

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

SCM/M/5

3 March 1981

Special Distribution

Committee on Subsidies and Countervailing Measures

MINUTES OF THE MEETING HELD ON 11 DECEMBER 1980

Chairman: Mr. P.R. Barthel Rosa

1. The Committee on Subsidies and Countervailing Measures held its fifth meeting on 11 December 1980.
2. The purpose of this meeting (as set out in GATT/AIR/1677) was to afford Signatories the opportunity to consult further on the question raised at the October meeting of the Committee regarding the invocation of the non-application provisions of Article 19:9 of the Agreement (SCM/M/4, paragraphs 49-61).
3. The Chairman said that he had been informed by some delegations that under other business they would address the question of the accession of Greece to the European Communities in the context of the Agreement.
4. The Chairman recalled that at the October meeting the delegation of India had made a statement explaining its position and raising several problems related to the invocation by the United States of the provisions of Article 19:9 with respect to India (SCM/W/7). The United States delegation had raised some questions concerning the nature and the scope of the proposed discussion. Several other delegations had expressed their preliminary position and all these statements were reflected in the minutes of the October meeting (SCM/M/4 paragraphs 49-61). The conclusion of the Chairman at that meeting had been that the Committee could not, at that point in time, prejudge any of the issues relating to the reservations expressed regarding the further discussion of the matter. However it seemed appropriate that a meeting be held to discuss the matter further and to reach conclusions as to the issue itself, or as to any role that the Committee might have to play. The Committee had accepted this conclusion and agreed to meet at this session. Bearing in mind this background delegations were invited to present their views on the matter.

5. The representative of India said that he considered as a basic document for the discussion his statement at the October 1980 meeting of the Committee circulated in SCM/W/7. In that document all the concerns of his delegation had been set out and he did not want to burden the delegations with repetition of the various points contained therein. These issues were brought to the attention of the Committee with the utmost reluctance but as they were very important, the intention of India was not so much to debate the academic aspects of the matter but to seek a solution with a keen desire to make this Committee more open for a larger number of countries to participate in a venture which sometimes was referred to as a "new GATT". He recalled that after India had signed the Agreement the United States had invoked Article 19:9 against India. Normally any country invoking this clause would be fully within its rights to do so; but in this case there was a special background which made him believe that this was not a correct measure. Through this invocation the Government of the United States had tried to get commitments which went beyond the Agreement. There was no doubt about this linkage, in particular if one referred to the statement made by the United States at the May meeting of this Committee, and to various rounds of bilateral talks between the United States and India. He considered that Article 19:9 should not be an instrument to demand certain commitments which were outside the purview of the structure itself of the Agreement. He also recalled that at the last meeting of the Committee he had mentioned that the United States statement at the May meeting, regarding its reservations in respect of extending some benefits to developing countries which did not enter into a commitment, might be construed as a conditional acceptance of this Agreement. There was a general practice that a new member when joining the Agreement assumed full responsibilities resulting from it and if he had any problems he entered into discussions with other Signatories. It was imperative that if a country had become a party to the Agreement all its future actions would be consistent with the Agreement. He did not wish to discuss at length the reasons the United States had been giving for its action, but he wanted to emphasize that an international agreement, having such important implications, should not be easily circumvented by certain actions taken outside it. He also referred to the procedural inadequacies in respect of the United States notification invoking Article 19:9 and considered this procedural defect as materially important. Concluding his remarks he urged the Committee to examine this matter and to give appropriate relief to the grievances he put before it.

6. The representative of the United States said that his delegation would be ready to participate in this particular discussion on the understanding that this participation as well as any statement with regard to the Indian position he might make would not be viewed as in any way prejudicing the United States' position as to the invocation of Article 19:9 of the Agreement. The Chairman confirmed this understanding.

