WORLD TRADE ORGANIZATION

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Dispute Settlement Body
13 June 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 13 June 2005

Chairman: Mr. Eirik Glenne (Norway)

Subjects discussed: Page

1. European Communities and certain member States – Measures affecting trade in large civil aircraft

(a) Request for the establishment of a panel by the United States (WT/DS316/2)

1. The Chairman drew attention to the communication from the United States contained in document WT/DS316/2, and invited the representative of the United States to speak.

2. The representative of the United States said that, as described in the US panel request of 31 May 2005, the United States was concerned that certain measures of France, Germany, the United Kingdom, Spain, and the EC provided subsidies that were inconsistent with their obligations under the SCM Agreement and the GATT 1994. The subsidies at issue benefitted Airbus, the European manufacturer of large civil aircraft. The United States had long been concerned about the subsidization of Airbus. Over its 35-year history, Airbus had benefitted from massive amounts of EC member State and EC subsidies that had enabled the company to create a full product line of aircraft and gain more than a 50 per cent share of large civil aircraft sales. Every major Airbus aircraft model was financed, in whole or in part, with government subsidies taking the form of "launch aid" – that was, financing with no or low rates of interest, and repayment tied to, and entirely dependent on, sales of the financed aircraft. Moreover, if a particular model did not sell well, Airbus did not have to repay the financing. The Airbus A380 "super jumbo" alone received approximately US$3.7 billion in launch aid subsidies from France, Germany, Spain, and the United Kingdom.

3. Airbus had also received numerous other types of subsidies. For example, Airbus had received over US$1 billion in subsidized financing from the European Investment Bank for use in developing several of its aircraft models. Likewise, EC member State governments had spent over €1 billion in recent years to create infrastructure for the specific use of Airbus. For example, in 2000-2003, the City of Hamburg had spent €751 million to fill in a protected wetland on the River Elbe to create additional land for Airbus's use at its production site in Hamburg. EC member State governments had also assumed and forgiven billions of euros worth of debt owed by Airbus, and had made numerous equity infusions and grants into the Airbus companies that private investors would not have made. In addition, the EC and its member States had provided billions of euros to Airbus for civil aeronautics research and development. The EC's Sixth Framework Program alone had allocated over €1 billion to such projects. Most of the funding at issue took the form of outright grants that Airbus had used to underwrite its commercial research. And unlike civil aeronautics R&D in the United States, EC-funded civil aeronautics R&D focused on producing results that Airbus could apply to products in the near- and medium-term. Airbus had used these subsidies to seize more than half of the large civil aircraft market at the expense of its US competitors. And yet it continued to seek and receive new subsidies. It was time for the subsidies to end.

4. The United States considered that the EC and member State subsidies to Airbus were inconsistent with Articles 3.1(a), 3.2, 5(a), 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement, and Article XVI:1 of the GATT 1994. She recalled that on 4 November 2004, the United States and the EC and the member States had held consultations. Unfortunately, those consultations had failed to resolve the US concerns. Accordingly, the United States was requesting that the DSB establish a panel to examine these matters, in accordance with Articles 4.4 and 7.4 of the SCM Agreement and Article 7 of the DSU. Further, should a panel be established at the present meeting, as described in the US panel request of 31 May 2005, the United States would also request that the DSB initiate the procedures provided for in Annex V of the SCM Agreement, pursuant to paragraph 2 of that Annex. At a future meeting, the United States would also be asking the DSB to designate a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of that Annex. The United States was exploring with the EC options for naming that representative.

5. The representative of the European Communities said that the EC was deeply disappointed about the decision of the United States to choose the path of litigation and confrontation. The US decision to request a panel would spark what was likely the biggest, most complicated and costly legal dispute in WTO history. At a time that all WTO Members should be concentrating on the Doha negotiations, the US decision resulted in serious diversion of energy and resources both in the WTO Members concerned as well as in the WTO on issues that should and could have been dealt through negotiations. The EC and the United States had a bilateral Agreement dating back to 1992 on Trade in Large Civil Aircraft which regulated explicitly the forms and level of government support the United States and the EC could provide to Boeing and Airbus respectively. It was within that forum that a negotiated solution should be reached.

