WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/81
26 June 2000

(00-2606)

Dispute Settlement Body
22 May 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 22 May 2000

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

Prior to the adoption of the agenda, the item concerning the Panel Report on "Brazil - Export Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU" (WT/DS46/RW) and the item concerning the Panel Report on "Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU" (WT/DS70/RW) were withdrawn from the agenda following Brazil's appeal of the Reports.

1. Brazil - Export financing programme for aircraft

(a) Recourse by Canada to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU (WT/DS46/16)

1. The Chairman drew attention to the communication from Canada contained in document WT/DS46/16.

2. The representative of Canada said that his country was requesting authorization from the DSB to take appropriate countermeasures pursuant to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU in the amount of Can$700 million per year. It was with regret that Canada was making its request. However, it had been forced to take this step due to Brazil's persistent disregard of its binding obligations under the WTO Agreement. Canada valued strongly its relations with Brazil and the two countries had an extensive and significant array of bilateral, political, trade and investment links. However, Canada fully expected Brazil to live up to all of its international commitments.

3. In order to put Canada's request in context, he wished to briefly recall the history of the dispute. Canada had first requested consultations with Brazil in 1996 and then also in 1996 it had requested the establishment of a panel. The panel request had subsequently been withdrawn to enable the parties to seek a negotiated settlement. Canada had always been prepared to work towards a mutually satisfactory solution. Unfortunately, these negotiations had failed to resolve the dispute, and Canada had been compelled to submit another panel request in July 1998. Subsequently, in April 1999, the panel had found that Brazil violated its obligations under Article 3 of the SCM Agreement by providing prohibited export subsidies. In August 1999, the Appellate Body had upheld the panel's finding. The resulting DSB's rulings included the recommendation that Brazil withdraw its illegal export subsidies within 90 days. Brazil had to comply with this ruling by 18 November 1999 but had failed to do so.

4. Canada had then entered into an agreement with Brazil to establish the correct sequencing: i.e. it had agreed that it would not proceed immediately to seek countermeasures, but would first request an Article 21.5 panel to determine whether Brazil had complied with the DSB's rulings. Canada had followed the letter and the spirit of the DSU and the Article 21.5 panel had circulated its report on 9 May 2000. As expected, the panel had found that Brazil's measures to comply with the DSB recommendations and rulings either did not exist or were not consistent with the SCM Agreement, and that Brazil had failed to withdraw the export subsidies for regional aircraft under PROEX. The Article 21.5 panel report had thus fully endorsed the position maintained by Canada from the beginning of this dispute, namely, that Brazil's PROEX export subsidies programme was illegal, and could not continue to be provided for undelivered aircraft or for new contracts.

5. Thus Brazil had lost in three separate proceedings: i.e. before the original panel, the Appellate Body and the Article 21.5 panel. There was a well-established rule in baseball: three strikes and you are out. Unfortunately, Brazil did not seem to want to understand this rule. Brazil now wanted a fourth chance by seeking to appeal the decision of the Article 21.5 panel. Even if one were to assume that an Article 21.5 panel's decision could be appealed - which was not clear - the only purpose of such an appeal would be for Brazil to delay, once again, its obligation to comply. Such delays in implementation would only serve to compound the damage already suffered by Canada's regional aircraft industry. Every month, 13 new Brazilian regional aircraft were delivered, with this number slated to increase by 2001. Also every month, Brazil granted illegal subsidies worth more than Can$47 million. Brazil's appeal of the Article 21.5 panel report was simply an attempt to continue to pay those subsidies - subsidies found to be prohibited three times by the WTO - for an additional two months. Canada resisted this attempt not only for the commercial harm it caused or for the distortions in the international economy it implied, but also in order to uphold the integrity of the dispute settlement process and the system of laws governing the conduct of nations. The failure of Brazil to comply with its obligations would have institutional and systemic implications, since the inability of the WTO to ensure compliance with its rulings would only bring the dispute settlement system into disrepute. Canada believed that it was time Brazil heeded that process and respected that decision and law.

