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Committee on Subsidies and Countervailing Measures

MINUTES OF THE SPECIAL MEETING HELD ON 10 NOVEMBER 1993

Chairman: Mr. Andrès Espinosa (Colombia)

United States - Countervailing duties on Certain Carbon Steel Flat Products from several member States of the EEC - Request for conciliation under Article 17 of the Agreement (SCM/176/Add.1)

1. The Chairman noted that the purpose of the meeting was to continue the conciliation process requested by the EEC with respect to countervailing duties imposed by the United States on certain carbon steel flat products from several member States of the EEC in SCM/176 and Add.1.

2. He recalled that these investigations had been the subject of a number of consultations. The EEC had requested consultations regarding the preliminary countervailing duty determinations by the US Department of Commerce on 2 February 1993 (SCM/159). The EEC had requested consultations regarding the definitive injury determination by the US International Trade Commission on 27 September 1993 (SCM/175).

3. Finally, the EEC had requested conciliation regarding these investigations on 8 October 1993 (SCM/176). Conciliation was conducted at the regular meeting on 27 October 1993. However, the United States had believed that certain items that the EEC was seeking to raise in the conciliation were not reflected in the conciliation request, and that it had therefore not had sufficient notice to prepare for conciliation on those issues. The parties had therefore requested that the Committee hold a second conciliation meeting limited to those issues, and a document detailing the issues was circulated to the Committee as an addendum to SCM/176.

4. The representative of the European Economic Community noted that the EEC reserved its rights in respect of any other issues raised during bilateral consultations held with the United States under Article 3 of the Agreement.

5. The EEC wished to raise a number of issues in respect of the injury and causality findings on the flat-rolled steel products by the US International Trade Commission (ITC), with regard to the preliminary and final determinations.

6. In the view of the Community the standards applied by the United States in determining injury appeared in several instances to be lower than the requirements of the Subsidies Code.

7. The Code provided in Articles 2 and 6 that provisional measures may only be taken after a preliminary affirmative finding had been made that a subsidy existed and that there was sufficient evidence of material injury. In the view of the EEC the ITC's preliminary determinations for a number of the flat-rolled products and countries did not meet this requirement.

8. US law and US practice appeared to require that a preliminary finding of material injury be made unless (i) the record as a whole contained clear and convincing evidence that there was no material injury, (ii) no likelihood existed that any contrary evidence would arise in a final investigation. A finding that there was no reasonable indication of material injury required therefore that the ITC find that there was no injury whatsoever. The Community submitted that this was not in accordance with the requirements of Article 6 of the Code.

9. Injury findings had to be based on positive evidence. Footnote 17 to Article 6 of the Subsidies Code referred to this requirement. The EEC considered that the administering authorities in a CVD investigation needed to demonstrate that there was sufficient evidence of material injury. The ITC appeared, as was demonstrated by the two criteria mentioned above, to have reversed the burden of proof: it had required respondents to prove that there was no material injury, instead of proving itself that there was material injury. This incorrectly placed on the defendants in a CVD investigation the burden of proving that they were not causing injury. Such standards for a provisional determination in the view of the EEC, were, from a procedural as well as a substantive point of view, inconsistent with the letter and the spirit of the Subsidies Code.

10. In both provisional and final determinations the ITC had cumulated imports from a large number of countries for the finding of material injury. The US law required the ITC to do so, unless the imports were negligible and had no discernible impact on the domestic industry. But the ITC apparently was only to apply this exception if imports were truly negligible and had no discernible impact at all.

11. The EEC submitted that besides the fact that the burden of proof was unacceptably reversed, this implied an inadmissible narrowing of the negligibility condition: any time that any discernible impact, however small, was being found, the ITC had to cumulate, if the other conditions were met. Article 2:12 of the Code stated that any time the administering authority found that the effect of the alleged subsidy on the industry was not such as to cause material injury, the investigation should be terminated. This standard, under which any investigation should be pursued, on the basis of such a low threshold of injury, was in violation of the Code.

12. Article 5:1 of the Code required an affirmative finding that a subsidy existed, sufficient evidence of injury and (Article 2, paragraph 1(c)) that a causal link between these two elements existed before provisional measures were taken. There seemed to have been lack of an examination of causality and of the possible effect of "other factors" in the ITC preliminary determinations. The representative of the EEC noted that the addendum document (SCM/176/Add.1) set out all the EEC's arguments concerning injury, which had been discussed in the previous meeting of the Committee. The EEC maintained its objection to the definitive findings, as expressed in the past.

