GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

SCM/M/53
18 October 1991

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD ON 26 SEPTEMBER 1991

Chairman: Ms. Angelina Yang (Hong Kong)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a special meeting on 26 September 1991.

2. The Committee considered two items:

A. United States countervailing measures against imports of Norwegian fresh and chilled Atlantic salmon - Request by Norway for the establishment of a panel under Article 17:3 of the Agreement (SCM/123 and Add.1)

B. Request under Article 13 by the United States for conciliation under Article 17 of the Agreement with the EEC regarding subsidies provided to the Airbus consortium (SCM/120, 122, 124 and 125)

A. United States countervailing measures against imports of Norwegian fresh and chilled Atlantic salmon - Request by Norway for the establishment of a panel under Article 17:3 of the Agreement (SCM/123 and Add.1)

3. The Chairman recalled that on 18 July 1991 the Committee had held a conciliation meeting (SCM/M/52) to discuss this matter and to examine the submission by Norway in SCM/117. The Committee now had before it a request by Norway for the establishment of a panel under Article 17:3 of the Agreement (SCM/123 and Add.1).

4. The representative of Norway recalled that consultations with the United States on this matter had been held in March and May of 1991, and that the matter had been brought to the Committee for conciliation in July. Unfortunately, there had been no movement towards conciliation, and Norway was thus left with no choice but to request that a panel be set up to examine this matter and to make recommendations.

5. The representative of the United States said that his delegation had no objection to the Committee's proceeding to respond to Norway's request. The United States was confident that its conduct in this case was fully in conformity with its obligations under the Subsidies Code. He asked Norway to clarify what was meant in SCM/123/Add.1, item 2(b), by the reference to double-counting in the calculation of the benchmark.

6. The representative of Norway responded that the background to this reference was covered in SCM/117, paragraph III(B), and that if more information was necessary, Norway would be happy to provide such clarification to the United States bilaterally.

7. The representative of the EEC reserved his delegation's right to make a third-party intervention in the Panel, as this matter touched on a number of interesting areas with regard to subsidies.

8. The Chairman proposed that in accordance with the provisions of Article 18:1 of the Agreement, the Committee agree to establish a panel which shall review the facts of the matter referred to the Committee by Norway in SCM/123 and Add.1 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 the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement.

9. The Committee so agreed.

10. The Chairman proposed that, in accordance with Article 18:3 of the Agreement, the Committee authorize her to decide, in consultation with the parties concerned, the composition of the Panel.

11. The Committee so agreed and took note of the statements.

B. Request under Article 13 by the United States for conciliation under Article 17 of the Agreement with the EEC regarding subsidies provided to the Airbus consortium (SCM/120, 122, 124 and 125)

12. The Chairman recalled that on 31 May 1991 the United States had requested consultations with the EEC under Article 12 of the Subsidies Agreement regarding subsidies provided to the Airbus consortium (SCM/120). Such consultations had been held on 1-2 August 1991. The Committee now had before it a communication from the United States requesting conciliation with the EEC regarding subsidies provided to the Airbus consortium (SCM/122), as well as communications from the United States (SCM/125) and from the EEC (SCM/124) relating to this matter. She said that at the outset of the discussion under this item, she wanted to remind the Committee and the two parties engaged in this conciliation exercise that the focus of this meeting should be conciliation rather than the emphasizing of differences. She therefore encouraged the parties to concentrate on enhancing the conciliatory nature of the exchange.

