to existing definitions had been made, it was clear that the Agreement did not cover PPM. Quoting from document MTN/NTM/W/138 of 20 February 1978, the representative of Finland further indicated that the text of Article 14.25 contained in that document had not been modified since that date. The Nordic delegations which had proposed that text had always understood that PPM were not covered either by the substantive or by the procedural provisions of the Agreement. Article 14.25 had been drafted to prevent circumvention of the provisions of the Agreement only, because it was recognized that there was a danger that new regulations might be drafted in terms of PPM rather than of product characteristics in order to escape the obligations of the Agreement. Therefore the Nordic countries considered that PPM were covered by the Agreement only when they were intentionally or in fact being used in lieu of technical regulations. While in some circumstances it was difficult to determine whether or not there was circumvention, some indications could be given to assist in such determination, for instance (a) when it was usual or common among countries to draft technical regulations for a given purpose which included characteristics of products, and suddenly it appeared that one government started using PPM for the same purpose, it would be clear that this government was attempting to circumvent obligations under the Agreement; (b) if one country traditionally had applied technical regulations drafted in terms of product characteristics and then changed its practice by drafting regulations in terms of PPM to

deal with the same problem, this would also be a clear case of circumvention. Other situations could of course be imagined. Finally, the representative of Finland recalled the statement made by the representative of Sweden at the previous meeting of the Committee to the effect that if there was discrimination by the United Kingdom against United States exports, this might be a case which fell under Article III of the General Agreement and which could be taken up under Article XXIII of the GATT.

25. The representative of Canada shared the views expressed by the representative of the Nordic countries. His delegation did not think that the provisions of the Agreement applied automatically to PPM but this did not mean that the case under examination could be considered a priori as being out of court. It was appropriate for the United States to raise the issue in order to see whether and how the provisions of Article 14.25 had been met. Whether or not this was the case, the United States could not be precluded from seeking recourse in this Committee to have the matter addressed. The delegation of Canada therefore continued to have an open mind on the question and they shared the view expressed by New Zealand that other cases were likely to arise where it would be necessary to take a hard look at the applicability of the Agreement. Regarding future proceedings, the delegation of Canada also remained flexible.

26. The representative of Austria noted that PPM were only mentioned in Article 14.25 of the Agreement and not elsewhere. There were two elements in the case at issue, a procedural one and a substantive one. On the procedural point, his delegation felt that whenever circumvention of the Agreement was considered to exist by one Party, that Party could invoke the dispute

settlement procedures and the Committee had to examine the case. In substance, one needed to consider whether the Party concerned was correct in thinking that there was circumvention. He felt that the Committee lacked evidence of this. Nevertheless, the Austrian delegation's position was still quite open in the expectation of further evidence of circumvention from the Party concerned.

27. The representative of Brazil shared the views expressed by the delegation of New Zealand particularly as regards the fact that the procedural debate could not in itself assist in clarifying the matter. In order to determine whether Article 14.25 was applicable, it was necessary to examine the specifics of the case, i.e. whether or not there had been a will to circumvent the obligations of the Agreement. As to further proceedings of the Committee his delegation was also quite open minded.

28. The representative of Switzerland also saw several aspects to the issue, in particular the specifics of the Community directives and their consequences and the more basic aspect of the interpretation of the Agreement, especially Article 14.25. As regards the particular case under consideration, certain aspects of it made it difficult to deal with it under the Agreement, for instance, the fact that the EC Directive in question had been adopted long ago and the fact that the United States delegation did not contest the EC Regulation itself but only its discriminatory application. In this connexion, the Swiss delegation agreed with other delegations that had suggested that the matter might be taken up under other, general GATT procedures. As far as the interpretation of the Agreement was concerned, the

specific case in point might not be an adequate basis for such an exercise. Moreover, while the intention of the negotiators of the Agreement might help in understanding its provisions, one could not continually refer to these intentions, were it only because all the signatories had not participated equally actively in the negotiations. Most importantly, however, it seemed clear that PPM were not covered directly by the Agreement itself and that they were referred to only indirectly in the Agreement through the provisions of Article 14.25. On the other hand, the dispute settlement procedures could be invoked in respect of PPM whenever a Party considered that it had been another party's intention to circumvent the Agreement. The purpose of this provision was not simply to allow a Party to obtain a hearing for its allegations of another Party's intention to circumvent the Agreement, but to provide an opportunity to examine the trade effects of the alledged circumvention. Finally, Article 14.25 referred only to the drafting of PPM, not to their application. It was the existence of PPM or their drafting which was at issue and nothing else. The Swiss delegation kept an open mind as regards the way to proceed with the case and was prepared to pursue the discussion of the applicability of the Agreement to PPM, though it was not convinced that the two matters needed to be linked.

