RESTRICTED

WORLD TRADE ORGANIZATION

WT/DSB/M/15
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DISPUTE SETTLEMENT BODY
24 April 1996

MINUTES OF MEETING

Held in the Centre William Rappard
on 24 April 1996

Chairman: Mr. Celso Lafer (Brazil)

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1. European Communities - Régime for the importation, sale and distribution of bananas.
   - Request by Ecuador, Guatemala, Honduras, Mexico, and the United States for the establishment of a panel (WT/DS27/6)

The Chairman drew attention to a joint communication from Ecuador, Guatemala, Honduras, Mexico and the United States in WT/DS27/6 containing their request for the establishment of a panel to examine the European Communities' régime for the importation, sale, and distribution of bananas.

The representative of Guatemala, speaking also on behalf of Ecuador, Honduras, Mexico, and the United States, said that the present request for the establishment of a panel was the most recent attempt, in a series of unsuccessful efforts to obtain open and fair market access for bananas into the Communities which would be consistent with the GATT and today with the WTO. The two panels established on these matters[1] had found the Communities' régime for the importation, sale and distribution of bananas to be inconsistent with its obligations under the GATT: in 1993, with respect to national banana import systems in member States, and in 1994, with respect to the common market organization

[1]Panel reports are contained in DS32/R and DS38/R.

for bananas pursuant to the Council Regulation (EEC) 404/93. Instead of bringing its banana import régime into conformity with the GATT, the Communities had further aggravated the discriminatory conditions for imports of bananas from third countries, or from the so-called "dollar zone", in particular, as a result of the Framework Agreement on bananas in force since 1 January 1995. At the GATT Council meetings from May 1994 until December 1995, his delegation, on behalf of Ecuador, Honduras, Mexico and Panama, had unsuccessfully requested a fair and mutually acceptable solution to this matter. On 28 September 1995, Guatemala, Honduras, Mexico and the United States had requested consultations with the Communities on this matter.[2] Although consultations had been held on 26 October, the matter remained unresolved, partly because the Communities had no mandate for finding a solution. Ecuador had joined the above-mentioned countries when a new request for consultations was made on 5 February 1996[3]. Consultations held on 14-15 March, in which the Communities again participated without a mandate, had failed not only to settle this dispute, but had offered no hope that this matter might be resolved without recourse to a panel.

The representative of the European Communities said that this matter, which was of great importance and complexity, had been addressed on different occasions. Consultations with the complaining parties were currently underway in an effort to find a mutually satisfactory solution, and contacts continued to be pursued. Since the Communities wished to pursue further these contacts, it believed that it was not opportune to establish a panel at the present meeting as requested by the complaining parties.

The representative of Mexico, speaking also on behalf of Ecuador, Guatemala, Honduras and the United States, regretted the Communities' decision not to agree to the request for the establishment of a panel at the present meeting. There was no indication that the Communities were making efforts to resolve this dispute in a WTO-consistent manner. The Communities had made only a proposal aimed at trying to induce certain countries to accept specific quotas within the tariff quota in exchange for their agreement to withdraw their objections to the Communities' discriminatory licensing system found by the last GATT panel in 1994 to be inconsistent with Articles I and III of the GATT. He therefore regretted that the Communities could not join the consensus on the establishment of a panel at the present meeting and requested that this matter be included on the agenda of the next DSB meeting to be held on 8 May.

The DSB took note of the statements and agreed to revert to this matter at its next meeting on 8 May.

2. Korea - Measures concerning bottled water
   - Statement by Canada

The representative of Canada, speaking under "Other Business", announced that Korea and Canada had reached a mutually agreed solution with regard to Korea's measures concerning bottled water. This agreement followed Canada's request for consultations made on 8 November 1995, which had been circulated in WT/DS20/1. The letters exchanged outlining the agreement would be attached to the written notification pursuant to Article 3.6 of the DSU, and would be sent to the Chairman of the DSB shortly with the request that it be circulated to Members.[4]

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[2]WT/DS16/1.

[3]WT/DS27/1.

[4]WT/DS20/6.

The representative of Korea confirmed that the matter concerning bottled water had been settled in a mutually-acceptable manner. As indicated by Canada, the written notification on this settlement, including the text of the agreement, would soon be submitted to the DSB and relevant Councils and Committees in accordance with Article 3.6 of the DSU.

The DSB took note of the statements.

