

GENERAL AGREEMENT ON

RESTRICTED

SCM/M/45

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TARIFFS AND TRADE

Special Distribution

Committee on Subsidies and
Countervailing Measures

MINUTES OF THE MEETING HELD ON
31 JANUARY 1990

Chairman: Mr. Maamoun Abdel-Fattah (Egypt)

A. Conciliation under Article 17:1 regarding the matter referred to the
Committee by the United States

1. The Chairman recalled that the agenda for this meeting had been circulated in the airgram convening the meeting (GATT/AIR/2902). The first agenda item was the request by the delegation of the United States for conciliation under Article 17:1 of the Code. The matter referred by the United States to the Committee had been explained in document SCM/97.

2. The representative of the United States said that he would briefly describe the concerns that gave rise to the US request for conciliation. He said that the matter in dispute was an export subsidy granted by the Federal Republic of Germany. The subsidy itself was an exchange rate insurance scheme of the kind specifically described at and prohibited by item "j" of the Illustrative List. The subsidy had been approved by the Commission of the European Communities in March 1989 and implemented as part of the Federal Republic of Germany's merger plan for Daimler Benz/MBB, directed at the financial rescue of the MBB subsidiary, Deutsche Airbus. He further said that the United States had, on several occasions over the last year, requested from the Federal Republic of Germany and the EC Commission, an official description of the terms of the plan so that the US Government could evaluate its terms and conditions in light of the provisions of the Code. Despite several requests, no such description had been provided. However, basing itself on the information available, the US delegation was of the view that the scheme was prohibited by item "j" of the Illustrative List. Item "j" prohibited the provision by governments of "exchange rate programmes at premium rates which are manifestly inadequate to cover the long-term operating costs and losses of the programmes". The German scheme did not require the payment of any premiums by the recipient and had no interest rate to cover the costs of the funds advanced nor dates for repayment of these funds. Under the scheme, the Government of the Federal Republic of Germany would cover most losses attributable to actual market rates for the US dollar when these rates were lower than the ranges specified in the scheme. The scheme did have a number of mitigating mechanisms. However, these were not required to operate at all or only for part of the period of coverage or were de minimis. Finally, the funds came directly from the Federal Republic of

Germany, which had already approved the provision of appropriate funds for this purpose. The US representative concluded by saying that in addition to being explicitly prohibited by the Code, this export subsidy was a matter of particular concern to his Government because of the extremely disruptive effects that these types of export subsidies had on international trade flows, by neutralizing the fundamental adjustment mechanism for international trade exchange - exchange rate adjustment. The United States was hopeful that, through the Committee's conciliation, it would be possible to find a resolution of this problem.

3. The representative of the European Communities said that it was important to understand the background against which the German Government had decided to adopt the exchange rate mechanism. For many years, the degree of government involvement in the German civil aircraft industry, and in MBB in particular, had been very significant. For example, at the outset of the participation of MBB in the Airbus programme, the German Government had covered 100 per cent of all commercial risks arising in the production phase, including all exchange rate risks. This situation was of course not satisfactory, and once the Airbus programme had developed beyond the first embryonic stage, a decision had been made to reduce the degree of government support over time. The production support had then completely disappeared, and the complete overall guarantee, including the exchange rate guarantee, had been replaced by the new exchange rate system. Furthermore, the industry had recently announced its intention to finance the Airbus 321 with its own funds. In order to improve the competitiveness of MBB and to eliminate its financial support completely after a transitional period, the German Government had decided to privatize MBB. This was, however, a difficult proposition in circumstances where the contractual commitments and ensuing risks of MBB regarding the production and delivery of a large number of aircraft already sold had to be honoured by the new managers and owners of the company. It was therefore necessary to adopt certain one-time measures in order to reassure potential private investors with respect to risks arising from business decisions for which they were not responsible. At the same time, it had also been decided to limit this contingent support to an absolute minimum, and to avoid any subsidy element. Consequently, an agreement had been made between the German Government and Daimler Benz, MBB and Deutsche Airbus, regarding, inter alia, the creation of an exchange rate mechanism, the purpose of which would not be to provide any subsidy to MBB but to create a greater certainty for its operations over a limited period of time in respect of one unknown factor unique to the non-US civil aircraft sector, i.e. the impact of widely fluctuating exchange rates on aircraft already scheduled for delivery in the future prior to privatization. The German Government had entered into this agreement on the basis of an explicit decision to make this a one-time exercise, justified by the peculiar nature of the risks involved for the private parties concerned.

