

# GENERAL AGREEMENT ON

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# TARIFFS AND TRADE

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Agreement on trade in Civil Aircraft

MINUTES OF THE MEETING  
HELD IN THE CENTRE WILLIAM RAPPARD  
ON 19 OCTOBER 1988

Chairman: Mr. T. Koda (Japan)

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1. Matters under Article 4

1. The Chairman said that this matter had been raised at the November 1987 meeting of the Committee and concerned possible mandatory offsets in Spain and Greece. At the last meeting the EEC had said that it would answer the United States enquiry bilaterally and report to the Committee at this meeting.

2. The representative of the EEC said that unfortunately, he was not yet in a position to report on the United States enquiry. The United States request was currently being examined in Greece and a report was expected to reach the Commission within a few weeks. He would then reply bilaterally to the United States. So far, preliminary information indicated that the conclusions of the report would be satisfactory and that the Greek demands with respect to offsets were within the bounds of the Agreement.

3. The representative of the United States said that he looked forward to receiving the report; he also enquired about a report concerning Spain. Those two cases were examples of possible offsets. On the issue of

mandatory offsets more generally, he said that additional demands had been received from "offset" countries, Signatories to the Agreement and non-Signatories. Such demands from Signatory countries were cause for concern because it was the United States' understanding that Article 4 was intended to, and did in fact, prohibit mandatory offsets, whether demanded directly or through airlines. This was clear throughout the paragraphs of Article 4. He solicited the views of other Signatories on their understanding of offsets. He recognized that the interpretation of Article 4 was also under discussion in the Informal Review Process, but nevertheless raised the issue in the Committee because mandatory offsets were creating a problem in current sales campaigns, not only for United States vendors of civil aircraft but for others as well.

4. The representative of the EEC said that he shared the United States concerns, but felt it was inappropriate to pursue the matter in the Committee, as long as it was being discussed informally between the EEC and the United States. Article 4 issues could not be separated from Article 6, and should therefore be kept in the bilateral talks for the time being.

5. The representative of Japan said that his government understood the meaning of mandatory offset practices to be very similar to counter-purchase practices. If this understanding was correct, Japan was prepared to discuss the matter in the Committee, with the agreement of all Signatories.

6. The representative of Canada said that his authorities saw the position of the US delegation on the question of mandatory offsets as a matter of interpretation of Article 4, an issue under discussion bilaterally between the United States and the EEC as noted by the EC representative. In the view of the Canadian delegation, the question of mandatory offsets was not clearly spelt out in Article 4 and Canada was ready to discuss this issue in the context of a possible review of the Agreement.

7. The representative of Sweden said that his government was also prepared to discuss the matter in the context of a revision of the Agreement, which could be the subject of negotiations in this Committee.

8. The representative of the United States said that he did not understand why the matter should be discussed in the context of a revision of the Agreement. The spirit and letter of Article 4 were clear: they prohibited government-mandated offsets. The meaning was perfectly clear even if the word "offset" was not used, which had been done by agreement. Offsets were of no economic benefit to airlines nor were they part of normal commercial terms. He recalled the wording of Article 4.2 and 4.3. His delegation hoped that a common interpretation of Article 4 could be reached without a rewriting of the provisions.

9. The Chairman said that the item would be put on the agenda for the next meeting.

## 2. Harmonized System

10. The Chairman said that this matter, raised under "Other Business", concerned the Protocol (1986) containing the Aircraft Annex in Harmonized System nomenclature. He recalled that the Protocol had been closed for acceptance on 31 December 1987. To enable those Signatories who had not been in a position to accept it by that date, a new draft Protocol (1988) had been drawn up, the text of which had been sent to Signatories by telex on 14 October 1988 for examination and with a view to its agreement at this meeting. There was an urgent need to have a legal instrument available for acceptance by those Signatories who had not yet accepted the Protocol (1986). He hoped to reach agreement on this matter at this meeting.

11. The representative of Japan said that his authorities did not oppose the idea of a Protocol (1988), as proposed; if other Signatories supported this idea, Japan was prepared to join the consensus. However, it was his authorities' view that the best way to proceed was to reopen the Protocol (1986) by extending the time limit for its acceptance, pursuant to the provisions of its paragraph 2. This method was practical and simple and presented no legal difficulties for Japan. He asked for other delegations' comments.

