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Dispute Settlement Body
4 August 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 4 August 2000

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

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1. United States – Measures treating export restraints as subsidies

(a) Request for the establishment of a panel by Canada (WT/DS194/2)

1. The Chairman drew attention to the communication from Canada contained in document WT/DS194/2.

2. The representative of Canada said that on 19 May 2000, his country had requested consultations with the United States regarding US measures that treated a restraint on exports of a product as a subsidy to producers of other products made, using or incorporating the restricted product if the domestic price of the restricted product was affected by the restraint. Consultations, which had been held on this matter on 15 June 2000, had failed to settle the dispute. In Canada's view, the US measures were unjustified and were inconsistent with the WTO obligations. Therefore, Canada was requesting the establishment of a panel to examine this matter.

3. The representative of the United States said that her country had several concerns with regard to Canada's initiation of this dispute. The United States believed that Canada's assertions were devoid of merit, and should a panel be established, it would find this to be the case. However, a more immediate concern was the fact that in its panel request, Canada had identified new measures that were only vaguely described and on which no consultations had been held. In its request for consultations[1], Canada had identified two so-called measures: (i) certain pages from the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act of 1994; and

[1] WT/DS194/1.

(ii) certain pages from the preamble to the Final Rule of the US Department of Commerce promulgating new countervailing duty regulations. Canada had not identified any provision of the US countervailing duty statute as a measure nor the US practice under that statute.

4. In a letter dated 19 May 2000, the United States had agreed to enter into consultations but had expressly informed Canada of the US view, namely, that Canada had failed to identify a "measure" as required by Article 4.4 of the DSU. During the consultations, the United States had explained that neither the SAA nor the preamble had any independent effect under US law, and that neither document authorized or required any action by the US Government. Canada had not responded to this explanation one way or the other. The next communication the United States had received from Canada on this matter was its panel request. The measures identified in the panel request were different from those identified in the request for consultations. Instead of identifying the SAA and the preamble as the measures, Canada had referred in its panel request to: (i) section 771(5) of the Tariff Act of 1930, as interpreted by the SAA and the preamble; and (ii) an unidentified US practice thereunder, thereunder being a reference to section 771(5).

5. The United States recognized that in the Brazil Aircraft case[2], the Appellate Body had found that the DSU did not "require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel" (paragraph 132 of the ABR). The United States would not quibble with Canada's substitution in its panel request of section 771(5) as interpreted by the SAA and the preamble, for the SAA and the preamble as identified in its request for consultations. This substitution was a permissible result of consultations clarifying the situation. However, the United States took great exception to Canada's inclusion of US practice under section 771(5) as one of the measures in question. First, since Canada had not identified what the US practice consisted of, Canada's request was not in conformity with Article 6.2 of the DSU. The United States did not know, on the basis of Canada's cryptic reference, what practice it was referring to. The panel request simply referred to section 771(5) as interpreted by the SAA and the preamble. There had been no example given regarding the application of the statute in practice. Second, the United States and Canada had not consulted with respect to any US practice, nor had this practice been identified in Canada's request for consultations. While the DSU might not require "a precise and exact identity" between the measures identified in a consultation request and a panel request, there had to be some identity. In this case, insofar as Canada's vague identification of "US practice" as a "measure" was concerned, there was no identity between the two requests.

6. For these reasons, the United States could not agree with the establishment of a panel at the present meeting. In addition, if Canada sought the establishment of a panel at a future meeting based on its current request, the United States would raise its concerns before that panel. In the US view, in order to be consistent with the DSU provisions, Canada had two options. First, if it wished to limit the measures identified in its panel request to section 771(5), as interpreted by the SAA and the preamble, it should file a new panel request. Alternatively, if it wished to include US practice under section 771(5) as a measure, it could file a new request for consultations, in which it would identify that practice so that meaningful consultations could be held thereon.

7. The United States also wished to identify another problem with the panel request. Canada had stated that US measures included section 771(5) as interpreted by the SAA and the preamble, and the unidentified "US practice thereunder". The use of the word "include" suggested that there might be other measures that Canada might attempt to raise before a panel, should a panel ever be established. Under the established jurisprudence, such an attempt would not be permissible. Therefore, the United States also wished to reserve its rights with respect to this aspect of Canada's request.

[2] WT/DS46.

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

2. Brazil – Export financing programme for aircraft: Recourse by Canada to Article 21.5 of the DSU

(a) Report of the Appellate Body (WT/DS46/AB/RW) and Report of the Panel (WT/DS46/RW)

9. The Chairman recalled that, at its meeting on 9 December 1999, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Canada concerning the measures taken by Brazil to comply with the DSB's recommendations in this case. The Panel Report had been circulated on 9 May 2000 in document WT/DS46/RW. On 22 May 2000, Brazil had notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel. The Appellate Body Report had subsequently been circulated on 21 July 2000 in document WT/DS46/AB/RW. Both Reports were now before the DSB for adoption at the request of Canada.

