WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
9 December 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 9 December 1999

Chairman: Mr. Kåre Bryn (Norway)

Prior to adoption of the Agenda, the Chairman informed the DSB that on 26 November 1999, the United States had notified the DSB of its decision to appeal the Panel Report on "United States - Tax Treatment for Foreign Sales Corporations". Therefore, pursuant to Article 16.4 of the DSU, the Panel Report could not be considered for adoption by the DSB until after completion of the appeal. He proposed that the above-mentioned item not be included on the Agenda of the meeting.

The DSB so agreed.

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1. Brazil - Export financing programme for aircraft

(a) Recourse to Article 21.5 of the DSU by Canada (WT/DS46/13)

The Chairman drew attention to the communication from Canada contained in document WT/DS46/13.

The representative of Canada said that, as set forth in document WT/DS46/13, his country was requesting the establishment of a panel under Article 21.5 of the DSU to examine the consistency of measures taken by Brazil regarding financing for regional aircraft with the SCM Agreement and the DSB's recommendation. The measures announced by Brazil were still not consistent with the SCM Agreement. In Canada's view, the Brazilian measures did not constitute withdrawal of PROEX export subsidies in the regional aircraft sector within the meaning of Article 4.7 of the SCM Agreement. Canada, therefore, was requesting that the matter be referred to the original Panel, pursuant to Article 21.5 of the DSU. Canada also noted the agreement reached with Brazil regarding

the procedures to be applied in this case pursuant to Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, as attached to its request.

The representative of Brazil said that at the 19 November DSB meeting, his delegation had read out a letter addressed to the DSB Chairman which had been sent to him that same day. In that letter, Brazil had informed the DSB of the measures adopted by his country to fully implement the decisions of the DSB concerning the dispute under consideration. That letter had been circulated as document WT/DS46/12 on 24 November 1999. At the present meeting, he did not wish to repeat the points raised in that letter in which Brazil had indicated the changes in domestic legislation that made operations under the PROEX programme compatible with the conditions prevailing in the international financial market, and, therefore, fully consistent with the disciplines of the SCM Agreement. Brazil was disappointed that Canada had requested that the matter be referred to the original Panel pursuant to Article 21.5. On 23 November 1999, Brazil and Canada had reached a bilateral agreement concerning the procedures to be applicable in this case with regard to Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement. That agreement was reproduced in documents WT/DS70/9 and WT/DS46/13, dated 23 and 26 November 1999 respectively. Thus, in line with the terms of the cited bilateral agreement, Brazil did not object to the establishment of the review panel requested by Canada at the present meeting. However, Brazil wished to reserve its rights to appeal the report to be issued by that Panel.

The DSB took note of the statements and agreed to refer to the original Panel pursuant to Article 21.5 of the DSU the matter raised by Canada in document WT/DS46/13. The Panel would have standard terms of reference.

The representatives of the European Communities and the United States, reserved their third-party rights to participate in the Panel's proceedings.

2. Canada - Measures affecting the export of civilian aircraft

(a) Recourse to Article 21.5 of the DSU by Brazil (WT/DS70/9)

The Chairman drew attention to the communication from Brazil contained in document WT/DS70/9.

The representative of Brazil said that at the 19 November DSB meeting, his delegation had pointed out that his country was not convinced that Canada had implemented the DSB's recommendations in this case. At that time, Brazil had also reserved its rights regarding the provisions of Article 22.6 of the DSU. On 23 November 1999, Brazil had sent a letter to the DSB Chairman indicating its reasons why it believed that Canada had in effect not implemented the recommendations of the DSB with regard to neither Canada Account nor Trade Partnerships Canada (TPC). In that letter, Brazil had also requested a special meeting of the DSB in order to refer the matter to the original Panel, if possible, pursuant to Article 21.5 of the DSU. Attached to that letter was a bilateral agreement reached by Brazil and Canada concerning the procedures to be applicable in this case regarding Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement. That letter and its annex were reproduced in document WT/DS70/9, dated 23 November 1999. In line with the terms of that letter and in accordance with the bilateral agreement reached with Canada, his delegation reaffirmed the request that the review panel under Article 21.5 of the DSU be established to consider the implementation by Canada of the DSB's recommendations in this case.

The representative of Canada said that his country had fully implemented the DSB's recommendations and rulings in this dispute. The Panel and the Appellate Body had found that certain Canadian measures, specifically the Canada Account debt financing and support by TPC as

applied to the Canadian regional aircraft industry, constituted export subsidies inconsistent with Canada's obligations under the SCM Agreement. As Canada had indicated at the 19 November DSB meeting, his delegation had fully implemented the ruling by re-mandating TPC and cancelling all contractual obligations to disburse funds after 18 November 1999. In addition, a Ministerial guideline had been issued specifying that all transactions under Canada Account had to be in accordance with the OECD Arrangement. Documents relating to Canada's implementation had been made available at the Permanent Mission of Canada. These actions constituted full implementation of the rulings in the Canada Aircraft case. Canada was, therefore, disappointed that Brazil had requested the establishment of a panel pursuant to Article 21.5 of the DSU. Canada also noted the agreement reached with Brazil regarding the procedures to be applied in this case pursuant to Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, as attached to its request.