7. The representative of the United States said that the United States could not accept any position that would imply that they had acted improperly in the manner in which it had invoked Article 19:9. It was clear that this action was taken in conformity with the requirements of the Agreement. Referring to the question of conditional acceptance raised in paragraph 5 of SCM/W/7, he said that the United States' firm position was that it had accepted the Agreement in full conformity with the obligations under the Agreement and it did not aim at any conditional acceptance or reservation. Therefore he considered that the question raised by India referred rather to the application of the Agreement between the United States and India. As to the

question of validity of the invocation referred to in paragraph 6 of SCM/W/7, he considered that this was a matter which could have been made more clearly known to the Government of India and therefore it could be one of the issues that could be subject to further discussion to make clear the procedures which should be followed in the invocation of Article 19:9. It was his Government's view that the Government of India had been notified that Article 19:9 would be invoked if certain factors had not developed, which indeed was the case. While formal notification to the Government of India might have been slightly delayed, it was certainly the view of the United States Government that the Indian Government had been fully notified of the intended invocation of Article 19:9. He also said that as far as reasons for invocation of Article 19:9 were concerned, he believed that there was no obligation whatsoever to give such reasons. The Agreement was absolutely clear on this point. Therefore the United States' action was in conformity with the Agreement also in this respect.

8. The representative of the United Kingdom speaking on behalf of Hong Kong said that it was particularly unfortunate that this dispute had arisen. Throughout the negotiations the conflicting views of developed and developing countries had been fully recognized and the Agreement in its final form was evidence of a compromise. The developed countries, including the United States, had shown their willingness to make real efforts to meet needs and special interests of developing countries. Against this background it was unfortunate that the United States had taken this action against India. He said it was correct that Article 19:9 could be used by any Signatory at the time of another Signatory's accession and that such an action was a unilateral act. On the other hand India had a sovereign right to join the Agreement without making any commitment under Article 14:5. The unfortunate aspect of this case was that the United States seemed to make a connexion between the two provisions. There was nothing in the Agreement which could link the two provisions, on the contrary, they were separate unilateral acts. In this particular dispute it was not India which was making any connexion between the two provisions, nor was India taking any action contrary to the Agreement. The procedures under the GATT and the MTN codes had been a target of some criticism, particularly by developing countries. The present dispute was a further example of an unwillingness of a major trading nation to take a reasonable and equitable attitude towards a developing country. He expressed his hope that some equitable way could be found to overcome the problem.

9. The representative of Yugoslavia said that the question raised by the delegation of India merited full attention as it was of great importance, not only for the future of the Agreement but also for relations between Signatories within the GATT framework. It was indispensable to find a solution that would create a climate of certainty and objectivity in the application of the Agreement. In the light of the interest that his Government had in this subject he recalled its position presented at the October 1980 meeting of the Committee. At this meeting he wanted to give further precision in this respect. The position of his Government on the question of commitments under the Agreement was based on the principle that differential and most-favourable treatment provided developing countries with a right to subsidize their exports and to decide at what point of time and to what extent they could eliminate or decrease their subsidies. Starting from this principle it was clear that the full acceptance of responsibilities under the Agreement by a developing country depended upon the needs and possibilities of its national production. Any decision in this respect remained exclusively within the sovereign competence of the developing

country, as a unilateral and voluntary decision. Any other approach would mean a modification of differential and more favourable treatment given to the developing countries. In this context he fully supported the recourse by India. He compared the provisions of paragraphs 1-4 of Article 14 with the action taken by the United States with regard to India and he concluded that the interpretation of the Agreement by the United States was neither in conformity with its letter nor with its spirit. He expressed his firm conviction that the Committee, realizing that the matter was of a magnitude going beyond the framework and interests of this Agreement, would be capable of finding an adequate solution which would ensure security and objectivity in the application and interpretation of the Agreement.

10. The representative of Chile recalled statements made at previous meetings of the Committee on the question of commitments under Article 14:5, and said that as the prevailing interpretation of this provision had never been challenged it seemed that the problem before the Committee was rather that of Article 19:9 than 14:5. Invocation of the former made it possible for the United States not to apply the Agreement to India. He believed that although the United States had full sovereign rights under the Agreement to take such a measure, the action by the United States was not appropriate and might have serious political implications. It affected not only India but also other developing countries and this fact was seriously preoccupying his delegation. An attempt to use the enormous economic potential of the United States to obtain a commitment which, under Article 14:5, was voluntary, seemed to go beyond what was reasonable. Such an action created uncertainty and risked destabilizing the function of this Committee and, in general, of other Agreements which had resulted from the Tokyo Round. He stressed that the attitude of the United States was dangerous and he appealed to the United States to review its position. Other points he wanted to raise and propose for an in-depth study by the Committee were the following: firstly, the question raised by the representative of India in relation to the 1961 Working Party's report (L/1545) on the application of Article XXXV of the General Agreement. This report provided certain general guidelines as to the conditions of invocation of a non-application clause which, by analogy, should be taken into consideration in the present discussions on Article 19:9 of the Agreement and in particular in relation to the presumed linkage. Secondly, the compatibility of the United States domestic legislation with the provisions of the Agreement. According to the United States delegation their action was motivated by an imperative need in their domestic legislation but the question remained whether this legislation was in full conformity with the Agreement.

