

GENERAL AGREEMENT ON

RESTRICTED

SCM/M/55

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TARIFFS AND TRADE

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 15 AND 18 NOVEMBER 1991

Chairman: Ms. Angelina Yang (Hong Kong)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a special meeting on 15 and 18 November 1991.
2. The Committee considered two items:
 - A. United States - Measures affecting the export of softwood lumber from Canada - Request by Canada for conciliation under Article 17 of the Agreement (SCM/128)
 - B. United States - Measures affecting the export of pure and alloy magnesium from Canada - Request by Canada for conciliation under Article 17 of the Agreement (SCM/130)
- A. United States - Measures affecting the export of softwood lumber from Canada - Request by Canada for conciliation under Article 17 of the Agreement (SCM/128)
3. The Chairman recalled that on 8 October 1991 Canada had requested consultations with the United States under Article 3:1 of the Subsidies Agreement regarding the United States' initiation of a countervailing duty investigation on exports of softwood lumber from Canada. These consultations had been held on 16 October 1991. The Committee now had before it a communication from Canada requesting conciliation with the United States on this matter (SCM/128) and a communication from the United States regarding the basis of Canada's request for conciliation (SCM/131).
4. The representative of the United States said that as indicated in SCM/131, his country was of the view that the present meeting had not been properly convened and that there was no proper basis at the present time for conciliation on this matter. The United States believed that its position required serious consideration by the Committee, and formally requested the Chairman to delay the remainder of the meeting so as to allow signatories time to reflect on this serious matter. Any other action

would be inconsistent with the letter and spirit of the relevant provisions of the Code. He then summarized the United States' position as follows: The consultations on this matter had been requested by Canada pursuant to Article 3:1 of the Code. This Article by its terms explicitly limited the subject matter of such consultations to matters under Article 2:1, i.e. clarification of the basis for initiation of an investigation. No consultations had been held for the purpose of considering either the validity of the interim measures taken by the United States or the question of whether Canadian provincial timber policy practices constituted a subsidy. The US position was based on the clear terms of Article 3:1 and was reaffirmed by comparing Article 3:1 with Article 3:2, specifically with regard to Footnote 13 to the latter. The last sentence of this footnote made clear that consultations throughout the period of investigation, i.e. under Article 3:2, may establish the basis for proceeding under the provisions of Part VI of the Agreement. The absence of any such reference or implication regarding consultations under Article 3:1 as a matter of law and statutory interpretation clearly indicated that the holding of the present meeting was inappropriate. His second point was that there was an additional basis on which to argue against any discussion, in a validly constituted conciliation meeting, of two of the three points raised by Canada in SCM/128. Article 3:1 was clearly limited to matters relating to the initiation of a countervailing duty investigation. Under no circumstances could questions concerning interim remedy or whether particular practices were or were not subsidies, be matters for conciliation under Article 3:1. Thus, as a matter of law, the United States objected to the holding of the present meeting.

5. The representative of Canada said that he had not detected any points in the United States' statement which were not contained in SCM/131. Canada's statement would provide additional information on all of the points raised by the United States. He drew the Committee's attention to information which addressed directly the United States' observations regarding the consultations that had been held under Article 3:1 on 16 October. This information was a letter from the US Assistant Secretary for Import Administration dated 18 October¹ which read in part:

"I hope our 16 October consultations were helpful towards a better understanding of the basis for the planned initiation of a countervailing duty investigation on softwood lumber from Canada.

"We discussed in the consultations the existence of Canadian lumber subsidies, material injury to the US lumber industry and the causal link between subsidized Canadian lumber imports and injury to the US industry."

¹Subsequently circulated to signatories as SCM/W/251.

He said that this refuted completely the assertions in SCM/131 and the US statement to the effect that, "No consultations had been held for the purpose either of considering the validity of the interim measures or whether the Canadian provincial timber policy practices constituted a subsidy" (SCM/131, last sentence of second paragraph).

6. The Chairman said that the procedural points raised by the United States would have to be settled before the substance of this matter could be discussed.

