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WORLD TRADE ORGANIZATION

Dispute Settlement Body
25 June 1997

MINUTES OF MEETING

Held in Centre William Rappard
on 25 June 1997

Chairman: Mr. Wade Armstrong (New Zealand)

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1. Surveillance of implementation of recommendations adopted by the DSB
- United States - Standards for reformulated and conventional gasoline: Status report by the United States (WT/DS2/10/Add.5)

The Chairman recalled that this item was on the agenda pursuant to Article 21.6 of the DSU which required that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved." He then drew attention to document WT/DS2/10/Add.5 which contained a further status report by the United States with regard to progress in the implementation of the DSB's recommendations on this matter.

The representative of the United States said that as provided for in Article 21.6 of the DSU, his country had submitted its sixth report on the implementation of the DSB's recommendations. At

the DSB meeting on 23 May 1997, the United States had stated that on 29 April 1997, the administrator of the US Environmental Protection Agency (EPA) had issued the proposed rule for comment. Consistent with normal US regulatory procedures, the EPA had invited all interested parties to comment on the specifics of its proposal. The comment period had ended on 19 June 1997. The EPA had received comments from a broad range of interested parties. These comments were all available for public inspection at the EPA which would be considered prior to the finalization of the Gasoline Rule.

The representative of Venezuela thanked the United States for the information just provided and said that as it had been announced at the DSB meeting on 23 May 1997, his Government and the representatives of the state enterprise *Petróleos de Venezuela SA* had already submitted comments on the proposed amendments to the Gasoline Rule. On 3 June 1997, the Venezuelan Minister of Industry and Trade had sent a communication to the US Trade Representative outlining his country's concerns with respect to a number of provisions in the proposed amendments relating to conventional gasoline which, if included in the revised Gasoline Rule, would contravene the DSB's recommendations and would once again result in the discriminatory treatment of imported gasoline.

In particular, Venezuela was concerned about the provisions which could subject foreign refiners to the United States civil and criminal jurisdiction. In accordance with the EPA proposal, the foreign refiner wishing to use its own baseline would have to waive its rights to sovereign immunity. Where questions of sovereignty were involved, Venezuela did not permit any country to impose its domestic laws on individuals or commercial entities for activities which the latter carried out in Venezuelan territory. On many occasions, his Government had indicated that there were viable alternatives which would enable the United States to ensure that its objectives in this area were fulfilled in a manner consistent with its WTO obligations. For example, the United States could make the importer responsible for any violation of the Gasoline Rule, while allowing the foreign refiner to use its own baseline, like the US refiner. There were numerous precedents in other sectors where the importer was legally responsible for the quality of products produced outside of the United States.

His Government believed that the proposed amendments which had unnecessarily complex and strict requirements intended to be applied exclusively to gasoline from foreign refineries would result in a significant reduction in imports of gasoline to the US market. From the environmental point of view, it should also be borne in mind that the maximum volume of gasoline regulated by these amendments would be significantly small compared to a daily consumption of about 8.5 million barrels in the United States. Venezuela, which was one of the principal suppliers of conventional gasoline to the United States, was exporting about 60,000 barrels per day. Thus, the small share of imported conventional gasoline in total domestic consumption made the less favourable treatment which the proposed amendments imposed on imported gasoline, as compared with US gasoline, even less justifiable. He reiterated that Venezuela did not question the right of the United States to establish its own environmental standards for the gasoline it consumed. On the contrary, it would cooperate with the United States, as it had done in the past, in order to continue improving the quality of its gasoline. Venezuela expected that such standards would be applied in a non-discriminatory manner and that the EPA would take due account of these and other similar comments which it had received from its trading partners and incorporate them in its final regulation due to enter into force next September.

The representative of the European Communities asked the following questions: (i) how would the United States reconcile the DSB's recommendations with the proposed Gasoline Rule where only imported gasoline - and not domestic gasoline - would be subject to a quality benchmark, a monitoring mechanism and the possibility to increase the statutory baseline, while deteriorations in the overall quality of conventional gasoline were possible for domestic products? (ii) how would the United States justify that certain surveillance requirements were only applicable to imports and not to domestic products? The Communities would be interested to receive replies from the US authorities to these questions. They believed that the correct implementation of the DSB's recommendations would require

the same treatment for like imported and domestic products unless differences could be justified by precisely identified environmental concerns.

