WORLD TRADE ORGANIZATION

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Dispute Settlement Body
12 October 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 12 October 2000

Chairman: Mr. S. Harbinson (Hong Kong, China)

Prior to adoption of the agenda, the Chairman drew attention to the fact there was a discrepancy between the airgram and the proposed agenda. He said that under item 1 the airgram only referred to document WT/DS108/11, which was the US request, while the proposed agenda contained an additional reference to document WT/DS108/12. He noted that the airgram was correct because document WT/DS108/12 was not directly related to the US request. He proposed that the agenda be adopted without the reference to document WT/DS108/12.

The DSB adopted the agenda with the amendment proposed by the Chairman.

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1. United States - Tax treatment for "Foreign Sales Corporations"

(a) Request for modification of the time-period for compliance

1. The Chairman drew attention to the communication from the United States contained in document WT/DS108/11.

2. The representative of the United States recalled that the DSB had decided that the compliance period in the Foreign Sales Corporations (FSC) dispute would end on 1 October 2000. The US Congress had been working hard on legislation to amend the FSC provisions of US tax law. While only a few steps remained for enactment, it had been apparent at the time the United States had submitted its proposal, that the process could not be completed by 1 October 2000. However, the United States hoped that those steps could be completed before the Congress concluded its work in October. Accordingly, after consulting with the EC, the United States had submitted its proposal. The United States believed that it was appropriate to provide time for the Congress to complete the legislative process and to provide the EC with time to review the outcome of that process. The United States believed that its proposal would promote the aim of providing a mutually satisfactory solution to this dispute. In this regard, she expressed her country's appreciation for the constructive attitude

displayed by the EC in order to avoid escalating the FSC dispute at this time. While the parties continued to disagree on the substantive issues involved, they, at least, had been able to agree on a procedure by which these disagreements might be resolved and that was in the interests of all the DSB members.

3. The representative of the European Communities said that the request submitted by the United States had to be examined in light of the following situation: by 1 October 2000 there had been draft legislation in the process of being approved by the US Congress, but the final legislative steps necessary for its adoption had not been taken by that date. The EC noted with great concern that the United States had been unable to observe its obligation to bring its FSC legislation into conformity with its WTO obligations by the time determined in the Panel Report adopted by the DSB on 20 March 2000. This entitled the EC to have recourse to the appropriate provisions under the SCM Agreement and the DSU with regard to countermeasures and suspension of concessions. However, since the EC had received formal assurances that the adoption of the FSC replacement system was imminent, it had preferred not to exacerbate the dispute. However, this should not be interpreted as having any bearing on the EC's position concerning the WTO compatibility of the US legislation replacing the FSC scheme. The Community continued to consider that, unless fundamental changes were made, the bill before Congress would not be in conformity with the WTO Agreements and, if adopted in its present form, did not represent proper implementation of the DSB recommendations.

4. In order to deal with the above-mentioned issues, the DSB had already been informed of the agreed procedures to be followed by the EC and the US in the follow-up to the FSC dispute by a joint letter of 2 October 2000. He noted that the question of the EC/US understanding would be taken up separately under "Other Business". The EC's position showed great understanding for the US predicament in a situation for which the United States alone bore the responsibility. The EC was not prepared to give up any of its rights under the WTO Agreement. The EC supported the extension if it was also agreed that all time-limits that would normally have already started on 1 October 2000 were now postponed by one month. In particular, any time-limit that might apply to an EC request for authorization would not start to run before the beginning of the month of November. He stressed that the DSB, in agreeing to the US request, should also agree that the EC's WTO rights were fully preserved and protected. The EC was pleased that the United States, in a case that was of importance to it, had agreed to follow the sequence which the EC, and virtually all other Members, considered to be the appropriate one. The EC believed that, pending completion of the DSU Review, this would imply that no attempt would be made to impose any other sequence on other Members.

5. The representative of Japan said that his country followed with concern the development of this dispute. Japan considered that the dispute in question would have a significant impact not only on the bilateral relationship between the United States and the EC, but also on the stable and effective functioning of the dispute settlement mechanism. Japan welcomed the constructive spirit in which both the United States and the EC had chosen to avoid a confrontation and had agreed, through consultations, to extend the time-period for compliance within which the United States had to withdraw its measure in accordance with the DSB's recommendations and rulings. Japan welcomed the efforts made by the two parties, and supported the extension of the time-period. This agreement, however, was only a stop-gap solution. Thus, Japan urged the United States to implement in good faith the DSB's recommendations and rulings before 1 November 2000. Japan would closely observe future developments of this important case.

6. The Chairman proposed that the DSB take note of the statements, and that, given that there was no opposition to the US request, the DSB should accede to the request of the United States as formulated in its letter of 29 September 2000 and circulated in document WT/DS108/11.

