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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 24 MARCH 1982

Chairman: Mr. M. Ikeda (Japan)

1. The Chairman recalled that at its meeting of 12 March the Committee had agreed to meet again to continue the conciliation process and to give advice on a very important matter of interpretation of the Agreement. Some delegations had already expressed their opinion either on the substance or on the procedural aspects of the dispute, some others requested more time for reflection. Some delegations had also indicated that they may wish to ask for further clarification.

2. The representative of the United States said that it was clear that, despite the statements and arguments made by the American spokesmen at the two previous meetings of this Committee, there continued to be a divergence of views as to the applicability of Article 9's explicit prohibition on the use of export subsidies in the case of EC export subsidies paid on pasta. The United States continued to believe that its interpretation of the obligations of Signatories under Article 9 of the Code was the only interpretation which could be supported by reference to the operation of Article XVI:4 of the General Agreement. While the representative of Switzerland had suggested at the previous meeting that there might be a third category of products - transformed agricultural products - both the Code and the GATT were clear in the sense that there was one rule for the subsidization of primary products and another, more stringent, rule for the subsidization of non-primary products. He did not hear anybody in this Committee maintain that pasta - the product of a complex multi-staged transformation process which was clearly not necessary to prepare durum wheat for "marketing in substantial volume in international trade" - was a primary product. While the EC had asked that this Committee focus its attention on the interpretation to be given to Article 9, his delegation viewed this meeting as essentially the second meeting in the conciliation phase of the dispute with the EC over export subsidies on pasta. Nevertheless, he wished to reiterate his arguments on the question of Signatories' basic obligations under the Code. In presenting his arguments, the representative of the EC had attempted to show the veracity of his argument through reference to past interpretations of Article XVI:4 of the GATT. Specifically, he had referred to the US reservation to that Article in respect of subsidies on processed - or non-primary - products calculated in relation to a primary product component. The US position was that the history of this reservation was indeed instructive, but that history led to quite the opposite interpretation from that view by the Community. In 1957 the United States had sought the acquiescence of the Contracting Parties to its suggestion that the US could continue to pay export subsidies on cotton

textiles where such subsidies would have been "essentially the payment which would have been made on the raw cotton consumed in the production of these textiles if the cotton had been exported in raw form". Specifically, the US had sought a recognition that the United States might continue such a practice consistently with Article XVI:4. The other contracting parties had rejected the US interpretation of what it might be permitted to do consistent with Article XVI:4 and the United States had been obliged to enter a reservation in respect of this practice. The point of such a reservation had been to highlight the fact that a party to the Agreement maintained a practice which had not been considered by other parties to the Agreement to be consistent with the obligations of the Agreement. A reservation did not mean that parties to an agreement considered like or similar practices to be acceptable. For example, speaking in 1958 on this question, the representative of Sweden had said that the reservation by the United States Government considerably limited the importance of the United States' adherence to the Declaration on Article XVI:4. Another example was New Zealand's acceptance of this Code last year - with a reservation to cover certain practices which New Zealand considered as not being in full conformity with the Code. The acceptance of New Zealand's reservation by other Signatories in no way indicated their recognition that New Zealand's programmes were consistent with Signatories' interpretation of the Code or with that country's obligations under the Code's provisions. There was no difference in terms of how a reservation was to be viewed from the standpoint of determining the consistency of practices covered with the basic obligations of an agreement, between the US reservation to Article XVI:4 and New Zealand's more recent reservation to this Code. In the case of the US reservation, the contracting parties had clearly believed that Article XVI:4 prohibited practices such as that which was the subject of the reservation. On page 3 of his statement (SCM/Spec/12), the spokesman for the EC tried to contort the meaning of a reservation by stating in the penultimate paragraph (with reference to the US reservation) "It clearly results that for the United States, at that time, the meaning of the prohibition on export subsidies on products other than primary products must be interpreted as allowing export subsidies to be granted on a primary product when the latter is incorporated in another product, provided they bear only on the primary product component incorporated." The United States did not interpret this reservation in the fashion indicated by the EC spokesman. In fact, the fact that the United States were obliged to enter a reservation showed exactly the contrary. Nobody in recent meetings of the Committee had demonstrated that the CONTRACTING PARTIES had ever decided differently than the decision they had reached at the time of the US reservation. Moreover, as the EC had correctly stated, since this issue had never been addressed during the negotiation of the current Code, it was clear that the Code's drafters had not intended to change the CONTRACTING PARTIES interpretation of Article XVI:4 in this respect as it was reflected in Article 9 of the Code. The rule remained the same despite widespread practices; other interpretations were not supported by the history of this issue and were in no way sanctioned by the rules of the GATT and the Code. The EC spokesman had argued that the fact that decades had passed without such practices being questioned was sufficient to create rights for those parties acting in such a fashion. The Committee could not accept such an interpretation, otherwise all one would need to gut the provisions of the Code, or any other provision of the GATT system, would be a situation where a number of countries practised violations of the Agreement for a period - which would then create the right to practice such violations to the parties concerned. He concluded by saying that both Article XVI:4 of the General Agreement and Article 9 of the Code prohibited

