GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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GERMAN IMPORT RESTRICTIONS

Report by the Working Party appointed by the Intersessional Committee

(Adopted by the Committee on 2 May 1958[1])

Introduction

1. The Working Party was appointed by the Intersessional Committee on 16 April 1958 and was instructed

> "to examine the contention of the Government of the Federal Republic of Germany that by virtue of paragraph 1(a)(ii) of the Torquay Protocol Germany's obligations under the General Agreement do not prevent the application of the restrictions pursuant to the agricultural Marketing Laws, and to report thereon to the Intersessional Committee".

2. The Working Party noted that the contention of the German Government was based on two arguments which, as set out in the statement it submitted at the opening of the present Intersessional Committee meeting (L/807), were as follows:

(a) that the German Marketing Laws imposed on the German executive authorities mandatory requirements for the application of restrictions on imports; and

(b) that in any case this legislation did not need to impose a mandatory requirement in order to be covered by paragraph 1(a)(ii) of the Torquay Protocol.

The Working Party also noted the report on the relevant discussions at the Twelfth Session (cf. paragraphs 12-15 of the Working Party report in the Basic Instruments and Selected Documents, 6th Supplement, pages 60-61).

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[1] See IC/SR.38, page 7.

Application of the Marketing Laws under GATT

3. The Working Party had before it the texts of the Marketing Laws in an English translation supplied by the German Government (MGT/47/57 Annex III). These were:

Law Concerning the Trade in Cereals and Vegetable Fodder (Grain Law), dated 24 November 1950.

Law Concerning the Trade in Sugar (Sugar Law) dated 5 January 1951.

Law Concerning the Trade in Milk, Milk Products and Fats (Milk and Fat Law), dated 28 February 1951.

Law Concerning the Trade in Cattle and Meat (Cattle and Meat Law), dated 25 April 1951.

4. It was noted that the structure of the four laws was generally the same. Each of the laws provided for the establishment of an Import and Stockpiling Agency. An importer must offer for sale to the relevant Agency any of such products which he proposed to import; the Agency was authorized, but not obliged, to take over the products offered to it and products not so taken over by it were not permitted to be imported or utilized in Germany. The combined effect of these provisions was that imports could not enter the domestic market without the consent of the Import and Stockpiling Agency. The Grain Law required the Minister to establish annually within the framework of a "supply plan" the quantities of grain "available from inland sources and the imported amounts that are necessary to feed the population".[1] The Meat and Sugar Laws have similar provisions for the establishment of a "supply plan" and of the quantities available from domestic production and the imports necessary to meet demands. There was, however, no provision for a "supply plan" in the Milk and Fats Law.

5. In the view of the German delegation import restrictions are required by the terms of the Laws, for the following reasons:

(a) The express provision in those Laws for the establishment ("feststellung") of the quantities of the products to be imported each year and the reference to estimates of domestic production and requirements clearly indicated that the intent of the Laws was to ensure that only such imports were effected as were necessary for meeting the deficiency in domestic production. Domestic production clearly must be taken into account

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[1] Article 2 of the Grain Law, for example, reads:

"Within the framework of a supply plan, for each business year (1 July to 30 June), the Federal Minister, in agreement with the Supreme Land Authorities for Food and Agriculture (Supreme Land Authorities) shall establish the amounts of grain available from inland sources and the imported amounts that are necessary to feed the population."

to the fullest extent in the supply plans and formed the starting point for the whole operation. Were the supply plans of no great importance to the operation of the Marketing Laws, it would not have been required that in drawing them up the Federal Ministry for Food, Agriculture and Forestry must act in agreement with the Land Authorities for Food and Agriculture, a requirement clearly aimed at securing the maximum degree of accuracy.

(b) Consequently, the Import and Stockpiling Agencies and the Minister for Food could make any decisions only within the limits set by the supply plan; they could have no margin of discretion beyond allowing imports equivalent to the difference between domestic production and requirements. In other words, the Federal Government was obliged to apply import restrictions for the operation of the Marketing Laws.

(c) In the case of fats, though no such plan or annual estimates were expressly provided for, the intent of the Law was nevertheless the same, the place of an annual plan being taken by Ministerial instructions which were issued at shorter intervals so that account might be taken of fluctuations in market conditions, particularly in raw materials for the manufacture of margarine.