11. The observer for Argentina said that the Agreement had been negotiated in the Tokyo Round in special circumstances and therefore it left room for different interpretations. It was regrettable that a developing country was the first to be involved in such a fundamental dispute. He shared the views expressed by the representative of the United Kingdom speaking on behalf of Hong Kong that nothing in the Agreement prevented India from joining it in the way it had done. He repeated his firm opinion that commitments under Article 14:5 were autonomous and voluntary and in no case constituted a pre-condition for accession to the Agreement. He also recalled efforts made in GATT to provide special and more favourable treatment to developing countries, in particular in the negotiations of the Tokyo Round, and said that in this context the decision of the United States went against this general spirit and

trend. He also recalled that during the last session of the CONTRACTING PARTIES many developing countries had expressed their hesitation in joining the Agreement before such uncertain legal situations had been clarified.

12. The representative of the United States said that his delegation had taken note of comments made. In order not to confuse issues he wanted to clarify his position with respect to certain points. Firstly the United States not only did not question the right of any country to sign the Agreement but its general principle was that broader participation in the Committee would be very helpful. He stressed once again that one of the benefits of the Agreement was that it provided a certain discipline in the use of export subsidies. The statement made on 8 May 1980 was intended to make it clear to all countries what the United States' policy was with respect to its expectations through the Agreement. He shared the view expressed by the representative of Chile that the issue before the Committee was to focus on Article 19:9 and the invocation of the non-application provision and not on Article 14:5. He also stressed that the Agreement was silent on the procedures to be followed under Article 19:9, and, although it might be unfortunate, the Agreement did not require any notification to the country against which Article 19:9 was invoked. This point seemed to be worth pursuing. Secondly his delegation could not agree with the view expressed by the delegation of Yugoslavia that the United States Government had not respected the letter and the spirit of the Agreement; in his view, it had respected both, and in the spirit of openness it tried to make its views very clear on how it observed the Agreement and fulfilled its obligations resulting from it.

13. The observer for Sri Lanka said that although his delegation did not want to unduly exaggerate the importance of this matter it regarded it not merely as a dispute between two countries, but as a matter of much wider significance and interpretation, a test-case for the implementation of MTN Agreements. For this reason he shared the concerns and wished to extend his support to the delegation of India. He believed that a number of countries were watching the outcome of this matter with interest in order to determine their attitude towards the Agreement.

14. The representative of Korea said that he shared the view of other developing countries that Article 14:5 did not provide for mandatory commitments. If the United States' decision had been made in connexion with Article 14:5, the invocation of Article 19:9 against India would not have been reasonable. Accordingly, he fully associated himself with the views expressed by other developing countries.

15. The representative of Canada said that although at the last meeting of the Committee he had supported the request for this meeting, he had had some doubt as to what the Committee might properly do in addressing the problems raised by India. He considered that the Committee was not really in a position to question the right of any Signatory to have recourse to Article 19:9. He did appreciate the concerns expressed in the Indian statement and shared certain views with respect to interpretation of Article 14:5 on the voluntary nature of the commitments. He also shared the more general concerns over actions taken by Signatories and the way this Committee responded to them as this would diminish the interest of developing countries in fuller involvement in the Agreement. However, he was not sure what kind of "relief" this Committee could provide in the case before it. One could have speculated on the reasons why one of the Signatories invoked

Article 19:9 but it would not be appropriate to do so in the formal meeting of the Committee because it would call into question the right of a Signatory to invoke this Article. He might also consider expressing regret over the invocation by any Signatory of the non-application provision in the sense of restoring the balance of obligations at a lower level - but he did not think that it would necessarily be relevant from the legal point of view. He thought that there was nothing the Committee could do, although the exchange of views had already been helpful. The nature of the problem was such that solutions of legal and other nature might best be sought outside the Committee. He did not mean by that that the Committee should not have a continually reviewing role or that other activities of the Committee should not touch upon certain points relevant to this case, for example in the context of an examination of national legislation, as mentioned by the representative of Chile.

