WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/67
30 September 1999

(99-4067)

Dispute Settlement Body
20 August 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 August 1999

Chairman: Mr. Nobutoshi Akao (Japan)

Subjects discussed: Page

1. Brazil – Export financing programme for aircraft

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

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS46/9 transmitting the Appellate Body Report on "Brazil – Export Financing Programme for Aircraft", which had been circulated in document WT/DS46/AB/R in accordance with Article 17.5 of the DSU. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He said that Article 4.9 of the Agreement on Subsidies and Countervailing Measures (SCM) required that: "The Appellate Body Report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body Report within 20 days following its issuance to the Members".

The representative of Canada welcomed the adoption of the Reports and thanked the members of the Panel and Appellate Body as well as the Secretariat for their important contribution to the development on international trade law. His country also wished to acknowledge Brazil's cooperation in the process. Canada was pleased that, consistent with the Panel's and the Appellate Body's Reports, PROEX[1] subsidies would cease on all regional aircraft delivered after 18 November 1999. In this respect, he noted that, in accordance with a well-established principle of international law, as reflected in GATT/WTO jurisprudence, private contractual obligations could not be invoked to excuse compliance with international obligations. Canada looked forward to collaborating closely with Brazil on the implementation of the recommendations in this case as well as in the case concerning Canada's measures in the aircraft sector (WT/DS70). To this effect, Canada had already contacted

[1]The Brazilian *Programa de Financiamento às Exportações.*

Brazil and was glad that both parties had agreed to consult on their respective plans for implementation in an effort to definitively resolve these disputes and to avoid further litigation. Canada looked forward to receiving, within the next 30 days, Brazil's information on its intentions in respect of implementation, as provided for in Article 21.3 of the DSU. Canada would agree that this information be submitted in writing in order to avoid convening a special DSB meeting. He noted that the second sentence of Article 21.6 provided that: "The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption". In accordance with this provision, the DSB had full authority to exercise its surveillance function with respect to adopted panel or Appellate Body reports.

The representative of Brazil welcomed the adoption of the Panel Report modified by the Appellate Body which concerned Brazil's interest rate equalization component of the programme for aircraft, PROEX. Although Brazil had serious concerns with some aspects of the Panel Report, it believed that the Appellate Body had made a number of significant improvements. Brazil intended to make the required changes in order to bring its programme into conformity with its WTO obligations. The Reports under consideration as well as the Reports on Canada's measures in the aircraft sector (Agenda item 2) dealt with issues of great importance for developing countries who had now entered the capital goods area that had primarily been the sector of developed countries. When capital goods, such as aircraft, were being sold, financing was an important part of the total package. The exporter was expected to provide financing, even if such exporter was from a developing country and the buyer from a developed country. As a result of the differences in interest rates between developed and developing countries, exporters in developing countries could be at a disadvantage, in particular when government financial institutions were involved. PROEX was an attempt by Brazil to reduce this disadvantage. This was a complex issue which deserved the attention of the WTO. He expressed his country's satisfaction that the findings of the Panel Report, as modified by the Appellate Body, would permit Brazil to continue to reduce that disadvantage, while complying with its WTO obligations.

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

2. Canada – Measures affecting the export of civilian aircraft

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

The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS70/5 transmitting the Appellate Body Report on "Canada – Measures Affecting the Export of Civilian Aircraft" which had been circulated in document WT/DS70/AB/R in accordance with Article 17.5 of the DSU. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO documents contained in WT/L/160/Rev.1, the Panel and Appellate Body Reports had been circulated as unrestricted documents. He said that Article 4.9 of the Agreement on Subsidies and Countervailing Measures (SCM) required that: "An Appellate Body Report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body Report within 20 days following its issuance to the Members."

The representative of Brazil expressed his country's satisfaction that the Appellate Body had upheld the Panel's finding that Canada had provided a minimum of Can$250 million in prohibited subsidies to its regional jet industry. These subsidies had been used for the development of a 70-seat aircraft that competed directly with aircraft produced by the Brazilian regional jet company, EMBRAER, without a benefit of government development funds. Although it was difficult for firms in developing countries to compete in the global market for high-technology and capital goods, EMBRAER was successful in doing so. This case involved an important issue, namely the extent of

Members' cooperation in providing information during consultations and in responding to panel requests for information. In this case, Canada had refused both Brazil's and the Panel's requests for information. The Appellate Body had found that Canada's explanation concerning its refusal to comply with the Panel's requests was "quite simply, bereft of any textual or logical basis". Since the Panel had the discretion not to draw adverse inferences from Canada's refusal to comply with the requests, the Appellate Body had declined to reverse the Panel's decision on this matter. However, the Appellate Body had suggested an approach that Brazil might take in a future case, which was seriously being considered by his country. Brazil believed that the issue concerning Members' lack of cooperation with panels was a serious one and thanked the Appellate Body for bringing it to the attention of all Members.