6. In all four cases, the German delegation maintained, to permit or effect imports beyond these limits set in the light of domestic supply and demand would not be in accordance with the intent and provisions of the Laws, and these limitations on the executive authority were such that they could not be modified by executive action. Under the Laws, the following binding obligations exist for the Federal Government:

(a) the Government has to establish an annual supply plan yearly;

(b) domestic production is to be included in the supply plan to its full extent;

(c) imports are to be restricted to the difference between total needs, as fixed in the supply plan, and ascertained national production;

(d) neither the Government nor the Import and Stockpiling Agencies may deviate from that plan;

(e) the financial means for the Import and Stockpiling Agencies provided for yearly in the budget are made available on the basis of the supply plan and place an upper limit to imports that can be effected.

7. The German delegation agreed, however, that this was not true in the case of those products to which the Grain Law might be applied, either temporarily or otherwise, at the discretion of the Federal Minister for Food, Agriculture and Forestry, by virtue of Articles 1, 8(7) and 14 of the Law.

8. In the examination of the German contention it was pointed out, on the other hand, that the Marketing Laws, while requiring all imports to be offered to the State monopoly at fixed prices and subject to certain levies, stipulated no obligation on the part of the Import and Stockpiling Agencies to limit the quantities of products which they could purchase and resell. From the absence of any reference to limitation of the Agencies' purchases it could reasonably be deduced that they were free to purchase and resell without limitation, in accordance with the provisions of the General Agreement, foreign products offered to them at the determined prices. Under three of the Marketing Laws the Government was instructed to establish domestic production and requirements and imports needed, but there was no indication, express or implicit, that the supply plans formed the basis of the purchase operations or placed limitations thereon or required that priority be given to domestic production. That one of the Laws (the Law on Milk and Fats) did not provide for a supply plan showed that supply plans were not an integral or indispensable part of the scheme.

9. Furthermore, it was argued that:

(a) none of the Laws contained any statement bearing out an expressed intention by the legislature that import restrictions must be used;

(b) nor did the titles of the Laws provide any indication concerning import restriction;

(c) above all, it was significant that all the four Marketing Laws, while explicitly prohibiting exports unless specially authorized, contained no corresponding clause on import restrictions; and

(d) there was no other specific provision for, or clear evidence of, expressed intent to restrict imports under the Laws.

10. The German delegation contended that, notwithstanding the absence of any specific provisions for import control in the legislation, import control was in fact mandatory on the executive because it was the only method of carrying into effect the specific provisions flowing from the "supply plan". Other members of the Working Party pointed out that there were alternative measures within the framework of the Marketing Laws available to the Federal Republic, and therefore it could not be argued that the Marketing Laws could not be implemented without the use of quantitative restrictions, which were inconsistent with Part II. It was, however, not for the Working Party to make any judgment of the merits of these various alternatives beyond noting that they would enable the Federal Republic to comply with its obligations under Part II of the General Agreement.

11. It was further suggested that insofar as the delegation of the Federal Republic relied on the implied intentions of the legislature it was appropriate to consider the circumstances in which the legislation was passed in 1951 and any indication of the purposes in the minds of those who introduced it. It was pointed out that the provisions of the laws taken as a whole indicated that the principal concern of the legislature of that time were for shortages, safeguard of interests of the consumer and fair distribution. In the light of these and having regard to the fact that at the time these laws were enacted Germany was suffering from inadequate food supplies and was dependent on imports for a large proportion of her needs, several members of the Working Party considered that it would not be reasonable to conclude that the laws were intended to require or indeed to facilitate the imposition of restrictions on imports. It was significant that in instituting "supply plans" the laws referred to requirements "to meet the demand" or "to feed the population" rather than to the capacity of the domestic market to absorb domestic production. The emphasis placed on need and requirement showed that the aim was to ensure that at least these minimum requirements were met, which might be by imports or by local production or by both. Insofar as restrictions of imports were contemplated it seemed to have been as a result of the acute balance-of-payments difficulties which the Federal Republic was then suffering. At the present time, Germany was suffering neither from shortages of essential foodstuffs nor from balance-of-payments difficulties.