6. While it was the choice of the United States to pursue its rights under the WTO Agreements, the United States did not have a right to use the dispute settlement system for purely speculative claims. Indeed, in the recent "Upland Cotton" dispute, the United States itself had protested and had prevailed against the inclusion of a measure that had not even existed when the panel request had been made and considered by the DSB. That was precisely what the United States itself had been doing with respect of alleged measures relating to the new Airbus plane A350. As all were aware neither the DSU nor the SCM Agreement allowed WTO Members to use it against a perceived threat of subsidization. A measure subject to WTO dispute settlement must be subject to consultations and exist at the time of the panel request. No such alleged support existed for the A350, neither in October 2004 when the US had asked for consultations nor now, nor in the very near future. Indeed this aircraft had not yet even been launched and no decision had been taken on whether or not the EC member States wished to invest in this project. The fact that the United States was attacking a non-

existent measure was not only ludicrous. It spoke volumes about the real intentions of the United States – that was to intervene in a commercial battle between two companies and to seek to influence the market in favour of Boeing. The EC, therefore, strongly objected to the inclusion of this non-existing measure into the panel request. The EC would not accept that the United States misuse the WTO dispute settlement for speculative purposes.

7. Unfortunately, this was not the only flaw of the US panel request. Even a cursory reading of the panel request filed by the United States had revealed that a number of allegations regarding certain purported measures did not figure in the US consultations request and they had not been the subject of proper WTO consultations. Thus, and according to established WTO jurisprudence, they could not be the subject of a panel request. Moreover, the panel request was strikingly unspecific, and the EC would raise with the United States a number of questions to be able to understand it. For example, the United States had included claims against a broad range of research and development programs, which had been formulated so broadly that they could be understood to cover suppliers to Airbus, thereby extending the scope of the dispute. The EC noted that such a development, being in sharp contrast with the consultations, threatened to escalate the dispute further.

8. The EC did not intend to enumerate all the measures which had been included in the US panel request and which the EC believed were outside of the future panel's terms of reference. The EC reserved the right to do so before the panel. The EC did not intend to proceed any further at this time. The EC had made clear that it entertained a number of serious objections to the US panel request based on jurisdictional grounds. In particular, the issue related to the alleged financing to A350 was the most serious one. The EC reserved its right to raise these and other objections later before the panel. He underlined that the EC was determined to fully defend its legitimate interests and ensure that conditions of fair competition prevailed in the production of civil aircraft. Finally, he said that the EC objected to the establishment of a panel at the present meeting.

9. The DSB took note of the statements and agreed to revert to this matter.

2. United States – Measures affecting trade in large civil aircraft

(a) Request for the establishment of a panel by the European Communities (WT/DS317/2)

10. The Chairman drew attention to the communication from the European Communities contained in document WT/DS317/2, and invited the representative of the European Communities to speak.

11. The representative of the European Communities said that the EC's request was rendered necessary by the US action that had just been discussed and the fact that it was in reality US subsidies to Boeing that were distorting the market for large civil aircraft. The EC and United States had a bilateral Agreement since 1992 on Trade in Large Civil Aircraft, which regulated explicitly the forms and level of government support the United States and the EC could provide to Boeing and Airbus respectively, and the EC would have preferred to resolve this matter in that forum. Unfortunately, however, the United States had refused to allow this to happen. As had just been noted, the US decision would spark probably the biggest, most difficult and costly legal dispute in the WTO's history. At a time that all WTO Members should be concentrating on the Doha negotiations, the US decision had resulted in serious diversion of energy and resources both in the WTO Members concerned as well as in the WTO on issues that should and could have been dealt through negotiations.

