

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/M/29

14 November 1985

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD ON 4 OCTOBER 1985

Chairman: Mr. J.Y. Sun (Korea)

1. The Committee held a special meeting on 4 October 1985 in pursuance of a request by the EEC. The purpose of the meeting was to consider matters relating to the terms of reference of the panel established at the 15 February meeting of the Committee concerning the definition of "industry" for wine and grape products contained in the United States Trade and Tariff Act of 1984 (SCM/M/25, paragraph 17).

2. The representative of the EEC recalled the background of the case which had started after the United States had modified its anti-dumping and countervailing duty legislation to allow grape producers to request the initiation of proceedings against wine imports. In the view of the EEC, a request for an investigation could, under the Code, only be introduced by producers of the like product, in this case the wine and not the grape producers. The amendment to the US legislation constituted therefore a clear and unprecedented departure from the Code rules. As consultations under Article 16 and the conciliation process under Article 17 had failed, his delegation had requested that the Committee establish a Panel. Since the establishment of the Panel on 15 February 1985, the Chairman had held consultations with the parties to determine the Panel's terms of reference, but these efforts had met with no success. Although the Code required that a Panel start to work within thirty days, seven months had elapsed since its establishment by the Committee. The EEC had suggested clear terms of reference for the Panel, namely, to examine whether the particular provision in the US legislation constituted a deviation from the Code. In the meantime a formal complaint had been introduced by the United States grape growers and the Department of Commerce had decided to open an investigation against EEC imports, despite the fact there was no evidence of support for the petition by a major proportion of the producers of the like product (wine). The very complex investigation machinery had been set in motion, and long and complicated questionnaires were being sent to all wine exporters in the EEC. It was therefore urgent that an agreement be reached on the terms of reference of the Panel.

3. The representative of the United States said that his delegation was concerned about finding itself before a Panel which would be addressing abstract issues. This concern was reflected in a proposal presented to the EEC in mid-summer which contained agreement on the terms of reference which the EEC had put forward in SCM/60 and to which an additional paragraph would be added to make it clear that the Panel would first decide whether it should

address these issues in the abstract or whether some action by the US authorities had to be taken before it could examine the case. This formula would have required the Panel to report back to the Committee so that the latter could proceed accordingly. However, these terms of reference had been rejected by the Community.

4. His delegation recognized that the recent filing of the countervailing duty complaint in the United States had changed the nature of the debate and that normal Code procedures contemplated the possibility of Panel examination of a countervailing duty issue once a case had been initiated even though no countervailing duty had yet been imposed. His delegation could accept the terms of reference originally proposed by the EEC; however, the key issue was whether the application of the law in a countervailing duty case resulted in an impairment of the EEC's rights. Therefore, an understanding should be found on the following points: first, if the countervailing duty case which was currently pending was terminated without a countervailing duty being imposed, the complaint would be withdrawn; second, if the Panel concluded that the US law was not in conformity with US obligations under the Code, the Panel should go on to address the question of whether the law had a negative effect on the EEC in the final outcome of a countervailing duty case. If no countervailing duty was imposed or if a countervailing duty was imposed but it was evident that the finding of the US International Trade Commission (USITC) was not affected by the change in the law, i.e. that wine producers in the United States were materially injured by imports of subsidized wine whether or not there was any indication of injury to grape growers, then the Panel should conclude that EEC rights were not impaired by the change in this law. The third point which should be understood was that if the Panel began its work at this stage, it should be recognized that until the USITC had made a decision, the US delegation could not make any statements as to the interpretation and application of the law, because the USITC was not subject to control by the executive branch. In summary, the US position did not mean that the Panel examination had to await a final decision in the countervailing duty case; the Panel could start its work now, on the basis of the EEC's proposed terms of reference, but with the understandings enumerated.