6. If the Article 21.5 panel report was appealed, then Canada would, of course, await the outcome of the appellate process before returning to the DSB to seek authorization to take countermeasures. This was a point of fundamental importance. Canada fully respected the principle of sequencing and would not seek countermeasures until the Appellate Body report had been adopted. Moreover, any request for countermeasures would be fully consistent with the findings of both the Arbitrators and the Appellate Body. However, there was no reason why the arbitration on the level of countermeasures could not proceed concurrently with the appeal. The arbitration was a separate and largely technical exercise to assess the appropriate level of countermeasures. It would be a needless waste of time and the Canadian interests would continue to be damaged, if this process could not begin until the appeal was over. This fact had already been recognized in the Salmon case (WT/DS18). In July 1999[1], on the same day, and in the same case, the DSB had agreed to two concurrent proceedings: (i) it had established an Article 21.5 panel to determine the consistency of Australia's implementing measures; and (ii) it had referred to arbitration Canada's request for retaliation. The situation before the DSB at the present meeting was similar. If in the case at hand the arbitration was completed before the Appellate Body had rendered its decision, then one would simply hold the arbitral award in reserve and await the outcome of the appeal. This approach was fully consistent with Canada's longstanding strong support for the principle of multilateralism of the dispute settlement mechanism.

7. In recent negotiations, Canada had offered to delay invoking its rights to seek countermeasures under Article 4.10 of the SCM Agreement in exchange for Brazil's commitment to

[1] WT/DSB/M/66.

forgo issuing new PROEX bonds on any aircraft delivered while settlement negotiations were ongoing. He regretted that Brazil had rejected that offer. Accordingly, Canada maintained its request for appropriate countermeasures. The text of the WTO Agreement was clear: i.e. Canada's request had to be granted, unless the DSB decided by consensus to reject the request - Canada would obviously not join in any such consensus - or Brazil requested that the matter be referred to arbitration. There were no other options. Canada had acted in order to safeguard its legal rights. Both the WTO Agreement and the Canada-Brazil bilateral agreement provided time-periods within which a complaining party had to act. His country had respected those time-periods and had thereby preserved its rights. He stressed that Canada had been forced into this action as a last resort. There were no winners in a situation of retaliation. This was why - despite the long-standing dispute and the three decisions in its favour - Canada would continue to negotiate with Brazil, in utmost good faith, in an effort to resolve the dispute. In fact, bilateral negotiations would resume later in the week. Canada called on Brazil, yet again, to respect its WTO obligations and to comply with the DSB rulings.

8. The representative of Brazil said that, as stated by Canada, both countries enjoyed an excellent relationship and supported the multilateral trading system and the rule of law. However, there was one difference, namely, Canada was a developed country while Brazil was a developing country. He recalled that on 23 November 1999, Brazil and Canada had signed two bilateral agreements regarding their respective Aircraft cases. Those agreements were aimed at establishing a procedural sequence between Articles 21 and 22 of the DSU. The parties had agreed that arbitration under Article 22.6 of the DSU would not take place until a proper finding under Article 21.5 procedures on implementation was available. Both parties were aware of serious systemic implications of precedents when a complainant was allowed to unilaterally and arbitrarily determine whether or not the respondent had implemented the DSB's recommendations. During their negotiations, Brazil and Canada had disagreed on two basic points: (i) whether the matter should be referred directly to the Appellate Body, which as the higher court had examined the two cases in the first stage of the dispute. In line with the first sentence of Article 21.5 DSU, the parties had agreed that the original panels should initially conduct the implementation review; and (ii) the possibility to appeal Article 21.5 panel reports. Brazil, unlike Canada, believed that such an appeal was possible. Therefore, the text of the bilateral agreements had deliberately been left silent on this point. The idea was that in case such appeals were to be made, the Appellate Body would have to decide whether or not to accept them. Since the two appeals had just been made it was up to the Appellate Body to deal with the issue. Therefore, Brazil was surprised about Canada's decision to request authorization to take countermeasures on the basis of the findings of the Article 21.5 panel report and despite the fact that the reports had been appealed and would not be adopted by the DSB at the present meeting. He did not wish to engage in a lengthy legal interpretation of the bilateral agreements. Brazil and Canada had disagreed on how to interpret that agreement. It was enough to note that Canada's interpretation of that agreement had defeated its original purpose, namely, to establish a procedural sequence between Articles 21 and 22 of the DSU and had led to absurd results.

