RESTRICTED
SCM/M/22
7 January 1985
Special Distribution

GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 6 DECEMBER 1984

Chairman: Mr. H.S. Puri (India)

1. The Chairman recalled that the purpose of this meeting was to review the matter referred by the EEC to the Committee for consultation under Article 16:1 of the Code, concerning the definition of industry for wine and grape products contained in the United States Trade and Tariff Act of 1984.

2. The Committee had before it two documents related to this matter: (a) a note by the United States (SCM/1/Add.3/Suppl.1) which listed amendments to the definition of "industry" in the Trade and Tariff Act of 1984 and (b) a communication from the EEC (SCM/45) which explained the EEC view on this matter.

3. The representative of the EEC recalled the urgency of the matter raised by the recently enacted United States Trade and Tariff Act of 1984. The new definition of "industry" stipulated that grape producers in the United States were to be assimilated to the producers of the processed product (wine) for the purpose of countervailing duty proceedings. This was in open conflict with an unambiguous provision of the Code. Due to the new definition, the provisions of the Code regarding initiation of investigations, injury and definition of "like product" were at stake. The Code provision limiting the right to initiate proceedings to producers of the like product was the result of detailed negotiations conducted with the aim of establishing narrow parameters for the scope of countervailing actions. The EEC concern related not only to the wine industry but also to the implications of this matter for other industries and for other signatories. To illustrate his point, the EEC representative drew the attention of the Committee to a recent decision by the US Department of Commerce, published in the Federal Register of 30 November 1984, concerning a countervailing duty investigation on live hogs and on pork products from Canada. This investigation had apparently been initiated not only on behalf of the producers of pork products, but also of the producers of live swine. In conclusion, the EEC representative urged the United States to take all the necessary steps to bring its legislation into conformity with its international obligations or to ensure that its application was not inconsistent with these international obligations.

4. The representative of the United States, while noting that the changes in the US legislation had been circulated in the SCM/1 document series, indicated that the matter before the Committee should be discussed under the

standard agenda item "Examination of national legislations" rather than in an extraordinary meeting. Denying the urgency of the matter, he said that the US law had only recently been enacted, had not yet tested, and was only applicable to a narrow group of products, and for only two years. Grape growers would be included as part of the industry only if they were producers of grapes included in the wine or grape product and only if the growers alleged material injury. He also indicated that no action as yet had been taken nor had a petition been filed under the new law. Article 15:3 of the Anti-Dumping Code provided for dispute settlement proceedings only in those cases where an action had been taken in the context of a real investigation. Although there was no corresponding provision in the Subsidies Code, the two Codes should in this respect be applied in a similar way. Moreover, in the absence of an actual case it could not yet be known how the ITC would interpret the new provision. Even assuming that a petition were filed and accepted in the future, it was very doubtful whether the situation would be any different compared to the application of the previously existing US law; at any rate, the standards for determining subsidization and causation had not been changed. It was not GATT practice to pass judgement on a country's law when no trade action had been taken or may ever be taken. The United States was not espousing an open-ended interpretation of the term "industry" and was open to further examination of the whole issue. He reiterated that section 612(a)(1) of the new law did not ordain a result in any case should a petition ever be filed; it only assured grape growers the opportunity to demonstrate material injury in cases involving products of paramount importance for their livelihood. The United States representative made it clear that his delegation recognized the important issues presented in theory by the new provision and that, due to representations made, Congress had enacted the law on a narrow basis and only for a limited time period. The argument was not that grapes were "like" wine, but rather that grape growers should be considered to be a 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 was often not always feasible in the raw product (grapes) in substantial quantities 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. In limited and special situations the growers of the raw material had to be considered as part of the industry. This was the idea underlying the new US legislation and it deserved further consideration by the Committee.

5. The representative of the EEC stated that in view of a clear contradiction with the Code, it was not necessary to wait until a particular case had occurred and an actual crisis had developed, in order to have a conciliation. As for the reference to Article 15:3 of the Anti-Dumping Code, the Committee was not at the conciliation stage and the Subsidies Code did not require actual action before entering conciliation. He disagreed with the view that the new law had brought about only minor changes. Regarding the two year duration of the new provision, he was against allowing a violation of the Code because it was temporary and noted that even for a limited period the law could have a detrimental effect; the US argument amounted to pleading mitigating circumstances which was an admission of guilt. Finally, the notion that the grape producers could be considered as part of the producers of wine was unacceptable; this was not what the drafters of the Code had intended. The question before the Committee was whether a given provision was consistent with the Code and not whether the Code should be changed.

6. The representative of Canada expressed concern over the definition of industry for wine and grape products included in the new Trade Act in terms of its consistency with the Subsidies and Countervailing Measures Code. He requested that the United States elaborate on the interpretation to be given to the concept of industry and the implications it might have for other products. In this regard, he noted there were other cases, such as the initiation in the United States of an investigation against both live hogs and fresh pork at the request of hog producers which did not seem to be along the lines of what had been mentioned previously by the United States delegation and which raised the generic question as to the applicability of the Code to trade in certain agricultural products. He opined that it might be useful for the Committee to broaden its discussion to include consideration of this general question.

