GENERAL AGREEMENT

ON TARIFFS AND TRADE

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Committee on Anti-Dumping Practices

MINUTES OF THE SPECIAL MEETING HELD ON 10 NOVEMBER 1993

Chairman: Mr. David Walker (New Zealand)

1. The Committee on Anti-Dumping Practices (hereinafter "the Committee") held a special meeting on 10 November 1993 for the purpose of conciliation under Article 15:3 of the Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade (hereinafter "Agreement") in the dispute between the European Community and the United States regarding the United States' dumping and injury determinations against certain steel plate and flat products from various member States of the European Community.

United States - Dumping/Injury determinations against certain steel plate and flat products from various member States of the European Communities

2. The Chairman recalled that the request for this conciliation was made by the delegation of the European Community at the regular meeting of the Committee in October 1993, when the Committee held conciliation under Article 15:3 of the Agreement (requested in ADP/107) in a dispute between the European Community and the United States regarding the United States' anti-dumping duties on certain steel products (hot-rolled, cold-rolled, corrosion resistant and cut-to-length) from various member States of the European Community. The text of the conciliation request which was on the agenda of this meeting was distributed to the Committee in document ADP/111, dated 29 October 1993.[1] The request related the United States' definitive affirmative dumping determinations against Germany concerning certain cold-rolled carbon steel flat products and preliminary and definitive affirmative injury determinations against Belgium, France, Germany, Italy, the Netherlands, Spain and the United Kingdom concerning certain cut-to-length carbon steel plate products, certain hot-rolled carbon steel flat products, certain cold-rolled carbon steel flat products and certain corrosion resistant carbon steel flat products. The Chairman said that the understanding was that bi-lateral consultations had taken place on this matter but the consultations had failed to lead to a mutually satisfactory solution.

3. The representative of the EC recalled that the issues had been touched upon in the regular meeting of the Committee in October 1993, and concerned injury standards and the exclusion of certain specialty steels. Addressing the issues related to injury determinations relating to preliminary and final determinations, he said that the standard for determining injury applied by the United States in several instances was lower than the requirement of the Agreement. The Agreement provided in Article 10:1 that provisional measures may be taken only after preliminary affirmative finding had been made that there was dumping and sufficient evidence of material injury. The United States International Trade Commission (hereinafter "ITC") preliminary determinations did not meet this requirement for a number

[1] A correction to this request was distributed later in ADP/111/Corr.1, dated 12 November 1993, which clarified that in the second paragraph of ADP/11, "Italy" should be inserted between "Germany" and "the Netherlands".

of the flat rolled steel producing countries. Indeed, it seemed to be United States law and practice that provisional positive injury determination was made unless the record as a whole contained clear and convincing evidence that there was no material injury and no likelihood existed that any contrary evidence will arise in a final investigation. According to Article 3:1 of the Agreement, findings had to be based on positive evidence. It was confirmed by GATT jurisprudence that it was up to the investigating authorities to demonstrate that there was sufficient evidence of material injury. The ITC, however, reversed the burden of proof. It required respondents to prove that material injury did not exist. Such standards for preliminary determination were, from procedural and as well as substantive points of view, inconsistent with both the letter and the spirit of the Agreement.

4. The representative of the EC said that in both provisional and final determinations, the ITC had cumulated a large number of countries for the finding of material injury. The United States law required the ITC to do so unless imports were negligible and had no discernable impact. Here again the burden of proof was unacceptably reversed, and this also implied an inadmissible narrowing down of the scope of the negligibility condition. Anytime that any discernable impact, however small, was found the ITC had to cumulate if the other conditions were met. In view of the EC such an interpretation infringed the Agreement. Indeed, negligible can only mean that there was a discernable impact but it was too small to justify the finding of the material injury.

5. The representative of the EC said that for imposing provisional measures, Article 10:1 in conjunction with Article 5:1(c) of the Agreement required an affirmative finding that there was sufficient evidence of link between the dumped imports and the injury was required. There seemed to be a total absence of an examination of this causality and of the possible effect of other factors in the ITC preliminary determinations. It was clear to the EC that if at the stage of the provisional findings the United States had used injury standards prescribed by the relevant provisions of the Agreement, a large number of cases would have been terminated immediately for reasons of negligible market share of the exporting countries concerned, for lack of causality or for the non-fulfilment of the material injury criteria. The EC was strongly of the view that for several reasons many of these cases should not have been initiated from the outset. The information in the complaint of injury was flimsy, for example the data on market share, import trends or pricing was so unconvincing that this would already have been sufficient reason not expose many of the companies concerned to the burdensome and costly proceedings.