16. The observer for Hungary said that as a potential Signatory to the Agreement he wished to recall the statement he had made at the Council meeting where this question had been dealt with for the first time, and to repeat that he shared the many general concerns expressed by various delegations in the Committee. It was clear to his delegation that not being a Signatory yet, it had no right to intervene in the debate on the interpretation of the provisions of the Agreement, but he wanted to say that his delegation was inclined to share the views expressed by the delegation of India and by the delegation of the United Kingdom speaking on behalf of Hong Kong. His delegation was generally concerned about the legal and practical consequences of the invocation of Article 19:9 of the Agreement. It seemed to him that such consequences were quite important on the legal side, touching upon the unconditional application of the most-favoured-nation treatment provided for in Article I of the General Agreement and this, to a certain extent, the very GATT system, and on the practical side by creating discriminatory conditions of access to the United States market for certain goods exported from India.

17. The observer for Colombia supported the position of India and shared the concern of other developing countries expressed at this meeting. He considered that the action taken by the United States had nullified the provisions of Article 14:1 and 14:2 of the Agreement which were fundamental to developing countries. Without these two provisions the Agreement would be totally imbalanced and deprived of any interest as far as developing countries were concerned. The fact that his Government had not yet signed the Agreement was motivated to a large extent by the measure taken by the United States against India. This action had prompted his Government to reconsider its attitude to the Agreement. The final decision of the Colombian Government would be taken in the light of the decisions taken by the Committee and other GATT instances with respect to this matter. He also recalled his position that any limitation of developing countries' rights under Article 14:5 should always be voluntary, unilateral and autonomous.

18. The representative of Sweden speaking on behalf of the Nordic countries reiterated their view that the Agreement was balanced without commitments and if a country entered into a commitment, this meant striking the balance at a higher level. Consequently, there was no obligation to make commitments, and no condition on commitments should be attached to any accession to the Agreement. Against this background he could understand the concern which the United States' action had raised. However, he wished to point out that it was within any country's full rights to invoke Article 19:9 and that so far there were no procedures for such invocation. He was prepared to participate in any

working out of such procedures if the Committee felt it useful. He concluded by saying that he shared the opinions advanced by some other representatives, in particular that of Canada.

19. The representative of the European Communities said that he understood the concern expressed by India as to the effects of the United States' decision on India's exports to that country. Looking at the matter from a legal point of view his delegation had already had an opportunity to indicate that commitments under Article 14:5 were unilateral and autonomous. His delegation was also of the opinion that each Signatory had a sovereign right to invoke Article 19:9 and that there was no agreed procedure for its invocation. He thought it was advisable for the Committee to reflect on the most appropriate way to continue the examination of this matter, taking into account the positions expressed by interested parties.

20. The representative of the United States said again that his delegation had taken note of the views expressed and thought that many of them were very helpful. He wanted to come back to one point which was of special importance to his Government, namely that from a legal point of view the procedures followed by the United States were perfectly in conformity with the Agreement. He also wanted to draw attention to the broader aspect of this matter raised by the observer for Hungary and said that although this aspect had been addressed under the GATT, it might have some repercussions on the issues discussed in the Committee.

21. The representative of Pakistan said that he was impressed by the way in which this matter had been deliberated and that the general feeling was that measures should be taken to encourage other contracting parties to join the Agreement. He was also glad to note that there seemed to be a general opinion that nothing should be done which could distort the overall system of the Agreement, but all Signatories should remain committed to the objectives of the Agreement. He was particularly glad that the United States Government also shared the concern of developing countries. He shared the views of the representatives of Chile and Canada as to the way out of the quandary in which the Committee found itself. The Committee should take note of valid points expressed by both sides and further pursue the matter, perhaps through informal consultations to find an equitable consensus as to the interpretation of Article 14:5, but he thought that Article 19:9 would also need further clarification in the light of certain suggestions made at the meeting.

