

TREATMENT BY GERMANY OF IMPORTS OF SARDINES

*Report adopted by the CONTRACTING PARTIES
on 31 October 1952
G/26 - 1S/53*

I. *Introduction*

1. The Panel on Complaints examined with the delegations of the German Federal Republic and Norway the factual situation resulting from (a) the imposition, as from 1 October 1951, of an import duty of 14 per cent on preparations of *clupea pilchardus* as compared with a duty of 20 per cent for *clupea harengus* and 25 per cent for *clupea sprattus*, (b) the application as from 16 November 1951 of a charge equivalent to the German turnover tax at a rate of 4 per cent on preparations of *clupea pilchardus* and of 6 per cent on preparations of *clupea sprattus* and *clupea harengus*, and (c) the removal of quantitative restrictions on preparations of *clupea pilchardus* while these restrictions were maintained on the preparations of the other varieties. It then considered whether the aforementioned measures taken by the Government of the Federal Republic of Germany constituted, within the terms of Article XXIII:1 (a), a failure by that Government to carry out its obligations under the Agreement. Having come to the conclusion that the evidence produced by the parties was not such as to warrant a finding that the measures taken by the Government of the Federal Republic of Germany were in conflict with the provisions of Article I:1 or of Article XIII:1 of the General Agreement, the Panel then examined whether those measures had nullified or impaired the tariff concessions granted by Germany to Norway on sub-items 1604 C 1 (d) – sprats (*clupea sprattus*) and 1604 C 1 (e) herring, and agreed on the text of a recommendation which, in its opinion, would best assist the German and Norwegian Governments to arrive at a satisfactory adjustment of the question submitted by Norway to the CONTRACTING PARTIES.

II. *Facts of the Case*

2. Prior to the tariff negotiations conducted at Torquay between Germany and Norway within the framework of the General Agreement, canned products of *clupea sprattus* and *clupea harengus* enjoyed the same customs treatment in Germany as the canned products of *clupea pilchardus*. This equality of treatment had been guaranteed by notes exchanged between the two Governments in 1925 and 1927.

3. The Torquay negotiations were conducted on the basis of the draft of a new German Customs Tariff, following the nomenclature elaborated in 1949 by the European Customs Union Study Group. The canned products of *clupea pilchardus*, *clupea sprattus* and *clupea harengus* were classified under separate sub-items of item 1604 C 1, but the duties proposed were uniformly at 30 per cent *ad valorem*. Requests for tariff reductions were submitted by two delegations regarding sub-item (b) – sardines (*clupea pilchardus*) and by Norway regarding sub-item (d) sprats and (e) herrings. The German delegation was not prepared to negotiate on sub-item (b), as the main supplier was not a contracting party, but agreed to enter into negotiations with Norway as regards the duties on "sprats" and "herrings". As a result of the Torquay negotiations, the duty on sardines remained unbound at 30 per cent and was not included in the German Schedule, whereas the duties on "sprats" were bound at 25 per cent and those on "herrings" at 25 per cent and 20 per cent.

4. The German Schedule and the Notes annexed to it do not contain any written commitment on the part of the German Government regarding the granting or continuance of equality of treatment as between the preparations of the various clupeae. Although no agreed minutes were kept in the course of the bilateral negotiations, the Panel was satisfied, on the basis of the evidence submitted, that the question of equality of treatment had been discussed between the two delegations at Torquay and that these conversations resulted in the basic assumption upon which the Norwegian delegation conducted

its negotiations, i.e., that the Norwegian "Brisling" and "Silde" sardines would continue to be granted full customs equality with preparations of *clupea pilchardus*.

5. At the time when the Torquay concessions entered into force the import duty applicable to sardines (*clupea pilchardus*) had been reduced. The German Government considered that it was bound by the tariff concession granted to Portugal before the war for that product and applied a specific duty of RM. 30 per 100 kgs. as before the war; this duty was replaced soon after by an *ad valorem* duty of 14 per cent. As the duties on preparations of *clupea sprattus* and harengus remained at the level bound at Torquay, this change introduced a differential of 6 per cent in certain cases and of 11 per cent in other cases between the duties applicable to the preparations of various types of clupeae.

