WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
3 June 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 3 June 1999

Chairman: Mr. Nobutoshi Akao (Japan)

Subjects discussed: Page:

Prior to adoption of the agenda

The item concerning "Argentina – Measures affecting imports of footwear: Request for the establishment of a panel by the United States" (WT/DS164/3) was removed from the proposed agenda at the request of the United States.

The representative of the United States drew attention to the US request for authorization to suspend concessions, and said that if, under item 1, the EC intended to request arbitration pursuant to Article 22.6, it should do so prior to the adoption of the agenda in order for item 1 to be removed from the proposed agenda. She asked whether the EC intended to request arbitration on this matter and if so the item should be withdrawn from the agenda.

The representative of Canada supported the statement made by the United States. If the EC was to request arbitration, then item 1 should be withdrawn from the agenda. His delegation did not believe that a DSB decision was required to refer this matter to arbitration.

The Chairman said that this procedural issue had already been discussed in the context of the DSU review. He asked whether the EC wished to take the floor at this stage.

The representative of the European Communities said that he wished to speak after the adoption of the agenda.

The representative of the United States said that at the present meeting the DSB should follow the established practice that when a panel report had been proposed for adoption and the panel report

was appealed, the agenda item was automatically withdrawn. The DSU did not require any decision by the DSB to refer the matter to arbitration. The text of Article 22.6 provided that "if the Member concerned objects to the level of suspension proposed, … the matter shall be referred to arbitration." It did not provide that the DSB should decide to refer the matter to arbitration. There was no requirement for the DSB to meet for this purpose and no requirement could be read into the DSU where none was provided. The DSB should follow the practice that had been established for arbitration under Article 21.3 of the DSU that whenever a party to a dispute requested arbitration, the arbitrator was appointed by the Director-General and the arbitration process started without delay.

The Chairman said that the Secretariat could provide some clarification on the practice under Article 21.3 and whether the same practice had been followed in the Banana case.

The representative of the United States said that since the EC had not provided any indication that it would request arbitration, the DSB should adopt the agenda and proceed to consideration of item 1.

The Chairman proposed that the DSB adopt the agenda as amended.

The DSB so agreed.

1. European Communities – Measures concerning meat and meat products (hormones)

(a) Recourse to Article 22.2 of the DSU by the United States (WT/DS26/19)

(b) Recourse to Article 22.2 of the DSU by Canada (WT/DS48/17)

The Chairman proposed that the two sub-items be taken up together since they pertained to the same matter.

The representative of the European Communities requested to take the floor in order to make an announcement.

On a point of order, the representative of the United States said that under normal procedure since the item had been placed on the agenda by the US delegation, the United States should speak first.

The representative of the European Communities recognized that it was the right of the United States to take the floor first, but his announcement might have a direct impact on the statements to be made by the United States and Canada. However, it was up to the United States to decide whether the EC could speak first.

The representative of the United States said that her country requested the authorization of the DSB to suspend the application to the EC and its member States of tariff concessions and related obligations with respect to imports of EC products to the amount of US$202 million. This level of suspension was equivalent, on an annual basis, to the level of nullification or impairment of US benefits as a result of the EC's failure to bring its measures into compliance with the DSB's recommendations. The EC had failed to comply with its WTO obligations to lift its ban on hormone-treated beef by 13 May. The United States was disappointed that after 15 months, the EC had failed to come into compliance with its WTO obligations. The United States had not been able to reach agreement on acceptable compensation. The United States intended to suspend tariff concessions and related obligations by directing the US Customs Service to impose duties in excess of bound rates on a list of products to be drawn from an initial list contained in document WT/DS26/19. The US objective was not to withdraw concessions, which did not help US exports, and was not to the benefit

of its importers. The United States would prefer to settle the dispute, and would therefore continue to strive to reach a mutually acceptable solution with the EC. Unless the EC contested the level of suspension at the present meeting, the US request should be authorized, unless there was a consensus decision to reject the request. As the United States would not object to its request, authorization should be granted that same day. This was why Article 22 provided for the suspension of concessions and why the United States insisted as a fundamental part of the Uruguay Round package of agreements that this decision be automatic.

