

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/M/63

8 January 1993

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD
ON 26 NOVEMBER 1992

Chairman: Mr. Gerry Salembier (Canada)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a special meeting on 26 November 1992.
2. The Chairman stated that the purpose of the meeting was to consider the request by the EEC for establishment of a panel under Article 17:3 of the Agreement regarding the imposition by Australia of countervailing duties on imports of glacé cherries from France and Italy in application of the Australian Customs Amendment Act 1991 (SCM/152).
3. The Chairman recalled that at a special meeting of the Committee on 26 March 1992 (SCM/M/58) the EEC referred to a request for consultations under Articles 3 and 16 of the Agreement with respect to some aspects of this matter (SCM/145), and Australia subsequently responded in writing to this request (SCM/146). In a communication dated 10 April 1992 (SCM/147) the EEC reiterated its request for bilateral consultations with Australia. At its regular meeting on 28 April 1992, the Committee discussed the Australian legislation in the context of its examination of the countervailing duty laws and/or regulations of signatories to the Agreement (SCM/M/59). The EEC indicated that it had repeated its request for consultations with Australia on the legislation. On 10 July 1992 the EEC made a written request for conciliation regarding Australian Customs Amendment Act 1991 and countervailing duty proceeding concerning imports of glacé cherries from France and Italy (SCM/150). These matters were discussed at a special meeting of the Committee held on 21 July 1992 (SCM/M/61). The Chairman drew the Committee's attention to document SCM/152 and asked the representative of the EEC to introduce this item.
4. The representative of the EEC stated that the substance of this case had been discussed by the Committee on several occasions, both in relation to the general discussion of the relevant Australian legislation and in relation to this particular countervailing duty action. The basis of the request is that the EEC disagrees with the notion of domestic industry employed by Australia in this case, and thinks that notion is in obvious contradiction with the provisions of the Agreement. Since it has not been possible to resolve this matter otherwise, the EEC has requested a panel. He hoped the proceedings would be carried out as expeditiously as possible.

5. The representative of Australia said that Australia did not oppose the establishment of a dispute settlement panel to examine Australia's action in imposing countervailing measures on glacé cherries imported from France and Italy. Consultations and conciliation have not led to a mutually satisfactory agreement with the EEC. The EEC has followed appropriate Code procedures specifically in respect to the action on glacé cherries.

6. Australia totally accepts the right of panels to examine actions of a signatory on findings of fact which form the basis of such action, so as to ensure that they comply with obligations under the Code. However, it is improper for a panel to examine domestic legislation itself. Nor does Australia accept that consultations and conciliation have taken place with respect to Australia's legislation per se. The EEC complaint covers in paragraphs 6 and 8 of SCM/152 matters on which conciliation has not taken place and which lie outside the proper rôle of a dispute settlement panel. Modified terms of reference therefore will be required in this case. Specifically, the reference in SCM/152 to section 269T and to Article 19 of the Code should not be reflected in the panel's terms of reference. Such a modification would facilitate the panel's consideration of the real issue in dispute, the findings of fact in relation to the glacé cherry decision as to the scope and extent of the Australian industry producing like goods to those imported.

6. The representative of the EEC stated that the EEC has undertaken consultation and conciliation procedures in respect to two matters which are closely linked but nevertheless procedurally separate. The EEC has started a process in respect of the Australian legislation. The EEC's position has been stated clearly in previous meetings and communications exchanged with Australia. The Australian position is also clear. The EEC chose not to proceed on that avenue in parallel when the legislation was applied in the concrete case of glacé cherries from France and Italy. The EEC has undertaken consultations and conciliation in respect of that action too, and it is that process that it has chosen to pursue now with this request for establishment of a panel. This countervailing duty action would not have been legally possible if Australia had not amended its legislation. It is difficult to understand how legislation can be separated from its application, quite apart from the issue whether one can challenge legislation per se.

7. The representative of the EEC stated that normally the standard terms of reference contained in the Code should apply, and the EEC would be within its rights to request the establishment of such terms of reference without further discussion. However, the EEC will consider any proposal that Australia wants to make for special terms of reference. The EEC does not disagree with the principle that if special terms of reference can be agreed among parties to the dispute, they should be used. The EEC expects that a proposal will be made in a very short time frame, and will consider it as expeditiously as possible.

8. The representative of Australia stated that both parties' positions were clearly on the record. The legislative changes effected in the Customs Amendment Act 1991 are consistent with the Code.

9. The representatives of the United States, Canada and Brazil reserved their rights to participate in the work of the panel.

10. The Committee decided to establish a panel in accordance with article 18:1 of the Agreement.

11. The Chairman noted that Australia sought modified terms of reference. Article 18:1 of the Code sets forth the terms of reference which normally apply to panels under the Agreement. The parties to the dispute can propose modified terms of reference, if they so agree. Therefore, the Chairman proposed to hold consultations with the parties in the near future, and asked that the Committee authorize him to decide on the terms of reference in light of those consultations. The Chairman also proposed that the Committee authorize him to decide, in consultation with the parties concerned, on the composition of the panel.

12. The Committee so decided.