RESTRICTED

WORLD TRADE ORGANIZATION

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DISPUTE SETTLEMENT BODY
27 September 1996

MINUTES OF MEETING

Held in the Centre William Rappard
on 27 September 1996

Chairman: Mr. Celso Lafer (Brazil)

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1. Brazil - Export financing programme for aircraft
- Request by Canada for the establishment of a panel (WT/DS46/2)

The Chairman drew attention to the communications from Canada and Brazil contained in documents WT/DS46/2 and WT/DS46/3 respectively, the latter having been circulated at the request of Brazil.

The representative of Canada recalled that in June 1996, Canada had requested consultations with Brazil pursuant to Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM), regarding certain export subsidies granted under Brazil's *Programa de Financiamento às Exportações* (PROEX). The request for consultations had been circulated on 21 June 1996. The consultations held on 22 and 25 July in Geneva, while helpful in providing a better understanding of the operation of PROEX, had not resolved all Canada's concerns. In its communication, dated 16 September, Canada had sought the establishment of a panel under Article XXIII of the GATT 1994, Articles 4 and 30 of the SCM Agreement and Articles 4 and 6 of the DSU. At the present meeting, Canada requested that a panel be established immediately in accordance with Article 4.4 of the SCM Agreement and that the case be treated on an accelerated basis in accordance with Article 4.12 of the SCM Agreement.

The representative of Brazil said that his Government was concerned by Canada's decision to request a panel to examine Brazil's PROEX. During the consultations on this matter, Brazil had expressed its willingness in a constructive spirit to submit all relevant information which would enable Canada to understand the scope and operation of PROEX. It had also been made clear that Brazil did not consider PROEX as a subsidy, certainly not a prohibited subsidy. Despite the Canadian interpretation of PROEX as a subsidy, Brazil was nevertheless covered by the provisions of special and differential treatment for developing-country Members contained in the SCM Agreement. During the consultations, Brazil had also expressed concerns regarding certain aspects of Canadian export incentives for aircraft.

Canada's request raised a number of issues which could be summarized as follows: (i) in its request for consultations contained in WT/DS46/1, Canada had included a reference to Article 27 of SCM Agreement, but had withdrawn such reference from its request for the establishment of a panel. In Brazil's view, Article 27 of the SCM Agreement was intrinsically related to the application of Article 3 of that Agreement, as explained in document WT/DS46/3; (ii) in its request for the establishment of a panel, Canada had invoked Article 4 of the SCM Agreement which provided for the immediate establishment of a panel and halved the ordinary time-periods applicable under the DSU. This meant the adoption of "fast-track" procedures for the settlement of this dispute. However, in its request for a panel, Canada had also included references to Articles XVI and XXIII of GATT 1994. While Article 4 of the SCM Agreement provided for "fast-track" procedures, its scope was limited only to issues raised under Article 3 of the SCM Agreement. There was no provision for "fast-track" procedures with regard to Article XVI and XXIII issues. Consequently, Canada should not invoke Articles XVI and XXIII of GATT 1994 if it was seeking "fast-track" procedures under Article 3 of the SCM Agreement. Therefore, Brazil was not in a position to accept the establishment of a panel under the legal framework proposed by Canada.

The representative of Jamaica said that his delegation had examined the request by Canada and the recent communication circulated at the request of Brazil in WT/DS46/3. He asked whether a panel would be established under the SCM Agreement and not under Article XVI of GATT 1994. He also asked whether standard terms of reference would be used by this panel. Finally, he asked if the nature of the measures taken by Brazil would be significantly different from those taken in the context of the OECD's Development Assistance Committee in respect of export credits for trade.

The representative of Canada said that the procedures to be followed by a Member challenging a prohibited subsidy were set out in Article 4 of the SCM Agreement. In particular, Article 4.4 of the SCM Agreement required the immediate establishment of a panel if consultations did not result in a mutually agreed solution. Furthermore, Articles 12.2 and 12.3 of the DSU clearly provided for the demonstration of good faith and flexibility with regard to the establishment of time-frames by a panel, in consultation with the parties. As this was essentially a prohibited subsidy issue, Canada believed that it was appropriate at the present meeting to establish a panel under the accelerated procedures set out in Article 4 of the SCM Agreement. For Members uncertain as to how the provisions of Article 4 would apply in this case, Canada suggested at the very least, a bifurcation of the time-frames with regard to the issues to be examined by the panel. In Canada's view, the prohibited subsidy issue must be decided upon first, in accordance with the mandatory language of Article 4.12 of the SCM Agreement, which expressly prescribed that the panel should rule on the prohibited subsidy issue on an expedited basis, namely, half the time-frame prescribed under the DSU. Other issues could then be examined by the panel within the normal time-frame.