6. The representative of the EC then addressed the scope of the proceedings for cold-rolled steel and the refusal of the investigating authorities to exclude certain specialty steel from the scope. He said that the United States authorities seemed to have ignored submissions by certain EC producers of specialty steel according to which their products did not compete with steel made in the United States and should therefore be excluded from the measures imposed. These specialized products were produced to specific specifications clearly different from those of the mass products covered by the other cold-rolled products. Their prices were up to 5 times higher and their uses were distinct. These factors had been confirmed by the United States buyers of these high carbon steel products. It was therefore clear that imports which cannot injure the domestic industry must not be subject to anti-dumping duties.

7. The representative of the United States noted that the EC was raising essentially two issues, i.e. the standard applied for preliminary determination and the scope of the determinations. With respect to the standard for preliminary determinations, he noted that the EC was asserting that the standard applied by the United States was not consistent with the standard for provisional relief as stated in Article 10:1 of the Agreement. He said that the Agreement provided that there must be sufficient evidence of injury to support provisional measures. Sufficient evidence was the same standard applied to support initiation of an investigation under Article 5:1 of the Agreement. In initiating investigation the United States Department of Commerce (hereinafter "Commerce") determined that sufficient evidence of material injury and causation had been presented in the petition. The standard in the United States

arguably exceeded the sufficient evidence requirement necessary for imposition of provisional measures when the ITC also determines whether there was a reasonable indication of material injury to support the affirmative preliminary determination. The representative of the United States said that in its request for conciliation, the EC ignored the information on which the initiation decision was based, and instead focused only on the preliminary determination. The EC also improperly interpreted the concept of positive evidence which according to the Agreement applied only to determinations that resulted in imposition of definitive duties not to preliminary determinations or the imposition of provisional measures. Moreover, the standard in United States law for preliminary injury determination provided for significant additional examination of the question of material injury beyond the finding of sufficient evidence in the petition. United States law required the ITC to gather further information and weigh the significance of that determination to determine whether a full investigation should be conducted in order to resolve the factual issues raised by the petition. In the cases now before the Committee, the ITC issued lengthy questionnaires to producers and importers and assembled a substantial body of evidence upon which to base its preliminary determinations of whether a reasonable indication of injury existed. In a recent court case in the United States (American lamb case), United States courts had upheld a preliminary negative determination by the ITC that was reversed by a prior court decision that had held that the ITC must issue a preliminary affirmative determination if there was evidence of a possibility of material injury. The courts held that reasonable indication was more than a mere possibility of injury. They also held that in assessing whether there was evidence of a reasonable indication of material injury, the ITC was not bound to consider all evidence most favourable to petitioners, but could weigh contrary evidence. It was in the light of the court's observations in the American lamb case that clear and convincing evidence of no material injury and no likelihood that contrary evidence will arise in the final investigation must be understood. Thus, there can be no doubt the United States' standard for provisional measures satisfied the Agreement's requirements.

8. The representative of the United States said that the questions relating to the scope of the measures arose both at the initial stages when Commerce was examining the petition and later when the ITC examined the issue of injury. For both the standing of petitioners as well as the scope of the imported product categories, i.e. classes or kinds of merchandise, Commerce determined that there were four products subject to these investigations (certain hot-rolled flat steel products, certain cold-rolled flat steel products, certain corrosion-resistant flat steel products and certain cut-to-length steel plate products). For purposes of standing, the petitioners demonstrated that they produced a wide range of products within all four like product categories and that they were filing the petitions on behalf of the domestic industry which produced the like products. During the course of the investigations, Commerce was requested by the relevant EC manufacturers to exclude from the scope of the investigation certain specialty products on the grounds that they were separate classes or kinds of merchandise which could not be obtained in any kind of commercial quantity from United States suppliers. Commerce carefully evaluated the arguments but concluded that there was no basis to exclude such products from the scope of the investigations. The products lines at issue were all cold-rolled and hardened strip products with particular chemical compositions, certain cleanliness, surface, flatness and straightness requirements and specific dimensional tolerances among other technical specifications. All of these products were flat rolled and clearly fell within the chemical and dimensional characteristics set forth in the product description governing the investigations. Although they may posses some physical characteristics or technical properties which distinguished them from other product lines, none of these distinctions were so fundamental as to give rise to a separate category of products. Rather they represented relatively minor product variations within the cold-rolled steel product category. Had Commerce accepted such distinctions as justifying the establishment of separate classes or kinds of merchandise, it would have led to creation of absurdly large number of product categories each subject to a separate investigation. In these cases consistent with the Agreement, the industry affected was the cold-rolled steel industry, not dozens of niche industries each producing one model or another of cold-rolled product. Also, those who claimed that such products were unavailable from United States suppliers did not provide a reliable basis for excluding such sub-products from the investigations.