9. He noted that the panel report[2] in relation to the item under consideration would not be adopted at the present meeting and, therefore, there was no legal determination on the degree of inconsistency, if any, of the implementation measures taken by Brazil. In the first stage of the dispute, the Appellate Body had questioned several fundamental findings of the panel. It was Brazil's firm belief that the Article 21.5 panel had insisted on the mistakes made in the first stage of the dispute, and that the findings made under the Article 21.5 review would be overturned by the Appellate Body. With regard to the case where Brazil was the complaining party, Canada had informed Brazil that, according to its interpretation of the bilateral agreement, Brazil had now missed the deadline to request authorization to impose countermeasures regardless of what the Appellate Body were to conclude. The Article 21.5 panel had examined two measures: Technology Partnerships Canada (TPC) and the Canada Account. It had found that Canada had failed to

[2] WT/DS46/RW.

implement the DSB recommendations concerning the Canada Account, but had implemented the DSB's recommendations with regard to TPC. Thus Brazil was appealing the conclusion with regard to TPC. If Brazil were to initiate the procedures under Article 4.10 SCM Agreement or Article 22.2 DSU, such procedures would have to be limited to the Canada Account. According to Canada's interpretation of the bilateral agreements, Brazil could never take countermeasures with regard to TPC. It could not do so now because the Article 21.5 panel had found compliance. It could not do so later, even if the Appellate Body were to reverse the panel's conclusions because the deadline to request authorization to impose countermeasures would have passed before the Appellate Body could rule. This interpretation of the WTO Agreements and the bilateral agreements, while convenient for Canada, amounted to an absurd interpretation. Brazil did not agree with Canada's interpretation that the bilateral agreements allowed one of the parties to initiate procedures under Article 4.10 of the SCM Agreement or Article 22.2 DSU on the basis of an Article 21.5 panel report that had not been adopted. The bilateral agreements established that the deadline for action under the first sentence of Article 22.6 DSU was "… 15 days after the circulation of the report under Article 21.5 of the DSU …".[3] Canada's interpretation of the bilateral agreements was without legal merit, defeated the purpose of the agreements, led to absurd results and amounted to a unilateral and arbitrary determination by the complaining party on the implementation of the DSB's recommendations by the responding party.

10. It was difficult to understand that Canada was seeking the DSB's authorization before the Appellate Body had made its conclusions and was thereby forcing Brazil to request arbitration. Due to the inconsistencies in the DSU text on the question of sequencing between Articles 21.5 and 22.6 of the DSU, Brazil was being forced to request, pursuant to Article 22.6 of the DSU, that the matter be referred to arbitration. It had no other alternative. In fact, since there was no legal determination on the degree of consistency, if any, of the implementation measure taken by the parties, Brazil had to object to the level of suspension proposed by Canada, which was entirely arbitrary. Brazil regretted that Canada's request was on the agenda of the present meeting and believed that its rights for a full defence under the arbitration procedures would be irreparably impaired if the Arbitrators had to start any substantive work before the Appellate Body report had been adopted by the DSB. Prior to the present meeting, Brazil had filed two notices of appeal of the Article 21.5 panel reports in relation to the Aircraft disputes. Brazil would challenge a number of the legal findings and conclusions of the panels, and hoped that the Appellate Body would agree that Brazil's appeals were justified. He did not wish to go into the details of Brazil's arguments to be made before the Appellate Body. He only wished to draw attention to some important issues concerning these appeals.

11. Both cases involved export subsidies and raised questions of what Members could or could not do. In Brazil's view, the reports represented an imbalance between what developed-country Members could do in relation to what developing-country Members could do. For that reason developments concerning those disputes should be monitored with the above question in mind. There were also issues of evidence and proof which raised systemic concerns. He recalled that in the original case concerning Canada's subsidies, the Appellate Body had disapproved Canada's refusal to provide information requested by the Panel. The issue of Members' obligation to cooperate in good faith in dispute settlement procedures and to provide all relevant information, had been and remained an issue in the disputes under consideration. Another issue concerned the legal or evidentiary standard to be applied by panels to statements made by Members. In the original case against Brazil, Brazil had made a statement before the panel concerning the interest rates applicable to a number of transactions in the Brazilian market. The Panel had requested details in writing and, unfortunately, Brazil had not been able to supply that information within the time available. The Panel had noted this and had ruled against Brazil on the ground that it had not met the burden of proof. Brazil had not appealed the Panel's conclusion. Furthermore, when the Appellate Body, while ruling on a related issue, had noted that Brazil had not supplied documentary evidence to support that particular claim,

[3] WT/DS46/13 and WT/DS70/9.

