RESTRICTED

SCM/M/23
8 February 1985

Special Distribution

# GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

## MINUTES OF THE MEETING HELD ON 7 JANUARY 1985

Chairman: Mr. K. Kautzor-Schröder (GATT secretariat)

1. The Committee nominated Mr. K. Kautzor-Schröder (GATT secretariat) to chair this meeting as both the Chairman (Mr. H.S. Puri, India), and the Vice-Chairman (Mr. F. Laschinger, Canada) were not in Geneva.

2. The Chairman said that this meeting had been convened following a request made by the EEC under Article 17:1 of the Code. Its purpose was to review the matter referred to the Committee for conciliation under Article 17:1 of the Agreement by the EEC regarding the definition of industry concerning wine and grape products, contained in the US Trade and Tariff Act of 1984. The Committee had already had an opportunity to consult on this matter at its meeting of 6 December 1984 but no mutually acceptable solution had been reached at that meeting. The Chairman also said that the objective of the meeting should be for the Committee, through its good offices, to encourage the signatories involved to develop a mutually acceptable solution.

3. The Committee had before it two papers relating to this issue which had already been circulated for the meeting of 6 December 1984: (a) a note by the United States (SCM/1/Add.3/Suppl.1) concerning amendments to the definition of "domestic industry" contained in the Trade and Tariff Act of 1984 and (b) a communication from the EEC (SCM/54) which explained the EEC view on this matter.

4. The representative of the EEC referred to the double task the Committee was confronted with, namely, to review the facts involved, and to encourage signatories involved to develop a mutually acceptable solution. As to the first task, the facts were not disputed. The United States had amended its legislation so as to include grape growers within the definition of the wine industry, i.e. to allow the producers of an input (grapes) to be considered as an affected industry for the purposes of countervailing duty proceedings against imports of the processed product. Moreover, all signatories which had spoken at the consultation meeting, except the US delegation, had shared the EEC's opinion that the amendment to the US legislation was inconsistent with the Code; a large number of signatories had also voiced their concerns. As to the second task, at the consultation meeting his delegation had urged the US side to take all the necessary steps to bring its legislation into conformity with its international obligations or to ensure that the application of the legislation was not inconsistent with these obligations. The representative of the EEC further said that it was not for him to say how the latter could be achieved. He stressed that the conciliation exercise should be carried out in good faith and that the EEC expected concrete suggestions on the part of the US delegation.

5. The representative of the United States said that the underlying assumption of Article 17:1 was that there was a concrete trade action at issue that could lend itself to a pragmatic solution without prejudice to the legal position of the parties to the dispute concerning the Code rules. Her delegation had traditionally viewed conciliation this way, and solutions to any potential disputes were to be made without prejudicing either party's legal position. Her delegation did not believe that there was anything that this Committee could conciliate at the present time. In this so-called dispute there was no concrete trade action at issue; there was only an EEC allegation that the application of a particular provision of the US countervailing duty law was inconsistent with the Code. The fact was that the US law might never be applied, but if it were, it might not result in countervailing duties being assessed, especially because the standards for determining subsidization, injury and causation had remained unchanged. Thus, this case was a hypothetical one and not ripe for dispute settlement or for conciliation by traditional GATT standards. If the Committee decided otherwise, it must be absolutely clear that any signatory had a right to use the dispute settlement process in relation to another signatory's legislation which it considered inconsistent with the Code, even if that legislation had never been applied and might never be applied. The representative of the United States further said that in deciding to proceed to conciliation after only one meeting under Article 16:1, the Committee was setting a precedent for the circumvention of established dispute settlement procedures contained in the Code. As had been stated in December, the United States doubted that Article 16:1 was envisaged as meeting the requirements for "consultations" and, moreover, her delegation had never been asked by the EEC for bilateral consultations on this matter. The Code contained explicit consultation provisions in Article 3 to countervailing duties, and in Article 12 concerning subsidies. The Committee had now opened a third door in Article 16:1 for a case in which Article 3 consultations clearly would be appropriate if a request for a countervailing duty investigation were accepted. She would also add that the requirement that a countervailing duty petition at least be filed prior to consultations were held was hardly an onerous one and it tended to reduce the problems of hypothetical cases. The representative of the United States finally stressed that the present conciliation meeting was setting two precedents: one with respect to the utilization of the provision under Article 16:1, and the other with respect to the use of the conciliation process for a purely hypothetical situation, i.e. the mere existence of legislation which might never be applied.

6. The representative of the EEC referred to the fact that the Committee had taken the decision in December to proceed to conciliation. He disagreed with the US view that the case before the Committee was a hypothetical one because in international trade, the very existence of a certain legislation had a detrimental effect. Moreover, the credibility of the Agreement was at stake if signatories had to accept unilateral actions involving obvious departures from the rules of the Code until even greater damage had been done.

7. The representative of the United States said that she was not asking the Committee to overturn its decision taken in December but simply to note that a precedent was being set and that the case was not ripe for dispute settlement. She further stated that a provision in the Anti-Dumping Code, whereby the appropriate time for dealing with an issue was only after an anti-dumping duty had been assessed, could be relevant in the present

context. She denied that the US legislation was inconsistent with the Code and that its mere existence was having harmful effects, and expressed doubts about the usefulness of the present conciliation meeting.