12. The representative of the United States said that he agreed with Japan. There were in fact two options before the Committee and both were acceptable. Paragraph 2 of the Protocol (1986) allowed the Committee to reopen it for acceptance. This was the simplest way to proceed and to obtain approval from capitals, as it was only a matter of changing a date rather than establishing an entirely new document. Even if the new Protocol had a lot of similarities with the Protocol (1986), there were slight differences: there was a new paragraph 4 in the draft Protocol (1988) which provided that new Signatories would be bound by the new HS Annex. The Protocol (1986) did not have that paragraph, but it implied the same thing in paragraph 1 which said that the new Annex would replace the old Annex. As the Annex was an integral part of the Agreement, the new Annex was the only one open. Paragraph 4 of the draft Protocol (1988) made things clearer but did not change the legal situation.

13. The representative of the EEC said that he had no comments on the value of the two options; they did not present any legal problem for the EEC. There was a practical concern, however, which was that all Signatories sign and accept the HS Aircraft Annex as soon as possible. There were technical reasons for which the EEC preferred extending the Protocol (1986); certain members of the EEC, who had not been in a position to sign the Protocol (1986), now had the powers to do so, but these powers were drawn up in terms of the Protocol (1986). For these essentially practical reasons, the EEC preferred prolonging the Protocol (1986). However, if all other Signatories preferred opening a new Protocol (1988), the EEC would not oppose it.

14. Mr. Kautzor-Schröder (secretariat) said he wished to point out a few elements before the Committee took a decision. He could understand the practical considerations of the EEC. As the United States representative had said, the contractual obligations were exactly the same in the Protocol (1986) as in the draft Protocol (1988); the legal wording had been drafted

very carefully by secretariat lawyers and it was watertight in that respect. He questioned the statement that two options were open. The Protocol (1986) had been closed on 31 December 1987; indeed, the original date had been 31 October 1987 and the extension had been done in the hope that the United States would still be able to sign before the end of that year. However, that had not happened. That extension had been for two months only and it had been done by the Committee after written approval had been obtained from all Signatories. In that sense, a prolongation from a legal point of view was quite in order. However, the present situation was different; the deadline was long past. He recalled an instance when a request for a waiver had been made to the GATT Council by a contracting party which had, by oversight, not respected the deadline by only a few days or a week; in the Council, it had been stated that such an extension should be an exception and that legal instruments, once closed, could not be revived. He wished to share this view with the Committee and questioned whether the retroactive reopening of the Protocol (1986) was legally possible.

15. Mr. Kautzor-Schröder added that some Signatories might not have instructions to approve the draft Protocol (1988) at this meeting. That should not be a major problem as there could be a Committee decision in principle at this meeting to open the Protocol (1988), with a 30-day period given for raising objections. Should there be any objections, then the Committee would be faced with a completely new situation. He stressed that the Protocol (1988) was equivalent to the Protocol (1986) in that it created matching legal obligations. This was the result of considered legal thinking of the secretariat and not only his personal view. He put these considerations before the Committee in detail so that the Committee could take a decision in full knowledge of the legal aspects of the matter.

16. The representative of Sweden said that in the Tariff Committee there had been a number of different Protocols for different contracting parties, with different dates of acceptance. He wondered why the Aircraft Committee should adopt a different procedure. Reacting initially, he said that the question of retroactivity appeared fundamental. He asked why those Signatories who had difficulties in opening a new Protocol (1988) were agreeable to the very same procedure in the Tariff Committee.

17. The representative of Japan said that he had listened carefully to the explanation given by Mr. Kautzor-Schröder (secretariat). His authorities had another opinion which favoured the proposal for extension of the time-limit for acceptance of the Protocol (1986), in accordance with its paragraph 2 which provided for the Protocol "to be open for acceptance ... until October 1987, or a later date to be decided by the Committee on Trade in Civil Aircraft". There were no conditions attached to this provision, and no time limit stipulated with respect to "a later date to be decided on by the Committee". Therefore, the Committee had full competence to reopen the Protocol (1986), even after expiry of the time limit which had been set on 31 December 1987. Such a decision would not be retroactive in the opinion of the Legal Office of Japan. The Signatories had authority to act for the future. They could reopen the Protocol (1986) without that

decision being retroactive and be in conformity with the provisions of paragraph 2 of the Protocol (1986).

18. Replying to the question of the representative of Sweden about the difference between Tariff Committee HS Protocols and Civil Aircraft HS Annex Protocol, the representative of Japan said that the implementation of the Harmonized System in the general tariff context was by nature, different to the implementation of the HS in the Aircraft Annex context. In the general tariff context, each schedule could be renegotiated individually under Article XXVIII of GATT, and each schedule was different from other GATT schedules. In the Civil Aircraft HS Protocol, the Annex was common to all Signatories; they all had the same obligations. From the outset, this Committee had discussed the structure of the Protocol (1986) and decided that every Signatory would accept it; this had been the premise for its negotiation. The Japanese authorities had a clear preference for re-opening the Protocol (1986). Should a Signatory have another opinion, his delegation was prepared to discuss it and would, of course, join the consensus.