4. The representative of the European Communities further said that the new scheme only covered exchange rate risks, but all other risks which Airbus might incur in relation to its new programmes fell entirely and

squarely on the shoulders of its new private shareholders. Finally, a time-frame was impressively short to eliminate even this residual form of support: until the year 2000, in a sector where the time to develop a new product and the useful life of a successful product was best measured in decades, rather than years. Consequently, he found the fact that the United States complained about this scheme rather surprising. He would have expected, and the German Government was the first to expect, that the United States would warmly welcome a decision which was far from easy, but which put Deutsche Airbus firmly in the hands of private operators, with all that this meant in terms of management style and attitudes; a decision which eliminated any future Government intervention in respect of commercial risks arising from Airbus operations; a decision which, finally, limited very strictly any possible government intervention in respect of exchange rate risks in terms of both size and duration of this intervention and at no final cost for the Federal Government.

5. The representative of the European Communities argued that the scheme in question was not a subsidy. To be a subsidy within the meaning of the Subsidies Code it was obviously necessary that a programme entailed a cost for the government concerned. In this case there would be no such cost. To the extent that there would be exchange losses, which would not be offset by the industry's own resources, there would be only a temporary and partial intervention by the government. This intervention would certainly be self-supporting in the long term, and it could already be so within the horizon of the year 2000, since the scheme was based on realistic assumptions about the development of the DM/US\$ exchange rate. Nor was it foreseen that the scheme would entail any financing cost for the government, because the sums which could be needed would only be allocated to the budget if and when needed. He further argued that the scheme was not export-oriented. The sales which might eventually trigger the government intervention were the sales of Airbus aircraft. All these sales, even those on the domestic Community market, were in US dollars, and they might all benefit from the scheme. In the case of Airbus, its domestic market was the Community, and Airbus sales within the Community were at least 30 per cent of its total sales, all, without exception, invoiced in US dollars. In addition, given the fluctuation of the exchange rates, it was likely in practice that domestic sales would, on occasion, benefit from the scheme, whereas exports, say, to the United States, on other occasions, would not. Thus, it could not be said that the scheme was, either de jure or de facto, contingent upon export performance.

6. The representative of the European Communities considered that there was no injury to the US industry or prejudice to US interests. Even in the unlikely event that a domestic subsidy element were to arise out of the operation of this scheme, this lack of export bias would require that the United States show one of the effects mentioned in Article 8:3 of the Subsidies Code. The request by the United States for a meeting of this Committee did not even contain any allegation in this respect. Indeed, as far as "nullification or impairment" of benefits accruing under the GATT

and serious prejudice to the interests of the United States were concerned, he had serious difficulties in understanding how the German scheme could cause such effects. With regard to possible injury to an industry in the United States, however, it would be incumbent upon the United States to provide some evidence. Even if the expectations of the German Government proved to be wrong, the total maximum amount of potential government support under this mechanism over the life of the system would be of such a limited amount that its impact on aircraft pricing, and therefore potential future injury, would be minimal. Since no funds had yet been paid out under this mechanism, there could be no question of any present injury. The prospects of the international civil aircraft industry over the years covered by the German exchange rate mechanism were better than they had ever been, and no forecast indicated any risk whatsoever for producers in the United States and elsewhere arising out of the possible future application of the German exchange rate mechanism.

