GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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Committee on Subsidies and Countervailing Measures

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# REQUEST FOR ESTABLISHMENT OF A PANEL UNDER ARTICLE 18:1 OF THE SUBSIDIES CODE

## Communication from the United States

The following communication, dated 8 July 1991, has been received by the Chairman from the United States Trade Representative.

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My authorities have instructed me to request under Article 17, paragraph 3 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the "Subsidies Agreement"), that the Committee establish a panel in accordance with the provisions of Article 18 of the Subsidies Agreement to consider a dispute between the United States and Canada. My Government is concerned that a March 1987 decision to impose countervailing duties on US exports of corn to Canada is inconsistent with Canada's obligations under the Subsidies Agreement.

The United States raised its concerns with Canada in regard to the inconsistency between Canada's determination and the Code requirements in the context of two formal consultations under the Subsidies Agreement - in 1987 and in June 1989 - as well as during the conciliation process of the Committee on Subsidies and Countervailing Measures, including at its meeting on 26-27 October 1989. In each instance, the responses of the Government of Canada to our questions concerning the Tribunal's decision did not allay our concerns that the decision - and an affirmance by the federal court of Canada - were not properly taken within the meaning of Article 6 of the Subsidies Agreement and could, if permitted to stand, set an erroneous and unfortunate precedent for future decisions in Canada and perhaps elsewhere.

Last December, the Supreme Court of Canada issued its affirmance of the federal court decision, thus effectively concluding the judicial review process within Canada. Accordingly, since the United States and Canada have failed to reach a mutually satisfactory resolution of the dispute during consultations and conciliation under the provisions of the Agreement, my Government now requests immediate establishment of a panel under the relevant provisions of the Agreement.

In March 1987, the Canadian Import Tribunal (which has since been renamed the Canadian International Trade Tribunal) issued an affirmative injury determination relating to production of grain corn in the United States which was found by Canadian authorities to benefit from countervailable subsidies. In issuing its determination, the Tribunal found that "the subsidization of US grain corn has caused and is causing material injury to Canadian corn producers." (emphasis supplied)

In reaching its conclusion, the Tribunal did not even mention the rôle of import volume, as Articles 2 and 6 of the Subsidies Agreement clearly require. To the contrary, the panel explicitly found that "other indicia of injury normally considered, such as increased imports and loss of sales and employment, are not present in this case because Canadian corn producers have accepted lower prices in order to maintain sales in the face of the potential inflow of low-priced US corn." In fact, the panel noted that counsel for the US exporters had pointed out that "US exports to Canada in recent years have been declining in both absolute tonnage and in percentage of the Canadian market supplied."

Indeed, the "essential question" that was addressed in the proceeding, the Tribunal wrote, was "whether the operation of the 1985 US Food Security Act ... was such as to cause prices in Canada to decline to levels judged to be of a material nature." A reading of the provisions of Article 6 of the Agreement makes clear that this does not meet the legal standard for determining material injury under the Agreement.

Moreover, it is notable that the investigation was initiated on the basis of a complaint in which the Canadian industry alleged not the presence of US imports and their effect on the market, but, rather, that there was a connection between prices in the US and world markets and prices in Canada. The petitioner emphasized: "the dominant factor in global corn trade is the United States."

The principal issue before the Tribunal in 1987, before the federal Court of Appeal and, most recently, before the Supreme Court of Canada, was the interpretation of Canada's countervailing duty laws as embodied in the Special Import Measures Act (known as "SIMA"). The majority of the Tribunal held that countervailing duties may be imposed under SIMA without the Tribunal finding a causal linkage between subsidized imports and injury to a domestic industry.

The Agreement's basic requirements with respect to a finding of material injury are simply stated in, inter alia, Article 6. There, the Agreement directs an investigating authority to "consider whether there has been a significant increase in subsidized imports". The administering authority is also directed to examine whether there has been significant price undercutting "by the subsidized imports" and whether "the effect of such imports" has been to suppress or depress prices in the domestic market. The Agreement nowhere states that investigating authorities should be guided by whether an alleged subsidy programme in the exporting country is "the dominant factor in global trade" in the commodity.

Thus, it is evident from the language of the Tribunal's decision that there was no finding that material injury had been caused by the subsidized imports, but rather by the existence of a foreign subsidy programme. Accordingly, my Government requests a panel to adjudicate a matter of legal interpretation under the Subsidies Agreement: namely, that the express language of the Agreement requires that material injury be caused by subsidized imports, and not simply by the existence of a foreign subsidy programme.

We ask that, consistent with the provisions of the Agreement, our request be considered and acted upon by the Committee at its next scheduled meeting. We also ask that a copy of this letter be circulated to the members of the Committee.