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GENERAL AGREEMENT ON TARIFFS AND TRADE

COUNCIL
18 December 1980

MINUTES OF MEETING

Held in the Centre William Rappard on 18 December 1980

Chairman: Mr. D.S. McPHAIL (Canada)

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1. Tax legislation (C/M/124)

(a) Income tax practices maintained by France (C/114)
(b) Income tax practices maintained by Belgium (C/115)
(c) Income tax practices maintained by the Netherlands (C/116)

The Chairman recalled that in July 1973 the Council had established three Panels following the recourse to Article XXIII:2 by the United States with regard to income tax practices maintained by France, Belgium and the Netherlands. He said that in November 1976, the Panels had presented their Reports to the Council, which had taken note of them. Subsequently these matters had been discussed at several meetings of the Council held in 1977 and again in March 1978. At the latter meeting it had been agreed to defer the matters to a future meeting of the Council. They had now been placed on the agenda at the request of the delegations principally concerned, who had also requested the circulation of three communications in documents C/114-C/116.

The representative of Belgium said that document C/115 presented a clear picture of the matter concerning Belgium. After briefly recalling the chronological developments of this matter, he stated that the United States had called into question the reduction of Belgian taxes on companies' earnings when these had already been taxed abroad, and the exemption from Belgian taxes of dividends already taxed abroad. He said that the Panel, basing itself on a broad

interpretation of the notion "export activities", had reached the conclusion that these tax practices could have effects which were incompatible with the provisions of Article XVI:4 of the General Agreement, i.e., that they could constitute subsidies incompatible with that Article.

His delegation regretted that the Council had not been able to bring this matter to a normal conclusion, but held the opinion that a solution could now be found since the legal situation of the practices in question had been clarified in the meantime. He said that the Code on Subsidies and Countervailing Measures recognized that measures aimed at avoiding double taxation could not be deemed to be export subsidies. Moreover, it had become clear that export activities stopped at the moment of sale of goods to the foreign buyer and did not include the resale of the goods by the foreign buyer. He stated that this concept of export activity was in line with the philosophy of the General Agreement, albeit narrower than the economic concept on which the Panel had based its conclusions.

He added that for a long time Belgium had paid particular attention to prevent measures adopted to avoid double taxation from being used by exporters to escape partially from Belgian income taxes, thus deriving an export price advantage. The tax authorities had made certain that goods for a foreign buyer associated with a Belgian exporter were invoiced in the same way as if the buyer were independent. Furthermore, his Government had given bilateral assurances to the United States that it would continue to apply this "arm's length" principle, which was also confirmed by Belgium's adhesion to the Code on Subsidies and Countervailing Measures.

He stated that Belgium accordingly asked the Council to adopt the Panel Report (L/4424), and in so doing, to make the following declaration:

(a) that economic activities involving exported products but taking place outside the territory of the country of origin need not necessarily be taxed by that country and could not be regarded as an export activity under the terms of the General Agreement;

(b) that measures for the avoidance of double taxation were not to be assimilated to export subsidies.

The representative of France said that document C/114 presented the position of his authorities, which was identical to that of Belgium. The Panel's conclusions were unacceptable to France because they went against the very principle of the French fiscal system, namely territoriality. In short, the Panel had reproached France for not taxing economic activities taking place after exportation. He noted that the system of territoriality was applied by some eighty countries, and he asked these countries to reflect on the consequences if the Panel's Report (L/4423) were adopted without any qualification.

He referred to one well-founded fear of the Panel, namely the case in which the foreign importer was under financial control of the French exporter, allowing prices to be manipulated in such a way that profits would be taxed in the country where taxes were lowest. He noted that such an eventuality was excluded on three distinct levels, as follows:

(1) on the national level by Article 57 of the French taxation code;

(2) on the multilateral level by the Code on Subsidies and Countervailing Measures, which embraced the "arm's length" principle; and

(3) on a bilateral basis with the United States through an exchange of letters in which the "arm's length" principle was confirmed, and in which the United States had recognized that economic activity should not be taxed beyond the point of export.

