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WORLD TRADE ORGANIZATION

DISPUTE SETTLEMENT BODY
20 November 1996

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 November 1996

Chairman: Mr. Celso Lafer (Brazil)

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1. United States - The Cuban Liberty and Democratic Solidarity Act

- Request by the European Communities and their member States for the establishment of a panel (WT/DS38/2 and Corr. 1).

The Chairman recalled that the DSB had considered this matter at its meeting on 16 October 1996, and had agreed to revert to it at the present meeting. He drew attention to the communication from the European Communities in WT/DS38/2 and Corr.1.

The representative of the European Communities said that as his delegation had not observed any change in the United States' position since the meeting of the DSB on 16 October 1996, the Communities' request for the establishment of a panel remained as outlined in document WT/DS38/2. A panel should therefore be established with standard terms of reference.

The representative of the United States said that this matter was on the Agenda of the present meeting for the second time following the request by the Communities and their member States for

the establishment of a panel regarding certain provisions of the Cuban Liberty and Democratic Solidarity (Libertad) Act and other US measures governing the United States' economic relations with Cuba. He recalled that when this matter had been brought to the DSB over a month ago, the United States had explained that the Communities had included in their request for a panel the measures which reflected long-standing US foreign policy and security concerns with regard to Cuba. The Libertad Act, in particular, had been enacted in the immediate aftermath of the shoot down by Cuba of two unarmed civil aircraft in broad daylight and without justification, in blatant violation of international law. The Act was designed to promote a swift transition to democracy in Cuba, a goal that the United States, the Communities and their member States, and many other Governments shared.

Certain of the other measures included in the Communities' request had been in force for some years, or decades, and had been expressly justified by the United States under the GATT 1947 as measures taken in pursuit of essential US security interests. As indicated at the DSB meeting on 16 October 1996, given the foreign and security policy concerns underpinning decades of the United States' relations with Cuba, and in the light of the common interests that the United States shared with its European friends in regard to Cuba, the United States was surprised and concerned that their differences over Cuba had been raised before a multilateral trade forum.

The United States regretted that the Communities and their member States had decided to bring these differences to a panel. The United States reiterated that its dispute with the Communities was not fundamentally a trade issue and thus the trade panel should not be requested to decide on this matter. There was no suggestion that any of the measures raised by the Communities reflected trade protectionism. The United States did not believe that recourse to a trade panel would lead to a resolution of this dispute, but rather believed that proceeding further with this matter would pose serious risks for this new and invaluable organization, which was only in the early stage of its development. The United States strongly urged the Communities to explore other, more appropriate and fruitful avenues for pursuing their interests in this matter.

The DSB took note of the statements and agreed to establish a panel with standard terms of reference in accordance with the provisions of Article 6 of the DSU.

The representatives of Mexico and Canada reserved their third-party rights to participate in the panel proceedings.[1]

The representative of New Zealand said that his delegation did not wish to reserve third-party rights. New Zealand recognized the concern which had led the United States to impose the additional measures, subject of the present dispute. Nevertheless, measures taken in response should be in accordance with international law and should not be broadened unilaterally to third countries and their nationals. New Zealand attached great importance to an early resolution by the parties of this dispute.

The representative of Cuba said that his country did not wish to reserve third-party rights to participate in the panel. However, since the United States had based its arguments on national security criteria and the alleged threat posed by Cuba, his delegation wished to speak on this issue. Cuba wished to recall and remind the United States that although it had never invaded the United States militarily, Cuba had been occupied for four years by US troops. Cuba's Parliament had never adopted any legislation against the United States, but the US Congress had adopted legislation relating to a number of Cuba's sovereign rights. That legislation included an authorization for the United States to intervene whenever it felt the need to re-establish law and order in Cuba. While his country occupied no part of US territory, the United States, against the will of the Cuban people, had a naval base in Guantánamo.

[1]After the meeting Japan, Malaysia and Thailand reserved their third-party rights.

Cuban ships had never threatened the US territory, but Cuba had, on a number of occasions, been the object of such actions by the United States. Cuba had never organized troops of mercenaries to invade or to take any kind of hostile action against the United States nor had allowed terrorist groups to act against the United States from its territory, or for aircrafts taking off from its national territory to act against civil or military targets in the United States. Cuba's intelligence services had never organized or planned any actions against US leaders. He believed that this forum was not appropriate to enumerate an endless list of such grievances. In fact Cuba would be in a better position than the US to resort to Article XXI of GATT 1994 which referred to national security concerns.

