GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD ON 5 MAY 1987

Chairman: Mr. E.O. Rosselli (Uruguay)

1. The Committee held a special meeting on 5 May 1987. The purpose of the meeting was to afford signatories the opportunity of consulting, under Article 16:1 of the Agreement on the matter referred to the Committee by the United States concerning the imposition by Canada of a countervailing duty on imports of grain corn originating in or exported from the United States (see document SCM/82).

2. The representative of the United States, in introducing the matter, said that in the course of the investigation conducted by the Canadian authorities, which had led to the imposition of a countervailing duty on grain corn from the United States, bilateral consultations had taken place between the United States and Canada under Article 3 of the Agreement. The United States could at this stage have pursued its rights under Article 17 of the Agreement. However, since the issue affected in an important way the operation of the Agreement and the furtherance of its objectives, the United States had requested a meeting of the Committee under Article 16:1 of the Agreement.

3. The representative of the United States recalled that on 2 July 1986 the Government of Canada had opened a countervailing duty investigation under the Special Import Measures Act of imports of grain corn from the United States. On 20 March 1987 the Canadian Import Tribunal (CIT) had issued an affirmative finding of material injury. However, the finding of the CIT of the existence of material injury had not been based on an assessment of the impact of imports from the United States; rather, the CIT had found that the Canadian industry was injured by declining world prices for grain corn and the current possibility of importation at those prices. Thus, the decision of the CIT would apply even if there were not, never had been, and never would be a single importation from the United States. While the problems experienced by Canadian corn growers were not to be taken lightly, the novel interpretation of the Agreement by the CIT in this case was not an appropriate manner of addressing that problem. The Agreement dealt with injury to a domestic industry caused by imports and was not meant to be extended to assessing duties on imports from one country because of injury caused by imbalances in world supply and demand.

4. The representative of the United States pointed out that in its determination of injury the CIT had adopted what it had called a "broader interpretation" of the Agreement; in his view this "broader interpretation" had resulted in affirmative injury findings in the absence of imports. In order to illustrate how the CIT had interpreted the Agreement in this case, he quoted several passages from the majority portion of the "Statement of Reasons":

> "Both the Special Import Measures Act and the GATT Subsidies Code exist for the express purpose of dealing with unfairly traded goods which cause or threaten injury. Necessarily their provisions must be interpreted, not in the abstract, but within the context of the environment within which they apply, namely, international trade. Since the economic and commercial realities of international trade dictate that price be met or market share lost, the majority of the panel is persuaded to adopt a broader interpretation of 'subsidized imports', that is, that cognizance be taken of potential or likely imports in the determination of material injury. To do otherwise, in the view of the majority of the panel, would be to frustrate the purpose of the system... The issue, therefore, is not whether imports have taken place, but whether they would have increased substantially in the absence of a price response by the domestic producers to the subsidized US corn.
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> The essential question to be addressed is whether the operation of the 1985 US Food Security Act, which, as the Deputy Minister found, subsidized grain corn produced in the United States, was such as to cause prices in Canada to decline to levels judged to be of a material nature. Other indicia of injury normally considered, such as increased imports and loss of sales and employment, are not present in this case because Canadian corn producers have accepted lower prices in order to maintain sales in the face of the potential inflow of low-priced US corn.
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> Counsel [for the petitioners] argued that there is nothing in the Special Import Measures Act or the Subsidies Code which restricts the scope of the Tribunal's enquiry into material injury to the causality of actual imports, but that the causality of potential imports and their effects for the past, present and future must also be encompassed."

5. The representative of the United States said that the dubious and dangerous notion of "causality of potential imports" must have been persuasive to the majority of the CIT. However, the language of the Agreement was clear in this regard. Article 6:1 required an examination

of the volume of imports and "the consequent impact of these imports". Article 6:2 then required an examination of whether there had been a significant increase in imports and whether these imports undercut or depressed domestic prices. The CIT had not considered imports or import trends, nor had it examined the effects of actual imports of grain from the United States. In fact, imports of US grain corn into Canada were low and there had been a declining trend since 1980/1981. Instead of evaluating the trends and effects of these declining imports, the injury analysis of the CIT had been based on the alleged effects in Canada of the price of grain in the United States, as represented by the Chicago Board of Trade corn prices. The CIT had acknowledged that the Chicago price was the world market price. Thus, injury had been found to exist on the basis of declines in the world market price and a potential for importation at that price. However, there was always a potential for importation of products. This was particularly true of commodities traded at world prices as reflected at similar exchanges in Chicago, London or elsewhere. De facto the majority of the CIT had also interpreted the Chicago Board price as an offer for sale, which it was not. The representative of the United States emphasized that the Agreement did not deal with injury to a domestic industry caused by declining world prices. The effect on a domestic industry of a declining world price was a factor other than imports. Article 6:4 of the Agreement indicated that the impact of such other factors should not be attributed to the imports. His delegation was concerned that, by looking at the impact of such another factor, the "broader interpretation" of the CIT had led to a new type of causal analysis not provided for by the Agreement. The CIT had found that injury had been caused by a decline in the world price of corn and that this decline had been caused by the United States. He wondered what type of causality standard should be applied with respect to the decline in the world price and whether it should be established that the United States was merely a cause of this decline, a material cause, a significant cause, a substantial cause or the only cause. The Agreement was silent as to any such standard for it did not contemplate this type of secondary causal analysis. Furthermore, this type of analysis could be applied in any case involving commodities, processed primary products, or even fungible manufactured products such as steel. The result of this approach would be that countries could find countervailing duty barriers raised against their exports in markets around the world, not because these exports were causing injury to domestic industries but because these countries could be alleged to be causing a decline in world prices. The United States was also concerned that this type of analysis might lead to determinations based on assumptions and conjectures about world price movements. Article 6 of the Agreement required that injury determinations be based on positive evidence. Such positive evidence might be readily collected concerning the condition of the domestic industry and the effects of imports on that industry. World price movements, however, were complex and were caused by factors and events in many locations around the world. It was unlikely that positive evidence would be available concerning any such factors and events. The problems raised by the determination of the CIT in this case had been summed up by the dissenting member of the CIT as follows:

