

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/M/6
25 June 1981

Special Distribution

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 29 APRIL 1981

Chairman: Mr. P.R. Barthel Rosa (Brazil)

1. The Committee on Subsidies and Countervailing Measures held its sixth meeting on 29 April 1981.

2. The Committee adopted the following agenda:

- A. Adherence of further countries to the Agreement
- B. Examination of national legislation and implementing regulations (SCM/1 and addenda)
- C. Notification of subsidies under Article XVI:1 of the General Agreement (L/5102)
- D. Reports on all preliminary or final countervailing actions (SCM/W/10, SCM/W/12 and SCM/W/13)
- E. Semi-annual reports of countervailing duty actions taken within the period 1 July 1980-31 December 1980 (SCM/5 and addenda)
- F. Report of the Joint Group of Experts on the definition of the word "related"
- G. Other actions taken under the Agreement
- H. Other business

A. Adherence of further countries to the Agreement

3. The Chairman informed the Committee that no further country had signed the Agreement since the October 1980 meeting. He further said that on 12 March 1981 the Government of Chile had ratified the Agreement and subsequently had made certain notifications pursuant to the relevant provisions of the Agreement. These notifications had been circulated in SCM/6 on 15 April 1981 and were now before the Committee.

4. The representative of Chile said that his Government had submitted these notifications in order to inform the Committee that there were no domestic regulations nor administrative procedures regarding countervailing duties, and consequently as long as appropriate legislation was not enacted no such duties would be imposed. It also wished to notify that no subsidies were granted for the export of any product and that no such subsidies were intended to be applied in the future. The Committee took note of these notifications.

5. The representative of India drew the Committee's attention to the lack of progress in attracting a sufficient number of developing countries to the Agreement. He recalled that at the previous meeting of the Committee some developing countries had stated reasons for this situation and in this relation his delegation would wish to make certain proposals under item (C) of the agenda.

B. Examination of national legislation and implementing regulations (SCM/1 and addenda)

6. The Chairman said that since the October 1980 meeting the following notifications had been circulated to the Committee: Hong Kong (SCM/1/Add.12), and Korea (SCM/1/Add/13). He also recalled that at the previous meeting a number of questions had been raised concerning notifications which had been examined at that time. Signatories were free to revert to some of these questions and seek further explanations or clarifications.

7. The representative of Japan referred to the legislation of Korea (SCM/1/Add.13) and said that it did not provide for the duration of time during which provisional measures would be applied. He also pointed out that there were no provisions concerning notification of the initiation of an investigation to the concerned parties and the duration of an investigation. He also wanted to know whether the Korean authorities would be willing to accept an undertaking as their legislation did not contain any provision dealing with this matter. The representative of the United States said that Article 13 of the Customs Act seemed to indicate that the provisions of paragraphs 2-4 of Article 10 similarly applied to countervailing duty investigations but paragraph 3 of Article 10 raised certain doubts as to whether the Korean authorities had the ability to impose countervailing duties prior to the completion of the investigation. He also asked what was exactly the purpose of the Committee referred to in Article 4, paragraph 9.

8. The representative of Korea said that his Government had not modified domestic legislation relating to countervailing duties. It was of the view that the existing legislation was in conformity with the Agreement. Furthermore, according to the Korean constitution all treaties duly concluded and promulgated had the same effect as the domestic laws. This meant that the Agreement had the status of a law and had entered into force in Korea. If there was any discrepancy between the Agreement and the domestic law or regulations the former would always prevail. He also expressed his belief that his Government had no intention of taking any countervailing action in the foreseeable future. However should it decide to change its policy on foreign trade and tariffs and to take countervailing actions, all the necessary revisions of the domestic law would be made before such action took place. Referring to the questions raised by the representative of Japan he said that the reason why certain provisions were lacking was that his Government did not envisage any countervailing action at this stage and therefore there was no need to elaborate these provisions now. As to the

questions asked by the representative of the United States he said that there was a provision allowing for the imposition of countervailing duties even before the completion of an investigation. However, as this provision was not in conformity with the Agreement the latter would prevail. He also said that the Committee referred to in Article 4 was supposed to assist the Government in taking countervailing actions, however it had not yet been established as there was no intention to take such actions.