5. The representative of the EEC recalled the discussions at previous Committee meetings on the nature of the present dispute and the fact that the Committee had, in spite of the absence of a specific complaint, decided to set up a Panel which should have started work within thirty days of its instigation. The issue was no longer an abstract one since an investigation had indeed been initiated and under US legislation this could not be stopped. With respect to the US point that if the present investigation were to be terminated without the imposition of a countervailing duty order then the Panel should terminate its work, he wondered what would happen if the complainant decided to appeal this decision to the courts and the negative decision was overruled. Would this signify that the Panel should restart its work? An alternative approach would be to turn round the first condition proposed by the US and agree that the Panel would cease to function only if the case had been terminated definitively. In this context he reminded the Committee that the fact that the legislation would expire in September 1986 did not mean that it could not be extended. In his view the only realistic solution was for the Panel to start its work straight away.

6. The representative of Chile wondered whether legislators in any particular country had to consult the Code before introducing a general legislation. Maybe a complaint should only be initiated if the actual implementation of a legislation was at variance with the Code. His comments did not prejudice the position of any party and should be interpreted only as a general question.

7. The representative of Spain stated that the position of his authorities was clearly reflected in documents SCM/M/23 and 25. He reiterated the concern of his delegation on the unsatisfactory results of the dispute settlement process and the non-fulfilment of Article 18:2. In his opinion the subject of the dispute was not an abstract matter because the simple adoption of a legislation could have a restrictive effect on imports. Furthermore, there was the question of non-fulfilment of Article 19:5(a) which required signatories to ensure the conformity of their laws, regulations and administrative procedures with the provisions of the Code. This case should be decided without delay in the interest of the credibility of the Code and the GATT.

8. The representative of Canada noted that although his authorities believed in establishing panels only after a concrete trade action had been taken, he had supported the EEC request. It was regrettable that the terms of reference had not yet been agreed upon. In view of the possible implications of this situation, he urged both parties to resolve the matter as soon as possible.

9. The representative of Japan recalled his delegation's support for the EEC request and the importance of an effective dispute settlement mechanism. He invited the parties to the dispute to find a mutually satisfactory solution.

10. The representative of Switzerland agreed with the views of the previous speakers. He also wondered whether, in the future, the Committee could set a deadline for determining the terms of reference of a Panel and whether consultations should be broadened to include other signatories. The fact that a case had been initiated against legislation which, in the view of many signatories, was not in conformity with the Code was a very serious matter.

11. The representative of Sweden recalled that his delegation had supported the establishment of the Panel and stressed the importance it attributed to the good functioning of the dispute settlement procedure. He noted with satisfaction the US willingness to accept the EEC's terms of reference but wondered whether parties to a dispute were in a position to attach conditions to the work of a Panel. He insisted that the Panel's mandate should be determined without further delay.

12. The representative of the United States made it clear that his delegation was in no way objecting to the Panel examining the conformity of US law with the Code, but it had at the same time to take into account the interpretation and application of the pertinent provisions by the US authorities. Clearly, any understanding the parties might reach would have to take into account the possibility of an appeal of a negative determination. In any event, it was difficult to understand why, if the case was terminated and no countervailing duties were to be imposed on EEC wine, the EEC would wish to pursue the matter further. The US delegation was

therefore asking for an understanding from the EEC that the dispute settlement proceeding would be terminated at that stage; one could see how the existence of the law without a concrete trade action might contribute to EEC exporters' uncertainty and lead the EEC to seek a panel judgement against the United States, however, a negative determination in a real countervailing duty case would be far better protection for the EEC's position than a continuation of the Panel's examination.

13. The representative of Australia was of the view that in light of the comments made by the parties to the dispute there was some common ground upon which a solution could be based. It was a positive sign that the United States was prepared to accept the EEC's terms of reference so that the only outstanding issue was how to interpret the understanding proposed by the US. Article 18:1 only provided for the Panel to review the facts, and it was not incumbent upon the Committee to put conditions on the work of the Panel. The Committee might wish to explore the nature of this understanding as it could very well be that it was only a condition on which the US wished to set in motion the Panel process.

