

**GENERAL AGREEMENT
ON TARIFFS AND TRADE**

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Committee on Subsidies and Countervailing Measures

**MINUTES OF THE MEETING HELD
ON 13 JUNE 1995**

Chairman: Mr. Ole Lundby (Norway)

1. The Committee on Subsidies and Countervailing Measures ("the Committee") held a regular meeting on 13 June 1995.

2. The Committee adopted the following agenda:

	<u>Page</u>
A. Election of Vice-Chairman	2
B. Notification of Subsidies Under Article XVI:1 of the General Agreement	2
(i) Notifications Due in 1995 (L/7611 and Addenda)	2
(ii) Updating Notifications Due in 1994 (L/7375 and Addenda)	2
(iii) Full Notifications Due in 1993 (L/7162 and Addenda)	2
C. Semi-Annual Reports of Countervailing Duty Actions Taken Within the Period 1 July-31 December 1994 (SCM/190 and Addenda)	2
D. Reports on Preliminary or Final Countervailing Duty Actions (SCM/W/320)	3
E. United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom - Report of the Panel (SCM/185)	3
F. United States - Countervailing Duties on Non-Rubber Footwear from Brazil - Report of the Panel (SCM/94 and 96)	6
G. German Exchange Rate Scheme for Deutsche Airbus - Report of the Panel (SCM/142)	7
H. Canada - Imposition of Countervailing Duties on Imports of Boneless Manufacturing Beef from the EEC - Report of the Panel (SCM/85)	7
I. EEC Subsidies on Exports of Pasta Products - Report of the Panel (SCM/43)	7

	<u>Page</u>
J. EEC Subsidies on Exports of Wheat Flour - Report of the Panel (SCM/42)	7
K. Other Business	8
A. <u>Election of Vice-Chairman</u>	
3. The Committee <u>elected</u> Mr. Victor de Prado Vice-Chairman of the Committee.	
B. <u>Notification of Subsidies Under Article XVI:1 of the General Agreement</u>	
(i) <u>Notifications Due in 1995</u>	
4. The <u>Chairman</u> noted that in accordance with the decision of the CONTRACTING PARTIES at the Twelfth Session (BISD 11S/58) every contracting party should submit an updated response to the questionnaire on subsidies. An invitation to provide such responses was circulated on 11 January 1995 (L/7611). To date, responses had been received from Hong Kong and Canada. In view of the decision taken by the CONTRACTING PARTIES of GATT 1947 on avoidance of procedural and institutional duplication, a notification pursuant to Article XVI:1 of the GATT 1994 was deemed also to be a Notification under Article XVI:1 of the GATT 1947.	
(ii) <u>Updating Notifications Due in 1994</u>	
5. The <u>Chairman</u> noted that in accordance with the decision of the CONTRACTING PARTIES at the Twelfth Session every contracting party should submit an updated response to the questionnaire on subsidies. An invitation to provide such responses was circulated on 11 January 1994 (L/7375). To date, responses had been received from Australia, Austria, Canada, the European Communities, Finland, Hong Kong, New Zealand, Norway, South Africa, Sweden and Switzerland.	
(iii) <u>Full Notifications Due in 1993</u>	
6. The <u>Chairman</u> noted that in accordance with the decision of the CONTRACTING PARTIES at the Twelfth Session, every contracting party should submit every third year new and full responses to the questionnaire on subsidies. An invitation to provide such responses was circulated on 11 January 1993 (L/7162). To date, notifications had been received from Australia, Austria, Brazil, Canada, Colombia, Chile, the EU, Finland, Hong Kong, Indonesia, New Zealand, Norway, Peru, the Philippines, Sweden, Switzerland, Turkey and Uruguay. No notifications had been received from India, Israel, Japan, Korea or Pakistan.	
C. <u>Semi-Annual Reports of Countervailing Duty Actions Taken Within the Period 1 July-31 December 1994</u>	
7. The <u>Chairman</u> noted that an invitation to submit semi-annual reports under Article 2:16 of the Agreement was circulated on 27 January 1995 (SCM/190). In view of the decision of avoidance of procedural and institutional duplication adopted by the Committee at its meeting of 22 February 1995, semi-annual reports notified to the WTO Committee on Subsidies and Countervailing Measures were deemed also to be notifications under Article 2:16 of the Agreement. To date, the following signatories and observers had notified actions pursuant to this request: Argentina, Australia, Brazil, Canada, Chile, the EU, New Zealand and Peru. Austria, Colombia, the Czech Republic, Egypt, Finland, Hong Kong,	

Hungary, Indonesia, Japan, Korea, Malaysia, Norway, Poland, Romania, Sweden, Switzerland, Thailand and Turkey had notified that they took no actions during the period. India, Israel, Pakistan and Philippines had provided no notification.

