

GENERAL AGREEMENT ON

RESTRICTED

SCM/M/50
6 May 1991

TARIFFS AND TRADE

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD
ON 11 APRIL 1991

Chairman: Ms. Angelina Yang (Hong Kong)

1. The Committee on Subsidies and Countervailing Measures held a special meeting on 11 April 1991. The purpose of this meeting was to decide on the terms of reference for the Panel established by the Committee at its meeting of 6 March 1991.
2. The Chairman recalled that at its meeting of 6 March 1991 the Committee established a Panel in accordance with Article 18:1 of the Subsidies Code. At that time she considered that, as a number of important procedural points had been raised during the discussion, she should conduct consultations with the parties to the dispute to see whether it would be possible to modify the terms of reference provided for in Article 18:1, in such a way as to take care of these procedural points. She was authorized by the Committee to agree to such modified terms of reference. Unfortunately, these consultations had not resulted in an agreed modification of the terms of reference. In addition, the Chairman's compromise suggestion based on an existing GATT precedent had not been accepted by any of the parties to the dispute. At a certain stage it had been made clear to the Chairman that there would be no useful purpose in continuing the effort to find mutually acceptable special terms of reference.
3. The Chairman further said that she did not want to rush the matter but, on the other hand, as the efforts to modify the standard terms of reference had not succeeded, it would be prejudicial to the dispute settlement process to drag the matter on just for the sake of repeating the same arguments and reaffirming the same divergent positions. In this situation the Committee had to assume its responsibilities and the Panel established by the Committee pursuant to the provisions of Article 18:1 of the Agreement should proceed as it was required to proceed by Article 18:1 of the Agreement, i.e. it should review the facts of the matter referred to the Committee by the United States (document SCM/108) and, in light of such facts, should 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 this Agreement.

4. The representative of the EEC thanked the Chairman for her efforts to find a mutually satisfactory solution for this matter. At the same time he wished to express his regrets that the Chairman did not refer to the EEC letter circulated in SCM/109 and did not intend to open a discussion on points raised therein. He wished to explain the reasons underlying these points. He said that the gist of the matter was that the Committee was faced with a case for which provisions of the Subsidies Code and the Aircraft Agreement were both relevant. The complaining party had chosen to use this Committee to put its case forward. However, this choice should not affect the question of which legal provisions could be invoked in order to safeguard the rights of parties to an international agreement negotiated, agreed and accepted under the auspices of the GATT. He recalled that the EEC had made several proposals to take these considerations into account, first of all by suggesting that both Committees should be involved in the process. The EEC view had always been that the Aircraft Committee was a more appropriate forum to deal with this matter because the Aircraft Agreement dealt with trade in civil aircraft in a comprehensive manner and it also referred to the provisions of the Subsidies Code. Furthermore, the Aircraft Agreement provided for a procedure that would allow a panel to examine this case in the light of all applicable provisions of both Agreements.

5. The representative of the EEC said that his delegation had never contested the right of the complaining party to seek a panel to have the case examined. However, he had thought that there would have been a more reasonable way to deal procedurally with this matter. This had not happened and the panel had been established by this Committee. The EEC therefore, had sought consultations on the terms of reference to have, at least, the principle of the relevance of the two Codes adequately reflected. Unfortunately, all the EEC proposals to this effect had been rejected. He found that this deplorable situation was constituting a further example of how the legal fragmentation of the GATT system made possible all sorts of forum shopping and how it could deprive a party of its procedural right to invoke clearly relevant legal provisions which affected or modified provisions of other agreements.

6. The representative of the EEC further said that the latest EEC proposal in SCM/109 was based on the precise wording of Article 18:1 of the Subsidies Code with the only addition that the panel should also be competent to look at the relevant provisions of the Aircraft Agreement. He believed that this was a sound proposal and that, as a matter of principle, the GATT should be able to deal in an appropriate manner with cases which cut across different agreements. He referred to an understanding reached in the Uruguay Round that the dispute settlement mechanism should function in a manner so as to overcome the legal fragmentation and it should be able to deal with cases in the light of all applicable and relevant provisions. However, this Committee was setting an extremely negative precedent based on purely procedural grounds and in fact on what he considered to be almost an abuse of procedures. He therefore invited the members of the Committee to express their views regarding this situation.