The representative of Canada said that his delegation was seeking authorization to suspend the application to the EC and its member States of tariff concessions under the GATT 1994. Canada was seeking authorization to suspend tariff concessions by imposing 100 per cent tariffs on products from the EC covering trade in the amount of Can$75 million. In accordance with Article 22.4 of the DSU, the level of suspension of concessions requested by Canada was equivalent to the level of nullification or impairment suffered by Canada as a result of the EC's measure. Canada was prepared to explain to an arbitrator – if arbitration was requested – why Can$75 million was an accurate representation of the impairment it had suffered. Canada was taking this exceptional action of requesting authorization to retaliate in response to the EC's failure to meet its obligation and to comply with the DSB recommendations by the deadline of 13 May 1999. However, this was not Canada's preferred option. His delegation urged the EC to comply with its obligations or to offer meaningful compensation as an interim solution until full compliance.

The representative of the European Communities said that the requests by the US and Canada to suspend concessions to the amount of US$202 million and Can$75 million respectively were significantly higher than the levels of benefits nullified or impaired as a result of the EC's import ban. His delegation therefore requested that the amounts proposed by the US and Canada be determined by arbitration in conformity with Articles 22.6 and 22.7 of the DSU. To this effect, a written request would be circulated shortly. The EC requested that in order to guarantee a minimum of security for EC operators, the products covered by any authorization to suspend tariff concessions should be identified in a precise, complete and exhaustive manner once the total value of the trade subject to suspension had been determined by the arbitrators.

The Chairman proposed that the DSB take note of the statements and agree that each matter be referred to arbitration by the original Panel in accordance with Article 22.6 of the DSU.

The representative of the United States said that it was her delegation's understanding that the DSB did not need to authorize the arbitration, and that no DSB agreement was necessary. Her delegation believed that the DSB did not need to take any action other than to take note of the EC's request.

The representative of the Philippines said that in light of the EC's request for arbitration, the DSB was not in a position to authorize the suspension of concessions at the present meeting. Therefore, the DSB could take a decision to suspend the requests by the United States and Canada pending arbitration.

The representative of India said that, without prejudice to any position or particular interpretation, the Legal Affairs Division could provide some clarification on this issue. In accordance with the text of Article 22.6, the US request for authorization should be brought to the DSB. Then if the Member concerned objected to the level of suspension, the matter should be referred to arbitration. It was his view that when the request for authorization was submitted to the DSB and objection was made in the DSB, the DSB would have to refer the matter to arbitration. He hoped that the outcome would not be prejudiced in any manner towards either party.

The Chairman said that several requests had been made for arbitration under Article 21.3 of the DSU, but Article 22.6 was only invoked for the second time. Therefore there could be some

differences of interpretation. The only precedent was the Banana case which might not constitute the right legal interpretation. In the Banana case, the former DSB Chairman had proposed that "the DSB take note of the statements and agree that the matter be referred to arbitration by the original panel in accordance with Article 22.6 of the DSU".[1] He proposed that the DSB follow the approach taken in the Banana case and that the matter be discussed in the context of the DSU review.

The representative of the United States said that the Banana case was a bad precedent. She reiterated that the DSU did not require any decision by the DSB to refer the matter to arbitration. The text of Article 22.6 provided that if a Member concerned objected to the level of the suspension proposed, the matter would have to be referred to arbitration. It did not provide that the DSB would decide to refer the matter to arbitration. There was no requirement for the DSB to meet for this purpose, and no requirement could be read into the DSU where none was provided. The United States believed that the DSB was not required to decide on the amount and that the request for arbitration did not need to be made in the DSB meeting. If the EC had to submit its request for arbitration on 18 May, would it have had to wait until now to start arbitration?

The representative of India said that the WTO was a Member-driven organization and since the United States had made its request in the DSB and the EC's objection to the level of suspension proposed had also been made in the DSB, it would not be appropriate to refer the matter to arbitration without the DSB's decision thereon.