8. The representative of the EEC replied that reference to Article 15 of the Anti-Dumping Code was irrelevant to the present discussion as no equivalent provision existed in the Subsidies Code; on the contrary, the inclusion of such requirement into the Anti-Dumping Code and its absence in the Subsidies Code underlined that such requirement did not exist in the latter. He disagreed with the point that the route the Committee had taken in using Article 16 was unorthodox. Moreover, there was no risk that the specific consultation provisions (Articles 3 and 12) would be circumvented, since the specific provisions were not designed to limit the application of Article 16 which provided for the opportunity to consult on any matter. As to the point that the Committee could not rule as to whether the US legislation was inconsistent with the Code, he would leave this matter open at this stage. However, it was clear that any signatory could voice his opinion and all signatories who had spoken at the last meeting, except the United States, had shared the EEC view that the pertinent legislation was inconsistent with the Code. As to the last US point, the EEC delegation was seeking conciliation which was the proper route to follow, and ultimately requesting the US to bring its legislation into line with the Code or to ensure that is application respected the international obligations. Concrete proposals on how to accomplish this had to come from the US delegation.

9. The representative of Austria said that if the Committee were to follow the views set forth by the United States, "like" and "unlike" products would be comparable; this was not consistent with the Code which the US had signed, and accepting the US law without any reaction was equivalent to altering the Code. He also asked what the US had done when other signatories had taken measures similar to that of the United States.

10. The representative of New Zealand stated that the purpose of consultation was to seek elucidation of US intentions. His concern therefore was not so much whether the US was or was not in breach of the Subsidies Code, but rather related to the need to obtain a correct interpretation of certain Code provisions. As a matter of principle, there was no reason why the Committee could not, in a case of this nature, make use of the dispute settlement provisions of the Code. However, it was very difficult how the specific issue in this case could be resolved in the absence of a countervailing duty action. As to the question of principle, Article 19:5(a) obliged governments to ensure the conformity of laws, regulations and administrative procedures with the provisions of the Code. Most of the Code provisions regarding consultation (Articles 3 and 12) were specifically case-oriented. However, Article 16:1 made it explicit that the Committee "... shall afford signatories the opportunity of consulting on any matters relating to the operation of the Agreement". Article 19:5(a) came within the ambit of this provision. The conciliation procedures of Article 17 covered matters subject to consultations under any provision of the Agreement, and this would include those taking place under Article 16:1. The way would then be clear to advance (if necessary) through Article 17:2 and Article 17:3 to a panel. The question of principle would appear to be quite clear. However, his delegation agreed that a finding could be made only at the formal dispute settlement stage; the consultation phase was not an appropriate time for a formal judgement to be made. Much of what had been said by other

delegations was focussed on the concept of "like product" as a standard. His delegation saw the emphasis less on this concept but rather on the ambit of "domestic producers" in Article 6:5. Unlike the term "like product", the term "domestic producer" did not have a specific definition in the Code. In the absence of such, there might be grounds to doubt whether producers of grapes could be ruled out a priori from being included in any assessment of what constituted a domestic wine industry. It was for these reasons that the New Zealand delegation had remained hesitant to state unequivocally that the United States was in breach of its obligations under Article 19:5(a).

11. The representative of New Zealand went on to say that he was concerned that the Code should be open to variable interpretation. It might well be that an importing country could (if it so decided) include raw material producers in order to sustain an argument that injury was occurring to its domestic industry. Therefore, he would refrain from passing hasty judgement on whether or not the US legislation was contrary to the Code. It was difficult to see how a panel could reach a definitive judgement on whether the United States was in breach of the Code without a determination of how "domestic industry" might be interpreted under the Code. One way of resolving the issue could be by means of recourse to a panel, but also possibly through Articles 16:2 or 19:7. After this matter had been dealt with, it would then be appropriate to approach the US legislation in the light of any determination made.

12. The representative of Spain expressed concern about the consequences of the US definition of industry. If the producer of the raw material was considered to be part of the industry of the final product for wine, then the same principle could be extended to other products. The latter implied a very wide interpretation of the term "domestic industry" in the Code. He agreed with the point made by the United States that the conciliation route should not be used in hypothetical cases, because if there was no prejudice there was no need to engage in a dispute settlement process. However, the problem was to find out if there was prejudice. In his opinion, the mere existence of a certain legislation induced certain reactions on the part of importers and exporters with the concomitant detrimental effects to trade. Therefore damage could easily be created.

