

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/M/66

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Special Distribution

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 4 JUNE 1993

Chairman: Mr. Andrés Espinosa (Colombia)

1. The Committee on Subsidies and Countervailing Measures held a special meeting on 4 June 1993 to consider the request by the EEC under Article 17:3 of the Agreement for the establishment of a panel concerning the imposition by the United States of countervailing duties on certain steel products originating in several member States of the European Community (SCM/169).
2. The Chairman noted that the Czech Republic had requested observer status in the Committee.
3. The Chairman stated that the agenda for the meeting was circulated in GATT/AIR/3443. The EEC in a communication dated 14 April 1993 (SCM/167) had requested conciliation under Article 17 of the Agreement concerning, first, definitive affirmative countervailing duty determinations regarding hot-rolled lead and bismuth carbon steel products and, second, preliminary affirmative countervailing duty determinations regarding cut-to-length carbon steel flat products, certain hot-rolled carbon steel flat products, certain cold-rolled carbon steel flat products, and certain corrosion-resistant carbon steel flat products. This matter was taken up at the regular meeting of the Committee on 28-29 April 1993. The Committee was now considering a request by the EEC under Article 17:3 of the Agreement to establish a panel in accordance with the provisions of Article 18:1. That request related only to the definitive countervailing duty determinations regarding hot-rolled lead and bismuth carbon steel products.
4. The representative of the EEC confirmed that the request concerned only the final determinations on lead and bismuth bar products. He noted that the US countervailing duty proceedings against steel products had been discussed several times in the Committee. The Committee was therefore aware of the EEC's very serious concerns with the directions these cases had taken and of the objections it had regarding the way the US authorities were applying or interpreting provisions of the Agreement. The EEC had had consultations with the United States at various occasions on these issues and it had submitted these issues to a conciliation meeting of the Committee on 28 April 1993. The consultations had been open, prompt and constructive. However, all this did not yield the results sought by the EEC. On many of the issues in these cases the US and the EEC had fundamental differences concerning the legal interpretation of provisions of the Agreement and their underlying economic rationale.
5. In the view of the EEC, the US system for countervailing subsidies had become so sophisticated, technically complex and abstract, that the conduct of CVD investigations had lost touch with reality. By recalculating the actual amount of subsidies given, making unrealistic or artificial comparisons or allocations, using arbitrarily chosen benchmarks, and other methodological subtleties, countervailing duties were imposed which were either excessively inflated or inescapably wrong. Thus, the EEC asked the Committee to establish a panel in order to review the facts of these matters and, in the light of such facts, present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Subsidies Agreement.

6. The representative of the EEC referred delegations to SCM/169 concerning the details of its request. The EEC reserved all its rights to refer to dispute settlement other issues in respect of the cases. It had requested the establishment of a panel in respect of several aspects of the countervailing duty methodology employed by the US in these investigations. There should be no mistake, however, as to the EEC's view on other aspects of these investigations, and in particular in respect of injury determinations by the US International Trade Commission.

7. In the view of the EEC, the standard applied by the ITC for preliminary injury determinations did not satisfy the "sufficient evidence" standard laid down in Article 5:1 of the Agreement. Furthermore, the methodological choices of the ITC in the final injury determinations issued so far also appeared questionable. This applied, in particular, to the identification of the domestic industry on the basis of a very narrow notion of "like product". This notion had moreover changed very considerably between preliminary and final determinations in the same investigations, with the result of a manifold increase in import penetration from 5 to 20 per cent, a change which dramatically affected the outcome of the investigation. In addition, the EEC considered that causality and the contribution of other factors to any alleged injury had not been adequately examined, in particular the effects of the competition of minimills on the US industry, and the fact that EEC exports covered niche markets which were not in competition with the US product. The EEC reserved all its rights under the Agreement in respect of the injury determinations in the various steel investigations carried out by the United States, and would request the Committee to revert to this matter if appropriate in the light of further developments, including future injury determinations by the ITC.

