WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/120
13 March 2002

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Dispute Settlement Body
19 February 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 February 2002

Chairman: Mr. K. Bryn (Norway)

Subjects discussed: Page

1. United States – Section 211 Omnibus Appropriations Act of 1998

(a) Implementation of the recommendations of the DSB

1. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that "the Member concerned shall inform the DSB, within 30 days after the adoption of the panel or appellate body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB". He recalled that at its meeting on 1 February 2002, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, in the case on "United States – Section 211 Omnibus Appropriations Act of 1998".

2. The representative of the United States said that it was the intention of the United States to implement the DSB's recommendations and rulings in this case in a manner that respected its WTO obligations. She said that the United States had begun to evaluate options for doing so and would need a reasonable period of time for implementation. Her delegation was ready to discuss this matter with the EC in accordance with Article 21.3(b) of the DSU.

3. The representative of the European Communities noted the United States' request for a reasonable period of time under Article 21.3 of the DSU in order to implement the DSB's recommendations in this case. The EC urged the United States to come into conformity with its obligations as soon as possible. It was in this context that the EC was ready to examine the US proposals under Article 21.3 of the DSU.

4. The representative of Cuba noted the statement made by the United States and reiterated her country's view, which had been stated at the 1 February DSB meeting, that the United States should

bring its legislation into line with WTO rules. In Cuba's view Section 211 should be repealed as soon as possible.

5. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations in this case.

2. Canada – Export credits and loan guarantees for regional aircraft

(a) Report of the Panel (WT/DS222/R and Corr.1)

6. The Chairman recalled that at its meeting on 12 March 2001, the DSB had established a panel to examine the complaint by Brazil pertaining to this matter. The Report of the Panel contained in document WT/DS222/R and Corr.1 had been circulated on 28 January 2002. In accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/160/Rev.1, the Panel Report had been circulated as an unrestricted document. The Report was now before the DSB for adoption at the request of Brazil. The adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

7. The DSB took note of the statement and adopted the Panel Report contained in WT/DS222/R and Corr.1.

8. The representative of Brazil said that the adoption by the DSB of the Panel Report in the case under consideration was an important development in this long-standing dispute concerning support for exports of regional aircraft. Brazil noted with satisfaction that its claims with regard to Canada's violations of the multilateral rules had been sustained by the Panel, which had found that since 1996 Canada had been providing prohibited export subsidies to support the export of aircraft. This was an important step in restoring the level playing field in the operations related to the aircraft sector. Brazil and Canada were engaged in active discussions with a view to settling their differences, and he hoped that these discussions would be successful. However, success would require far more transparency than had been the case thus far. It would also require countries to avoid measures that would distort the market and deny developing-country exporters the opportunity to compete fairly on the basis of the price and quality of their product.

9. Before commenting on some specific aspects of the Report, he first wished to refer to some serious systemic issues regarding export credits raised therein as well as in the Panel Report in the case on "Brazil – Export Financing Programme for Aircraft" (DS46), which should be brought to the attention of Members. The first issue concerned the role of the Organization for Economic Cooperation and Development (OECD) in changing the rights and obligations of WTO Members under the Subsidies Agreement. The Illustrative List of Export Subsidies, in Item (k) second paragraph, provided that export credits that conformed to the interest rate provision of the OECD Arrangement on Export Credits were not prohibited – even though they were prohibited subsidies. This provision had been interpreted by the panel in the case on Brazil – Aircraft to mean that the latest version of the Arrangement, of whatever date, was applicable to the WTO. If this were so, any time the OECD decided to change the Arrangement, such a change would also apply to the WTO. Brazil believed that only WTO Members should have the power to change WTO obligations. This issue deserved the prompt attention of the WTO. Thus, while Brazil was gratified that the Panel had found that Brazil's PROEX programme fully conformed to WTO rules, it found the implications of this aspect of the Report disturbing.