The representative of Norway said that this case was complicated because of the trade, economic, and political implications. His delegation did not reserve third-party rights but supported the statement made by New Zealand.

The DSB took note of the statements.

2. Japan - Taxes on Alcoholic Beverages (WT/DS8/11, WT/DS10/11, WT/DS11/8
- Implementation of the recommendations of the DSB

The Chairman recalled that the DSU provisions required the DSB 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 required the Member concerned to inform the DSB, within 30 days after the date of adoption of panel and Appellate Body report, of its intentions in respect of implementation of recommendations and rulings of the DSB. On 1 November 1996, the DSB had adopted the Appellate Body report on "Japan - Taxes on Alcoholic Beverages" and the panel report on the same matter as modified by the Appellate Body report. He informed Members that this item had been inscribed on the Agenda at the request of Japan.

The representative of Japan reiterated his country's deep regret that the Appellate Body report had concluded that Japan's liquor tax system was not consistent with Article III of GATT 1994. His delegation, however, noted that the report had accepted some of Japan's arguments and subsequently had made several corrections to errors contained in the panel report. Under Article 21.3 of the DSU, Japan had the obligation to inform the DSB of its intentions in respect of the implementation of the recommendations of the DSB and his country intended to meet this obligation.

The tax reform process for the 1997 fiscal year during which the implementation of the recommendations of the DSB would be examined, had just begun in Japan. Therefore, he was not in a position at this stage to indicate any details of the tax reform which would be formulated during this process. The question of how the distilled liquor tax system should be amended in order to implement the recommendation of the DSB, would be examined in the light of the following conclusions set out in the Appellate Body report: (i) under the Japanese distilled liquor tax system imported vodka was taxed in excess of domestic shochu; and (ii) the Japanese distilled liquor tax system did not tax distilled liquors other than vodka similarly to domestic shochu thereby affording protection to domestic production.

Pursuant to Article 21.3 of the DSU, Japan requested a reasonable period of time to comply with the recommendations of the DSB. It intended to consult with the other parties to the dispute, namely Canada, the European Communities and the United States, to determine a possible period of time.

The representative of Canada said that as stated previously Canada was pleased with the panel and Appellate Body recommendations on this matter. It was also pleased that Japan intended to respect

these recommendations by bringing its measures into conformity with the WTO. The need for "prompt compliance" required by the DSU should be emphasized. Consequently, these Japanese measures must be amended in the very near future. The fact that this matter had been an issue between Japan and a number of its trading parties for many years must be taken into account in considering the "reasonable period of time" within which Japan would need to bring its tax system into conformity with the recommendations. Canada's Minister for International Trade had urged Japan "to carry out the ruling quickly". In Canada's view, too much commercial damage had already been sustained by Japan's trading partners; therefore, this was the time for action. In this connection, the April budget cycle was the appropriate opportunity for Japan to enact the required changes. Canada requested that Japan implement the recommendations of the DSB without delay, both in letter and in spirit, in order to bring this long-standing dispute to an end. In this connection, Canada would be closely examining the details of how the implementation would be carried out.

The representative of the European Communities thanked Japan for its statement concerning its intention to implement the DSB's recommendations. The Communities noted that Japan was not yet in a position to indicate the manner and time-period in which it intended to implement the DSB's recommendations. He recalled that full implementation must take place promptly, which meant immediately or at the latest within a reasonable period of time, which should normally not exceed 15 months. Given Japan's systemic interest in preserving respect for the dispute settlement provisions by all Members, the Communities expected Japan to comply fully with these provisions. The Communities considered that the only way for Japan to achieve full implementation without any risk of a new WTO condemnation was to introduce a single tax rate per degree of alcohol for all spirits. If any taxation difference remained between directly competitive or substitutable products it would run the risk of being more than "*de minimis*" and would again be found unjustified. The term *"de minimis"* meant negligible and it should be taken literally.

With respect to the reasonable period of time to implement the recommendations, the Communities observed that this dispute already had a long history, covering a ten-year period. During that time, the Japanese tax system for spirits had been condemned by two panels and by the Appellate Body. The Communities therefore expected Japan to make every effort to achieve full implementation of the DSB recommendations as promptly as possible, well within the time-frame of 15 months stipulated in Article 21.4 of the DSU.