The representative of India said that his delegation noted the statements made by both Brazil and Canada and their respective agreements with regard to the procedures to be followed in the two cases. In India's view, these procedures were in accordance with both the letter and the spirit of the DSU with regard to sequencing of multilateral determination and suspension of concessions. India, therefore, welcomed the steps taken by both parties which, it considered, were the proper steps to be taken when there was disagreement as to the consistency of implementing measures.

The DSB took note of the statements and agreed to refer to the original Panel pursuant to Article 21.5 of the DSU the matter raised by Brazil in document WT/DS70/9. The Panel would have standard terms of reference.

The representatives of the European Communities and the United States, reserved their third-party rights to participate in the Panel's proceedings.

3. Withdrawal of an appeal under Rule 30 of the Working Procedures for Appellate Review

(a) Statement by India

The representative of India, speaking under "Other Business", said that in accordance with Rule 30 of the Working Procedures for Appellate Review, the United States had withdrawn its appeal in the case on "United States - Tax Treatment for Foreign Sales Corporations". That withdrawal was in line with the above-mentioned Rule and the United States had the right to do so. However, the Appellate Body, which was required to notify the DSB of the withdrawal, had not provided such a notification. In accordance with Rule 30, "At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB". He was concerned that in the dispute under consideration, no reasons been given to justify the withdrawal. If the US withdrawal had been made for scheduling reasons, it would have been useful for the Appellate Body to notify the DSB of such reasons. If other reasons were involved, it was even more important for the DSB to be informed thereof. He also wished to draw attention to the fact that while under Rule 30 one could withdraw an appeal, no reference had been made to the effect that such an appeal could be launched again. One could argue that the Working Procedures were without prejudice to the right of the appellant or any Member to make an appeal. However, the Working Procedures referred only to the withdrawal of an appeal and made no reference as to the conditional right to be used at any time in future.

The representative of the United States said that his country had notified the DSB of its withdrawal of the appeal in the dispute to which India had just referred. That notification which was contained in document WT/DS108/6 specified that the United States was withdrawing its appeal for scheduling reasons. It was the United States' understanding that the Appellate Body also had to notify

the DSB of the US withdrawal. He was not aware whether that had in fact taken place. He believed that if such a notification had not been made on the part of the Appellate Body, it could have been that the Appellate Body had recognized that it was sufficient that the United States had notified the DSB of its withdrawal.

The DSB took note of the statements.

4. Review of the Dispute Settlement Understanding

(a) Statement by Uruguay

The representative of Uruguay, speaking under "Other Business", said that under the 1994 Ministerial Decision, the Ministerial Conference was mandated to take a decision as to whether to continue, modify or terminate the DSU. However, no such a decision had been taken at the Third Session of the Ministerial Conference held in Seattle. Therefore, it was Uruguay's understanding that the General Council should be in a position to decide on this matter. He noted that the issue of the DSU Review was not on the agenda of the General Council meeting scheduled for 17 December 1999. He also noted that this issue was linked to the efforts to agree on modifications of the DSU. Uruguay had taken part in these efforts and supported them. However, without a decision as mandated by the 1994 Ministerial Decision, the question would arise as to the status of the DSU. There was no common interpretation as to what was meant by non-compliance with the 1994 Ministerial Decision. Uruguay believed that there was a need to ensure the integrity of the DSU as well as to comply with the 1994 Ministerial Decision. If not, a dangerous precedent would be set to the effect that, at any time, a Ministerial Decision could be ignored. It would therefore be appropriate for the General Council to take a decision to continue the current DSU in accordance with the 1994 Ministerial Decision. At a later stage, if a consensus was reached, one could take a decision to modify the DSU in accordance with Article X:8 of the WTO Agreement. However, it was important to ensure the integrity of the DSU.

The representative of the United States said that in his country's view, the Third Session of the Ministerial Conference had been suspended not completed. Therefore, the 1994 Ministerial Decision had not been ignored nor was there any doubt about its current status. A decision on the DSU Review would have to be taken at the Ministerial Conference after the resumption of the Third Session.

The representative of the Philippines said that his country supported Uruguay that it would be prudent for either the Ministerial Conference or the General Council to take a decision on the DSU Review. However, the Philippines also agreed with the United States that the Ministerial Conference had been suspended not concluded. Furthermore, in his country's view, if there was no consensus as to whether to continue, modify or terminate the DSU, the current rules should continue because the lack of decision by Ministers and the failure to reach a consensus on this matter did not in any manner affect the DSU which prevailed over the Ministerial Decision.

The representative of the European Communities noted the statement made by Uruguay. His delegation would have wished to have been informed in advance that such matter would be raised at the present meeting in order to allow for consultations among the EC member States. He also noted the statement made by the United States to the effect that the Third Session of the Ministerial Conference had been suspended. That fact should reassure those Members who were concerned about the issue. His delegation wished to further reflect on this matter and believed that, at this stage, it was not appropriate to take a decision thereon.

The DSB took note of the statements.