7. The representative of Japan shared the view that the new provision in the US law was contrary to the Code. He expressed concern about the consequences of proliferation of such an interpretation, particularly for high technology goods, and wondered whether a concrete action would arise as a result of the new definition.

8. The representative of Australia agreed with the EEC delegation that the new law was contrary to Articles 6 and 19:5 of the Code. In his view, the new provision by its existence, independently of whether it was applied or not, had injurious and prejudicial effects on the rights of other signatories as exporters to the US market. In drawing attention to the wording of Article 6.5 of the Code where the definition of domestic industry is limited to the domestic producers of the like product, he asked what was the definitional limit of a "domestic industry" under the new US legislation if the concept of "like product" was not applicable. He further asked that if the US representative was not certain as to the meaning or effect or use of the new definition of domestic industry what had been the reasons for the legislative change and which particular principle of the Code had the new definition tried to cover. He concluded by expressing concern for the effects that this definition of industry might have on the open trading system if it were adopted by other GATT members.

9. The representative of Austria reiterated the concern he had expressed in a previous meeting of the Committee. He fully supported the EEC's point of view, particularly as the Code was very clear on the question of "definition of industry". He indicated his wish to consult with the US delegation in Geneva.

10. The representative of Sweden said that the Nordic countries were not satisfied with the US explanation of the new definition which was contrary to the Code. The Nordic countries were disappointed with such a unilateral departure from the Code, because major trading nations had a special responsibility for safeguarding multilaterally agreed instruments. Their view was also influenced by the particular case against hogs and pork products from Canada subject to an investigation in the United States.

11. The representative of Switzerland echoed the views of delegations which had raised the issue of the prejudicial effects of the legislation, particularly in view of the risk of proliferation to other sectors, by other signatories. He asked the US delegation to bring the new legislation into conformity with the Code.

12. The representative of Uruguay shared the concern in regard to the new definition of industry in the US law. If such a definition were extended to textiles, US sheep raisers could complain about textiles coming from developing countries. He asked the US delegation to put the relevant provision in line with the Code. The representative of India shared the concerns expressed by other delegations regarding what would appear to be a unilateral departure from the Code. This had serious implications, notwithstanding the mitigating circumstances pleaded by the US delegation. He also noted the risks involved of proliferation to other areas, by other signatories and endorsed the concern expressed by the representative of Australia regarding the apparent absence of definitional limits of "industry" under the new US legislation. The representative of the United Kingdom on behalf of Hong Kong noted that any law whose effect or meaning was not clear was a bad law. The representative of Yugoslavia shared the view of those delegations which had requested the United States to bring its legislation into conformity with the Code.

13. The representative of the United States recalled that the underlying purpose of countervailing duties was to offset injurious subsidization. It would be contrary to the purpose of the Code and to GATT rights to interpret Code terms in such a way as to immunize injurious subsidized imports from countervailing duties. This could well be the result in some cases if a rigid approach was taken. His delegation was against an open-ended interpretation of the concept of industry but there were sound reasons for addressing the particular problems of processed agricultural products. In terms of the Code it was possible to draw on the Code's treatment of primary agricultural products for the purpose of export subsidy rules. The definition of primary products included not only products in their natural form, but also products which had undergone such processing as was customarily required to prepare them for marketing in substantial quantities in international trade. The Code thus had explicitly recognized that in some circumstances, the product in its natural and in its processed form should be treated as one, at least where practical trade considerations require processing. There was a very high degree of interdependence between growers and processors in the agricultural area, and farmers were in many cases more sensitive to competition from imports than processors. The purpose of subsidy programmes for processed agricultural products was often largely to assist the farmer; if the farmer was the major beneficiary, it was plausible that in the importing country it would also be farmers were was the most affected. The US representative stressed that although his delegation resisted an examination of a law which had not been applied or interpreted, the issues raised by its enactment were important for the Committee and should be addressed. In this connection the Committee could not ignore the relationship between this issue and the pasta case. In the pasta case, the EEC, and certain other European countries, had prevented adoption of the pasta panel report. That report had found that EEC export subsidies on pasta violated the clear rule of Article 9. The EEC had claimed, however, that whatever the language of the Code and the GATT, export subsidies on pasta should be treated as subsidies on durum wheat exported in processed form. While his delegation would not go as far as this, the question arose whether processed agricultural products were viewed by the EEC as exports of primary products in processed form. If that was the case, he wondered whether importing countries could view imports of subsidized processed agricultural products as imports of primary products in processed form. If the primary producer was the major beneficiary of such subsidized exports, as the EEC had claimed, he queried would it not follow that domestic growers might be the

most adversely affected by subsidized imports of a processed product. The point, he said, was not that his delegation agreed with the EEC on the pasta panel report, nor that the corollary on the import side should necessarily be extended so far as the EEC system of export subsidies on processed products. The question of the scope of an industry should be examined basically on its own merits, not on the basis of whether another dispute has been blocked. However, he maintained that it was at best inconsistent for the EEC to claim a right to subsidize processed agricultural products to the extent of their primary product input, while arguing that closer relationships must be ignored totally when the issue was the damage caused by subsidization. He finally reiterated that the matter before the Committee was complicated and that it deserved full attention in the context of a detailed Committee examination of the question.