7. The representative of Canada said that his statement also addressed the procedural points raised by the United States.

8. The representative of the United States said that he believed that his country would be within its legal and procedural rights in insisting that no discussion other than that relating to the procedural points raised by the United States be undertaken at this juncture. However, if Canada believed that there was some value to making its entire statement at this time, the United States would not engage in a protracted procedural fight. He reiterated the US position that the only issue properly before the Committee at this time was the procedural issue, and that following Canada's statement, the United States would formally re-assert its request for an interpretation on the legal point involved.

9. The representative of Canada said that this matter was extremely important to his country, as Canada's softwood lumber exports to the United States which were subject to the US action at issue were worth no less than US\$2.3 billion in 1990. While the commercial matter required some urgency, some basic and fundamental issues needed resolution. This was the third time in eight years that the US Department of Commerce (USDOC) had initiated an investigation of the Canadian softwood lumber industry, on the basis of alleged subsidies provided by provincial governments in the pricing of natural resources. The USDOC had made only one final determination - in 1983 - on this issue, in which it had found that provincial timber pricing policies did not constitute a subsidy.

10. In October 1986 the USDOC had preliminarily determined a 15 per cent subsidy on Canadian softwood lumber exports to the United States. This reversed the 1983 final determination of no subsidy, even though there had been no substantive change in international trade rules, United States law, or Canadian timber pricing practices in the intervening period. Canada had challenged this preliminary determination under the Subsidies Code. Prior to the completion of the panel established to examine this matter, Canada and the United States had reached a bilateral settlement. On 30 December 1986, Canada had agreed to a Memorandum of Understanding (MOU) wherein it would impose a 15 per cent export tax on softwood lumber exported to the United States. The United States had then agreed to terminate its countervailing duty investigation. However, the MOU had not been envisaged as permanent and on 3 September 1991, in light of changed circumstances, Canada had given the United States notice of its intention

to terminate the MOU on 4 October. Termination by either party was explicitly provided for in the MOU with 30 days notice. On 4 October, the United States Government had responded to Canada's exercise of the MOU's termination clause by introducing a new bonding requirement applicable only to softwood lumber imported from Canada and by announcing its intention to self-initiate a countervailing duty investigation of softwood lumber exports from Canada.

11. Canada had held consultations under Article 3:1 of the Code with the United States on 16 October 1991. At these consultations, on the basis of the provisions of Article 2:1 of the Code, Canada had requested from the United States evidence of the existence of a subsidy, of injury, and of a causal link between the alleged subsidy and the alleged injury on which the USDOC had justified its intent to self-initiate a countervailing duty investigation. Canada had reiterated its view that the United States had not met the requirements of the Subsidies Code for self-initiation of a countervailing duty investigation. Canada had restated its position that the exploitation of standing timber ("stumpage") did not constitute a subsidy. Canada had also indicated that it did not consider the United States' case for either injury or causal link to be justified.

12. With respect to suspension of the liquidation of entries and imposition of the bonding requirement, Canada had stated that in its view the United States had not fulfilled its obligations under Article 5:1 of the Code. Canada had rejected the United States' claim that the above-mentioned measures were justified as "expeditious action" under the "violation of undertakings" provision of Article 4:6 of the Code. No undertakings had been violated, as the 1986 countervailing duty investigation had been terminated. The MOU was not and could not be construed as an undertaking in the sense of Article 4:6. The consultations under Article 3:1 had not resulted in a mutually agreed solution. The USDOC had formally initiated the countervailing duty investigation on 31 October 1991, with the publication of the notice of initiation in the Federal Register of that date. As a result of the initiation, Canada had requested conciliation as, in its view, the United States was in breach of its obligations under Article 2:1 of the Code. Specifically, the United States had initiated an investigation on the basis that government programmes which allocated rights to harvest standing timber on provincial lands were a subsidy and countervailable. It had long been the position of the Canadian Government that government policies related to the exploitation and pricing of natural resources, in particular Canada's provincial practices for harvesting standing timber, did not constitute subsidies within the meaning of the Code. The provinces in Canada had jurisdiction over the natural resources in their territories and formulated the policies which governed the exploitation and pricing of such resources. Governments had the general responsibility to govern by allocating resources, including natural resources. In the particular case of policies governing the exploitation of standing timber, governments took a number of considerations into account in formulating

resource policies so that an optimal use was made of this particular bounty of nature. The management of a natural resource could not be construed to constitute a subsidy; thus the United States had no grounds under the Code to initiate a countervailing duty investigation.