The representative of Bulgaria said that if the matter was not referred to arbitration by the DSB, one would not know who would initiate the arbitration and when the arbitrators could start their work.

The representative of Hong Kong, China said that his delegation believed that it was appropriate for the DSB to consider a request under Article 22.6. The problem was that the respondent did not officially know the amount until the request was formally made in the DSB under Article 22.2. Only when the DSB was convened could the respondent decide whether or not it wished to request arbitration. Furthermore, there would be a lack of transparency for other Members, if the matter was referred to arbitration without any DSB involvement. He also underlined that many Members attached importance to transparency and to the multilateral character of the dispute settlement mechanism.

The representative of the European Communities said that it was not necessary to prolong the procedural discussion on this matter. The outcome of this issue had already been decided, namely that the matter would be referred to arbitration. It was his understanding that this matter could be discussed in the DSU review. As the request for arbitration had been made in the DSB, it would be appropriate that the DSB take note of the request and apply the provisions of Article 22.6 in accordance with the precedent set in the Banana case at the DSB meeting in January 1999. He added that the minutes of that meeting had not been challenged by the United States. This should not prejudice any views concerning procedural issues. This important matter which involved the suspension of concessions was of concern to all Members and it was only legitimate that this issue should be discussed in the multilateral context.

The representative of Uruguay proposed the following language: "since the Member concerned, i.e. the EC objects to the level of suspension proposed, in accordance with Article 22.6 the matter is referred to arbitration". He believed that this neutral language would not prejudge Members' positions.

The representative of the United States said that her delegation could agree with the suggestion made by Uruguay. The United States was one of the delegations who supported

[1] WT/DSB/M/54, p. 34.

transparency, and it was not her intention to imply that the DSB should not be involved when a request had been made under Article 22. Her intention was to emphasize that the DSU did not require the Chairman to seek agreement of the DSB when a request for arbitration was made. She proposed that in light of the EC's request, the matter shall be referred to arbitration.

The Chairman proposed that the DSB take note of the statements and that, in light of the EC's request, each matter shall be referred to arbitration by the original Panel in accordance with Article 22.6 of the DSU.

The DSB so agreed.

2. European Communities – Regime for the importation, sale and distribution of bananas - Recourse to Article 21.5 of the DSU by Ecuador

(a) Implementation of the recommendations of the DSB

The Chairman said that this item was on the agenda at the request of Ecuador.

The representative of Ecuador said that, without prejudice to its rights under Article 22 of the DSU, Ecuador had requested that this item be included on the agenda of the present meeting in order for the EC to report on its progress in the implementation of the DSB recommendations following the adoption of the Panel report on "European Communities - Regime for the Importation, Sale and Distribution of Bananas: Recourse to Article 21.5 by Ecuador". Due to its failure to comply with its obligation to bring its banana import regime into conformity with the WTO rules, the EC had an obligation to report on its progress in implementation. The EC was not entitled to another reasonable period of time and had an obligation to immediately modify its regime. The obligation to provide status reports in writing under Article 21.6 of the DSU continued until the EC had complied with the DSB's recommendations. Ecuador wished the DSB to be informed of any changes and steps to be taken on this matter. Ecuador was aware of the EC's difficulties to modify its regime. However, some inconsistent elements of its banana import regime could be rectified through adoption of administrative measures, which could be done immediately by the Commission. These included elimination of country quotas. He then requested that the EC provide its status report on this matter.

The Chairman said that delegations had discussed this matter in the DSU review, and had in general supported the view that surveillance under Articles 21.6 and 22.8 should continue beyond the expiration of the reasonable period of time.

The representative of the European Communities said that the EC did not have any problems in keeping the DSB informed about its progress in implementation. The EC intended to bring its banana regime into conformity with the Panel's findings as soon as possible, and to this end, it continued its examination of various options for a WTO-consistent regime. The EC had already started, and intended to pursue, intensive discussions with all the main parties before drawing any conclusions. Consultations had been held with Ecuador, the United States, the main supplying countries, the ACP countries and many other interested parties.