Brazil had not raised any complaints. It had regretted that the information was not provided in time and had accepted the ruling.

12. Brazil was surprised and disappointed when the Article 21.5 panel had applied the opposite standard to an important statement by Canada. Canada had made a statement concerning the interest rates applicable to a number of transactions in Canada, but had refused to provide any details. However, the Panel did not hold, as in case of Brazil, that Canada had not supported its claim with documentary evidence. On the contrary, the Panel had stated that it could not assume bad faith on the part of Canada and therefore it had to accept the veracity of Canada's statements. However, a year earlier, in the same circumstances, the same Panel had assumed bad faith on the part of Brazil and had not accepted the veracity of Brazil's statements. He questioned whether it was in this way that special and differential treatment should be interpreted. The relevant parts of the two reports did not show a substantive difference between the statements made by Brazil and Canada or with regard to the documentary evidence that they had been unable to produce. The only difference was that one statement had been made by a developing country, Brazil, and the other by a developed country, Canada. The statement made by Brazil had been rejected by the panel while Canada's statement had been accepted.

13. Unfortunately, this was not the only example where Canada had been effectively rewarded for the absolute lack of transparency regarding its measures. The original panel that had examined the financing practices of the Export Development Corporation (EDC) had found that Brazil had not provided sufficient evidence to establish a prima facie violation of the SCM Agreement by Canada. That panel had not been impressed by the fact that Brazil did all it could possibly do to obtain information concerning EDC operations, and that such efforts had always been defeated by the allegations of confidentiality by Canada. The panel had decided that Canada was not breaching its duty to be forthcoming and to engage in the DSU procedures in good faith efforts to resolve the dispute. The panel had refused to draw adverse inferences from Canada's refusal to provide the data that was requested by the panel even in light of the provisions of Article 13.1 of the DSU that "[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate".

14. However, the Appellate Body recalled that "Members are ... under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU". Nevertheless, despite its misgivings about the panel's conclusions, the Appellate Body had indicated that it could not hold that the panel had erred in law and had implicitly invited Brazil to pursue the case once more. One year later, in the Article 21.5 review conducted by the panel reviewing Brazil's export financing programme, Canada had finally admitted that EDC provided financing below the OECD CIRR rate. That panel, not surprisingly, had admitted to be "struck by Canada's assertion that export credits provided by EDC through the 'market window', even at interest rates below CIRR, were nevertheless 'commercial' export credits that did not confer a benefit within the meaning of Article l". Despite the Appellate Body's views on Canada's lack of transparency and the panel's statement about how EDC operated in the so-called "market window", Brazil had found no remedy concerning EDC financing, which would continue to injure exports from Brazil and other Members. To find satisfaction, Brazil would have to reinitiate a costly case that would last 18 months or more. Brazil would also have to endure a few more years of injury caused by the TPC if the Appellate Body had upheld the Article 21.5 panel review. That programme had initially been found to be a "de facto" export subsidy. Despite making few cosmetic changes to the language of the programme, which still targeted exactly the same industries, Canadian authorities had announced publicly that they would provide even more funds to the recipients of TPC assistance. In other words, the same recipients will receive more funds to conduct the same programmes. The only difference was that the Canadian Government now risked not being fully repaid for the grants authorized under TPC, a luxury of proportions no developing country could afford. In short, the panel had found that

Brazil had to sustain several more years of injury before a new and costly case could be made against the TPC.

15. Not all of the issues presented in those complex cases were as obvious as those to which he had just referred. There were also other systemic issues of interest to Members, in particular developing-country Members. One concerned the extent to which the WTO permitted another organization - the OECD - to make WTO rules. Many Members would be surprised to learn that this was being done with an exemption for the OECD rules contained in the second paragraph of item (k) of the Illustrative List of Export Subsidies. At any time the OECD members decided to change their rules with regard to export credits, they also changed the WTO rules. Yet most WTO Members were not members of the OECD. The OECD exemption was not a subject of these appeals, but constituted an important part of these cases. The panel had provided an extended discussion on this issue.

16. Brazil would continue to work with Canada to achieve a negotiated solution to these long-standing disputes. In fact, Brazilian negotiators would shortly meet with their Canadian counterparts. At the same time, Brazil would pursue the appeals, and was confident that the Appellate Body would take a different view from that taken by the panels on those important legal questions. However, regardless of their outcome, the cases in question raised a number of very important issues relating to fairness and balance between Members and, as such, deserved Members' attention.