The representative of Brazil welcomed the United States' efforts to bring its legislation into conformity with the Panel's recommendations which had been upheld by the Appellate Body. He recalled that the deadline for compliance with the DSB's recommendations on this matter was 20 August 1997, and that prior to that date only one regular meeting of the DSB was scheduled. Although Brazil had expressed its concerns that compliance might not take place within the required time-period, it had accepted the reassurances of the United States in this regard. Brazil had a number of questions with regard to the EPA's proposed amendments to the Gasoline Rule. Although these amendments should eliminate less favourable treatment for foreign refiners by allowing them to obtain individual baselines for their gasoline, nevertheless it contained elements that could create a situation of discrimination against foreign refiners. In this regard, the Brazilian gasoline producer had already expressed its main technical concerns to the US authorities. However, in Brazil's view, two aspects of the proposal had systemic relevance and should be brought to the DSB's attention.

One aspect related to the proposal for a burdensome, expensive and trade-restrictive requirement for gasoline exporters to post bonds. The reason for this requirement was to provide a fund that would ensure the payment of fines or penalties imposed on foreign refiners for possible future violations of the EPA's regulations. Brazil believed that this proposal raised serious questions in relation to the GATT 1994, including Articles II and III thereof. If exporters would be required to post bonds to ensure that penalties for possible future violations of law were paid, all trade could be seriously affected, since this payment created a trade barrier which, in Brazil's view, was tantamount to a tariff.

Brazil was even more concerned with the second aspect of the proposal, namely the requirement that state-owned or state-operated foreign refiners agree to waive their rights to sovereign immunity with regard to prosecution in the United States for civil and criminal violation of the Clean Air Act and of Title 18 of the US Code. The right to sovereign immunity was fundamental in public international law, and as such, had implications reaching far beyond this particular matter. No Member could impose a waiver of rights under international law as a condition for granting national treatment or any other WTO benefits. These points had been made to the EPA by the Brazilian exporter, and his country hoped that the EPA would reconsider these proposals, which had serious implications for the WTO.

The representative of the United States noted that the comments made at the present meeting, in particular those of Brazil and Venezuela, had already been submitted to the EPA. He reiterated that the comment period had ended on 19 June and that the EPA was now in the process of reviewing these comments. He assured delegations that all comments that had been received would be taken into account. He also reiterated that the United States took seriously its commitments to the timely implementation of its obligations with respect to this case and that it was on track towards meeting its commitments.

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

2. European Communities - Measures affecting importation of certain poultry products
   - Request for the establishment of a panel by Brazil (WT/DS69/2)

The Chairman drew attention to the communication from Brazil contained in document WT/DS69/2.

The representative of Brazil said that although his country's request for the establishment of a panel contained in WT/DS69/2 was sufficiently clear, he wished to make some comments on this matter. In July 1992, in the context of Article XXVIII:4 negotiations on the modification of the European Communities' concessions with regard to certain oilseeds and oil-cakes included in their schedule, Brazil had informed the Communities of its principal supplying interest in soya oil-cakes, its substantial interest in soya beans and its export interest in sunflower oil-cakes. The negotiations pursuant to Article XXVIII:4 had been a second-best solution made available to the Communities by the reconvened Oilseeds panel[1] and had been authorized by the GATT Council on 19 June 1992.[2]

In the course of Article XXVIII:4 bilateral negotiations concluded in July 1993, Brazil had been flexible and had not only accepted the changes proposed by the Communities with regard to its oilseeds sector, but had also accepted a package of compensation in other agricultural products. This package, which had been tabled by the Communities at the outset of the negotiations and which had only been modified in the following year to a limited degree, had been accepted on the understanding that the specific elements of the compensation offer, such as concessions on poultry, would benefit Brazil. His country was therefore surprised that in implementing the part of the agreement related to poultry meat, the agreed compensation had been reduced. The allocation of less than half of the chicken parts quota to Brazil had been a clear departure from the bilateral agreement. This quota had been designed to compensate Brazil for its losses in the oilseeds sector and not to reflect alleged market shares in the Communities' chicken parts market. After all, the compensation had been linked to changes in the market access conditions for oilseeds and not to chicken exports. Brazil had been entitled to an arrangement which would guarantee benefits beyond its actual share in the chicken parts market. Furthermore, the allocation of part of the Brazilian quota to countries that had not participated in the Article XXVIII:4 negotiations as interested parties, or to a category of others, including non-WTO Members, could not be considered as a compensation to Brazil.