10. The representative of Canada said that, in November 1999, Canada had sought a determination on the consistency of the measures taken by Brazil to comply with the DSB's rulings and recommendations in this case. At that time, Canada had announced that the measures taken by Brazil were not sufficient to bring Brazil into conformity with the SCM Agreement, and did not constitute a withdrawal of the prohibited export subsidies. The Article 21.5 Panel and the Appellate Body which had examined Brazil's implementation, had fully supported Canada's position. The Panel and the Appellate Body had reaffirmed the previous DSB's rulings, namely, that Brazil could not continue to make payments after 18 November 1999 under its subsidy programme (PROEX) that had been found to be prohibited. The Panel and the Appellate Body had also ruled that, despite the modifications made for new transactions, PROEX remained a prohibited export subsidy. It had been more than eight months since the deadline for Brazil's implementation had expired but no compliance had yet taken place. Canada and Brazil had been engaged in this dispute for over four years, and four reports had now been adopted by the DSB, all ruling in favour of Canada: i.e. the report of the original panel, the report of Appellate Body, the report of the Article 21.5 Panel and now the report of the Appellate Body under Article 21.5. All four reports had found that Brazil's PROEX programme was a prohibited export subsidy and violated Brazil's obligations under the SCM Agreement. Since the dispute had gone on for a long time, Canada called on Brazil to implement immediately the DSB's rulings and recommendations.

11. The representative of Brazil said that his country intended to bring all future PROEX operations in line with the DSB's recommendations. However, Brazil would respect its legal commitments with regard to prior operations. Those matters were part of broad consultations currently being held with Canada, and Brazil hoped that a mutually satisfactory solution would soon be reached. The dispute at hand involved provisions of the SCM Agreement in an area relatively new to developing countries, namely, official export financing. International cooperation in the area of export credit insurance dated back to, at least, 1934 - the period of the Great Depression - when the Berne Union had been set up. In January 1955, the Organization for European Economic Cooperation, the predecessor of the Organization for Economic Cooperation and Development (OECD), had adopted rules on export credits. Since then those rules, which had been negotiated among developed countries, had evolved significantly. As far as those rules were concerned, until recently, developing countries had been considered as recipients of credits.

12. The dispute at hand concerned a developing country that had entered into an industry of high cost, high technology and with a high value-added content. For such an industry, export financing was critical. However, from the point of view of developing countries, in particular non-OECD members, there were many systemic difficulties in this area. Brazil's concerns about multilateral rules on export credits, or lack thereof, were known. During the preparatory process for the Third

Ministerial Conference, Brazil had expressed its concerns regarding the laconic and unbalanced language of item (k) contained in Annex I of the SCM Agreement. Brazil had tried to use interest rate support to finance exports of regional aircraft. However, that mechanism had been challenged by Canada. In order to defend itself, Brazil had invoked the first paragraph of item (k). However, the Panel had suggested that Brazil should invoke the second paragraph of item (k) which refered to the interest rate provisions of the OECD Arrangement. The Appellate Body had condemned this interpretation, but had left open some questions as to how the first paragraph of item (k) could be applied.

13. Brazil had found several problems with the requirements of the second paragraph of item (k) and its reference to the interest rate provisions of the OECD Arrangement. First, developing countries had not participated in the negotiations of those provisions. Nevertheless, one panel had intended to limit export financing activities of developing countries to the parameters contained in those provisions.

14. Second, developing countries were not familiar with the provisions of the OECD Arrangement. In addition, the OECD Secretariat was not responsive to inquiries from non-OECD participants. Most questions raised by Brazil had not been answered due to the confidential nature of the OECD deliberations. This was surprising, given that many major participants of the OECD had an interest in greater transparency in the WTO.

15. Third, a mere reference in item (k) to the interest rate provisions of the OECD Arrangement was not enough to clarify to non-OECD participants what should be done to comply with the SCM Agreement. The Article 21.5 Panel that had examined the Canada Account Program had tried to define the OECD interest rate provisions. However, that effort had raised more questions than answers. The fact was that no one knew what those provisions were. For example, the "matching" provision of the OECD Arrangement allowed an OECD participant to match unduly generous credit terms offered by another country - whether or not an OECD participant - as long as special and confidential intra-OECD notification procedures were observed. At least one Member believed that "matching" was part of the interest rate provisions of the OECD Arrangement. He underlined that the Panel had disagreed on this point. However, if "matching" was an OECD interest rate provision, then OECD participants could provide OECD minus credit terms to its exporters and still be in compliance with the WTO disciplines. However, transparency would only be ensured for OECD participants. He asked whether a developing country practising "matching", with no OECD notification requirements, would be deemed to be in compliance with the WTO Agreement. He believed that he knew how some other Members would answer this question.