7. The representative of the European Communities then turned to the question of the legal framework which applied to those facts. He said that the United States complained about this scheme as if it were a subsidy, and an export subsidy in particular, and this was the reason it considered this Committee to be the appropriate forum to attempt conciliation. However, if a dispute existed, it had to be examined in its entirety, i.e. taking into account all relevant facts and all the applicable rules, and the appropriate forum for reviewing the matter had necessarily to be one which could properly examine all those facts and rules. The trade in civil aircraft was a special case, so special that countries who had a strong interest in this sector had negotiated and signed an agreement ad hoc, the Aircraft Code, in order "to establish an international framework governing conduct of trade in civil aircraft". The provisions of the Subsidies Code did form part of this framework, and indeed Article 6:1 of the Aircraft Code expressly recalled their applicability. They did not constitute, however, the entire framework, and indeed the very same Article 6:1 forcefully directed signatories to "take into account the special factors which apply in the aircraft sector".

8. He considered that the Subsidies Committee could properly review any matter brought to its attention only in the light of the provision of the Subsidies Code. It could not consider the application of rules set by other multilateral instruments which were not recalled by the Subsidies Code, and could not consider the facts whose relevance was grounded in instruments other than the Subsidies Code. Yet, those rules and facts were crucial for understanding the matter at issue, and no dispute concerning this matter could ever be settled without due account being taken of those rules and facts. Therefore, he failed to understand why it should not be possible to agree on a procedure which his delegation was going to propose, and which would allow a review of this matter to take place in the most expeditious manner, without any prejudice to the overall balance of rights and obligations arising for both the Community and the United States from the complex of their international commitments. He emphasized that the presence of the Community at this meeting was intended

to testify to its attachment to the multilateral trading system and to its conciliation and dispute settlement mechanism. However, it was difficult to understand how this Committee could properly review this matter, when it could not take into account all relevant elements of fact and all applicable rules. Whether it was for the purpose of attempting conciliation, or in the context of dispute settlement proper, the mechanisms provided by the General Agreement and other multilateral instruments had the objective to solve concrete trade problems. The interpretative function of the CONTRACTING PARTIES, the Codes' Committees, and of the Panels which these bodies might establish was certainly a fundamental one, but it remained ancillary to the settlement of a dispute. The procedures had to be fair, and this meant that it was unacceptable, and indeed dangerous for the GATT system itself, to engage in procedures which were clearly inadequate to provide a fair solution to the concrete dispute.

9. He further said that fairness meant first of all that the overall balance of rights and obligations of the parties to a dispute should be taken into account. Obviously, the Community and the United States had reciprocal rights and obligations arising from the General Agreement and the Subsidies Code, but they both also had reciprocal rights and obligations specific to trade in civil aircraft, arising from their membership of the Aircraft Code. No matter which related to trade in civil aircraft and touched the interests of both the Community and the United States could be fairly considered without considering the whole balance of rights and obligations of the Community and the United States in this respect. The same conclusion also stemmed from a well-known legal principle, according to which legal provisions which were the lex specialis in a particular field had to prevail over the general rules. It was obvious that the Subsidies Code provided the general discipline over the use of subsidies and countervailing measures within the GATT system, but the wording of the Aircraft Code made it equally clear that signatories of that Code considered trade in civil aircraft as a special case in need of additional and specific legal rules. It was therefore clear that, in case of conflict between the provisions of the two Codes, those of the Aircraft Code should prevail. But in this case it could not even be said that there was a conflict, because the provisions on subsidies were expressly recalled as being applicable, qualified by those of the Aircraft Code. This point of substantive law had obvious procedural implications. The Aircraft Code Committee was competent to examine and review any case where a signatory considered that its interest in civil aircraft trade had been or were likely to be affected. That Committee could properly take into account, according to Article 6:1 of the Aircraft Code, all relevant elements. A review by that Committee would be fair to the United States because that Committee could consider the elements which the United States considered to be relevant, and it would be fair to the Community, because it would also be able to consider those additional elements of fact and of law that the United States did not mention, but which were also relevant for this case.

10. The representative of the European Communities concluded by saying that his delegation was ready to discuss this matter bilaterally with the United States, as it had already done in the past, and it was willing to accept review of the same matter by a multilateral body which could ensure that all relevant factors were properly and fairly taken into account.

