RESTRICTED

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WORLD TRADE ORGANIZATION

DISPUTE SETTLEMENT BODY
10 February 1995

MINUTES OF MEETING

Held in the Centre William Rappard
on 10 February 1995

Acting Chairman: Mr. Peter D. Sutherland

Subjects discussed: Page

1. Rules of Procedure for meetings of Dispute Settlement Body 1

2. Ethical Code of Conduct 2

3. Appellate Body 3
   (a) Establishment of the Appellate Body 3
   (b) Procedures for appointment of members of the Appellate Body 3

4. Indicative list of governmental and non-governmental panelists 5

5. Malaysia - Prohibition of imports of polyethylene and polypropylene 6
   - Recourse to Article XXIII:1 of the GATT 1994 by Singapore 6

6. United States - Standards for reformulated and conventional gasoline 7
   - Request for consultations by Venezuela under Article XXIII:1 of GATT 1994 with the United States 7

1. Rules of Procedure for meetings of Dispute Settlement Body (PC/IPL/9)

The Chairman recalled that in accordance with Article IV:3 of the Agreement Establishing the WTO, the Dispute Settlement Body (DSB) "shall establish Rules of Procedure as it deems necessary for the fulfilment of its responsibilities." In this context, he drew attention to document PC/IPL/9 containing Rules of Procedures for sessions of the Ministerial Conference and meetings of the General Council, Dispute Settlement Body, and Trade Policy Review Body. With respect to the Dispute Settlement Body, the above-mentioned document specified that when the General Council convened as the Dispute Settlement Body, it shall follow the Rules of Procedure for meetings of the General Council, except as provided otherwise in the Dispute Settlement Understanding (DSU) or in the specific rules for DSB contained in PC/IPL/9. He also recalled that the General Council had approved its rules at the first meeting in January 1995 leaving open two issues which were subject to further consultations.[1] These issues which concerned the question of officers and the participation of international organizations as observers in the WTO, were also relevant to the Rules of Procedure for the DSB. He proposed that

[1]The rules adopted by the General Council at its meeting in January 1995 were subsequently issued as WT/L/18.

the DSB adopt the Rules of Procedure contained in PC/IPL/9 with the exception of the issues that were still in square brackets to which the Dispute Settlement Body would revert once agreement on them had been reached.

The Dispute Settlement Body so agreed.

The representative of the United States said that a decision on observership for international organizations should not involve a final determination as to which organizations would be permitted to participate in DSB activities. It was important not to close the door at all levels to participation of other organizations, particularly when a dispute involved issues on which other organizations had special expertise or a special interest due to the potential impact on agreements which they administered. The DSB should be allowed to invite other organizations on a case-by-case basis to ensure that it did not automatically sacrifice the potential benefits associated with their participation in DSB meetings.

The Dispute Settlement Body took note of the statement.

2. Ethical Code of Conduct (PC/R, paragraph 50)

The Chairman recalled that, as indicated in document PC/R, paragraph 50, the Preparatory Committee had forwarded the work done on draft rules of conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as resulting from informal consultations on this matter, to the WTO as a possible basis for further work. Subsequently the General Council, at its January meeting, forwarded this matter to the Dispute Settlement Body for consideration.

Mr. Trainor, on behalf of Mr. Armstrong (New Zealand) presented a progress report on the work done during the informal consultations. He recalled that at the January General Council meeting, in the context of the adoption of the Report of the Preparatory Committee, a number of matters had been referred to relevant WTO bodies to oversee continuing work. In order to maintain the positive momentum developed in informal consultations held in 1994 further informal consultations, open to interested delegations, were held under the Chairmanship of Mr. Armstrong on 25 January and 1 February 1995. Constructive discussions took place and further progress was made towards a consensus text. Mr. Armstrong intended to conduct further consultations in the weeks of 20 and 27 February 1995.

The Chairman then proposed that the Dispute Settlement Body invite Mr. Armstrong to pursue informal consultations with the view to concluding a final draft Code of Conduct for consideration by the DSB before 24 March 1995.

The representative of the United States expressed his country' s appreciation for the time devoted and attention given by other delegations to this issue. The objective was to develop procedures that would build confidence in the integrity and impartiality of the WTO dispute settlement system. The United States believed that each WTO Member had an important stake in this system which represented one of the major achievements in the Uruguay Round. Therefore the adoption of a unified dispute settlement system and the tremendous potential for expansion of the number and complexity of disputes meant that the pool of panelists would have to be significantly expanded beyond the Geneva-based missions from where panelists had traditionally been selected. It was more likely that non-governmental experts, for example in the areas of intellectual property rights and services, would be serving on panels. He also noted that under the WTO dispute settlement system new people would be involved and new types of conflicts would occur. Under the GATT 1947 system, panel reports were subject to review and adoption by the GATT Council, which helped to offset the weaknesses in the system. The WTO dispute settlement system represented a significant improvement over the old system, but the high

probability that panel reports would be adopted by the DSB might raise concerns in some quarters. A Code of Conduct for panelists, Appellate Body members and advisors to the dispute settlement process was one means of building confidence in the system. The United States was firmly committed to reaching agreement on a Code of Conduct. In this respect a working deadline would be useful in encouraging progress, but it was the result of the process on which the success of this effort ultimately must be judged and not the process itself. His country would work with other delegations in the context of the proposed time-frame and see how much progress could be made therein.