In a spirit of cooperation and flexibility, Canada was willing to discuss with Brazil the inclusion of Article 27 of the SCM Agreement in the terms of reference for this panel. However, Canada wished to make it clear that each Member had the right to have recourse to any relevant provision of the WTO Agreement in response to arguments made by another Member in the context of dispute settlement

under the DSU. Canada believed that Brazil's request for the inclusion of Article 27 of the SCM Agreement in the terms of reference must not be seen as an indication that parties to a dispute had the obligation to list all the provisions of the WTO to which recourse could be made in defending a challenge. With regard to Jamaica's reference to the OECD Export Credit Consensus and Brazil's comment on Canada's export incentives for aircraft, she pointed out that the issue before the DSB was Brazil's subsidies under PROEX.

The representative of Brazil said that two completely different issues were at stake, namely, the establishment of a panel and the possible terms of reference of the panel. With regard to the establishment of a panel, his delegation firmly believed that the invocation of the provisions of Article 4 of the SCM Agreement related only to Article 3 of that Agreement. However, the current request for the establishment of a panel covered much wider scope since it asked the panel to determine that PROEX was inconsistent with the SCM Agreement, in particular Article 3 as well as Article XVI of GATT 1994 and that the operation of this programme nullified and impaired the benefits accruing to Canada under the WTO Agreement. Brazil, which believed that this was an important issue of law and precedent, could not accept that Article 4 which only related to Article 3, be used to establish the "fast-track" approach with regard to the establishment of a panel which would also be requested to rule on issues beyond Article 3 of the SCM Agreement.

With regard to the establishment of the terms of reference, Brazil had circulated document WT/DS46/3 because Canada had withdrawn the reference to Article 27 of the SCM Agreement which was the legal basis for special and differential treatment in favour of developing countries. In defining the terms of reference of the panel Article 27 of the SCM Agreement should be seriously considered.

The representative of Canada said that her country believed that this debate had highlighted the fact that further discussion was required with regard to the question of timing as well as the joint operation of different dispute settlement mechanisms under the integrated WTO Dispute Settlement Understanding. This issue would certainly arise again in the future should any Member wish to exercise its right to request that a panel examine an issue covering both prohibited subsidies and another aspect of any WTO Agreement. Given that Canada did not want the discussion of these broader issues to delay consideration of the concrete case at hand, it was willing to propose a compromise by withdrawing from its request for a panel the two sections (b and c) that fell outside Articles 3 and 4 of the SCM Agreement: i.e., the GATT 1994 and in particular Article XVI thereof, and nullification and impairment of benefits accruing to Canada pursuant to the WTO Agreement. Given that the amended request would now deal only with a question of consistency of PROEX with the SCM Agreement, and in particular Articles 3 and 4 thereof, Canada reiterated its request for the establishment of a panel at the present meeting under the accelerated procedures set out in Article 4. It did so with the understanding that this panel would not prejudice any subsequent important discussions on timing and the joint operation of dispute settlement mechanism under the integrated WTO system.

The representative of Brazil appreciated that Canada recognized that its request was of a wider scope than that which would guarantee a "fast-track" approach. However, for a proper functioning of the DSB, it would be a good precedent to accept the withdrawal of the request and that Canada should present a new request indicating the limits and the terms of reference therein.

The representative of Canada said that her delegation was disappointed that its request for an accelerated procedure had raised some procedural concerns and that the offers made in a spirit of compromise had not met with the agreement of the DSB Members. The only course of action now open to Canada was to submit a reformulated request for the establishment of a panel under Article 4 of the SCM Agreement for consideration by the DSB at its meeting on 16 October. Consequently, considering these developments, Canada was withdrawing its request for a panel at the present meeting and would re-submit a new request to be considered by the DSB at its meeting to be held on 16 October.