13. The representative of the EEC drew to the Committee's attention that in the final determinations, the ITC appeared to have ignored the submissions by certain Community producers of speciality products that their products did not compete with steel made in the United States, and should therefore have been excluded from the enquiry. Those imports could not have caused injury.

14. The EEC therefore submitted that the US had ignored procedural rights laid down in the Subsidies Code and that it had reached affirmative injury determinations in situations where they were not warranted because it applied standards which demonstrated injury in circumstances where no material injury nor threat thereof could have been found if the standards continued in the Code had been applied.

15. The representative of the United States noted that the EEC had asserted that the standard applied by the United States in preliminary injury determinations in the countervailing duty cases was not consistent with the standard for provisional relief enunciated in Article 5:1 of the Subsidies and Countervailing Measures Code.

16. The Code required that there be "sufficient evidence of injury" to support provisional measures. "Sufficient evidence" was the same standard applied to support initiation of an investigation under Article 2:1 of the Subsidies Code. In initiating investigations, the Department of Commerce determined that "sufficient evidence" of material injury and causation was contained in the petition. The United States arguably exceeded the "sufficient evidence" requirement necessary for imposition of provisional measures when the ITC also determined whether there was "a reasonable indication of material injury" to support an affirmative preliminary determination.

17. In its request for conciliation, the EEC had ignored the information on which the initiation decision was based and had instead focused only on the preliminary determination. The EEC had improperly interjected the concept of "positive evidence", which according to the Code applied only to determinations that resulted in imposition of definitive duties, not to preliminary determinations or the imposition of provisional measures.

18. The US standard for preliminary injury determinations provided for a significant examination of the question of material injury in addition to the examination of sufficient evidence in the petition. US law required the ITC to gather further information and to weigh the significance of that information to determine whether a full investigation should be conducted to resolve the factual issues raised by a petition. In the case before the Committee, the USITC had issued lengthy questionnaires to producers and importers and had assembled a substantial body of evidence upon which to base its preliminary determinations of whether a reasonable indication of injury existed.

19. In the case of American lamb, the US courts had reversed a prior court decision that had held that the Commission must issue a preliminary affirmative determination if there was evidence of a "possibility" of material injury. The Court held that a reasonable indication is more than "a mere possibility" of injury. It also held that, in assessing whether there was evidence of a reasonable indication of material injury, the ITC was not bound to consider all evidence in the most favourable light for petitioners, but could weigh contrary evidence. It was in light of the Court's observations that the American lamb test - (i) clear and convincing evidence of no material injury; and (ii) no likelihood that contrary evidence will arise in a final investigation - should be understood. There could be no doubt that the United States' standard for provisional measures satisfied the Code's requirements.

20. For the purpose of determining the standing of petitioners to lodge a complaint on behalf of a domestic industry as well to determine the scope of the imported product categories (i.e. the "classes or kinds of merchandise"), the US Department of Commerce determined that there were four products subject to these investigations: certain hot-rolled flat steel products, certain cold-rolled flat steel products, certain corrosion resistant flat steel products and certain cut-to-length steel plate products. For the purpose of standing, the petitioners demonstrated that they produced a wide range of products within all four like product categories and that the petitions were filed on behalf of the domestic industries which produced like products.

21. During the course of the investigations, manufacturers of the products referred to by the EEC requested that the Department of Commerce exclude from the scope of investigation the following specialized products lines: certain doctor blade steel, certain flapper valve steel, certain coater blade steel, certain creping blade steel, certain lapping carrier steel, certain elevator tape steel and certain precision spring steel. These product lines comprised parts of the scope of imported merchandise subject to the investigations on certain cold-rolled flat steel products, but the relevant EEC manufacturer claimed that they were separate classes or kinds of merchandise which could not be obtained in any commercial quantity from US suppliers.

22. The Department of Commerce carefully evaluated the arguments and information put forth, but concluded that there was no basis to exclude such products from the scope of the investigations.

The product lines at issue were all cold-rolled and hardened strip products with particular chemical compositions, certain cleanliness, surface, flatness and straightness requirements, and specific dimensional tolerances, among other technical specifications. All of these products were flat-rolled and clearly fell within the chemical and dimensional characteristics set forth in the product description governing the investigations. Although they possessed physical characteristics or technical properties which distinguished them from other product lines, the distinctions were not so fundamental as to give rise to a separate category of products. Rather, they represented relatively minor product variations within the cold-rolled steel product category. If the Department had accepted such distinctions as justifying the establishment of separate classes or kinds of merchandise, it would have led to creation of an absurdly large number of product categories, each subject to a separate investigation. Consistent with the Code, "the industry affected" was determined to be the cold-rolled steel industry, not dozens of "niche" industries producing one model or another of cold-rolled product.