13. Canada considered the suspension of liquidation of entries and the imposition of a bonding requirement to be contrary to the United States' obligations under Article 5:1 of the Code. These measures had been put in place prior to initiation. The bond rates were, for softwood lumber originating in the province of Quebec, 6.2 per cent for entries before 1 November 1991, 3.1 per cent for entries on or after that date, and 15 per cent for other provinces and territories. No bond was required for Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick and British Columbia. The bonding requirement was in effect a guarantee that a countervailing duty would be paid for the period prior to an affirmative preliminary determination. It was Canada's view that the United States had no basis on which to initiate an investigation, for the third time, of provincial practices for the exploitation of standing timber as they related to Canadian exports of softwood lumber products. Canada asked the US Government to terminate the countervailing duty investigation of certain Canadian softwood lumber products, which it had initiated on 31 October 1991, and to cancel all outstanding bonds on Canadian softwood lumber exports.

14. The Chairman reiterated that she would like to clarify the procedural points raised by the United States. She said that the information provided by Canada on the substance of this matter was without prejudice to the discussion on those procedural points. She recalled that the United States had requested that the Committee reflect on those points, and asked if any other delegations wanted to speak on this matter.

15. The representative of Colombia said that his delegation would like to know whether the United States considered that the consultations had taken place or not. Were the parties at the stage of consultations or conciliation? This should be clarified before the discussion continued.

16. The representative of the United States said that Colombia's question was not legally relevant at this juncture because the United States' view was that there was no basis for the present meeting to be held. Nevertheless, he would respond to Colombia's question. Were the present meeting to be a properly constituted meeting, the United States would dispute the fact that consultations were appropriate on the issues of whether the United States' suspension of liquidation of entries was consistent with its obligations under Article 5 and whether Canada's provincial practices for harvesting standing timber constituted subsidies within the meaning of the Code. The United States acknowledged that Canada had mentioned these points in the past; however, they had not been discussed or treated by the United States as properly subject to consultations. There was nothing in the letter from the US Import Administration that indicated to the contrary. Particularly in light of

the less-than-universal representation at the present meeting and the inability of delegations to respond to the Chairman's request for views on the legal point raised, the only appropriate course of action would be to call for a suspension of this meeting until such time as delegations were prepared to provide some guidance on the legal interpretation regarding the issue of whether conciliation was juridically proper under the Code following consultations under Article 3:1.

17. The representative of Brazil said that he was confused by the United States' statement. If the mere invocation of the legal complexities of an issue before the Committee could prevent the Committee from considering a relevant case, this would establish a dangerous precedent. He asked if the Chairman or the secretariat had any information regarding precedents for this type of problem that would enable the Committee to move forward.

18. The secretariat (Mr. Woznowski) said that he hesitated to give any advice on this matter because there were no sufficiently well-established precedents which could provide legal guidance. One case similar to the one at issue was the previous case involving softwood lumber exports from Canada. In that case, the Committee had moved from consultations presented as having been held under Article 3:1, to conciliation in the Committee. However, he did not know to what extent this could be considered as a legal precedent, because at that time, the United States had not objected to the holding of the conciliation meeting. There were two cases where the Committee had held - rather than a conciliation meeting following consultations under Article 3:1 - a special meeting which had been considered as a consultation meeting. Thus, there were two cases where the Committee had held a conciliation meeting following a special consultation meeting without Article 3:1 consultations proper.