The DSB took note of the statements and agreed with Canada's decision that its request for a panel in WT/DS46/2 be withdrawn and that a new request for a panel on this matter be circulated and considered by the DSB at its next regular meeting.

2. European Communities - Measures affecting livestock and meat (hormones)
- Request by Canada for the establishment of a panel (WT/DS48/5)

The Chairman drew attention to the communication from Canada contained in document WT/DS48/5.

The representative of Canada said that in July 1996, her Government had requested consultations with the European Communities regarding certain measures prohibiting the importation of livestock and meat from livestock that had been treated with certain substances having a hormonal action[1]. Unfortunately, the consultations had not resolved the dispute and the measures were still in force. These measures were unjustified and were not consistent with the Communities' obligations under the WTO. Consequently, Canada was requesting the establishment of a panel.

The representative of the European Communities said that the subject matter concerning this particular request for a panel was not new. However, it was the first occasion on which the request for the establishment of a panel had appeared on the agenda of the DSB. His authorities therefore wished to have further time to consider some of the implications, including procedural implications of accepting Canada's request for a panel. He hoped therefore that the DSB would revert to this matter at its next regular meeting.

The representative of Canada said that her delegation regretted the Communities' decision not to agree to the establishment of a panel especially considering that there was already a panel established on this matter. Canada therefore requested that this matter be included on the agenda of the DSB meeting to be held on 16 October.

The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

3. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/36)

The Chairman drew attention to document WT/DSB/W/36 containing additional names proposed by Members for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained therein.

The DSB so agreed.

4. Poland - Import regime for automobiles
- Mutually agreed solution (WT/DS19/2)

The representative of the United States, speaking under "Other Business", recalled the discussion which had taken place in the DSB on Article 3.6 of the DSU regarding the notifications of mutually agreed solutions. Pursuant to that provision any Member could raise any point relating to those

[1]WT/DS48/1

notifications. His authorities sought clarification on the notification by Poland and India circulated in WT/DS19/2 regarding Poland's import regime for automobiles. Paragraph 1 of that communication described an import quota that Poland had established as the principle element of the solution. His authorities sought clarification whether this import quota was being implemented as a tariff rate quota. The document seemed to suggest that, but it was not clear how this import quota would be implemented. This raised some concerns about the consistency of the solution with WTO obligations. He therefore requested Poland to clarify that point.

The representative of Poland said that his country together with India had acted in accordance with Article 3.6 of the DSU and had notified a mutually agreed solution. He thanked the United States for its interest in this matter and asked the United States to make a written request. The short answer to the United States' question was in the affirmative. His Government was ready to provide a more detailed written answer at a later date.

The DSB took note of the statements.

5. 1996 Annual Report of the DSB
- Announcement by the Chairman

The Chairman, speaking under "Other Business", said that the work on the 1996 Annual Report of the DSB was underway. He recalled his statement made to the General Council at its meeting on 18 July 1996, on an assessment of the work of the DSB since January 1995. He then submitted his preliminary ideas on the Annual Report. It should be factual and stress that the DSB had been an active body. He believed that the application of the DSU had been positive and that as a result of codification and progressive development of the GATT system, it had offered both the legal possibility through the panels and appellate body route, as well as the possibility of negotiated solutions. This simultaneous double approach had been positive for the multilateral trading system. In the summary conclusions of the Annual Report it would be pointed out that the DSU provisions had been invoked by both developed and developing countries which would show that in this area the Uruguay Round and the Marrakesh Agreement had been applied in a truly universal manner consistent with the idea of a global multilateral trading system. This was a positive dimension of the first two-year experience of the WTO.

The representative of Jamaica said that his delegation had appreciated the Chairman's statement made at the General Council meeting on 18 July 1996. Jamaica supported the content and tone of this statement. It believed that in preparing the Annual Report of the DSB the following points should be taken into account. The dispute settlement system was neither static nor rigid, but was an evolving system which required careful monitoring and review. The gaps ought to be taken up not on a case-by-case basis in individual panels, but in the context of this overseeing body.