14. The representative of Austria reiterated the support of his authorities for the EEC's request. Austria was concerned about the fact that no agreement had been reached on the Panel's mandate and the implications that this had on the dispute settlement mechanism. It was imperative that agreement be reached so that the Panel could start its work immediately. He was hopeful that the United States was not putting conditions on the Panel's work in order to avoid reaching an agreement.

15. The representative of the EEC was surprised to hear the remarks made by the Chilean delegation, particularly because at the meeting held on 7 January 1985 Chile had supported, in very clear terms, the establishment of the Panel (SCM/M/23, paragraph 14). The EEC fully shared the views expressed by the previous delegations that the Panel should start its work straight away as otherwise a shadow would be cast on the dispute settlement procedure. In this context he recalled that the US itself had insisted on the smoother functioning of these procedures. For the EEC the provisions of Article 18 of the Code were clear. His delegation could not agree with the imposition of conditions upon the Panel. More importantly, there were no reasons to believe that the Panel would not be reasonable; its members would certainly take into consideration any relevant future developments in the United States. As to the concrete proposal made by the United States, an understanding to the effect that the Panel, in its work, would take into account any actual implementation of the US legislation, would be acceptable to his delegation.

16. The representative of the United States explained that the understanding his delegation was proposing was not expected to constrain in any way the work of the Panel, but to reach a common view with the EEC in the event that it became clear that no countervailing duty order was to be imposed on EEC wine in which case the EEC would not pursue the matter. His second understanding that in case the US law was not found to be in conformity with the Code, the Panel must go on to address the question of whether the law had a negative effect in the final determination by the USITC, would indeed affect the Panel's work; however, this did not concern the question of whether the statute was in conformity with the Code, but only whether the existence of the statute had impaired EEC rights under the Code. In short,

it was essential that the Panel not only rule on the abstract question posed by the EEC but also resolve the issue of impairment because otherwise, if the Panel merely found in favour of the EEC, it would leave open a certain number of questions which related to the points raised in the proposed understandings.

17. The representative of Chile reiterated that in his previous intervention he was only asking a question of a general nature which did not prejudice anybody's position. Article 19:5 contained a clear reference to the implementation of laws ("aplicacion" in Spanish), so that a Panel could very well take this aspect into consideration. Chile had supported, and continued to support, the establishment of a Panel.

18. The representative of the EEC noted that there was no need to continue the debate because the Panel could itself address these questions; a Panel was composed of competent people conversant with GATT matters. The United States would be entitled to ask the Panel's view on a possible negative decision by the USITC. It went without saying that the Panel could also address the situation whereby material injury was found to exist concerning wine but not concerning grape producers, and nobody would prevent the United States from raising questions in this context. The Panel should start its work as soon as possible.

19. The representative of Australia said that it was clear that the Panel could take the actual implementation of the US legislation into account. There was agreement that no conditions could be imposed on the Panel's work and that any understanding would be between the United States and the EEC. He thought that the EEC's terms of reference with the inclusion of language regarding the implementation of the legislation might be a compromise solution.

20. The representative of the United States found it difficult to understand why the EEC could not accept the first understanding proposed by his delegation.

21. The Chairman said that the matter referred to the Committee by the EEC (SCM/54) had been discussed at the meetings of 6 December 1984, 7 January and 15 February 1985. At the meeting of 15 February the US representative had strongly argued against establishing a panel until such time as a concrete trade action had been taken under the new legislation (SCM/M/25, paragraph 3). After discussion, the Committee had agreed with the EEC request and had established a Panel; the US delegation had not objected to this (SCM/M/25, paragraph 18). The Committee had also authorized the Chairman to decide, in consultation with interested delegations, on the Panel's composition and terms of reference. The US delegation had accepted this decision although it had considered that the Committee's decision had set a precedent having a number of implications (SCM/M/25, paragraph 19). The US statement, as well as statements from other delegations, showed that there was no doubt that the Panel had been established in order to examine the matter referred to the Committee by the EEC, and that the complaint by the EEC was directed against the US legislation. In spite of numerous consultations which had taken place since February, it had been impossible to reach an agreement on the terms of reference of the Panel. In this situation and in the interest of the credibility of the Code's dispute settlement procedure, the Chairman said that he felt he had to decide, on the basis of