The Agreement did not require that a petitioner manufacture each and every variation within a like product in order to have standing as a producer of a like or domestic product. Indeed, to the extent that the domestic industry did not produce certain product lines within a product category it may well be because injurious dumping had caused it to loose previous customers or had prevented it from entering specialized markets.

9. Regarding the injury aspects of the issue of scope, the representative of the United States said that the ITC addressed a number of arguments that particular imported steels did not compete with domestically produced steel. Far from ignoring these arguments, the ITC discussed them extensively. To address these issues, the ITC first had to determine what domestic material was like the imported product; pages 90 through 94 of the ITC's opinion accompanying its final determination on cold-rolled steel were devoted to the issue of what types of steel were within the cold-rolled steel like product. There were three different types of high carbon steel which various parties, including Germany, argued should be treated as separate like products from cold-rolled steel, i.e. high carbon steel, hardened carbon steel and seat belt retractor steel. Other parties also argued that high carbon bands soft steel, high carbon spring steel and high carbon scrapping steel should be treated as separate like products. The ITC fully analyzed all of these proposals for separate like products. In analyzing the evidence, the ITC focused on general similarities and physical characteristics, production processes, channels of distribution and perceptions of producers and consumers which clearly outweighed differences between highly specialized products within the same general grouping. With respect to high carbon steel the ITC specifically rejected the arguments of the respondents for separate higher carbon steel like product by holding that "[m]any of the basic production processes, equipment and workers and channels of distribution for high and low carbon content cold-rolled products are essentially the same". The ITC also found that there was some limited interchangeability in end use between certain types of high and low content cold-rolled products, as well as overlap and customer and producer perceptions. Finally, the ITC stated that there was no consistent price differential between specialized high and low carbon steels. Respondents' arguments concerning a separate like product for hardened carbon steel were also rejected by the ITC on the basis of factors such as similarities of production processes, overlapping distribution channels, and tensile strength and fatigue resistance of products (pages 92 through 93 of the ITC opinion). The ITC concluded that all of these materials were part of the cold-rolled steel like product, having concluded that the appropriate like product was cold-rolled steel. The ITC then found that imported materials did compete with domestically produced cold-rolled steel. Finally, the ITC concluded that the domestic cold-rolled steel industry was threatened with material injury by reason of dumped imports from Germany and the Netherlands.

10. The representative of Japan said that his Government had repeatedly expressed concern regarding the methodologies used by the United States for dumping and injury determinations in steel cases. He said that Japan shared the concerns raised in the EC's conciliation request (ADP/111), in particular the reversal of viable proof regarding material injury in the preliminary determination, scope of the measures, and the low standards for injury applied by the United States authorities. He said that in Japan's case, the Japanese respondents had also made submission that most of their products neither competed with products from United States mills nor with products from other countries. Therefore, the United States should exclude those products from the measures imposed. Japan hoped that the United States will seriously consider these issues and act in accordance with the requirements of the Agreement. The representative of Japan then asked whether ADP/111 was an addendum to ADP/107 or a replacement of ADP/107?

11. The Chairman said that his understanding was that ADP/111 was an additional item and not a replacement for ADP/107.

12. The representative of Mexico emphasized his Government's concern with the investigations which were carried out by the United States in connection with these products. The various aspects

mentioned by the EC in their document ADP/111 were sufficiently clear and caused considerable concern regarding the practices which were being followed by the United States in this regard.

13. The representative of Australia said that his Government shared some of the EC's concerns about the approach taken by the United States in the injury determination in the steel trade cases, including on such issues as like product and cumulation.

14. The Committee took note of the statements made. The Chairman encouraged the parties to the dispute to continue their efforts to reach a mutually satisfactory solution of the dispute consistent with Article 15:4 of the Agreement.