Brazil contended that the implementation of the tariff-rate quota for poultry meat as contained in the bilateral agreement had not properly maintained "… a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided … prior to such negotiations" as defined in Article XXVIII. The compensatory adjustment in some products had not materialized as a result of the allocation and administration of the quota. Since 1994, when the Communities had begun implementing the *Agreement in the form of Agreed Minutes on Certain Oilseeds between Brazil and the Communities Pursuant to Article XXVIII of the GATT*, his Government had conveyed to the Communities its understanding of the terms of the agreement and its views on how it should be properly implemented.

Apart from numerous oral representations made by Brazil on this matter, its position had also been conveyed in a series of letters sent in March, April and May 1994 as well as in April 1995 and in May and July 1996. The continuing lack of response by the Communities -- to date no reply to any of these letters had been received -- and its failure to act on proposals made during bilateral consultations, had led Brazil to request consultations under Article XXIII of GATT 1994, and to invoke its rights under the dispute settlement mechanism. At the time of this request and during the two rounds of consultations held with the Communities, Brazil's intention had been to try once again to seek a mutually agreed solution to this matter in accordance with the spirit of Article 3.7 of the DSU.

While the consultations had failed to settle this dispute, they had provided information on the possibility that the problems with regard to Brazilian exports of poultry meat were not only limited

[1]Follow-up on the Panel Report "European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" (DS28/R).

[2]C/M/257.

to trade within the quota. The lack of transparency of the EC administration concerning a reduced share of the tariff-rate quota allocated to Brazil had also affected trade outside the quota. His country was not in a position to know whether its dutiable exports which had been subject to special safeguard provisions under Articles 4 and 5 of the Agreement on Agriculture, benefitted from the market access opportunities which had been agreed during the Uruguay Round negotiations.

In order to make his country's position clear, he said that Brazil's complaint could be summed up in two words, namely, compensation and transparency. Compensation was a second-best option to compliance with multilateral rules. This GATT principle was reflected in Article 22 of the DSU. Therefore, compensatory agreements, as substitutes for compliance, should be strictly adhered to. Transparency, one of the pillars of the multilateral trading system, did not require any further comments. Brazil wanted full compensation in chicken meat, which had been agreed during the Article XXVIII:4 negotiations. It also wanted the Communities to administer the tariff-rate quota in a transparent manner. This would enable Brazil to identify which sales were being made inside and outside the quota, and would ensure that its WTO rights were being respected.

During the consultations, the Communities had defended the position that this dispute was limited to the interpretation of what had been agreed. In Brazil's view, the Communities' interpretation had resulted in a nullification and impairment of Brazil's rights under the WTO Agreement. Therefore, his country requested the establishment of a panel to examine this matter. He recalled the following statement made by Brazil on 19 June 1992 at the time when the GATT Council had agreed to authorize the Communities to conduct the negotiations pursuant to Article XXVIII:4: "Brazil also regretted that the Community had chosen the second of the two options suggested by the reconvened Panel members for the resolution of the dispute, for this would entail a long and burdensome process, the outcome of which no one could ensure".[3] In retrospect, he believed that this was a very valid comment given the problems currently faced by Brazil.

The representative of the European Communities thanked Brazil for the extended statement of its position, which his delegation had duly noted. This was the first time that the request for a panel was on the agenda of the DSB. As pointed out in the statement, the Communities had held consultations with Brazil on this important issue. His authorities considered that there were certain elements in the Brazilian arguments and position that required further examination. Therefore the Communities could not agree to the establishment of a panel at the present meeting.

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

3. Indonesia - Certain measures affecting the automobile industry
   - Request for the establishment of a panel by the United States (WT/DS59/6)

The Chairman drew attention to the communication from the United States contained in document WT/DS59/6.

The representative of the United States said that for nearly a year, his Government had consulted with Indonesia on its policies in the automobile sector. The United States was seriously concerned about this matter and hoped that all Members would adhere to WTO rules in the development of their policies in the automobile sector. His country had held intensive discussions with Indonesia over the past two weeks on this issue. While positive, these discussions had not resulted in a mutually satisfactory solution to this matter. Therefore, the United States requested the establishment of a panel to consider

[3]C/M/257, p.17.

its claims regarding Indonesia's automobile policies. However, it expected to continue constructive discussions with Indonesia and hoped to reach a mutually satisfactory solution to this matter in the near future.

The representative of Indonesia said that her Government appreciated the constructive attitude of the United States in its efforts to seek a mutually agreeable solution to differences with regard to Indonesia's automobile policy. Indonesia recognized that the United States wished to join the Panel recently established at the requests of the European Communities and Japan.[4] However, it believed that it was preferable to continue the efforts to explore whether this matter could be settled. Therefore, Indonesia could not support the establishment of a panel at the present meeting.

