

# GENERAL AGREEMENT ON TARIFFS AND TRADE

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## EUROPEAN COMMUNITY - TARIFF TREATMENT ON IMPORTS OF CITRUS PRODUCTS FROM CERTAIN COUNTRIES IN THE MEDITERRANEAN REGION

### Communication from the European Communities

The following communication, dated 12 March 1985, has been received from the Commission of the European Communities with the request that it be circulated as a document.

### Summary of the Declaration of the Spokesman for the European Community

The Panel report (L/5776) causes serious concern. The adoption of this report by the CONTRACTING PARTIES would enshrine as precedents in GATT jurisprudence findings and conclusions which appear to us to be highly controversial, unjustified in relation to GATT provisions, and such as to prejudice the legitimate rights and interests of contracting parties in general and of the Community in particular.

The main points of concern are :

1. The panel concluded that the Council did not mandate it to undertake an examination of the conformity of the agreements as a whole under Article XXIV, and that competence for this is reserved to the CONTRACTING PARTIES : yet a judgement is made in this respect when the report considers that "the formation of customs unions or free-trade areas between the EEC and the relevant Mediterranean countries concerned has not yet been realised", and it concludes on this basis that the balance of rights and obligations in GATT has been affected to the detriment of third countries.

2. The Panel considers that although the Community and the Mediterranean countries entirely fulfilled their obligations to notify as laid down in Article XXIV:7 and that the CONTRACTING PARTIES duly completed the examination required by this Article, the Agreements should have been explicitly approved by the CONTRACTING PARTIES. The Panel believes it can use the absence of such explicit adoption as a basis for the conclusion that there is an upsetting of the balance of GATT rights and obligations. No trace can be found in the General Agreement, nor in GATT jurisprudence, nor in any texts by authors who have studied the General Agreement, to justify the need for such a positive, explicit decision. In fact, the reverse is true : the EEC-Mediterranean Agreements must be considered compatible with the GATT unless the CONTRACTING PARTIES have formally adopted a contrary recommendation. Thus, the Panel is creating something new in this field, and, in our opinion, commits an error of principle.

3. The Panel excludes, without any justification, the applicability of Part IV to the provisions of Article XXIV of the GATT. Should the EEC henceforth insist on reverse preferences from developing countries ?

4. The legal consequences, explicit or implicit, which would result from adoption of this report, would introduce an element of permanent uncertainty as well as conflict :

- a) for EEC/Mediterranean agreements;
- b) for other agreements aimed at the establishment by the Community of free-trade areas or customs unions;
- c) for all free-trade areas or customs unions of which other Contracting Parties are members; and
- d) if the findings and conclusions are examined attentively, equally for specific regional agreements which are subject to a derogation under Article XXV of GATT, without even excluding any tariff preferences exchanged between developing countries or those established for developing countries under the GSP.

ANNEX

SUMMARY OF THE REPORT ON THE GATT PANEL ON CITRUS PRODUCTS  
AND OF THE LEGAL CONSEQUENCES WHICH RESULT

A. TERMS OF REFERENCE OF THE PANEL

FIRST QUESTION : Has the Panel been mandated to pass judgement on the compatibility of agreements as a whole submitted to GATT under Art. XXIV ?

The reply is negative

"The Panel... found that it had not been requested to pass judgement on the conformity of the agreements as a whole with the provisions of Art. XXIV" (§ 4.14).

"The Panel... concluded that it should, in the absence of a specific mandate by the Council to the contrary... abstain from an overall examination of the bilateral agreements." (§ 4.16)

Not only does the Panel not consider itself mandated in this respect, but it considers that it would be inappropriate to act on the basis of a complaint under Article XXIII, the proper framework for the examination of the agreements being that of Article XXIV and not that of Article XXIII.

"The Panel was of the view that it would not be appropriate to determine the conformity of an agreement with the requirements of Article XXIV on the basis of a complaint by a Contracting Party under Article XXIII:1 (a)". (§ 4.15)

"The Panel considered that the practice, so far allowed by the CONTRACTING PARTIES, never to use the procedures of Article XXIII:2 to make recommendations or rulings on the GATT conformity of measures subject to special review procedures was sound". (§ 4.16)

"The Panel had not been requested, nor would it be proper for it to pass judgement on the conformity of the EC agreements as a whole with the provisions of Article XXIV". (5.1, conclusion(c))

SECOND QUESTION : Despite not being mandated to judge the compatibility of the agreements as a whole with Article XXIV can the Panel rule on the consistency (in GATT terms) of a special measure taken in the framework of the agreements themselves ?