The representative of the Netherlands said that his delegation had asked to have this item placed on the agenda out of respect for the dispute settlement procedures. It was his delegation's duty to report to the Council on developments which had taken place since the Council dealt with this item in March 1978, developments which, in his view, had settled the case. He said that details of this view were contained in document C/116.

He recalled in this connexion that the representative of the United States himself had stated at the meeting of the Council on 12 November 1976 that "similar tax practices of a large number of other contracting parties that had not been parties to this proceeding appeared by implication to be also in violation". He also recalled that the representative of Argentina had pointed out at the same meeting "that the conclusions drawn up by the experts had been very carefully phrased. They often referred only to some aspects of the very complex matters and avoided making a categoric finding. In his view the conclusions therefore were not final. The Council therefore should consider how to come to final conclusions. It was essential that the reports should not be put aside but be utilized, so that the CONTRACTING PARTIES could come to decisions which would be of great importance to all contracting parties".

He said that these were the reasons why the Netherlands proposed that the Panel's Report (L/4425) now be adopted with some kind of clarification, interpretation or qualification, which was in the overall interest of the GATT.

The representative of the United States said he had taken note of the views expressed by the representatives of Belgium, France and the Netherlands. He recalled that there had been four cases on tax practices for which four

separate panels with identical memberships had been established to examine the cases, each of which had raised a number of major policy issues. As the new communications contained in documents C/114-116 raised additional questions for examination, his authorities would need more time for reflection.

The representative of the European Communities said that the Council was dealing with three separate Reports on the tax practices of Belgium, France and the Netherlands. His delegation was participating in the discussion on these three Reports alone and was not prepared to discuss any other Report at the present meeting. He stated that the EEC shared the views expressed by each of the three member States with respect to adoption of the three Reports with qualifications concerning the notion of "export activities".

The representative of Switzerland said that these Reports had already been examined by the Council in the past at the same time as the Tokyo Round Negotiations were taking place, which had also dealt with these questions. It was in the interest of the GATT that the dispute settlement procedures remain credible and even be improved as an indispensable instrument for the implementation of the provisions of the General Agreement. He was of the opinion that Note No. 2 to the Illustrative List of Export Subsidies annexed to the Code on Subsidies and Countervailing Measures (BISD 26 S/82) contained the necessary elements for a solution of this matter.

The representative of Greece supported the views expressed by the representative of the European Communities.

The representative of Austria, expressed appreciation that in the interest of a well functioning dispute settlement procedure the representatives of Belgium, France and the Netherlands had reintroduced these Reports to the Council with a view to their final adoption. He said that his delegation, too, had previously been of the opinion that the term "export activities" needed further clarification, and that only after this clarification would the Council be in a position to proceed further. As his authorities had not yet been in a position to study the new documents C/114-116, he asked for the matter to be deferred to the next meeting of the Council.

The representative of Japan, recalling the stance taken by his delegation in previous Council discussions, welcomed the initiative of Belgium, France and the Netherlands to reintroduce these items in the Council, to remedy, at least in part, what many contracting parties had considered to be an unsatisfactory state of affairs. He expressed regret that agreement could not be reached along the lines proposed at this meeting of the Council, as his delegation was ready to join a consensus. He expressed the hope that the Council would be able to conclude this matter at its next meeting.

The representative of Sweden, speaking for the Nordic countries, recalled that during discussion of the Panels' Reports in early 1977 the Nordic delegations had stressed the importance of the integrity of the dispute

settlement procedures, especially for smaller countries. He said that there were dangers in a failure to take final action on disputes which had otherwise followed the proper procedures. The Nordic delegations therefore welcomed the initiative shown by Belgium, France and the Netherlands to dispose of these matters.

The representative of Canada said that his delegation had examined the documents C/114-116 and would have been ready to join in a consensus for the adoption of the three Reports, taking into consideration the three documents mentioned. He expressed the hope that the Council would return to this matter at the appropriate time and adopt the Reports on that basis.

