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EUROPEAN ECONOMIC COMMUNITY - PAYMENTS AND SUBSIDIES PAID TO PROCESSORS AND PRODUCERS OF OILSEEDS AND RELATED ANIMAL-FEED PROTEINS

Communication from the European Economic Community

The following communication, dated 22 January 1990, has been received from the European Economic Community, with the request that it be circulated to contracting parties in connection with the Council meeting scheduled for 25 January 1990.

Comments by the European Community on Paragraphs 131-154 of the Report of the Panel

"European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins"

1. The Community accepts the recommendations of the Panel in paragraphs 155, 156 and 157 of the report, in particular to adjust its Regulations, and will not hinder the consensus for the adoption of the conclusions of the report provided the United States is likewise prepared to comply with the recommendations in full.

The Community will engage in the process for complying with these recommendations and will adopt the Community regulations in question in the context of the implementation of the results of the Uruguay Round.

2. The findings set forth in paragraphs 131-154 raise many fundamental problems concerning the interpretation of Articles II, III, XVI and XXIV and the interrelationship among these Articles, which are being reviewed in the context of the Uruguay Round.

Accordingly, at this stage the Community intends to reserve its rights in full concerning the interpretations suggested in the findings of the Panel.

3. The Community wishes to draw the attention of other contracting parties to the following points:

Applicability of Article III to subsidies

The Panel considers (paragraph 137) that Article III:8(b) applies only to payments made exclusively to domestic producers and considers that it can reasonably be assumed that a payment not made directly to producers is not made exclusively to them.

The Community considers that nothing in the text or in the preparatory work of Article III:8 allows such an assumption which is tantamount to reversing the burden of proof normally falling on the complainant.

It recalls that the constant practice followed for many years by many contracting parties is to pay producers subsidies downstream of production and to different persons (see annex on notifications under Article XVI:1).

It stresses that the grant of direct subsidies to producers involves complex administrative procedures for granting and supervising them simply because of the number of producers concerned.

Applicability of Article XXIII:1(b) to subsidies that are consistent with Article XVI

The Panel considers (paragraph 152) that benefits accruing from a concession are nullified or impaired simply as a result of the fact that a subsidy protects producers completely from the movement of prices of imports and prevents the tariff concession from having any impact on the competitive relationship between domestic and imported products.

The Community considers that nothing in the provisions of the General Agreement and in particular in Article XVI or the reports of other Panels adopted by the CONTRACTING PARTIES justifies singling out one category of subsidy as impairing by its very nature an earlier tariff concession.

It stresses that, in the context of the Uruguay Round negotiations, it has subscribed, like other contracting parties, to the objective of making agricultural policies more responsive to world market signals. The Community therefore considers it unjustified and untimely for a Panel to anticipate and prejudge the outcome of these negotiations.

Application of Article XXIV:6

The Panel considers (paragraphs 145 and 146) that the negotiations conducted by the European Community under Article XXIV:6 did not concern the establishment of a new customs tariff but the extension of the Community's existing tariff concessions to its new Member States, and that therefore the Community's partners could assume that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained.

The Community considers that this interpretation is contrary to the text itself of Article XXIV:6 which refers to the procedure set forth in Article XXVIII and hence to renegotiation with a view to the establishment of a new balance of tariff concessions.

Furthermore, the Panel has made a mistake in its substantive assessment of the facts. It ignores the fact, duly reported and substantiated by the tariff offer notified by the Community, that the latter did indeed propose in 1986/1987 to modify the tariff commitments of the previous customs union to enable the new customs tariff of the enlarged Community to be established.

Furthermore, to go back to the situation existing at the time when the tariff concession was originally granted in 1962, it is an established fact that the concession in question replaced the individual concessions of the constituent parties of the Community, at the very time when some of the latter had support arrangements for oilseeds. Therefore the Panel cannot ignore the fact that the competitive conditions which the United States was entitled to expect should take account of these arrangements and the probability that they would be continued. This element must also be taken into account with respect to the conditions for the elimination of obstacles to the achievement of the benefits of the Agreement.

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Finally, the Community stresses that on the three essential points mentioned above, the Panel, instead of making findings in keeping with its terms of reference, considered that it could make do with assumptions. The Community points out that presumption cannot constitute a systematic method for the settlement of disputes, in particular when written texts - such as the 1979 Understanding Regarding Dispute Settlement or common and agreed interpretations by the parties such as the agreement on interpretation and application of Articles VI, XVI and XXIII - require that the effects of the challenged measure should be duly established.

ANNEX 1

Some Communications to GATT Pursuant to Article XVI:1 in which Production Subsidies are not Granted Directly to the Producer

CANADA (L/5603/Add.20)

Oilseed products

"Freight assistance for prairie rapeseed processors." "The programme (1976-1983) compensated rapeseed processors for a portion of the freight costs for rapeseed oil and meal shipments to the West Coast (export only), rapeseed oil shipments to Eastern Canada ...".