9. The representative of the European Communities said that although he noted with satisfaction that the Agreement had supremacy over the domestic legislation in Korea it was a matter of serious concern that this legislation was not brought into conformity with the Agreement. There were no provisions on injury investigation, nothing on disclosures, nothing on hearings, not very much on the initiation of an investigation and on the requirements for the content of the complaint. He was also concerned about the functions of the Committee, the composition of which raised serious reservations. It would be composed, inter alia, of representatives of private industry which was inadmissible. He concluded by saying that the statement that the Agreement had priority over the domestic legislation was not sufficient and that he had serious reservations on the Korean legislation. The representative of Korea said that he had taken note of the comments made and that he would transmit them to his Government. He also said that the Customs Tariff Committee would be composed of officers of economic organisations such as the Korean Traders Association and the Korean Chamber of Commerce and Industry and that no representatives of private industry would be members.

10. The Chairman said that all comments had been noted and that members of the Committee would be free to revert to this or any other legislation at any of the future meetings.

11. The representative of the European Communities said that he would be grateful for any clarification on the new Brazilian subsidy legislation concerning certain tax practices. He said he would also like confirmation that the new measures were not in contradiction with the arrangement made in the Tokyo Round and that the time-table for the reduction of certain measures would be respected. The representative of Brazil said that when signing the Agreement Brazil had made a commitment that it would phase out its export subsidies (see document L/4922). In 1980 Brazil had suspended the granting of certain subsidies by a unilateral act. Subsequently it had reintroduced these subsidies but this was done strictly in conformity with the Brazilian commitment. These subsidies would be eliminated on 30 June 1983 as provided for in the commitment. His Government would be strictly applying the scheme of phasing-out the subsidies as established in document L/4922.

12. The representative of India said that the reason why his Government had not notified the Indian legislation was that this legislation did not contain any provision on the imposition of countervailing duties which would be in conflict with the Agreement. As long as there were no detailed legislations on countervailing measures his Government would fully comply with the provisions of the Agreement if need arose to take a countervailing action.

C. Notification of subsidies

13. The Chairman said that all contracting parties to the GATT were obliged, by virtue of Article XVI:1, to notify their subsidy practices according to the Decision of the CONTRACTING PARTIES at their twentieth session (BISD,

11th Supplement, page 58). This obligation had been reaffirmed by Article 7:1 of the Agreement, thus the Signatories should feel specially obliged to fulfil this obligation. In January 1981 the secretariat had circulated a request to submit new and full responses to the questionnaire on subsidies (L/5102). So far the secretariat had received responses from Luxembourg, Romania and Finland. The Committee should consider what was necessary to ensure full compliance with this obligation. In particular it should be recalled that the Committee had already agreed to revert to the question of whether the questionnaire on subsidies reproduced in L/5102 was adequate or whether there was any need for changes. Irrespective, however, of whether the questionnaire needed further improvements, the most important first step to be taken by Signatories was to submit their full notifications under Article XVI:1 on the basis of the present questionnaire. In the light of the responses received the Committee would examine whether the questionnaire was adequate. Therefore he wished, once again, to urge the Signatories to comply with their obligation under Article XVI:1 of the GATT and to submit their notifications without delay.

14. The representative of Chile said that he fully supported the Chairman's proposal on how to deal with the matter and was in full agreement that notifications under Article XVI:1 should be submitted. His Government had not submitted such a notification because it did not apply any subsidy practices, however it would inform the secretariat accordingly. The representative of Switzerland said that he fully supported the procedures outlined by the Chairman and expressed his hope that notifications would be forthcoming without delay from all Signatories. Referring to GATT document C/W/361 he said that it clearly resulted from it that there was a serious lack of discipline in complying with the obligation to notify subsidies and the Committee should do something to remedy this situation. The first step should be examination by the Committee, not only of the questionnaire but also of qualitative aspects of the notifications.