the payment of export subsidies on non-primary products - whether that subsidy was paid in relation to a primary product input into the non-primary product or not. Pasta was a non-primary product. The Community clearly granted export subsidies on exports of pasta. No other interpretation could be reached than that these subsidies were paid in violation of Article 9.

3. The representative of the European Community said that the whole question before the Committee was how to interpret the provisions of Article 9 and that it was perfectly legitimate to llok at the history of the precedent provision which was the 1960 Declaration. This history showed that there were disagreements and differing interpretations and he did not believe that there had ever been a CONTRACTING PARTIES' decision on this point. All this had happened a long time ago and statements made on that occasion had not since been renewed. On the other hand the US reservation was there as a matter of record. The European Community had simply noted that this reservation was still there and had never been withdrawn and therefore one could presume that it still reflected the US attitude. The European Community had been entitled to this presumption during the negotiations of the Code. There had also been a period of twenty years in which the practices relating to subsidization of transformed agricultural products had developped. A number of contracting parties had felt that such subsidies were not prohibited, no other contracting parties had attacked these practices and the European Community was entitled to draw certain conclusions from these facts. Assumptions about these facts had certainly been in the minds of negotiators when they drafted the Code. He believed that the Committee could have further discussions on the interpretation to be given to the various questions, first of all the definition of a primary product and secondly the question of how to apply the provisions of the Code to a case where there was subsidization on a finished product but it was limited to subsidization of the primary element.

4. The representative of the United States said that it was clear from comments made by several delegations, including the parties to the dispute, at the previous meeting, that there was unlikely to be any consensus on this question of interpretation of Article 9. For that reason he thought that it was unnecessary to continue the discission on the interpretation of Article 9. As the Committee was in a conciliation processs he wanted to put some questions to the European Community with respect to the pasta case. He would like the EC representative to explain the methods used to calculate their subsidies paid on the export of pasta. This question was without prejudice to the US position that export subsidies paid on a non-primary product were, irrespective of their amount, in violation of Article 9. In this connexion he asked how the convertion factor was arrived at. According to his information this factor was currently set at 1.67. In other words 167 kg. of durum wheat were required to make 100 kg. of pasta. He also asked what the EC considered - on the assumption that the subsidy was intended to be limited to the amount and value of the what incorporated in the exported pasta so as to accurately account for the difference between the world and the EC durum wheat prices - to be the appropriate time to set the prices and the subsidy ratio for a given production for the export of pasta. Was it the price which was in force on the day of export, or that in force on the day of purchase of the durum wheat by the producer? How did the European Community explain the fact that its exporters could apply for an advanced fixing of the refund?

