

GENERAL AGREEMENT ON

RESTRICTED

SCM/M/49

4 April 1991

TARIFFS AND TRADE

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD
ON 6 MARCH 1991

Chairperson: Ms. Angelina Yang (Hong Kong)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a special meeting on 6 March 1991.
2. The Committee considered two items:
 - A. Election of officers
 - B. Request by the United States under Article 17:3 of the Agreement to establish a panel on the matter referred to the Committee by the United States and concerning an alleged export subsidy of the Government of Germany (SCM/108).
- A. Election of officers
3. The Committee elected Ms. Angelina Yang (Hong Kong) as Chairman and Mr. J. Potocnik (Austria) as Vice-Chairman.
4. Many representatives expressed their appreciation to the outgoing Chairman, Mr. Crawford Falconer, for his excellent service as Chairman of the Committee over the past year.
- B. Request by the United States under Article 17:3 of the Agreement to establish a panel on the matter referred to the Committee by the United States and concerning an alleged export subsidy of the Government of Germany (SCM/108)
5. The Chairman explained that the purpose of this meeting was to consider a request by the United States under Article 17:3 of the Agreement to establish a panel on the matter referred to the Committee by the United States in document SCM/108 and concerning an alleged export subsidy of the Government of Germany. It was her understanding that the consultation and conciliation process had not produced any satisfactory solution, and that the United States was therefore requesting that the Committee establish a panel in accordance with Article 18:1 of the Agreement.

6. The representative of the United States recalled that this matter had most recently been before the Committee on 31 January 1990, when the United States had sought Committee conciliation. That effort had been unsuccessful. Since then, the United States had continued to attempt to reach a mutually satisfactory solution of this matter through repeated meetings with the EEC, as well as with individual member States. Unfortunately, this had not proven possible. Thus, the United States had no choice but to request the establishment of a panel in accordance with the provisions of Articles 17:3 and 18 of the Subsidies Agreement. The basis of this request was an exchange rate "insurance" scheme that was part of a comprehensive plan of the German Government to facilitate the merger of Messerschmitt-Boelkow-Blohm (MBB) into Daimler-Benz, and the financial rescue of MBB and its subsidiary, Deutsche Airbus. This subsidy had been approved by the Commission in March 1989 and had been implemented by the German Government. Indeed, since the date the Committee had undertaken conciliation, the German Government had distributed in excess of 390 million deutschemarks under the guarantee scheme. Under the scheme, as the United States understood it, the German Government would provide, through the year 2000, exchange rate risk insurance, whereby the Government would cover most losses deemed attributable to lower actual market rates for the dollar than specified in the plan. The German Government would charge no premiums for the provision of this so-called "insurance"; neither would it charge interest on the funds advanced, which came directly from the Government. It had also recently become clear that the programme was more extensive than previously indicated, and extended to German component suppliers as well as Deutsche Airbus. The exchange rate subsidy alone amounted to an average of approximately US\$2.5 million on each plane delivered by Airbus in 1990.

7. He recalled that during the conciliation, the United States representative had noted that the EEC had not, despite US requests, provided an official description of the exchange rate scheme. That request had been reiterated during the conciliation meeting, but the EEC representative had said that he did not consider it appropriate to provide this information to the Committee. Furthermore, the EEC had not complied with the United States' 26 February 1990 written request pursuant to Article 7:1 of the Code for written information on the nature and extent of any subsidies provided to Airbus. He said that he was calling this fact to the attention of the Committee as directed by Article 7:2. Additionally, he formally reiterated at this meeting of the Committee the US request under Articles 7:1 and 7:2 that information on the exchange rate scheme and other subsidies to Airbus - including any information pertinent to the function of this Committee which had been provided in other GATT fora - be provided to the Committee on Subsidies and Countervailing Measures pursuant to the latter's rules. The United States regretted that the EEC had not seen fit to provide this information to the Committee, notwithstanding that it had provided such information in other fora. This decision by the EEC weakened the ability of this Committee to carry out the work with which it was charged.