29. The representative of the United States said that the many statements he had heard were an indication of the willingness of the Committee to resolve problems as they arose in order to ensure a satisfactory implementation of the Agreement, which could only serve the interests of all Parties in the best manner possible. The United States delegation was grateful for the statements of support from other delegations, as it believed that the action taken by the United Kingdom was in direct violation of the Agreement.

They also had noted that the statements of some other delegations did not appear to support the United States position. The United States delegation held the view that the Agreement did not permit signatories to apply standards in a discriminatory manner. The United States was being treated unfairly by the United Kingdom in a manner inconsistent with this country's obligations under the Agreement.

30. The representative of the United States noted that most speakers had alluded in one way or another the three issues in relation to the case: (1) whether the United States had the right to bring the case before the Committee for its review, (2) the merits of the case against the United Kingdom regarding this country's discriminatory action and, (3) whether Article 14.25 was applicable. As to the first point, the representative of the United States said that the discussion had confirmed that there was no doubt the United States had the right to bring the case before the Committee. As to the second point, he noted with satisfaction that a number of delegations seemed to support the United States contention that the United Kingdom's action was inconsistent with this country's obligations under the Agreement. However, several delegations had suggested that the United States could more appropriately seek relief from the United Kingdom's action under the GATT as a violation of Article III. While there was no consensus in the Committee that the United Kingdom's action was a violation of the Agreement, there seemed to be implicit agreement that the United Kingdom's action violated the national treatment provisions of GATT Article III. The representative of the United States stressed that delays in obtaining relief from the United Kingdom's action would put United States exporters at a further commercial disadvantage. Therefore his delegation would take other countries' views on

the matter into account in deciding what action to take next. As to the third point, namely the applicability of Article 14.25 to PPM, the United States delegation was somewhat disturbed that some major trading partners did not agree with their interpretation of Article 14.25. Their reading of that provision was that any party to the Agreement was entitled to redress under the Agreement when a PPM circumvented obligations under the Agreement. They also felt that this was the situation as regards the aforementioned United Kingdom action. He reiterated that the United States had held bilateral consultations with the European Economic Community and the United Kingdom under Articles14.1 and 14.2 and had brought the issue to the Committee's attention under Article 14.4, notwithstanding the European Economic Community's arguments to the contrary. In this connexion the representative of the United States recalled the terms of Article 14.1 and said that the European Economic Community could not in good faith decline consultations under the Agreement simply on the grounds that it disagreed with the United States on the matter of substance. This attitude was not in keeping with the letter and spirit of the Agreement.

31. The discussion in the Committee had shown that some delegations believed that Article 14.25 was narrow in scope and could only be utilized in rather limited circumstances. In the view of the United States, the utility of the Agreement, particularly as it applied to agricultural trade, would suffer greatly from such an interpretation and therefore it would be in the interests of all Parties to decide ultimately that Article 14.25 should be interpreted in the way they had suggested.

32. This being said, and given the fact that there was no consensus in the Committee on the substance of the issue, the United States did not intend to pursue any further the particular issue of United Kingdom poultry imports as a dispute settlement case under the Agreement. Nevertheless, the United States still wanted the issue of the coverage of PPM by the Agreement to be the subject of further discussion in the Committee. The full effectiveness of the Agreement could not be assured until a significant difference of views on this matter was resolved. The representative of the United States therefore requested that the issue of the applicability of the Agreement be put on the agenda of the next meeting as a general discussion item. In addition, he requested that the GATT secretariat should prepare a factual paper on the negotiating history of Article 14.25, drawing on negotiating documents available to it. This paper would be useful in revealing the factual history of various proposals on PPM, in further clarifying what might be learned from looking at the origin of the existing language of 14.25 and in putting the issue of applicability of the Agreement to PPM in a clearer context.

33. The United States Government intended to pursue the resolution of certain of the difficulties that had emerged over the issue of PPM on an informal basis with interested signatories. Unless PPM that did circumvent the Agreement could be subject to its dispute settlement provisions and redress could be obtained, the applicability of the Agreement to trade in agricultural products would be severely limited, which would not be in the interests of any signatory.

34. The representative of the European Economic Community drew different conclusions from the debate in the Committee. He had noted that no delegation had fully shared the position of the United States delegation. On the other hand, certain delegations had felt that an application of the statutory instrument of the United Kingdom could give rise to difficulties but that a solution to these should be sought under other procedures. Regarding Article 14.1 he again said that the Agreement was not applicable to the Community Directive or the United Kingdom statutory instrument and that therefore consultations could not have taken place on the basis of the Agreement with the United States delegation. He saw confirmation of this in the fact that the United States had withdrawn their complaint and indicated that they would seek redress through other means. Regarding Article 14.25, he noted that several delegations had taken a position on the meaning of this Article in respect of PPM. While the intention of the negotiators of the Agreement was clear to members of the European Economic Community, his delegation had no objection to reverting to the matter in the Committee, with a view to determining how proof of circumvention of the Agreement could be given. His delegation also agreed that a factual study by the secretariat based on working documents of the negotiations from the two MTN groups which had dealt with the matter would be useful in assisting the Committee to form a clear opinion on the meaning of Article 14.25.