19. The representative of Canada said that he too was confused by the United States' statement that it was not appropriate for the Committee to decide whether its consideration of the issue at hand was appropriate. His delegation thanked the secretariat for the information on legal precedents, and understood that there had never been a ruling of the sort requested by the United States. Regarding this legal question, he drew the Committee's attention to the provisions of Article 17:1 which stated unequivocally that conciliation was provided for under the Code in respect of "any provision of this Agreement". The precedent to which reference had been made was instructive in that regard and showed that the conciliation procedure provided for in Article 17 was broadly available to deal with precisely these sorts of cases. He agreed with Brazil that any cessation or suspension of the present meeting would be a dangerous precedent and would provide any delegation with a basis on which nearly any proceeding before the Committee could be halted. Regarding Colombia's question, the letter from which he had quoted was a covering letter for a summary prepared by the US Assistant Secretary for Import Administration pursuant to the consultations held on 16 October (SCM/W/251). He noted

that this summary referred to an analysis conducted by the USDOC on the question of whether or not stumpage constituted a subsidy. This analysis had been discussed in detail at the 16 October consultations.

20. The representative of the United States said that he would react in order to aid delegations who had remained silent to reflect on this legal issue and to come to the appropriate conclusions when the Committee might meet again to have a full, adequate and conclusive discussion of this legal point. The secretariat had given an accurate description of the softwood lumber case brought to the Committee in 1986 in which the United States had chosen not to raise any procedural objection to the highly expedited process that had been undertaken. Clearly that position of voluntarily declining to assert legal rights was not the situation in the present case. The United States agreed with Canada that a ruling of the sort requested by the United States at the present meeting had never before been requested. This was further support for the point that it was crucial for all members of the Committee to reflect seriously on this issue and to provide an interpretation. Article 17:1 was clearly a provision which would have to be examined in arriving at such an interpretation, as all provisions in a text were assumed to have meaning. This applied equally to Articles 3:1 and 3:2 and the footnote to the latter, where there was a clear delineation, evident explicitly in Footnote 13, that made sense only if one concluded that consultations under Article 3:1 did not provide the basis for proceeding under Part VI. Thus, at the very least, there was a monumental legal question, a seemingly huge inconsistency, between Footnote 13 and the reference in Article 17:1. This was all the more reason why, before it took any further step in regard to this matter, the Committee as a whole had to reflect carefully and to decide this fundamental point.

21. The representative of Canada said that the US delegation's reading of Footnote 13 seemed in effect to be that this provision of the Code amounted to a limit on access to the conciliation procedures of the Code. In Canada's view, that was an incorrect interpretation. To the contrary, the footnote, on its face, imposed a positive obligation on the parties to consult in respect of matters such as the one at issue. In no way could the footnote be construed as limiting access to the conciliation procedures, which were provided for in Article 17:1 in respect of any provision of the Agreement. In addition, Canada understood that the same point had been raised in the 1986 proceeding, and that it had been made quite clear at that time that the Code did allow for access to the conciliation proceeding at the point in an investigation which had been reached in the case at hand. By contrast, the Anti-Dumping Code, which had been negotiated at the same time and by many of the same individuals, did not provide for conciliation until a point much later in an investigation. The fact that the Subsidies Code contained no such provision had to be taken as an indication that there was a different intent. Canada's reading of the Subsidies Code conciliation provisions was that they conveyed a great sense of urgency to both the consultation and the conciliation processes. Regarding the United States' comment on

expedited procedures, he noted that in keeping with the agreed procedures of the Subsidies Committee, Canada's request for conciliation had been submitted the requisite 10 days prior to the convening of the Committee. While some delegations had remained silent, several others had apparently found this time sufficient to prepare interventions at the present meeting. Canada would continue to consult with those and other interested delegations during the course of the present meeting or during the remainder of the conciliation period.