8. He said that based on the United States' understanding of the exchange rate insurance scheme, it constituted a prohibited export subsidy in violation of Article 9 of the Subsidies Code, with reference to items (a), (j) and (l) of the Illustrative List. Item (j) in particular forbade "[t]he provision by governments ... of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes". In the US view, the exchange risk programme of the German Government was inconsistent with these provisions of the Subsidies Code. Accordingly, pursuant to Article 17:3 of that Code the United States had requested the establishment of a panel to adjudicate this matter. Under the Code, establishment of such a panel was a straightforward matter. The United States had fulfilled all of the requirements under the Code for a panel to be established. Since conciliation had not resolved the matter and more than thirty days had passed since the US request for conciliation, Article 18:1 of the Code provided that "The Committee shall establish a panel upon request pursuant to paragraph 3 of Article 17" (emphasis added). He stressed that the paragraph read "shall", not "may" or "should". Furthermore, unlike the situation in some other GATT instruments, there was no question as to what the terms of reference should be; these were explicitly set out in the second sentence of Article 18:1. Therefore, the United States eagerly awaited the expeditious exercise by this Committee of its legal obligation to establish the panel requested and to empower it with the Code-mandated terms of reference.

9. The representative of the EEC expressed his delegation's regret that this matter had thus far not been resolved satisfactorily and that the United States had chosen to pursue it by requesting the establishment of a panel by the Committee on Subsidies and Countervailing Measures. He said that the EEC had fully explained its position on the substance and the procedure of the exchange rate mechanism in this Committee as well as in the Committee on Trade in Civil Aircraft. It had also provided extensive information which had been circulated in the context of the Aircraft Committee (AIR/W/76). As what had been said had been fully recorded in the minutes of these meetings, he would not reiterate the arguments at great length. His authorities had instructed him to take the following position at the present meeting: Aircraft was a very special product, and the specificity of trade in civil aircraft had long been recognized in the GATT, to the point where specific multilateral rules on trade in civil aircraft had been negotiated and agreed upon. While there might arise problems of co-ordination between different legal instruments, such as the Subsidies Code and the Aircraft Agreement or the Agreement on Technical Barriers to Trade, it was obvious that the only logical and equitable solution would be to apply the lex specialis - the specifically applicable agreement - that governed this sector, which was the Aircraft Agreement, especially since this would not at all exclude the application of the substantive provisions of the Subsidies Code, which was expressly recalled in the Aircraft Agreement. This would be all the more reasonable because the latter provided expressly for a dispute settlement mechanism that would allow for full consideration of the interests of both parties to the

dispute. While recourse to this mechanism was not mandatory, the choice by the United States not to use it and to resort to the Subsidies Code would prevent examination of all the issues under the applicable rules and therefore deprive the EEC of the possibility of asserting its rights under the Aircraft Agreement. These were the main reasons behind the position taken by the EEC at the Subsidies Committee meeting on 31 January 1990. The EEC continued to believe that this position was sound and reasonable. Should the United States believe that a panel was necessary to adjudicate this dispute, it was only fair to resort to the dispute settlement mechanism of the Aircraft Agreement which would enable consideration of the provisions of both Codes. This was and remained the EEC's position.

10. He then added what he termed personal observations. He said that this case was extremely sensitive, both because of the issues it involved and because of its timing. It would thus seem to be of the utmost importance that this case be handled with great care and in an exemplary matter. The parties involved could not be allowed to poison the atmosphere with procedural battles, which would, from the outset, mortgage a satisfactory solution. It was therefore imperative that the parties co-operate - precisely in the spirit of co-operation referred to by the United States - to find a satisfactory procedural solution which respected the positions of both parties. This should not be a difficult or lengthy task. After all, the EEC accepted that the US complaint be examined by a panel, whatever the procedure for the establishment of the panel and the terms of reference might ultimately be; the EEC did not want to limit this examination in any way, but simply wanted to ensure that the panel would be able to hear and examine all the factual and legal arguments advanced by either party, and that the panel would not - for purely procedural reasons, be barred from taking into account relevant arguments and legally applicable provisions.