7. The Chairman said that since there was no request for the floor, she wished to state that she had made all possible efforts to find a compromise solution but, as no agreement was in sight, she had to conclude that these efforts had failed. In this situation she could only repeat her previous statement. The Committee had established the Panel under the relevant provisions of the Code, which was Article 18:1. Article 18:1 provided expressly what such a Panel should do. In other words, Article 18:1 provided the terms of reference for this Panel. These terms of reference could be modified if both parties so agreed, but as there was no agreement on such a modification, then Article 18:1 fully applied. The Chairman believed that no signatory intended to contest a provision of the Code which he had accepted and ratified. In this situation the Chairman did not need to make any ruling. She had only to quote the relevant provision of the Code and every signatory had to assume its obligations under the Code. She said that in accordance with Article 18:1 the Panel "shall review the facts of the matter 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 this Agreement." It was so decided.

6. The representative of the EEC expressed some regret that apparently at this point in time, for whatever reasons, the members of this Committee had not considered it useful and appropriate to express any position on the proposal. He took this as being a wait-and-see attitude, as not being prejudicial in one way or the other, with respect to the soundness and the reasonableness of that proposal. At the same time, he did recognize that in light of the provisions of Article 18:1 the Chairman had no choice but to proceed at this point in time as she had proceeded. Nevertheless and for the record of this meeting, he wished to make the following declaration:

"The Community is deeply concerned with the decision which has just been made. When the question of the German Exchange Rate Scheme was first brought before this Committee on 31 January 1990, the Community explained why dispute settlement in the Civil Aircraft sector should take place in the Civil Aircraft Committee. The Agreement on Trade in Civil Aircraft contains the relevant substantive disciplines for this sector, including a cross-reference to the Subsidy Agreement, and it expressly provides in its Article 8, paragraph 8 for its dispute settlement procedures to apply with respect to any dispute arising out of the Aircraft Committee and of another of other agreements negotiated multilaterally under the GATT; a procedure for that is provided for. When the US decided to request the establishment of a panel under the Subsidies Committee, the Community decided, notwithstanding its position on the role and the functioning of the Aircraft Agreement, not to block the establishment of such a panel, in the expectation that the panel would be given terms of reference which would cover both Agreements. This would fully safeguard for the US all its rights arising out of the GATT and the Subsidy Agreement and respect the basic principle that all relevant obligations and provisions be taken into account. These legitimate requests of the Community with respect to

the panel's terms of reference have simply been rejected without any attempt of justifying this rejection. We find ourselves in the situation where the Community is being deprived of its at least procedural rights arising out of the Aircraft Agreement, because these provisions apparently cannot now be pleaded before the panel, which is being treated as if the Community and as if the US had never signed that Agreement. The Community is confident that the panel will conclude that the German Exchange Rate system does not constitute an export subsidy. This confidence does not, however, detract from our concerns which are motivated by considerations of legal and general principle. The panel established under this Agreement with its terms of reference limited to the provisions of the Subsidy Agreement will be constrained to operate on an inadequate, an incomplete legal basis. Its work may therefore lead to partial and consequentially incomplete conclusions regarding the rights and obligations of the parties to this dispute. The Community regrets this instance of forum shopping even more so as the Community decided not to insist on the matter being examined only by a panel established under the Civil Aircraft in order to demonstrate our commitment to an effective and rapid dispute settlement mechanism. The Community therefore has no choice but to reserve all its rights and to reserve its positions in respect of the outcome of this panel which will now start on a flawed basis."

7. The representative of Brazil reserved his delegation's right to make a submission to the panel.

8. The representative of the Nordic countries said that the lengthy discussions on the mandate of the panel gave evidence of the desirability to improve the dispute settlement procedures that the Nordic countries were striving at in the context of the Uruguay Round. He said that the overall objective should be to avoid disputes but in cases where mutually satisfactory solutions could not be found, the dispute settlement mechanism had to secure a just and equitable handling of the case taking into account all its relevant aspects. He assumed that one of the objectives of the dispute settlement negotiations in the Uruguay Round, to reach an overall consistency of dispute settlement procedures clarifying the relation between dispute settlement procedures under the General Agreement and under the Codes and even between the Codes, would at least partly solve problems of the kind the Committee had encountered in the establishment of this panel. The Nordic countries supported the right of the United States to bring the dispute in front of a panel, but they questioned whether the strict insistence on procedural aspects as to how the question should be handled would lead to the optimal solution. The Nordic countries welcomed the settlement of this issue at hand but noted with concern that it had taken place without agreement between the parties to the case. This would not, therefore, facilitate the work of the panel.

9. The Chairman said that all statements will be reflected in the minutes of this meeting.