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Committee on Trade in Civil Aircraft

MINUTES OF THE MEETING OF THE COMMITTEE HELD ON 17 NOVEMBER 1995

Chairman: Mr. M. Abdel-Fattah (Egypt)

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A. Adoption of Agenda

1. The Chairman noted that the agenda for the present meeting was contained in WTO/AIR/205/Rev.1. He welcomed Macau, which had accepted the Agreement on 14 July 1995, as a Signatory to the Agreement on Trade in Civil Aircraft.

B. Status of the 1979 Agreement on Trade in Civil Aircraft under the WTO and proposed technical revisions to the Agreement

2. The Chairman recalled that the proposed technical changes to the 1979 Agreement on Trade in Civil Aircraft (hereafter the "Aircraft Agreement") were contained in AIR/W/98 which had been circulated on 26 October 1994. He then summarized his understanding of the status of the Agreement under the WTO as follows. It had not been possible to conclude the negotiations on a new Agreement on Trade in Civil Aircraft in time for the conclusion of the Uruguay Round in 1993. Additional attempts in 1994 had been equally unsuccessful. Finally, it had not been possible to adopt a proposal to introduce technical changes into the existing text to make it formally fit within the WTO framework. In his view, the resulting situation was very worrying.

3. He recalled that the Aircraft Agreement was one of the Plurilateral Trade Agreements contained in Annex 4 to the Marrakesh Agreement Establishing the World Trade Organization (hereafter the "WTO Agreement"). In application of Article II, paragraph 3, of the WTO Agreement, it was part of that Agreement. However, among the elements which had to be taken into account in determining the actual status of the Aircraft Agreement, there were three main factors which created a high degree of legal uncertainty and which led to a situation where the Aircraft Agreement was practically not operational. The first related to the date of adoption and entry into force of the Aircraft Agreement compared with the date of adoption and entry into force of the other WTO agreements. This factor had an impact, *inter alia*, on the applicability of certain substantive provisions of the Aircraft Agreement. The second factor was the absence of a decision on the application of the WTO Understanding on Rules

and procedures Governing the Settlement of Disputes (hereafter the "DSU") to the Aircraft Agreement. The last factor related to the different institutional provisions existing in the Aircraft Agreement compared with those of the WTO.

4. Regarding the first factor, as the Aircraft Agreement had entered into force in 1980 and had been last amended in 1986, any of the agreements annexed to the WTO Agreement were later in time compared with the Aircraft Agreement. As no provision in the Aircraft Agreement or in the WTO agreements expressly addressed the issue of applicability of prior or subsequent agreements, one could only rely on principles and customary rules of international law regarding the application of successive treaties relating to the same subject-matter, in particular those reflected in Article 30 of the Vienna Convention of 1969 on the Law of Treaties. In application of the principles and customary rules recalled in the relevant provisions of that Article, whenever a provision of the 1979 Agreement on Trade in Civil Aircraft was not compatible with a provision of one of the agreements annexed to the WTO Agreement relating to the same subject-matter, the provision of the Agreement on Trade in Civil Aircraft could not be applied. In his view, the obligation to rely on residuary principles or rules of international law raised a high degree of legal uncertainty. For example, the meaning of, *e.g.*, "successive treaties", "same subject-matter" or "compatible" in a particular case could be subject to discussion. Such a situation was in contradiction with the spirit of the WTO Agreement to improve legal certainty in international trade and was particularly worrying in light of the fact that there was no effective dispute settlement available under the Aircraft Agreement as it stood.

5. Regarding the second main factor, he recalled that Appendix 1 to the DSU provided that the applicability of the DSU to the Plurilateral Trade Agreements in Annex 4 to the WTO Agreement (including the Aircraft Agreement) would be subject to the adoption of a decision by the parties to each agreement, setting out the terms for the application of the DSU to the individual agreement, including any special or additional rules or procedures. This matter had been discussed in 1994 and a draft decision had been suggested. However, as the discussion on technical changes had become deadlocked, this specific issue had not been discussed any further. As a result, the situation was that the DSU could not apply to disputes initiated under the Aircraft Agreement. One was left with the provisions of the Aircraft Agreement, together with the provisions of GATT 1947 and those of the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/210). This implied that, at best, Signatories would have to rely on the pre-Uruguay Round instruments, which were less efficient than the DSU. A worst case scenario would involve the termination of GATT 1947 and the termination of the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, either through a formal decision of the countries parties to that Understanding, or as a result of the application of principles or customary rules of international law applicable to termination of treaties, as embodied in particular in Article 59 of the Vienna Convention. In such a situation, dispute settlement under the Aircraft Agreement would be reduced to total inefficiency, should the parties to a dispute not agree on how to handle the dispute.

