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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 15 FEBRUARY 1985

Chairman: Mr. F. Laschinger (Canada)

1. The Chairman said that the purpose of this meeting was to examine a request by the EEC concerning the definition of "industry" for wine and grape products contained in the United States Trade and Tariff Act of 1984 as set out in document SCM/60; the Committee had this document before it. As the consultation and conciliation process had not produced any satisfactory solution, the EEC had requested that a panel be established by the Committee and proposed its terms of reference. The Chairman recalled that according to the Committee's customary practice signatories should concentrate on the question of establishing a panel and leave the question of its terms of reference and composition for consultation between the Chair and interested parties. He would, of course, do his best to stick to the time-periods set out in the Code.

2. The representative of the EEC recalled that his delegation had scrupulously followed the relevant procedures of the Code. First it had requested a consultation meeting which had not produced any positive results. Although the matter required some urgency his delegation had not requested the conciliation meeting right after consultation. As a mutually acceptable solution had not been found either in consultation or in conciliation he had to request the Committee to establish a panel. He wished, however, to recall that the EEC had proposed concrete solutions: the United States should either bring its amended legislation into conformity with the Code or it should make a commitment to apply it in a manner consistent with the Code. The United States had not met either of these two requests and this was partly due to the nature of the United States' countervailing duty legislation. This legislation was to be applied automatically since once a petition was filed there was no discretion on the part of the administration to apply those provisions which were at variance with Code rules in a manner consistent with the Code. The representative of the EEC finally noted that this case was indeed important as US$600 million of wine trade was at stake.

3. The representative of the United States said that she was surprised to hear that the EEC wanted a panel to be established after they had originally indicated that this was not needed until such time as the disputed provisions of the US law were applied. For the United States delegation the EEC request was premature and the question was therefore not ripe for a panel. Moreover, as it had already been stated (SCM/M/23, paragraph 5) the law might never be applied and a petition might never be filed. Furthermore, the inclusion of the grape growers would probably not affect the result of the investigation

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as the standards for determining subsidization, injury and causation had not been changed. Since her delegation did not know how the US authorities would interpret or apply the law it was not clear how a panel could rule on this matter nor how she could defend such a hypothetical claim. Nevertheless, she did not deny that it was up to the Committee to decide whether or not to establish a panel. She also agreed with the Chairman that, according to the customary procedures, the terms of reference and composition of a panel were to be left to informal consultations. She would urge that a panel not be established until there was a concrete trade action at issue; perhaps the EEC could postpone the composition of a panel until then. Referring to a more general question of the use of the Code dispute settlement procedures she expressed her concern that the EEC sought to use these procedures to its benefit while it had been continuously frustrating them when the United States had been challenging some practices of the Community.

4. The representative of the EEC recalled that at the conciliation meeting his delegation had reserved its right to request a panel at any time (SCM/M/23, paragraph 19). He further stressed that the case was not a hypothetical one since once a petition had been filed there was no way of stopping the machinery of countervailing duty proceedings. Moreover, a petition had already been filed under the preceding legislation and subsequently the USITC had decided that there was no injury because grape growers could not be considered as part of the US wine industry. The legislation had been changed in order to rectify this decision. If a petition was filed under the new legislation the case would be wrapped up very quickly. He could not, therefore, accept the US suggestion of putting the decision to establish a panel into effect only after a concrete case has been initiated. As to the point raised by the United States on the EEC frustrating the good operation of the dispute settlement procedures, he said he could make similar comments about the US behaviour but such an exchange of comments would lead nowhere.

5. The representative of Brazil stated that his Government's position was that it was not incumbent on the Committee to pass judgement on legislation which had not been implemented and where there was no concrete trade measure.

6. The representative of Switzerland expressed concern about the US unilateral interpretation of a multilateral instrument negotiated within the GATT. It was therefore not difficult for him to understand the reaction of the EEC. On the other hand the request to establish a panel raised the question of whether a panel should be established every time a commercial measure was taken, thus transforming the negotiations system into a system based on casuistry of a jurisprudential nature. He thought that an alternative solution would be the establishment of a working party, provided that the interested parties were willing to negotiate. If the answer to the latter was negative his delegation would not oppose the establishment of a panel. He nevertheless stressed his concern about this course of action.

7. The representative of Canada said that his delegation was in favour of the EEC request to form a panel. He also noted that the issues involved may go beyond the immediate impact of the law in question; there were some similar issues involved in the US-Canada proceedings on live swine and pork. Should a panel be established Canada may wish to make a submission to it.

8. The representative of Uruguay stated that the recent amendments in the United States Trade and Tariff Act of 1984 were not consistent with the Code nor with the obligation of Article 19:5(a). On the other hand it was GATT practice to review certain issues only when concrete measures had been taken. Nevertheless the EEC had the right to request the establishment of a panel and his delegation would not object to this.