14. The representative of the United States, referring to a point made about the definitional limits to the term "industry", indicated that his authorities were not changing their view regarding what a "like product" was. He cited the Preamble to the Code as an explanation for the recently introduced amendment in the US legislation. He also recalled that in the past nothing had been done in the Committee about the provisions of certain signatories whose legislation appeared to be potentially inconsistent with the Code.

15. The representative of the EEC said that although the Committee was at the consultation stage, the subject matter of the discussions was nonetheless a legal issue and consequently deliberations should also be cast in legal terms. He further explained that producers of the "like product" were eligible to bring a case and could claim protection against injurious subsidization of the "like product"; what his delegation contested was the possibility of bringing a case on behalf of the producers of the input. The comments by the US representative concerning the pasta panel report were not relevant to the present case because the pasta case had involved the interpretation of certain code provisions which were not clearly defined and which had required an analysis of economic concepts. He stressed that the Committee was not being confronted with an interpretation question and reiterated his position that a panel finding on different economic concepts could not be relevant to the present discussion. As to the argument of using the Preamble to the Code as a justification for the new definition of industry, he indicated that reliance on the purpose of the Code was appropriate only if the terms of the Code were not clear. Even if he were to follow the US rationale, he still had to disagree with it as the Preamble referred to the relief made available to producers "within an agreed international framework of rights and obligations", and the latter were precisely the terms of the Code.

16. The representative of the United States maintained that the reference to the pasta case was indeed relevant to the discussions. The point he wanted to make was that the granting of a subsidy on the processed product was frequently made on the basis of a connection to the primary or raw material product which was part of that processed product, and that it was very often the industry of the raw material in the importing country which could be most adversely affected by imports of the subsidized processed product. As to the reference to interpretation of the Code and difficult economic concepts in the pasta case, he again failed to see the difference with the present discussion.

17. The representative of the EEC referred to the views expressed by the US Administration before the Congress when the new law was discussed in Washington. At that time, the Administration had referred to the difficulty to go beyond the limits of US international obligations. He again urged the United States to make an effort to bring its legislation into conformity with the Code or to make sure that its application was not inconsistent with international obligations.

18. The representative of the United States replied that the view expressed by the US Administration before the Congress had related to a more far-reaching draft version of the new legislation. The latter had subsequently been substantially narrowed down.

19. The representative of Uruguay enquired whether the new definition of industry in the US law could be extended to products other than wine. The representative of the United States said that the law had a very particular sectoral focus, restricted to grape products and wine, and that this narrowing was a result of the Administration's efforts during the deliberations in the Congress.

20. The representative of Canada reiterated his question as to the US concept of "industry" The representative of the United States said that he preferred the answer to be developed as a result of the Committee examination of some of the economic issues involved. The Trade and Tariff Act of 1984 could be seen as an effort to clarify the economic realities of the domestic industry. The representative of the EEC, while acknowledging the importance of the economics of the definition of industry, indicated that this issue fell outside the scope of the consideration by the Committee, which was the examination of the conformity of a particular legislation with the Code.

21. At the end of the discussion, the Chairman put the following text to the Committee for its consideration:

> The Committee,
>
> - having heard expressions of great concern from a number of signatories regarding the amended definition of "industry" in the US Trade and Tariff Act of 1984;
>
> - having heard a statement from the US representative that this provision will expire after two years, that this provision had not been invoked thus far and might not be invoked in future;
> - noting that all the other delegations which spoke found that the amended definition seemed to be at variance with the definition of "industry" in Article 6:5 of the Code;
>
> Urges the United States, in case where countervailing duty proceedings are envisaged in pursuance of the relevant provisions of the Trade and Tariff Act of 1984, to take full account of their obligations under the Code.

22. No agreement could be reached on the text contained in the preceding paragraph. The representative of the EEC then formally requested that the Committee engage in a conciliation exercise under Article 17.

23. The representative of the United States stated that although it was important for the Committee to examine some of the issues under discussion,

his delegation did not consider that conciliation was the right route to follow at present. He recalled that in view of the nature of the case there was no urgency and that the consultation procedure under Article 3 could be used. The representative of the EEC noted that the lack of success of the consultations under Articles 16 supported his request for a conciliation session.

24. The Committee decided to reconvene on 7 January 1985 for a conciliation meeting under Article 17.1 of the Code.