15. The Chairman said that the Committee should examine the questionnaire as well as qualitative aspects of responses to it. The Committee agreed that Signatories should submit their responses before its next meeting and that it would undertake an examination of the matter at that meeting.

D. Reports on all preliminary or final countervailing actions (SCM/10, SCM/W/12 and SCM/W/13)

16. The Chairman recalled that at its May 1980 meeting the Committee had agreed that Signatories should send to the GATT secretariat all formal decisions concerning preliminary or final actions taken with respect to countervailing duties, immediately after such decisions had been taken. These notifications were available in the GATT secretariat for inspection by government representatives. In addition the secretariat circulated a periodical checklist of notifications received during the preceding period. The experience gained with the operation of these procedures was that notifications were sent very irregularly and that not all actions had been notified. As many of these notifications were sent with a considerable delay it was understandable that there was not much interest in them and that the number of inspections was very limited. In this connexion he wanted the opinion of the Committee as to whether the circulation of the checklist served any useful purpose and whether it should be continued. The representative of Japan said that he was of the opinion that the circulation of the checklist should be continued as it was the most rapid way for the representatives in

Geneva to get information about countervailing actions. The Chairman said that the circulation of the checklists would be more useful if Signatories notified their decisions immediately after they had been taken and not several months later. Therefore the Signatories were urged to comply with this requirement. The secretariat would continue, at least until the autumn session, to circulate the checklists. The Committee would revert to this question at its next meeting.

E. Semi-annual reports of all countervailing duty actions taken within the preceding six months (SCM/5 and addenda)

17. The Chairman recalled that an invitation to submit semi-annual reports covering the period 1 July 1980-31 December 1980 had been circulated in SCM/5 of 4 February 1981. Signatories who had not taken any action within the reporting period had also been invited to inform the Committee accordingly. The following Signatories had notified, in addenda to SCM/5, that they had not taken any countervailing duty action during the period 1 July 1980 to 31 December 1980: Switzerland (Add.2); Japan (Add.3); Norway (Add.4); Brazil (Add.5); Finland (Add.5); Korea (Add.5); Yugoslavia (Add.5); Austria (Add.5); Hong Kong (Add.5); Sweden (Add.6); European Communities (Add.7); Uruguay (Add.9); Chile (Add.10). Countervailing duty actions had been notified by the United States - SCM/5/Add.1, and Canada - SCM/5/Add.8.

18. The representative of the European Communities said that the notification submitted by him covered only actions taken with respect to Signatories.

19. The representative of India informed the Committee that his Government had not taken any countervailing action within the reporting period. He said that he had a number of questions concerning the semi-annual report submitted by the United States and wondered whether the representative of the United States would be prepared to answer them in spite of the fact that the Agreement was not in application between their two countries. The representative of the United States said that he would always be prepared to answer questions on condition that this would not, in any way, prejudice his Government's position vis-a-vis countries which were Signatories but to which the United States did not apply the Agreement. He added that any countervailing action taken by the United States was always taken in full conformity with its obligations under the Agreement.

20. The representative of India said that three countervailing duty actions had been initiated against India during the period under review. In all these proceedings a common question had been raised concerning the linkage between unrefunded taxes and certain payments that were being made by the Indian Government. In two of the cases the countervailing duties had been imposed without giving any allowance for the refund of indirect taxes borne by the product. The reasons given in the relevant findings were rather unclear in the context of the GATT obligations and provisions of the Agreement. He would like to have some clarification on this matter. He also said that in the proceedings concerning grey metal iron castings there was a substantial difference between provisional and final duties. One of the reasons was that in the preliminary finding the US Department of Commerce had considered it necessary to include 7 per cent as the amount represented by the alleged subsidy on the account of post-shipment credit. The Indian Government had stated that no such subsidy had been used by the exporter and there was no evidence to the contrary. However the US authorities had imposed provisional

duties including this amount. Subsequently, in the final finding, this amount had been excluded. He considered that preliminary proceedings had given rise to certain arbitrary calculations and wanted to know what step would be taken by the US authorities to avoid such a situation in the future. He also added that in this case India intended to file a review petition on the grounds of material change in circumstances and wondered whether it would be possible to review the case even before the date for the annual review.

