

GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD ON 19 MAY 1983

Chairman: Mr. M. Ikeda (Japan)

Report of the Panel on EEC Subsidies on Export of Wheat Flour (SCM/42)

1. The Chairman said that in relation to this item the secretariat, had circulated a factual Note on the negotiating history of Article 18:9 of the Code and the treatment of reports of working parties and panels established under Article XXIII of the General Agreement (SCM/W/48).
2. In the view of the representative of the United States the Note confirmed that, although there was no reference to "adoption" or "noting" of reports in either Article XXIII or the Framework Agreement, the practice had been to adopt, without or with certain qualifications, or take note of, these reports. She saw no reason to depart from this practice in the Committee. In fact, nothing in the negotiating history of Article 18:9 suggested that the Committee should depart from established GATT practice.
3. The representative of Canada said that he shared the same views as those of the United States; there was nothing to suggest that this Committee should depart from GATT practice in adopting or noting reports with or without qualifications. He reserved the right to comment on the description of actions taken as reproduced in the table annexed to the secretariat's note.
4. The representative of Australia said that the secretariat note implied that no panel report had ever been rejected. In his view this was an oversimplification; some reports had been adopted with fundamental qualifications, and a number of reports concerning export subsidy issues had been substantially qualified at the time of their adoption. His authorities were in favour of noting the Report on Wheat Flour (SCM/42).
5. The representative of Chile said that the secretariat note showed that the CONTRACTING PARTIES had considerable flexibility in the treatment of panel reports; it was important, however, was that they had never ignored a report or left it in suspense.
6. The representative of the EEC said that he had no comments regarding Part 1 of the secretariat note. With respect to Part 2 on the actions following panel reports, he said that the paragraph 9 which summarized the situation was incomplete and misleading. He referred to recent cases of adoption of panel reports which had been accompanied with unilateral declarations, qualifications, reservations, etc. This phenomenon had become much more common in the last five years or so. As to the statement that the

CONTRACTING PARTIES had never rejected a report, he pointed out that there had been cases where the Council had de facto put reports aside. It was always up to the CONTRACTING PARTIES or the Committee to have the final decision on a panel report. From the legal point of view, there seemed to be no obligation for the Council or the Committee to adopt a panel report automatically. Practice has been to adopt, with or without qualifications or reservations, or to take note of these reports. As panel reports were only advisory what was important was that the Council or the Committee examine such reports and take appropriate follow-up action.

7. The representative of Switzerland recalled that Article 18:9 contained inter alia a provision for the Committee to make recommendations. It was up to the Committee to act, recommend, ignore, in other words take the final decision. Article 18:9 spoke of the Committee examining the report. The Panel had instructions to present a report containing certain findings, constituting in a way the case file, supplemented where appropriate by proposals or recommendations. If it contained recommendations, the Committee could endorse them, in which case it would adopt the report. But it could also not wish to support them, in which case it would content itself with taking note of the report without approving it, and would draw its own conclusions from the Panel's findings, making recommendations different from those proposed and which it considered more appropriate. Similarly, if the Panel report did not contain recommendations, the Committee then had the choice between two possibilities. Either it would approve the Panel's position and adopt its report without recommendations, or it would content itself with taking note of the report and would itself draw up such recommendations as it considered justified. In any event, the Committee acted under its own responsibility, whether in agreement or not with recommendations contained in a panel report.

8. The representative of Australia said that the point made by the representative of Switzerland was important. The Committee was not limited to acting on a panel report but was free to add or subtract from such report.

9. The representative of Yugoslavia said that his authorities' impression was that each time a Signatory was losing part of a market it entered a complaint, without consideration of whether the complaint was relevant. In this context it could be supposed that the appearance of new suppliers would bring about a surge of complaints. On the question of the panel report in document SCM/42, he said that the panel had had a difficult job but had nevertheless thrown light on some of the difficulties encountered. In his authorities' view the findings of the panel in paragraphs 4.16 were basic and pertinent. It showed that political factors had been in play and it explained other findings and conclusions. He added that his delegation supported the views expressed by the Nordic delegations that there were no grounds to question the panel report.