The Panel considers that it is able to reply in the affirmative, basing itself in particular on the conclusions reached by the Contracting Parties following the examination of the Treaty of Rome (EEC) and of the Stockholm Convention (EFTA). These conclusions read as follows :

- a) The Contracting Parties also welcome the willingness of the members /of the Community/ /of the EFTA/ to furnish in Article XXII consultations information as to the measures arising out of the application of /the Treaty/ /the Convention/,
- b) the Contracting Parties note that other normal procedures of the General Agreement would also be available to Contracting Parties to call in question any measure taken /by any of the Six in the application of the Treaty/ /by any of the seven countries of the EFTA in the application of the provisions of the Stockholm Convention/, it being open of course to such country to invoke the benefit of Article XXIV insofar as it considered that this Article provided justification for any action which might otherwise be inconsistent with a provision of provisions of the General Agreement.  
(BISD 7 and 9) (\*)

#### B. QUESTIONS OF SUBSTANCE

THIRD QUESTION : Are the preferences in question :

- a) incompatible with the provisions of the GATT ?
- b) actually prejudicial to the trade interests of other competing countries ?

The detailed reply can be summed up as follows :

for a) - NO ; the preferences cannot be considered as incompatible with the GATT, because in the present case, there is

- neither evidence of contravention of the GATT (no prima facie violation case - Article XXIII:1 (a))
- nor evidence of a situation which annuls or impairs advantages under the General Agreement (no prima facie impairment case - Article XXIII:1 (b)).

for b) - YES, in practice, in the Panel's opinion, the preferences have caused substantial prejudice to American exports of lemons and oranges, in the context of an "upsetting of the balance of rights and obligations on which Article I and XXIV of the General Agreement are based".

#### ACCORDINGLY

This idea of an "upsetting of the balance of rights and obligations" is very important in the Panel's conclusions. It will therefore be necessary to examine closely the justifications advanced by the Panel in support of this idea.

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(\*) N.B. : The final part (underlined) of the above quotation has not been included in its entirety in the text of the Panel's report.

C. REASONING OF THE PANEL

I. PART IV IS NOT RELEVANT

The Panel "considered Article XXIV to be a relevant provision to the matter the Panel had been established to examine". (§ 4.3)

The Panel considered that Article XXIV and Part IV constituted distinct sets of rights and obligations and that measures taken under one could not be covered by the other... The Panel therefore did not consider Part IV and the Enabling Clause as being relevant and therefore did not consider it any further. (§ 4.11)

Legal implications : Agreements presented under Article XXIV MAY NOT be adjusted to take account of the special needs of developing countries as foreseen in Part IV of the GATT. If this principle were accepted, the Community would have to require reverse preferences not only from the Mediterranean countries such as Algeria, Egypt, Jordan, Lebanon, Morocco and Tunisia, but equally from all the associated countries of Africa, the Caribbean and the Pacific.

II. THE COMMUNITY AND THE MEDITERRANEAN COUNTRIES HAVE RESPECTED THE OBLIGATIONS ARISING FROM ARTICLE XXIV:7

"The Panel noted that the agreements... had been presented to the GATT..." (§ 4.4)

"The Panel considered that in accordance with Article XXIV:7 (a) the EEC and the Mediterranean countries with whom it had concluded agreements had notified the CONTRACTING PARTIES and made available to them information regarding the proposed union or area that could have enabled the CONTRACTING PARTIES to make reports and recommendations as they deemed appropriate". (§ 4.8)

III. THE CONTRACTING PARTIES DID NOT DRAW UP RECOMMENDATIONS UNDER ARTICLE XXIV:7

It should be noted that Article XXIV:7 provides for two types of recommendation :

one, OPTIONAL (XXIV:7 a) : "the recommendations it judges to be appropriate"

the other BINDING, which the Contracting Parties must address to the parties to the Agreement only if they conclude that the Agreement as such will not lead to the establishment of a free-trade area.

The Panel appears not to attach any importance to the existence of optional recommendations, and notes :

"... that Article XXIV :7(b) provides that CONTRACTING PARTIES shall make recommendations to the parties to the agreement when they find that "such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one". (§ 4.10)

IV. CONSEQUENTLY, THE CONTRACTING PARTIES DID NOT REACH THE CONCLUSION THAT THE AGREEMENTS ARE NOT SUCH AS TO LEAD TO THE ESTABLISHMENT OF A FREE-TRADE AREA. (§ 4.10)

Having established this, the Panel should have decided to conclude its work at this point because, at this stage in its work, it found itself confronted with a situation where, if the CONTRACTING PARTIES had considered that the agreements were not compatible, they would have had to produce a recommendation. The absence of a recommendation would be equivalent in this case to the absence of incompatibility in legal terms. At this point, the Panel is innovating and believes that it can prove that...

V. AS THERE HAS BEEN NO CONSENSUS, THE CONTRACTING PARTIES HAVE NOT REACHED A POSITIVE CONCLUSION EITHER, AND THEREFORE, THE LEGAL QUESTION REMAINS OPEN...