16. Fourth, the OECD rules were not suited to the needs and specificities of developing countries or to any non-OECD participant. For example, it was not clear what was the appropriate Commercial Interest Reference Rate (CIRR) for supplier credits denominated in local currencies. Many export credit agencies in developing countries used London Interbank Rates (LIBOR) as a reference for both fixed and floating rate transactions. He questioned whether that practice was inconsistent with the SCM Agreement as LIBOR was not an OECD benchmark. These questions had not been answered by the Panel. Another question was what version of OECD interest rate provisions should be observed: i.e. that which was in force at the time when the Marrakesh Agreement had been signed or that currently in force. In the 1992 version of the OECD Arrangement interest rate support was not defined in the text "in light of differences between long-established national systems of export credit … in operation in the participating countries". In the latest version of the OECD Arrangement, interest rate support was mentioned in the text. However, non-OECD participants did not know how this mechanism worked or what were the national practices in this regard. It was not clear what the next version of the OECD Arrangement would offer for non-OECD participants. Brazil, as a non-OECD participant, continued its efforts to define multilateral rules in this area. Brazil had never raised this matter during the proceedings as its defense was not based on the second paragraph of

item (k). Nevertheless, this was an important matter for Brazil as well as for developing countries and non-OECD participants. Outside the WTO, the rules on export financing were being developed to suit the needs and interests of OECD participants. At the same time the needs and interests of non-OECD participants were being disregarded. Those uncertainties and inequities in the area of export financing should not be ignored because they were too difficult or sensitive issues to be dealt with.

17. The representative of the European Communities said that the EC had initiated a trade barrier regulation (TBR) investigation on PROEX at the request of the European aircraft producers. This procedure had been suspended in order to monitor Brazil's implementation of the DSB's recommendations. The Appellate Body had confirmed that Brazil had failed to implement the DSB's recommendations by continuing to make payments under the condemned PROEX scheme and by failing to amend PROEX in a manner consistent with the WTO rules. The EC therefore expected Brazil to immediately stop issuing NTN-I bonds for the sale of the outstanding aircraft for which letters of commitment had been given, and to stop providing new export subsidies under the amended PROEX scheme. Failure to do so would oblige the EC to take further steps to protect its rights.

18. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS46/AB/RW and the Panel Report contained in WT/DS46/RW, as modified by the Appellate Body Report.

3. Canada – Measures affecting the export of civilian aircraft: Recourse by Brazil to Article 21.5 of the DSU

(a) Report of the Appellate Body (WT/DS70/AB/RW) and Report of the Panel (WT/DS70/RW)

19. The Chairman recalled that at its meeting on 9 December 1999 the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Brazil concerning the measures taken by Canada to comply with the DSB's recommendations in this case. The Panel Report had been circulated on 9 May 2000 in document WT/DS70/RW. On 22 May 2000, Canada had notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel. The Appellate Body Report had been subsequently circulated on 21 July 2000 in document WT/DS70/AB/RW. Both Reports were now before the DSB for adoption at the request of Canada.

20. The representative of Canada said that his country was pleased with the conclusions of the Appellate Body confirming that as a result of the revisions to the Technology Partnerships Canada Programme, Canada had fully implemented the DSB's rulings and recommendations. Canada welcomed the adoption of the Appellate Body Report. He noted that the Article 21.5 Panel had also made some findings with respect to the Canada Account Programme that had not been appealed. The Panel had called on Canada to adopt a more detailed description of the rules to be followed in its future assistance under that Programme. In reaching this decision the Panel had interpreted, for the first time, the exception in the second paragraph of item (k) of Annex I of the SCM Agreement. This exception related to the provision of export credits consistent with the OECD Arrangement. Canada appreciated the guidance and clarification provided by the Panel on item (k). However, it had some concerns that the Panel had gone beyond its mandate in the details of its prescriptions for compliance.

21. The Panel had determined that Canada's guideline lacked sufficient detail to satisfy the Panel's interpretation of item (k). The Panel had gone on to list the elements that had to be contained in the guideline in order for it to be acceptable and had made suggestions as to how the guideline should be worded. Canada was of the view that, in dictating the precise elements and wording to be contained in the Canadian guideline, the Panel had exceeded its role. The role of the Panel was to interpret the SCM provisions, but it was for Members to implement their obligations in the manner that was most appropriate given their domestic legal system.