10. The representative of Japan said that with regard to the rôle of the Committee he supported the views expressed by the representative of Switzerland, namely that the Committee was free to adopt, note, add to or qualify a panel report. He added that if the Committee could work out an appropriate recommendation this would facilitate the finding of a mutually satisfactory solution.

11. The Chairman thanked delegations for these comments and opened the floor for discussion of the report of the panel (SCM/42).

12. The representative of the United States said that their position with respect to this dispute remained unchanged: the panel had not answered two of the three questions referred to it (set forth by the panel itself in paragraph 4.4 of the report), and those questions had to be answered before the Committee could consider whether the report should be adopted, qualified, noted or noted with qualification and whether recommendations should be made. The Committee had to face its obligation to make the dispute settlement process work in this first dispute under the Code. To do otherwise would not only cast doubt on the credibility of the process, it also would render the key provisions of the Code related to agricultural trade meaningless and inoperative. She recalled the position of the United States delegation taken at the April 1983 meeting concerning the need to complete the process. The United States was not asking the panel to reconsider the case but the Committee to answer the unresolved questions. To that end her delegation made a proposal in order to resolve this dispute, as follows: in accordance with Article 13.4 of the Agreement, and as a result of its review of the report of the Panel on EEC subsidies on the export of wheat flour (SCM/42), the Committee concludes: (1) that the EEC grants export subsidies on wheat flour in a manner which results in the EEC having more than an equitable share of world export trade in wheat flour, inconsistent with the provisions of Article 10 of the Agreement; and (2) that the use of such subsidies has caused nullification and impairment of benefits accruing to the United States under the General Agreement and serious prejudice to the interests of the United States within the meaning of Article 8 of the Agreement.

13. She added that there was ample support for these conclusions within the panel report itself, particularly in the statistical data set forth in table 6 and 7 of the report and dramatically illustrated by the graph on page 32. The report was fraught with findings which provided the basis for the Committee to make these conclusions, for example: in paragraph 4.12, regardless of what period was examined, the panel found a consistent trend in market shares over the past twenty years; in paragraph 4.13 the overall increase in the EEC market share was considered "significant" by the panel in that it had increased 158 per cent while the share of all other suppliers had declined between 39 to 82 per cent.

14. According to paragraph 5.2 of the Panel Report the EEC share "increased considerably... when application of subsidies was the general practice..."; that is, the panel had found a causal link between subsidies and increased exports. In paragraph 5.6 the panel had referred to the "undue disturbance" to United States commercial interests resulting from EEC subsidies and had recognized that the United States had lost sales opportunities. In paragraph 5.7, the panel had concluded that the EEC should make greater efforts to limit its use of these subsidies. Most importantly, in paragraph 5.8 the panel had concluded that the EEC "would generally not be in a position to export substantial quantities of wheat flour" without the application of export subsidies.

15. The United States representative went on to say that her delegation realized that the panel had also addressed what it termed "special factors". The Committee had to recognize that the special factors considered by the

panel were useful in completing the picture of the world wheat flour market, but could not outweigh or explain away the causal link between the EEC subsidies and the resultant increase in exports at the expense of all other suppliers. The special factors were minor compared to the effect of the subsidies and did not impede a conclusion by the Committee that the EEC took more than an equitable share.

16. Indeed the EEC representative had acknowledged at the meeting of 18 May 1983 that the factor which outweighed everything else in wheat flour sales was that of the price, and no factors discussed by the panel other than a subsidized price could possibly account for the EEC's 158 per cent increase in market share while every other supplier's share declined.

17. The United States delegation also urged the Committee to recognize that the concept of "more than an equitable share" was not so difficult to apply as the panel had alleged, considering that a 1958 working party was able to conclude that France had taken more than an equitable share of world flour trade when France's share had risen far less than the EEC's share in the present case, and where such special and political factors as World War II were not at play in the market. Her delegation seriously doubted that more significant factors were involved today than in the pre-war or post-war period examined by the working party in 1958.