11. The representative of the United States said that he would react in two parts to the EEC statement: (1) the part of the statement labelled instructions from Brussels, and (2) the part labelled personal observations. Regarding the first of these parts, he agreed that the nature of the product was important in this matter; it was important that the product was aircraft and not, for example, soya. This meant that Article 9, and not Article 10, of the Code was applicable. However, the United States took a somewhat different view of the fact that the product in question was aircraft. The United States drew a different conclusion from the concept of lex specialis. The exchange rate scheme about which the United States was complaining was the central issue in this matter, not the particular sector to which it had been applied. Thus, using the principal of lex specialis, it was the Committee on Subsidies and Countervailing Measures, and no other, which was the appropriate forum. The United States had found no indication in the drafting or interpretative histories of this Code or of the Aircraft Agreement that the latter was to be read as a sectoral exemption of the former, particularly with respect to export subsidies. Indeed, the Subsidies Code provided no sectoral exemptions whatsoever. The locus of the EEC's argument of lex specialis

was the Aircraft Agreement. It was clear as a matter of GATT law that each Agreement was a legally separate instrument; thus, the United States believed that the Committee on Subsidies and Countervailing Measures had no legal competence to interpret the provisions of the Aircraft Agreement or of any other Agreement. However, since the EEC had raised the argument of lex specialis, he had to refer to the Aircraft Agreement in his arguments to counter the EEC's. Article 6:1 of the Aircraft Agreement was very instructive in this regard. In it the Agreement's signatories "note" that the provisions of the Subsidies Code apply to trade in civil aircraft. Far from carving aircraft out of the Subsidies Code, this provision specifically declared its applicability. While this same provision included a reference to so-called "special factors", there was no reference whatsoever to export subsidies, and contrary to the EEC arguments that the special factors listed indicated an intention for there to be less discipline in this sector, a different and more plausible interpretation would be that the express desire to expand participation in the aircraft market indicated an intention for stricter discipline in this sector than in others.

12. He then drew attention to Article 8.8 of the Aircraft Agreement and quoted from it as follows: "Signatories agree that, with respect to any dispute related to a matter covered by this Agreement, but not covered by other instruments ...". In the US view, this matter clearly was covered by another instrument; therefore, by the express terms of the Aircraft Agreement, it was the dispute settlement provisions of the Subsidies Code - as asserted by the United States - which applied. While the last sentence of Article 8:8 did permit the use of Aircraft Agreement dispute settlement in cases covered by other GATT instruments where the parties to the dispute so agreed, needless to say the United States did not so agree.

13. He then made reference to the work of a European legal scholar, Akehurst, entitled The Hierarchy of Sources of International Law, and said that this work made clear that in light of the intent of the signatories to the Subsidies Code not to provide any sectoral exemptions or derogations from the disciplines of that Code, the principal of lex specialis would not favour application of the Aircraft Agreement in this case. He would not expect the EEC to agree with the legal interpretations, in whole or in part, which he had just given. This was not the time, prior to the establishment of a panel, to decide which party was right or wrong. That was the panel's job, and after it had reached its conclusion, the Committee's job to review it. He was raising these points for the record in an abundance of caution to protect his position so that it could not be argued subsequently that the United States shared expressly or by silence the interpretation of the EEC.

14. In his view, it was a very positive sign that the representative of the EEC had stated his personal observations. This dispute had and would continue to attract a high level of attention, and he appreciated the EEC's expressed intention to see if it would be possible to diffuse some of the

extraneous heat that accompanied disputes of such a significant commercial nature. The United States would not and could not back off from its request for a Panel, nor from its assertion that this Committee, by the express terms of the Subsidies Code, was mandated to establish a panel upon the US request in this Committee. Nor was the United States backing off from its position that it had a right to demand that the Committee exercise its legal obligation to provide for the terms of reference specified in Article 18:1. However, he had noted the statement by the EEC urging co-operation to find a satisfactory procedural solution. In the spirit of co-operation, his Government could agree to defer for a short period of time - a week or ten days - insistence that this Committee exercise its right to provide for the Code-mandated terms of reference, so as to provide a period during which the United States and the EEC could explore whether some agreement on procedural details might be possible. In summary, he said that he had to insist that the Committee take the decision to establish a panel today and to act in the only way it was authorized to act under the Code. However, he would be willing, should it be the wish of the Chairman, to agree that the part of the US request regarding terms of reference be deferred for a short period of time to enable the parties to explore whether an alternative solution might be possible. In order for this to occur, the EEC would have to make precise proposals for such procedural solutions.

