GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

L/6676
16 May 1990

Limited Distribution

Original: English

EEC COMMENTS ON THE PANEL REPORT ON EEC - REGULATION ON IMPORTS OF PARTS AND COMPONENTS

The following communication, dated 8 May 1990, has been received from the Permanent Delegation of the Commission of the European Communities.

A. The Report

The Community, having received the Report on 2 March 1990, wrote to the Panel on 15 March 1990 commenting on the findings and requesting that the Panel reconsider its conclusions. This the Panel declined to do and circulated the report to the Contracting Parties on 22 March 1990 as document L/6657.

The Community has taken note of the Panel's comments at the GATT Council Meeting of 3 April 1990.* However, the Community continues to have grave misgivings concerning the reasoning applied by the Panel in coming to its conclusions and also notes that the Panel did not give any indication of any alternative solution to an internationally recognized problem which would be compatible with the General Agreement. In the Community's view, it is inconceivable that the Agreement does not permit contracting parties to legislate for instances of circumvention of anti-dumping duties such as those covered by the Community's present anti-circumvention legislation.

The Panel's conclusions are the following:

- The duties imposed by the EEC under Article 13:10 of Council Regulations Nos. 2176/84 and 2423/88 on products assembled or produced within the EEC by enterprises related to Japanese manufacturers of products subject to anti-dumping duties are inconsistent with Article III:2, first sentence.

- These duties are not justified by Article XX(d) of the General Agreement.

- The decisions of the EEC to suspend proceedings under Article 13:10 conditional on undertakings by enterprises in the EEC to limit the use of parts or materials originating in Japan in their assembly or production operations are inconsistent with Article III:4 and not justified by Article XX(d) of the General Agreement.

*C/M/240, pages 21-24.

B. The Community's Position

1. Internal Tax

As regards the Panel's first conclusion, it is remarkable that in considering the wording of Articles I, II and III, the Panel does not attempt to interpret the words "in connection with importation", which had been referred to by the Commission. If it is clear that, as the Panel says, policy or purpose does not play a role in the interpretation of such words as "imposed on importation" or "collected ... at the time or point of importation", it should be equally clear that the nature and purpose of a duty must play a role, when interpreting "in connection with importation".

Another reason given by the Panel for its findings is the content of earlier panel reports (i.e. Belgian social security case, EC animal feed protein and Superfund). An analysis of these cases shows no parallel whatsoever with the present case. Moreover, the Superfund panel decided that the GATT rules on tax adjustment, and notably Article III, did not distinguish between taxes with different policy purposes (in the way they distinguished between taxes levied directly and indirectly on products). This is simply not relevant to the question of whether the objectively ascertainable purpose of a levy can play a role in the decision whether or not such a levy is imposed "in connection with importation".

In reaching its findings, the Panel has failed to give any independent meaning to the words "in connection with importation", which, if the Panel's findings be accepted, would have to be considered to be identical with "on importation" and with "at the time or point of importation".

The Community considers that its anti-circumvention duties are duties imposed in connection with importation for the following reasons:-

Their purpose is to eliminate the circumvention of anti-dumping duties which are themselves imposed on importation.

Their nature and level is identical to that of the anti-dumping duties they are intended to enforce.

They are imposed only on the value of imported parts used in assembly of the product concerned i.e. in connection with their importation.

The time and place of imposition (i.e. ex-assembly plant) is merely to avoid the imposition of the anti-circumvention duty on all imports of the parts concerned whether they are destined for assembly within the context of the anti-circumvention provision or not.

There are, additionally, several circumstances in which duties are currently collected by contracting parties in a similar if not identical way to anti-circumvention duties, for example, inward processing or particular destination. These duties are also undoubtedly collected in connection with importation. The consequences of considering such regimes as incompatible with the General Agreement clearly cannot have been considered by the Panel.

2. Non-compliance - Article XX(d)

As regards the Panel's finding that the anti-circumvention duties were not justified by Article XX(d) of the General Agreement, the Community has noted that the Panel's interpretation of this Article covers only measures relating to the enforcement of obligations under laws or regulations consistent with the General Agreement.

Although it is quite normal to opt for a strict interpretation of specific exceptions to treaty obligations and for the maintenance of the effectiveness of the conditions of such Articles as VI, XII, XVIII and XIX, the Panel's interpretation seems to be inconsistent with the general character of the provisions of Article XX, which aims to protect legitimate policy objectives, such as public health, environment and enforcement of GATT consistent measures as long as the enforcement measures do not go beyond the legitimate purpose of the policy to be enforced. There would even seem to be inconsistency with the plain meaning of words of Article XX ("nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting parties of measures etc.")[1] It is also difficult to accept that the terms of a treaty should not permit the realisation of one of its objectives. This is difficult to reconcile with the principle of effectiveness in treaty interpretation.

Moreover, the Panel has overstated the dire implications of a broader interpretation of Article XX(d). It is not beyond a Panel's capacities to determine if certain GATT objectives are indeed objectively pursued by the measures which are allegedly covered by Article XX(d). The conditions in such articles as VI, XII, XVIII and XIX would continue to play a role in the case of a broader interpretation, if only because the narrow interpretation of "necessary" (cf. Section 337 panel) would impose on the party invoking Article XX(d) a heavy burden of showing why the conditions of these articles could not be respected and if their deviations from these conditions were strictly proportional to the gravity of the situation.

---

[1] It is also interesting to note that Article XX(j) contains an exception which goes beyond and modifies the conditions of the exception of Article XI(2)(a). In other words, Article XX(j) enlarges the authority given in Article XI to contracting parties.

Finally, Article XX(d) is one of the general exceptions to the Agreement, but, if the Panel's interpretation is to be followed, it will merely permit contracting parties to act in a manner which is already foreseen in other GATT provisions. Confronted with the Panel's narrow interpretation, it is difficult to see what could be considered exceptional as regards Article XX(d) since it would not enlarge the authority to enforce obligations and would, as a result, be rendered simply redundant.

3. Acceptance of parts undertakings

In contrast to its approach to other aspects, the Panel opts for a broad interpretation of Article III:4. In doing so, it extends the reasoning of the FIRA panel by arguing that not only requirements which an enterprise is legally bound to carry out, but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute "requirements" within the meaning of that provision.

The consequences of this broad interpretation could be that any government incentive which results in discrimination in favour of national products over foreign products on the internal market of a contracting party, even where its purpose is to combat circumvention of anti-dumping duties or avoid a safeguard measure, would be prohibited in the future.

C. Conclusion

The Community, therefore, cannot agree with the reasoning behind any of the Panel's findings which, moreover, do not contain any indication of a GATT compatible solution to a recognized and very real problem.

In these circumstances the Community considers it essential that a solution to this problem be found on an international basis within the framework of the Round of negotiations currently taking place.