13. The representative of the United States said that some of the points made by the representative of New Zealand on the question of "like products" could serve to reply to the delegate of Austria. She also stressed that grapes were not like wine but rather that grape growers should be considered as part of the industry producing wine because of the economic relationship and dependence within the production chain. The grape/wine situation was one of those cases in agriculture in which trade of the raw product (grapes) in substantial quantities was often not always feasible but trade in the processed product (wine) had greater effects on the raw material producer. It would be illogical to interpret the Code to exclude the latter. This was the basis for maintaining that the US legislation was not inconsistent with the Code. Her delegation had also suggested that the Committee might want to further examine the whole question of processed products; in her view, an examination of the broad issue of the scope of an industry, either in the Committee or in a working group, would be very useful. She also wanted to make sure that the Committee acted with a clear understanding of US arguments as to why this case was not ripe for dispute settlement and that it was understood by all that the procedural decisions in this case constituted a

precedent for (and against) all in the future. She believed that, upon further reflection, Committee members would agree that the substantive issue was by no means as simple as presented by the EEC.

14. The representative of Chile stated that the new provision in the US legislation was not in conformity with the Code and that it was the duty of the Committee to examine national legislations and its amendments. She was in favour of examining the conformity of a given legislation independently of the fact that this could set a precedent for the future work of the Committee. The representative of Chile also said that the Committee's deliberations could serve as an incentive to persuade the US delegation not to apply the legislation during the two-year period of its validity.

15. The representative of the EEC, replying to the New Zealand delegation, said that the EEC was not asking the Committee to pass judgement or to make a finding and recommendation within the meaning of Article 18:9 at this stage. As to the comment that the issues involved in the question of "domestic industry" were not as simple and straightforward as suggested by the EEC, he recalled that the US Administration itself had during the discussions leading to the adoption of the Trade and Tariff Act of 1984 taken the view that such an amendment would be inconsistent with US obligations. Furthermore, Article 6:5 was unambiguous in that it provided that in determining injury, the term "domestic industry" should "be interpreted as referring to the domestic products as a whole of the like products or to those of them whose collective output of the products constituted a major proportion of the total domestic production of those products"; consequently, the term "like products" was essential to the notion of domestic industry. Turning to the points raised by the representative of Spain, he said that although prejudice was not a requisite for conciliation, he fully supported the view that the very existence of the legislation already had prejudicial effects. The objective which his delegation was pursuing at the present stage was that the United States undertake measures to avoid the sort of prejudice which would inevitably occur if the relevant provisions were to be applied.

16. The representative of Canada said that the matter before the Committee raised questions as to whether the amendments in the US legislation were consistent with the US obligations under the Code. The issue also touched on generic questions as to whether the traditional interpretation of "industry" and "like products" was fully relevant and responsive to injury being caused by trade in certain agricultural products. He said that these questions should consequently be examined as a separate exercise. While Canada recognized that the EEC had a right to request a panel, he noted that the usual GATT practice had been to delay proceedings until after a concrete measure had been taken. He also noted that his delegation recognized the relevance of Article 19:5 and accordingly would not challenge the EEC's request for a panel.

17. The representative of Australia disagreed with the view that the Committee had to wait for the establishment of a panel until an actual case had materialized. He made it clear that the US law was contrary to Articles 6 and 19 of the Code and that the legal issue was not altered by the fact that the legislation had yet to be applied or that it contained a sunset clause. He stressed that the pertinent provision by its very existence had injurious and prejudicial effects on the rights of other signatories.

18. The representative of the United States noted that the EEC remark about taking measures to avoid inevitable injury showed clearly that the case was hypothetical. Such cases were a drain on Committee resources and could lead to useless or even bad decisions. She reiterated that the US Administration had expressed certain views on a previous version of the Trade and Tariff Act of 1984 which had subsequently been substantially narrowed down. She finally proposed that in light of what other signatories had said, consideration of the matter under Part VI of the Code be terminated or at least suspended, until a countervailing duty case under the new law was initiated.

19. The representative of the EEC stated that in view of the fact that the conciliation under Article 17 of the Code had failed to reach a mutually satisfactory solution, this particular stage of the procedure was terminated. The EEC was bound to reserve its right to pass to the stage of requesting the establishment of a panel. His delegation would, at any rate, ask for the establishment of a panel if and when the legislation in question was applied by the US authorities, i.e. as soon as the US Department of Commerce declared admissible a complaint in which grape growers were taken into account as part of the wine-producing industry for the purposes of initiating a countervailing duty investigation on imports of wine.

20. The representative of the United States indicated that her delegation would also reserve all its rights according to normal procedure. The representative of Austria said that he also wished to reserve his delegation rights under the Code.

21. The Chairman, while indicating that every delegation retained its rights under the Code, summarized the discussions in the following terms:

(i) The Committee had conducted and terminated the conciliation process under Article 17:1 of the Code;

(ii) Notwithstanding the efforts made in the course of this meeting, it was clear that the matter had remained unresolved;

(iii) According to Article 17:3 "any signatory involved may, thirty days after the request for conciliation, request that a panel be established by the Committee in accordance with the provisions of Article 18" of the Code. The thirty days after the request for conciliation, made on 6 December 1984, had now lapsed.

22. The representative of the EEC added that his delegation would also ask for the establishment of a panel in other situations where the new legislation would be applied or practice would be followed in line with it.

23. The representative of the United States said that her delegation would reply to any such request at the time in accordance with the Code procedures.