11. The representative of the United States said that his authorities welcomed the privatization of Airbus. However, it did not consider that this privatization could or should be on the backs of the citizens of the Federal Republic of Germany or its Government or at the expense of Airbus' competitors. He noted that the European Community had described the scheme as a "limited system". However, there was no limit whatsoever on the amount of funds that might be advanced. While there was a fixed period over which the funds were to be advanced, there was no fixed date for repayment of those funds; thus, their benefits might continue to be received indefinitely. He noted in particular that even if no funds were advanced, the scheme would benefit MBB/Daimler Benz by saving it the expense (borne by other private firms) of exchange rate hedging. His delegation regretted that the European Communities was not prepared to provide, to the members of this Committee, the relevant information that it had indicated it would provide to the Aircraft Code Committee. Such information would enable this Committee to evaluate the matter fully. The EC decision weakened the ability of the Subsidies Committee to carry out the work with which it was entrusted under the Code.

12. He further noted that the European Communities claimed that the scheme was not an export subsidy and that the EC market was the domestic market into which completed Airbus products were sold. In his delegation's view, such a definition of the "domestic market" would be unprecedented. Moreover, even if some small share of products benefiting from an export subsidy were sold domestically, the US delegation did not consider that this fact alone should eviscerate the disciplines provided by the Code. If such a rule were established, the disciplines of Article 9 could easily be circumvented.

13. In response to the EC's points on the "legal framework" of this dispute, the representative of the United States considered that the ramifications of the EC's position went far beyond this case and that it was unprecedented for a defending party to request this Committee to abdicate its authority so that the defending party might choose a more convenient forum for it. He noted that there was no indication in the drafting or interpretative histories of the Subsidies Code or the Aircraft Code that the latter was to be read as a sectoral exemption of the former, particularly with respect to export subsidies. Indeed, the Subsidies Code contained no sectoral exemption whatsoever.

14. Referring to the question of lex specialis, the representative of the United States said that the exchange rate scheme was the issue. If the EC wished to argue its point on lex specialis regarding this issue, the Subsidies Committee was the appropriate forum. Furthermore, the European Community had made no commitment not to introduce this export subsidy in other areas. It was therefore important for this Committee to review the

problem. He also said that it was dangerous for any signatory to refuse to accept the jurisdiction of the Code Committee or to attempt to dictate the terms of dispute settlement to the complaining party. Such a precedent, if permitted, could bring the entire dispute settlement mechanism to a grinding halt.

15. The representative of the European Communities said that his delegation would respond to all points made by the representative of the United States in the Aircraft Committee. At this point of time he wished to state that his delegation did not agree with the legal interpretation advanced by the United States. He further said that the paper explaining the functioning of the exchange risk scheme in question would be circulated in the Aircraft Committee but not in this Committee.

16. The representative of the United States requested that the minutes of this meeting reflect the fact that the EC delegation had refused the US request to provide the relevant information to this Committee. The US delegation would shortly submit a request under Article 7 of the Subsidies Code in order to obtain this information.

17. The Chairman said that the Committee had heard and reviewed the facts of the matter and he would express the general feeling if he encouraged the signatories involved to step up their efforts to develop a mutually acceptable solution, consistent with Article 17:2 of the Code.

18. The representative of the European Communities said that he could agree with the Chairman's conclusion but he did not think that the reference to Article 17:2 of the Code or the Code itself was appropriate as, in his view, this matter was rather within the competence of the Aircraft Code and its Committee.

19. The Chairman said that as there were some doubts as to the competence of the Subsidy Committee on the matter, he wished to say that the competences of this Committee were defined exclusively by the provisions of the Code. The Code did not subject these competences to competences of any other body nor did it condition this Committee's action on actions taken elsewhere. Although individual signatories might be subjected, by virtue of their bilateral or multilateral obligations, to competences of other bodies, this fact could neither determine nor influence the action of this Committee unless the Committee decided otherwise. Consequently, if a matter in the area covered by the Code (i.e. all subsidies and countervailing duties) was raised in this Committee, the Committee had to deal with it in accordance with the provisions of this Code and it had neither competence nor need to determine what were rights and obligations of individual signatories under other Codes, even if these other Codes also dealt with subsidies. The Chairman further said that the Code established certain procedures which, once invoked, imposed on the Committee well-defined actions. These procedures were triggered by a signatory who "has reason to believe" that a subsidy was being granted or maintained and that such a subsidy was inconsistent with the Code or that it was causing some