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

4. Terms of office of Appellate Body members (Article 17.2 of the DSU)
- Statement by the Chairman

The Chairman said that as a result of his extensive informal consultations with Members in recent weeks concerning the issue of the expiry of the terms of three of the seven Appellate Body members in December 1997, he wished to propose a course of action to achieve the objectives which Members had expressed to him. During the course of these consultations Members had indicated their acceptance that the three Appellate Body members to be determined by lot, pursuant to the provisions of Article 17.2 of the DSU, should be reappointed for a final term of four years. Such a decision did not have any bearing on the integrity of the Dispute Settlement Understanding. Furthermore, it did not set a precedent for the actions of the DSB in the future when the terms of other Appellate Body members would expire.

Based on the above understanding, he proposed that the DSB undertake the following process at the present meeting, in order to ensure the orderly reappointment of the three Appellate Body members whose terms would expire this year. Following this statement, he would suspend this meeting in order to undertake the drawing of lots as required by Article 17.2 of the DSU, to determine which three Appellate Body members would have initial two-year terms. In accordance with Articles 2 and 17.2 of the DSU, which identified the DSB's responsibility to administer the DSU and to appoint or reappoint persons to serve on the Appellate Body, and consistent with the DSB Decision on "Establishment of the Appellate Body", WT/DSB/1 of 19 June 1995, he believed that the drawing of lots should be conducted by himself as Chairman of the DSB in the presence of the Chairpersons of the General Council, the Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS as well as the Director-General, if possible. Immediately after the drawing of lots, it was his intention to resume the meeting and to inform those present of the names of the Appellate Body members who would serve the initial two-year terms as determined by lot. Finally, he proposed that the DSB take a decision at the present meeting to reappoint, effective 11 December 1997 for a final four-year term, the three Appellate Body members determined by lot pursuant to the provisions of Article 17.2 of the DSU. On the understanding that the DSB would proceed to a decision on this matter at the present meeting, he proposed that the DSB adopt the outlined process in order to ensure the orderly reappointment of the three Appellate Body members whose terms were due to expire this year.

The DSB agreed to the Chairman's proposal.

[4] 12 June 1997, WT/DSB/M/34

Upon resumption of the meeting, the Chairman said that in the presence of Mr. Celso Lafer, Chairman of the General Council and Ms. Carmen Luz Guarda, Chairperson of the Council for TRIPS, he had drawn lots pursuant to Article 17.2 of the DSU in order to determine the three Appellate Body members who would have an initial term of two years that expired this year. The names of the three Appellate Body members, selected by lot were the following: Mr. Claus-Dieter Ehlermann, Mr. Florentino P. Feliciano and Mr. Julio Lacarte-Muró. He proposed to follow the course of action agreed earlier and proceed to reappoint the three named Appellate Body members, pursuant to Article 17.2 of the DSU, for a final term of four years commencing on 11 December 1997.

The DSB so agreed.

5. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/56)

The Chairman drew attention to document WT/DSB/W/56 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained therein.

The DSB so agreed.

The Chairman said that at the DSB meeting on 22 January 1997, the outgoing Chairman of the DSB had recalled that in accordance with the proposal for the administration of the indicative list of panelists approved by the DSB on 31 May (WT/DSB/5), the list should be completely updated every two years. To this end, Members were required, within the first month of each two-year period, to forward updated curricula vitae of the persons contained on the indicative list. Since the current indicative list had been constituted on 27 September 1995, the Secretariat would circulate an updated list in September 1997. He reminded delegations of the need to forward updated curricula vitae of all persons on the list in order to maintain its credibility. He emphasized that this new updated indicative list would contain only the names of persons for which the updated curricula vitae would be received. The names not reconfirmed would not appear on the indicative list to be circulated in September. He therefore emphasized the importance of submitting updated curricula vitae.

Furthermore, he informed Members that the Secretariat had made the necessary arrangements for making the curricula vitae of panelists on the indicative list available in the Document Dissemination Facility. This information would be available only to Members and would include not only the summary curricula vitae of panelists, as had been initially foreseen but also the full curricula vitae. It was hoped that these arrangements would facilitate the process of consulting the curricula vitae of the panelists. The Secretariat would shortly circulate a note explaining those arrangements.[5]

The DSB took note of the statement.

[5]Subsequently circulated in WT/DSB/W/58