19. The representative of the United States said that the views of the Japanese Legal Office were identical to the US legal advisors' views both in Washington and Geneva. In the view of United States legal advisors there is a clear distinction between the approach of the Tariff Committee HS Protocols which related to individual contracting parties' schedules and Article XXVIII of the GATT, and the HS Protocol as it related to the Aircraft Agreement. He added that the Signatories had the competence to extend the Protocol (1986). This had already been done once, between 31 October and 31 December 1987, which had allowed the acceptance of the instrument by a number of Signatories between those dates, as only Sweden and Japan had accepted the Protocol (1986) prior to the original expiry date.

20. The United States wished to accept the same level of obligation as in the Protocol (1986). The new draft Protocol (1988) seemed to ensure that, but if some delegation had doubts then it would be neater and more elegant to re-open the Protocol (1986) so that all Signatories would accept the same document. For those Signatories who might not have instructions concerning the other approach it might be helpful to have a delay for tacit approval. The United States intended to implement the HS pursuant to statute on 1 January 1989. The United States preference went to re-open the Protocol (1986). However, his delegation was in a position to accept a new Protocol (1988) should that be the consensus.

21. He stressed that in the United States view re-opening the Protocol (1986) was not retroactive, certainly not more so than the last time it had been extended. It would be retroactive only if there had been signatures of acceptance between 1 January 1988 and the time it is re-opened. There had been no such signatures and the Committee would only be re-opening the Protocol (1986) for the future.

22. The Chairman said that the Committee had heard the Japanese and the United States comments as well as the remarks made by Mr. Kautzor-Schröder, and invited the representative of Sweden to comment.

23. The representative of Sweden said that he preferred opening a new Protocol for the reasons outlined by Mr. Kautzor-Schröder. Re-opening the old Protocol (1986) would not be the same thing, as it would imply retroactivity. He could not understand the argument that the provisions of paragraph 2 in the Protocol (1986) gave unlimited authority to the Committee to re-open the Protocol; this could lead to repeated extensions of the closing dates. It seemed to him that it would be more reasonable to have the original Protocol with a closing date, and as need arose, to open new Protocols.

24. The representative of the United States said that his authorities had no difficulty with any number of re-openings of the Protocol (1986). There was no problem because the validity of legal commitments would not be altered.

25. Mr. Kautzor-Schröder (secretariat) said that he sensed that both Japan and the United States were not opposed to opening a new Protocol. He recalled that he had corresponded at length with the Japanese delegation over this problem. The view he had expressed in his first intervention was a considered opinion, arrived at after serious consultations with the GATT Legal Office. He agreed with the representative of Sweden concerning retroactivity: it was one thing to extend an existing legal instrument with in its deadline (31 December 1987), but a different one to revive a Protocol that had expired some ten months ago. The representative of Sweden was also right in pointing out that there had been several HS Protocols in the Tariff Committee context: three Protocols in 1987, one opened and valid for 1988, and there would be others in 1989 and 1990 as more countries adopted the Harmonized System. The procedure was generally accepted and worked smoothly. The parallel was relevant for the Aircraft HS Annex. As for the concerns expressed that the legal obligations would not be identical between the Protocol (1986) and the Draft Protocol (1988), he said that the legal link was not necessarily through the Annex or the Protocol but through the Agreement itself, and if the Annex were the same then it was guaranteed that the legal obligations of Signatories were exactly the same.

26. He added that there was one more Signatory, Romania, where the situation was unclear because it was not known when that country would accept the Harmonized System. This could mean that the Protocol (1986) would have to be re-opened time and again. It was normal practice in GATT to have different Protocols on one and the same matter, as long as they created identical obligations. On the question of retroactivity, the view of the secretariat was firm, the legal opinion was provided, but it was up to the Committee to decide. However, the Committee should be aware that the matter had been discussed in the wider context of the GATT and strong reservations had been expressed against retroactive re-opening or revival of legal instruments after their expiry date.

27. The Chairman noted that there was no consensus at this time. There were two options to be examined, both of which were legally feasible. The first one was to re-open the Protocol (1986). The secretariat had repeatedly said that it had problems with so-called retroactive action. However, this Committee had already, in November 1987, decided on retroactive extension of the acceptance deadline for the Protocol (1986) for a short period of time. Now some ten months had passed and re-opening the Protocol (1986), while feasible in his opinion, seems somewhat awkward. The opening of a new Protocol (1988) was also legally feasible. He intended to adhere closely to the provisions of the Agreement, and pointed out that under Article 9 amendments to the Agreement - and the Annex was an integral part of the Agreement as the United States had said - could only take place once the Signatories had "concurred in accordance with the procedures established by the Committee". Two or three Signatories were waiting for a legal instrument to be opened in order to accept it, and it was important to reach consensus at this meeting. To summarize, three Signatories preferred re-opening the Protocol (1986) and one Signatory preferred a new Protocol. He adjourned the meeting for informal consultations.