10. The second issue concerned government guarantees such as loan guarantees. This was another exception to the general prohibition against export subsidies. Guarantees allowed private parties to obtain better terms than they could obtain in the market. Indeed, that was why they were provided. The problem was that the guarantees were not equal. The market placed a higher value on guarantees from some countries. That meant that some exporters were able to offer potential buyers

government-supported financing that their competitors could not match. This had nothing to do with the price or quality of the product, but with the credit rating of the exporter's government. At Doha, Brazil's Minister of External Relations, a former Chairman of both the DSB and the General Council, had specifically noted that provisions like these amounted to a perverse form of special and differential treatment in favour of some countries. As the Minister had pointed out in Doha, Brazil had circulated papers and proposals on this issue, both in the Subsidies Committee and in the General Council. He was confident that other Members would also agree that there was a need to revise the Agreement so that some Members were no longer at a disadvantage.

11. With regard to the case under consideration, he wished to point out several critical aspects of the Panel's findings. In one of the transactions involving the US carrier Air Wisconsin, Canada had openly announced that it was granting illegal support simply to "match", as it had claimed, Brazil's offer. Canada had done so without knowing the facts and had based its argument on assumptions. As the Panel's proceedings had made abundantly clear, those assumptions were incorrect. Moreover, the official support to Bombardier in that transaction had been much more generous than had allegedly been offered by Brazil to Embraer under PROEX. However, even if Canada was correct in its belief that Brazil had offered some kind of prohibited export subsidy – and he emphasized that Canada was not correct in that belief – its actions would still constitute the kind of "self help" that was prohibited by Article 23 of the DSU which, by no coincidence, was entitled: "Strengthening of the Multilateral System".

12. Further, according to the Panel's findings, Canada had been providing illegal subsidies since at least 1996. The panel had identified four other transactions which benefitted from subsidies, either through the so-called EDC Corporate Account or by means of resorting to the Canada Account funds. He stressed that these programmes and transactions had never been notified to the SCM Committee, as required by Article 25 of the SCM Agreement. This was particularly disturbing because in 1998 the Canada Account had been found by another panel to be a prohibited subsidy, and a review by that panel under Article 21.5 of the DSU had concluded that Canada had not withdrawn the subsidy, as recommended by the DSB. To-date, according to Brazil's knowledge, the Canada Account had not been notified and remained unchanged. Furthermore, and – as was known from its use in the Air Wisconsin sale – it was still being used to provide prohibited export subsidies.

13. He noted that during the past several years in the WTO there had been three rulings against Canada Account, two rulings against Technology Partnership Canada and one ruling against the EDC Corporate Account. Altogether, the DSB had made seven rulings against Canadian programmes which distorted the playing field where the regional aircraft manufacturers operated. Brazil hoped that Canada would reconsider its actions and that it would properly notify its subsidies. Furthermore, it also hoped that Canada would follow the DSB's recommendations and rulings with regard to its programmes, including the EDC Canada Account and the EDC Corporate Account. Brazil also hoped that bilateral efforts in the search of a mutually satisfactory solution would be successful and that Embraer and Bombardier would be allowed to compete on an equal footing.

14. The representative of Canada said that this was a complex case and had been made more complicated by the rather fluid nature of Brazil's complaints. However, in the end, most of these complaints had been rejected by the Panel. He recalled what had been decided by the Panel. Brazil had argued that the EDC Corporate Account programme "as such" involved the granting of prohibited exports subsidies, contrary to Article 3.1(a) of the SCM Agreement. The Panel had rejected that argument. Brazil also argued that the EDC Canada Account programme, "as such", involved prohibited export subsidies. The Panel had also rejected that argument. Brazil had argued that the EDC's Corporate Account and the Canada Account, "as applied", necessarily involved prohibited export subsidies. This had been similarly dismissed by the Panel. Brazil complained that the Investissement Québec programme, both "as such" and "as applied", necessarily conferred prohibited export subsidies. These arguments had all been rejected. The Panel had found that in the case of certain specific transactions, the EDC's financing was inconsistent with Article 3.1(a). The largest of

