1 March 1984

THE UNITED STATES MANUFACTURING CLAUSE

Report of the Panel adopted on 15/16 May 1984
(L/5609 - 31S/74)

I. Introduction

1. At its meeting of 21 July 1982, the Council was informed that consultations were taking place between the European Communities and the United States in regard to the Manufacturing Clause of the United States copyright legislation (C/M/160, item 12). In a communication dated 8 March 1983 (L/5467), the European Communities outlined the nature of their complaint on this matter and indicated their intention to have recourse to the provisions of Article XXIII of the General Agreement.

2. At the Council's meeting of 20 April 1983 (C/M/167, item 11), the European Communities informed the Council that the Communities and the United States had held several rounds of consultations under Articles XXII and XXIII which had mainly concentrated on the question of prejudice caused by the legislation, but without a satisfactory result. The Communities therefore asked the Council to establish a panel to examine the United States measure under the provisions of Article XXIII and in particular to concentrate on the amount of prejudice involved and on the amount of compensation whi9Xaoon

II. Factual Aspects

4. The Manufacturing Clause - Section 601 of Title 17 of the United States Code, as extended by Public Law 97-215 of 13 July 1982 - prohibits,

(iv) that the CONTRACTING PARTIES should recommend that the United States Government should terminate

13. The European Communities maintained that an interpretation of the Protocol of Provisional Application that would consider the extension of "existing legislation" by new legislative action after an expiry date as covered by the Protocol of Provisional Application would be inconsistent with the basic purpose of that Protocol as conceived by its drafters. The Protocol had been intended to enable governments to put the General Agreement into effect provisionally without having to change or violate existing legislation that was inconsistent with Part II of the GATT. Hence legislation existing in 1947 could not be extended by any further legislative initiative once an expiry date had been fixed in the law; and no amendments to such legislation could be introduced which would create further departures from GATT rules. If a contracting party had discretion as to whether to act consistently with the GATT or not, it was expected to act consistently. This interpretation of the Protocol of Provisional Application had been reflected in the subsequent interpretation given to "existing legislation", namely that it should be "mandatory" in character. The United States had been faced in 1982 with the choice of either to come fully into line with the General Agreement or to perpetuate an inconsistency; this option to come into line with Part II had been available without changing existing legislation or violating it. Since the enactment of Public Law 97-215 extending the Manufacturing Clause had not been obligatory but a matter of choice, the United States could no longer claim the re-enacted Manufacturing Clause as "existing legislation" under the Protocol of Provisional Application.

14. The United States maintained that the Manufacturing Clause was "existing legislation" within the meaning of paragraph 1(b) of the Protocol of Provisional Application. The Manufacturing Clause met the two requirements for "existing legislation"; it was "mandatory" in its terms and expressed intent, i.e. it left no discretion to the executive agency responsible for its enforcement, and it had been part of United States law on 30 October 1947. Although over the years the scope of the Manufacturing Clause had been narrowed, it had been retained continuously as part of United States copyright law since 1891 (except for a brief period in 1904 to enable goods affected to be displayed at the St. Louis World Fair). The extension of "existing legislation" beyond an expiry date inserted unilaterally by a contracting party did not constitute enactment of "new" legislation that must conform with Part II of the GATT.

15. The United States said that it would flow from the Communities' position that, if a given amendment of "existing legislation" was not mandatory - that is, the actual change made to law was not required by some superior provision of law, presumably the constitution - then enacting that amendment would constitute "new" legislation that must conform to the obligations of Part II of the GATT. This would apply to any amendment, even one that liberalized a provision. The United States found no indication in the original intent of the Protocol of Provisional Application, or in the interpretations of provisional application adopted by CONTRACTING PARTIES that would support that interpretation. The recommendations of working parties and panels relating to the word "mandatory", that had been adopted by the CONTRACTING PARTIES (BISD, Vol.II/62; BISD, 1S/59; BISD, 6S/55; BISD, 7S/99), related to the terms and the intent of the legislation involved, not to whether a contracting party was required to amend that legislation by some superior provision of law. The CONTRACTING PARTIES had accepted modifications of "existing legislation", so long as the modifications did not increase the degree of non-conformity with the General Agreement. They had adopted a Working Party report that had found such modifications, in the form of indirect tax increases, to be permissible so long as the amendment did not increase the absolute margin of difference between the tax applied to imported goods and that on domestic goods (Brazilian Internal Taxes, Report adopted by the CONTRACTING PARTIES on 30 June 1949, BISD, Vol.II/181).

