

GENERAL AGREEMENT ON

RESTRICTED

SCM/M/56

27 January 1992

TARIFFS AND TRADE

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD
ON 16 DECEMBER 1991

Chairman: Ms. Angelina Yang (Hong Kong)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a special meeting on 16 December 1991.
2. The Committee considered two items:
 - A. United States - Measures affecting the export of softwood lumber from Canada - Request by Canada for the establishment of a panel under Article 17:3 of the Agreement (SCM/133).
 - 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).
3. The Chairman noted that the United States had agreed to the inclusion of the second of these two items on the agenda of the meeting circulated in GATT/AIR/3276.
 - A. United States - Measures affecting the export of softwood lumber from Canada - Request by Canada for the establishment of a panel under Article 17:3 of the Agreement (SCM/133)
4. The Chairman recalled that on 15 and 18 November 1991, the Committee had held a conciliation meeting to discuss this matter and to examine the submission by Canada in document SCM/128. She drew the Committee's attention to document SCM/133 in which Canada requested the establishment of a panel under Article 17:3 of the Agreement.
5. The representative of Canada said that Canada had requested this meeting of the Committee under Article 17:3 in order to establish a panel under Article 18:1 to resolve the dispute concerning the imposition by the United States, since 4 October 1991, of a bonding requirement on imports of certain softwood lumber products from Canada, and the initiation by the United States of a countervailing duty investigation of government policies related to the exploitation and pricing of natural resources, in particular

the practices of certain provinces for harvesting standing timber ("stumpage"). The United States had imposed the bonding requirement on 4 October 1991 and had formally self-initiated the countervailing duty investigation on 31 October. Bilateral consultations on 16 October had not resulted in a mutually satisfactory resolution of the dispute. Formal conciliation efforts had been undertaken by the Committee on 15 and 18 November 1991 to resolve the issues raised by Canada both in its request for conciliation and as stated orally at that meeting. These efforts had been similarly unsuccessful. This was the third time within ten years that the United States had initiated a countervailing duty investigation of provincial pricing practices for standing timber. Each time it had introduced novel and different standards for determining the existence of subsidies, and it was difficult to believe that these actions were anything but a harassment of the exports of a signatory of the Code which was endowed with natural resources. He said that this dispute did not concern theoretical arguments. Canada had exported about US\$2.3 billion of softwood lumber products to the United States in 1990. Its exports since 4 October were already being affected by the bonding requirement. The US authorities were proceeding with their investigation, and on 12 December, the US International Trade Commissioners voted that Canadian exports of certain softwood lumber products had resulted in injury to US producers, during a period in which imports and Canada's market share of the US market had actually declined and domestic prices had increased. This vote was to be formalized on 16 December as a preliminary determination of injury, which would pave the way for the continuation of the countervailing duty investigation. Canada therefore asked the Committee to establish a panel under Article 18:1 to examine the complaint outlined in document SCM/128 and discussed at the special meeting of the Committee held on 15 and 18 November.

6. The representative of the United States said that the United States was confident that the initiation of the investigation referred to by Canada had been fully in accordance with the United States' obligations under Article 2:1 of the Agreement, and that the suspension of liquidation of entries which had come into effect on 4 October 1991 was fully consistent with the provisions of Article 4:6 of the Agreement. Regarding the substance of the investigation, his authorities would proceed in accordance with the provisions of the Code and would reach findings on subsidization and injury which would also be in accordance with the Code. He said that the United States too was richly endowed with lumber resources, the only difference between the United States and Canada being that this resource was not made available to US producers at subsidized rates.

7. The representative of Japan said that his delegation supported the establishment of a panel as requested by Canada and reserved Japan's right to intervene in the panel's proceedings, as it attached great importance to the matters involved in this case.

8. The Chairman noted that the representative of the United States did not oppose the establishment of a panel to review this matter. She therefore proposed that in accordance with the provisions of Article 18:1 of the Agreement, the Committee agree to establish a panel as requested by Canada. She would hold consultations with the parties in the very near future regarding the terms of reference of the panel, and asked the Committee to authorize her to agree to any modified terms of reference agreed by the parties to the dispute. She also proposed that in accordance with Article 18:3 of the Agreement, the Committee authorize her to decide, in consultation with the parties concerned, the composition of the panel.

The Committee so agreed and took note of the statements.

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)

9. The Chairman recalled that at its meeting on 15 and 18 November 1991, the Committee had agreed to postpone to a date in the near future the conciliation meeting requested by Canada on 4 November 1991 (SCM/130) on the matter involving pure and alloy magnesium exports from Canada to the United States, and that the two parties would continue their efforts to find a mutually satisfactory solution to this matter.