18. She finally stressed that in accordance with Article 13:4, this Committee was authorized to make the conclusions proposed by the United States, and to make such recommendations to the parties as it deemed appropriate to resolve the issue. The process should be taken one step at a time, in the proper sequence, and the first step was to answer the following questions: (a) Had the EEC gained more than an equitable share of the world wheat flour market through export subsidies? The Committee's answer must be affirmative; if Article 10, paragraph 1 did not apply in this case, it was hard to imagine where it could ever apply. (b) Had the EEC subsidies resulted in serious prejudice or nullification or impairment in terms of Article 8? The Committee's answer should again be unequivocally affirmative. She concluded by saying that her delegation looked forward to hearing all delegations' views on this proposal and again urged the Committee to face up to its obligations to make the dispute settlement process work in this important case.

19. The representative of the EEC said that he agreed that the Committee was free to adopt or not the report and draw its own conclusions. He also agreed that the findings in the panel report were a relevant basis for drawing conclusions. However, the EEC interpretation of the conclusion to be drawn from the report was different to that of the United States. The panel had done its best in view of the present situation in the wheat flour market. Concerning the findings he disagreed with the United States. The panel had replied to the questions put to it on the basis of existing texts and of the market situation. The Panel could not give more precise replies. The Committee had a job to do and in doing so it would have to take the panel findings into account. But should it do so the basis of the two questions put by the United States, it would amount to rebutting the panel report. In general, his delegation was satisfied with the panel report and could not accept the contention that the panel had not answered two of the questions. The panel had indeed answered the questions and his delegation agreed with these answers.

20. The representative of the United States referred to Article 13:4 which clearly said that the Committee had to review the panel reports and to draw conclusions and make its recommendations. She further noted that paragraph 4.4 of the panel report indicated that three questions needed to be addressed. Of these, the panel had only answered one. Therefore, the Committee needed to complete the process without altering the panel report. She suggested that the Committee could do this without the EEC and the United States participation.

21. The representative of Canada noted that the two parties to the dispute were drawing different conclusions with regard to the three questions. His delegation had hoped that the panel would be in a position to make a finding on the concept of equitable share of the world market. However, it did not believe that the panel had technically erred in its findings. In paragraphs 5.8 and 5.9, it had asked the Committee to address this question. Therefore, this Committee could adopt the report and take the necessary steps to make the Code more operational. As to the United States proposal that the Committee complete the panel report he had some doubts whether the Committee could come to different conclusions. The panel in fact had put the finger on a traditional problem area of Article XVI of the GATT and 10 of the Code. In his delegation's view the question before the Committee was not whether the panel had failed in its task but whether Article 10 of the Code could be interpreted in any meaningful way. He suggested that the Committee take an initiative in this area.

22. The representative of Chile said that the Canadian statement was important. It should be recognized that a number of obligations in the Code were not clear, and maybe the time had come to clarify certain provisions. There were two problems before the Committee: firstly, the EEC-United States dispute, which needed resolution despite the absence of conclusions in the panel report. However, for the time being it would seem that the Committee could do very little because it had received no conclusions from the Panel and furthermore, there seemed to be no consensus on the interpretation of key provisions that would allow the Committee to draw its own conclusions. And that was the second problem to which the Committee should address itself, by exploring the possibilities of a precise interpretation of certain provisions of the Code. Areas that needed such clarification were not only the concept of "equitable share of the market" but also Article 8:4(c), concerning primary products. For example, should non-commercial sales be included or not in world trade shares; the same question arose with regard to concessional sales.

23. The representative of New Zealand said that with respect to the panel report the position of his delegation had not changed from the last meeting. His delegation did not believe that problems of equity and interpretation could be resolved by the panel. There were unclear areas and, unless these were clarified, it was unlikely that the panel report would ever be completed. As the panel report was inconclusive, the Committee was now in a situation where a central provision of the Code was inoperative, leaving Signatories with no clear rules to follow. The absence of clear guidelines was a dangerous situation, in particular for agricultural trade. As for the particular dispute, he hoped that a solution could be found on a bilateral basis. He suggested that the Committee focus on the unclear provisions of the Code with some urgency. It should adopt a procedural course of action to

get early discussion or negotiations underway to clarify certain provisions relating to subsidies so that future panels would be provided with clear guidelines.

