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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 14 JULY 1986

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

1. The Committee held a special meeting on 14 July 1986. The purpose of the meeting was to consider the request by Canada for conciliation under Article 17 of the Agreement on Subsidies and Countervailing Measures ("the Agreement"). This request for conciliation concerned the decision taken by the United States on 6 June 1986 to open a countervailing duty investigation into softwood lumber products from Canada (see document SCM/73).

2. The representative of Canada said that the decision by the United States to open an investigation of Canadian softwood lumber constituted a violation of the obligations of the United States under Article 2:1 of the Agreement. The new investigation included products and timber pricing practices which had been the subject of a countervailing duty investigation as recently as 1983. In that investigation the United States authorities had come to the conclusion that these timber pricing practices did not constitute a subsidy. The United States International Trade Administration had found that the Canadian federal and provincial governments were "using methods of valuation that are a reasonable means of valuing their timber". The final determination in that case had also stated that "in view of its general availability without governmental limitation and its use by wide-ranging and diverse industries, we determine that stumpage is not provided to a specific group of industries". Given that no changes had taken place in the Canadian stumpage programmes or in the relevant United States' law, one could only conclude that in this instance the United States had initiated a countervailing duty investigation without sufficient evidence of the existence of a subsidy. This was not in conformity with Article 2:1 of the agreement.

3. The representative of Canada further said that this case raised several fundamental issues that were of interest to all signatories. Firstly, repeated investigations of the same products for the same measures constituted a harassment of exports. The process of defending oneself was very costly and the very existence of an investigation created a climate of uncertainty which had harmful effects on investment in the industry concerned. Signatories should not be permitted to invoke the Agreement as cover for this type of harassment. Secondly, the initiation of an investigation of Canadian softwood lumber gave rise to doubts as to the continued adherence by the United States to the principle of specificity which was a generally agreed standard providing an important degree of

discipline on the use of countervailing duties. The launching of a second investigation into programmes which previously had been found to be generally available meant that the United States authorities were allowing for the possibility of reversing that finding. Such a development constituted a significant unilateral departure from a generally agreed approach to this issue. A third issue was the question whether countervailing duties could legitimately be used as a means to offset comparative advantages arising from natural resource endowments. All contracting parties had an interest in ensuring that the sovereign right of countries to develop natural resources based on a general comparative advantage continued to be recognised. One should be alerted to the possibility that one country might try to offset other countries' comparative advantages through an improper use of the countervailing duty procedure.

4. The representative of Canada concluded by saying that the United States should immediately take corrective action and at the very least should remove Canadian stumpage programmes from the scope of the current investigation on the grounds that these programmes had already been found not to constitute a subsidy and that there was no new evidence to the contrary.

5. The representative of the United States welcomed the opportunity for conciliation under Article 17 of the Agreement. He believed that the meeting could serve a very useful purpose by clarifying the circumstances surrounding the decision by the United States to initiate a countervailing duty investigation of softwood lumber products from Canada and by showing that the action by the United States was consistent with the Agreement. He said that on 19 May 1986 the United States Department of Commerce had received a countervailing duty petition, filed by the Coalition for Fair Lumber Imports which presented detailed evidence concerning the petitioner's allegations that: (1) manufacturers, producers, and exporters of softwood lumber products in Canada were benefiting from subsidies, (2) imports of Canadian softwood lumber products were causing or threatening material injury to the United States softwood lumber industry, and (3) a causal link existed between imports and the alleged injury to the United States industry. He recalled that in a previous countervailing duty investigation of softwood lumber products from Canada the Commerce Department had found that certain programmes did not confer countervailable subsidies and that the remaining programmes were de minimis. In particular, the Commerce Department had determined that stumpage programmes were not provided to a specific industry or group of industries and therefore did not satisfy the specificity test. In view of its previous negative finding the Commerce Department had decided to apply a stricter standard in reviewing the new petition. In its official notice, the Department had stated: "Absent a change in the law, in order for the Department to reinitiate on a programme which has previously been found not to be countervailable the petitioner must submit new evidence, must show that there has been an evolution in the Department's interpretation of the countervailing duty law, or both." Applying this standard, the Commerce Department had decided not to reinitiate on two programmes: (1) equity infusion from REXFOR into Forex, Inc. and (2) Quebec SDI equity infusions. These programmes had been investigated previously and found not to constitute countervailable subsidies, and no new facts had been alleged. The Commerce Department had, however, decided to initiate an investigation of stumpage programmes maintained by the provincial governments of Alberta, British Columbia, Ontario and Quebec. The petition had alleged that the