5. The representative of India recalled that at the meeting of 3 March 1982 his delegation had taken the view that the Committee was not, as yet, ready to undertake a substantive discussion on the interpretation of Article 9. This position continued to be conditioned by the fact that the Code was still in its infancy and it might not be appropriate to place a final interpretation on the various articles. Attempting to force such an interpretation might become counter-productive. Notwithstanding this, he felt that although export subsidies could be granted to certain primary products, in accordance with the interpretative note to Article XVI, so that the product could undergo such processing as was customarily required to prepare it for marketing in international trade, the concept inherent in the words "customarily required" could not be stretched very far. He could not agree with the view that subsidies on processed products would be admissible up to the extent of the subsidy on the primary product content. After being processed beyond what was defined in Article XVI as a primary product, the processed product could not be covered by any protection with regard to the admissibility of a subsidy. He also said that he would find it difficult to accept the position that pasta was a primary product. The pasta had clearly undergone substantial processing beyond the stipulations for a primary product in Article XVI. Since the Committee could not complete its work with regard to a final interpretation of Article 9 this task could await a suitable opportunity in due course and, meanwhile the dispute settlement procedure should not be held up.

6. The representative of Austria said that pasta was a processed agricultural product. When exported, the compensation for the difference between world market prices and home market prices for the primary agricultural input should be allowed. Export subsidies only covering this difference were not in contradiction with Article 9.

7. The representative of Korea said that his authorities were not yet in a position to judge whether the question of interpretation of Article 9 should be dealt with by the Committee at this stage. He thought that the Committee might need more relevant information from other trade-related organizations, the definition of a primary product in the CCC nomenclature and its explanatory notes and a detailed description of the eighteen primary products falling under the UNCTAD Common Fund Agreement.

8. The representative of New Zealand said that his country's basic problem was that it objected to the fact that it was possible, under the present GATT rules, to subsidize agricultural products. He also found it unfortunate and discriminatory that this particular differentiation in the rules had been carried over into the Code. Leaving this aside he reiterated the statement he had made at the previous meeting when he had said that this matter should go through a dispute settlement procedure. He could agree with the US view expressed in document SCM/Spec/11 that if the Committee discussed the scope of the interpretation of Article 9 in relation to the pasta issue it could constitute a considerable risk to the integrity of the dispute settlement procedure. For this reason he did not want to go into the details of the two questions before the Committee, but he wished to say that, in his view, pasta was not a primary product.

9. The representative of Yugoslavia said that the question of interpretation of Article 9 was very important but he was not in a position to commit his delegation in any way at this stage as his authorities were still considering this matter. However he would be ready to accept any consensus which might be arrived at in the Committee.

10. The representative of Chile recalled that at the previous meeting he had presented his view that pasta was not a primary product and that consequently Article 9 of the Code was applicable. As to the definition of a primary product he considered that such a definition had already been clearly delineated in the interpretative note to Article XVI, Section B, and there was no reason to go deeper into this problem. With respect to Article 9 in general and how it should be interpreted, this was a matter in which he did not want to give a final judgement. Firstly because there was a matter of principle involved, namely that in discussing such a general point the Committee was prejudging a specific case which had been put into the dispute settlement mechanism. This was a dangerous and unacceptable precedent. Furthermore he wanted to reiterate that whatever general interpretation was given to Article 9 it should be given by the Committee, and not unilaterally, in a different context from the one in which the Committee was at this time. It was essential that if the Committee undertook such a general interpretation observers should be present.

11. The representative of Finland said that his country had never been Signatory to the Article XVI:4 Declaration and therefore had not taken any position on the US reservation. He thought that the reason for which a number of countries had not accepted the US interpretation was the fact that it covered industrial products. Such a position was certainly appropriate. In the present stituation more or less traditional border-lines between agricultural and industrial products came into play and interpretations had always, as far as his delegation was concerned, been based on existing practices. He agreed that the processing indsutry could not be subsidized but, on the other hand he could not agree to any such interpretation or application of the Code which would make it impossible to use domestic raw materials in the processing industry. If the subsidy eliminated only the difference between domestic and world market price of the agricultural raw material component, then such a subsidy would fall under the agricultural provisions of the Code.