The representative of India recalled that his country had been participating in the informal consultations carried out by Mr. Armstrong. Although he did not question the broader objectives of ensuring absolute impartiality of the persons involved in the dispute settlement process at various levels, he had some concerns about the manner in which this objective had been pursued. His country would continue to cooperate in future consultations with a view to reaching a consensus on the matter at hand.

The Dispute Settlement Body took note of the statements and agreed that informal consultations be pursued by Mr. Armstrong with a view to concluding a final draft Code of Conduct for consideration by the Dispute Settlement Body not later than 24 March 1995.

3. Appellate Body (PC/IPL/13)

(a) Establishment of the Appellate Body

The Chairman recalled that in accordance with Article 17:1 of the Dispute Settlement Understanding (DSU), "a standing Appellate Body shall be established by the Dispute Settlement Body." He also recalled that the Preparatory Committee had approved the recommendations on the establishment of the Appellate Body in document PC/IPL/13 and had agreed to forward them to the WTO for further action, as appropriate. Subsequently the General Council, at its meeting in January 1995, had referred this matter to the Dispute Settlement Body for consideration. He proposed that the Dispute Settlement Body establish the Appellate Body.

The Dispute Settlement Body so agreed.

(b) Procedures for appointment of members of the Appellate Body

The Chairman drew attention to document PC/IPL/13 containing the procedures for the appointment of members of the Appellate Body. He proposed that the Dispute Settlement Body agree to the following time-table: (i) governments shall make suggestions for candidates for the Appellate Body no later than 24 March 1995. The suggestions should be addressed to the Director-General of the WTO; (ii) The Director-General, the Chairman of the Dispute Settlement Body, the Chairman of the General Council and the Chairmen of the Councils for Trade in Goods, Services and TRIPS would examine the suggestions. After appropriate consultations a proposal on the composition of the Appellate Body would be submitted to the Dispute Settlement Body by mid-May 1995.

The representative of the United States said that his Government welcomed the idea of establishing a process for selecting the members of the Appellate Body and making it operational. The procedure for proposing potential candidates and developing a slate must be thorough. It appeared that there was broad agreement that the Appellate Body would not have to be operational until late 1995. Accordingly, the necessary time should be allowed to ensure the best possible slate of candidates. Although the United States would work with others on the basis of the deadline set by the Chairman, it urged the Dispute Settlement Body to retain the flexibility to adjust the schedule as the deadline approached. This would avoid the possibility of some of the best qualified potential candidates being passed over because they would not be immediately obvious. The Appellate Body would benefit from having candidates with a wide variety of backgrounds to ensure objective assessment of the appeals

it would hear. In this regard, individuals with juridical credentials should be considered at least as seriously as those with direct involvement in GATT work and negotiations.

He also expressed concern with the process that the Secretariat was already pursuing to hire support staff. First, he recalled the agreement that the support staff of the Appellate Body would be completely independent of the Secretariat. Therefore, the Secretariat should not be involved in the process of interviewing and selecting staff. Vacancy notices had gone out, and that was a positive step. However, the United States urged the Secretariat to advertise the positions for the Appellate Body in international journals and magazines to ensure that a good group of candidates emerged. The recommendation of the Preparatory Committee specifically noted that the staff should be hired by the Director-General in consultation with the Chairman of the Dispute Settlement Body. Second, the independence of the Appellate Body staff must be maintained not only from the Secretariat, but also from Member governments. In this regard, he noted that individuals should not serve on the Appellate Body staff while on leave of absence from Member governments or "on loan" from those governments.

The representative of New Zealand supported the view that it was important, in considering the composition of the Appellate Body, to take into account the question of juridical experience of its members. In order to ensure that the Appellate Body was adequately equipped to fulfil the legal functions, the juridical experience relevant to GATT law was important.

The representative of the European Communities stressed the need that the Appellate Body had solid legal experience as well as experience in the area of international trade to ensure a good balance between the two types of experience. He agreed with the suggested time-frame for the designation of candidates for the Appellate Body. One should not allow too much time to go by. While it was necessary, as indicated by the United States, to ensure that the very best experts available were to be drawn, at the same time he believed that to leave the door open for an indefinite period of time would put Members in a situation where the number of excellent candidates would be too great - a greater number than one could actually deal with. Therefore, a deadline should be established, and at a given time the selection of candidates should be made. The six week deadline proposed by the Chairman should be amply sufficient.