6. He said that a consequence of this was that the Aircraft Agreement could not, in practice, be enforced against any of its Signatories. Such a situation implied that any discipline under the Aircraft Agreement which was not also covered by another WTO agreement was *de facto* not applicable. This was the case, for example, for the provisions of Article 4 of the Aircraft Agreement regarding government-directed procurement, mandatory sub-contracts and inducements. This clearly added to the existing legal uncertainty already stemming from the absence of clarity on the applicability of certain provisions of the Aircraft Agreement in relation to the other WTO agreements.

7. He further said that the Aircraft Agreement still contained institutional provisions which were at odds with the structure established under the aegis of the WTO. While it could be argued that the WTO institutional framework should apply to the Aircraft Agreement even in the absence of formal amendment of the latter, either on the basis of interpretation of provisions of the WTO Agreement

(in particular Articles II.3 and IV.8 thereof), or on the basis of principles or customary rules of international law, such an option, by its very nature, implied additional legal uncertainty.

8. In concluding, he recalled that, while some of the problems resulting from the absence of a formal adaptation of the Aircraft Agreement to the WTO framework could be, to a certain extent, addressed through the application, *e.g.*, of principles and customary rules of international law, the degree of legal uncertainty which would nevertheless result from the current situation clearly could not be tolerated in the context of the WTO, which was *inter alia* intended to rationalise the functioning of the agreements compared with the Tokyo Round situation. He then asked delegations for their thoughts on how to break the deadlock.

9. The representative of Canada thanked the Chairman for having recalled the need for improved legal certainty, which had been the concern of delegations when they had discussed technical amendments to the Aircraft Agreement in 1994. One year later, the problem was only more evident. He underlined the importance that Canada attached to a solution to this issue. A year ago, Canada had been ready to accept the texts contained in document AIR/98, which it considered to be a balanced proposal. His delegation hoped agreement on a text could be reached at the present meeting.

10. The representative of the European Communities recalled that it had been previously agreed that the exercise of amending the Aircraft Agreement would be a purely technical one. No attempt should be made to alter the substance of the Aircraft Agreement. There had also been an agreement *ad referendum* on a decision of the Signatories to be adopted in connection with the Protocol. All Signatories had supported this decision, but one Signatory had subsequently changed its position. In his view, a useful starting point for a discussion on how to proceed further would be to have an explanation from that Signatory as to why, after reflection, it could not accept the previously agreed compromise.

11. The representative of the United States welcomed Macau as a new signatory to the Agreement. On the issue of rectification of the Aircraft Agreement, he said that the United States had explained its position at the previous meeting of the Committee and that alternative language had been communicated to the Committee (circulated as AIR/83). The United States agreed with the statements made by the Chairman and the EC that one of the premises for the rectification was that it had to be a technical exercise. There had been certain complications from the beginning, one being that the Aircraft Agreement had not been rectified by the time the WTO Agreement was signed in Marrakesh or by the time it entered into force. The process had been held up by one other Signatory until late in 1994. This would make any rectified Aircraft Agreement a later-in-time agreement. He agreed with the Chairman that participants had to proceed with the rectification exercise as soon as possible. However, while it was important to remedy the potential legal problems, he noted that there had been no formal dispute in the history of the Aircraft Agreement. As a result, there was no urgent need for a more efficient dispute settlement mechanism.

12. He said that in the US view, the object of the technical exercise was to track as closely as possible the language of the Aircraft Agreement, as amended by the 1986 Protocol. The Aircraft Agreement was not silent as to the relationship to other agreements. In Article 6.1, it made clear that the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade applied to civil aircraft and, in Article 8.8, it made clear that where a dispute was covered by another multilateral agreement, the dispute would take place under that agreement unless the parties to the dispute agreed to move it to the Aircraft Agreement. In the US view, changing that relationship, particularly with respect to the WTO Agreement on Subsidies and Countervailing Measures, was more than a technical change. The US proposal, first in the form of a textual change in Article 6 of the Agreement and later in the decision accompanying the draft protocol, was designed to restore the situation that existed prior to the entry into force of the WTO Agreement. In the US

view, there was no specific conflict between the Aircraft Agreement and the WTO Agreement on Subsidies and Countervailing Measures.