6. The German Government levies on imports a charge equivalent to the German turnover tax; the rates of this countervailing tax have been fixed in a law which entered into force after the conclusion of the Torquay negotiations. In the course of these negotiations, several delegations, including the Norwegian delegation, discussed this problem with the German delegation, but did not obtain definite information on the way in which this countervailing tax would operate. According to evidence submitted to the Panel, the rate of the countervailing tax is normally 4 per cent but this rate may be increased to 6 per cent if it is ascertained that the incidence of internal taxes on the like domestic products equals or exceeds that figure. In the computation of such incidence, the German authorities include not only the 4 per cent turnover tax on the finished product but also the so-called *Vorbelastung*, i.e. the incidence of the taxes which have been paid on the raw materials and semi-finished products at various stages of processing. As the German authorities estimated that the domestic preparations of *clupea sprattus* and *clupea harengus* were subject to a tax incidence of more than 6 per cent, the rate for the imported like products has been fixed at 6 per cent. As there is not domestic production of preparations of *clupea pilchardus*, the imports of such products are subject to the standard rate of 4 per cent. The tax differential of 2 per cent, as between the various types of imports, represents an additional adverse factor in the relative competitive position of the Norwegian product.

7. The Panel noted that the operation of the German countervailing tax in the circumstances described in paragraph 6 above, had the effect of subjecting the German preparations of *clupea sprattus* and *clupea harengus* to a turnover tax of 4 per cent (*if the Vorbelastung is not taken into account*), whereas the like imported products are subject to a 6 per cent countervailing charge and that an additional 1 per cent tax may be levied on them when they are sold by the importer to the wholesaler.

8. As a result of measures taken with the framework of the OEEC programme of liberalization, the German Government decided to place the preparations of *clupea pilchardus* on a free list as from 1 April 1952, whereas the products of *clupea sprattus* and *clupea harengus* remained subject to quantitative restrictions. Consequently, the preparations of *clupea pilchardus*, originating in the territories of the OEEC countries, are imported without limitation in Germany, whereas the imports of the preparations of other varieties cannot exceed the quotas that may be granted unilaterally by Germany or agreed in the course of bilateral trade agreements. This difference of treatment constitutes an additional adverse factor in the relative competitive position of the Norwegian products.

9. According to the figures submitted by the parties, the exports of Norwegian preparations of *clupea sprattus* and *clupea harengus* to Germany have undergone a substantial decrease in the first seven months of 1952, as compared with the exports in the corresponding period of 1951. As, however, those export figures include the exports to United States military units in Western Germany, which are not subject to import duty and as the fluctuations in the volume of German imports of canned fish products from all sources in recent years have been particularly erratic, the Panel did not feel that an analysis of the recent trade statistics would lead to definite conclusions as regards the existence of any causal relationship between the measures taken by the German Government and the reduction in the volume of Norwegian

exports of fish products to Germany. Nor did the Panel feel that it was necessary for a finding of nullification or impairment under Article XXIII first to establish statistical evidence of damage.

III. *Consistency of the German Measures with the Provisions of Article I:1 and Article XIII:1*

10. The Panel considered whether, by failing to extend to particular preparations of the clupeoid family, of interest to Norway, the advantages, favours and privileges granted by Germany to other preparations of the same family, which are of interest to Portugal, Germany had acted inconsistently with the provisions of paragraph 1 of Article I and of paragraph 1 of Article XIII of the General Agreement.

11. The Panel noted that the difference of treatment was not based on the origin of the goods but on the assumption that preparations of *clupea pilchardus*, *clupea sprattus* and *clupea harengus* are not "like products" within the terms of Article I and Article XIII.

12. The Panel noted also that the General Agreement made a distinction between "like products" and "directly competitive or substitutable products" and that the most-favoured-nation treatment clause in the General Agreement was limited to "like products". The Panel did not feel that it was called upon to give a definition of "like products" or that it was necessary for the consideration of the Norwegian complaint to decide whether the preparations of *clupea pilchardus*, *clupea sprattus* and *clupea harengus* had to be generally treated as "like products". Although the Norwegian complaint rested to a large extent on the concept of "like products" as set out in the Agreement and the German reply addressed itself also to that concept, the Panel was satisfied that it would be sufficient to consider whether in the conduct of the negotiations at Torquay the two parties agreed expressly or tacitly to treat these preparations as if they were "like products" for the purposes of the General Agreement.