12. This was the reason why the EC had engaged in good faith negotiations to revise the 1992 Agreement on the basis of an understanding of 11 January 2005. The EC's objective from the very beginning was to secure a rapid, fair, equitable and balanced agreement regarding subsidies for Large

Civil Aircraft. The EC had tried hard to secure this objective. Regrettably, this had not been achieved. This was neither the time nor the place for analyzing the real causes for this failure. Simply, the EC needed to stress that the United States, through its intransigent attitude, had blocked any meaningful negotiation. In order to sustain conditions for fair competition in civil aircraft production and to defend its interests, the EC had no alternative than to respond and resume action in the WTO.

13. Indeed, as was apparent from the EC's panel request, the EC had significantly more measures to attack exceeding by far the value of any measures attacked by the United States. The evidence that the EC had collected over the years clearly demonstrated that Boeing had been benefiting – and continued to benefit – from massive subsidies in violation of the SCM Agreement. These subsidies also violated a long-standing treaty between the United States and the EC which governed the terms under which support to development of large civil aircraft could be provided. There was no need to enumerate in detail all the various and WTO-incompatible forms of subsidies granted to Boeing. However, one should take a look at the facts concerning Boeing's colossal use of public funds and taxpayer subsidies in its operations: (i) Boeing's different forms of subsidies from the US federal and state governments benefitted the development, production and sales of its civil aircraft. Taken together, US subsidies had consistently exceeded the 1992 EC-US Agreement by two to three times. None of these subsidies had been reimbursed; (ii) In the United States, Boeing received subsidies from NASA, the Department of Defence and the Department of Commerce contracts estimated at US$22 billion over the past decade. This had financed specific Boeing technology research the results of which had been integrated into specific Boeing models and in particular to Boeing 787, which was under production. It was important to stress that this particular aircraft, the 787, would receive US taxpayer subsidies amounting to 70 per cent of its total development cost. Boeing would contribute only 15 per cent; (iii) It was widely acknowledged in US Congressional circles that non-competitive "military" contracts at inflated prices benefited Boeing's civil aircraft business. In other words, R&D for Boeing's civil airplanes was being paid for from US military budgets, rather that Boeing's own pocket; (iv) Under such circumstances, it did not come as a surprise that Boeing had also been allowed to use research, test and evaluation facilities owned by the US government to its benefit; (v) In addition, Boeing continued to benefit substantially from US Foreign Sales Corporation tax breaks, infringing WTO law. Members were aware of the current panel proceedings that the EC had initiated as a result of the US refusal to terminate as it should have done, the WTO-illegal subsidies granted under the FSC/ETI and relevant successor legislation and of which Boeing continued to be the major beneficiary; and (vi) At the sub-federal level, the State of Washington in an unprecedented move, had committed US$3.2 billion in tax breaks and US$4.2 billion in infrastructure payments to Boeing for production of the 787 over the next years. Other states and cities, such as Kansas and Illinois had done likewise. All these subsidies that the United States granted to Boeing distorted trade to the detriment of Airbus and breached US obligations under the WTO. It was, therefore, essential to put an end to them and to re-establish a level playing situation. He underlined that the EC shall fully defend its legitimate interests as well as the integral application of the SCM disciplines.

14. The representative of the United States said that her country was disappointed that the EC had requested a panel on this matter. The EC's request was broad, but without merit. The United States intended to defend the measures at issue vigorously. In that regard, the United States noted that not all of the items identified by the EC in its panel request were "measures," including, for example, the High Speed Research Program Technology Transfer Control Handbook. The United States also noted that many of the alleged programs and measures contained in the EC's panel request had not been consulted upon and had not been included in the EC's request for consultations. Therefore, the DSU did not permit the EC to pursue panel proceedings with regard to those programs and measures at this time. For example, 13 of the 28 alleged subsidy programs referenced in the panel request were not listed in the consultation request. In addition, more than half of the underlying laws and regulations cited in the panel request were not provided for in the request for consultations. Separately, the