"Neither had the Contracting Parties, in the view of the Panel, found that the agreements would likely result in the formation of a customs union or of a free-trade area or that the period contemplated was a reasonable one. The Panel considered that, in effect, the Contracting Parties had withheld judgement at that time as to the conformity of the agreements with the requirements of Article XXIV. The agreements had not been disapproved, nor had they been approved. The Panel found therefore that the question of the conformity of the agreements with the requirements of Article XXIV and their legal status remained open". (§ 4.10)

"Given the lack of consensus among Contracting Parties, there had been no decision by the Contracting Parties on the conformity with Article XXIV of the agreements under which the EC grants tariff preferences to certain citrus products originating from certain Mediterranean countries, and therefore the legal status of the agreements remained open". (§ 5.1 - conclusion (b))

VI. IN THESE CIRCUMSTANCES, THE PANEL :

- EXCLUDES THE PRESUMPTION OF NULLIFIED OR IMPAIRED ADVANTAGES under Article XXIII:1 (a) (no prima facie case of violation) (§ 4.20)

"There could not be said to be a clear case of infringement by the EEC of the provisions of the General Agreement which would constitute prima facie nullification or impairment in the sense of Article XXIII:1 (a)".  
(§ 5.1 - conclusion (d))

VIII. - EXCLUDES ANY PRESUMPTION OF NULLIFICATION OR IMPAIRMENT OF A BENEFIT under Article XXIII:1 (b) (no prima facie impairment case).

It is of considerable interest to note the reasons put forward by the panel in this respect.

The Panel recalls (§ 4.26) that Article XXIII:1 (b) was applied prima facie in previous cases where the following conditions prevailed :

- a) a tariff concession has been negotiated
- b) a governmental measure, not inconsistent with the General Agreement, introduced subsequently /in the case in point, as a hypothesis, free-trade areas/ which upset the competitive relationship
- c) and the measure could not have been reasonably anticipated at the time of negotiation of the tariff concession at (a) above.

It excludes the applicability of this precedent solely because either condition (a) is absent (§ 4.27 : "Fresh winter sweet oranges... fresh lemons... etc... were not bound") or condition (b) is absent (the agreements could have been anticipated by the USA at the moment of the confirmation of the tariff concessions - ref. § 4.32 and 4.33).

"Given that the tariffs on some of the products covered by the complaint of the United States were not bound, that the preferences were already being granted by the EC to certain Mediterranean countries on certain fresh citrus before the negotiation of concessions by the Community of the Nine in 1973, and that it could be expected that these preferences would be deepened and extended thereafter, prima facie nullification or impairment of benefits accruing under Article II in the sense of Article XXIII:1 (b) could not be concluded on the basis of past precedents". (§ 5.1 - conclusion (f))

Legal implications :

For all agreements involving a free-trade area or a customs union which have not been the subject of a POSITIVE decision by the CONTRACTING PARTIES, if the parties to the agreement have granted tariff concessions prior to the agreement and if third parties could not

reasonably have anticipated, at that time, the establishment of the agreement, the tariff concessions covering products included in the agreement, are presumed (prima facie) to be nullified or impaired.

This implied consequence could not only be applied to the US-Israel Free-Trade Area agreement among others, but by analogy would equally apply to special agreements established on the basis of a derogation under Article XXV (e.g. "Caribbean Basin Initiative") and, perhaps even, to the preferences under the GSP.

VIII. ...BUT DOES NOT ENTIRELY EXCLUDE RECOURSE TO ARTICLE XXIII:1 (b), hereby creating the FIRST example in GATT of a "NON-VIOLATION-NON-PRIMA FACIE IMPAIRMENT CASE" which could be defined as a "SECUNDA FACIE IMPAIRMENT CASE".

To reach this conclusion, the Panel uses the following elements :

- a) THE BALANCE OF RIGHTS AND OBLIGATIONS on which Articles I and XXIV of the General Agreement are founded has been upset (ref. : § 4.37 and § 5.1 - conclusion (g)).

Why ?

1. Because the CONTRACTING PARTIES refrained from making a recommendation and did not prevent the EEC from putting the agreements into effect.

The first element of UPSETTING is an old friend - see points III, IV and V above and the comments given there.

2. Because the establishment of customs unions or free-trade areas has not yet taken place.

What does the Panel mean here ? That the delay in carrying it out has become unreasonable ? That the agreements have not lead to the establishment of customs unions of free-trade areas which conform to Article XXIV ?

In either of these two cases, such a judgement is within the competence of the CONTRACTING PARTIES, because it covers the totality of each agreement, as the Panel rightly remarks.

- b) and as a consequence, for each case where the granting of preferences has caused SUBSTANTIAL DAMAGE to the United States (and in the Panel's opinion, this is the case for oranges and lemons), the USA will have the right to compensation.

Legal implications :

Any agreement which aims at a customs union or a free-trade area, duly notified to the CONTRACTING PARTIES, duly examined by them without recommendation, could be called into question in the framework of the General Agreement, under the pretext of substantial damage - whether or not a binding exists - and this in the context of non-violation of GATT.

By analogy, Article XXIII:1 (b) could be applied - in the absence of a binding - and without the need for the "reasonable expectation" condition - to any special agreement accepted under a derogation to Article XXV and perhaps even to any system of preferences, such as the GSP.