9. The representative of Sweden speaking on behalf of the Nordic countries shared the concerns expressed by the Swiss delegation. His delegation would not oppose the establishment of a panel.

10. The representative of Portugal said it was regrettable that a mutually acceptable solution had not been found and that the EEC had had to request the formation of a panel. He supported this request and invited interested signatories to reply to the comments made by the Swiss delegation.

11. The representative of Austria was in favour of the request made by the EEC.

12. The representative of the United States, referring to the Swiss intervention, said that her delegation had always considered that the matter was not as simple as had been suggested by the EEC; it involved some broader issues regarding agricultural inputs (SCM/M/22, paragraph 13 and SCM/M/23, paragraph 4). In view of this her delegation had suggested that the Committee should examine these issues rather than establish a panel; it was difficult for her to see how a panel could accomplish its task when confronted with a hypothetical situation only.

13. The representative of the EEC echoed the comments by the Swiss delegation that interested parties should be willing to negotiate. However, the approach followed by the United States to imply that certain provisions of the Code were no longer appropriate, i.e. to unilaterally change a provision in its national legislation and then to ask a working party to change the Code accordingly, was clearly at variance with the proper procedures. In his view the real question was whether the United States was willing to abide by its obligations under Article 19:5(a). In this vein, he recalled that the EEC had requested that the US legislation be brought in line with the Code or alternatively that the United States undertake to apply it in a manner consistent with the Code.

14. The representative of Australia agreed with the Chairman on the question of addressing the terms of reference of the panel at a later stage. He stated that his delegation did not object to the request by the EEC to establish a panel. As to the point made by the United States that the case was only hypothetical he had to disagree with this view. From the non-conformity of legislation or prima facie violation of one's obligations it did not follow that only a hypothetical case existed. A hypothetical case would be to ask about the impact of this type of legislation if the United States implemented it. The Committee was therefore confronted with a practical case where legislation had been put on the books. A panel should address the question of the impact of this legislation on the rights of signatories as well as the rights of other signatories in respect of implementing similar legislations. Australia may have an interest to submit their views to a panel, should it be established.

15. The representative of Spain expressed his concern about the fact that a mutually acceptable solution had not been found and a panel had to be requested. The position of his delegation was already reflected in the record (SCM/M/23, paragraph 12) and consequently he did not object to the request by the EEC. He nevertheless shared the concern expressed by the Swiss delegation and also by Uruguay on the inconsistency with Article 19:5(a).

16. The representative of Switzerland said that his idea of a working party was the reflection of a general consideration and did not necessarily cover the interpretation that the United States delegation had given to it. As to the comments made by the EEC he said that if it was possible to argue that there was no real purpose for a working party similar reasoning could also raise doubts as to the usefulness of a panel.

17. The Chairman said that the Committee had taken the discussion of the request by the EEC under Article 17:3 of the Code to establish a panel as far as possible at this meeting. While he had detected some expressions of concern about the nature of the dispute he had not heard any opposition to the establishment of such a panel. He therefore proposed that the Committee agree to the EECs request to establish a panel as provided for in Article 18:1 of the Code and that it authorize the Chairman to decide, in consultation with interested delegations, on its composition and terms of reference. It was so decided.

18. The representative of the United States disagreed with the Australian delegation as in her view a panel could not assess some hypothetical impact for signatories when there was no concrete trade action. She said she wanted the record to reflect that despite the expressions of concern of several signatories regarding the fact that no trade action was present, the Committee had nonetheless agreed to the establishment of a panel. Therefore, the Committee's decision had set a precedent paving the way for establishing panels to examine the legislation of any signatory regardless of whether any concrete action existed or whether that legislation was actually applied.

19. The representative of Brazil said that as the parties to the dispute were agreeable to the formation of a panel and as the members of the Committee held the same view he had not opposed the establishment of this panel, on the understanding which he had expressed earlier (see paragraph 5). As to the point made by the United States that the Committee's decision had set a precedent, he had to disagree with this view for the case in question was a very specific one and also because any subsequent request for a panel, concerning legislation without a concrete trade measure, would have to be examined on its own merits.

20. The representative of the EEC explained that a precedent would only be set in the light of the facts of the case of that precedent. The EEC had stressed time and again the very particular features of this case which set it completely aside from the general review of legislation of signatories against their obligations under the Code. The Committee had agreed to the establishment of the panel in the light of the particular circumstances of the case.

21. The representative of the United States, referring to the point of the Committee setting a precedent, noted that the relevant "facts" setting a precedent here were merely that there was a law on the books, and a panel was established on that fact alone.

22. The representative of Uruguay invited the Chairman to take into account the concerns of various delegations when consulting on the terms of reference of the panel. The representative of Brazil indicated his wish to be associated with these consultations. The Chairman took note of these statements.