13. The representative of the United States said that his Government's concerns which had led to the request for conciliation were outlined in a letter of 21 August 1991 (SCM/122), and that he would amplify on and clarify those concerns at the present meeting. He said that the Chairman of Airbus Industrie had been quoted recently as saying that Airbus Industrie would give away planes if it had to in order to achieve its target market share of 40 per cent. While this statement was clearly an exaggeration, it illustrated the United States' position that subsidies provided to Airbus Industrie and/or to its partner companies (hereinafter referred to as "Airbus") were inconsistent with the EEC's and with certain member States' obligations under the Subsidies Code. Such sales behaviour - driven solely by a quest for ever greater market share - was made possible only by massive subsidies which allowed an entity like Airbus to offer prices for its product that bore little if any relation to market forces. Such pricing behaviour had caused and was causing adverse trade effects to Airbus's competitors. Such behaviour was precisely what the drafters of the Subsidies Code had contemplated to be actionable and, in this case, inconsistent with the EEC's obligations under the Code. If the disciplines of the Code were not meant to address this circumstance, what were they meant to address? He said that the Subsidies Code provides that all signatories "shall" seek to avoid ... causing adverse trade effects ... through the use of "any" subsidy. Thus, under the legal standard established by the Code, only three questions needed to be addressed: (1) Do the EEC member State programmes constitute "subsidies" within the meaning of the Code? (2) Have they caused adverse effects to the US industry? (3) Has the EEC sought to avoid causing these adverse effects?

14. With regard to the first question, the subsidies provided to Airbus clearly constituted subsidies within the meaning of the Code. Broadly speaking, Airbus received two basic types of subsidies: (1) launch aid and (2) production supports. Each clearly constituted a subsidy within the explicit language of the Code. Launch aid to Airbus constituted "government financing of [a] development programme" within the meaning of Article 11:3. Similarly, the generous production supports that had been provided to Airbus constituted "government provi[ded] or government-financed provision of operational or support services" within the meaning of the same Article. These two types of supports were dispensed in several forms, each of which was also explicitly included by the Code within the definition of the term "subsidy". The first type of support provided to Airbus was comprised of loans conditionally repayable, loans on non-commercial terms and grants. These were explicitly included within the Code's definition of "subsidies"; specifically, Article 11:3 included within the definition of a subsidy, "government financing of commercial enterprises, including grants or loans". To illustrate, in the case of Airbus there had been (a) loans forgiven or cancelled before repayment; and (b) loans with no fixed repayment schedules, i.e. loans whose repayment was contingent on the sale of a certain number of aircraft. Both types of support constituted subsidies under the Code. A second type of support was government guarantees of loans, guarantees against losses and performance guarantees. These clearly fell within the definition of "government financing of commercial enterprises including guarantees"

within the meaning of Article 11:3. These benefits had been provided both to specific partner companies (e.g. Deutsche Airbus) and to specific programmes (e.g. the A330/A340). Moreover, these supports had been provided in massive amounts. The only question was the extent of their massiveness. In the aggregate, these supports had amounted to some US$26 billion or more. These estimates were based on all available public information, of which the United States had made an extensive compilation. The principal sources had been (1) budgets of member State governments; (2) annual reports of the partner companies; and (3) new accounts. Compiling this information had not been an easy task for the reason that few budgets or annual reports contained line items specifying the "subsidies provided" or "subsidies received" by partner company governments or partner companies, respectively. In calculating the amounts of the subsidies, the United States had sought to be prudent and conservative. The United States had no incentive to overstate the problem, because the problem, in effect, overstated itself; the numbers were so large as to need no exaggeration. He said that one source of information on which the United States had not been able to rely was notifications to the Committee by the EEC or individual member States concerning Airbus subsidies. The EEC had repeatedly refused to notify these subsidies in accordance with its obligations under Article 7:1, notwithstanding repeated requests. The United States once again asked the EEC to notify these subsidies in accordance with its obligations, once again drew the Committee's attention to the EEC's failure to do so pursuant to Article 7:2, and asked the Committee to direct the EEC to comply with its obligations.