provincial governments were selling the right to harvest softwood lumber at preferential rates. While stumpage programmes had been found not to confer countervailable subsidies in 1983, the petition had provided new factual allegations regarding the administration and use of provincial stumpage programmes and had further alleged that the decision in the first investigation was inconsistent with the principles of two more recent determinations by the Commerce Department. After examining the new allegations, the Department had concluded that the petition provided sufficient evidence of subsidization to justify initiation of a new investigation with respect to certain of the alleged subsidy programmes. He emphasized that the decision to initiate an investigation was only the first step in the United States countervailing duty procedure; his Government was committed to a fair investigation of the facts of the case and all parties concerned, including the Canadian softwood lumber industry, would have ample opportunities to make their views known to the United States authorities.

6. The representative of the United States stated that the issue that was before the Committee was whether the Agreement prohibited a signatory from investigating a programme that had previously been found not to be a subsidy. In this respect he referred to Article 2:1 of the Agreement which permitted the administering authorities to initiate a countervailing duty investigation if the industry submitted a petition containing sufficient evidence of subsidization, injury and a causal link. This relatively low standard reflected the fact that a decision to initiate merely commenced a countervailing duty investigation. It did not result in the imposition of countervailing duties or even of provisional measures which required a higher standard of proof. Nothing in Article 2:1 prohibited a signatory from reinitiating an investigation after a previous negative finding. A previous negative finding after investigation of any of these elements might create a legitimate question as to whether a new investigation was warranted, but did not preclude a new investigation in cases such as the present one where there was new factual evidence and reasons had been presented to doubt the legal theory or reasoning for the earlier finding. Although Article 2:1 did not prohibit reinvestigation of a previous negative finding, the United States readily admitted that reinvestigation was not appropriate in all circumstances. In many situations, the existence of a prior negative finding and the lack of any changed circumstances would eliminate the need for a new investigation. These considerations had resulted in the decision of the United States authorities to dismiss two programmes. Nevertheless, the Commerce Department felt that the petition had alleged new facts regarding which industries were benefitting from stumpage programmes and had also alleged an evaluation of the legal principles used to decide the previous case. Under the circumstances, the United States' authorities concluded that the petition had met the burden of showing that review of the previous finding was appropriate.

7. The representative of the United States mentioned several provisions of the Agreement which actively encouraged signatories to review and examine previous findings. He noted that Article 4:9 provides: "The investigating authorities shall review the need for continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review." He also referred to Article 4:7 which explicitly encouraged an importing signatory to "review the need for continuation of any undertaking ...". He concluded that

if the Agreement encouraged the review and revocation of an existing countervailing duty, it followed that nothing in the Agreement precluded a review of a potentially outdated negative finding. Sound administration of the law and the principles on which the Agreement was based required review of potentially outdated decisions. In this regard he recalled that one of the objectives of the Agreement was to ensure that "relief is made available to producers adversely affected by the use of subsidies within an agreed framework of international rights and obligations." The United States government had an interest in ensuring that the United States domestic industries had a fair right to the countervailing duty procedure; this objective would be undermined if a new investigation were automatically barred whenever there had been a negative finding. With respect to the argument of the Canadian government that a petition which contradicts a previous negative finding cannot show any evidence of subsidization and therefore cannot meet the criteria of Article 2:1, he said that this argument did not control where the petition showed a sufficient change of circumstances to render the previous finding unapplicable. While administering authorities obviously attempted to find all pertinent facts and to apply appropriate legal principles in every case, it would be naive to assume that new facts would never emerge or to discount the possibility of human error. If, for example, the petition alleged new facts showing that crucial factual findings contained in the earlier finding were no longer valid or that the legal theories used to decide the previous case had changed, then a previous finding as to the absence of dumping, subsidization or injury might no longer control. Under these circumstances the authorities were justified in commencing a new investigation.