3. Turkey - Action on imports of textiles and clothing
- Statement by India

The representative of India, speaking under "Other Business", said that on 21 March 1996, India had requested consultations with Turkey under Article XXIII:1 of GATT 1994, and Article 4 of the DSU on the unilateral imposition of quantitative restrictions on imports of textile and clothing products from India. This request contained in WT/DS34/1 had been accepted by Turkey on 1 April. In a letter confirming this, Turkey had mentioned that it had agreed to enter into consultations "on textiles and clothing restrictions applied by Turkey" at a mutually acceptable time and venue. Turkey considered that "the Eureopean Communities as our partner in the customs union should also be represented in the consultations". On 4 April, India had proposed that consultations be held in Geneva on 18-19 April, and had clearly stated that it could not accept Turkey's view that the European Communities participate in these consultations since, under the GATT and WTO practices, consultations under Article XXIII:1 of GATT 1994 were basically of a bilateral nature. In doing so, India had only followed the stand taken by a major trading entity concerning the bilateral character of Article XXIII:1 consultations, as recorded in GATT documents. India had requested that Turkey confirm the venue and time proposed for consultations to be held without the participation of the Communities.

On 16 April, Turkey had replied that "the Turkish authorities would be prepared to hold with their Indian counterparts the consultations requested by India..on the understanding that representatives of the EC would also be participating. This meeting could be held on 18 April 1996 from 3.30 p.m. to 6 p.m. as suggested by India." Despite this extremely short notice, India ensured the presence of its delegation at consultations. Regrettably, the delegation of Turkey did not attend the scheduled meeting nor it provided explanation for its absence. Nevertheless, India, in good faith, had sent another communication to Turkey on 18 April, proposing to enter into bilateral consultations on 19 April. Regrettably, the delegation of Turkey had again failed to participate. Persevering in its good faith, India had contacted Turkey and had been told that the latter could not enter into these consultations without the participation of the Communities, and that this would be conveyed in writing by close-of-business on 19 April. This communication, dated 19 April had been received on 22 April.

India was concerned about the manner in which a Member had dealt with the procedures for the settlement of disputes which had been negotiated and accepted by all Members. His delegation did not wish to enter into the substance of the matter but had been compelled to bring this unfortunate situation to the attention of the DSB. The rather casual treatment of procedures and processes contained in the DSU and the GATT 1994 should be of considerable concern for all Members. This situation also raised some questions that the DSB might wish to consider. First, could a consulting Member refuse to attend consultations it had agreed to enter into without any advance notice? Second, if the response to the above were affirmative, how might this be reconciled with the ten-day rule provided for in Article 4.3 of the DSU? Third, what was the required period of time a Member requesting consultations had to wait for a consulting Member to arrive at a mutually agreed venue and time before concluding that the consultations had not been entered into? Fourth, could a consulting Member acquire the right to decide unilaterally to include another Member in bilateral consultations if the request had not been addressed to any other Member other than the consulting Member? What did such unilateral action imply for the rights of a Member requesting consultations under Article XXIII:1 of GATT 1994

and Article 4 of the DSU? Fifth, what redress could the DSB give to a Member which had acted in good faith to uphold the letter and the spirit of the rules-based multilateral trading system?

So far, Turkey had not notified the WTO nor India of the details of the restrictions on textile and clothing products. When India sought consultations under Article XXIII:1 of GATT 1994 and Article 4 of the DSU, it had been told that in these bilateral consultations some other delegations should also be present. It was India's understanding that this major trading entity, whose participation Turkey considered necessary in the bilateral consultations, had been taking a consistent stand in the GATT and the WTO that Article XXIII:1 consultations could only be bilateral. Furthermore, India understood that when Members having a common interest on a trade measure taken by this major trading entity had recently sought joint consultations, this major trading entity had taken the stand that the interests of the parties would be best served by holding separate bilateral consultations. He therefore requested that this major trading entity "sensitize" Turkey's authorities to the stand it had taken with respect to Article XXIII consultations in the past. India therefore found that its recourse to the provisions of the GATT 1994 and the DSU had been frustrated in a most unprecedented manner. It had made its request for these bilateral consultations in good faith, and in full transparency with a view to reaching a mutually satisfactory solution. Since Turkey had not entered into these consultations within the thirty-day period, as required under Article 4.3 of the DSU, India reserved its rights on this matter under the DSU provisions.

The representative of Turkey confirmed that several written communications on this matter had been exchanged between India and Turkey. However, India's statement at the present meeting did not refer to the communication in which India had indicated that it could not agree to the participation of the Communities in the consultations. On 17 April 1996, following receipt of that communication, Turkey had thought that since its proposal regarding the participation of the Communities had not been accepted, consultations would not be held. Since on 18 and 19 April Turkey had attended a meeting with EFTA States, it had not received the communication sent by India on 18 April on time and therefore had been unable to reply properly. As stated by Turkey at the DSB meeting on 17 April, the DSU provisions had not been designed to deal with situations arising from the establishment of the customs union. Unlike previous enlargements of the Communities, Turkey was the first and perhaps the only country which had entered into the customs union with the Communities without having acceded as a full member. Article XXIV of GATT 1994 clearly stated that "a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories"; in other words, a customs union as a single entity shall apply unified commercial policy instruments. In this respect any measure, taken by the customs union or either partner to it, would be applied within that single customs territory. Therefore any request for consultations on the measure taken as a result of the completion of the customs union should be addressed to both partners of the customs union. This point had already been made by the Communities and Turkey at the DSB meeting on 27 March. He reiterated Turkey's willingness to discuss this matter with India to find a mutually agreeable solution without excluding the other partner of the customs union.