15. Regarding the second question, he said that under the Subsidies Code, trade effects could be established under any one of three different standards: namely, whether there was (1) injury to the domestic industry of another signatory; (2) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement; or (3) serious prejudice to the interests of another signatory. In the case at hand, trade effects as provided for under each of these standards existed. These effects could be illustrated in the world market as a whole and/or in three smaller market segments, namely, (1) the markets of the subsidizing countries, (2) the United States, and (3) the rest of the world. Adverse trade effects resulting from subsidized Airbus competition were amply illustrated by two specific market impacts: (1) lost sales, and (2) suppressed prices. Each of these was a criterion for findings of serious prejudice and/or injury and/or nullification and impairment. The manner in which the subsidies had functioned in order to lead to these effects was not difficult to understand: subsidies provided to Airbus lowered Airbus's costs of production, enabling Airbus to sell aircraft at lower prices, thereby suppressing and/or depressing prices and/or underselling Airbus's competitors, enabling Airbus to obtain increased sales that otherwise would have gone to one of Airbus's competitors. The net result for Airbus's competitors was fewer sales - relative to Airbus and/or in absolute terms - at significantly lower prices; for example, Airbus discounts of 30-50 per cent were commonplace. This scenario was not hypothetical; it was real. Figures released by

Airbus Industrie itself demonstrated this point. As the US letter requesting conciliation had noted, according to Airbus's own claims, its market share in recent years had doubled, rising from 16 per cent in 1988 to 35 per cent in 1990.

16. He said that a critical element of the impact of subsidized competition by Airbus on its competitors had been to reduce its competitors' ability to make the necessary investments in the development of new generations of aircraft. In the aircraft industry, development of new aircraft models was critical to staying in business. New investment still meant betting half, or more, of the entire net worth of the company on a new project. Subsidized competition from Airbus had significantly impaired the ability of the US industry to continue to make such investments.

17. With regard to the third question, he said that there was no evidence whatever that either the EEC or any of the Airbus partner company member States had taken any action to "seek to avoid" these adverse trade effects. In fact, the publicly professed intention of Airbus to garner additional market position throughout the world demonstrated, if anything, the opposite. Thus, the three elements of a Subsidies Code case were all present. The EEC - and the relevant member States - had to take immediate steps to bring its practices into conformity with its obligations.

18. The representative of the EEC said that this meeting was an opportunity for conciliation. The civil aircraft industry was a very special one in that for large aircraft, it was dominated by a very small number of producers - three accounted for 90 per cent of the market. It was also an industry in which the cost of launching new products and the entry cost for a new producer were extremely high. Towards the end of the 1960's it became clear that if prevailing trends continued, the large civil aircraft market would soon be totally dominated by one or two producers, with all of the ensuing effects for purchasers of such aircraft and the negative side-effects of the establishment of a de facto monopoly. It was in this context that a number of EEC member State governments had decided to provide public support to launch a civil aircraft industry. Such support, which should be seen in this context, had not been in violation of any part of the General Agreement, the Subsidies Code or the Agreement on Trade in Civil Aircraft.

19. He said that with regard to the figure of US$13.5 - 27 billion in alleged Airbus subsidies cited by the United States, the support provided by the EEC governments had reached a level far below the US figure. He noted that domestic subsides were not prohibited by the Subsidies Code. An important aspect of the market for large civil aircraft had been and was characterized by a very high level of US Government support for its own aircraft industry. One European study had put the level of support at about US$23 billion over a 15-year period, this amount relating to programmes directly or indirectly benefiting the large civil aircraft industry, and excluding any element of accumulated interest. In fact, this feature of the large civil aircraft industry was one of the principle

reasons the EEC had consistently supported the applicability of the Agreement on Trade in Civil Aircraft to any problems arising in trade in this sector, while not excluding the applicability of the Subsidies Code. Article 6 of the Aircraft Agreement noted the applicability of the Subsidies Code to trade in civil aircraft and went on to talk about "special factors..., in particular the widespread governmental support in this area". The United States and the EEC had signed both Agreements at the same time for the obvious reason that they had felt it necessary to adopt the type of provision found in Article 6 which, in the EEC's view, provided for a particularly important qualification of the Subsidies Code.