22. In addition, the Panel's decision made it impossible for Canada to have been in compliance. He explained that the Panel had ruled that Canada's guideline lacked sufficient detail to satisfy its interpretation of item (k). Yet, as previously explained, item (k) was interpreted for the first time by this very Panel. It was only logical that Canada could not have complied with an as-yet-unknown interpretation. Despite those concerns, Canada was prepared to adopt the Report of the Panel and would implement its recommendations.

23. The representative of Brazil said that a considerable period of time had elapsed since consultations on this matter had been held for the first time. Since then, the Canada Account and the TPC Programmes had been found to be inconsistent with the SCM Agreement. Brazil had also learned more about the financing activities of the Export Development Corporation (EDC). Brazil had serious reservations about the credit terms extended by that agency, but confidentiality barriers had hampered its efforts to have EDC transactions examined by the original panel. Only under Article 21.5 procedures was it recognized that the EDC financing was provided with repayment periods and interest rates that did not conform to the OECD Arrangement. As that recognition had come too late in the process, the original panel's decision in this regard was unfortunate. This matter was now being evaluated by Brazil. The Article 21.5 Panel had agreed with Brazil's position that Canada had not withdrawn the subsidies provided by the Canada Account Programme which, thus far, remained inconsistent with the SCM Agreement. Brazil hoped that its ongoing consultations with Canada would settle this issue.

24. The TPC Programme had originally been found to be a de facto export subsidy. Under Article 21.5 procedures, Brazil had pointed out that any changes made to the legal framework of the Programme should ensure that prohibited export subsidies would no longer be granted. Despite its arguments, the standards adopted by the Article 21.5 Panel, which had been endorsed by the Appellate Body, had set a very low threshold for the implementation of the DSB's recommendations. In fact, under the standards set out in the Article 21.5 Panel Report, a Member could set a de facto export subsidy by making a few changes to the legal framework of the Programme - which was not found to be in violation of the WTO disciplines - and by not taking improper action during the Article 21.5 procedures. However, following the adoption of panel reports under Article 21.5 proceedings, the subsidizing Member would be free to resume the practice found to be in violation of multilateral disciplines and the complaining party would be left with one option, namely, to start a new dispute settlement procedure. This was an unreasonable and highly undesirable outcome.

25. This case involved another important issue for developing countries. That issue related to the Appellate Body's reasoning based on the contingency test aimed at establishing whether or not a subsidy was an export subsidy. Brazil was concerned about the Appellate Body's finding in this regard. The Appellate Body had ruled that even 100 per cent export-oriented industries might be selected to receive subsidies, as long as the granting of these subsidies was not contingent on export sales. In the original proceedings, Brazil had pointed out that in order to meet the repayment requirements of the TPC, the recipients had to achieve sales targets. Since their production was entirely directed to foreign markets, the contingency would be evident: i.e. in order to repay they had to sell and in order to sell they had to export. Not surprisingly, the TPC's recently amended regulations were quite vague on the repayment aspect of the Programme. However, in the proceedings this had been considered to be sufficient. The Appellate Body had stated that Article 3 of the SCM Agreement did not preclude an industrial sector that had a "… high export-orientation from … being expressly identified as an eligible or privileged recipient of subsidies", and that there was also no limitation on " … the amount of subsidies that may be granted to that industry" (paragraph 49 of ABR). This was a very costly enterprise and one that developing countries could not afford.

26. Under the previous item, he had already expressed his country's concerns regarding export financing, a crucial factor in the area of high technology, high cost, and high value-added products. He had shown how tilted the playing field was in favour of developed countries in the area of export

financing. Brazil found that also in the case concerning the subsidies granted to the Canadian aircraft manufacturer - an instrument that was liberally used to support other high technology and highly export-oriented Canadian companies - the playing field was anything but level. Brazil believed that not just a few adjustments to the WTO disciplines were required, if developing countries were to become modest players in industries that developed countries were determined to maintain captive. Brazil considered that the standard chosen by the Appellate Body to assess the new TPC's conformity with the WTO disciplines was very low. However, the Appellate Body had recognized that the outcome of Article 21.5 proceedings "does not, of course, preclude possible subsequent dispute resolution proceedings regarding the WTO consistency of the revised TPC programme, or of specific instances of assistance actually granted under that programme" (paragraph 52 of ABR). Brazil carefully noted the Appellate Body's wording in this regard.

27. The representative of the European Communities said that the EC noted with satisfaction the clarification provided by the Appellate Body with regard to the scope of the Article 21.5 procedure. In the interest of prompt settlement of disputes, a panel examining implementation issues should not only examine whether measures taken by a Member were in conformity with the DSB's recommendations, but should also ensure the overall conformity of such measures with the WTO Agreements.

28. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS70/AB/RW and the Panel Report contained in WT/DS70/RW, as modified by the Appellate Body Report.