D. Reports on Preliminary or Final Countervailing Duty Actions

8. The Chairman noted that reports under these procedures had been received from Australia in SCM/W/320. Further notifications had since been received from the EU and would be circulated promptly.

E. United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom - Report of the Panel

9. The Chairman noted that the Report of the Panel was circulated to the Committee on 15 November 1994, and was before the Committee for the first time.

10. The Report was presented on behalf of the Chairman of the Panel by Mr. Abdel-Fattah.

11. The representative of the EU stated that the Panel had made important decisions on a number of points which should lead to greater clarity and certainty as to the scope of certain provisions of the Subsidies Code and which should limit, at least to some extent, the extensive use the United States had made of countervailing duties. For instance, the finding that forgiveness of debts by *private* banks to a German steel company could not be considered as a subsidy would limit efforts by the United States to render even private actions countervailable. The finding that an equity infusion given to an unequityworthy company was not equal to a grant was also of great importance. The Panel recognized that finding a company not equityworthy did not imply that a company would not provide some return on the investment. The EU also attached great importance to the fact that the Panel had ruled on the use of best information available (BIA). The United States had resorted without clear justification to the extremely high IMF short-term interest rates as benchmarks to calculate whether certain loans to a French steel company contained a subsidy element, and it was quite clear that the Panel considered the use of BIA and the application of IMF rates objectionable.

12. The Panel had taken a very strict line on the need to motivate determinations in an adequate manner and to explain to interested parties the reasons for applying certain methodological choices. The EU fully agreed with the need to explain in sufficient detail the decisions taken in the determination even though it remained of the view that in this kind of proceeding a balance should be found between adequately motivated decisions and the need to carry out prompt and efficient investigations, as both these elements were necessary to ensure fair treatment of all the parties concerned.

13. The EU did not always agree with all the considerations and findings of the Panel, however. For instance, the EU did not agree with the reasoning of the Panel in respect of the United States' choice of a 15-year allocation period for so-called non-recurring subsidies. The interpretation given by the Panel to the guidelines on allocation was incorrect. Another example was the reasoning applied by the Panel concerning the need to take prospective factors into account in assessing that capital infusions contain an element of subsidy. The Panel had dealt with this matter as if it had been a merely procedural lapse of the United States instead of a substantial one.

14. In spite of these objections, the EU favoured the adoption of the Report and encouraged the Committee to require that the United States bring its decision into conformity with the findings of the Panel. The EU had nevertheless identified some issues which were of paramount importance and on which the reasoning of the Panel raised great doubts. It was for this reason that the EU had to make

clear qualifying statements. The EU would limit itself to the most important reservations, and asked the Committee to take account of these reservations which would be further specified below.

15. The first issue raised by the EU was public investments. The EU had argued during the Panel proceedings that the "reasonable private investor" was not a proper benchmark for government investment, because governments might have different motives for investment from those of private investors, and hence the private investor standard could not be validly applied to a government investment decision. The Panel had not, however, accepted this line of argument, and had relied heavily, *inter alia*, on a distinction between Parts I and II of the Code. The EU considered not only that the argument by the Panel drawn from linguistic differences between Parts I and II was questionable from a legal point of view, but also that the findings of the Panel on substance were seriously flawed. The EU therefore made a reserve in respect of this reasoning, which ignored the special nature of public investorship. The EU regretted that the Panel had chosen to ignore a feature of economic life found in many countries, and re-affirmed that international disciplines on subsidies could not be taken to have any implication for the regime of ownership of firms in individual countries.

16. The EU next turned to the issue of inside versus outside investors or creditors. The EU had argued before the Panel that the United States, in a number of these countervailing duty determinations, had acted contrary to the requirements of the Code by failing to examine the difference between an "inside" and an "outside" investor, and that by this failure the United States had infringed Article 4:2 of the Code, as confirmed by the findings of the Pork Panel. The United States had rejected this distinction and argued that all investors should be treated equally, and that each investment should be assessed *at the margin*. In other words, the existence of past investments made or credits provided by the same investor or creditor would not, in the view of the United States, influence a finding whether additional investments or credits to the same company would have been made by a "reasonable private investor," and thus whether or not they contained an element of subsidization.

17. The Panel Report appeared to have analyzed only whether the United States had failed to provide sufficient reasoning for its decisions or whether it had adequately supported its reasoning. The Panel considered that the United States had in this respect fulfilled its obligations. The conclusion appeared therefore to be that the Panel did not see an obligation to distinguish between "inside" and "outside" investors or creditors, provided that such failure to make a distinction was well-reasoned. The EU deeply regretted this conclusion, which went against economic reality and plain common sense, and considered that this part of the Report was seriously flawed. It reserved the right to raise this issue again in the future.