21. The representative of the United States recalled the statement he had made on the conditions under which he participated in this discussion. He also said that it would be much easier for him to answer specific questions if they were provided prior to the meeting. In the absence of such advance notice he could only confirm that his Government strictly followed the practice of publishing all grounds and reasons for any decision taken and that all decisions were taken in conformity with the provisions of the Agreement. As to the question concerning the possibility of having an earlier review, he said that the practices of his authorities were fully consistent with the Agreement, and at least once a year they conducted reviews of outstanding countervailing duty orders where warranted. However, they would be ready to accommodate those situations where they felt that it was appropriate to expedite certain investigations, as long as all relevant information was fully available and assessable.

F. Report of the Joint Group of Experts on the Definition of the Word "Related"

22. The Chairman said that the Group of Experts established by the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures had completed its work and prepared its report to the Committee (reproduced in Annex I). He proposed that the Signatories examine this report with a view to adopting it at the next meeting of the Committee. It was so agreed.

G. Other actions taken under the Agreement

23. The Chairman recalled that at its December 1980 meeting the Committee had had an extensive discussion on the question regarding the invocation of the non-application provisions of Article 19:9 of the Agreement by the United States (SCM/M/5) and it had agreed to revert to it at this meeting. In this connexion he wanted to draw the Committee's attention to document SCM/W/14 containing a draft decision proposed by the delegation of India.

24. The representative of India said that although no agreement had emerged from the December 1980 meeting comments made at that time provided the nucleus of a possible decision by the Committee with regard to the scope of Article 19:9. He considered that the invocation of Article 19:9 by the United States raised a very important question of policy relevant to future negotiations of multilateral instruments. Both India and the United States had worked very closely in the negotiation of the Agreement. There were reasons to believe that the United States' Government attached great importance to the Indian participation in this Agreement (see MTN/NTM/W/243) but when India had decided to sign the Agreement the United States had invoked the non-application clause. He stressed that one of the fundamentals of international economic co-operation was that countries should carry out in good faith the obligations they had undertaken during the multilateral trade negotiations. Countries should not be asked, at the end of the negotiations,

to undertake some other obligations than those provided in the instrument they had negotiated. He requested the Committee to adopt the decision proposed in SCM/W/14.

25. The representative of the United Kingdom speaking on behalf of Hong Kong welcomed the draft decision proposed by India. He said that it was particularly well-balanced - it recognized the rights of Signatories under Article 19:9 and, on the other hand, was a necessary corollary to the use of this Article. He fully supported the Indian draft. The representative of Yugoslavia said that he had always insisted on the need of finding an adequate solution to the matter. He considered the Indian proposal to be very reasonable and flexible. He fully supported it as a good basis for a satisfactory compromise.

26. The representative of the United States reiterated his position that nothing he said should in any way prejudice his Government's position vis-a-vis the steps taken under the Agreement with respect to certain Signatories. He said that as the draft decision had just been circulated his delegation was not in a position to take any stand on it at this meeting. It contained certain important issues which required further reflection. He also agreed that during the Multilateral Trade Negotiations leading to this Agreement his delegation had worked very closely with the Indian delegation but he felt compelled to emphasize that the United States' position, in particular with relation to Article 14:5 of the Agreement, had always been clearly stated. Objectives which the United States had sought while engaging in the negotiations of this particular Agreement, namely the increased discipline in the use of subsidies, had been well known and the position taken by the United States' representatives in this Committee had always been consistent with the stated views taken in the course of the Multilateral Negotiations.