8. With regard to the argument of the Canadian government that the issue of natural resource pricing should be considered in a new round of trade negotiations, the representative of the United States stated that he could not agree that the possibility of further negotiations limited rights under existing provisions of the General Agreement and the Agreement on Subsidies and Countervailing Measures. Part I of the latter Agreement authorised the imposition of countervailing duties to offset the effects of subsidies and clearly encompassed domestic subsidies. Concerning the allegation of the Canadian government that, by initiating a new investigation of the stumpage programme, the United States was violating the principle of specificity, he said that United States domestic law obliged the Commerce Department to apply the principle of specificity in its investigations of domestic subsidies; his government had no intention to depart from that principle in this case. The intention of his government was to determine whether in fact the Canadian stumpage programmes conferred a sector-specific subsidy on Canadian timber producers.

9. The representative of the United States further denied that the initiation of a new investigation of Canadian softwood lumber constituted a form of harassment of exporters. He said that the petition contained new evidence concerning the existence of subsidy and injury; in addition, the petition had alleged that the interpretation of the law had changed. In view of this new evidence it was only fair to examine the administration of Canadian stumpage programmes more in detail. He reiterated that the decision to open the investigation was only the first step in the legal process and that his authorities were committed to a thorough and impartial investigation of the case.

10. The representative of the EEC made some observations as to the manner in which his authorities would handle a request to open a new investigation of programmes which previously had been found not to constitute countervailable subsidies. Firstly, he said that the Community would not re-open an investigation on the basis of a new administrative interpretation of the countervailing duty law. He also expressed doubts as to the argument of the United States according to which Article 4:7 and 4:9 of the Agreement could be interpreted as permitting the re-opening of an investigation in a case which previously had been terminated with a negative determination. Secondly, he addressed the question whether a substantive change in the information available to the petitioner could justify a re-opening of the case. In this respect the provisions of Article 2:1 should be strictly observed and the new evidence submitted by the petitioner should in itself be sufficient to justify the initiation of a new investigation. Finally, he reiterated the Community's long-standing position that generally available programmes could not constitute countervailable subsidies. He regretted that the Committee had not yet adopted the guidelines on the application of the principle of specificity.

11. The representative of India requested clarification on a number of issues. Firstly, he asked whether existing United States domestic countervailing duty law obliged the investigating authorities to open an investigation automatically whenever a petition had been filed by the relevant domestic industry, or whether the law left some measure of discretion to the authorities. In particular, he wished to know whether the relevant authorities could decide not to conduct an investigation of a programme if that programme had been the subject of a previous investigation which had been terminated with a negative finding and if there existed prima facie evidence that no changes had occurred in that programme. Secondly, he asked whether the United States intended to examine the Canadian stumpage programmes in the light of the principles contained in the draft guidelines on specificity. Thirdly, he asked whether the United States had already made a preliminary finding in this case.

12. In reply to the points raised by the representative of the EEC and by the representative of India, the representative of the United States said that the relevant question in this case was whether there was sufficient evidence to justify the initiation of an investigation. He agreed that the initiation of a second investigation would not be appropriate if the request for such an investigation did not contain evidence as to changed circumstances or a changed interpretation of the law. However, in this particular case the United States authorities had concluded that there was sufficient evidence of changed circumstances; consequently, and as a matter of discretion, they had decided to conduct a new investigation. With respect to the issue of general availability he stated that the United States had no intention to depart from the principle of specificity as contained in the draft guidelines that were still pending in the Committee. The United States had applied this principle consistently for the past five years and his government saw this concept of specificity as the most important element of the definition of a domestic subsidy. Although the United States had, for political reasons, not been in a position to agree to the adoption of the draft guidelines on specificity, it was applying this principle in practice. Finally, he stated that the United States International Trade Commission had already made a unanimous preliminary determination of injury. As the case

had been designated as extraordinarily complicated, the Commerce Department's preliminary determination was due no later than 16 October 1986; the final determination by the Commerce Department was due no later than 30 December 1986. If the Commerce Department's final determination would be affirmative, the USITC would issue its final determination with respect to injury no later than 23 February 1987.