8. The representative of the EEC noted that the Agreement had been often criticized for its lack of clarity on many crucial issues. Yet, the Agreement did exist, and it contained certain legal provisions. As a matter of legal interpretation and of plain common sense, it was inconceivable that such provisions had been negotiated and agreed to no other purpose than to confirm unfettered freedom for signatories to apply countervailing duties in whatever manner suited them. The Agreement existed, among other reasons, to put the use of countervailing duties "within an agreed international framework". Whatever latitude this framework allowed, there had to be boundaries somewhere. It was the duty of the Committee to draw these boundaries, and it was the duty of panels to assist the Committee in this task. The EEC did not ask the Committee to decide or suggest that a particular method to define a subsidy and calculate its amount was better or more appropriate than another. It asked that the method used be examined in the light of its consistency with plain logic, with economic reality, and with the facts of the case at hand. This was the least that should be done to measure the consistency of the US actions with the Agreement.

9. The representative of the United States said that the EEC had complied with all of the procedural requirements of Article 17 of the Agreement for the establishment of a panel in this matter, and therefore the United States did not object to its establishment. The United States did not share the assertions expressed by the EEC, but this was not the time to debate the merits of the matter. This was for the Panel to decide. Regarding the reservation of rights by the EEC to bring before the Committee and dispute settlement other matters relating to methodology by the Department of Commerce and the USITC he understood that this was not a reservation to add these matters to the work of this Panel, a reservation to which his authorities would have objected. Rather, it was a reservation of rights to bring other matters in separate proceedings before the Committee, as was fully within the rights of the EEC.

10. The representative of Canada supported the right of the EEC to the establishment of a panel on this case. Canada shared many of the concerns expressed by the EEC regarding US countervailing duty methodology, including but not limited to the methodology regarding so-called "pre-privatization" subsidies, and reserved its rights to intervene as a third party before this panel.

11. The representative of Japan supported the establishment of the Panel and welcomed the US acceptance of its establishment. Japan had expressed its concerns regarding US anti-dumping and countervailing duty investigations on steel products in the Council, the Anti-Dumping Committee and this Committee. Japan reserved its rights to protect its interests, including bilateral consultations under the Anti-Dumping Agreement. While the product coverage in this case differed from that in the US anti-dumping investigation against Japan, the case brought by the EEC was very important. Japan was concerned about the arbitrary calculation methodology used by the US authorities, which exaggerated subsidies. Normal commercial transactions based on market principles were countervailed in this case. According to the EEC request, for example, non-recurring subsidies were allocated over fifteen years without justification, subsidies were allocated only over the domestic production of the company, and duties were imposed even after sales of assets by government-owned companies to a private investor at full market value. If this was true, it led to the imposition of countervailing duties on normal commercial transactions without any element of subsidies or to the exaggeration of the subsidies. The footnote to Article 4:2 of the Agreement did not mean that signatories could conduct countervailing duty investigations arbitrarily. Countervailing duties were an exception to GATT principles such as MFN. Japan had a strong interest in the disciplines and methodologies used in this case by the United States, and reserved its right to participate in this Panel as a third party.

12. The representative of Brazil stated that the Committee was fully aware of Brazil's position regarding the US actions. Brazil reserved its rights to participate as a third party in this proceeding.

13. The representative of Sweden noted that a Swedish company presently was affected by preliminary US countervailing duties, and Sweden's concerns in that case were similar to those raised by the EEC. Sweden had held consultations with the United States in late April, and was still examining the US responses. Sweden reserved its rights in relation to that case. Sweden also reserved its third party rights in the Panel established in this meeting.

14. The representative of Austria stated that his country was interested in the clarification of certain legal questions raised by the EEC. He looked forward to the findings of the Panel, which would be useful for bilateral and multilateral negotiations that were taking place or were scheduled. Austria reserved its right to intervene as a third party in this proceeding.

15. The representative of Australia reserved his country's right to participate as a third party in this proceeding.

16. The Chairman stated that the Committee had heard the views of the EEC, the United States and other signatories on this matter. The United States did not oppose establishment of a panel to review this matter. In accordance with the provisions of Article 18:1 of the Agreement, therefore, he proposed that the Committee establish a panel as requested by the EEC.

17. The Committee so decided.

18. The Chairman further noted that Article 18:1 set out the terms of reference that normally applied to panels under the Agreement. While the parties could propose modified terms of reference if they so agreed, they had not done so in this case. In accordance with Article 18:1, therefore, the terms of reference of this Panel were:

"To review the facts of the matter referred to the Committee by the EEC in SCM/169 and, in light of such facts, to present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement."

19. The Committee so decided.

20. The Chairman further proposed, in accordance with Article 18:3, that the Committee authorize him to decide, in consultation with the parties concerned, the composition of the Panel. He would begin these consultations promptly.

21. The Committee so decided.