"The GATT is not an instrument designed to police the social and economic policies of the signatories. It is concerned with international trade: with goods crossing frontiers: with imports."

However, the majority of the CIT had explicitly disregarded actual imports and the actual movement of goods across borders. The GATT and the Agreement were structured to apply only when there was actual international trade. By venturing beyond the scope of the Agreement, the "broader interpretation" adopted by the CIT had necessarily resulted in a decision made without any standards established by the signatories.

6. The representative of the United States summarized his remarks on this issue as follows. The "broader interpretation" adopted by the CIT in this case was regarded by his authorities as being outside the scope of the General Agreement and the Agreement on Subsidies and Countervailing Measures. There was no basis for assessing countervailing duties on the goods of one signatory when injury was caused by a factor other than imports, in this case a declining world price. Furthermore, the Agreement provided no standard to determine who was causing a decline in the world price, and such an inquiry was inappropriate in any event. Finally, the Agreement required that a determination of injury be made on the basis of positive evidence of the effects of imports, not on conclusions about alleged impact of a potential for importation. He urged the Canadian Government to take whatever actions were necessary to clarify the situation and ensure that countervailing duties were not levied on imports of grain corn from the United States unless warranted by the terms of the Agreement.

7. The representative of Canada said the action taken by this Government in applying a countervailing duty on imports of grain corn from the United States was in full conformity with the terms of the General Agreement and the Agreement on Subsidies and Countervailing Measures. The subsidy determination had been made in accordance with the generally accepted guidelines on the application of the principle of specificity and the final injury determination had been made by the CIT, a quasi-judicial body comparable to the United States International Trade Commission, following an objective examination of the facts which it had gathered and which had been presented to it in the course of the enquiry. Public hearings had been held by the CIT which had provided interested parties with a full opportunity to plead their case.

8. The representative of Canada further said that corn was a homogenous commodity which was traded internationally in significant quantities. The United States was the largest single exporter of corn and dominated international corn trade. It was the only viable source of imports of corn into Canada. Subsidy practices of the United States had resulted in a massive excess production of corn which had caused a dramatic decline of the price of corn in the United States and in world markets. The domestic price of corn in Canada, as in other small countries which did not restrict imports of corn, was strongly influenced by prices of corn in the

United States and therefore had declined to the level of import prices. This had had adverse effects as producers in Canada had been obliged to accept lower prices to maintain sales in the face of import competition. As a result there had been an increased burden on governmental agricultural support programmes. In 1986-1987 this increase amounted to $115 million. Regarding the contention in the second paragraph of the communication from the United States in SCM/82 that "the Tribunal had found that the material injury was attributable to the 'potential for importation' of grain corn from the United States, rather than actual imports", he said this statement was misleading and side-stepped the elements of injury identified by the CIT. The finding of the CIT had been based on actual imports from the United States and their prices, and not on potential imports as had been argued by the United States. Imports of subsidized corn from the United States constituted the injury transmission mechanism without which the determination of injury could not have been made since the United States was the only viable source of imports of corn into Canada. Subsidies granted by the United States had lowered the prices of corn in the United States and had caused Canadian domestic corn prices to fall in the face of import competition. In the absence of a price response by the Canadian corn producers, an increase in imports of corn from the United States would have been a certainty. This price suppression was obviously a factor limiting the increase of imports of corn from the United States. On the market share of imports of corn from the United States he said that these imports, which accounted for 5.7 per cent of the Canadian market in 1985-86, were not inconsequential; in the light of some recent cases in which countervailing or anti-dumping duties had been imposed by the United States on imports from Canada, the market share in Canada of imports of subsidized corn from the United States was significant. For example, in 1985 the United States had imposed countervailing duties on imports from Canada of live swine which accounted for 2.6 per cent of the United States market, primarily because prices in the United States were very sensitive to those imports. In contrast, a countervailing duty had not been imposed on imports of pork from Canada, which accounted for 2.8 per cent of the market in the United States. because such imports had little discernible effect on prices in the United States. In a more recent action the United States had imposed anti-dumping and countervailing duties on standard carnations from Canada even though imports from Canada of those products accounted for less than 0.05 per cent of the United States market. He said that other signatories might have had similar experiences with countervailing duty investigations in the United States.