12. The representative of Uruguay said that the case was of the utmost importance. As to the practical aspect of it, one should remember that the very basis of GATT was its pragmatic application. This pragmatism was reflected in many articles of the General Agreement and, in practice, it always led contracting parties to see whether, in a given case, there was prejudice. Even if some provisions had been violated but there was no consequential prejudice, the matter was left at that without going into the legal aspects of it. Of course if there was prejudice then an appropriate solution had to be found. Another aspect of the case before the Committee was the question of how to interpret Article 9 of the Code. The basic approach should be that as the Code was supposed to facilitate international trade, it should not be converted into an obstacle. Therefore he could agree with those who had said that it was in order to attempt a precise interpretation that more experience should be gathered. For this reason the secretariat could,

perhaps, prepare a few reflections and link up this problem with other precedents in the international field so that the Committee would have more comprehensive insight and be better prepared to take a wise decision than would be possible at present.

13. The representative of the European Communities said that at least three delegations had said that as the Code was in its early days the Committee should not rush things. He understood it as an appeal to the parties not to force the issue for a final decision at this point, but to allow a little bit more time to reflect and to allow a consensus to develop. He wished to remind the Committee that in view of the history of the question before them nobody could simply sit down and look at Article 9 and say that it was completely straightforward and clear. As there was no unanimity that Article 9 applied in this case, the Committee should consider what rules should apply in the situation where primary agricultural products incorporated into a processed product were subsidized.

14. The representative of the United States said that his worst fears had been confirmed because the Committee was used as a panel and it had been asked to undertake the panel type of examination and of gathering materials, calling on the secretariat and making interpretations as to which Article applied to this case or not. He was afraid that if the Committee continued down this road it would end up in a total impasse, which might be, of course, the aim of certain parties involved, but he would strongly recommend that the Committee continue with the conciliation and if there was no possibility for conciliation, it should move to establish a panel.

15. The representative of Japan said that the matter was extremely complex and it required much more thinking before the Committee could make any final decision. He was very much impressed by the Chairman's statement that the Committee should find a way in which the efficient functioning would be ensured. Three meetings had already been spent on the discussion of this matter and no solution was in sight. He hoped that the parties to the dispute would make every possible effort to find a satisfactory solution but, taking into account the need of securing the efficient functioning of the Committee he wondered whether this kind of discussion should continue endlessly. He proposed that both parties should use the remaining days of the conciliation period to work out a solution but, failing such a solution, the dispute settlement procedure should be followed and in such a case the Chairman should have the authorization to establish a panel and decide on its composition and terms of reference, taking into account all the views expressed in the Committee on procedural and substantial aspects of the matter.

16. The representative of Brazil said that as to the question of whether pasta was a primary or a non-primary product, his delegation was of the view that it was not a primary product and he did not think that any other approach was possible. As to the question of interpretation and application of Article 9, in particular with respect to agricultural raw material components, he did not think that the time was appropriate to answer that question. He would like to study more carefully all the implications of any kind of interpretation. Regarding the procedure he would like to support the Japanese suggestion that the dispute settlement mechanism be put to work. He considered that the efficient functioning of this mechanism was very important to the operation of the Code. If, in the meantime the parties to the dispute

could find a satisfactory solution, that would be the best way out, but if not, the matter should be taken to a panel. If some countries were interested in having a more precise interpretation of Article 9 then, in the future, the Committee could establish a working party to examine this question.

17. The Chairman said that the Committee had proceeded with the process of conciliation and in this connexion several questions were asked about the methods of calculation of subsidies on pasta. The Committee had also discussed the intepretation of Article 9 and no consensus had emerged. Some delegations had expressed doubts as to the productivity of continuing the discussion on a general interpretation of Article 9. A concern had also been expressed that the dispute settlement process should not be disrupted and a suggestion had been made that the Committee should establish a panel.

18. The representative of the European Communities said that the Committee had not, as yet, come to the end of the conciliation procedures. He agreed that various views had been expressed on Article 9 and that there had been no consensus. As to the procedure he thought it would be wrong to move, at this stage, beyond the conciliation procedure. The United States had certain rights in this respect and the conciliation should be allowed to proceed. If, at a subsequent stage, a request was made to establish a panel, the Committee would have to react to such a request. However he wanted to point out that as there was a variety of views and no consensus in the Committee, the panel would not be in a better position to come up with a solution and, therefore, the Committee should consider whether that procedure would be more likely to produce a result than the present one.

