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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 1 AUGUST 1986

Chairman: Mr. E.O. Rosselli (Uruguay)

1. The Committee held a special meeting on 1 August 1986.

2. The Chairman recalled that at its meeting held on 14 July 1986 the Committee had agreed to hold another special meeting, if so requested, to consider a possible request by Canada for the establishment of a panel on the matter referred to the Committee by Canada in document SCM/73 (initiation by the United States of a countervailing duty investigation on softwood lumber from Canada). Such a request had been received on 25 July 1986 and had been circulated in document SCM/76. In addition, the Chairman had received a request from the Commission of the European Communities that the Committee review at this meeting the matter referred by the EEC for conciliation under Article 17:1 of the Agreement. This request for conciliation concerned a countervailing duty investigation carried out by Canada on boneless manufacturing beef from the EEC (see document SCM/75).

A. Request by Canada for the Establishment of a Panel under Article 18:1 of the Agreement

3. The representative of Canada said that several attempts by his authorities to resolve the matter referred to the Committee in SCM/73 on a bilateral basis with the United States had not resulted in a resolution of the problem. On 4 June 1986 (i.e. prior to the initiation of the countervailing duty investigation) consultations had taken place under Article 3:1 of the Agreement between Canada and the United States. On 26 June 1986 Canada had referred the matter to the Committee for conciliation under Article 17 of the Agreement. However, the subsequent special meeting of the Committee held on 14 July 1986 had not led to any resolution of the problem. Accordingly, his delegation requested the Committee to establish a panel to review the facts raised in document SCM/73.

4. The representative of Canada reminded the Committee of certain points that had been raised by Canada at the meeting held on 14 July 1986. Firstly, the initiation by the United States of a countervailing duty investigation of Canadian timber pricing policies was in violation of the obligations of the United States under Article 2:1 of the Agreement. His authorities believed that the CONTRACTING PARTIES to the General Agreement had never intended the countervailing duty remedy provided for in Article VI of the General Agreement to cover natural resource pricing policies. To countervail against Canadian timber pricing policies would thus constitute an abuse of the remedy provided for in Article VI of the General Agreement.

Secondly, the timber pricing policies concerned had been the subject of a previous countervailing duty investigation by the United States authorities in 1982-1983 and had been found conclusively not to constitute a subsidy. As there had been no changes of relevance in either the United States countervailing duty legislation or the Canadian timber pricing practices since that time, one could only conclude that the United States had initiated the new investigation without sufficient evidence of the existence of a subsidy. The representative of Canada concluded by requesting that the Committee agree to the establishment of a panel under Article 18 of the Agreement and, as customary, authorize the Chairman or Vice-Chairman of the Committee to determine, in consultation with the parties concerned, its terms of reference and composition.

5. The representative of the United States said that the basic contention of the Canadian delegation seemed to be that, by initiating a countervailing duty investigation on softwood lumber products from Canada, the United States had not abided by its obligations under Article 2:1 of the Agreement, which requires inter alia that a request to open a countervailing duty investigation include sufficient evidence of the existence of a subsidy. The Canadian delegation had in fact argued that a petition which contradicted a previous negative determination could not show any evidence of subsidization. He agreed that the re-initiation of a countervailing duty investigation of programmes which previously had been determined not to constitute countervailable subsidies was not appropriate in all cases and that, where administering authorities were requested to do so, the burden of proof put on petitioners should perhaps be greater. Nevertheless, changed circumstances could arise and new facts or allegations could be presented which could justify a decision to open a new investigation on the basis that there was sufficient evidence of a subsidy. In this respect he pointed out that nothing in the text of Article 2:1 of the Agreement prohibited the re-initiation of a countervailing duty investigation after a previous negative finding. Furthermore, there was no multilaterally agreed definition of a subsidy which would preclude the United States from reinvestigating whether stumpage constituted a subsidy. Therefore, while he could understand the concern of the Canadian delegation, he considered there was no basis for the Canadian request to establish a panel. Referring to footnote 34 ad Article 17:1 of the Agreement, he suggested that there was no reasonable basis supporting the allegations made by Canada.

6. The representative of the United States further expressed his doubts as to the rôle which a panel could play in this particular case. He wondered whether the panel would perhaps have to examine the contents of the petition filed by the United States softwood lumber producers and compare this petition with a sample of other petitions presented to the United States authorities in order to determine whether the petition did in fact contain sufficient evidence of a subsidy. He also doubted whether this case was even ripe for a panel. In this connection he said that although the Agreement did not contain a counterpart to Article 15:3 of the Anti-Dumping Code, there were many parallels between anti-dumping and countervailing duty laws and procedures which could justify the application to countervailing duty cases of the principle contained in Article 15:3 of the Anti-Dumping Code.