27. The observer for Colombia, said that she wanted to support the draft decision proposed by India. This decision contained a number of conclusions which should be acceptable to the Committee. The observer for Australia said that he would confine his comments to the issue of general principle. The second part of paragraph 1 stated "and that no reasons have to be given." In his view this particular concept was not in conformity with obligations under the General Agreement itself and was certainly inconsistent with a long accepted tradition under that Agreement. He considered that if an action of this kind was taken then it should be open to Signatories to investigate the reasons behind such a course of action. It was provided for in Article XXXV:2 of the General Agreement and as the Subsidies/Countervailing Measures Agreement was a multilateral agreement within the GATT framework this provision was also applicable to it. He said that this point required further consideration but that he had no problems with other parts of the draft decision.

28. The representative of the European Communities said that he had no problems with the text proposed by India as far as bilateral relations were concerned, but if it were to be applicable in a more general context and if it were to establish certain precedents he would have to reserve his position pending further reflexions, in particular on paragraph (ii). The representative of the United States said that his Government's position was that it was not necessary to provide reasons for the invocation of the non-application clause. He pointed out that a decision on whether to take such an action had to be taken within a very short period of a maximum of 30 days and in some cases it would be very difficult to provide reasons. Referring to the

comment made with respect to the relevance of Article XXXV of the General Agreement he said that he could not see anywhere in the Agreement any obligation to give reasons. Therefore the Committee should not start embarking on the issue of what negotiators had intended or what the true spirit of this Agreement should or should not be. The only appropriate way would be to consider possible changes in the text of the Agreement. When a country signed the Agreement it assumed those obligations which were provided for in it and not those which one wished should be contained therein. The representative of Canada welcomed the initiative taken by India but, given the very short notice, his delegation would also need some time for reflection on the problem. He said that he would probably have some reservations on certain aspects contained in the draft but he would be ready to look at them in a way which would go towards meeting the needs and intentions of the Indian delegation and which would be agreeable to all other Signatories.

29. The representative of India thanked those delegations which supported his draft. As to the comment made by the observer for Australia he thought that his preoccupations were taken care of by the second part of paragraph (i). His interpretation was that no reasons had to be given while invoking the non-application clause but it did not mean that such reasons should not be given if sought by other Signatories. From his point of view the second part of paragraph (i) was consistent with the practices under Article XXXV of the General Agreement.

30. The representative of Sweden said that he had had no time to study the Indian proposal in detail and therefore he needed some time for reflection. His preliminary impression was that it reflected in a fairly balanced way some of the key observations made at the December 1980 meeting of the Committee. Therefore it seemed that this draft could provide a basis for an acceptable understanding. The representative of Chile welcomed the draft decision and said that it could open the road to a rapid solution of the problem. He would also need some time to consider all the details of the draft, possibly in informal consultations, but he wanted to stress that the Indian proposal had great merit, being balanced and very reasonable and that it managed to convert a bilateral problem into a more general issue which should be solved on a multilateral basis. The Committee should therefore have the opportunity to decide on a code of conduct which would be a rule applicable to all its members. The representative of Brazil said that he had no problem with the Indian proposal and could accept it. The representative of Switzerland welcomed the initiative by the Indian delegation. As this draft was received only at this meeting any detailed examination was not possible and as it was a legal text it warranted very careful consideration. He expressed his hope that this document would provide a basis for a satisfactory solution. The representative of Norway said that he believed a solution would be found on the basis of the proposed text. The representative of Finland shared the views expressed by the representatives of Sweden and Norway. He thought that before any final decision was taken all possible implications should be carefully examined.

31. The observer for Australia said that if paragraph (i) meant that a Signatory had the right to invoke the non-application clause without giving any reason at that time he would agree with such an interpretation. However, he considered that it would be against GATT tradition, practice and precedents if a Signatory was not bound, upon request by another Signatory, to give reasons for his action or that Signatories would not be able to review the operation of Article 19:9. The representative of India said that this was

mainly a question of drafting and that his intention was to emphasize that a Signatory did not need to give any reasons at the time he invoked Article 19:9. This drafting point would be taken care of while discussing the final text.