The representative of Canada welcomed the Reports and thanked the members of the Panel and the Appellate Body as well as the Secretariat for their effort, dedication and expertise brought to this important task, which was indispensable to the development of a rule-based multilateral trading system. Canada also thanked Brazil for its cooperation in this joint effort aimed at resolving the differences through the objective application of the WTO rules under the dispute settlement procedures. Although Canada was disappointed with certain aspects of the Panel and the Appellate Body decisions, it was pleased that the Reports had helped to clarify certain elements of the rules on export subsidies under the SCM Agreement. It was Canada's intention to implement fully and faithfully the Panel's and the Appellate Body's recommendations with respect to two programmes – the Canada Account and the Technology Partnerships Programme – that had been found to constitute prohibited export subsidies as applied to the regional aircraft sector. Pursuant to Article 21.3 of the DSU, Canada would inform the DSB of its intentions in respect of implementation within the next 30 days. As he had indicated under Agenda item 1, Canada would prefer to do this in writing instead of convening a special DSB meeting for that purpose.

Canada appreciated certain clarifications provided by the Appellate Body as to what constituted a de facto export contingency. However, it regretted that the Appellate Body had not been able to provide the level of clarity sought by Canada which, it believed, all export-dependent economies required for effective and predictable policy making. Canada was convinced that implementation in this case as well as in the case on Brazil's aircraft (Agenda item 1) would be facilitated if both parties consulted fully and at an early date on their respective implementation plans. To this end, Canada had already contacted the Brazilian authorities who had responded positively to this initiative. Therefore, Canada hoped that the findings of the Panel and the Appellate Body would lead to an early and mutually beneficial resolution of the dispute.

Canada wished to draw attention to the Appellate Body's decision on the fact-finding powers and the authority of panels to draw adverse inferences from the refusal of a party to provide requested information (paragraphs 181-206, Section VII of the AB Report). The Appellate Body had introduced Section VII by noting that the parties' arguments on this issue "raise[d] a number of questions with fundamental and far-reaching implications for the entire WTO dispute settlement system". This observation applied equally to the Appellate Body's ruling on these issues. The issue under appeal was whether or not the Panel had erred in law in declining to draw adverse inferences from Canada's refusal to provide information to the Panel about the Export Development Corporation's (EDC's) debt financing activities. The Appellate Body had ruled that the Panel had not erred in law and had upheld the Panel's finding that Brazil had not established a prima facie case that the EDC's debt financing activities in support of the Canadian aircraft industry conferred a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. Canada's views on the legal merits and systemic implications of the Appellate Body's ruling were not motivated by its interest with respect to the issue of whether the activities of the EDC challenged by Brazil constituted an export subsidy; Canada prevailed on that issue. Rather, Canada was concerned about the "fundamental and far-reaching implications" of the Appellate Body's conclusions and reasoning "for the entire WTO dispute settlement system".

The principal interpretive issue before the Appellate Body was whether the phrase "should respond" in the third sentence of Article 13.1 of the DSU imposed a legal obligation on parties to provide information and produce documents requested by a panel. The Appellate Body had decided that these words imposed a legal obligation. Although the issue had already been exhaustively discussed during the oral proceedings, the Appellate Body Report had ignored the fact that the sentence employing the verb "should" was found in a paragraph in which each of the other three sentences contained the verb "shall". The only contextual analysis the Appellate Body provided in support of its conclusion was the following statement: "If Members that were requested by a panel to provide information had no legal duty to 'respond' by providing such information, that panel's undoubted legal "*right* to seek" information under the first sentence of Article 13.1 of the DSU would be rendered meaningless" (paragraph 188 of the AB Report). The Appellate Body had emphasized the word "right" and had ignored the equally important word "seek". This emphasis significantly affected the meaning of this sentence and its relation to the third sentence. If the right of panels was limited to *seeking* information, then there was no contradiction with the ordinary meaning of the word "should", as employed in the third sentence. The core of the Appellate Body's reasoning was contained in paragraph 189 of its Report : "To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences". In order to reach its decision, the Appellate Body had read the word "should" as "shall" and the word "seek" as "require". Canada believed that Members should consider whether the resulting interpretation respected their collective will, as reflected in the DSU and whether this interpretation had altered the carefully calibrated balance established under the DSU between State sovereignty and its international responsibility as well as between the rights of complainants and respondents.