22. The representative of India said that his delegation was grateful to the members and observers who had shown their interest in the matter and expressed their concern regarding various aspects of it. Regarding the consideration of the matter in another forum of GATT, he hoped that it would be done with the utmost expedition. He considered some statements made by the United States delegation as having a connotation of acceptance that the matters discussed at this meeting could also be raised there. He also recalled his position that the matters discussed in the Committee and those submitted to the other GATT forum were interrelated. He noted that the trend of the discussion was not pointing to a positive decision on the issue already at this meeting. However, he wanted to stress the urgency of the decision on this issue because it had not academic, but concrete material interest as practically affecting the exports of India. He referred to suggestions made by certain speakers that this matter could be further pursued in informal consultations and wanted to reflect on how the expeditious and in-depth handling of this matter could best be married together. He emphasized that he did not want to draw any

conclusions but he could not agree with an interpretation of the deliberations that no one had challenged the legality of the action. He had heard some speakers expressing their concern about the linkage involved in this action. He considered it premature to draw conclusions on such a vital question at this meeting.

23. The Chairman expressed his appreciation for the highly constructive spirit in which all delegations approached the matter. The discussion had not advanced far enough to enable the Chairman to attempt a meaningful summing-up. Nevertheless he wanted to make the following points: (1) certain issues had been raised which a number of delegations considered relevant to the operation of the Agreement, and which would therefore merit examination by the Committee. (2) Also, it was quite clear that there was no agreement as to how the Committee should deal with these issues. Consequently the Chairman proposed that: (i) the Committee take note of all positions expressed on the matter before it; (ii) the Committee agree to take up this matter again at its next session; (iii) the Committee authorize the Chairman to consult informally with interested Signatories on how the Committee might proceed in its future examination of this matter. It was so agreed.

24. The representative of Japan said he agreed with the Chairman's proposal but he wanted to raise two points. The first point was that it was not clearly provided in the Agreement on how to invoke Article 19:9 and what procedure should be followed. A strict interpretation of the present text of this Article seemed to be that a Signatory could invoke Article 19:9 only on the day when another country formally submitted the document of its accession to the Agreement. However such an interpretation was not correct and the procedure should be that a Signatory should have the right to invoke Article 19:9 within twenty-nine days from the day on which another Signatory formally acceded to the Agreement. The Signatory invoking the non-application clause should submit appropriate notification to the acceding country and send a copy to the Director-General of the GATT. He proposed that the Committee consider further this procedure. As to the second point he recalled the procedures and commitments under Article 14:5 adopted by the Committee at its March 1980 meeting (SCM/M/2, paragraph 36) and wanted confirmation that these procedures continued to be valid.

25. The Chairman said that the Committee might wish to take note of the comments made by the representative of Japan on Article 19:9 and that there would be an opportunity to come back to this matter. As to the second point he confirmed that the procedures adopted by the Committee on commitments under Article 14:5 were those that had just been recalled.

26. The Chairman recalled that at the beginning of the meeting some delegations had expressed their intention to raise some problems concerning the accession of Greece to the European Communities. The representative of the United States said that as Greece was acceding to the European Communities on 1 January 1981 his delegation intended to discuss the issue of possible consistency of the Greek export policy with the Communities' obligations under the Agreement. He noted that the European Communities had signed the Agreement on behalf of its member States. He also requested the Committee to note that his delegation expected the European Communities to report to the Committee before 1 January 1981 about the status of Greece's assumption under the umbrella of the Communities of its obligations under the Agreement.

27. The representative of the European Communities said that the issue raised by the delegation of the United States had been duly noted. He wanted to inform the Committee that his delegation intended to notify all Committees of the fact that Greece would accede to the European Communities as of 1 January 1981 and therefore would adhere to the Agreement as of that date. The Community had been discussing with the Greek Government the possible problems which might arise out of its accession for the implementation of various Agreements. These discussions were still being pursued.

28. The representative of Japan said that if Greece acceded to the European Communities on 1 January 1981 it should abolish, by this date, all subsidy measures inconsistent with the Agreement, if any. If such measures were not abolished the Committee should take up this matter and examine it, as provided for in the Agreement. The representative of the European Communities said that the statement of the Japanese delegation had been duly noted and that the matter was already the subject of informal discussions.

29. The Chairman said that the Committee had taken note of the statements made. He recalled that the regular meeting of the Committee would be held in the beginning of April or the beginning of May 1981, the date being subject to consultations. He also reminded Signatories that semi-annual reports under Article 2:16 of the Agreement on all countervailing actions taken within the period 1 July 1980-31 December 1980 should be submitted in time before the next meeting.