18. The EU next raised the issue of the pass-through of benefits in the case of a sale of assets. The issue of whether the benefits of subsidies granted to a publicly-owned company in case of an arms-length sale at full market value of a productive unit pass through to the newly-created (and privately-owned) entity had been addressed in great detail by both parties before the Panel. The EU had put forward convincing legal and economic arguments to demonstrate that the countervailing duties imposed by the United States on products produced by such a privatized unit were without any justification. If the productive unit had been sold at the full value, as determined by normal market forces, such a sold unit could no longer benefit from any competitive advantage caused by past subsidization. The United States had not been able to demonstrate that any benefit existed for the company that had purchased the assets. The Panel had struck down the US determination; however, it had based itself on the consideration that the United States, in not taking into account the purchase price of the productive unit, did not base itself on all relevant facts. The Panel, therefore, had based itself on a procedural default, but had refrained from entering into the substance of the matter.

19. The Panel's findings confirmed the Report of the Panel in the Pork case, in underlining that all relevant facts must be taken into account in determining whether a subsidy existed. The EU agreed

that an investigating authority ought to take all relevant information into consideration. However, in ruling that the United States had failed to take account of the purchase price, the Panel had taken the easy way out on this issue. The EU regretted that, in a case where the underlying facts of the matter were so clear and uncontested between the parties involved, and where the different views on the issue were set out in such an obvious manner by each of the parties, the Panel had not been willing to rule on this issue, which was of great importance not only for the case in point but also for many future cases, maybe involving other signatories. The EU considered that it would have been in the interest of the multilateral trading system to create clarity as to the situation of subsidies granted prior to a sale of assets at full market value. Many economic operators which might find themselves in comparable situations would now remain uncertain as to the potential countervailability of their products if these were exported towards the US market.

20. Notwithstanding the above, the EU asked the Committee to adopt the Report of the Panel, and to recommend that the United States bring its actions into conformity with the Agreement.

21. The representative of the United States informed the Committee that the United States was not in a position to agree to the adoption of the Report. It required more time to study the potential impact and implications of the Report. The US view had always been that the actions and decisions of the US Department of Commerce were fully consistent with US obligations under the Code, both in substance and with respect to procedural requirements. The decisions made by the Department of Commerce were reflective of economic and commercial reality, which in many respects the Panel had recognized in its decision.

22. The United States would not respond to the detailed procedural and methodological aspects of the EU's intervention, but urged delegations to refer to past minutes of the Committee on the US position with respect to many of the substantive issues that had been examined by the Panel, and to which the EU had made reference. The Report was likely the most detailed that had ever been issued concerning the determination of the existence of a countervailable subsidy and the measurement of a countervailable subsidy. The Panel had dealt with some large issues of first impression, and many of the issues addressed in the Report were currently under review by US courts. In light of this, and in light of the US authorities' reservations with respect to the approach of the Panel to many of the issues, it was premature to come to a final decision on this Report at the present time.

23. The United States noted, with respect to the EU's intervention, that it was unclear what the EU was requesting when it asked the Committee to take note of its reservations with respect to certain issues. Clearly the EU had reservations and those would be reflected in the Minutes.

24. The representative of Canada agreed with the United States that the Panel Report required further analysis and study. Canada's preliminary view was that it generally supported the findings of the Panel, although it was disappointed that the Panel, on the question of subsidy with respect to fully privatized assets sold at market value, chose to take a procedural approach rather than dealing with the substance of the issue. This was a fundamental issue which had been the subject of Canada's third party intervention. Canada would study the Report and hoped to be able to provide a more complete reaction at the next Committee meeting.

25. The delegate of Japan urged the Committee to adopt the Report with a recommendation that the United States bring its measures into conformity with the Agreement. Japan supported the Panel's analysis of the issues and the conclusions it had reached. The Panel had determined that many aspects of the underlying United States decisions were inconsistent with US obligations under Article 1 and Article 4:2 of the Agreement, and there were compelling reasons for the adoption of the Panel Report. The Report should be adopted to ensure the continued reliability and utility of the dispute settlement resolution process. The Report reflected over two years of dispute settlement efforts between the

United States and the affected parties, and as such demonstrated how the Panel resolution process could solve disputes without recourse to unilateral measures. The governments of France, the United Kingdom and Germany should be commended for their demonstrated faith in, and reliance on, the dispute settlement system. Finally, the Report should be adopted as part of a continuing effort to ensure that contracting parties did not stray from their GATT obligations. The Panel concluded that the underlying US decisions were adverse to the exporting countries which benefited the US domestic industry, but which violated the United States' obligations under the GATT. Japan hoped and expected that this Panel decision would serve as a continuing reminder to the United States and other contracting parties that violations of GATT obligations would not be tolerated. Such violations would be addressed in the dispute settlement process.

26. The representative of the EU considered that the United States had an obligation to ensure the consistency of its legislation and also the application thereof with the Code and its provisions, and that a signatory could not hide behind the fact that domestic dispute settlement proceedings were taking place.