17. The representative of the European Communities said that the EC had followed the matter at hand with great interest and expected Brazil to implement very quickly the DSB's recommendations. He noted the statement by Canada to the effect that millions of dollars were still being paid every month. Nevertheless, on account of the systematic implications arising once again from the difficult problem of the sequencing of Articles 21.5 and 22 of the DSU, the EC considered it necessary to act with prudence and restraint, as long as the basic problem of the relationship between the two Articles remained unsolved. The EC was therefore surprised that Canada, having had recourse to Article 21.5, had not pursued this line of action to its logical conclusion and maintained its request for authorization from the DSB to implement retaliatory measures, since the DSB had yet to issue a ruling concerning Brazil's failure to make its regime WTO-consistent, and in view of the fact that the panel report had not been adopted and was the subject of an appeal. Furthermore, it was difficult to imagine how the Arbitrator with a mandate provided for by Article 22.6 would be able to determine if the level of the suspension requested was equivalent to the level of the nullification or impairment resulting from a new measure whose consistency was being examined by the Appellate Body. The EC concluded that all the controversy and difficulties of implementation over sequencing created a continuing difficulty regarding the implementation of the relevant DSU provisions. This difficulty needed to be resolved as a matter of urgency in order to avoid further problems with regard to the requirements of due process in the relevant DSU procedures.

18. The representative of Uruguay said that the issue of sequencing between Articles 21.5 and 22 had been discussed in the context of the DSU Review, but, thus far, it had not been resolved. The case under consideration pointed out to the need to resolve problems related to the inconsistencies in the DSU text. Uruguay believed that, in the case at hand, the procedures of Article 21.5 had not been concluded and, therefore, it would not be appropriate to take further action. His country always supported the principle of sequencing in procedures starting from the adoption of panel and Appellate Body reports leading up to the implementation stage under Articles 21.5 and 22.6. Uruguay would have preferred that Canada did not take the position it had taken at the present meeting, in particular, in light of the ambiguities in the DSU text. Both Canada and Brazil had raised substantive issues but the correct sequence should be respected.

19. The representative of the United States said that the question of whether there was any requirement for sequencing Articles 21.5 and 22 had already been discussed on many occasions both in the DSB and in other fora. He therefore did not think that it was necessary to repeat those long

debates in the present DSB meeting. However, the position of the United States was quite clear on this question and that position had not changed. The approach agreed by Canada and Brazil to refer the matter to arbitration at the present time rather than waiting was a sensible approach and would help to move the process forward. Like the EC, the United States also hoped that it would be possible to make changes to improve the operation of the DSU.

20. The representative of Malaysia said that he wished to make comments from the systemic point of view and in the light of the implementation problems faced by developing countries, in particular under the SCM Agreement. In Malaysia's view, Canada should have awaited the outcome of Article 21.5 appeal before proceeding with its request for retaliation. While his country fully recognized the position of Canada, which as the aggrieved party would wish an early redressal, it believed that the process had to be respected. The current DSU text did not outlaw an appeal of an Article 21.5 panel report and Brazil had chosen to seek recourse to this process. Irrespective of earlier models used in the Salmon case, Canada should have awaited the outcome of the Article 21.5 appeal. Otherwise, it would further overload the system and would complicate the question of sequencing. Malaysia acknowledged that Canada would await the outcome of the Article 21.5 panel prior to seeking authorization from the DSB to suspend concessions. However, even seeking authorization at the present meeting, in the absence of the multilateral determination, was inconsistent with the DSU. He also wished to seek clarification from Canada in regard to its intention to suspend Brazil from its GSP scheme. That scheme was a unilateral initiative and Canada had a right to do whatever it wished at any time. However, he wished to know whether Canada intended to do so within the meaning of Article 22.2 of the DSU which stipulated that suspension of concessions or related obligations were limited to the covered agreements.