In an assessment of the implementation of the DSU it was not enough to state that the DSU was one of the greatest successes of the Uruguay Round of the multilateral trading system. The DSU, like all other agreements, was positive and contributed to security and predictability in the rule-based multilateral trading system. However, its true success had to be measured in the results not in the provisions themselves as contained in the Understanding. As part of the predictability and security, intrinsic and explicit in the evolution of the GATT-system had been the introduction of equity which was an important element of common law to provide procedural due process and consequential due process. Equity as a consequence of special and differential treatment in Part IV of the GATT was a codification of this principle. His delegation did not wish such an important principle to be overlooked. Therefore it was necessary to identify the gaps as they emerged in the implementation of the DSU.

When making "systemic" challenges in the WTO system, it was necessary to make the distinction between the "systemic" nature of the WTO agreements and the integrated dispute settlement mechanisms.

In the past, negotiating history constituted an important pillar on which panels based their work. In the WTO, the negotiating history, if still applicable, should be available in a transparent manner to enable common interpretation. In recent cases, for example in the decision of the Appellate Body, negotiating history apparently did not count as being of the same importance as in the past. There was a presumption in the WTO that one could be a co-complainant, but not a co-respondent as reflected in the DSU. It was possible to join a complainant as an interested party in an issue but interest in an issue on the defendant's side allowed for third-party status only, with less procedural or due process rights. It was important to identify this gap, analyze it and decide how it would be dealt with in the dispute settlement system. In respect of working procedures, it was important to elaborate on procedural or due process rights in the context of the spirit of the DSU. This was related to third-party rights.

The DSB had brought increasing predicability and security including for the so-called developing countries: i.e, sometimes in matters of principle it was difficult to say whether a country was a major or a small trading partner, whether developed or developing. If one was to apply rules and principles and law than all should understand that they stood equal before the law without distinction between developed and developing countries. He believed that it was important that the WTO continued the practice of the GATT which was pragmatic and conciliatory, seeking to resolve disputes rather than to take up matters in a very legalistic manner. Otherwise, the WTO and dispute settlement would become a general agreement on litigation. This should be avoided.

Something resembling a credential committee had never been instituted in the GATT and it should not be instituted in the WTO. If each delegation's credentials were to be inspected as to who was or was not a member, then it was everybody's right to question each other. This was not a constructive way to operate in the WTO. However, in his personal view he did not believe that it was in the interest of the dispute settlement system for private lawyers to be present and litigate. A pragmatic solution should be found with respect to the role of experts within individual delegations. With regard to third-party participation there was no reference to observers in the DSU and its working procedures. Therefore, it would not be appropriate to describe as observer any Member present in a panel. They should either be described as third parties or by the name-plates of their countries.

Another related point was the automaticity in the establishment of panels. Although a great step forward, it was important that automaticity should not simply lead to standard terms of reference where this would be inappropriate, given the complexity of the complaints made. In request for the establishment of panels there should be an indication for either standard or special terms of reference. With regard to the time-frames, he supported Canada's statement that timing and joint operation of dispute settlement mechanism required further consideration. The above-mentioned points would require constructive consultations so as to avoid overstating the success of the dispute settlement system without identifying the gaps that might militate against the best interest of Members.

The representative of Mexico said that two issues were being confused. One was the treatment of gaps in the DSU and the other was an explicit reference to cases with implicit references to the banana panel which was currently underway. Mexico believed that all the issues referred to by Jamaica had been dealt directly by the panel. It did not agree that all Jamaica's proposals were related to the banana case.

The representative of Jamaica clarified that his intention was not to take up matters which were currently before the panel. However, some of those matters were of a generic nature and should not

be identified as unique to any single panel. These were not proposals, but merely identifications of some issues that needed consideration.

The representative of Mexico thanked for the clarification and understood that the issues identified by Jamaica would be examined once the banana panel had concluded its work.

The representative of Norway thanked Jamaica for raising points of substance, but wished to recall his delegation's previous intervention wherein the attention had been drawn to the fact that substantive issues should not be raised under "Other Business" since Members could not be prepared in advance to discuss such matters The issues raised would have been more carefully studied if Members had been advised previously.

The Chairman recalled that in accordance with the Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the Ministerial Conference would be invited to complete a full review of disputes settlement rules and procedures under the WTO. After just two years some problems had emerged which needed examination and discussion. Nevertheless it was wise to give the DSB and the DSU the benefit of four years of practice, after which Members could consider the review of the DSU.

The DSB took note of the statements.