7. In reply to the remarks made by the representative of the United States concerning the timing of the request for the establishment of a panel, the representative of Canada stated that the mere initiation of a countervailing duty investigation by the United States was already causing great difficulties for the Canadian softwood lumber industry. In this respect he pointed to the high legal costs involved in the countervailing duty proceedings and the climate of uncertainty created by the investigation which adversely affected decisions on production and investment within the Canadian softwood lumber industry. There was therefore no need to wait for a preliminary determination before proceeding with the establishment of a panel. He recalled that in the dispute between the EEC and the United States regarding the definition of industry in the case of wine and grape products, the Committee had established a panel well before a countervailing duty determination had been made by the United States authorities.

8. The representative of the EEC said that there was a second item on the agenda of the meeting of the Committee relating to certain problems his delegation had with Canada. However, in the light of one of the provisions of the Understanding Regarding Notification, Consultation, Dispute Settlement And Surveillance, which required that complaints and counter-complaints in regard to distinct matters should not be linked, his delegation was prepared to support the Canadian request for the establishment of a panel. He recalled that at the previous special meeting of the Committee his delegation had already expressed its views on the re-initiation of a countervailing duty investigation of programmes which previously had been determined not to constitute countervailable subsidies. With respect to the view expressed by the representative of the United States concerning the timing of the Canadian request for the establishment of a panel, he said that Article 15:3 of the Anti-Dumping Code was irrelevant in the context of a dispute settlement procedure under the Agreement on Subsidies and Countervailing Measures. The fact that the Agreement, which had been negotiated in parallel with the Anti-Dumping Code, did not contain a provision similar to Article 15:3 of the Anti-Dumping Code made it clear that signatories of the Agreement could request that a panel be established before a final countervailing duty determination had been made.

9. The representative of the United States noted that in his first statement the representative of Canada had requested that the Committee establish a panel "and as customary also authorize the Chairman or Vice-Chairman to determine in consultation with the parties concerned the terms of reference and panel composition." He recalled that when the Committee had established the Wine Panel, it had also authorized the Chairman to determine the terms of reference in consultation with the parties concerned; eventually, however, those terms of reference had been decided by the Chairman of the Committee, in consultation with but not with the agreement of both parties to that dispute. He said that the Committee should reach an understanding on this issue before taking a decision on the Canadian request.

10. The Chairman proposed that, in accordance with Article 18:1 of the Agreement, the Committee establish a panel to review the facts of the matter referred to the Committee by Canada in SCM/73 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 Agreement on Subsidies and Countervailing Measures.

11. The representatives of Canada and of the United States indicated that before they could agree definitively to the terms of reference proposed by the Chairman, they had to consult with their authorities.

12. The Chairman then proposed that the Committee authorise him to resolve this matter in consultation with both parties and on the basis of the mandate just put forward. It was so agreed.

13. The Chairman further proposed that the Committee authorise him to decide, after securing the agreement of the signatories concerned, on the composition of the panel. It was so agreed.

B. Request by the EEC for Conciliation under Article 17 of the Agreement

14. The representative of the EEC introduced document SCM/75 which contained a request for conciliation by his delegation with respect to a countervailing duty investigation carried out by the Canadian authorities on imports of boneless manufacturing beef from the EEC . He said that bilateral consultations had failed to resolve the problem. The EEC had decided to request conciliation not just only because of the harassment of EEC exporters of boneless beef caused by the Canadian procedures but above all because this case involved a violation of elementary and fundamental rules of the Agreement. He briefly reiterated the views of the EEC concerning the inconsistency of the Canadian measures with the Agreement. Firstly, Canada had acted in violation of the requirement of the Agreement that a countervailing duty investigation be initiated upon a petition filed by or on behalf of the industry affected, which was defined in the Agreement as the domestic producers of the like product. Under this standard the Canadian Cattlemen's Association (CCA) had no standing to file a petition against imports of boneless manufacturing beef because they were not producing the like product. Secondly, the Canadian authorities had determined that imports of boneless manufacturing beef from the Community had caused injury to Canadian cattlemen. This was also inconsistent with the Agreement which requires that a determination of injury be made in respect of a domestic industry, defined in terms of the domestic producers of the like product. He recalled that the same issues had been raised in the dispute between the EEC and the United States concerning the United States Wine Equity Act. He stressed that the request for conciliation by the EEC was limited to these two issues but that this did not mean that the EEC considered that other aspects of the procedure followed and the findings made by the Canadian authorities in this case were fully consistent with the provisions of the Agreement. The representative of the EEC concluded by urging the Canadian authorities to take appropriate measures to ensure that a situation would prevail which would be consistent with the Agreement, and to redress the harm that had been done.

