

# GENERAL AGREEMENT ON

RESTRICTED

SCM/M/47

27 July 1990

## TARIFFS AND TRADE

Special Distribution

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Committee on Subsidies and  
Countervailing Measures

MINUTES OF THE MEETING

HELD ON 22 JUNE 1990

Chairman: Mr. Crawford Falconer (New Zealand)

1. The Committee held a special meeting on 22 June 1990.
2. The Committee discussed the following item:

Export subsidies granted by Australia - Request by the European Communities for Conciliation under Articles 13:1 and 17 of the Agreement.

3. The Committee had before it a communication from the delegation of the European Communities (SCM/103) in which this delegation confirmed its request for conciliation made at the regular meeting of the Committee on 24 April 1990.

4. The representative of the EEC referred to document SCM/103 and stated that there were principally two reasons which had prompted his authorities to request consultations and conciliation with the Australian Government. Firstly, it had been brought to the attention of the European Communities that the Government of Australia was granting a subsidy to producers of photographic film in Australia. While the relevant Australian legislation showed this subsidy to be contingent on production, an examination of the available information and of statements obtained from official Australian sources indicated that the purpose of the subsidy was to maintain and enhance the export performance of Australian producers of this product. It was of concern to his authorities that recourse had been made to a subsidy prohibited under the Code. While several rounds of bilateral consultations with the Government of Australia had clarified a few issues related to this case, his authorities remained unconvinced that this subsidy was not an export subsidy. Secondly, several reports in the Australian press had led his authorities to believe that subsidies granted by the Government of the State of Victoria were dependent on the granting of the Federal subsidy. Thus, in the opinion of his delegation, it would not be wrong to classify the Victorian State subsidy as an export subsidy. During the consultations, requests which were made to the Government of Australia to provide the necessary information regarding this subsidy were

refused. The reason given was that the Australian constitution prohibited the Federal Government to assume obligations in respect of States. The representative of the EEC noted that this refusal was inconsistent both with the provisions and with the spirit of the Code. He indicated his delegation's interest in hearing the opinion of the Committee on this matter.

5. The representative of Australia presented the Committee with his Government's views on the facts of the case and on the allegations and contentions contained in document SCM/103. He described the history and operation of Kodak Australasia. He noted that as part of rationalization plans, its parent company proposed that the Australian colour film sensitizing operation be transferred to another of the company's operations. The alternative site would not have required new investment or capacity and would have enjoyed special benefits such as tax advantages. He outlined the legal details of the Bounty (Photographic) Film Act and the Bounty (Photographic) Film Regulations which governed the subsidy. The Act stipulated that a company was eligible for the subsidy if (a) the sensitizing and finishing operations in respect of the film were all carried out in Australia; (b) the finishing operations in respect of the film were completed on or after 1 January 1990 and before 1 January 1993; (c) the producer of the film was, at all times, during the period to which this Act applied, a registered person. Article 4(1) of the Regulations laid down more detailed eligibility criteria relating to an industry development agreement, minimum levels of capacity and employment, the retention of production and distribution rights, management and industrial relations, improvements and investment within Australia. Sub-section (2) of the Regulations prescribed the information which a company registered under the Act had to provide at the time of the agreement. The representative of Australia recalled that the subsidy in question had been notified under Article XVI:1 of the General Agreement.

6. The representative of Australia disagreed with the points made by the representative of the EEC. He maintained that the bounty was not an export subsidy and that instead it fell under Article 11, in particular paragraphs 1(c) and (d) of the Code, i.e. to sustain employment and to encourage re-training and change in employment, and to encourage research and development programmes especially in the fields of high technology industries. The Community's claim that the subsidy was also being granted for the purpose of increasing production was not only inaccurate in terms of the regulations but also irrelevant in the present context. Furthermore, the Community had not provided any proof of adverse trade effects, in terms of Article 8, on the export of Kodak's competitors or Kodak's European operations. Referring to the conclusions reached by the Community as a result of public statements, the representative of Australia told the Committee that during consultations, explanations had been given regarding the legal status of those statements with respect to the Act and the Regulations. He drew the Community's attention to the detailed eligibility criteria, present in the Australian Regulations, which did not require export performance. He expressed the view that the Community had not demonstrated that there was a reasonable basis to support the claims it

had made. As to the concern voiced by the Community about the Victorian Government's assistance measures, the representative of Australia said that while the Federal Government had exclusive competence for granting production and export subsidies, this did not preclude State Governments from extending other forms of aid to industries within their States. His authorities were of the opinion that this issue was immaterial to the present discussion which was being conducted under the provisions of Article 13.1.

7. The representative of the EEC said that although there was no express reference to enhanced export performance either in the Act granting the subsidy or in the Regulations implementing the programme, the latter did make mention of the person's level of activity in international markets. The eligibility criteria contained in sub-section 2(b) and (c) of the Regulations clearly showed that the company's business objectives and its plans for achieving these objectives were important considerations in the Australian Government's decision to accord a subsidy. The achievement of these business objectives also ensured the company's continued suitability for the subsidy. He pointed out that it was possible for these business objectives to contain precise export commitments. Unfortunately, his authorities were unable to proceed with such a verification as this information had been classified by the Australian Government as commercial-in-confidence and could not be disclosed. He informed the Committee that public statements which called attention to the export-oriented nature of the subsidy had been made by an Australian Minister to the press and to representatives of the European industry. This incident had led his authorities to believe that the Australian producer had in fact assumed export obligations in exchange for the subsidy. He stated that while it was true that there were no express export performance requirements written in the legislation and in the Regulations, this did not mean that the subsidy was not an export subsidy. He specified further that such a requirement would have made the provisions of the Code superfluous. The representative of the EEC said that while the subsidy may comply with the objectives of Article 11 of the Code, as had been declared by the Australian representative, his authorities were nevertheless inclined to believe the statements made by the Australian Minister. Consequently, his authorities felt that the subsidy fell under the provisions of Article 9 and the Illustrative List of the Code.