The representative of the United States said that his authorities welcomed the announcement that Japan would implement the DSB recommendations on taxation of distilled spirits. The United States looked forward, pursuant to Article 21.3 of the DSU, to discussing with Japan in the next few weeks what constituted a reasonable period of time for implementation of the DSB recommendations and the manner of this implementation. He recalled that at the DSB meeting on 29 October and 1 November, the United States had noted that the adoption of the reports had come in good time for the necessary changes to be made in the context of the budget for the next Japanese fiscal year, which would begin on 1 April 1997. It had also noted that this dispute had a long history. The United States would closely follow Japan's implementation measures with the hope and expectation that Japan would adopt a market-opening solution, and that it would be no further need for this issue to be brought to the WTO.

The Chairman recalled that Article 21.3 (b) of the DSU required the parties to the dispute to agree to a time-period necessary for implementation of the DSB recommendations.

The DSB took note of the statements and of the information provided by Japan regarding its intentions to implement the recommendations of the DSB.

3. Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes

- Report by the Chairman of the Informal Group on the Rules of Conduct

The Chairman recalled that the work done on the Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes had been forwarded by the Preparatory Committee to the WTO as a possible basis for further work. On 31 January 1995, the General Council, in the context of the adoption of the Preparatory Committee report contained in PC/R, had forwarded this matter to the DSB for consideration. Subsequently, the work had been carried out by the Informal Group on the Rules of Conduct under the Chairmanship of Mr. Armstrong. Periodically, Members had opportunities to hear progress reports by Mr. Armstrong. The last report on this matter had been presented in September 1995. In accordance with this report there had been a consensus on the draft text of the Rules of Conduct circulated to Members on 24 July 1995, except for one outstanding issue in the area of the Textiles Monitoring Body (TMB). The final text of the Rules of Conduct had been circulated on 15 November 1996, in document WT/DSB/RC/W/1.

The Chairman of the Informal Group on the Rules of Conduct, Mr. Armstrong, reported on the results of more than two years of negotiation on the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes. He recalled that on 9 November 1994, a proposal had been circulated for a draft Code of Ethics in PC/IPL/W/12 applicable to all persons involved in the dispute settlement process of the WTO. He had then been asked to chair informal consultations to which all interested delegations had been invited. He recalled that on 31 January 1995, the General Council had taken note of his progress report to the WTO Preparatory Committee and had referred the matter to the DSB. On 14 February 1995, he had been asked by the DSB to continue open-ended informal consultations with a view to concluding a final draft text of the Rules of Conduct for consideration by the DSB as soon as possible. Due to the very active participation of many delegations, the text of the Rules of Conduct had been substantially changed to take into account the concerns of many countries. On 24 July and 27 September 1995, he had reported to the DSB that a consensus had been reached amongst the participants in the open-ended consultations on a draft text of the Rules of Conduct, except for the single issue of the relationship between the TMB and the Rules of Conduct. Subsequently, the text of the Rules of Conduct, as they then stood, had been adopted by the Appellate Body on 15 February 1996 as Annex II of Working Procedures for Appellate Review.[2]

Following his progress report at the DSB meeting on 27 September 1995, he had sought to address the single outstanding issue of the TMB, by continuing informal consultations with a number of exporter and importer countries in the textiles sector. Subsequently, he had brought a revised text of the Rules of Conduct to wider informal consultations for discussion. Last week, this text had been faxed to all Heads of Delegations prior to an open-ended meeting. On 15 November 1996, this text had been circulated in WT/DSB/RC/W/1. He was pleased to report that, based on this extensive process of consultations and meetings, it appeared that a consensus had been reached on the text contained in WT/DSB/RC/W/1.

The representative of Norway thanked Mr. Armstrong for the effective work done in this area. Although this process had been long, without Mr. Armstrong's contribution delegations would still be struggling with this issue. He supported the adoption of the text contained in WT/DSB/RC/W/1. He believed that a good solution had been reached with regard to the outstanding problem of the relationship between the TMB and the Rules of Conduct.

[2]WT/AB/WP/1

The representative of India thanked Mr. Armstrong for finalizing the Rules of Conduct. His delegation had been involved in this process from the beginning and he was aware of the amount of time and energy that Mr. Armstrong had devoted to this work in order to bring it to a successful conclusion. Like Norway, he believed that it had taken a very long time to finalize this work because of the complex and various issues related to this question and to the fact that this was the first time that Members had undertaken such an exercise. His delegation could go along with the text proposed by Mr. Armstrong.