13. The representative of Canada emphasized that Canada was not disputing the right of signatories to re-open an investigation. However, her government contested that in this case sufficient new evidence existed to justify a new investigation, especially as regards the stumpage programmes. She reiterated that no changes had occurred in Canadian stumpage practices or in the relevant United States law since the investigation conducted in 1982-1983. With respect to the issue of the changed interpretation of the countervailing duty law by the United States authorities, she assumed that this change concerned the interpretation of the concept of general availability. In her view there was an international consensus that the determination of a countervailable subsidy rested on (1) specificity and (2) a financial contribution by the government concerned. She reiterated that in the previous investigation of Canadian lumber the United States had found that the provincial governments "were using methods of valuation that are a reasonable means of valuing their timber." No evidence had been presented to demonstrate that any change had occurred in these methods of valuation and there was therefore no reason to suppose that the current Canadian lumber pricing practices involved a financial contribution by a government.

14. The representative of the EEC emphasized that, while the existence of sufficient new evidence within the meaning of Article 2:1 of the Agreement could provide a justification for the re-opening of an investigation which previously had been terminated with a negative finding, a change in the interpretation of the law by the investigating authorities would in itself not be a sufficient reason to re-initiate the investigation. In this context he referred to the " Preferentiality Appendix" that had been published by the United States Commerce Department in April 1986 (Carbon Black from Mexico; Preliminary Results of Countervailing Duty Administrative Review, 51 FR 13269) and said that his authorities would not re-open a case only on the basis of a change in the administrative interpretation of the countervailing duty law.

15. The representative of the United States interpreted the remarks made by the representatives of Canada and the EEC as implying that there was agreement that a re-opening of a case which had been closed with a negative finding could be appropriate if there was sufficient evidence of changed circumstances. If one accepted this proposition, the thrust of the Canadian complaint had to be that the petition filed by the United States softwood lumber industry did not contain sufficient new evidence warranting a new investigation. Therefore, Canada was in fact asking the Committee to review the judgement reached by the United States Commerce Department on the basis of the information contained in the petition; obviously, such a review would require an exhaustive examination of the petition by the Committee. Concerning the point made by the representative of the EEC that a mere change in administrative interpretation was not sufficient to reinitiate an investigation, he stated that the rules concerning subsidies and

countervailing measures were not necessarily fixed propositions as was illustrated by the work of the Committee in attempting to reach agreed interpretations of the rules of the Agreement. If a change occurred in the interpretation of the rules it was only logical to bring one's practice into conformity with the new interpretation. His authorities were now giving greater weight to certain elements in examining whether the specificity test had been met and it was only fair to ensure that prior decisions conformed to this new practice.

16. The representative of India asked whether his understanding was correct that the central question in this case was whether the United States domestic industry had submitted information containing sufficient evidence of changed circumstances warranting a new investigation. If so, he believed that the Committee would not be in a position to take a view on this issue unless it had the opportunity to examine the contents of the petition.

17. The representative of Canada said it was obvious that it would be difficult to find a solution to this problem prior to the expiration of the conciliation period. She proposed that the Committee authorise the Chairman to establish the terms of reference and membership of a panel to take account of the possibility that at the end of the conciliation period no solution had been found and that her government would request the establishment of a panel. She emphasised that she did not intend to circumvent normal procedures and that her government had not yet made a decision to request a panel upon expiration of the conciliation period. The purpose of her proposal was to avoid a pro forma meeting of the Committee in case her government should decide to request a panel.

18. The representative of the United States said that, while he understood the suggestion by the representative of Canada, he considered that it went beyond the nature of the conciliation phase of the current dispute. One should not rule out the possibility of reaching agreement when the conciliation process had just begun and he therefore preferred that the Committee would wait until the end of the thirty-day period to consider whether it would be appropriate to establish a panel.

19. The representative of Canada reiterated that the purpose of her proposal was to avoid an unnecessary meeting of the Committee. However, if the United States attached importance to such a meeting, she was prepared to drop her proposal on the condition that the Committee would establish a date for that meeting in the week of 28 July 1986.

20. The Chairman proposed that, subject to confirmation, the Committee would meet again in the week of 28 July 1986. It was so agreed.

21. The Chairman invited the signatories concerned to step up their efforts to find a mutually acceptable solution, consistent with the principles of the Agreement.