9. The representative of Canada pointed out that the affirmative injury determination of the CIT was fully consistent with the relevant provisions of the Agreement. The criteria to be considered in an investigation of injury were listed in Article 6. This Article specified a number of factors to be taken into consideration in the examination of the volume of subsidized imports and their consequent impact on prices in the domestic market and on domestic producers of the like product. This Article clearly identified as relevant factors price undercutting and the impact on

governmental support programmes which had been key elements in the finding of the CIT. Furthermore, the fact that injury might manifest itself in different forms was recognized in Article 6 which stated that not one or several of the factors listed could necessarily give decisive guidance. This meant that the question whether there had been an increase in imports could not alone give decisive guidance as other factors might also bear on the question of injury. With respect to governmental support programmes he said it was important to stress that the purpose of these programmes was to prevent significant reductions in farmers' incomes when agricultural prices fell by lessening the burden of downward domestic price responses to import competition. These price responses maintained the competitiveness of Canadian domestic producers and might prevent increases in imports as domestic prices fell to the level of import prices. This was why the Agreement recognized that in the case of imports of subsidized agricultural goods, injury could be found to exist even if imports had not increased. On the fact that the CIT had not issued a unanimous finding, the representative of Canada said that this in no way undermined the finding of the CIT. In this respect, he noted that the United States International Trade Commission frequently issued decisions with dissenting opinions.

10. Finally, the representative of Canada said that the request by the United States for a meeting on this issue was interesting in that it seemed to suggest that the United States was prepared to discuss the operation of the Agreement not only with regard to the subsidy provisions but also with regard to the provisions on the application of countervailing measures. The Negotiating Group on Subsidies and Countervailing Measures offered a forum for such discussions.

11. The representative of the EEC said his authorities had noted with interest that, after apparently extensive investigation, the Canadian authorities had found that certain agricultural support programmes of the United States constituted countervailable subsidies. The EEC had always taken the view that the United States was one of the countries operating potentially trade distorting programmes in the sector of agriculture; this view seemed to have been affirmed by the findings of the Canadian authorities in this case. With regard to the injury issue he reiterated the view of the EEC that signatories of the Agreement should abide strictly by the relevant provisions of the Agreement; in this connection he referred to the invocation by the EEC of the dispute settlement mechanism of the Agreement with respect to a dispute with the United States concerning wine and grape products and a dispute with Canada concerning boneless manufacturing beef. He noted with interest that it now seemed that the United States shared some of the concerns of the EEC and expressed the hope that in the near future the United States would agree to adoption of the Report of the Wine Panel. He further recalled that the EEC, over a number of years, had insisted that anti-dumping and countervailing duties be limited to what was necessary to remove the injury actually caused to domestic producers. This approach had, however, been opposed by the United States. He hoped that, in the light of the broad interpretation adopted by the CIT in this case, the United States would be prepared to

consider this issue again. He further said that signatories should make an attempt to develop a consistent approach with respect to the interpretation of the relevant provisions of the Agreement, an approach which should not depend on the manner in which it affected specific interests of signatories in particular cases. Finally, he reserved the right of the EEC to make more specific comments on the finding of the CIT at a later stage.

12. The representative of the United States said a crucial element of this case was that under Section 42 of the Special Import Measures Act the CIT was required to investigate whether "the subsidizing of the goods" subject to investigation had caused, was causing or was likely to cause material injury. Thus, the Act permitted the CIT to investigate the effects of subsidized goods, rather than the effects of imports of subsidized goods. The Statement of Reasons published by the CIT on 20 March 1987 indicated that in this case the CIT had decided to adopt a broad interpretation of the term "subsidized goods" and to include in this term subsidized goods which had the potential for importation and therefore had a price depressing effect.

13. The representative of India said he appreciated that the United States had brought this matter before the Committee since it appeared to raise important issues relating to the operation of the Agreement. However, as his delegation had not been in possession of the full facts, he was not in a position to offer any comments at this stage. The statements of the United States and Canada appeared to present two different views. Other signatories could only form an opinion if they were provided with all relevant information.

14. The representative of Chile said he agreed with the statement made by the representative of India. He considered it particularly important that the determination of the CIT be made available to the Committee.

15. The representative of Canada said he would submit to the secretariat a copy of the Statement of Reasons issued by the CIT on 20 March 1987.

16. The Chairman concluded the meeting by inviting Canada and the United States to continue their bilateral consultations in order to arrive at a mutually satisfactory solution; he further invited these two signatories to inform the Committee of the results of these consultations at the next regular meeting of the Committee on 3 June 1987.