The representative of Pakistan thanked Mr. Armstrong for finalizing the Rules of Conduct and said that his delegation fully supported the text in WT/DSB/RC/W/1.

The representative of Brazil said that his delegation thanked Mr. Armstrong for the work done on the Rules of Conduct. The length of time dedicated to the negotiation of this text had led to an undoubted improvement of the text and his delegation fully supported the adoption of this text in WT/DSB/RC/W/1.

The Chairman also thanked Mr. Armstrong for his efforts and his successful accomplishment. He noted that it appeared that there was a consensus in favour of adoption of the Rules of Conduct and proposed that the DSB revert to this matter at its next regular meeting to be held on 3 December in order to formally adopt of the Rules of Conduct.

The DSB took note of the statements, of the consensus in favour of adoption of the Rules of Conduct and agreed to revert to this matter at its next regular meeting in order to formally adopt the Rules of Conduct.

4. Proposed nominations for the indicative list of governmental and non-governmental panellists (WT/DSB/W/43)

The Chairman drew attention to document WT/DSB/W/43 containing additional names proposed by Members for inclusion on the indicative list of governmental and non-governmental panellists in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained therein.

The DSB so agreed.

5. India - Patent protection for pharmaceutical and agricultural chemical products
- Request by the United States for the establishment of a panel (WT/DS50/4)

The Chairman drew attention to the communication from the United States contained in document WT/DS50/4.

The representative of the United States said that his country had requested consultations with India on 2 July 1996, on the latter's failure either to provide patent protection for pharmaceutical and agricultural chemical products or to comply with the obligations of Article 70.8 and 70.9 of the TRIPS Agreement. India, as a developing country, was entitled to take advantage of the transitional provisions in Article 65 of the TRIPS Agreement and defer modifying its patent system to make patent protection available consistent with Article 27 of the TRIPS Agreement. However, because India had not provided patent protection for pharmaceutical and agricultural chemical products on 1 January 1995, it was obliged to comply with Article 70.8 and 9 of the TRIPS Agreement as of that date.

Article 70.8 of the TRIPS Agreement required India to establish procedures to permit entities to file product patent applications drawn to pharmaceutical and agricultural chemical inventions, which were sometimes referred to as "mailbox" applications. Article 70.8 of the TRIPS Agreement also obliged India to ensure that when it provided patent protection for pharmaceutical and agricultural chemical products, all "mailbox" applications would be promptly examined based on their priority date, and patents granted would be based on the standards established in the TRIPS Agreement.

Article 70.9 required India to establish a system which would provide exclusive marketing rights in products that were the subject of a "mailbox" application, where the product had been patented and granted marketing approval in another Member and had been granted marketing approval in India. Although over 22 months had elapsed since these obligations had become mandatory, India had not introduced the necessary changes to its laws to meet these obligations. The United States had held unsuccessful consultations with India with regard to this matter. Accordingly, the United States requested the establishment of a panel to examine this matter.

The representative of India said that he had carefully listened to the request made by the United States for the establishment of a panel to examine the United States' assertion that India's legal regime had failed to conform to the obligations under Articles 27, 65 and 70 of the TRIPS Agreement, and had nullified or impaired benefits accruing directly or indirectly to the United States under the TRIPS Agreement. India had responded positively to the United States' request for consultations pursuant to Article 4 of the DSU and Article 64 of the TRIPS Agreement regarding the alleged absence in India of either patent protection for pharmaceutical and agricultural chemical products or formal systems that permitted the filing of patent application for pharmaceutical and agricultural chemical products and that provided exclusive marketing rights in such products.

During the consultations held in Geneva on 27 July 1996, India had done its best to respond to the United States' concerns, but it was not necessary to go into details at this stage. India was disappointed with the United States' decision to request the establishment of a panel. However, it recognized and respected the right of a Member to request the establishment of a panel in accordance with the DSU provisions after consultations failed to settle a dispute. India did not wish to stand in the way if other DSB members deemed it appropriate to agree at the present meeting to the request of the United States for the establishment of a panel, as contained in document WT/DS50/4.

The DSB took note of the statements and agreed to establish a panel with standard terms of reference in accordance with the provisions of Article 6 of the DSU.

The representative of the European Communities reserved third-party rights to participate in the panel proceedings.