21. The representative of India said that the matter under consideration raised many systemic concerns. His country shared the views expressed by Malaysia. The DSB meetings in which ambiguities in the DSU text, real or perceived, had to be dealt with constituted sad occasions. At the July 1999 DSB meeting[4], India had made a statement with regard to the Salmon case which involved Canada and Australia. At that time, India had stated that Members wished to preserve their rights in legally ambiguous situations but in that process multilateralism was being undermined. In India's view, Articles 21.5 and 22 of the DSU were sequential. India could not accept a situation in which a prevailing party unilaterally determined compliance or non-compliance by a losing party. It was also clear that a party had a right of appeal from the Article 21.5 panel's decision. He noted that Canada had always taken a principled stand on the issue of sequencing and had always supported multilateralism. At the present meeting, Canada had stated that it could not wait until the appeal was over. Canada was unlikely to lose much in this long-standing dispute if it waited for another two or three months. On the other hand, the benefits to the system would be enormous if Canada could defer its request for retaliation until such time as the Appellate Body had concluded its proceedings. India, therefore, wished to make an appeal to Canada in this regard. There was certain amount of delay in any judicial process and therefore possibility of delay could not be cited as an argument against allowing the judicial process to run its full course. Members should reflect on the situation in the case at hand and in past cases such as Bananas and Salmon. It was important that the DSU ambiguities, real or perceived, were removed collectively in good faith. Unless Members acted quickly, the credibility and predictability of the dispute settlement mechanism would be undermined.

22. The representative of Argentina said that, from the systemic point of view, his country believed that it was not appropriate to resort to arbitration on the level of suspension when there was still no multilateral determination with regard to compliance.

23. The representative of Hong Kong, China said that his delegation did not have a trade interest in the matter at hand and only wished to make comments from the systemic point of view. Canada

[4] WT/DSB/M/66.

had stated there were no winners in terms of retaliation. He, therefore, urged both parties to make an effort towards reaching a mutually agreeable solution as soon as possible. Since the panel report had been appealed it would not be adopted at the present meeting. Hong Kong, China believed that Article 21.5 procedures should be exhausted before the complaining party might proceed to Article 22 of the DSU. This was in line with the fundamental principle of sequencing. Hong Kong, China was concerned that the request at the present meeting would have an impact on that principle. The request questioned the legal basis and conditions for invoking Article 22 of the DSU. Moreover, the question of whether and how such request might affect the ongoing efforts by many Members in resolving the problems arising from Articles 21 and 22 in the wider context should be monitored closely. Hong Kong, China urged Canada to reconsider its request. It urged both parties to intensify their bilateral efforts in finding an early solution to the dispute. From the multilateral point of view it was necessary to urgently seek an early agreement on how to resolve the issues arising from Articles 21 and 22 of the DSU.

24. The representative of Saint Lucia said that her delegation wished to restate its believe in the sequencing issue as set out in the DSU calling for clear multilateral determination before recourse to Article 22.6. Saint Lucia shared many of the views expressed by previous speakers, in particular, the concern expressed by Malaysia with regard to suspension of the GSP scheme for Brazil. Her delegation also shared the disappointment about sanctions against developing countries. At the same time, Saint Lucia respected Canada's adherence to following procedures under Article 21.5. It believed that Canada, as a supporter of the multilateral trading system, should consider restraint. Recourse to arbitration, at this stage, would be of little effect because the Appellate Body could change the results of the case. Saint Lucia, therefore, asked Canada to go a step further in support of the multilateral trading system while all tried to solve the ambiguities in the DSU text.

25. The representative of Canada said that he wished to respond to a few issues raised both by Brazil and other delegations. First, he wished to reassure delegations that the parties should spare no effort in seeking a negotiated solution. Canada had never pulled back from that attempt and, as stated by both parties at the present meeting, negotiations would start this week. He hoped that those continued efforts would provide a satisfactory resolution to the dispute. Second, it had been recognized that the difficulties faced in the case at hand were due to the deficiencies in the DSU. There were two ways of resolving them. First, Members could collectively make the appropriate legislative changes to fill in those gaps in an efficient way and Canada supported any collective efforts along those lines. Second, the parties to the dispute could try to reach a contractual agreement. Canada had reached such an agreement with Brazil. In the event of a failure of a collective legislative arrangement and a failure of a contractual arrangement between the two parties, the current text of the DSU should apply. Therefore, to protect and promote its interest, Canada had to follow the DSU text.

26. Third, one delegation had stated that it was surprised about Canada's position taken at the present meeting. He believed that that surprise was because of Canada's record on the issue. Canada was clearly following the sequencing that it had worked out in its bilateral agreement with Brazil. Canada had been a leading proponent in the DSU Review of the need to resolve the sequencing problem. To that end, it had tabled a proposal to establish clear and unambiguous procedures for sequencing, which had formed the basis for the subsequent negotiations on this issue. Unfortunately, the DSU amendments had not been adopted by the Third Ministerial Conference in Seattle and, in the absence of that legal certainty, Canada had no choice but to proceed in the manner that ensured that there was no risk of impairment to its legal rights. Canada looked forward to the resolution of those systemic issues through broader multilateral discussions.