The Appellate Body had attributed to panels the power to require or order the provision of information and the production of documents, and had imposed on Members the obligation to provide such information and documents upon request. In addition, the Appellate Body's interpretation severed this power and obligation from the burden of proof. The Appellate Body had ruled that a panel could order the production of information from a respondent, whether on its own motion or at the request of the other party, at any stage during the proceedings, and without regard as to whether the other party had made a prima facie case. In so ruling, the Appellate Body had disregarded the general practice of international tribunals, which had been extensively argued by both parties. The Appellate Body had thus attributed to panels powers of discovery that were not grounded in the DSU, and that were free of the checks and balances limiting the exercise of the fact finding powers under general international law. Under this interpretation, a complaining party might initiate a case on the basis of unsubstantiated allegations and then request a panel, armed with far-reaching powers of discovery, to carry out a wide-ranging investigation on its behalf. This could result in an exponential increase in the number of cases brought before panels. Apart from the consequences of this interpretation for the procedural operation of the dispute settlement system, Canada was also concerned about its implications for the principles of legal stability and predictability of the rule-based trading system. When they negotiated these Agreements, Members used the terms "should" and "shall" deliberately to convey different and well-understood levels and types of obligations. By ignoring this distinction, a major element of instability could be introduced into the WTO Agreements. Notwithstanding these concerns, Canada wished to join other Members in adopting the Reports.

The representative of the European Communities expressed the EC's gratitude that the Appellate Body had clarified a number of elements regarding the assessment of a de facto export contingency. In particular, the EC was pleased that the Appellate Body had confirmed that the legal

standard expressed by the word "contingent" was the same for both *de jure* and de facto contingency. However, the EC was concerned that the notion of de facto contingency was interpreted by panels too broadly, and that there was no guidance on the weight to be given to certain factors. He noted that the same point had been made by the EC in the context of the Panel Report on "Australia – Subsidies Provided to Producers and Exporters of Automotive Leather" (WT/DS126/R). In particular, the EC was concerned that factors which should only be at best peripheral in the decision on export contingency, such as the export-orientation of recipient firms, were considered as highly relevant to the Panel's findings. Other factors, such as whether or not the choice of recipient firms to export or sell domestically was restricted, which the EC considered highly relevant in all cases, did not seem to be examined in the same way. The EC recognized that circumstances might vary from case to case, but believed that the current approach removed any certainty from the process and provided no real guidance to governments on how to pursue WTO-consistent policies in this area.

The representative of the United States welcomed that in both cases the Appellate Body had confirmed that the SCM Agreement contained meaningful disciplines on subsidies that were contingent upon export performance. It had also clarified that the market was the proper basis for determining whether a particular measure or practice conferred a benefit under the SCM Agreement. The United States was confident that the Appellate Body's reasoning would give pause to Members who might otherwise be tempted to grant prohibited subsidies to their manufacturers. This was a welcome development. The United States would be keenly interested in seeing how the parties would choose to implement the Appellate Body's decisions.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS70/AB/R and the Panel Report in WT/DS70/R as upheld by the Appellate Body Report.

The Chairman said that Canada had referred to the obligation under Article 21.3 of the DSU and had proposed that the parties to the dispute inform the DSB in writing of their intentions in regard of implementation in order to avoid convening a DSB meeting for this purpose. He recalled that the next regular DSB meeting was scheduled for 22 September.

The representative of Brazil said that his country had no objections to the procedures proposed by Canada.

The representative of United States said that, without prejudice to the US interpretation of Article 21.3 of the DSU, and in particular in light of footnote 11 thereto as well as the US statements made in the DSB, her delegation could go along with Canada's proposal that the parties to the dispute agree to waive the obligation to convene a meeting in order to inform the DSB of their intentions in regard of implementation.

The DSB took note of the statements.

3. Review of the DSU

(a) Statement by the Chairman

The Chairman, speaking under "Other Business", recalled that at the informal DSB meeting on 30 July 1999, delegations had concluded that the DSU review had not been terminated by 31 July 1999. It was understood that any further work to be carried out would have to be approved retroactively by the General Council at its meeting on 6 October. Therefore, in order to make progress it would be necessary to start informal consultations in the beginning of September with a view to finalizing a report on the DSU Review at the next regular DSB meeting on 22 September. He recalled that a draft report on the DSU Review had been sent to delegations at the end of July. That

report, which was not yet final, was based on the comments made by delegations. He recognized that, at this stage, it was premature to decide on when and how the work on the DSU Review should be resumed. He proposed to hold consultations in the beginning of September and to convene an informal DSB meeting with a view to finalizing a report on the DSU Review.

The DSB took note of the statement.