16. The United States maintained that it would be detrimental to the interests all contracting parties had in the elimination of "existing legislation" if the extension of such legislation beyond an expiry date added subsequent to the date of the Protocol of Provisional Application or in the relevant protocol of accession were interpreted as enactment of "new" legislation. A contracting party that wished to provide unilaterally for the expiration of such a law would be unlikely to do so if such unilateral action were to be considered an international commitment and, should the contracting party in question consider that changed conditions justified extension of the provisions beyond the expiry date, it could be subject to claims for compensation under GATT.

17. The European Communities maintained that, given the purpose of the Protocol of Provisional Application, contracting parties benefiting from it had a basic obligation to respect Part II of the General Agreement, with a specific exception accorded pro tempore. Since in these circumstances there could be no question of reciprocal concessions being accorded in return for a decision to bring GATT inconsistent legislation into line with the GATT, such a decision could only be taken unilaterally. But once taken and announced, such a decision created reasonable expectations and had to be considered, in a certain sense, tantamount to a multilateral obligation vis-à-vis other contracting parties. Such "reasonable expectations" were pivotal in the case of the Manufacturing Clause because of the drafting of the law and the interpretations given to it, as well as the discussions in GATT during the Tokyo Round (see paragraphs 24-29 below). They had not existed in the case of the Brazilian Internal Taxes which had involved no expiry date; also the Brazilian Internal Taxes case had concerned a developing country which could expect a more flexible approach to GATT rules. The European Communities believed that the arguments of the United States in paragraph 16, if acted upon, would tend to undermine the GATT as a framework for conducting trade on the basis of recognised and durable rules to be relied on by all contracting parties. If contracting parties were free to reverse moves bringing their practices into line with the GATT, there would no longer be any certainty that restrictive measures abandoned over the years would not be reintroduced at some time in the future on the grounds that such reintroduction was no more than a continuation of legislation which existed on 30 October 1947. This would create unstable relationships between contracting parties and a constant risk of a disequilibrium

20. The United States said that the Manufacturing Clause had remained in the United States Code during the period 1-13 July 1982; all that had lapsed was the authority to enforce it. This was the reason it had been possible to reactivate application of the Clause with a bill that said only that "Section 601(a) of Chapter 6 of Title 17 of the United States Code is amended by striking out '1982' and inserting in lieu thereof '1986' ". There had thus been no "new" legislation. Moreover, the effective date of the extension had become 1 July 1982 automatically because the only change made to the statute was to the year in which expiration was to occur. Had any non-conforming materials been entered during the period 1-13 July 1982, the United States customs would have been obliged to seize the goods after 13 July 1982. In practice, however, customs would have delayed completion of the necessary paperwork to release the materials for domestic consumption until the outcome of the Presidential veto and the reaction of Congress to it had become known.

(iii) The exemption of Canada

21. The European Communities further argued that, without prejudice to its view that the re-enacted Manufacturing Clause could not be regarded as "existing legislation", the element of discrimination in the Manufacturing Clause

25. The European Communities maintained that, on the basis of the understanding reached in the Tokyo Round, they had a "reasonable expectation" that the Manufacturing Clause would expire on 1 July 1982, and that they had

(ii) the Communities could reasonably have anticipated the possibility of action by the United States to extend the Manufacturing Clause.

27. The United States contended that the Communities had given no explanation of the content or the context of any understanding reached between the two in the Tokyo Round on the Manufacturing Clause, nor had they claimed that they had made concessions in return for such an understanding. The documents that the Communities had provided did not provide any relevant evidence. All but one of them post-dated the end of the

(d) The economic effects of the Manufacturing

in policy. After a careful evaluation of the evidence before it, in particular of the evidence in paragraphs 24-29, and having regard to the fact that the expiry date inserted in the Clause in 1976 was the first such provision introduced since the legislation came into force in 1891, the Panel found that the European Communities had been justified in reaching the conclusion that the expiry date inserted in 1976 had constituted a policy change. The Panel therefore found that the insertion

V. Conclusions

42. The Panel found that:

(i) the Manufacturing Clause was inconsistent with Article XI of the General Agreement;

(ii) the extension of the Manufacturing Clause beyond 1 July 1982 could not be justified under the Protocol of Provisional Application;

(iii) the United States was therefore acting in this respect inconsistently with its obligations under the General Agreement, as applied pursuant to the Protocol of Provisional Application; and

(iv) the extension of the Manufacturing Clause beyond 1 July 1982 consequently had to be considered prima facie to nullify or impair benefits accruing to the European Communities under the GATT.

43. In the light of the above, the Panel suggests that the CONTRACTING PARTIES recommend that the United States bring the Manufacturing Clause into line with its obligations under the General Agreement.

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