27. Fourth, Brazil and other Members had referred to the broader issue in relation to developing versus developed countries. The principle of illegal subsidies was an issue that was viable for both developing and developed countries. However, he wished to make comments with regard to Brazil's statement on this matter. The Article 21.5 panel as well as earlier decisions had found that Brazil had

lost its developing-country exemption for the PROEX export subsidy because it had failed to comply with the conditions not to increase the level of export subsidies and to phase out the subsidy by 2003. Evidence before the panels demonstrated that Brazil had increased the overall level of its export subsidies and had also committed itself to grant PROEX well after the year 2002. The panels had also rejected the use of what has been termed "Brazil risk" that was high domestic interests rates reflecting uncertainty about the country's economic prospects as a justification of the PROEX export subsidy. But PROEX was used to buy down the interest rates applied to loans assumed by Embraer customers outside of Brazil and, therefore, the subsidy amounted to a transfer of resources from a developing nation and its tax payers to what could be called prosperous North American and European aircrafts and airlines. Neither of those two specific points should be ignored in regard to this specific issue in relation to the question of developing versus developed countries.

28. Finally, Brazil had referred to the issue of TPC as well as the Canada Account. The Article 21.5 panel in the Canadian aircraft case confirmed, in no uncertain terms, that the revisions that Canada had made to its TPC programme had fully implemented the DSB's rulings and recommendations. With regard to the Canada Account, however, the panel had found that the measures taken by Canada were not sufficient. The panel had adopted a narrower interpretation on the exemption in item (k) of Annex I of the SCM Agreement than that put forward by Canada. Canada noted that this had not been interpreted prior to the panel's rulings and appreciated the guidance and clarification that had now been provided. Accordingly, Canada had not appealed this decision but instead it was in the process of developing a regulatory instrument that would fully implement the Article 21.5 panel's decision.

29. The representative of Brazil said that his country was not seeking exemption from the SCM Agreement. In his statement concerning the OECD, he had only referred to the question of fairness. He did not wish to go into details of the arguments to be made before the Appellate Body. He only wished to indicate that his reference to special and differential treatment in no way meant that Brazil should be exempted from the rules. He had also refered to different ways in which good faith of the parties had been recognized or not by the panel. Those points would be examined by the Appellate Body. Some Members believed that, from the systemic point of view, Canada should withdraw its request for retaliation in order to act in line with the principle of sequencing. There was a legal problem because there was no DSB recommendation and a practical problem because the case involved many specific measures which could make the assessment of the Arbitrators completely different. The same would apply to a possible request by Brazil for retaliation in regard to TPC. Therefore, the best approach would be for Canada to withdraw its request which would be consistent with its strong support for multilateral rules. If not, there should be an understanding that Arbitrators would not even meet before the Appellate Body had completed its proceedings.

30. The Chairman said that a large number of delegations, if not all, who had spoken at the present meeting, had expressed concern as to the problems created by certain perceived ambiguity in the DSU, in particular over the question of sequencing. He noted that this was not the first experience of problems in this regard. It was encouraging to note that there appeared to be a willingness on the part of a number of delegations to continue to address these. He believed that this was desirable and hoped that delegations would continue and perhaps intensify their discussions in this regard with a view to trying to clarify the provisions concerned as soon as possible.

31. He then proposed that the DSB take note of all the statements made at the present meeting, and agree that, as requested by Brazil pursuant to Article 4.11 of the SCM Agreement and Article 22.6 of the DSU, the matter be referred to arbitration to determine whether the countermeasures requested by Canada in document WT/DS46/16 were appropriate; it being understood that no countermeasures would be sought pending the Appellate Body report and until after the Arbitration report in the present case.

32. The DSB so agreed.

33. The representative of the European Communities said that the decision taken at the present meeting with regard to the bilateral arrangements, which had a primarily pragmatic aim to avoid the paralysis of the system, should not constitute a precedent prejudging the need to find a solution to the problem of the sequence between Articles 21.5 and 22 of the DSU.

34. The DSB took note of the statement.