these transactions involved Canada Account financing to Air Wisconsin. However, the Panel had rejected Brazil's apparent challenges to many other transactions, involving the EDC Corporate Account financing and the Investissement Québec equity and loan guarantees. Thus, however Brazil might wish to characterize the Panel Report, the fact remained that all of Canada's programmes and most of the transactions under those programmes had been vindicated. It was important that the Air Wisconsin transaction was understood in its proper context. Canada argued before the Panel that this transaction was consistent with the SCM Agreement because Canada was merely matching Brazilian subsidies to the Brazilian company Embraer. Canada had explained, when it had announced its intention to match, that it had done so to protect jobs in the face of ongoing Brazilian subsidies to Embraer and to ensure that Canada's aircraft industry would be competing with Brazil's industry on a level playing field. At the panel stage, Brazil had denied that it was in any way involved in Embraer's bid to win the Air Wisconsin contract. The Panel, however, had looked at the evidence and found otherwise. It had found that Embraer's offer to Air Wisconsin – the offer that had prompted Canada's response – was not on market terms and was made with the expectation of support from the Brazilian Government.

15. Canada had long taken the position that in such circumstances, a matching offer of support was consistent with the interest rates provisions of the OECD's Arrangement on Guidelines for Officially Supported Export Credits and thus qualified for the "safe haven" provided under the second paragraph of Item (k) in Annex 1 to the SCM Agreement. It was unfortunate that the Panel had not accepted this position, which was shared by many WTO Members, including the EC and the United States. Canada also remained hopeful that the parties could reach a mutually satisfactory settlement to this dispute. Senior Canadian and Brazilian negotiators had met in New York on 8 February 2002 to discuss potential solutions. Both parties had expressed renewed interest in resolving this dispute and had agreed to resume negotiations in April 2002.

16. In order to advance this process, Canada had chosen not to appeal this Panel Report. However, this did not imply that Canada agreed with all of the Panel's findings. Canada still believed that matching, in accordance with the OECD Arrangement, was an important discipline on the use of illegal subsidies and qualified for the "safe haven" in Item (k), Annex 1 to the SCM Agreement. Canada also considered that the Panel had erred in finding three of the EDC's Corporate Account financings to Comair to be subsidies. In Canada's view these deals were on market terms. In reaching its findings the Panel had substituted, *ex post facto*, its own judgements as to prevailing market conditions for judgements made by experienced bankers at the time of the transactions on the basis of the information then available. Canada disagreed with the Panel's use of some market benchmarks, and its readjustment of others to arrive at its conclusions. Even after these adjustments, the Panel deemed the interest rates offered by the EDC to be below what it had considered to be prevailing market rates by only the smallest of margins – as little as four basis points or four one hundredths of one percentage point. By contrast, the interest rate buy-down offered by Brazil under its PROEX programme ranged from 250 to 380 basis points. The Panel's approach in the three Comair transactions involved, in essence, a *de novo* review of the judgements made by the EDC's bankers. It denied the experts in the field any reasonable discretion when making commercial decisions. There were also ample grounds for questioning whether the Comair transactions – and other transactions – were properly before the panel at all, given the vagueness of the claims in Brazil's request for the establishment of a panel. However, despite its reservations about certain aspects of the Panel Report, Canada believed it was preferable to seek a solution through negotiation rather than through continued WTO litigation. Canada was therefore prepared to allow the report to be adopted at the present meeting. It looked forward to continued and constructive discussions with Brazil with a view to resolving this long-standing dispute.