13. The representative of the European Communities said that one of the purposes of the Uruguay Round was to clear up some of the problems that had arisen in earlier years because of the way the GATT had developed, *inter alia* the possibility for forum shopping. All this had been revised in the context of the WTO. He could not see any reasons for putting the clock back and allowing for a resumption of forum shopping, which had been, *inter alia*, one of the reasons for the modifications introduced by the WTO dispute settlement mechanism. The only objective of the European Communities, apart from the necessary technical amendments, was to ensure that all relevant WTO agreements were applied to the aircraft sector as they had been drafted, including the Aircraft Agreement as amended through the protocols, and the WTO Agreement on Subsidies and Countervailing Measures in its entirety.

14. The representative of the United States said that the drafters of the Aircraft Agreement had been very careful in spelling out the relationship between the Aircraft Agreement and other agreements. The 1979 text was not silent on that point. The United States did not want a situation in which ambiguities in the Aircraft Agreement could be used to interpret or diminish obligations under the WTO Agreement on Subsidies and Countervailing Measures. In the US view, special treatment had already been given to aircraft in the WTO Agreement on Subsidies and Countervailing Measures, and Signatories to the Aircraft Agreement were also Members of the WTO Agreement on Subsidies and Countervailing Measures. The extent to which aircraft had to be treated differently was specified in three footnotes to the WTO Agreement on Subsidies and Countervailing Measures. The disciplines in those agreements were clear, and the United States did not want to introduce anything different that would create confusion. This was a technical exercise, and any Member wishing to modify the WTO Agreement on Subsidies and Countervailing Measures should go to the Committee established under that Agreement and propose an amendment. There were no reasons to change the WTO Agreement on Subsidies and Countervailing Measures through changes in the Aircraft Agreement. He said that Signatories already had to deal with a temporal change because of delays in the rectification process, for which his delegation was not responsible.

15. In response to the Chairman's question, he suggested that, since there seemed to be a difference of views, there should be continued bilateral consultations with suggestions and coordination from the Chairman and the Secretariat, so that Signatories could bring this exercise to a conclusion as quickly as possible, hopefully before the end of 1995. The United States would work constructively to this end but could not give up its substantive rights.

16. The representative of the European Communities said that there was not only a basic contradiction between the positions of two Signatories, but also an internal contradiction in the position of one of them. The current exercise was purely technical and no Signatory should engage in an attempt to introduce substantive modifications to the Aircraft Agreement. The United States' alternative proposal to the draft decision agreed *ad referendum* in 1994 included substantive modifications to the 1979 Aircraft Agreement. This was why the EC could not accept it.

17. The Chairman expressed disappointment and frustration over the lack of success in moving positions on this issue closer. He asked all delegations to reflect on initiatives to unblock this exercise. He recalled that the draft text of a protocol was contained in Annex I to AIR/W/98. His understanding from past discussions was that there was no objection to its content as such, but that its acceptance by certain delegations was conditional upon the concurrent adoption of a decision addressing certain concerns of these delegations. It was therefore in relation to this draft decision that he thought he could provide an intellectual contribution to the debate, which he urged delegations to consider in a constructive spirit. In his view, his approach would not make the legal situation of any Signatory worse than it was under the Aircraft Agreement as it stood, in the context he had described. He suggested that attempts

could be made to amend the current second sentence of the second paragraph of the draft decision contained in Annex II of AIR/W/98 in order to simplify it, by merely referring to the fact that the Aircraft Agreement did not take precedence over the Agreement on Subsidies and Countervailing Measures.

18. He urged the delegations concerned to consider carefully this approach or to come up with other, realistic and compromise-oriented proposals, which could bridge the gap between their current positions. He said that it seemed from the discussion that delegations were in agreement that the present situation should not continue and that a satisfactory solution should be found. He would conduct informal consultations with all interested delegations on how to resolve the present deadlock and make the Aircraft Agreement operational. He added that he might call another meeting of the Committee at an appropriate time to consider the results of these consultations.

19. The Committee took note of the statements.

C. Report (1995) to the CONTRACTING PARTIES to the GATT 1947 and to the WTO General Council

20. The Chairman recalled that, pursuant to Article 8.2 of the Agreement on Trade in Civil Aircraft, the Committee was to report to the CONTRACTING PARTIES. However, in application of Article IV.8 of the WTO Agreement, the bodies provided for under the Plurilateral Trade Agreements were to keep the WTO General Council informed of their activities on a regular basis. Given that both the WTO and the GATT 1947 were concurrently in force, and given that the provisions of Article 8.2 of the Agreement on Trade in Civil Aircraft and those of Article IV.8 of the WTO Agreement were not incompatible, he suggested that the 1995 report of the Committee be submitted both to the CONTRACTING PARTIES to the GATT 1947 and to the WTO General Council.

21. The Committee adopted its Report (1995) to the CONTRACTING PARTIES to the GATT 1947 and to the WTO General Council, contained in WT/L/107-L/7655.