27. The Committee took note of the statements made and agreed to revert to this matter at a future meeting.

F. United States - Countervailing Duties on Non-Rubber Footwear from Brazil - Report of the Panel

28. The Chairman noted that he had received a communication from the Permanent Mission of Brazil regarding this Report.

29. The delegate of Brazil pointed out that the Brazil had until now not been able to support adoption of this Panel Report for a number of reasons. Brazil was not the only country which had reservations about the Report. The issue underlying this Report was also the subject of a Report before the GATT Council, which was finally adopted and removed from the Council's agenda the previous year. As the underlying dispute examined by the Panel no longer existed, Brazil saw no reason to oppose adoption of the Report. Nonetheless, it had concerns about the precedent which might be created by this Report, which was the reason for the communication addressed to the Chairman, which read as follows:

"With reference to the Report of the Panel - United States Countervailing Duties on Non-Rubber Footwear from Brazil, I have been instructed to inform you that Brazil does not oppose the adoption of such Panel Report by the Committee. The Government of Brazil understands that the adoption of the above-mentioned Panel Report does not in any way affect the implementation by the Government of the United States of the footwear provision of the Uruguay Round Agreements Act. The Government of Brazil also understands that the referred Report does not create obligations on parties which were not involved in the specific dispute addressed by the Panel, nor does it represent a binding legal precedent applicable to other disputes."

30. The representative of the United States confirmed that certain provisions of the Uruguay Round Agreements Act of 1994 had made it possible to address some of the bilateral issues underlying this dispute, and the United States was glad that the Brazilian authorities had allowed adoption of the Report.

31. The Committee took note of the statements made and adopted the Panel Report.

G. German Exchange Rate Scheme for Deutsche Airbus - Report of the Panel

32. The delegate of the EU stated that the EU was not in a position to agree to the adoption of the Report.

33. The representative of the United States stated that the central elements of this Report, i.e., prohibited practices and obligations of individual Members, were as important, if not more relevant, under WTO rules, as they were under the Tokyo Round. He, regretted that the EU was unable to allow adoption.

34. The Chairman stated that the protracted non-adoption of Panel Reports undermined the credibility of the dispute settlement system. He was available should the parties wish to consult regarding a possible mutually satisfactory solution to this matter.

35. The Committee took note of the statements made and agreed to revert to this matter at a later meeting.

H. Canada - Imposition of Countervailing Duties on Imports of Boneless Manufacturing Beef from the EEC - Report of the Panel

36. The delegate of Canada stated that his authorities' position regarding this Report had not changed.

37. The representative of the EU observed that in this Panel the underlying dispute had not yet been resolved. Canada had claimed eight or nine years previously that these imports threatened injury to its domestic beef production industry. The Panel had ruled that the like product criteria that had been used by Canada were GATT-inconsistent and that the countervailing duties were not valid. Canada could not accept this ruling, but undertook to try to resolve the trade issue in the context of the Uruguay Round negotiations. This had never happened. The EU hoped that the Committee could incite Canada to urgently seek a solution for the conflict even if it was not willing to agree to adoption of the Report.

38. The Committee took note of the statements made and agreed to revert to this item at a future meeting.

I. EEC Subsidies on Exports of Pasta Products - Report of the Panel

39. The representative of the EU stated that his authorities were not in a position to change their views, although the underlying dispute had to a large extent been resolved. The legal reasoning in the Report continued to cause problems.

40. The Committee took note of the statement made and agreed to revert to this item at a future meeting.

J. EEC Subsidies on Exports of Wheat Flour - Report of the Panel

41. The delegate of the United States stated that his authorities were not in a position to support the adoption of the Report.

42. The representative of the EU stated that his authorities were also not in a position to support the adoption of the Report.

43. The Committee took note of the statements made and agreed to revert to this item at a future meeting.

K. Other Business

44. The representative of the EU stated that his authorities had received information regarding the adoption of provisional measures by Mexico on imports of pork meat originating in Denmark. There were questions in the determination which were of serious concern for the EU. The Commission had submitted information regarding a subsidy granted by the EU. The Mexican authorities had not objected to the substance of the information received, but had objected that the Commission rather than Denmark had presented this information. The EU had always been ready to explain the reasons why it had presented the information. The Mexican authorities, however, had chosen to disregard the information submitted and had proceeded on the basis of the best information available. The impact of the preliminary determination by Mexico was very important and caused serious injury to the interests of the Danish exporters. The EU reserved full rights under the Code and the GATT 1947 to revert to this question.

45. The delegate of Mexico asked whether any other Member wished to speak on this matter. He took note of the concern voiced by the EU and said he would inform his capital because Mexico is an observer and not a Signatory of the Agreement.

46. The Committee took note of the statements made.

47. The next regular meeting will be held in the week of 30 October 1995.