17. The representative of the European Communities said that the EC was concerned by the interpretation given by the Panel in this case with regard to the application of the mandatory/discretionary test and the coverage of the safe haven under the second paragraph of Item (k) in Annex I to the Subsidies Agreement. The EC believed that laws that specifically

envisaged the granting of export contingent subsidies which would not respect Article 3.1(a), were contrary to the Subsidies Agreement. This applied both to "mandatory" and "discretionary" measures and were confirmed by Article 3.2 of the Subsidies Agreement, which explicitly prohibited the maintenance of such subsidies. Furthermore, the EC considered that practices such as matching, which were expressly foreseen by the OECD Arrangement and which provided effective disciplines on export credits, should be protected under the second paragraph of Item (k) in Annex I to the Subsidies Agreement. Otherwise, the disciplines of the Subsidies Agreement could more easily be circumvented, in the knowledge that any action compensating WTO incompatible behaviour in the field of export credits – even though allowed under the OECD Arrangement – was now effectively prohibited under the Subsidies Agreement. Such a result did not correspond to the intention of the drafters of the Subsidies Agreement and undermined the balance of the OECD Arrangement. The EC wished to point out that all WTO Members, even those which were not members of the OECD Arrangement used the OECD provisions, and that matching was very much an action of last resort.

18. The representative of the United States said that her country had been following this case with interest, and hoped that the Panel Report would assist Canada and Brazil in finding a way to resolve their differences. The United States wished to make brief comments about the Panel's conclusions on the relationship between Item (k) and the matching provisions of the OECD Arrangement. The Panel's conclusions caused the United States great concern from a systemic standpoint. The Panel had concluded that the Item (k) "safe haven" was not available to parties who matched export-financing offers that derogated from the terms of the OECD Arrangement. The Panel's interpretation threatened to undercut the disciplines on export subsidies under the OECD Arrangement and the Subsidies Agreement. The ability of Members to match non-conforming offers created an incentive for other Members not to make non-conforming offers, lest they found themselves in a subsidy "race to the bottom". The Panel's interpretation of the second paragraph of Item (k), which prohibited Members concerned about respecting their obligations under Article 3 of the SCM Agreement from matching non-conforming offers, removed any such incentive. Conversely, an interpretation of the second paragraph of Item (k) that would shield matching offers from the Article 3 prohibition, particularly when the initial non-conforming offers were not themselves shielded, would provide an especially strong incentive against making non-conforming offers in the first instance. The Panel had based its finding in part on its conclusion that an alternative interpretation would render partially ineffective the special and differential treatment provided under Article 27 of the SCM Agreement to developing country Members. The Panel's interpretation was erroneous and illogical. The WTO Members that agreed to accept Article 27 of the SCM Agreement had also agreed to accept the second paragraph of Item (k). To the extent that the provisions overlapped, that was a consequence of the Members' agreement. The Panel's interpretation invited an increase in market distorting subsidy practices, an outcome which was contrary to the entire premise of the SCM Agreement.

19. The DSB took note of the statements.

3. Election of Chairperson

20. The Chairman recalled that at its meeting on 15 February 2002, the General Council had taken note of the consensus on a slate of names for Chairpersons to a number of WTO bodies including the Dispute Settlement Body. On the basis of the understanding reached by the General Council, he proposed that the Dispute Settlement Body elect Mr. Carlos Pérez del Castillo (Uruguay) as Chairman of the body by acclamation.

21. The DSB so agreed.

22. Mr. C. Pérez del Castillo expressed gratitude to all Members for his nomination. He believed that this nomination was in honour to his country and to him personally. He recalled that over the past years the DSB had been chaired by excellent individuals such as Messrs. S. Harbinson, R. Farrell and K. Bryn. The efficient manner in which they had handled the business of the DSB would set an

example for him to follow and would be a source of inspiration in the year of 2002 which would be a complex year and would require a lot of work. Uruguay had always shown its interest in the dispute settlement mechanism and this had been manifested in the work of Mr. J. Lacarte-Muró during the Uruguay Round, when the DSB had been established. Uruguay believed that the DSB was an essential body ensuring the predictability and security of the multilateral trading system and guaranteeing the rights and obligations of all Members. It was thus important to ensure that the DSB's recommendations were faithfully implemented. As Chairman, he wished to assure Members that he would deploy every effort to ensure that this objective was achieved with the help of Members and the Secretariat.

23. The DSB took note of the statement.