22. The Chairman said that it was her duty, as Chairman, to ensure that the provisions of the Subsidies Agreement were applied fairly and consistently. She noted that the provisions of the Agreement relating to consultation and conciliation on matters involving countervailing measures did not specify any minimum time period between the date of a request for consultations and the date of a request for conciliation in the Committee, provided that the consultations had in fact taken place prior to the request for conciliation. Where there was no stipulated time period between consultations and conciliation - as, for example, the time periods set out in Articles 13:1 and 13:2 - the signatory could request conciliation once consultations had been held. She noted that Canada and the United States had held consultations on this matter under Article 3:1 on 16 October 1991, and that in the United States' view, these consultations had been limited to matters under Article 2:1 of the Agreement - that is, to clarify the basis for the initiation of a countervailing duty investigation only. She also noted that in the US view, Canada had no basis in Article 3:1 on which to move from that Article to a request for conciliation under Article 17, as the relevant provision for such a move would be Article 3:2 as explained in Footnote 13.

23. After careful examination of the relevant provisions of the Subsidies Agreement, she could only say that these provisions were not absolutely clear. Although it was true that consultations under Article 3:2 clearly established a basis for proceeding under the provisions of Part VI - which basis was not expressly established in the language of Article 3:1 by consultations under that Article -, it was nowhere excluded that Article 3:1 could not be invoked as the basis for a request for conciliation, in particular as Article 17:1 referred to "consultations under any provision of this Agreement". As members of the Committee knew, she had never declined her responsibility to make a ruling where the text of the Subsidies Agreement was clear. However, where there were grey areas that required even a bit of interpretation, as there were in the provisions under examination, she wanted to hear the views and have the advice of the Committee, as this was the only body authorized to interpret the Agreement. She encouraged members of the Committee to make their views known on this issue, in particular, the following question: did consultations under Article 3:1 provide a sufficient basis to move to the conciliation process under Article 17:1; or was such a basis provided only through further steps in the consultation process under Article 3 as provided for in the footnote to Article 3:2?

24. The representative of the United States asked that all delegations which had instructions at the present meeting to respond to the questions raised, so indicate. In the US view, absence of any affirmative response to this request could be taken as evidence that delegations did not have sufficient instructions and needed further time to respond to these questions.

25. The representative of Canada said that in his delegation's view, the US request was entirely out of order. Some representatives had already spoken on these issues, indicating that they either had instructions or had authority to speak on behalf of their government. In any event, it could also be said that silence meant consent.

26. The representative of Finland, speaking on behalf of the Nordic countries, said that these countries had no legal advice to offer regarding Articles 17:1 and 3, and Footnote 13, but felt frustration that procedural arguments were being used to protract the dispute settlement process which should allow for a mutually acceptable solution to the dispute as quickly as possible. They hoped that the procedural aspects in dispute could be resolved quickly. In the Nordic countries' view, parties should act quickly in dispute settlement, and if consultations did not provide a solution, the parties should move rapidly to the next phase.

27. The representative of Colombia supported the statement by Finland that procedural issues should not be used to obstruct the dispute settlement process. The Code was very clear that when one stage of dispute settlement had been completed, the parties should go to the next stage. Once consultations pursuant to the Code had been held and had not led to a mutually satisfactory solution, there was an obligation to go to conciliation. Furthermore, the Committee had a duty not to set any precedents which might spill over to other Codes and to the entire GATT dispute settlement system. In the case at hand, if Canada could demonstrate that consultations had been held and had not led to a solution, the Committee should proceed to the conciliation stage.

28. The representative of Brazil associated his delegation with Finland's statement regarding the attempt to use procedural points to prevent a quick decision on this very serious matter.

29. The representative of the United States said that pragmatism and expediency were desirable as long as the legitimate rights of one of the parties were not railroaded. One could not elevate expediency above proper process and proper protection of rights. The gist of some of the statements at the present meeting seemed to suggest that consultations under the Code could be held without any proper delineation or discussion of the issues, and that the complaining party could then move as fast as possible to conciliation and a request for a panel. The principle for which the United States was arguing was neither frivolous nor intended to delay the dispute settlement process. The United States could understand the commercial importance of this case for Canada. However, it was of

great importance for the country being complained against that there be a proper following of rules and process and a proper articulation of concerns. It was the United States' firm belief that the Code did not provide for conciliation following consultations under Article 3:1; these might be agreed to as a matter of grace, but could not be demanded as a matter of right. In countervailing duty actions, only when one reached the stage of consultations under Article 3:2 was there legal provision for the conciliation process. This was a matter of fundamental principle, not a delaying tactic.