FINLAND (L/5603/Add.16)

Dairy products

"A regional production subsidy for milk is paid through [illegible] in nothern Finland."

Meat

"A production subsidy for beef, pork and mutton is paid through slaughterhouses in northern Finland, in the eastern districts and in the outer archipelago."

SWITZERLAND (L/6111/Add.13)

Dairy products

- Butter

"BUTYRA pays a subsidy to the butter centres to enable them to sell table butter without loss."

Colza (rape) seed

"The organizations concerned concluded cultivation contracts with producers. There are also agreements between the Administration and the oil processing plants for purchase of the crop, processing of the seed and disposal of the oil."

"... without the subsidy, this crop would disappear."

Sugar

"... in order to enable the sugar refineries to take over, at prices fixed by the Federal Council, the beet produced under the cultivation contract concluded with the planters, the Confederation grants them a subsidy."

"In virtue of the Confederation guarantee, the sugar refineries are in a position to process domestic sugar beet even when the sugar prices on the world market are extremely low. This helps to secure the country's supply in times of trouble."

Fruit

"Subsidies for the transformation of fruit growing ... are granted to cantons which themselves provide assistance for this purpose."

Wine

"Subsidies for the non-alcoholic use of grapes are granted to traders and to manufacturers of grape juice on condition that they pay the fixed prices to the producer. The subsidies must ultimately be passed on to the consumer."

UNITED STATES (L/5603/Add.9)

Peanuts

"There are import quotas in effect ... there is a dual price support system in effect, under which peanuts for domestic edible use are supported at one level, and peanuts for export or crushing are supported at a lower level, set consistent with the world market price."

"The price of peanuts is supported through non-recourse warehouse-storage loans to approved grower associations acting for farmers."

"The import quota is needed to protect the price support programme."

Dairy products

"The CCC supports milk prices by buying butter, cheese and non-fat dried milk from manufacturers at announced prices which correspond to the support price for manufacturing milk."

"[The Government] is obligated to support the market price of milk at a certain level by CCC purchases of milk products at fixed prices. These purchases raise demand so that, ideally, processors will offer the support price to milk producers."

However, if the milk production is high, "processors have not bid milk prices up to the support price; thus, the average price received by farmers has fallen short of the support price."

"... [the United States strives to avoid setting] support prices at levels which stimulate production beyond domestic market requirements."

"... import quotas are in effect for ... several other dairy products. ... the elimination of the dairy programme would likely result in increased imports."

Sugar

"Sugar prices are supported through purchases and non-recourse loans made to sugar processors who must agree to pay at least the minimum level of support for the applicable region to any producer who delivers to them sugar beet or sugar cane for processing. ... the loan programme is limited to domestically-grown sugar cane and sugar beets."

"Sugar imports currently are subject to quotas." "The price support programme is not intended to stimulate an increase in domestic production but to stabilize it and to support producer income."

AUSTRIA (L/6111/Add.16)

Grains

"In order to secure a smooth absorption of the marketed quantities and to prevent any deviation from the officially-fixed producer price ... contributions are paid to mills, co-operative societies and dealers for storage and marketing of bread grain."

SWEDEN (L/6111/Add.15)

Field beans

"A support is paid to farmers for certified seed and to the feed industry for its use of field beans and peas."

AUSTRALIA (L/5947/Add.9)

"... the Bounty is payable on production ... of certain kinds of soft, edible, stoneless berry fruits. The Bounty is payable to the producers of bountiable fruit at the rate of $A 100 per tonne when delivered to processors for processing."

"The Bounty is intended to help the industry to achieve improved efficiency at a time when competition from imports is inhibiting development of local berry fruit growing." (1982-1987)

ANNEX 2

The Community has difficulty in following the line of the Panel's argument as regards the context in which the relevant tariff concessions were given; and therefore the benefits that the United States is entitled to expect from them.

The Panel gives a short description of the negotiating process in paragraph 131. This acknowledges that, after 1962, "on the occasion of each of its successive enlargements, the Community conducted negotiations based on Article XXIV:6 and established a new schedule ... most recently in 1986/87". However, in the analysis that follows, especially in paragraphs 145 and 146, the Panel appears to treat the 1962 concession as the only one that is relevant to its examination.