The representative of the United States said that her country had consulted with the EC on its implementing options and appreciated the EC's readiness to consult with the United States while it was preparing ways to comply with the WTO rulings. The United States had provided the EC with its views and concerns regarding some options, and hoped the EC would take into account these points and the concern of all parties as it moved forward in its process. Her delegation would appreciate the opportunity to continue discussions with the EC on this issue, and hoped that the EC would be in a position to adopt a WTO-consistent regime to enable the United States to terminate the suspension of concessions in accordance with Article 22.8 of the DSU.

The representative of Guatemala said that his delegation had indicated its support for Members to invoke Article 21.5 procedures. Guatemala wished to reiterate that it never questioned the efficiency of the DSU rules. His delegation believed that transparency was a basic principle and thus supported Ecuador's request. Guatemala considered that status reports under Article 21.5 procedures should continue to be provided to indicate progress in implementation. Guatemala hoped that there would be no obstacles in the implementation of the DSB recommendations in this case, and that the EC would shortly comply with its WTO obligations.

The representative of Panama said that, like previous speakers, his delegation supported the request by Ecuador. He had previously made a statement in the DSB that status reports should be automatically placed on the agenda until the issue had been resolved. At that time, the Secretariat had stated that the current practice was that Members had to request the inclusion of a status report on the agenda. He continued to believe that Panama's interpretation was correct and that under Article 21.6 of the DSU status reports should be automatically placed on the agenda, and should remain on the agenda until the issue had been resolved. His delegation maintained that the language of the Article placed an obligation on Members to provide status reports and there was no need for a Member to request that the item be included on the agenda. He thanked the EC for its report and hoped that it would continue to provide status reports since this was of interest not only to the parties to the dispute, but, due to its systemic implications, it was of interest to all Members. Panama hoped that the EC would be able to intensify its efforts in consultations with the interested parties.

The representative of Ecuador said that his delegation had noted the statement made by the EC. However, he was not sure whether the information provided by the EC met Members' expectations concerning status reports, in particular because this case was under public scrutiny. The information provided at the present meeting had not contained any references to the EC's paper currently under consideration in Brussels. His delegation believed that the paper submitted to the EC authorities, which listed three options, contained elements which were not aimed at meeting the expectations of the countries whose views on the legality of the EC's banana regime had been supported by the Panel. The EC should not miss the opportunity to radically reform its banana regime and should eliminate protectionist elements which had negative trade effects. He said that not all options contained in the EC's paper were aimed at free trade and, at least, two options would preserve protectionism in the banana trade.

The representative of Mexico said that the consultations which would continue to be carried out by the EC should cover all co-complainants, including Mexico. His country requested that the EC comply immediately with the DSB recommendations.

The representative of Colombia said that her delegation wished to comment on some elements referred to by Ecuador. Colombia had two concerns. First, the country quotas did not have to be eliminated, but rather reallocated with a more appropriate reference period. As long as the EC maintained its tariff-quota regime, it had an obligation to preserve country-quota allocations. This obligation would be terminated with the introduction of a single tariff regime. Second, in the process of modification of its banana import regime, the EC should cooperate with all the parties concerned to ensure a prompt and broad solution which would cover all elements including import licences, tariff preferences and the MFN tariff-quotas.

The representative of Honduras supported the statements by Ecuador and Mexico. Honduras, as a party to the dispute, would welcome consultations with the EC at its convenience. His delegation encouraged the EC to try to bring its regime into conformity.

The representative of the European Communities said that his delegation had noted the statements made. The EC was currently examining its implementing options and was of the view that

at this stage, one should try to arrive at an overall solution as soon as possible. However, at this stage no final position had been taken.

The Chairman said that in light of the discussion, the matter would be placed on the agenda of subsequent DSB meetings in accordance with Article 21.6 of the DSU.

The DSB took note of the statements and agreed to revert to this matter.