12. Insofar as internal supply and demand were not unrelated to prevailing prices, and as prices were influenced by the Government's price policies, certain members thought that it was within the power of the German Government to avoid the use of import restrictions through adjustment in that field. In other words it was within the power of the executive authorities, in exercising their price fixing functions, to influence supply and demand in such a way as to create internal market conditions under which imports could gradually be permitted without restriction. This being so, the restrictive character of the operation of the Marketing Laws might be said to be the consequence of the price policies of the German Government. They pointed out that the Marketing Laws contained various provisions for the fixing of prices either by government order or by susbsequent legislation. Such criteria as were set forth in some of the Marketing Laws seemed to reflect the intention to stabilize prices or that prices should be fixed in such a way as to enable benefits to be derived from competition; at any rate they imposed no obligation on the Government to pursue policies inimical to the gradual resumption of marketing conditions under which trade could be conducted on a competitive basis. As for the fixing of prices in accordance with legislation other than the Marketing Laws, such as any laws connected with the "Green Plan", they pointed out that paragraph 1(a)(ii) of the Torquay Protocol could not be invoked to justify action inconsistent with the provisions of the General Agreement which was pursuant to legislation enacted after the date of that Protocol.

13. The German delegation, for its part, maintained its position that apart from the fodder products to which the Grain Law might be applied by executive decision, the Laws mandatorily required the use of import restriction on the products; the purposes of the Law were not merely to safeguard the

immediate interests of the consumer and to ensure adequate supplies at times of shortage, but also to promote on a long-term basis domestic production with a view to achieving full and rational utilization of national resources in meeting the needs of the population; the absence of express provision for import restriction was partly due to the fact that at the time the Laws were enacted the importation of goods was generally prohibited by virtue of Military Government Law N° 53 which had been in force since 1949; in the absence of a similar law governing exports the Marketing Laws had to provide for export restrictions which were essential to their operation; as for the German price policies these were administered on independent criteria which were linked with broad economic and social considerations and could not be manipulated for the purpose of adjusting import requirements; and insofar as prices were fixed in accordance with other Federal legislation the subject would seem to lie outside the terms of reference of the Working Party. In the opinion of the German delegation the CONTRACTING PARTIES should not interfere in the national affairs of a country. Other delegations pointed out that the discussions had been directed solely to the effects of the Marketing Laws on Germany's obligations under the General Agreement.

Interpretation of the Torquay Protocol

14. Under paragraph 1(a)(ii) of the Torquay Protocol the governments concerned are required to apply Part II of the General Agreement to the fullest extent not inconsistent with their legislation existing on 21 April 1951, i.e. the date of that Protocol. The Government of the Federal Republic maintained that in undertaking this obligation it had proceeded on the assumption that, according to the wording of that provision, any legislation in force on that date would take precedence over Part II of the General Agreement; it could not accept the view that only "mandatory" legislation was so entitled (see Section I of L/807).

15. It was recalled that when this subject was discussed at the Twelfth Session, a number of delegations supported the view that the provision in the Protocol applied only in respect of legislation which was of a mandatory character, i.e. which imposed on the executive authority requirements which could not be modified by executive action. They had argued that if legislation existing at the date of the Protocol left a government no discretion but to act contrary to a provision of Part II of the Agreement the government would be entitled to suspend the application of that provision to the extent necessary to conform to the legislation in question. They had gone on to argue that, on the other hand, where a legislation gave the government discretion between action which was in conflict with Part II of the Agreement and action which was consistent with it, then action in accordance with the GATT provisions would not be inconsistent with the national legislation, and there would be no ground for deviating from them (BISD, 6th Supplement, pages 60-61).

16. In discussing this, the Working Party noted various relevant passages in reports which had been approved by the CONTRACTING PARTIES. The instances mentioned included the following:

(a) a 1949 report on Article XVIII matters, which states that "a measure is so permitted /i.e. by virtue of the Protocol/ provided that the legislation on which it is based is by its terms or rexpressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action" (see BISD, Volume II, page 62);

(b) the report of a 1949 Working Party set up to examine the Brazilian internal Taxes which records "the view that the Protocol ..... limited the operation of Article III only in the sense that it permitted the retention of an absolute difference in the level of taxes applied to domestic and imported products required by existing legislation and that no subsequent change in legislation should have the effect of increasing the absolute margin of difference" (see BISD, Volume II, page 183);

(c) the 1950 "Report on the Use of Quantitative Restrictions for Protective and Other Commercial Purposes" which in reference to export restrictions, states that "during the period of provisional application of the Agreement contracting parties may be entitled under paragraph 1 of the Protocol of Provisional Application ..... to maintain certain export restrictions required by existing legislation which are not consistent with Part II of the Agreement".