32. The Chairman said that the Committee should reflect on how to reach a final conclusion with respect to the matter which had been before the Committee for quite a long time. Some delegations had expressed their support for the proposal submitted by India, some had considered that further consultations should be carried out informally on the basis of this proposal while some others had said that they needed further time for reflection. He proposed that informal consultations be pursued on this matter and that the Committee revert to it at its next meeting with a view to taking a decision. It was so agreed.

H. Other business

33. The representative of Canada recalled that the footnote number 2 to paragraph (e) in the illustrative list of prohibited export subsidies obliged Signatories who maintained practices inconsistent with this paragraph (e) to bring them promptly in conformity with the Agreement. In this context he requested the representative of the United States to inform the Committee what measures or steps had been taken or were being contemplated to bring the DISC legislation in line with paragraph (e). The representative of the United States said that the situation had been under very close review. It would be difficult to report, before the whole process was finished, what specific steps had been taken. He could, however, assure the Committee that the matter would be further pursued.

34. The Chairman requested Signatories to inform him whether there had been any changes in the list of panel members which had been submitted in 1980.

I. Date and agenda for the next meeting of the Committee

35. The Chairman proposed that the next meeting of the Committee take place in the week of 26 October 1981, following the meeting of the Committee on Anti-Dumping Practices. The agenda for this meeting would be circulated, after consultations with Signatories, in advance of the meeting. It would include, inter alia, traditional items such as:

- (a) adherence of further countries to the Agreement;
- (b) examination of national legislation and implementing regulations;
- (c) reports on all preliminary or final countervailing duty actions;
- (d) semi-annual reports of countervailing duty actions taken within the period 1 January 1981-30 June 1981;
- (e) annual report to the CONTRACTING PARTIES.

36. The Chairman said that it would be preferable if the Committee could agree on fixed dates for its regular sessions. He proposed that these sessions should be held in the last week of April and the last week of October every year with possible modifications resulting, for example, from holiday periods. It was so agreed.

ANNEX I

REPORT TO THE COMMITTEE ON ANTI-DUMPING PRACTICES
AND TO THE COMMITTEE ON SUBSIDIES AND COUNTERVAILING MEASURES

1. The Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures established, at their May 1980 meetings, a Joint Group of Experts with the following terms of reference:

"to identify and examine, at a technical level, problems involved in the definition of the word "related" as required by footnote 7 to Article 4 of the Agreement on Implementation of Article VI of the GATT and footnote 21 to Article 6 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT and to report to both the Committees" (SCM/M/3, paragraph 42).

2. The Group met on 24 October 1980, 4 February 1981 and 27 April 1981. It elected Mr. M. Lemmel (Sweden) as its chairman.

3. Interested Signatories and Parties which had not nominated their experts, and interested observers wishing to make their contributions on the matter were invited to submit them to the Chairman (ADP/Spec/2-SCM/Spec/3).

4. The Group based its discussion on contributions from individual experts and on the definition of the word "related", contained in Article 15 of the Agreement on Implementation of Article VII of the GATT (Valuation Code). It was recognized that the matter of defining the word "related" should be "seen as limited to the purposes of interpretation of the term "domestic industry" in anti-dumping or countervailing proceedings.

5. The experts were of the opinion that the best approach would be to combine certain relevant criteria from the definition in the Valuation Code with the requirement that the effect of the relationship was such as to cause the producer concerned to behave differently from non-related producers. At the same time they recognized that, as certain criteria were extremely difficult to evaluate, any such definition should allow sufficient flexibility and should be applied with appropriate care.

6. Taking into account all the views expressed, the Group agreed to propose the following text for consideration and possible adoption by the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures respectively:

For the purpose of Article 4:1(i) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and of Article 6:5 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade,

producers shall be deemed to be related to the exporters or importers only if:

- (a) one of them directly or indirectly controls* the other; or
- (b) both of them are directly or indirectly controlled* by a third person; or
- (c) together they directly or indirectly control* a third person; provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.

*For the purposes of these Articles, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.