21 February 1992

PANEL ON CANADIAN COUNTERVAILING DUTIES ON GRAIN CORN FROM THE UNITED STATES

Report of the Panel adopted by the Commmittee on Subsidies and Countervailing Measures on 26 March 1992 (SCM/140 and Corr.1 - 39S/411)

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duty investigation and subsequent determination of injury from grain corn imports from the United States. Following the failure to reach a mutually satisfactory solution through consultations in early 1987 under Article 3 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (the "Subsidies Agreement"), the United States requested consultations with Canada under Article 16.1 of the Subsidies Agreement on 30 April 1987 (SCM/82). These consultations, held on 30 July 1987 and 29 June 1989, did not result in a mutually acceptable solution to the matter. On 2 October 1989, the United States referred this matter to the Committee on Subsidies and Countervailing Measures (the "Committee") for conciliation pursuant to Article 17 of the Subsidies Agreement (SCM/95). As the conciliation process did not lead to a resolution of this dispute, the United States, on 8 July 1991, requested the establishment of a panel under Article 18 of the Subsidies Agreement to examine the matter (SCM/118).

1.2 At its special meeting on 18 July 1991, the Committee agreed to establish a panel on the matter (SCM/M/52). The representative of the European Community reserved the Community's rights to intervene in the proceedings of the panel.

1.3 The Committee decided on the standard terms of reference provided in Article 18.1 of the Subsidies Agreement as follows (SCM/M/52):

Terms of Reference:

> "The Panel shall review the facts of the matter referred to the Committee by the United States in SCM/118 and, in light of such facts, shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement."

1.4 The composition of the Panel was agreed on 7 August 1991 as follows:

Composition

Chairman:	Mr. Luzius Wasescha
Members:	Ms. Jo Tyndall
	Mr. Hiroyuki Ishige

1.5 The Panel met with the parties on 27 September and 4 November 1991. It submitted its report to the parties to the dispute on 13 January 1992.

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2.2 On 2 July 1986, pursuant to the Special Import Measures

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The Definition of Subsidized Imports for Determining Injury

2.3.6 Both parties to the CIT injury investigation raised the issue of the interpretation of subsidized imports. In responding to the various arguments raised the CIT view was that, "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 must be met or market share lost, the majority of the panel is persuaded to adopt the 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."[1]

2.3.7 Thus, in this case of price suppression, the CIT included in the definition of subsidized imports actual and potential or likely imports for the purpose of establishing the causal link between subsidized imports and material injury which is required for imposing a countervailing duty. The inclusion of potential or likely imports was based on the argument that these imports would have actually occurred had the Canadian producers not lowered their prices. The CIT opinion in this context was that, "In the case of

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3.2.4 Canada agreed that for an injury determination, there must be actual imports of the subsidized product and that these imports must be examined, considered and taken into account. Canada said there were actual subsidized imports and that the CIT examined these imports. Canada noted further that Canadian law did not permit a finding of injury in the absence of actual subsidized imports. Its

3.2.9 Canada said that its contention was not that the increased burden on government support

Inclusion of potential or likely imports in the volume of subsidized imports

3.2.12 The United States agreed that an injury determination, particularly in the case of price suppression or depression, need not be limited to actual imports which had crossed the border. However, the United States said that the determination of injury on the basis of potential or likely imports as used by the CIT had introduced a standard which was broad and ambiguous, and was susceptible to far more than one definition and interpretation. In this context, the United States pointed out that even Canada had had difficulty defining "potential imports" and had used a number of different attempted definitions of the term during the Panel proceedings. The United States argued that allowing the standard used by the CIT under the Subsidies Agreement would result in material injury being demonstrated on the basis of speculative or hypothetical imports. The United States pointed out that a threat of material injury analysis under the Subsidies Agreement can only be caused by imports whose future entry is imminent, not by imports that "would have" happened in the past but never in fact did, as asserted by the CIT. To characterize a continuing but never-realized possibility as a "threat" was to permit a countervailing duty to be imposed under virtually any circumstances.

