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WT/DSB/M/435

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(19-8036) Page: 1/3

**Dispute Settlement Body**
**14 October 2019**

# MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 14 OCTOBER 2019

*Chairman: H.E. Dr David Walker (New Zealand)*

## 1 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT

### A. Recourse by the United States to Article 7.9 of the SCM Agreement and Article 22.7 of the DSU (WT/DS316/42)

1.1. The Chairman drew attention to the communication from the United States contained in document WT/DS316/42. He then invited the representative of the United States to speak.

1.2. The representative of the United States said that the Arbitrator in this matter had released its decision as to the level of countermeasures commensurate with the adverse effects caused by the subsidies of the EU, including its member States Germany, France, Spain and the United Kingdom, to large civil aircraft. That figure was nearly US$7.5 billion each year. The level determined by the Arbitrator was larger by far than the largest amount previously awarded by a WTO Arbitrator, and documented the point that the United States had been making all along – that the EU's subsidies to Airbus had, for decades, caused massive harm to the US economy. Accordingly, the United States had requested DSB authorization to impose countermeasures under Article 7.9 of the SCM Agreement and Article 22.7 of the DSU consistent with the Award. It was the preference of the United States to find a negotiated outcome with the EU that would end all WTO-inconsistent subsidies. That had been the objective of the United States from the outset. But that could only happen if the EU genuinely terminated the benefits to Airbus from current subsidies and ensured that subsidies to Airbus could not be revived under another name or another mechanism. For 15 years, the United States had indicated its desire for such an agreement. During this period, there had been no countermeasures, and the EU had consistently failed to engage in serious discussions. The United States hoped the countermeasures would encourage the EU to agree to a genuine cessation of its WTO-inconsistent subsidies and the adverse effects that flowed from them. Accordingly, the United States was now requesting authorization to impose countermeasures.

1.3. The representative of the European Union said that the EU took note of the decision of the Arbitrator in this dispute, and the level of possible countermeasures. This decision marked another milestone in the 15-year-long aircraft saga. Parties would reach another milestone of this saga with the upcoming decision in the Arbitration proceedings in the "US – Large Civil Aircraft (second complaint)" dispute (DS353). The EU would provide more information about the bigger picture later in its statement, but this report warranted a closer look as it raised serious concerns. Having reviewed the report, the EU was compelled to observe that it disagreed with the report on the basis of which the United States had put forward its request at the present meeting. In this respect, the EU noted, in particular, the following. First, there was no analysis whatsoever in the report of the amount of benefit or the alleged price effects. The alleged volume effects were largely based on the assumption that Airbus or its products should not exist. Notably, the parties were told that, without the measures, the A380 would never have been launched. This conclusion was at odds with the facts and evidence and did not accurately reflect the prior findings of the Appellate Body. The assertion of the US Trade Representative – in the press release issued upon the publication of the Award –

which claimed that "the Appellate Body agreed that '[w]ithout the subsidies, Airbus would not have existed ... and there would be no Airbus aircraft on the market'", had no basis in the Appellate Body rulings previously adopted in the course of this dispute. Second, awarding recurring annual countermeasures for an indefinite period in response to non-recurring measures, the benefit and adverse effects of which were constantly diminishing, was a breach of the rule foreseen in the SCM Agreement that countermeasures must be commensurate with the degree and nature of adverse effects, and contradicted the existing case law. The Award of recurring annual countermeasures was all the more striking with respect to the A380 even though the Arbitrator knew that the A380 programme had been terminated. This ignored the principle of representativeness, led to countermeasures that were not commensurate with the adverse effects, and contradicted the Members' long-held view – which had been confirmed by the United States itself during the proceeding – that compliance obligations were prospective only. Third, the Award disregarded the risk of over-counting resulting from cumulating nullification or impairment from both orders and deliveries at the same time. This disregarded the basic principles of economic valuation and again led to countermeasures that were not commensurate with the adverse effects. Fourth, the Award contained a finding that the hypothetical impedance associated with the six country markets where impedance had been found coincided with the total number of aircrafts [47] that Airbus had sold in those markets, without any effort by the United States to substantiate that assertion. Fifth, the Award systematically avoided taking into account the treaty terms that referred to the "no-subsidised like product", which clearly supported the view that the volume effects of competing subsidies cancelled each other out.