The representative of New Zealand said that prompt procedures for dispute settlement were particularly important for small countries. As his authorities had not been able to complete consideration of these matters, however, particularly in the light of the communications in documents C/114-116, he suggested that they be deferred to the next meeting of the Council.

The representative of Australia said that there had not been sufficient time for his authorities to study the new issues raised in the recent communications, in which there were a number of implications.

The Council took note of the statements made and agreed to defer these matters to its next meeting, if possible, or if not, to a meeting in the near future.

2. Agreement between the EEC and Yugoslavia (L/5007 and Add.1)

The Chairman recalled that at the meeting of the Council in March 1980 the representative of the European Communities had stated that on 25 February 1980 a Co-operation Agreement had been initialled between Yugoslavia and the EEC. In July 1980 the parties had sent a copy of the text of the Agreement to the secretariat, as indicated in document L/5007. Additional copies had subsequently been received by the secretariat and had been sent to contracting parties with document L/5007/Add.1. In November 1980 the Council had agreed to revert to this matter at its next meeting.

The representative of Chile expressed an interest in the establishment of a working party.

The representative of Australia suggested that it would be appropriate for the Council to set up a working party and requested that this be done.

The representative of the European Communities said that it was a routine practice in GATT to examine agreements notified to the CONTRACTING PARTIES and said his delegation was prepared to agree to the establishment of a working party in the present instance.

The Council agreed to establish a working party with the following terms of reference and membership:

Terms of reference

"To examine, in the light of the relevant provisions of the General Agreement, the Interim Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia on trade and co-operation, signed on 6 May 1980; and to report to the Council."

Membership

Membership would be open to all contracting parties indicating their wish to serve on the working party.

The Chairman of the Council was authorized to nominate the chairman of the working party in consultation with delegations principally concerned.

The Council agreed furthermore that contracting parties wishing to submit questions in writing to the parties to the Agreement should be invited to send such questions to the secretariat not later than 29 January 1981 and that the parties to the Agreement should submit their replies to these questions within six weeks after receipt of the written questions.

3. Sub-Committee on Protective Measures - Report (COM.TD/SCPM/2)

The Chairman recalled that in March 1980 the Committee on Trade and Development had established a Sub-Committee on Protective Measures (COM.TD/104) in accordance with the Decision of the CONTRACTING PARTIES on 28 November 1979 on the Examination of Protective Measures affecting Imports from Developing Countries (BISD 26 S/219). That Decision provided that the Sub-Committee would report on its work to the Committee on Trade and Development and through it to the Council. At its November 1980 meeting the Committee on Trade and Development had adopted the Report of the second session of the Sub-Committee and had forwarded it to the Council for adoption (L/5074, paragraph 19).

The Council adopted the Report contained in document COM.TD/SCPM/2.

4. ACP/EEC Convention of Lomé

The representative of the European Communities, speaking under Other Business, recalled that on 16 November 1979 his delegation had informed the Council of the signature of the new Lomé Convention, and that in March 1980 the Council had been informed of a delay in the entry-into-force of the Convention.

He said that the Convention would enter into force on 1 January 1981 and that in the near future copies of the text of the Convention would be sent to the secretariat for circulation to contracting parties.

The Council took note of the statement.

5. EEC - Imports of poultry from the United States

The Chairman recalled that at its meeting in October 1980 the Council had agreed to establish a panel to examine the complaint by the United States, and had authorized the Chairman to decide on its composition and on appropriate terms of reference in consultation with the parties concerned.

He informed the Council that the Panel would have the following composition and terms of reference:

Composition:

Chairman: H.E. Ambassador M. Trucco (Chile)
Members: Mr. Ki-Choo Lee (Republic of Korea)
Mr. M. Pullinen (Finland)

Terms of reference:

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States relating to United Kingdom application of EEC Directives to imports of poultry (L/5013 and L/5033), and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings as provided in Article XXIII."

The Council took note of the composition and terms of reference of the Panel.