3.2.13 According to the United States, an unambiguous and non-speculative interpretation of the Subsidies Agreement required that if an investigation of injury had to include a consideration of subsidized imports other than those which

3.2.15 Further, Canada maintained that since the CIT had logically examined those imports which would have flowed in the past or would flow in the future if the domestic producers did not match the subsidized import price, the United States was not correct in claiming that the CIT had considered only "essentially an open-ended offer to sell, to the world, at a given price". For the same reason, a consideration of probable or potential imports as used by the CIT did not open the door to abuse of the injury provisions.

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Canadian

3.3 The parties to the dispute disagreed as to whether the CIT had drawn a causal link with subsidized imports or with a subsidy programme.

3.3.1 The United States said that the CIT's determination had found that the injury to Canadian industry was due to a factor other than the subsidized imports, namely, the world supply and demand for corn and, in particular, world prices for corn. According to the United States, the sole focus of the CIT inquiry was to determine whether there was a nexus between subsidies provided in accordance with the United States Food Security Act of 1985 and the injury suffered by Canadian corn growers (emphasis by the United States). In this context, the United States quoted from the CIT's opinion and finding[1]:

> "The essential question to be addressed is whether the operation of the 1985 U.S. Food Security Act … was such as to cause prices in Canada to decline to levels judged to be of a material nature. … For these reasons, the majority of the panel therefore concludes that the subsidization of U.S. grain corn has caused and is causing material injury to Canadian corn producers [and] will continue to cause material injury to Canadian production of like goods" (emphasis added by the United States).

The United States argued that the CIT

of price suppression caused by those subsidized imports, i.e. potential or probable imports, whose low prices were matched by Canadian producers. Canada further said that the United States had not contested that there were subsidized imports or material injury.

3.3.8 The United States disagreed with Canada's assertion that the United States had conceded that their grain corn exports to Canada were subsidized. It clarified that the United States position in this regard was that, "we are not, in this proceeding, contesting the subsidy portion of Canada's determination." Regarding Canada's argument that the CIT had drawn a link between material injury and potential imports, the United States said that Canada was giving a post-hoc rationalization of the CIT reasoning. According to the United States, a reading of the CIT finding showed that its decision was based on the subsidy programme, and only passing references were made to potential imports.

4. SUBMISSION BY THIRD PARTY

4.1 In its submission as a third party to the Panel, the European Community said that Article 6 of the Subsidies Agreement clearly stated the requirement that "a determination of injury has to involve an objective examination, based on positive evidence, of the volume of subsidized imports and the effect of these imports on prices in the domestic market of the importing country".[1] Similarly, Article 6.2 referred explicitly to subsidized imports. According to the Community, it was mandatory that an investigation of injury under Article 6 of the Agreement required the presence of subsidized imports, and an examination of the effects of these subsidized imports to demonstrate a causal link with material injury. Factors other than subsidized imports, such as price effects, could be examined only after the examination of the mandatory factors. The Community's opinion was that injury in this case had been caused by factors other than the imports

such

5. FINDINGS

5.1 Introduction

5.1.1 The Panel noted that the issues before it arose essentially from the following facts: Pursuant to SIMA, a countervailing duty investigation was initiated by the Government of Canada on 2 July 1986 in respect of imports of grain corn from the United States. On 20 March 1987, the CIT issued an affirmative determination that "the subsidizing of importations into Canada of grain corn … has caused, is causing and is likely to cause material injury to the production in Canada of like goods".[1]

5.1.2 The CIT's determination was based upon findings that: the grain corn markets of Canada and the United States were closely integrated, with an established pattern of trade between the two countries; the only border measure affecting exports to Canada was a two per cent tariff, and due to the nature of Canada's phytosanitary regulations and the costs of transportation,

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5.2 Consistency of CIT Determination with Article 6

5.2.1 The Panel noted that the following provisions of Article 6 of the Subsidies Agreement are relevant in this case[1]:

> "1. A determination of injury[2] for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products.
>
> 2. With regard to volume of subsidized imports the investigating

factor in the case of agriculture, namely, whether there has been an increased burden on government support programmes; and Article 6.4 makes clear that there may be "other factors" which may at the same time be injuring the domestic industry, and the injury from these "other factors" must not be attributed to the subsidized imports. The Panel decided to examine these elements successively.