15. The representative of the EEC said that when he used the term lex specialis he did not mean to say or imply that the Aircraft Agreement provided for a sectoral exemption from the Subsidies Code. The provisions of this Agreement quoted by the United States already showed the contrary - that this Agreement specifically referred to the provisions of the Subsidies Code but qualified this by additional provisions. Moreover, if the argument advanced by the United States was correct that the provisions of the Aircraft Agreement might be construed as even stricter, then it was even more difficult to understand why the United States would not refer to that Agreement. The EEC believed that the Aircraft Agreement specifically dealt with all the problems concerning trade in civil aircraft, either by specific norms or by reference to other norms - such as the General Agreement or the Subsidies Code - and did so in a complete way, not only in substance but in procedures as well. The Aircraft Agreement, while it might to some extent have fallen out of favour with one or another of its signatories, was still part of international law binding the governments of the two parties to the dispute at hand. One could not altogether ignore the specific agreement which dealt with the problems involved in a comprehensive manner, and in an even broader manner than the Subsidies Code. One could say that the latter concerned only a very specific aspect of the broader aspects of the Aircraft Agreement, which was the relevant agreement. However, there were some substantive provisions in the Subsidies Code which might or might not be of some relevance and might warrant examination.

16. The EEC wanted to underline that in the Aircraft Agreement there was a provision which addressed precisely the situation at hand, and this was Article 8.8, last sentence, which read that "These procedures shall also be

applied for the settlement of any dispute related to a matter covered by this Agreement and by another instrument multilaterally negotiated under the auspices of the GATT, should the parties to the dispute so agree." The EEC was not challenging that the way in which this might be done would be subject to the agreement of the parties. However, at least the drafters of this text had thought about the problem of overlaps between separate legal instruments and had provided an appropriate solution, although there was no specific provision in the Subsidies Code addressing this issue. This problem had been discussed at great length in past years in the context of the negotiations on dispute settlement in the Uruguay Round, and the general view supported by both the United States and the EEC had been that one should try to harmonize these procedures as much as possible and to agree on dispute settlement procedures which solved these jurisdictional problems and overcame the fragmentation of dispute settlement procedures, so that all the applicable multilateral rules could be examined. The body of international law could not be chopped up by a selective application of only certain parts of it, to the exclusion of other relevant and applicable parts. This would not lead to the resolution of a dispute in a satisfactory and legally sound manner. Regarding the US allusion to the Hierarchy of Sources of International Law, he said that the present case did not involve a hierarchy. In the EEC's view, the Aircraft Agreement, the Subsidies Code and the General Agreement were all agreements under international law and all had the same hierarchy. Where there were different provisions, all of which might be relevant, it was important that a body examining the legal situation determine precisely how these provisions related to each other, while respecting that they were all at the same level in legal terms. In particular in this case, it would be necessary to look at all the applicable instruments and determine how they related to each other and which parts were relevant. How could a panel pursue examination of this dispute while recognizing that its terms of reference precluded it from taking into consideration certain applicable provisions of international law? What could be the outcome of such a panel but that a second panel would have to be established to look at the same case, in the light of the first panel's report, from the perspective of the Aircraft Agreement? This would mean a prolongation of the procedure. Thus, the EEC sincerely hoped that the two parties could explore some of the procedural aspects of this matter in order to reach a truly satisfactory solution not just for the two parties but for the system itself, and for a satisfactory outcome of the matter in the future. The EEC did not challenge the procedural right of the United States to request a panel under the Subsidies Code. However, the EEC had doubts as to the wisdom of insisting on such a course and of establishing a panel at the present time. Time was necessary to explore what the precise procedure and mandate should be, and the results of these exploratory talks might have some implications with respect to the procedure for setting up such a panel. The EEC had no interest in delaying this process, but wanted a sound procedure which helped the process and allowed both parties to bring forward the arguments they considered relevant to the case, to allow the panel to examine all these arguments on their merit, and to facilitate that the panel report to be properly handled, approved and implemented.

17. The representative of Canada supported the establishment of a panel as a matter of principle. It was the prerogative of the United States in this case to decide the venue, and Canada supported the United States' choice of the Subsidies Code as the appropriate forum to examine the dispute. His authorities had not yet completed their analysis of the issue under consideration; however, Canada reserved its rights to make a third party submission to the panel.

