18 June 1982

# PANEL ON VITAMINS

*Report of the Panel adopted on 1 October 1982*
*(L/5331 - 29S/110)*

## I. INTRODUCTION

1. The Panel was established by the Council on 11 June 1981. Its terms of reference were:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the European Communities in documents L/5157 and L/5129 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations and rulings provided for in Article XXIII:2."

2. The Chairman of the Council informed the Council of the composition of the Panel through document C/121:

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| Chairman: | Ambassador E. Nettel (Austria) |
| Members: | Mr. M. Pullinen (Finland) |
| | Dr. J. Yeabsley (New Zealand) |

3. The Panel met on 31 July, 10 November, 17 November, 20 November, 18 December 1981, 11 January, 12 May, 26 May and 17 June 1982.

4. In the course of its work the Panel heard statements by representatives of the European Economic Community and the United States. Background documents and relevant information submitted by both parties, their replies to questions put by the Panel as well as relevant GATT documentation served as a basis for the examination of the matter. This documentation is available in the secretariat for consultation.

## II. FACTUAL ASPECTS

5. In the course of the Multilateral Trade Negotiations, the United States agreed to eliminate the American Selling Price (ASP) System of Valuation[1] upon the entry into force of the Agreement on the implementation of Article VII of GATT (Valuation Code). Prior to the implementation of the new Valuation Code by the United States on 1 July 1980, both Vitamin B12 feedgrade and pharmaceutical qualities were subject to the ASP System of Valuation. They were classified under Tariff Line 407.85 at a nominal rate of duty of 1.7 cents per pound plus 12.5 per cent ad valorem. This rate was bound by the United States in the Kennedy Round Negotiations. The United States reserved the right in its Kennedy Round Schedule, in case the ASP system were eliminated, to convert the rates of duty on "competitive" benzenoid chemicals as follows: "In the event that the United States makes effective measures which provide for elimination of the application of American selling price, as defined in sections 402(e) and 402a(g) of the Tariff Act of 1930 (19 U.S.C. (1964) 1401(e), 1402(g)), as a basis for determining dutiable value for any article on which a concession is provided in this schedule, it shall be free to adjust the rate of duty provided for such article in such concessions either pursuant to the agreement relating principally to chemicals, supplementary to the agreement to which this Schedule is annexed, or shall be free to adjust such rate to the extent of offsetting the difference in the amount of duty which, without such adjustment, would result from making such measure effective" (general note 4 to Schedule XX).

[1]Under the ASP system "competitive" products imported were valued for

6. Vitamin B12 feedgrade quality and Vitamin B12 pharmaceutical quality were subject to different charges resulting from the ASP valuation: during the period 1 January 1976 - 30 June 1980 the feedgrade quality had an ASP of US$3.45 to US$3.50 per gram of active substance, resulting in an effective duty of approximately 21.4 per cent, whereas the pharmaceutical quality entered with an ASP of US$11.2 per gram of active substance, resulting in an effective duty of approximately 43.6 per cent (calculated on the basis of average duties collected and average invoice values in 1976, the base year for ASP conversions).

7. In the process of conversion of the ASP rates both qualities of Vitamin B12 were taken together and the rate of duty was converted from 1.7 cents per pound plus 12.5 per cent ad valorem to 1.7 cents per pound plus 40.4 per cent ad valorem. According to US calculations, this converted rate of duty represented the weighted average of the actual charges collected for both grades. After the conversion of the rate of duty for Vitamin B12 in the Tariff Schedules of the United States (TSUS), the tariff item number for all Vitamins B12 was 412.56.

8. In connection with the negotiations with the United States on the abolition of the ASP system of valuation, the Community agreed in a bilateral Understanding with the United States (see Annex), dated 2 March 1979, that, the United States could incorporate the extra duty charged on "competitive" chemicals as a result of the ASP valuation into the base rate for the MTN tariff reductions (see paragraph 3 of the Understanding). In addition to this, the Community reserved the right to raise any problem it might have in respect of the converted rate for particular products, and the United States undertook to examine such cases "on a case-by-case basis, taking into account the characteristics of the product and of the trade with a view to finding a mutually acceptable solution".