20. He said that in August 1987, John McDonnell, of McDonnell Douglas, made a speech at the time of the launching of the MD-11, in which, by way of reassuring the shareholders, he said that the support McDonnell Douglas would get from the government via its military operations would more than see the company through the difficult early phase of launching the MD-11. Thus, both the United States and the EEC were providing government support to their large civil aircraft industries. His delegation rejected the United States' suggestion that this public support had caused any adverse effects, and was at a loss to understand the United States' references to lost sales and increasing Airbus market share. There had been no loss of market share of a significant nature for the United States over a significant period of time. In any event, how did one define and measure market share? For 1991, Boeing's share of the world market had been 70 per cent, representing a significant increase over the figure for just two to three years earlier. The market share accruing to Airbus had been gained because of superior technology, and the increase in market share had been won in this way, not at the expense of other producers. Boeing had made consistent profits at a very high level for a long period of time, with no evidence of any erosion of those profits. With regard to the EEC not having sought to avoid adverse trade effects, he said that he could not respond to this because it was not clear that there had been any such effects.

21. He said that the Community had consulted bilaterally with the United States on these matters with no satisfactory result, and that the negotiations had been suspended in early 1991. The Community had made a formal proposal in the Committee on Trade in Civil Aircraft to launch a renegotiation of the Aircraft Agreement with a view to tightening the Agreement's disciplines on subsidies. This initiative had received a positive response from many of the Agreement's signatories but not from the United States. That proposal remained on the table, and the Community had recently asked that the Aircraft Committee be convened as soon as possible in order to get that renegotiation underway. Were that to happen, the Community would participate in such a way as to try to remove the difficulties in the case at hand, and all signatories would be asked to accept much greater disciplines. It took only the decision by the United States to launch those negotiations, and the Community would do all it could to conclude them before the end of 1991. The Community had also offered to resume bilateral negotiations with the United States in the context of a renegotiation of the Aircraft Agreement.

22. With regard to the legal basis of the US complaint, he recalled that when the United States had requested the establishment of a panel on the German exchange rate guarantee scheme, the EEC had expressed deep concern with the decision to establish such a panel with terms of reference limited to the confines of the Subsidies Code. This concern was in the context of the very high level of government support which was made available to the civil aircraft industry and which was specifically cited in the Aircraft Agreement but not in the Subsidies Code. The Community had said at the time that the Panel would not be able to reach meaningful conclusions because it did not have an adequate legal basis on which to do so, since it could not take account of the provisions of the Aircraft Agreement. However, the Subsidies Committee had agreed on standard terms of reference for the Panel. The Community was now faced with a similar situation, in which it was in the midst of a procedure which would deprive it of some of its rights under the Aircraft Agreement. The desire to find a negotiated settlement in the case at hand had led the Community to accept the principle of dispute settlement on the basis of consultations which would not prejudice the legal basis of those consultations. These consultations, by mutual agreement, had been held without prejudice as to their legal basis, and had not been held on the basis of the Subsidies Code alone. Similarly, the Community's participation in this conciliation meeting did not prejudge the legal basis of the conciliation. The Community maintained its unambiguous reservation regarding the alleged exclusive competence of the Subsidies Code regarding matters of trade in civil aircraft. It was common sense that the Aircraft Agreement had to apply as well; otherwise, why had it been signed? This was the reason for the EEC's letter to the Director-General seeking clarification. Unfortunately, the United States had responded that it did not want the Director-General to intervene. In conclusion, he said that to the extent that the renegotiation of the Aircraft Agreement could be successfully launched, and to the extent that increased commitments on disciplines for aircraft subsidies could be agreed to, the EEC hoped that the legal basis of this dispute would become a moot point.

23. The representative of the United States said that his country continued to be willing and open to reaching a mutually satisfactory resolution to this matter as soon as possible. Regarding the EEC's letter to the Director-General, the United States had explicitly stated that it remained open to any resolution to which both sides could agree. The United States' seminal response to both matters was that such a resolution had not been possible.