18. The representative of Japan supported the establishment of a panel. Japan was very interested in this case and reserved its right to intervene, including to make a submission to the panel.

19. The representative of the United States said that while he had taken note of the EEC request to postpone action on the establishment of a panel, as well as on its terms of reference, so as to allow the EEC to provide more details on a possible procedural solution which his authorities could examine, he could not and would not agree to the entirety of that request. The United States maintained its request that this Committee act, as legally required to act pursuant to Article 18:1, at the present meeting to declare that a panel be established. He was not insisting that the Committee today exercise its legally-mandated authority to declare that the terms of reference set out in Article 18:1 should be the terms of reference of this panel. The United States deferred, for a limited period of 7-10 days, pursuing this second part of the US request, in order to enable the EEC to provide details supporting the idea of a procedural solution. Should this prove to be the Committee's decision, he would need assurance that after expiry of this short period, either terms of reference would be established on the basis of an agreed solution, or, should it not prove possible to do so, the US request for the Code-mandated terms of reference would be resumed and automatically approved either by the Committee or by the Chairman on behalf of the Committee.

20. The representative of the EEC reiterated that the EEC fully accepted that a panel would be established to examine this matter and did not challenge the US right to request a panel under the forum of its choice. However, time was needed to sort out informally what the most appropriate procedure and procedural rules would be to handle this matter satisfactorily, taking into account the basic positions of both parties. The EEC hoped that the solution which would hopefully be reached regarding the precise formulation of the terms of reference might have some implications with regard to the precise, formal procedural step of how to establish the panel and whom to involve in its establishment.

21. The Chairman said that her responsibility and obligation in this Committee were entirely governed by the letter and spirit of the Subsidies Code. The Committee had examined the US request and had noted statements made by interested delegations. A number of important procedural points had been raised during the discussion, and it seemed that delegations had acted in a positive spirit and had shown a good deal of flexibility. In particular, she had noted that the EEC did not oppose the establishment of a panel and did not challenge the United States' right to request such a panel. She had also noted that a number of procedural matters, including the panel's terms of reference, needed to be worked out. She therefore proposed that the Committee establish a panel at the present meeting.

22. The Committee so decided.

23. The Chairman said that she intended to conduct consultations with the parties to the dispute and with any interested parties as to the procedural matters, in particular the terms of reference, and would ask the Committee to authorize her to agree to any modified terms of reference. She would hold these consultations in the very near future. However, should it be necessary, she would promptly call another meeting of the Committee. She also proposed that the Committee authorize her to decide, after securing the agreement of the parties concerned, on the composition of the panel.

24. The Committee so agreed.

25. The representative of the EEC regretted the manner in which this matter had been handled. He had nevertheless chosen not to oppose the establishment of the panel at this point in time, in the expectation that the terms of reference ultimately adopted would reflect the EEC's position of principle as well as the need to reach a solution allowing the panel to handle the case in a satisfactory manner, and also in the expectation that these informal discussions would yield certain consequences with respect to the involvement of the Aircraft Committee stemming from whatever agreement was reached on terms of reference.

26. The representative of the United States reiterated his hope that the Chairman would take due note of the time-frame of 7-10 days expressed in his earlier interventions. His authorities were very worried by the potential that the panel's work might be delayed for a protracted period, as had unfortunately been the case in the past in this Committee. He reiterated that the United States had engaged to undertake with the EEC good-faith exploration of ideas that the EEC might propose, and that if agreement were thus reached, the resulting terms of reference would be applied. However, he wanted to be very clear that should it not be possible to reach such mutual agreement, the United States would, instantly upon expiry of this short exploration period, put into effect the second portion of its original request that the terms of reference as spelled out in Article 18:1 be automatically deemed to apply as a matter of Subsidies Code law regarding this panel. He had stated this position for the third time at this meeting so as to avoid any potential misunderstanding on these points.

27. The representative of the EEC said that the EEC wanted to reach a quick and swift solution, but felt that a sound solution was more important than the exact number of days taken to reach it. He recalled that there had been a case in this Committee in which the United States had requested specific terms of reference, the discussion of which had taken roughly six months. The EEC did not ask for or expect such an extreme delay in this case, but it was important to get the procedures right in order not to poison the panel's work from the outset.

28. The Committee took note of the statements.