19. The representative of the European Communities said that if the three United States questions had been put to set in motion a true conciliation procedure, he would draw the conclusion that the United States had now understood that everything was not either white or black, that there were not just primary products on the one hand and non-primary products on the other hand, but that there was also something intermediate. That was the first time, therefore, that the United States was seeking practical solutions through a conciliation procedure. That fact being acknowledged, he could reply to the first question that, as indicated by United States pasta producers, the general criterion was indeed 1.67, in other words, 1.67 kg. of wheat was needed to make 1 k.g. of pasta in the case of durum wheat imported from the United States; if other types of wheat were used, however, the conversion factor was very much lower and could be within a margin between 1.67 and 0.66. As to the second question, the general rule in the Community was that the refund was valid for the day of export. The reply to the third question was that in general the amount of the refund for the type of products concerned was fixed once a month, and it was a fact that Community operators had the possibility of advance fixing, the rule currently applied being the current month plus the five ensuing months.

20. The representative of the United States said that his delegation had always been and remained ready to enter into bilateral discussion with the European Community to seek an appropriate solution. Having gone through the conciliation process in the Committee it seemed that his delegation should be, and in fact it was, requesting the establishment of a panel. According to the provisions of the Code this request should not take place before the expiration of a thirty-day period but he would not like to ask for a special meeting of the Committee only to set up a panel. In order to ensure the

efficient functioning of the Committee he proposed allowing the parties to continue their efforts during the remaining period and if there was no satisfactory solution, to give to the Chairman the authority to set up a panel and decide on its composition and terms of reference.

21. The representative of the European Communities recalled that several delegations had said that the Code was in its very early days, that it was premature to take final views and that the Committee should be pragmatic. The Committee was confronted with a very difficult case and more reflection was certainly needed on how to proceed and whether a panel would be the only, and the best, way. Such a panel would be faced with two completely contradictory submissions and he did not think that the Committee would escape further discussion of this issue following the work of the panel. Referring to the dispute settlement procedure in the Code, he said that part of the difficulty of operating it was that the United States had a very rigid and mechanical attitude to this procedure which resulted from the way that they had carried the Code procedure into their internal legislation. One of the results was that there was no flexibility even in very difficult cases which required a lot of reflection and negotiations. Another result was that the Committee was hardly able to play the rôle in the dispute resolution assigned to it by the Agreement. He felt that this was a serious issue which should be tackled in the context of the Ministerial Meeting. As to the present case he did not see any reason why it would not be an efficient way for the Committee to establish a working party to look into some of the points raised in greater detail and to agree what provisions would be applied. He said that his delegation did not intend to undermine the dispute settlement procedure but was attempting to resolve a problem. The Committee should reflect on what would be the best way to resolve the problem. It was perfectly clear that the United States had a right to ask for a panel once the conciliation period expired. It was also clear that it should be done in a formal way but in the meantime the United States should reflect on all the comments made in the Committee and decide, in the light of the discussion, whether they really wanted a panel. Once a formal request has been made the Committee could reflect on whether it would be the best way to proceed. The provisions of the Code were clear in that once there was a request, a panel should be established but there was also a footnote, and it could be that the Committee would consider that it was not a case in which it was reasonable to ask a panel to do work which, inevitably, in the end would come back to the Committee.

22. The representative of the United States said that it was true that the US domestic law contained a rigid procedure for cases which ended up in a dispute settlement procedure in the GATT. It was done in order to make the US domestic procedures align, as closely as possible, to the requirements of the various Codes. He could not agree that the procedures were being pushed and if someone found himself in a kind of rush, it was primarily because it had taken the European Community two months to even answer the US request for consultations. On the question of procedures he said that his delegation would reflect and would come back to the Committee once the conciliation period was over.

23. The Chairman said that all parties should reflect and report back to their governments on the discussion at this meeting. The Committee would meet again once the conciliation period was over to consider how to proceed further in the light of requests which might be made at that time. The Committee agreed to meet on 7 April 1982.