24. He said that, in regard to the history and nature of the civil aircraft industry as described by the EEC, the focus of the US concern was that the EEC's intervention in this sector was continuing, and that the size of that intervention was being maintained. A number of programmes were under serious consideration by Airbus and according to reports, the possible need for development or other supports was very high. In fact, the level of EEC supports had been high since the very beginning of the EEC's entry into this market and showed no signs of dissipating. Furthermore, the United States did not believe that the Subsidies Code or

any other GATT Agreement provided that the high cost of market entry justified intervention on a significant scale in any market situation. The period corresponding to the subsidies figures of US$13.5 - 27 billion cited by the United States were 1968-1989.

25. He then made four points with respect to what the Community termed indirect supports, by which the Community referred to purchases by the government from companies of products other than the commercial products involved, that in some way leant support to the production of the commercial products. First, these were contracts. Payment was made for work performed; there were no grants. Second, where there was a benefit, i.e. a spillover from work performed on a project that could conceivably benefit a later commercial project, US law required that a repayment be made to the government for that benefit. His delegation was not aware of any similar provision in EEC law or the laws of the member States involved. Third, the percentage of work from military or government contracts for the Airbus partner companies was comparable to, if not higher than, that for Boeing and/or McDonnell Douglas. Fourth, the numbers given by the United States for its estimate of support levels in the EEC did not include any measurement of such indirect supports. As to a provision establishing disciplines for indirect supports, the United States would welcome any proposal the EEC might put forward. He said that regarding the market share figures cited by the United States, these figures had been taken from an Airbus publication called "Airbus Insider", which showed Airbus's market share jumping from 16 to 35 per cent in the last several years. Regarding the Community's mention of the jump in Boeing's market share over the first six months of 1991, he said that for this industry, looking at any short period of time did not yield a representative sample of actual market share, because sales tended to be made in clumps of aircraft. A much longer period of time had to be examined, and when one looked, for example, at the past decade, one saw a consistent and significant rise in Airbus's market share.

26. Regarding the points relating to jurisdiction, he said that the US position was well known to the Committee. The United States did not share the Community's views on this matter, and referred to the points it had made in the context of the conciliation meeting regarding the German exchange rate scheme case, and in particular to the statement by the Chairman as reflected in SCM/M/45, paragraph 19.

27. The representative of the EEC said that he could not let pass the notion that indirect support in the Community was of the level suggested by the United States, i.e. as high as the level in the United States. It would be very interesting if at some stage, probably in the context of the Aircraft Committee, a study could be made of the actual level of indirect support provided by the signatories of that Agreement. He thanked the representative of the United States for the strong support he had given to the notion of the negotiation and adoption of a strong international discipline on indirect support, and took up the US offer that anything the EEC could write and could accept would be acceptable to and signed by the United States.

28. The representative of the United States said that on substance, his delegation felt that the present discussion had been useful, although the United States could not say that its view had been changed or its concerns alleviated regarding the problem of EEC subsidies to Airbus. While the United States remained open to reaching a mutually satisfactory resolution of this dispute, it reserved its rights to take any appropriate steps under the Code should such resolution not be possible.

29. The representative of Canada said that while his delegation was sympathetic to some of the Community's concerns, it was Canada's position that as a practical matter, it was the right of an aggrieved contracting party to choose the dispute settlement forum for the complaint at issue. Canada recognized that this had resulted in a proliferation of dispute settlement fora and in a good deal of confusion in the GATT dispute settlement system, but it was precisely for that reason that Canada was actively seeking, in the Round, an integrated dispute settlement system, and it was in that context that this issue should be pursued. Canada reserved its right to return to this issue at a later date in the context of any proceedings before the Committee.

30. The Chairman said that the Committee had heard extensive statements from the United States and from the EEC, as well as a statement from Canada. She recalled that Article 17:2 of the Agreement provided that signatories shall make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation. She had taken note of the receptiveness of the parties to finding a solution, and as Chairman of the Committee, she further encouraged the two parties concerned to try to find the best possible solution before considering other avenues of action. If at any future time the two parties felt that she, as Chairman, could be of some help in facilitating this conciliation process, she would make her good offices available to them.

31. The Committee took note of the statements.