1.4. The European Union said that in the "US – Large Civil Aircraft (second complaint)" dispute (DS353), the EU had already obtained multilateral findings that the United States was out of compliance with respect to both Washington State tax subsidies and Foreign Sales Corporation (FSC) legislation. It was currently pursuing its own proceedings under Article 22.6 of the DSU against the United States in the "US — Large Civil Aircraft (second complaint)" (DS353) dispute. With respect to the same issues, the same principles would be applied in that case. From a systemic point of view, in order to provide security and predictability to the multilateral trading system, and not least for the sake of procedural fairness, that was the only acceptable course to follow. Unlike the United States, the EU had made a substantial further effort to comply that was currently under consideration by a second compliance panel. The result of that proceeding would shortly be known. The EU would be insisting that, as a matter of law, the outcome of that proceeding was fully and immediately reflected in the level of sanctions imposed by the United States. Finally, the EU had taken very careful note of the Arbitrator's repeated and heavy reliance on the proposition that, as long as the defending Member was "out of compliance", because it did not have a multilateral determination of compliance, or a mutually agreed solution, or an unconditional and unequivocal acknowledgement of compliance from the complainant, the full amount of any retaliation remained due. The EU recalled in this respect that the possibility of a "multilateral determination of compliance" would be at serious risk in the very near future in the absence of a functioning multilateral dispute settlement system, and the United States bore the responsibility if that situation were to materialize. The content of this report demonstrated why the existence of appellate review of legal issues was essential within the WTO system. The EU was continuing to review the report and fully reserved its right to challenge its findings at the appropriate time and in the appropriate forum. Unlike the United States, the EU well understood that, even if it strongly disagreed with the report that formed the basis of the US request, it could not prevent the DSB from granting authorization to suspend concessions or other obligations consistent with this Award, absent a DSB decision by consensus to reject the request, because that authorization would be granted automatically or by operation of law (that is, *ipso jure*). Nevertheless, the EU wished to reiterate that it disagreed with the content of the Award, including for the reasons outlined above. The EU would monitor very closely the application of the US countermeasures and called on the United States to respect the level authorized by the WTO. In conclusion, the EU wished to reiterate that it remained of the view that even if the United States obtained authorization from the DSB at the present meeting, opting for applying its countermeasures at this moment would be short-sighted. Both the EU and the United States had been found at fault by the dispute settlement system of the WTO. In the parallel "US – Large Civil Aircraft (second complaint)" dispute (DS353), the EU would in some months equally be granted right to impose additional countermeasures. The mutual imposition of countermeasures, however, would only harm global trade and the broader aviation industry. As the EU had consistently stated, it remained ready to work with the United States on a fair and balanced solution for their respective aircraft industries. Pending progress in finding such a solution, and while reserving its rights in this regard, it was not the EU's intention to seek reporting from the United States with respect to any of the above matters.

1.5. The representative of Canada said that his country had a significant interest in both the substantive and procedural issues raised in this dispute and that Canada had, since the beginning, participated as a third party. Canada also had a significant systemic interest in ensuring the fair and effective operation of the dispute settlement system at all stages of proceedings. This included the authorization of suspension of concessions, a fortunately rare but nonetheless an important moment in a dispute, and an authorization that should be used with the greatest of caution. Canada wished to make a statement at the present meeting principally on the question of the jurisdiction of Arbitrators convened under Article 22.6 of the DSU to consider measures taken to comply after the request for authorization to retaliate had been referred to arbitration. This was a difficult issue, one that had been considered in the DSU Review, but also one that Members had needed to confront with increasing frequency in recent years. Canada was sympathetic to the concerns expressed by the European Union in the arbitration that, if an Arbitrator did not take into account subsequent compliance measures and market developments, it might well end up determining a level of nullification and impairment that was, in fact, not equivalent to the present level of nullification and impairment. And this might be especially consequential in circumstances involving the valuation of adverse effects under the SCM Agreement. Nonetheless, Canada acknowledged that requiring an Arbitrator to await the outcome of subsequent compliance proceedings, or to engage itself in a review of claims of compliance, would blur the role of Arbitrators with that of compliance panels. To impose such requirements only on the basis of a claim of compliance – however objective and ultimately well-founded – would risk subjecting the parties, especially the complaining party, to an endless loop of litigation without ever getting closer to a resolution. That said, Canada considered that an Arbitrator should calculate the level of countermeasures in a manner that allowed for calibration in the future, based either on additional compliance steps taken by the responding Member or on subsequent market developments. Canada, therefore, considered it unfortunate that the Arbitrator in this dispute had declined to determine separate levels of countermeasures for the different product markets at issue. In addition, Canada noted that, while the United States had the right to receive authorization to retaliate at a level that was calculated appropriately based on the latest multilateral determination of non-compliance, it also had to use that authorization responsibly. It should not simply ignore subsequent measures taken to comply or market developments that might affect compliance, such as Airbus's decision to terminate the A380 programme. Ultimately, the purpose of authorized retaliation was to induce compliance. If there was evidence of compliance, even if partial, the authorized party had to take that into account when using its retaliation rights. Canada, therefore, called upon the United States in this dispute to use restraint when imposing retaliation under the authorization it would receive at the present meeting. The health of an increasingly integrated aircraft industry, the global economy and the dispute settlement system depended upon it. More systemically, as was the case in other areas of the dispute settlement system, the rules could not be expected to regulate precisely every possible scenario. Much still depended, and always would depend, on the good faith and good will of the parties. Canada, therefore, encouraged both parties to bring this dispute, as well as their related dispute, to resolution.

1.6. The DSB took note of the statements and, pursuant to the request by the United States under Article 7.9 of the SCM Agreement and Article 22.7 of the DSU contained in document WT/DS316/42, agreed to grant authorization to suspend the application to the European Union and certain member States of tariff concessions or other obligations consistent with the Arbitrator's decision contained in document WT/DS316/ARB.