23. The claim that such products were unavailable from US suppliers did not provide a reliable basis for excluding such subproducts from the investigations. In no respect did the Code require that a petitioner manufacture each and every variation within a like product in order to have standing as a producer of the domestic like product. To the extent that a domestic industry did not produce certain product lines within a like product category, that could be due to subsidized imports causing loss of previous customers or having preventing the manufacturer from entering specialized markets.

24. In its review of injury, the ITC addressed a number of arguments that particular imported steels did not compete with domestically-produced steel, and discussed the arguments extensively.

25. To address the issues, the ITC first determined what domestic material was "like" the imported product. The ITC devoted pages 90-94 of the opinion accompanying its final determination on cold-rolled steel to the issue of what types of steel were like products. There were three different types of high carbon steel which various parties, including Germany, argued should be treated as separate like products from cold-rolled steel: high carbon, hardened carbon and seat belt retractor steel. Other parties also argued that high carbon band saw steel, high carbon spring steel and high carbon strapping steel should be treated as separate like products.

26. The ITC fully discussed all of these proposals for separate like products. In analysing the evidence, the ITC focused on general similarities in physical characteristics, production processes, channels of distribution and perceptions of producers and consumers which clearly outweighed differences between highly specialized products within the same general grouping.

27. With respect to high carbon steel, the ITC specifically rejected the arguments of the respondents for a separate high carbon steel like product by holding that any of the basic production processes, equipment, and workers and channels of distribution for high and low carbon content cold-rolled products were essentially the same. The ITC also found that there was some limited interchangeability in end use between certain types of high and low carbon content cold-rolled products, as well as overlap in customer and producer perceptions. Finally, the ITC stated that there was no consistent price differential between specialized high and low carbon steel.

28. Respondents' arguments concerning a separate like product for hardened carbon steel was also rejected by the ITC at pages 92-93 of the opinion. The ITC found that there were similarities in production processes, overlapping end uses and distribution channels for hardened carbon and certain types of high carbon cold-rolled steel. The ITC also determined that hardened carbon steels had hardness, tensile strength, and fatigue resistance similar to high carbon (non-hardened) steels.

29. The ITC concluded that all of these materials were part of the cold-rolled steel like product. Having concluded that the appropriate like product was cold-rolled steel, the ITC then found that the

imported materials did compete with domestically produced cold-rolled steel. Finally, the ITC concluded that the domestic cold-rolled steel industry was threatened with material injury by reason of subsidized imports from Germany and the Netherlands.

30. The representative of Japan noted that Japan shared some of the concerns contained in the EEC's request for conciliation (SCM/176 and SCM/176/Add.1). The ITC had reversed the burden of proof on injury, in a manner inconsistent with Article 6 of the Code. Japan shared the EEC's concerns about the United States' interpretation of Article 2:12. The United States' cumulation of the imports of non-competing products was of concern to Japan. Most of Japan's exports of corrosion resistant carbon steel competed neither with products manufactured in the United States, nor with products from other countries. The United States should have excluded these products from consideration. Japan had a strong interest in this case and hoped that the United States would bring its measures into conformity with the Code.

31. The representative of Austria noted Austria's concerns with the countervailing duties. The ITC's final decision had been that imports from Austria did not cause injury to the United States' industry. During the course of the enquiry lasting over a year, there had been a considerable amount of work which was very costly and had caused problems for the industry concerned. Certain cases should have been excluded right from the start of the investigation because they only concerned a minimal quantity of imports. Austria had always had minimal trade with the United States because anti-dumping and countervailing duty levels were very high. If the negative determination had been at a much earlier stage a lot of work could have been avoided.

32. The representative of Australia registered that Australia shared a number of the EEC's concerns in relation to this case, especially concerning the approach taken by the United States in making the injury determination, particularly including such issues as like product and the cumulation of imports.

33. The Chairman urged the United States and the EEC to try and reach a satisfactory outcome under paragraph 2 of Article 17 of the Agreement.

34. He reminded the Committee of his remarks regarding notification of subsidies in the regular meeting of the Committee under Article XVI:1 of the General Agreement.

35. The Committee took note of the statements made.