15. The representative of Canada said he did not question the right of the EEC to raise this problem in the Committee. However, as the Canadian Import Tribunal (CIT) still had to publish its Statement of Reasons for the findings it had made, his comments could only be of a preliminary nature. He said it

had been determined both by the Federal Court of Canada as well as by the CIT that the CCA had standing to file a countervailing duty petition with respect to imports of boneless manufacturing beef. This determination was based on the consideration that the production of beef involved a continuous sequential production process, commencing with live cattle and ending with beef, which was characterised by a high degree of functional dedication and economic dependence. The CIT had also determined that the CCA represented a major proportion of the producers in Canada of boneless manufacturing beef. These findings, which were consistent with previous administrative decisions in the same case, were also applicable to the question of the definition of the domestic industry for the purpose of the injury determination. He reiterated that the CIT would shortly publish its Statement of Reasons and expressed the hope that the representatives of the EEC would look again at this issue in the light of that Statement.

16. The representative of the United States said the Committee should reflect on the request for conciliation made by the EEC in the light of footnote 34 to Article 17:1 of the Agreement. In his view there was no reasonable basis to support the allegations made by the EEC. The issue raised by the EEC once again pointed out the special nature of the production process of certain agricultural products, a problem that had been discussed in the Committee on several previous occasions, e.g. in the context of the dispute between the EEC and the United States concerning the definition of domestic industry in the case of wine and grape products and in the context of a countervailing duty case involving live swine and pork products. This was a complicated and important issue and he reiterated the view expressed on previous occasions by his delegation that the Committee should clarify the interpretation and application of the Agreement as regards certain agricultural products the producers of which could be affected by trade of the product concerned in a processed form. In his mind there could be no question that imports of subsidized beef had the potential for causing injury to cattlemen.

17. The representative of the EEC said it was not relevant that the Statement of Reasons of the CIT was not yet available; the CIT had already made its finding concerning the issue of standing and the definition of domestic industry for the purpose of the determination of injury, and it was clear that its conclusions with respect to these two basic issues were not in conformity with the provisions of the Agreement. Concerning the views expressed by the representatives of Canada and the United States on the specific nature of the production process of certain agricultural goods he said that the law as it stood was quite clear in requiring that the filing of a countervailing duty petition and the determination of injury to a domestic industry could only involve domestic producers of the like product. While it was perhaps possible that producers of an agricultural product could suffer injury from imports of that product in a processed form, this was not covered by the existing provisions of the Agreement. He expressed his serious concerns about the implications of the views taken by the representative of Canada and the United States which could, e.g., justify the filing of a countervailing duty petition by steel producers against imports of cars.

18. The representative of Canada said he could not accept the contention that the decisions of the CIT and the Federal Court of Canada were inconsistent with the Agreement, and he reiterated that it was appropriate to consider cattlemen as representing the producers of beef.

19. The representative of the United States said that the relevant question was not whether cattle was like beef but whether the cattleman was a producer of beef. He further considered as irrelevant the examples mentioned by the representative of the EEC of producers of inputs of industrial products filing countervailing duty petitions against imports of finished products. In the case of certain agricultural products there were specific and unique linkages between the different stages of the production process involving, as noted by the CIT, a high degree of functional and economic dependence; such linkages did not exist in the industrial sector.

20. The representative of Sweden said that he was not in a position to express a definitive view on the case brought before the Committee by the EEC. This issue raised several important questions which needed further reflection and he proposed that the Committee revert to this problem at a later stage.

21. The representative of Australia stated it was unclear on what basis the Committee could contribute to conciliation between the two parties concerned. It seemed to him that the EEC's view was that cattlemen could never be producers of beef, while other signatories seemed to argue that cattlemen were always producers of beef. One important element that should be taken into account in the considerations of the Committee on this issue concerned the extent to which the production in Canada of beef was taking place in vertically integrated firms.

22. The representative of the EEC said that the point made by the representative of Australia was interesting but not relevant to the case before the Committee as the CIT had already made it clear that the CCA was only producing cattle. Thus, the type of fully integrated production process referred to by the delegate of Australia did not exist in this case.

23. The Chairman said the Committee had heard the different views expressed on the matter and encouraged the signatories involved to intensify their efforts to develop a mutually acceptable solution, consistent with the Agreement.

24. The representative of the EEC said he was looking forward to the proposals Canada might want to make in the context of the conciliation procedure. However, the EEC reserved the right to request the establishment of a panel and he understood that this right could be exercised as from the 30th day after the request for conciliation had been made.

25. The representative of the United States reiterated that there was no reasonable basis supporting the allegations of the EEC in its dispute with Canada. The United States would therefore, at this stage, not support the establishment of a panel.

26. The Committee took note of the statements made by the representatives of the EEC and the United States.