28. After a short recess the Chairman re-opened the meeting.

29. The Chairman said that consensus was emerging: one Signatory preferred the opening of a new Protocol (1988) and other Signatories had a flexible approach. His conclusion was therefore that a second Protocol (1988) could be opened. However, as one Signatory had received the draft text too late to have instructions to join the consensus, he proposed that, subject to no objection being raised within a period of fifteen days, the draft Protocol (1988) would be agreed.

30. The representative of Japan said that his delegation had no objection to the Chairman's proposal. However, he was under instruction to put on record the following legal opinion of the Japanese Authorities: "The Protocol (1986) and the Draft Protocol (1988) were separate and independent treaties. For this reason there arose no "rights and obligations" between the Signatories who had accepted the Protocol (1986), (i.e. the first group) and the Signatories who will have accepted the Protocol (1988) (i.e. the second group). Therefore from the legal point of view under the Civil Aircraft Agreement the Signatories of the first group were not under obligation to give duty-free or duty-exempt treatment for products listed in the new Annex to the Signatories of the second group and vice versa. On the other hand the Signatories of the first group were still under obligation to give duty-free or duty-exempt treatment for products listed in the old Annex to the Signatories of the second group and vice versa.

31. The Chairman concluded that within fifteen days, provided no objections were recorded with the secretariat, the Protocol (1988) would be agreed.

### 3. Bilateral consultations on the review of Articles 4 and 6

32. The representative of the United States, in reporting on the status of the bilateral consultations under way on the review of Articles 4 and 6 and

their interpretation, said that there had been discussions last Spring between his delegation and the EEC, including France, Germany, the United Kingdom and Spain, and also with some other governments. On 18 March 1987 there had been a Ministerial level meeting between the Community and member states and the United States, after which it had been taken note of publicly that substantial progress had been made on the issue of Article 4, but that significant gaps over Article 6 remained. Concerns had been expressed, particularly from the United States point of view, that discipline did not exist on the terms and conditions for future support of new civil aircraft programmes. There were differences of views regarding governments providing long-term exchange rate risk. Following that meeting, discussions continued between the United States, the EEC and the four member States, including in Washington on 9-10 June, but no breakthroughs had been achieved. He said that the United States remained committed to a negotiated solution. The United States was also concerned over reports of additional supports being contemplated for civil aircraft programmes, which could have an adverse effect on US industry. He sought consensus to strengthen the Agreement. His delegation remained open to discussion with all parties and, if further progress with the EEC and the four Airbus governments were achieved, it would be desirable to extend that progress multilaterally as quickly as possible.

#### 4. FAA Regulations

33. The Chairman recalled that this item had been added to the agenda under Other Business.

34. The representative of the EEC said that this was an important question for his delegation and recalled that at the last meeting, he had asked for information from the United States representative on the status of FAA Regulations.

35. The representative of the United States said that regarding the issue of foreign repair stations he believed that the interim measures taken by the FAA, which included exemptions for original equipment manufacturers and temporary exceptions for other providers of repair services on US flag or US-operated equipment repaired abroad, adequately dealt with any immediate concerns other Signatories had expressed. There had been no specific problems brought to his authorities' attention. The FAA was considering a new rule in the area. After advertising publicly, the FAA had received extensive comments from interested parties, both domestic and foreign, on the rule it was considering. The new rule would take into account the views of United States' trading partners as well as domestic concerns, and would be consistent with US obligations under the Agreement. He expected the FAA would promulgate the new rule by the end of the year.

36. The Chairman said that this item would not be put on the agenda for the next meeting unless requested.

#### 5. Procedural Matters

37. The representative of the United States noted that both the question of the Harmonized System Protocol and the matter of FAA Regulations had

arisen under "Other Business" and suggested that it would be preferable in the future, for the United States and other Signatories to give advance notice of any item to be raised so that it could be put on the agenda, rather than under "Other Business".

38. The representative of the EEC agreed with this view.

6. Report to the CONTRACTING PARTIES

39. The Chairman recalled that Signatories had an obligation under Article 8.2 to inform the CONTRACTING PARTIES of developments under the Agreement during the year. To facilitate this work the secretariat had prepared a draft report which could be used as a basis of work.

40. The Committee adopted its eighth report to the CONTRACTING PARTIES, contained in document L/6415.

7. Dates of next meeting

41. The dates for the next meetings were set for 15 March 1989 and, tentatively, for the week starting 16 October 1989.