13. The evidence produced before the Panel shows that in the course of the Torquay negotiations the German delegation has consistently treated the preparation of the various types of clupeae as if they were separate products; the wording of item 1604 and its sub-items was not objected to by other delegations and separate negotiations were in effect conducted on the various sub-items. The Norwegian delegation tried without success to obtain that preparations of sprats and herrings should be treated as sardines for marketing purposes and, failing that, was content with assurances that equality of treatment in customs matters would be continued. It would seem, therefore, that the Norwegian Government, in order to secure the extension of advantages or privileges granted to preparations of *clupea pilchardus* to preparations of *clupea sprattus* and *clupea harengus*, relied on assurances which it considered it has obtained in the course of the negotiation rather than on the automatic operation of the most-favoured-nation clause.

14. Since the draft German customs tariff was first submitted at Torquay, there has been no unilateral splitting-up of item 1604; one change has been introduced with the concurrence of the Norwegian delegation at Torquay in order to provide for a privileged treatment for certain preparations of herring.

15. The examination of the evidence submitted to the Panel to the conclusion that no sufficient evidence had been presented to show that the German Government had failed to carry out its obligations under Article I:1 and Article XIII:1. The Panel did not consider that it was necessary to consider whether the practical application of the German countervailing tax was inconsistent with the provisions of Article III:2, or whether the failure to liberalize imports of preparations of *clupea sprattus* and *clupea harengus*, even though consistent the provisions of Article XIII:1 of the General Agreement, was inconsistent with other provisions of Articles XII to XIV.

IV. *Nullification or Impairment of the Concessions Granted
to Norway on Preparations of Clupea
Sprattus and Clupea Harengus*

16. The Panel next considered whether the injury which the Government of Norway claimed it had suffered represented a nullification or an impairment of a benefit accruing to Norway directly or indirectly under the General Agreement and was therefore subject to the provisions of Article XXIII. It agreed that such impairment would exist if the action of the German Government, which resulted in upsetting the competitive relationship between preparations of *clupea pilchardus* and preparations of the other varieties of the clupeoid family could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on preparations of *clupea sprattus* and *clupea harengus*. The Panel concluded that the Government of Norway had reason to assume, during these negotiations that preparations of the type of clupeae in which they were interested would not be less favourably treated than other preparations of the same family and that this situation would not be modified by unilateral action of the German Government. In reaching this conclusion, the Panel was influenced in particular by the following circumstances:

- (a) the products of the various varieties of clupeae are closely related and are considered by many interested parties as directly competitive;
- (b) that both parties agreed that the question of the equality of treatment was discussed in the course of the Torquay negotiations; and
- (c) although no conclusive evidence was produced as to the scope and tenor of the assurances or statements which may have been given or made in the course of these discussions, it is reasonable to assume that the Norwegian delegation in assessing the value of the concessions offered by Germany regarding preparations of clupeae and in offering counter concessions, had taken into account the advantages resulting from the continuation of the system of equality which had prevailed ever since 1925.

17. As the measures taken by the German Government have nullified the validity of the assumptions which governed the attitude of the Norwegian delegation and substantially reduced the value of the concessions obtained by Norway, the Panel found that the Norwegian Government is justified in claiming that it had suffered an impairment of a benefit accruing to it under the General Agreement.

18. In the light of the considerations set out above, the Panel suggests to the CONTRACTING PARTIES that it would be appropriate for the CONTRACTING PARTIES to make a recommendation to Germany and Norway in accordance with the first sentence of paragraph 2 of Article XXIII. This recommendation¹ should aim at restoring, as far as practicable, the competitive relationship which existed at the time when the Norwegian Government negotiated at Torquay and which that Government could reasonably expect to be continued.

¹See page 30 for the text adopted by the CONTRACTING PARTIES.