24. The representative of Australia pointed out that the panel report was based on the premise that wheat flour was a primary product. He reiterated his view that wheat flour should not be considered a primary product. His delegation believed that the proper procedure for the Committee would be to examine which article of the Code was relevant to wheat flour. The panel should have addressed this issue, but it had not done so. He noted that the Committee did not follow these views and wished to record his delegation's reservations on the matter. He further suggested that the panel report seemed to contain sufficient material for the Committee to judge what was a more than equitable share of the market. It was extraordinary that the panel could not make any finding when it had included evidence in its own report of an EEC increase in market shares of as much as 158 per cent. He suggested that the Committee should address this question.

25. The representative of Switzerland said that the panel had set about its task very seriously. It had examined the facts in the light of the provisions of the Code. Its conclusions flagged two areas of obscurity: (a) at the legal level, the applicability of relevant legal provisions, and (b) at a practical level, the behaviour of the parties in the wheat flour market. These two problem areas had made it impossible for the panel to come to definitive conclusions. The Committee, as suggested by the panel and subsequently by Canada and Chile, could examine and clarify certain provisions of the Code. In his view this work was urgent, though it should not put the Code itself into question. It should be limited to an elaboration and clarification of certain provisions. In parallel, he would have wished the parties to the dispute to take a position on the remarks addressed to them by the Panel in paragraphs 5.7 and 5.8.

26. The representative of Uruguay said that his delegation shared the views expressed. However, it also understood the request by the United States. In his view a panel was expected to furnish elements for a decision. He noted that the panel had said that it could not conclude whether the EEC had gained more than an equitable share of the market; on the other hand the panel report had noted that the EEC share of the market had grown very considerably. His delegation could see no basis on which the Committee could adopt the panel report; it needed to analyse the facts of this particular case.

27. The representative of the United States said she believed that all delegates should reflect on the proposals put forward by the United States and the consequences of suspending the report, as many delegates appeared now to be suggesting. If the Committee could not interpret Article 10:1 and Article 8 in this case, how could it work on the interpretation of these provisions in the abstract. It would leave the particular dispute unresolved and it would leave future panels without any guidelines. In the meantime, code disciplines would not be applicable. She invited the Committee to reflect on the proposals made by the United States and the questions it had put, and suggested that the Committee also reflect on the consequences of suspending the panel report and admitting that the Code was inoperative and the particular dispute unresolved.

28. The representative of Canada agreed with the representative of New Zealand that the Committee should examine the issues in a broad context. Certain Code provisions remained ambiguous and therefore there was a need to clarify them.

29. The representative of India recalled the position of his delegation at the 22 April 1983 meeting. His delegation could not accept the conclusion in paragraph 5.9 to the effect that solutions to the problem of export subsidies could only be found in making the pertinent provisions of the Code more operational, stringent and effective in application, and that this involved a clear understanding of the concept of more than equitable share. He did not believe that the Committee should proceed on the basis of a single panel report to conclude that the Code provisions were inadequate. The panel had not addressed the central issue. His delegation disagreed with the proposals to undertake a clarification of the Code. He believed that the Code needed time to be tested and interpreted as circumstances arose.

30. The representative of Australia supported the views expressed by the representative of India. He stressed that the concept of more than an equitable share of the market should not be examined in the abstract. There was enough material in the panel report to permit the Committee to address the issue under dispute.

31. The representative of the EEC noted that in general few Signatories had agreed with the United States that the panel report was incomplete; most Signatories had recognized that the panel had had serious difficulties in its task. The panel had encountered problems in the interpretation of the concept of more than an equitable share of the market. The EEC thought that the panel members were right in being prudent and not giving an interpretation of its own. The question remained of how to define the concept of equitable share of a market. He recalled that there had been difficult negotiations on this point both in the GATT and in the elaboration of the Code. It was his view that the Committee should be prudent before undertaking any clarification; there was a need to reflect on the modalities and the most appropriate form for such an exercise which the Panel had wisely left open. Furthermore there were a number of other questions which also needed clarification, including concessional sales and the notion of primary products.