5.2.3 As the Panel considered that paragraphs 2, 3 and 4 of Article 6 provide more detailed guidance on the interpretation and application of Article 6.1, it was appropriate to begin its analysis of the CIT decision by considering if the CIT, in accordance with Article 6.2, examined whether there had been a significant increase in imports of subsidized grain corn from the United States, either in absolute terms or relative to production or consumption in Canada. In this regard,

5.2.5 Thus, the Panel came to the conclusion that the CIT did not consider positive evidence of the level or trend of United States subsidized imports of grain corn into Canada[1], as required by Article 6.2.

5.2.6 The Panel then examined whether, pursuant to Article 6.2, the CIT examined the price effects of subsidized imports in the domestic market. On this point, the Panel first noted that the CIT did not have any information with respect to actual import prices and did not attempt to collect any statistics on this basis.[2] The Panel also noted that the CIT did not consider any evidence of price undercutting. As the Panel recalled, much of the CIT opinion was devoted to a discussion of the decline in world market prices for grain corn and its impact on Canadian producers. The CIT concluded that

> "the price declines experienced by Canadian grain-corn producers are of a magnitude such as to constitute material injury, whether borne by the farmer directly in terms of reduced income, or indirectly by increased burden on government-support programs".[3]

It then went on to analyze the relationship between the 1985 Farm Bill of the United States and this world price decline, concluding that

> "the dramatic decline in the international price for corn is, in very large measure, a direct consequence of the provisions of the 1985 Farm Bill … Because of the open nature of the Canadian market these lower prices were transferred to Canada, with substantial adverse effect on Canadian producers. … For these reasons, the majority … concludes that the subsidization of U.S. grain corn has caused, … is causing … [and] will continue to be a cause of material injury to the Canadian production of like goods."[4]

The Panel noted however that whereas the CIT equated the world market price decline with the decline and depression of the price for corn in the Canadian

> "that, generally, Canadian corn must be priced competitively with the cost of landing corn from the United States; in fact, buyers look to the Chicago Board of Trade price in deciding what they will offer for Canadian corn, and sellers look to the Chicago price in deciding the price they are prepared to accept."[1]

Thus, the CIT discussed the effect of the Chicago price for grain corn on the Canadian price for the like product, but did not examine the effect of subsidized imports on the Canadian price. The CIT concluded that the Canadian grain corn producers had virtually no choice but to match the United States (Chicago) price or lose sales, but did so without considering any positive evidence on price depression or sales lost due to subsidized imports. The Panel accordingly found that the CIT did not consider the price effects of subsidized imports, as required by Article 6.2.

5.2.7 The Panel then examined whether the CIT determination complied with the provisions of Article 6.3 and 6.4, which require the examination of the consequent impact of the subsidized imports on the domestic industry, and a demonstration that the subsidized imports are, through the effects of the subsidy, causing the material injury to the domestic industry. Injuries caused by other factors must not be attributed to the subsidized imports. With respect to Article 6.3, the Panel noted the following statement of the CIT:

> "The essential question to be addressed is whether the

6. CONCLUSIONS

6.1 The Panel concludes that the determination of injury by the CIT in respect of "Subsidized Grain Corn Originating In or Exported from the United States of America" is not consistent with the requirements of Article 6 of the Subsidies Agreement because the CIT did not determine on the basis of positive evidence relating to subsidized imports of grain corn from the United States that material injury to Canadian grain corn producers was caused by such imports.

6.2 The Panel recommends that the Committee request Canada to bring its countervailing duty measure into conformity with Canada's obligations under the Subsidies Agreement.