Indeed, the Panel states in paragraph 145: "The result of the Article XXIV:6 negotiations following the successive enlargements of the Community was not the creation of a new external tariff but the extension of the existing tariff concessions to the new Member States." While the first part of this sentence may be true as a matter of fact, in the sense that the Community has not generally sought on successive enlargements to alter the pre-existing duty rates, the rest of it flies in the face of the Community's argument that a new tariff schedule in GATT was indeed being created. Existing tariff concessions are extended in the geographic sense to the new Member States, but not in the temporal sense that previous concessions are automatically prolonged: this is a matter of negotiation. There is, after all, a difference between the common external tariff (where the duty rates for the enlarged Community may be totally unchanged) and the Community's GATT schedule (where the nature and context of the Community's obligations may have been altered by the new negotiations). The Panel has apparently set aside the fact that the Community's GATT schedule has on several occasions since 1962 been renumbered, reflecting the fact that it was a new instrument which replaced a previous one which was withdrawn. None of the documents quoted in the footnote to paragraph 145 entitles the Panel to draw its conclusion, which is indeed the opposite of the view held by the Community.

Furthermore, the Panel attempts, in paragraph 146, to shift the burden of proof in this area onto the Community. " ... the offer to continue a tariff commitment ... was an offer not to change the balance of concessions previously attained"; and " ... nothing in the material ... indicated that the Community had made it clear ... that (it) was seeking a new balance of concessions." The Community rejects this line of argument; it was offering, in the course of a negotiation, to maintain the level of previous concessions and to extend them to the new Member States in the conditions of competition obtained at that time. If these had in fact changed since the previous concession had been given (without any complaint having been made!) then the other contracting parties should be expected to know of that. Ignorance in such negotiations is no excuse; and a concession offered at a given moment can only reflect the conditions of competition existing at that moment. (The Community comments further on this point below.)

This raises the following questions:

- Is the 1962 concession considered to be simply renewed on each successive enlargement? and widened to include a new commitment for the new Member States?

- Is there a new negotiation at each successive enlargement? and if so what are the legitimate expectations of the United States (a) as regards the new element of the concession; and (b) as regards the original 1962 element?

- Could there be different expectations as regards these two different elements of the final concession granted in 1986/87?

The Community has advanced the view to the Panel that on each successive enlargement the former concessions of the EEC are totally withdrawn and that after a process of negotiation a new schedule with new concessions in it is created. This would be directly analogous to an Article XXVIII negotiation in which a contracting party withdraws a concession at a given level of duty but is willing to offer a new binding on the same item either at a higher duty level or on a part of the item only. In such a case no one would consider that legitimate expectations for the contracting parties benefiting from the original concession would survive; on the contrary, they would disappear and be substituted by expectations on the new concession.

The Panel clearly did not accept this argument and the Community has difficulty in accepting its reasons for not doing so. But, leaving this matter on one side, what are the implications for the expectations of the United States of the successive negotiations that have taken place?

1. It appears to be common ground that the Community introduced domestic price support arrangements for certain oilseeds in 1966 and that these were extended to soyabeans in 1974 (see paragraphs 132-134).

2. Given that a Regulation adopted in 1974 will have been preceded by a long period of preparatory discussion within the Community, it can be assumed that the United States and other interested contracting parties would have known of this evolution in the support arrangements prior to the conclusion of the Article XXIV:6 negotiations in mid-1974. No contracting party at that time made any reservation to the new schedule of the Community of Nine in respect of the duty-free binding offered on oilseeds.

3. It follows that the United States (and other contracting parties that negotiated with the Community) knew - at the time of those Article XXIV:6 negotiations - that domestic support arrangements existed and their expectations as regards the benefits of the concession, in terms of the conditions of competition that would apply, would have had to be qualified by this knowledge.

4. If this is true for the 1973-74 negotiations, it is also true a fortiori for the subsequent negotiations in 1981 and in 1986-87.

5. It follows that the United States' expectations in respect of the "widened concessions" granted for the United Kingdom, Denmark, Ireland, Greece, Spain and Portugal are different from those that might have existed in 1962. It further follows that the Community, in consdiering "ways and means to eliminate the impairment of its tariff concession for oilseeds" (paragraph 156) will of necessity have to take account of this situation.

Reverting then to the situation of the original tariff concession granted in 1962, (and accepting for the sake of the argument the Panel's view that this was renewed through the years), what were the expectations of the Community's partners? It will be accepted that the concession granted on oilseeds at that time replaced the individual concessions, if any, in the tariffs of the constituent parties (France, Italy, Benelux, Germany) and that a shift in the benefits to be expected took place compared with the situation when concessions were first given by those parties. Yet it is an established fact that (some of) those parties already had domestic support arrangements in force for oilseeds prior to 1962, arrangements which were later subsumed into the Community scheme in 1965.

In the light of these facts, the Community is entitled to consider that the conditions of competition to be expected by the United States in 1962 already reflected, or should have reflected, the fact that domestic support arrangements for oilseeds had existed and would be likely to continue to exist in future. In other words, the conditions of competition at issue are not those which would occur in a totally free market but those which would occur in a market subject already to some limitations and constraints. In considering the Panel's recommendations (paragraph 156 quoted above) that the Community will also bear this point in mind, in deciding what measures are required to eliminate impairment of benefits.