32. The representative of New Zealand disagreed with the aspect of the EEC statement. He believed that there was enough evidence in the panel report that would have allowed a conclusion on the issue of equitable share. However, the Panel had been unable to reach a conclusion, and therefore it was a matter of urgency that the rules be clarified as this was a very sensitive area.

33. The representative of the United Kingdom on behalf of Hong Kong said that the panel report left a number of questions unanswered. His delegation agreed with certain elements of the EEC comment, in particular that prudence should be shown before tackling clarification. However, some problems did exist. There was no finding on the concept of equitable share of the market in the report. His delegation was in favour of further consideration of the problem before the Committee came to any conclusion as to what action should be taken.

34. The representative of Japan noted that there had been many arguments concerning the further clarification of Code provisions. In his view the important matter before the Committee was to get a solution to the particular dispute before it. The panel report in its paragraph 5.7 stated that the EEC, bearing in mind the provisions of Article XVI:2, should make greater efforts to limit the use of subsidies on the exports of wheat flour. If this statement could be accepted and implemented by the EEC, progress in the particular case before the Committee would be achieved. In his view, paragraph 5.7 of the report contained the key to a solution.

35. The representative of Sweden recalled the Nordic delegations' position as expressed at the meeting of 22 April 1983. In their view there was need for clarification of certain Code provisions. It was a matter of urgency that the Committee arrive at a working definition of more than an equitable share of the market. This could be done in this Committee or in the Committee on Agriculture.

36. The representative of the United States said that the Committee at its meeting of 18 May 1983 had decided to establish a panel involving Article 10 of the Code. She wondered how the panel could proceed if Article 10:1 was inoperative. She asked the Committee to consider the consequences of leaving this dispute unresolved.

37. The representative of the EEC said that the two panel cases should not be linked to each other. He was of the view that the EEC complaint under Article 10 was sufficiently clear. He asked a clarification of Chile's suggestion that the Committee could leave the panel report aside.

38. The representative of Chile said that the panel report had been criticised for its lack of conclusions, thus leaving the dispute unresolved. He agreed with the representative of Australia that the report in fact contained enough material to draw conclusions. This could be done. However, the problems of interpretation of certain Code provisions remained, and it was necessary to clarify them. He remarked that the Japanese statement did provide an element for a resolution of the dispute.

39. The representative of the EEC expressed his perplexity at the Chilean intervention. If the provisions of the Code were not clear and there was need for clarification, it was not possible for the Committee to come to a clearer decision than the Panel on the specific issue of compatibility with these provisions. With regard to the Japanese statement concerning paragraph 5.7 of the panel report, which was based on Article XVI:2, he noted that the Panel had utilized the formulation of Article XVI:2 and reminded the Committee that there was also a paragraph 3 to Article XVI. This permits export subsidies provided that they do not cause prejudice. The EEC had not caused prejudice to United States trade. Exports in 1982-83 had in fact fallen substantially. The panel could not conclude that the EEC had caused injury, nor could it draw conclusions that the EEC had taken more than an equitable share of the market.

40. The representative of Switzerland said that it was the task of the Committee to clarify the concept of equitable share of the market, it being understood that other GATT bodies might be called on to co-operate in this respect. Any conflict of competence must be avoided.

41. The Chairman concluded by saying that the United States had put precise questions to the Committee and had requested answers. There had been several comments on particular points of the panel report. Some of these comments stressed the need to clarify key concepts in the Code. There had been observations regarding procedures to deal with disputes. All these observations, questions and comments deserved the careful evaluation and reflection by members of the Committee. He concluded that the item should be kept on the agenda and reverted to at a further meeting. This was agreed.

42. The observer for Argentina said that regarding document SCM/W/48 he wished to put on record that the secretariat's factual note on the negotiating history of Article 18:9 and the treatment of reports of working parties and panels established under Article XXIII of the GATT concerned all contracting parties. Certain information in Part II of the document, in particular paragraphs 38-40, were not complete or exact. He took it that this document did not prejudice the rights and obligations of any contracting party; if not, he would have to make a reservation concerning the information contained in the document.