United States was surprised to see that the EC had included the procurement of military aircraft and military research and development funding as alleged subsidies to large civil aircraft. The fact was, Airbus and its corporate parents, EADS and BAE Systems, also participated in the US defense market. BAE Systems alone was one of the top ten participants in the very programs the EC was attacking as subsidies to US large civil aircraft producers. Airbus and its corporate parents also participated in many military procurements in Europe, such as the A400 and the Eurofighter. The United States had been carefully studying these programs. It noted that the EC had provided billions of euros in military R&D funding to Airbus and to its corporate parents, EADS and BAE Systems. The United States had assumed that, like its military procurements, these programs were tied to military purposes. However, given the EC's apparent belief that military R&D was related to civil aircraft technology, the United States might need to reevaluate its assumptions about the A400 and Eurofighter programs. In light of these considerations, the United States was not in a position to accept the establishment of a panel at the present meeting.

15. The representative of the European Communities said that the US objections were unjustified and unfounded. Even a cursory reading of the EC's request for consultations and its panel request was sufficient to demonstrate that the US objections were without merit. The wording employed in the consultation request was wide enough to cover all the measures listed in the panel request. Further, the EC wished to point out that following the consultations held in Geneva on 5 November 2004, it had requested further consultations on the basis of additional questions that had been addressed to the United States. The United States had explicitly declined to continue consultations and thus bore the responsibility for that. The EC would take careful note of these objections and verify again. What could already be stated at this stage was that the United States seemed to apply different rules with regard to its own requests. It attacked the EC for not having specified, for example, sub-state authorities in the panel request that had not been identified in the consultations.

16. The DSB took note of the statements and agreed to revert to this matter.

3. Implementation of the recommendations of the DSB

(a) European Communities – Export subsidies on sugar

(b) Dominican Republic – Measures affecting the importation and internal sale of cigarettes

17. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He proposed that the two sub-items to which he had just referred be considered separately.

(a) European Communities – Export subsidies on sugar

18. The Chairman recalled that at its meeting on 19 May 2005, the DSB had adopted the Appellate Body Report pertaining to the complaints by Australia, Brazil and Thailand in the case on: "European Communities – Export Subsidies on Sugar" and the Panel Reports with regard to the same matters, as modified by the Appellate Body Report. He then invited the EC to inform the DSB of its intentions in respect of implementation of the recommendations.

19. The representative of the European Communities recalled that on 19 May 2005, the DSB had adopted the recommendations and rulings in the "EC – Sugar" dispute brought by Australia, Brazil and Thailand by adopting the Appellate Body and the Panel Reports. The EC intended to fully

implement the DSB's recommendations and rulings in this case in a manner consistent with the WTO obligations. The EC had begun already to evaluate options for doing so. In order to achieve compliance with the DSB's rulings and recommendations, the EC was required to modify its legislation regarding the sugar sector; i.e. its common market organization as well as to adopt subsidiary legislation on that basis. Due to the complexity of the issues involved and the need to adopt a Council regulation as well as subsidiary legislation, the EC would need a reasonable period of time in which to comply with the DSB's recommendations and rulings. The EC stood ready to discuss with Australia, Brazil and Thailand on an appropriate duration of this reasonable period of time for implementation, in accordance with Article 21.3(b) of the DSU.

20. The representative of Australia said that her country welcomed the EC's advice that it intended to implement the DSB's recommendations and rulings in this dispute. Australia looked forward to the scheduling of early consultations with the EC with a view to reaching agreement on the reasonable period of time for implementation by the EC, in accordance with the provisions of Article 21.3 of the DSU. With regard to the EC's claim that it was required to make legislative changes in order to implement the DSB's recommendations and rulings in this dispute, in Australia's view, there was no legal barrier to implementation by the EC under the existing system, and there was no reason why the EC could not commence its implementation straight away.