8. The representative of the EEC also asked for clarification of the statement made by the Australian representative that the subsidies given by the Government of the State of Victoria were not relevant to the case under consideration. The fact that the Victorian Government had no competence to grant an export subsidy did not necessarily mean that it had not done so. This, he stated, could only be verified on receipt and examination of the relevant information requested by the Community. However, this request had been refused by the Australian Government because of its alleged irrelevance to the issue under question. The representative of the EEC felt that the Committee should have the right to decide on the relevance of any information and whether a subsidy programme should be examined in relation to the Code.

9. The representative of Australia informed the Committee, in relation to comments about a business plan, that a company entering into an agreement with the Federal Government was obliged, by Regulation 4(1)(A), to provide information related to its business objectives. This is set out in Regulation 4(2). He stressed the confidential nature of the agreement, but noted that there are no specific targets set for the various elements of this Regulation. In relation to public statements he advised that in previous consultations, the legal status of various official statements with respect to the provisions of the Act and the Regulations had been explained to the Community. The Australian side had also clarified what it regarded as misunderstandings on this score, pointing out that the subsidy was governed by the legislation and the Regulations. Addressing the point raised by the Community on export commitments, he stated that a company's continued qualification for the subsidy depended on various elements comprised in the eligibility criteria list contained in the Regulations. One of these criteria related to the retention of existing (not new) franchises in Australia and in the Asian and Pacific Regions. This criterion merely specifies the "right" to continue activities. It had as its main purpose the prevention of the withdrawal of production and distribution franchises and did not, in the view of his government, amount to an export performance contingency. In relation to the point made by the Community regarding the Victorian Government's assistance measures, he stated that the Federal Government was not aware of the terms of the Victorian Government's assistance to Kodak. Further, under normal Constitutional arrangements there was no reason for the Federal Government to be aware of activities carried out within a State's proper jurisdiction. He informed the Committee that while a request might be made to the Victorian Government for access to information, that Government's compliance with such a request might depend on its own legal position. However, he pointed out that the Community had not made a request in terms of Article 7 of the Code and that in any case, for the Federal Government to act on such a request would be to acknowledge that the State subsidy was one which operated directly or indirectly to increase exports. Bearing in mind the division of powers involved, it would be a serious matter for the Federal Government to contend that the assistance was an export subsidy. Under the circumstances, the representative of Australia felt that it was up to the Community to put forward a prima facie case which could then be submitted to the State Government. His authorities did not believe that such a case had been established. Referring to document SCM/103 and in the context of Article 13.1, he said that the Community had made no claim that the State Government's aid was an export subsidy. The document merely contended that the State's assistance might be dependent on Federal assistance. His authorities were not aware of the terms of the State Government's assistance and, regardless, rejected the apparent assumption put forward by the Community that any assistance, were it so provided, could be deemed to be an export subsidy regardless of its nature. He therefore emphasized his authorities' belief that this point was irrelevant to consultation and conciliation under Articles 12.1 and 13.1.

10. The representative of the United States said that the statements made by the representatives of both sides would be carefully reviewed by his delegation. He mentioned that attention would be focused on one item in particular, namely the unilateral refusal of a signatory to provide requested information in the context of a dispute using the argumentation of application significantly beyond the instant dispute.

11. The representative of the EEC re-emphasized the fact that, for his authorities, the business plans formed an integral part of the subsidy programme and that consequently knowledge of those plans was essential to determine whether a subsidy had been given with a view to enhancing the export performance of a company. According to the statements made by the Australian Minister, it would appear that the subsidies were in fact export subsidies. He added that these statements should not, as the Australian representative had suggested, be interpreted in terms of the Australian legislation. He reiterated his concern about the refusal by the Australian Government to supply the necessary information to identify the purpose of the subsidy accorded by the State of Victoria. He explained that the function of Article 7 was to enable signatories and the Committee to receive and assess information on subsidies in order to find out whether or not they comply with the disciplines set out in the Code. While the Community might still make such a request under the terms of Article 7, it had nevertheless felt entitled to ask for this information under Articles 12 and 17 of the Code. He reminded the Committee that signatories to the Code were expected to fully respect the obligations that they had assumed. His authorities were aware that for signatories with a federal system of government, different divisions of power existed. However, even under such circumstances a signatory was not exempted from bearing the consequences of the non-respect of the disciplines of the Code. His authorities therefore rejected the contention that they were not entitled to seek and to receive information regarding the action of the Victoria State Government. While further details related to the case had been received during the consultation proceedings and in the conciliation meeting, his authorities were not entirely convinced that the programme was not an export-oriented one, and consequently the EEC reserved its right under the GATT and the Code.

12. The Chairman encouraged the signatories involved to step up their efforts to develop a mutually acceptable solution consistent with the Code.

13. The representative of the EEC said that the Community remained, as had been its tradition, open to any effort to reach a mutually acceptable solution to the dispute.

14. The Chairman welcomed the delegate of Colombia to the Code.

15. The delegate of Colombia thanked the Chairman for the welcome and expressed his government's intention to comply with the provisions of the Code.

16. The Committee took note of the statements made.