3. Adoption of panel reports

(a) Statement by the Chairman

The Chairman said that he wished to report on the outcome of his consultations on the question of the adoption of the report of the Panel established at the request of the EC, namely, "European Communities – Regime for the Importation, Sale and Distribution of bananas – Recourse to Article 21.5 of the DSU by the European Communities" (WT/DS27/RW/EEC and Corr. 1), which had been circulated on 12 April 1999. On the basis of his consultations, he had detected that a number of delegations were of the view that if the party who requested the establishment of a panel did not inscribe the item on the agenda of the DSB, then there was no need to take action in this regard within 60 days. It was his understanding that the EC had contacted some delegations who had indicated their flexibility in this matter. He asked whether the DSB could agree that no action be taken on this report within the 60 day time-limit as provided for in the DSU.

The representative of Hong Kong, China drew attention to footnote 7 to Article 16.4 which he believed was relevant in this case. His delegation considered that in the interests of the overall systemic operation of the DSB, it was not appropriate to allow any flexibility. Once a panel had been established and its report had been circulated, the DSB had to meet within 60 days from the date of circulation to consider the adoption of a panel report. No flexibility was envisaged under the existing DSU provisions. His delegation urged the Chairman to continue to consult on this important systemic matter.

The representative of Panama supported the statement made by Hong Kong, China. Due to its limited resources, Panama had not participated in the consultations carried out by the Chairman on this matter. This was the first time that Panama had been made aware of the fact that such consultations had been held. He therefore requested that the Chairman include Panama in informal consultations to be held on this matter. His delegation wished to be informed of any possible consequences in case no action was taken within 60 days. It was his delegation's view that, for transparency purposes, the panel report should be considered by the DSB in order to provide an opportunity for Members to express their views.

The representative of the Philippines wished to associate his delegation with the statement made by Hong Kong, China.

The representative of the United States said that his delegation believed that this question had to be considered in the context of Article 3.4 of the DSU which stated that the aim of recommendations was to achieve a mutually satisfactory solution. If neither party to the dispute wished to request the adoption of a panel report within the 60-day period, then it had to be due to the fact that a satisfactory solution had been reached. His delegation believed that only the parties to a dispute could request the adoption of a panel report. This was the established practice under the GATT 1947 and it should continue to be the practice under the WTO. The United States read Article 16.4 of the DSU not as requiring action by the DSB within 60 days if no party had requested it, but rather as a deadline for having a right to adoption by negative consensus. After 60 days a party could seek adoption of the panel report, but would need positive consensus for adoption.

The representative of Turkey said that this matter had been discussed at length in the DSU review, and his delegation had supported the view expressed by the majority of delegations present at the meeting, namely that only one of the parties to the dispute could request the adoption of a panel report.

The representative of Uruguay said that his delegation believed that the objective of the DSU was to find a satisfactory settlement. If the parties agreed to a settlement at any time in the process, then the problem was solved. Uruguay did not believe that the right to request the adoption of the report could be lost through the negative consensus rule. It was not correct to state that if 60 days had elapsed, then the Member would lose its right. Uruguay did not support such an interpretation.

The representative of Hong Kong, China recalled that the United States had stated that once a mutually satisfactory solution had been found, then according to Article 3.4 of the DSU, if no party to the dispute requested the adoption of the panel report, the DSB should take no further action. His delegation wished to point out that under Article 3.6 of the DSU, any mutually agreed solution would have to be notified to the DSB. Second, the DSU allowed other Members to raise any point relating thereto. His delegation wished to know whether a mutually agreed solution had been reached in this case and, if so, whether this solution had been notified to the DSB, and whether the DSB could meet so as to allow other Members to raise any relevant point.

The Chairman said that there was only one party to the dispute under consideration.

The representative of Brazil supported the view that only the parties to the dispute had the right to place a panel report on the agenda for adoption.

The representative of India reiterated his statement made at the previous meeting. India continued to believe that panel reports should be adopted within a 60-day period. Once a panel report had been circulated, it was the property of the DSB, and it was obligatory for the DSB to place it on the agenda of its meeting within 60 days.

The Chairman said that in light of the discussion he would continue to consult on this matter. He believed that the systemic issue under consideration would be better dealt with in the DSU review.

The DSB took note of the statements.