GENERAL AGREEMENT ON TARIFFS AND TRADE

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PANEL ON COMPLAINTS

TREATMENT OF IMPORTS OF SARDINES (BRISLING) BY GERMANY

Statement by the Norwegian Delegation

The Norwegian Government in a letter, dated 5 September 1952, to the Executive Secretary for the Interim Commission of the International Trade Organization have asked that the discriminatory practices followed by the Government of the Federal Republic of Germany in respect of Norwegian sardines be placed on the agenda for this session of the CONTRACTING PARTIES.

A summary of this communication is given in document L/16. In this document you will find the ways in which the Government of the German Federal Republic discriminate against the Norwegian sardines.

In the first place the discrimination relates to the customs duties. (14% a.v. for sardines of Clupea pilchardus as against 25 and 20% respectively for the Norwegian products of Clupea sprattus and Clupea harengus.)

In the second place the discrimination relates to the German import tax (the so-called "Umsatzausgleichsteuer" or "turnover countervailing tax" which the German delegation now call it). Here the Norwegian products are charged 6% a.v. against 4% a.v. for the competing imported products from Clupea pilchardus and 4% a.v. for the products made in Germany.

Finally the German authorities discriminate with regard to their import restrictions as sardines from Clupea pilchardus have been placed on the free list as from 1 April this year, while the Norwegian products are still subject to quantitative restrictions.

The Norwegian Government are of the opinion that the discrimination with regard to the customs duties and the import tax (the "Umsatzausgleichsteuer") is inconsistent with Articles I and III of the General Agreement.

Furthermore, my Government are of the opinion that the discriminatory measures relating to the quantitative import restrictions are inconsistent with Article XIII, paragraph 1 of the same Agreement.

The Norwegian Government base this view on the firm conviction that Norwegian sardines from Clupea sprattus and Clupea harengus and sardines made elsewhere from Clupea pilchardus are "like products" in the meaning of the GATT, and that, therefore, the Norwegian products should be accorded the same treatment as a consequence of the most-favoured-nation clauses in the General Agreement.

The history of this case is briefly the following:

Ever since the Norwegian export to Germany of Norwegian sardines from Clupea sprattus and Clupea harengus started in 1880 until the new German customs tariff entered into force on 1 October 1951, the Norwegian sardines and sardines made in other countries from Clupea pilchardus were subject to the same customs duty under the German tariff No. 219, where the original rate was R.M. 75,- per 100 kgs. In 1923 the Germans, however, made a trade agreement with Portugal according to which the rate of the Portuguese products made from Clupea pilchardus was reduced to R.M. 30.- per 100 kgs. The Norwegian authorities immediately took this matter up with the German Government claiming the same treatment for the Norwegian sardines and by an exchange of notes in 1925 and 1927 the rate of duty on the Norwegian products was reduced to the same figure and the full equality re-established.

Due to the war, all pre-war treaties and agreements with Germany were suspended, and in the first years after 1945 no customs duties were levied on the imports to that country.

The draft of the new German customs tariff which was presented to the CONTRACTING PARTIES at the Torquay conference, stipulated the same rate of duty for all canned products of the Clupeid family (tariff item No. 1604 C.1), namely 30% a.v. During the negotiations the Norwegian delegation obtained certain reductions for the Norwegian products "brisling" and "sild", where the rates were stipulated at 25% and 20% respectively. During the negotiations it was constantly stressed from the Norwegian side that the Norwegian products should in no way be treated less favourably than sardines of Clupea pilchardus. An assurance that that would not be done was given by the German delegation.

Nevertheless, the German Government in a trade agreement with Portugal, which was concluded in the middle of 1951, reduced the rate of duty for sardines of Clupea pilchardus to 14% a.v. By doing this, the German Government have nullified the concessions obtained by Norway at the Torquay conference, as this favourable treatment accorded to the Portuguese products have made it impossible to sell the Norwegian products on the German market.

You will have noted from the statement made by the German delegation in document L/56 that the German Government now claim that sardines from Clupea sprattus and Clupea harengus cannot be held to be "like products" in the sense of the General Agreement.

As the CONTRACTING PARTIES will know, the General Agreement itself does not define what is to be understood by a "like product". Nor have the CONTRACTING PARTIES, so far, given any definition[1]. The Analytical Index

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[1] The following quotation from the Analytical Index to the General Agreement (MGT/51/52) might, however, be of interest in this connection. Under Article I, paragraph 6, it says the following about the notion a "like product":

> "The Preparatory Committee did not think it necessary to define this phrase and recommended that such definition be studied by the ITO".

Then comes a long reference to the conference document in question. (EPCT/C.II/PV-12, pp. 5-8 London Report Section A 1 c p.9).

to the General Agreement contains a passage which might be of interest in this connection. It says that the Preparatory Committee suggested that the method of tariff classification could be used for determining whether products were "like products" or not[1]. This merely suggests that the method of tariff classification could be used - it does not say that the classification under different items in itself precludes the treatment of such goods as like products.