the Committee's decision at its February 1985 meeting, on the terms of reference. He added that the time-period required by the Code for the Panel to submit its findings to the Committee was sixty days (Article 18:2). Given the divergent views on the terms of reference, the Committee had to go back to the Code. The Code was clear on when and how a Panel should be established and what it should do. According to Article 18:1 a panel "shall review the facts of the matter, and, in the light of such facts, shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute ...". The Chairman further said that when he had been elected Chairman, he had told the Committee that the provisions of the Code would be the ultimate guidance in his decisions. Taking into account the discussion at the meeting of 15 February 1985 which had led to the establishment of the Panel and the valid points just raised by various delegations, and acting in conformity with Article 18:1 of the Code, he decided that the terms of reference of the Panel established by the Committee would be as follows:

"To review the facts of the matter referred to the Committee by the EEC in SCM/54 and, in 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 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade."

The Chairman furthermore said that it was his understanding that the Panel would, in its work, take into account any actual implementation of the legislation in question by the competent authorities of the United States. As to the composition of the Panel, it would be chaired by Mr. Magnus Lemmel, former Chairman of the Anti-Dumping Committee, now with private industry in Sweden. Members were Mr. Darry Salim, member of the Textiles Surveillance Body of the GATT (from Indonesia) and Mr. H. van Tuinen, retired senior GATT official.

22. The representative of the United States said that although the Committee had authorized the Chairman to decide on the terms of reference in consultation with the interested parties (SCM/M/25), it had not authorized him to decide on his own without the agreement of the parties. The decision taken by the Chairman was unorthodox, and he therefore reserved his delegation's right to consider the US position in the Agreement and whether or not another meeting of the Committee should be convened.

23. The representative of Canada considered that Article 18:1 of the Code provided for the establishment of a panel on request but it did not provide a basis for the Chairman to impose terms of reference. The same was true under the Framework Agreement, and procedures regarding panels in general did not envisage this course of action. His delegation could not endorse the Chairman's decision.

24. The Chairman replied that he had been requested to consult with the interested delegations but his decision had not been conditioned upon their full agreement. He had consulted and had tried, to the extent possible, to take into account the views expressed by the parties. Delegations would note that whereas the Code required the Chairman to secure the agreement of the signatories concerned on the composition of the Panel (Article 18:3), it did not provide for such an agreement on the terms of reference. This was

logical because the Code itself established the terms of reference (Article 18:1) which, of course, could be modified by common agreement, but if such an agreement could not be arrived at, then Article 18:1 was the ultimate recourse. His decision, based on Article 18:1, had not been an easy one but it was indispensable if the dispute settlement procedures of the Code were not to be destroyed completely.

25. The representative of Indonesia said that her delegation attached great importance to the dispute settlement procedures contained in GATT and in the Codes. Being aware that the Chairman had taken his decision along the lines of Article 18:1 and that the dispute settlement mechanism was at stake, she fully supported the Chairman's action.

26. The representative of the EEC supported the terms of reference outlined by the Chairman. As the US delegation had raised difficult and important legal questions on the interpretation of the dispute settlement procedures of the Code, the EEC would also have to reserve its position.

27. The representative of Japan said that it was not certain whether the Chairman's action represented an imposition. However, Japan supported his efforts to reach agreement and also his decision.

28. The Chairman, while recalling his obligations under the Code, said that he wished to repeat that at its 15 February 1985 meeting the Committee had clearly "authorized the Chairman to decide, in consultation with interested delegations, on its composition and terms of reference" (SCM/M/25, paragraph 17).