10. The representative of Canada said that Canada had requested conciliation on this issue because it considered the United States to be in breach of its obligations under the Subsidies Code in that the United States had initiated an investigation on imports of pure and alloy magnesium from Canada contrary to Article 2:1 of the Code. On 5 September 1991 the US Department of Commerce (USDOC) and the International Trade Commission (USITC) had accepted a petition for the imposition of anti-dumping and countervailing duties filed on behalf of Magnesium Corporation of America. In its petition, Magnesium Corporation had clearly indicated that it represented only 22 per cent of US domestic production. It had also indicated that the other two US producers, Dow Magnesium and North West Alloy, had not joined in the petition. Canada understood that subsequently, one of the other two producers had been excluded on the grounds that it was a related party, which would bring the proportion of the domestic industry represented by Magnesium Corporation to about 28 per cent. A diplomatic note, dated 23 September 1991, had been delivered to the United States to protest the initiation of an investigation based on the petition. Consultations under the Subsidies Code had also been held with the United States on 23 September 1991. Canada had specifically noted that Magnesium Corporation did not represent the domestic industry as required by Article 2:1 of the Code, and that the United States could not properly initiate an investigation on the basis of the petition. Canada had also urged the United States to undertake a verification that the complaint was on behalf of the domestic industry as required by the Code. Canada had been advised by the US authorities that they had taken no such steps and did not intend to do so prior to their

decision to initiate. Despite Canada's request, the US authorities had initiated the investigation on 25 September 1991. The USITC had made a preliminary determination of injury against Canadian exports on 16 October 1991.

11. He said that the fact that Magnesium Corporation did not represent the relevant domestic industry was not only clearly set out in its own petition, but was also clearly established in the "Additional Views" of Acting Chairman Anne E. Brunsdale which formed part of the USITC preliminary finding report where she noted (at page I-26) that Dow Magnesium and North West Alloy "have declined to support petition". She further stated that, "It is not clear that a petition lacking the support of producers of approximately three-quarters of the domestic industry should be considered to have been filed 'on behalf of' the domestic industry. At this point, I am not willing to rely on the lack of support to terminate this proceeding." He said that Article 2:1 of the Code states that, "An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry affected". Article 6:5 defines "domestic industry" as "referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, ..."

12. He said that furthermore, the US authorities had not taken steps to verify that the petition represented the domestic industry as defined under Article 6:5 of the Subsidies Code. In the report of the Panel on "United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden" (ADP/47) - not yet adopted - the Panel had considered the obligation of investigating authorities in initiating an investigation under the Anti-Dumping Code. At paragraph 5.10 the Panel concluded that Article 5:1 of the Anti-Dumping Code requires "investigating authorities, before opening an investigation, to satisfy themselves that a written request is made on behalf of a domestic industry, defined in accordance with Article 4". The wording of the Anti-Dumping Code and the Subsidies Code was identical with respect to the requirements for initiating an investigation and with respect to the definition of domestic industry. It was Canada's position that obligations under the Anti-Dumping Code with respect to the initiation of an investigation would equally apply to the initiation of an investigation under the Subsidies Code. Therefore, the decision of the Panel in the Seamless Stainless Steel Hollow Products case applied equally to investigating authorities seeking to initiate an investigation under the Subsidies Code. Therefore, in Canada's view, the United States was in breach of its Subsidies Code obligations because it had initiated an investigation on the basis of a petition which had not been filed by, or on behalf of, its domestic industry as required by the Code. Indeed, the United States had taken no steps to verify that the petition had been filed by or on behalf of the domestic industry affected. Canada therefore requested that the investigation currently being undertaken by the US authorities in the matter of exports of pure and alloy magnesium from Canada be terminated.

13. The representative of the United States said that his country had a different view of the procedural and substantive status of this case. In the US view, the petition had been properly filed and initiated by the US Government. Canada, by its own admission, could point to no opposition to the petition anywhere in the US industry. The petitioner had properly filed on behalf of itself and other members of the industry. The fact that one of the members of that industry had already been found to be a related party and therefore not part of the domestic industry or part of domestic production under the Code illustrated this point further. In addition, Canada could not and had not pointed to anything in the Subsidies Code that in any way invalidated the filing of the petition or the initiation of the investigation by the United States. The only interpretation of the question of verification, and not a question of the percentage that a domestic petitioner need represent in order to file on behalf of an industry, was contained in an unadopted Panel report from another Code Committee. Therefore, the United States considered that the investigation had been properly initiated, and would continue to pursue it in accordance with the terms of the Code.

14. The representative of Canada said that, in fact, there had been no verification of standing of the petitioner as required under the Code, and nothing the United States had just said contradicted that. In Canada's view neither 22 per cent nor 28 per cent constituted in any way a major proportion.

15. The representative of the United States said that the Code did not require verification of the standing of a petitioner who was filing on behalf of an industry. The United States respected Canada's opinion that 22 or 28 per cent of an industry did not constitute a "sufficient proportion" for a petitioner filing on behalf of an industry, but this was nowhere contained either in the Subsidies Code or any adopted or unadopted panel report on this issue.

16. The representative of Finland, on behalf of the Nordic countries, supported Canada's views on the interpretation of the initiation of investigations under the Subsidies Code. The Nordic countries shared the view that the investigating authority should verify the standing of the petitioner. They objected to the United States' so-called standard practice of continuing with an investigation provided there was no opposition to this from within the domestic industry.

17. The Chairman said that the Committee had heard the views of Canada, the United States and the Nordic countries on this matter, and encouraged the delegations of Canada and the United States to continue their efforts to reach a mutually satisfactory solution consistent with the Code.

The Committee took note of the statements.