35. The representative of Argentina said that the text of Article 14.25 was the result of a compromise reached during the Multilateral Trade Negotiations and that this was the source of the present difficulties in the Committee. It may be correct, as one delegation had said, that the Agreement did not apply directly to PPM, but it certainly did apply indirectly. This was in fact what was being discussed in the Committee. Hence the delegation of

Argentina supported the request by the United States to have the matter examined in the Committee and felt that the United States had the right to invoke Article 14.1. In this sense the problem of United States exports of poultry to the United Kingdom was directly relevant to the application of the Agreement, even if in the end the United States sought redress through other means. The Argentine representative supported the request for a secretariat study which he felt was necessary to assist the Committee in dealing with a question of general interest particularly for exporters of agricultural products. Argentina intended that the Agreement should apply to the agricultural sector.

36. The representative of New Zealand reiterated his country's interest in the matter as an agricultural exporter and agreed to revert to the matter at the next meeting of the Committee with the help of a secretariat paper. He said that New Zealand supported the United States' position in most essential respects, especially on the point that some interpretations being given to the provisions of the Agreement would tend to deny coverage of agricultural trade in the GATT.

E. Request for accession by Bulgaria

37. The Chairman drew attention to the request for the opening of negotiations for accession addressed to him by Bulgaria and circulated in TBT/2.

38. The representative of Bulgaria said that his country had actively participated in the elaboration of the agreements and arrangements reached in the MTN. It had recently accepted the arrangements on bovine meat and dairy products. Bulgaria's request for accession to the Agreement on Technical Barriers to Trade was consistent with its interest in participating in the implementation of the results of the Multilateral Trade Negotiations in full conformity with the understandings reached in the Trade Negotiations Committee

at its April 1979 session. In particular, Bulgaria considered that the TNC statement on accession of non-contracting parties provided a reasonable basis for accession of Bulgaria to the Agreement on Technical Barriers to Trade, as it provided for a parity of rights and obligations between contracting parties and non-contracting parties to the GATT. His delegation considered further that the terms of Article 15.3 of the Agreement and the specific terms of accession spelt out in the Annex to document TBT/W/6 and derived from the TNC statement would place Bulgaria on the same basis as contracting parties in the Agreement, which was the aim of the negotiations for accession. Bulgaria therefore expected that the Committee would take these relevant terms duly into account. Bulgaria would not nullify or impair directly or indirectly advantages which accrued to other Parties under the Agreement by taking action which, had it been a contracting party to the GATT, it would have been debarred from taking by virtue of its GATT obligations, provided that Parties to the Agreement would not nullify or impair, directly or indirectly, advantages which accrued to the Government of Bulgaria under the Agreement by taking action which they would be debarred from taking by virtue of their GATT obligations, had the Government of Bulgaria been a contracting party to the GATT.

39. The representative of Hungary stated that the method of accession proposed by Bulgaria was suitable to meet the requirements of Article 15.3.

40. The representative of the European Economic Community took note of the request presented by Bulgaria and recalled the procedures adopted in the Committee on 19 June 1980 which provided, inter alia, that negotiations for the accession of non-contracting parties would be conducted on a case-by-case basis.

41. The Committee noted the statement by the delegation of Bulgaria circulated in document TBT/2 of July 1980. Since this communication had only been received recently, it was not in a position to take action immediately. However, the Committee agreed that it would be useful if informal consultations were held with a view to establishing the basis on which negotiations for the accession of Bulgaria would be conducted, and that it would revert to the matter at its next meeting.

F. Procedures for circulation of documents

42. In reply to a question from the representative of the Ivory Coast, the Chairman recalled the discussion concerning the circulation of notifications that had taken place at the second meeting of the Committee as reported in document TBT/M/2, particularly paragraphs 33-35.

G. Dates and agenda of the next meeting

43. The Committee agreed to hold its fifth meeting on 15, 16 and 17 October 1980. The following items would be included in the agenda:

1. Requests for observer status.
2. Statements on implementation and administration of the Agreement.
3. Applicability of the Agreement to processes and production methods.
4. Negotiations for accession of Bulgaria.
5. Annual review.
6. Other business.

Other items might be included by the Chairman in consultation with delegations. The draft agenda for the next meeting would be circulated in accordance with established practice.