17. It was pointed out that these reports, which sustained the view noted in paragraph 15 above, were adopted prior to the accession of Germany to the Agreement and constituted a part of the permanent records of the CONTRACTING PARTIES. It might be assumed by contracting parties that the Government of the Federal Republic when contemplating or negotiating for accession to the Agreement would have acquainted itself with the commitments which it was going to be required to undertake.

18. It was also recalled that during the Review Session in 1954-55, the CONTRACTING PARTIES approved a report in which this interpretation was confirmed in the following terms:

"The Working Party has recommended the use in the Reservation of the same phraseology as is employed in the Protocol of Provisional Application and other Protocols, viz. 'to the fullest extent not inconsistent with existing legislation'. Some members of the Working Party would have preferred to specify that such legislation in order to be within the Reservation must be 'mandatory'. As other members of the Working Party felt that this would create difficulties for them because of the inappropriateness of such a term in relation to

their domestic legislative process the Working Party did not adopt this suggestion. It was felt that the use of this term was in fact unnecessary since it is plain from the working of the Protocol of Provisional Application that the exception can only be applicable to legislation which is, by its terms or expressed intent of a mandatory character, that is, it imposes on the executive action. The representatives of Cuba and Chile reserved their positions on this interpretation of the Protocol of Provisional Application." (BISD, 3rd Supplement, pages 249-250)

19. Members of the Working Party reaffirmed this interpretation and maintained the position which they had adopted at the Twelfth Session. They further pointed out that at the time of signature or accession to the Agreement most countries had laws of a permissive character providing for a wide range of action which was not consistent with Part II of the Agreement. Should the German view be accepted all these contracting parties would be entitled to claim the right to apply measures contrary to the provisions of GATT.

20. The Swedish delegation expressed the opinion that the Torquay Protocol, as different from the Resolution of 7 march 1955 concerning definitive application, did not contain any legal requirement for examining national legislation. Before the new rules came into force such an examination could not lead to positive results because contracting parties did not as yet exactly know the scope of their own obligations and those of other contracting parties under the Torquay Protocol. For that reason the Swedish delegation recalled the suggestion made on earlier occasions that all contracting parties be invited to present the legislation for which they intend to make reservations in connexion with the definitive application of the revised Agreement. In its view, which was shared by other contracting parties, that suggestion should now be implemented.

General

21. It was the opinion of most members of the Working Party that the contention of the German Government that the terms of the Torquay Protocol did not prevent the application of import restrictions pursuant to the Marketing Laws was unacceptable. Three delegations, however, wished to put on record that they did not express an opinion on this matter. Furthermore, those members which had expressed views considered that, even if the contention were accepted, there was nothing in the Laws which would justify any departure from the non-discriminatory provisions of the General Agreement in the application of the restrictions.[1]

[1] The representative of Denmark expressed the view that insofar as the Marketing Laws required the stabilization of prices, import restrictions might be considered as mandatorily required by the Laws when they were necessary for that purpose or applied to imports from subsidized sources.

22. The German delegation reaffirmed its view that legislation existing on the date of the Protocol took precedence over provisions of Part II of the General Agreement whether or not it had a mandatory character. It also held the view that the question whether any national laws had a mandatory character could be decided only under the constitutional law of the country concerned and that therefore it was doubtful whether the CONTRACTING PARTIES could appropriately examine the matter and make a decision. The French delegate expressed the view that it would not be desirable for the CONTRACTING PARTIES to contest the mandatory character of a national law which the government concerned officially presented to them as having such character. Other members did not consider that it was within the terms of reference of the Working Party to pass final judgment on the mandatory character of the legislation which the Government of the Federal Republic had officially presented to the CONTRACTING PARTIES as having such character. They did consider, however, that it was within the terms of reference, on the basis of a careful examination of the question and discussion with the contracting party concerned, to say whether they were satisfied that the Federal Republic was fulfilling its obligations by applying the provisions of Part II of the General Agreement to the fullest extent not inconsistent with the legislation in question.

23. The German representative emphasized his Government's profound attachment to the General Agreement and its general purposes and objectives. The efforts that had been made by his Government in promoting the achievement of these objectives had so far not been unsuccessful, as might be seen from the continuous expansion and liberalization of German imports in recent years. The German delegation wished it to be noted by the CONTRACTING PARTIES that the legal basis of Germany's participation in the General Aggreement was such that, if the present German contention were not recognized as valid, the question might arise as to whether the accession of the Federal Republic to GATT had ever been legally effective.