30. The representative of Canada said that regarding two points raised by the United States, first, there was nothing unusually expeditious about the present proceeding, and the precedent cited by the secretariat showed that in the case at hand, the usual practice of the Committee and the letter of the Code were being followed. Second, it seemed that members of the Committee other than the two parties to the dispute had unanimously expressed frustration over precisely the procedural issue raised by the United States.

31. The Chairman noted that while there were still differences of view, the majority of signatories who had spoken on this issue favoured proceeding with the conciliation exercise as requested by Canada, based on the reference to Article 17:1. This Article read, "In cases where matters are referred to the Committee for conciliation failing a mutually agreed solution in consultations under any provision of this Agreement, the Committee shall immediately review the facts involved and, through its good offices, shall encourage the signatories involved to develop a mutually acceptable solution." In view of this, she appealed to the United States not to oppose - without prejudice to its legal position on the matter - the view of the majority that Article 17:1 provided a legal basis within the Code on which to bring the matter raised by Canada in SCM/128 to the Committee for conciliation.

32. The representative of the United States said that with due regard to the Chairman in her personal and institutional capacity, statements by only two third-party delegations in a sparsely attended meeting and the conspicuous silence of a vast majority of Code signatories gave him no legal or political reason to retreat from his previously stated objection regarding the convocation and validity of the present meeting. The representative of Canada pointed out that at least three third-parties had spoken on this matter.

33. The Chairman suggested that the Committee adjourn for a brief period in order to allow her time to immediately hold informal consultations with the two parties concerned. After a brief adjournment, the Chairman announced that she needed more time for her consultations and suggested that the meeting be suspended until the following Monday, 18 November.

34. The representative of Brazil said that his delegation wanted to go on record that its proposal to proceed with discussion of this case in the Committee was without prejudice to any general legal interpretation of the provisions mentioned in the Chairman's two questions.

35. The Committee took note of the statements and adjourned.

36. The Committee reconvened on 18 November 1991.

37. The Chairman said that she understood that the United States and Canada had reached a mutually satisfactory solution to the procedural problem discussed at the meeting on 15 November.

38. The representative of the United States confirmed that a mutually acceptable solution had been reached as to how to proceed in this matter. The United States maintained with full vigour its legal position on interpretation of the Code expressed at the meeting on 15 November 1991. However, the United States chose voluntarily not to continue at the present time in this proceeding to exercise its legal rights in that regard, and chose voluntarily to consider that the meeting held on 15 November could be considered to be a conciliation meeting, and that this meeting had not produced a mutually acceptable solution to the matter. His delegation understood that Canada might thus choose to continue the dispute settlement process in this case.

39. The representative of Canada confirmed that the statement by the United States fully reflected the understanding on procedure which the two parties had reached in regard to this matter.

40. The Chairman said that as the two parties were in agreement on procedural points, she encouraged them to make further efforts to reach a mutually satisfactory solution on the substance of this matter consistent with the Code.

41. The Committee took note of the statements.

B. United States - Measures affecting the export of pure and alloy magnesium from Canada (SCM/130)

42. The Chairman said that in light of the lengthy discussion on procedure at the 15 November meeting and in light of the busy schedule of meetings in connection with the Uruguay Round, she would suggest that the Committee postpone to a date in the near future, the conciliation meeting on the matter involving pure and alloy magnesium exports from Canada to the United States, and that in the meantime the two delegations continue their discussions on this matter with a view to reaching a mutually satisfactory solution consistent with the Code.

43. The representative of Canada said that his delegation could agree to the Chairman's suggestion. Canada would continue discussions with the United States until such time in the near future as this conciliation meeting was reconvened. The representative of the United States said that his delegation could agree to the Chairman's suggestion.

44. The Chairman said that in light of the statements by Canada and the United States, she would suggest that these two parties continue their efforts to find a mutually satisfactory solution to this matter, and that the conciliation meeting of the Committee requested by Canada on 4 November be held at an early future date.

45. The Committee so agreed and took note of the statements.