7. The DSB so agreed.

2. Canada - Term of patent protection

(a) Report of the Appellate Body (WT/DS170/AB/R) and Report of the Panel (WT/DS170/R)

8. The Chairman invited Mr. Bryn, Chairman of the General Council, to preside over the proceedings of item 2 since the Chairman had participated in the Panel which had examined this case. The Chairman of the General Council drew attention to the communication from the Appellate Body contained in document WT/DS170/6 transmitting the Appellate Body Report on "Canada – Term of Patent Protection", which had been circulated in document WT/DS170/AB/R in accordance with Article 17.5 of the DSU. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He drew attention to Article 17.14 of the DSU which required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

9. The representative of the United States said that her country welcomed the adoption of the Reports of the Panel and the Appellate Body in the case before the DSB. The Appellate Body had upheld the finding of the Panel that a 20-year patent term, as required by Article 33 of the TRIPS Agreement, was not available under Section 45 of Canada's Patent Act which only provided a patent term of 17 years. As such, the Appellate Body had specifically recommended that Canada bring Section 45 of its Patent Act into conformity with its TRIPS obligations. The United States considered this to be a straightforward dispute, and was pleased that both the Appellate Body and the Panel had agreed. The next step would be an early implementation. She noted that as long as Canada remained out of compliance, valuable patents would continue to expire too early. By Canada's own count, about one-third of the 17-year patents that had been in existence on 1 October 1996 had expired as from 1 January 2000. Another 13,639 patents would prematurely expire within the current year, and on average, 1,149 patents would prematurely fall into the public domain in each month of 2001. Each day without compliance would cost patent holders the very benefits that they were entitled to under the TRIPS Agreement. The United States therefore urged Canada to immediately amend its Patent Act to implement the DSB's recommendations and rulings to be adopted at the present meeting.

10. The representative of Canada thanked the Panel, the Appellate Body and the Secretariat for their work in preparing the Reports. He said that the dispute in question concerned patents that had been filed before 1 October 1989 and had been granted within three years from the date of filing. Under Canada's Patent Act, the term of protection of these patents was 17 years from the date the patent was granted. Patents based on applications filed on or after 1 October 1989 had a term of 20 years from the date of filing and had not been at issue in the dispute. In Canada's view, a proper interpretation of the TRIPS Agreement should have accommodated the term of protection provided for by its Patent Act for patents filed before October 1989. Canada was disappointed that the Panel and the Appellate Body did not see fit to accept the arguments put forward by Canada during the proceedings. His country nevertheless was prepared to join in a consensus to adopt both Reports at the present meeting. Canada would notify its intentions with respect to implementation at the 23 October DSB meeting.

11. The representative of Argentina said that her country had not yet completed its examination of the Reports and wished to reserve its rights to provide its view on the case at hand at a future DSB meeting.

12. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS170/AB/R and the Panel Report in WT/DS170/R, as upheld by the Appellate Body Report.

3. Information provided by the EC with regard to the agreed procedures in the follow-up to the Foreign Sales Corporations dispute

13. The representative of the European Communities, speaking under "Other Business", said that by a joint letter of 2 October 2000, the EC and the US had informed the DSB of the procedures agreed by the parties in the follow-up to the Foreign Sales Corporations (FSC) dispute (WT/DS108/12). The objective of the agreed procedures was to deal with the so-called "sequencing issue" in a way that would allow for a multilateral determination regarding WTO-compatibility of the US legislation while fully protecting the EC's rights to suspend concessions and adopt countermeasures if the US legislation was found to be WTO-incompatible. The US reading of the DSU provisions as applied in the banana dispute had left the EC with two options on the procedures to follow in this case: (i) either to go directly to Article 22.6 of the DSU and request authorization to suspend concessions, as the United States had done in the banana dispute; (ii) or to agree on procedures like those contained in the agreement that combined legal security for the EC with the fundamental WTO principle that prohibited unilateral determinations. In this respect, the parties had agreed to simultaneously start Articles 21.5 and 22.6 of DSU procedures, but to suspend the work of the Arbitrators until the reports of the compliance panel and Appellate Body, in case of appeal, had been adopted. The agreed procedures were also designed to apply in case the United States failed to adopt any FSC replacement legislation, in which case the EC could have direct recourse to Article 22.6 of the DSU. Finally, he wished to reiterate the point made under item 1 with respect to the issue of sequencing and the hope that he had expressed thereunder.

14. The representative of India said that the dispute settlement system was a central element in providing security and predictability to the multilateral trading system. India welcomed the agreement between EC and the United States as contained in document WT/DS108/12. India considered that major delegations like the United States and the EC who frequently used the DSU provisions had major responsibilities. Since they had reached this bilateral, mutual understanding, India expected that they would behave in the same way in other cases as well. If not, it would lead to unpredictability and uncertainty. India also believed the DSB should carefully consider the mutual understanding between the United States and the EC as a way out of the current ambiguity in the DSU text.

15. The representative of Japan said that his country did not object to the EC/US understanding regarding procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, which was contained in WT/DS108/12. However, Japan would like to express its view that this agreement only concerned the two parties and could not be applied to Members in general, nor could it be considered to have any effect on the interpretation of the existing provisions of the DSU. Furthermore, the very fact that the two parties had to agree on such an understanding confirmed, once again, the generally shared view that the current DSU text needed to be improved, especially in regard to the sequence between Articles 21 and 22 of the DSU, in order to find a more predictable and multilateral solution to this issue. In Japan's view, the ambiguity of the current DSU text should be clarified through the treaty amendment procedures under Article X of the WTO Agreement. Japan hoped that all Members would resolve this issue together in the near future.

16. The DSB took note of the statements.