The representative of the European Communities noted the statements made by the previous speakers, and agreed that consultations under Article XXIII:1 were bilateral in nature. The measure considered to be inconsistent with WTO obligations had been agreed within the framework of the customs union. The GATT 1994 had procedures for such situations and working parties had been established under Article XXIV. The measure under consideration resulted from completion of the customs union and other procedures may not be applicable to this particular situation in the same way. The Communities considered that a member of the customs union was not in a position to change a measure without the consent of the other partners. Therefore, if a measure taken within the framework of the customs union were to be challenged, it was only natural for both partners to the customs union to participate in consultations in order to assess the request and draw conclusions. This matter required further reflection by the DSB.

The representative of Hong Kong expressed his delegation's concern regarding the difficulties experienced by a number of delegations in communicating proposed arrangements for consultations. Over several meetings, the DSB had heard of these difficulties but the matter remained unresolved. Referring to the statements made by Turkey and the Communities regarding the relevance of Article XXIV to the consultations requested by India, he reserved his delegation's rights to revert to this matter if necessary at a later stage. He observed that a separate forum was available for consultations under Article XXIV, and that no reference had been made to Article XXIV in the request for consultations made by India.

The representative of India thanked Members for their statements. Referring to the statement by Turkey, he said that on 17 April, India had sent a communication to Turkey in which, among other things, it had indicated that there was no question of participation in these consultations of third parties. He reiterated that at the present meeting he did not wish to enter into the substance of this matter. He regretted that, notwithstanding Article XXIII:1 of the GATT 1994 and Article 4.1, and 4.2 of the DSU, his country, which had suddenly been faced with quantitative restrictions, could not induce the consulting Member to hear its complaint.

The DSB took note of the statements.

4. Mutually agreed solutions
   - Announcement by the Chairman

The Chairman, speaking under "Other Business", drew attention to Article 3.5 of the DSU, which provided that: "all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements..shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements". In order to ensure this result, Article 3.6 further provided that "mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto". The DSB had so far received notification of mutually agreed solutions in three cases: (i) Malaysia - Prohibition of imports of polyethylene and polypropylene (WT/DS1); (ii) Korea - Measures concerning the shelf-life of products (WT/DS5); (iii) United States - Imposition of imports duties on automobiles from Japan under Section 301 and 304 of the Trade Act of 1974 (WT/DS6). At the present meeting, Canada and Korea had informed Members that they had reached a mutually agreed solution with regard to Korea's measures concerning bottled water. However, it appeared that there were other cases where parties to a dispute under the DSU had reached a mutually agreed solution. These had not been notified to the DSB under Article 3.6 of the DSU, nor had their withdrawal been notified. He recalled that in July 1995, following Singapore's withdrawal of its request for consultations with Malaysia, the Chairman of the DSB had stated that: "it was important that at this stage when DSB practices were being established that Members considered the need to register formally not only the initiation of disputes but also the settlement and resolution thereof". This precedent had not been followed. At the present meeting, he wished to call upon Members to implement fully the provisions of Article 3.6 of the DSU in order to secure the fullest transparency in the matter of dispute settlement.

The representative of India thanked the Chairman for his statement and pointed out that the obligation to notify mutually agreed solutions was not limited to matters raised in the DSB pursuant to DSU provisions. He referred to Article 3.6 of the DSU and pointed out that all mutually agreed solutions on matters formally raised under the dispute settlement provisions of the covered agreements have to be notified to the DSB and the relevant Councils and Committees. He also mentioned that Article 3.5 of the DSU clearly highlighted the concern that mutually agreed solutions should not

undermine a multilateral covered agreement and that paragraph 6 flows out of paragraph 5. In this context, he suggested that the Secretariat provide information on the dispute settlement provisions of covered agreements apart from those contained in the DSU and felt that this information would provide guidance to Members as well as to the DSB regarding the categories of mutually agreed solutions which had to be notified to the DSB and the relevant Councils and Committees.

The Chairman said that India's suggestion would be conveyed to the Secretariat.

The DSB took note of the statements.