It is true that the working party established by the CONTRACTING PARTIES at their session at Annecy to deal with the Australian subsidy on ammonium sulphate based its decision that ammonium sulphate and the Chilean product sodium nitrate could not be regarded as "like products" on the fact that these two products are usually classified under different tariff items. It is evident that the way in which two products are usually classified in the various customs tariffs is of interest when one shall try to reach a decision whether two products are to be regarded as "like products" under the rules of the GATT.

In the case now under discussion it will be found that sardines from Clupea pilchardus, Clupea sprattus and Clupea harengus are - with very few exceptions - classified under the same tariff item and that all the above mentioned products are subject to the same customs duties. Furthermore, it will be found that in practically every country, these products are classified under the same numbers of reference in the statistics for foreign trade. As mentioned before, this was also the case in Germany until the new customs tariff entered into force.

Important as these criterions might be, the Norwegian Government hold the view that they are not the decisive criterions in this connection. The decisive factor is how two directly competitive products are dealt with commercially. How are the customs of trade with regard to these products?

Clearly, a "like product" does not mean that the products in question have to be identical. The mere fact that we talk here of products originating in different countries would make such a provision impossible.

Nor can purely scientific distinctions between the raw material utilized be held to be of decisive importance. The zoological difference between the various species of Clupea used for canning purposes are so negligible that it took the scientists many years before they could agree on a definition of the various species. And he who claims to be able to tell the difference when these fish are canned in oil or tomato sauce according to more or less the same recipe, will indeed have a hard time making himself believed.

The main factor in this connection is, therefore, as stated before, how the finished products are considered by the trade and by the consumers.

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1 (EPCT/C.II/PV/12, pp. 5.8
E/CONF/2/C.3/SR.5. p.4)

To the trade and to the general public in almost all countries - including Germany - any small fish of the Clupoid family canned in oil or tomato sauce is regarded as being a "like product" - regardless of the name or description under which the particular products is being sold, thus regardless whether it be called a "sardine", a "brisling" or a "sild".

All these products are directly competitive and substitutable. They are all sold at practically the same prices and the customers buy sometimes the one kind, sometimes another, according to their particular taste and inclination.

If, however, through discriminatory customs treatment and/or through discriminatory internal taxation one of these products is suddenly to be made more expensive than the other, one will see - as in this case - that the public stop buying the product which has been hit by these discriminatory measures. This factor, more than any other, clearly shows that we are here dealing with truly "like products" and that any discrimination against one of these products is contrary to the letter and the spirit of the General Agreement.

If by unilaterally splitting up a tariff item into a number of subcategories a country should be permitted to admit at the new lower tariff rate only products coming from certain countries, at the exclusion of "the like products" from certain other countries, this, to my mind, would be a clear circumvention of that country's obligation under the most-favoured-nation clauses of the GATT. Such a procedure is contrary of the spirit of the General Agreement and if permitted to develop would soon lead to the establishment of new and cumbersome barriers to international trade. I feel certain that the CONTRACTING PARTIES will not look with favour upon such measures which to my mind constitute steps in the opposite direction to the one in which we here want to go.

Finally, just a word about the German import tax levied on the Norwegian products. It is a fact that the products from Clupea pilchardus when imported into Germany, are charged 4% a.v., and that the German home produced products are also charged 4% a.v. when sold by the producer. The reason given by the German Government for the levy of 6% a.v. on the Norwegian products is apparently that the German producer has been levied a turnover tax in every phase of his production in the transformation of the raw material into a finished product. The foreign producer, however, is in exactly the same position insofar that he also will often have to pay turnover tax in his own country on raw materials and certain other goods which are necessary for his production. To charge imported products a certain additional amount to countervail such turnover taxes as the domestic producer might have been charged in the cause of his production, is to my mind contrary to Article III, paragraph 2, of the General Agreement. According to this article no higher internal tax or charge of any kind may be levied upon an imported product than the one levied upon the finished product when this is sold in Germany. Any addition which discriminates against the imported product is contrary to the General Agreement.

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The Norwegian Government place the greatest importance to a prompt abolishment of the German discrimination against these Norwegian products. My Government have, therefore, for a long time attempted to bring these discriminatory practices to an end through bilateral negotiations. All these attempts, however, have so far proved to be unseccessful.

This is the reason why my Government have deemed it necessary to bring this matter before the CONTRACTING PARTIES in accordance with Article XXIII, paragraph 2 of the GATT, and my delegation trust that the CONTRACTING PARTIES will give their sincere attention to this case and address an appropriate recommendation to the Government of the German Federal Republic.

I would suggest that the CONTRACTING PARTIES establish a working party to deal with this case and that the working party be asked to submit a draft of the communication to be sent by the CONTRACTING PARTIES to the Federal German Government in this matter.