9. In letters to the United States delegation dated 6 April, 6 June and 12 June 1979, after the conclusion of the above-mentioned Understanding on 2 March 1979, the Community raised specifically the case of the converted rate of 1.7 cents per pound plus 40.4 per cent for Vitamin B12 feedgrade quality in the US offer and requested the United States to consider splitting TSUS 412.56 into two items, for feedgrade and pharmaceutical quality, in order to provide for a converted base rate of duty of not more than 21.4 per cent for feedgrade quality, subject to an MTN reduction to 16.2 per cent ad valorem applicable to the whole of the TSUS 412.56. On 19 June 1979, the United States delegation orally informed the Community that it was not possible to accede to the Community's request with respect to vitamin B12 on the grounds of possible diversion. The Community did not consider this as a final United States position and it was never formally confirmed in writing. The United States considered this position final and that no further written bilateral confirmation was necessary, since that position had been in the United States tariff offer and was incorporated formally in the United States GATT schedule.

10. Schedule XX - United States which was annexed to the Geneva (1979) Protocol on 30 June 1979 established for the whole of item 412.56 a base rate of 1.7 cents per pound plus 40.4 per cent ad valorem; this compound rate would be reduced to 16.2 per cent ad valorem by 1 January 1987. The Community made no reservation in its Schedule LXXII with respect to the conversion of Vitamin B12.

## III. MAIN ARGUMENTS

11. The Community representatives pointed out that, as a result of the Kennedy Round negotiations, the United States had granted a concession on Vitamin B12 which, because of the ASP valuation system, meant that feedgrade quality vitamins were subject to a lower duty Sr7ower

12. Up to 1 July 1980, exports of feedgrade quality of Vitamin B12 to the United States had been constantly increasing; in fact they had tripled from 1979 to July 1980. As from 1 July 1980, because of the doubled duty, the European producers had stopped their exports. In 1981, because of a considerable effort to quote competitive prices and the rise of the dollar, they had been able to resume modest exports to the United States in order to keep their market position, whilst awaiting a favourable decision in the matter.

13. The increase in the actually applied rate for feedgrade vitamins from 21.4 per cent to 4.7 per cent plus 40.4 per cent was contrary to the provisions of Article II paragraph 1 (a) and (b) and paragraph 3 of the GATT and constituted, unless renegotiations had been carried out under Article XXVIII, a nullification or impairment of the concession given by the United States in the Kennedy Round negotiations. Given the relatively short time for negotiations in a complex area, which imposed on both sides the need for a pragmatic approach, the Community had accepted an approach in this sector on the basis of a bilateral agreement and in doing so the Community had also agreed that the United States would not follow the formal procedures of GATT Article XXVIII for ASP conversions, which however did not mean that it had abandoned its normal GATT rights in case of disagreement.

14. The Community emphasized that, in the bilateral Understanding concluded between the Community and the United States on 2 March 1979, the United States had undertaken to examine, at the request of the Community, specific cases of ASP conversion "on a case-by-case basis, taking into account the

17. The base rate fixed for vitamin B12 after the abolition of the ASP valuation system was the weighted average of the duties paid under the ASP system as a percentage of the invoice values for all grades of Vitamin

21. In response to United States arguments the Community representatives made the following points:

- the United States had argued that they could not meet all requests on competitive products. In fact, the Community had raised only one single case: Vitamin B12 feedgrade quality;

- the United States had not, formally and in writing, informed the Community that the request to split the Vitamin B12 heading had been refused, whether prior to 30 June 1979 or during later bilateral

did not involve any arbitrary increase. The Panel believes the method used by the United States for the calculation of the level of the base rate - the weighted average of actual duties collected for feedgrade and pharmaceutical quality vitamins - to be in conformity with that proviso.

(f) The Panel notes that Community exports of feedgrade Vitamin B12 to the United States virtually ceased in the second half of 1980, after the abolition of the ASP valuation system on 1 July 1980, but that they recommenced in 1981, although at a lower level than in 1978 and 1979.

(g) Although the Panel, as indicated above, considers that the method used by the United States for the calculation of the base rate for Vitamin B12 was in principle fair and equitable, it felt that in this particular case, the result in respect of feedgrade quality vitamins had excessively negative effects for

ANNEX

A.S.P Chemical Products

1. Pursuant to note no. 4 to the US GATT schedule of concession the US has reserved the right, in the event of abolition of ASP, to adjust the rates of duties provided for in Schedule XX to the extent of offsetting the difference in the amount of duty which, without such adjustment, could result from making