adverse effects to its interests (Article 12). Such a signatory might request consultations with the other signatory. The next stage in the Code procedures (conciliation) might be invoked irrespective of whether the other signatory had actually accepted this request or what developments occurred in the course of the consultations. It was sufficient that a request for consultations had been made and that thirty or, as appropriate, sixty days thereafter there was no satisfactory solution. Consequently, if thirty or, as appropriate, sixty days after the request for consultations (and not the consultations themselves) a signatory so requested, the Committee had no choice but to "immediately review the facts involved and, through its good offices, encourage the signatories involved to develop a mutually acceptable solution" (Article 17:1).

20. The Chairman concluded by saying that as in this case no mutually satisfactory solution had been reached within thirty days of the request for consultations, and as a request for conciliation had been made in accordance with Article 13:1 of the Code, the Committee had to carry out its responsibilities under Article 17:1, i.e. to review the facts involved and, through its good offices, encourage the signatories involved to develop a mutually acceptable solution.

21. The representative of the EEC said that he noted the Chairman's statement but that he maintained his position.

22. The Chairman said that all statements made would be recorded in the minutes of this meeting.

B. Panel reports pending before the Committee (SCM/42, 43, 71, 85)

23. The Chairman recalled that four Panel reports had been before the Committee for some years now, and despite efforts by previous chairmen no satisfactory solution permitting their adoption had been found. He had consulted with the directly involved parties and, at that time, had had some reason to believe that sufficient progress had been made to enable the Committee to engage in a technical discussion leading to the adoption of these reports. He further said that, in his efforts, he had been motivated by several considerations. First, the dispute settlement mechanism under the Subsidies Code had been undermined by the lack of decision to adopt these reports. Second, GATT had entered in a new era by agreeing, in the Uruguay Round, on a new dispute settlement process. Third, the four pending cases involved major signatories of the Code which had special responsibilities under the GATT system. Fourth, there was a danger that efforts to improve GATT disciplines would become fruitless if the enforcing mechanism was paralyzed.

24. The Chairman said that the United States delegation had officially requested the two other parties directly involved to adopt these four reports and thus to send a strong signal that there was a new era in dispute settlement in the Subsidies Code. It was the Chairman's

impression that the EC delegation was also favourable to his efforts. He needed, however, a strong signal to the same effect from all delegations directly involved in order to be able to submit to the Committee a proposal to settle these matters.

25. The representative of the United States reiterated his delegation's strong support for the Chairman's efforts and appealed to the two other parties to join him to resolve these pending cases. The representative of the European Communities thanked the Chairman for his efforts. He recalled that in the case of wheat flour and pasta the parties concerned had found a practical solution and thus there were no adverse trade effects. In the case of wine, the incriminated legislation had lapsed and no countervailing duties were imposed. However, in the manufacturing beef case and despite numerous efforts, both at multilateral and bilateral level, Canada had not found a satisfactory solution for adverse trade effects of its action. As a consequence, EC exports of manufacturing beef to Canada had ceased. If, however, a satisfactory solution could be found as in the other cases, the EC delegation would be ready to explore a solution that would lead to the adoption of the pending reports.

26. The representative of Canada said that he had nothing new to report but his delegation would certainly be willing to engage constructively in any process that would lead to resolving these four cases. The representative of Israel said that although his country was not directly involved in any of these four cases, it attached great importance to the Code dispute settlement procedure. He supported the Chairman's initiative and wished to encourage the three parties to step up their efforts to find promptly a satisfactory solution. The representative of New Zealand also supported the Chairman's initiative and recalled that although the three parties directly involved were primarily concerned, it was the Committee's responsibility to consider and adopt the four reports.

27. The Chairman said that he would continue his discussion with the three parties and report to the Committee on any developments in these discussions.