21. The representative of Brazil said that his country welcomed the statement by the EC concerning its intentions with regard to the implementation of the DSB's recommendation in the "Sugar" dispute, in line with what the EC had indicated at the 19 May 2005 DSB meeting. Brazil believed that the EC would share its view that, in light of both dispute-specific and systemic interests, Members should make their best efforts not to transform their obligations under Article 21.3 of the DSU in a *pro forma* exercise depleted of any substance. Brazil stood ready to consult with the EC at the earliest opportunity on a reasonable period of time for implementation.

22. With reference to the need expressed by the EC to promote changes in its legislation, the representative of Brazil wished to echo Australia's view that there was no legal barrier to implementation by the EC under its existing system, as Brazil had stated at the 19 May 2005 DSB meeting, and that there was no reason why the EC could not commence implementation straight away.

23. The representative of Thailand said that, like others, his country also welcomed the statement made by the EC informing the DSB of its intention to implement the recommendations and rulings made by the Panel and the Appellate Body in relation to this dispute. Thailand looked forward to consultations with the EC on the reasonable period of time for implementation by the EC. Thailand envisaged that such consultations would be initiated as soon as possible. Thailand was ready to work together with the EC in order to achieve this goal and ensure that these consultations were as efficient as possible.

24. The representative of Mauritius said that her delegation wished to reiterate the request made at the 19 May 2005 DSB meeting whereby on behalf of the 14 ACP countries – which had participated in the proceedings of the Panel and the Appellate Body – it had called upon the EC and the complainants to accept that the ACP countries be involved in the negotiations on implementation. Her delegation had taken good note of the statement made by the EC regarding its proposal to modify its legislation in the sugar sector as well as to adopt subsidiary legislation on that basis. In this regard, Mauritius wished to underscore that the ACP countries expected that in modifying its legislation in the sugar sector, the EC would fully comply with its legal, moral and political commitments *vis-à-vis* the ACP sugar supplying countries, and in particular, its commitments under the ACP/EC Sugar Protocol and Article 36(4) of the Cotonou Agreement. She noted that Article 36(4) called for the safeguarding of the benefits to the ACP countries while taking into account the special legal status of the Protocol.

25. The DSB took note of the statements, and of the information provided by the European Communities regarding its intentions in respect of implementation of the DSB's recommendations.

(b) Dominican Republic – Measures affecting the importation and internal sale of cigarettes

26. The Chairman recalled that at its meeting on 19 May 2005, the DSB had adopted the Appellate Body Report in the case on: "Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes" and the Panel Report on the same matter, as modified by the Appellate Body Report. He then invited the Dominican Republic to inform the DSB of its intentions in respect of implementation of the recommendations.

27. The representative of the Dominican Republic recalled that at its meeting on 19 May 2005, the DSB had adopted the recommendations pertaining to the dispute "Dominican Republic – Measures Affecting the Importation and Internal Sales of Cigarettes". At the present meeting, she wished to inform the DSB of her country's intention regarding the implementation of the DSB's recommendations, pursuant to Article 21.3 of the DSU. She said that her government firmly intended to implement the DSB's recommendations pertaining to this case. Accordingly, the Dominican Republic was evaluating various options for implementation of these recommendations, but it would require a reasonable period of time for that purpose. Her country was currently holding discussions with Honduras in an effort to reach an agreement on a reasonable period of time, pursuant to Article 21.3(b) of the DSU.

28. The representative of Honduras thanked the delegation of the Dominican Republic for the statement that the Dominican Republic firmly intended to comply with the findings and recommendations of the Panel and the Appellate Body in this matter. Honduras wished to remind the Dominican Republic that prompt compliance with the DSB's rulings and recommendations was essential. Accordingly, Honduras considered that the rulings and recommendations relating to this dispute could be implemented immediately.

29. The DSB took note of the statements, and of the information provided by the Dominican Republic regarding its intentions in respect of implementation of the DSB's recommendations.