The Chairman said that his understanding of the point made by the representative of the United States was not to dispute the calendar, but to signal that at some stage the United States might look for some flexibility in regard to it.

The representative of Canada supported the statement made by the Community. It was understandable that there might be some need for flexibility in a calendar. However, the Appellate Body, once selected, still had considerable amount of work to do in order to set up its own working procedures and be ready for the first case which might soon be presented to the Appellate Body. Therefore, one should not wait too long.

The representative of India said that Article 17:3 of the DSU clearly specified the type of background required for members of the Appellate Body namely that "the Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally". He agreed with the United States that one must look for people with different types of background. He also agreed with the deadline proposed by the Chairman.

The Chairman proposed to agree to the indicative time-limits which would continue to be under review since there was a general understanding of the urgency of completing the process which required the establishment of a time-frame. He pointed to the fact that the recommendations by the Preparatory Committee on the Establishment of the Appellate Body and the staff support which were approved

by the General Council on 31 January 1995 through the adoption of the report of the Preparatory Committee as a whole had been followed. If necessary, these matters would be discussed further.

The Dispute Settlement Body took note of the statements and agreed to the proposals read out by the Chairman.

The Chairman said that at an appropriate date the Chairman of the DSB would consult with Members of the WTO Bodies in order to obtain their views on the working procedures of the Appellate Body.

4. Indicative list of governmental and non-governmental panelists

The Chairman recalled that in accordance with Article 8.4 of the Understanding on Rules of Procedure Governing the Settlement of Disputes, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals from which panelists could be drawn as appropriate. This indicative list should constitute an integrated list, including names in the GATT 1947 Roster together with any other names proposed by governments. The list should also indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements. The Roster, established on 30 November 1984, which appeared in document L/7493 dated 23 June 1994, and Add.1, dated 25 July 1994, contained names of non-governmental persons. New names had been added to the Roster since 1984 but the Curriculum Vitae were not up to date. In the process, governments were invited to revise and update the Roster as it stood as of 1 January 1995, including through the provision of updated Curriculum Vitae for names contained in that list. The GATT 1947 Roster would be revised by submitting to the Secretariat written confirmation of names previously proposed by governments to be retained, together with updated Curriculum Vitae where this would be applicable. Any names not confirmed would not be included in the revised Roster which would form an integral part of the indicative list. The Chairman proposed that mid-June 1995 should be the deadline for the submissions to the indicative list. He also proposed that the indicative list be revised periodically, for example every five years.

The representative of the Unites States said that his Government believed that additional thought needed to be given to a number of procedural issues before proceeding in an efficient manner to the establishment of the indicative list. His delegation was interested in discussing with delegations and the Secretariat issues such as: (i) the nature of the information that should be submitted to support the nominations of individuals to the roster; (ii) whether the DSB would seek to assess the nominations to the roster in light of the information received, and if so, over what period of time and through what process should the assessment be conducted; and (iii) whether procedures should be developed to remove names from the indicative list. His delegation believed that a more normalized review of the names suggested by Members for inclusion in the indicative list would enhance confidence in the dispute settlement system. In addition, Members should be encouraged to nominate individuals serving as government officials in capitals as well as those serving in Geneva for inclusion in the indicative list. This would greatly expand the base of expertise on which the DSB could draw to compose future panels. He proposed that the Chairman of the DSB conduct consultations with interested delegations as soon as possible in order to exchange views on the above-mentioned issues and related topics, and develop a workable set of procedures. The United States was prepared to submit written comments in advance of these consultations, if the DSB Chairman would wish so. He also noted that, although the DSU provided for some form of a comprehensive roster, the Ministerial Decision on disputes arising under the General Agreement on Trade in Services (GATS) created a requirement for a separate roster of panelists. Accordingly, a method for easily distinguishing persons with the required qualifications for disputes involving the GATS (such as a separate list) would be most helpful, since only those persons well authorized would be selected as panelists.

The representative of Tunisia said that the time period until 24 March for delegations to revise names on the roster and suggest new names was insufficient and suggested that this time period be extended so that a greater number of panelists, from different regions, be included in the indicative list. He also said that the period of five years for revising the list would be too long and suggested that it be reduced.

The representative of Norway said that although the said list was of an indicative nature, the period of five years between each revision was too long. His country preferred a period of three years. It also supported the proposal made by the United States for holding informal consultations on matters related to the indicative list.

The Dispute Settlement Body agreed that the issue of the indicative list should be further discussed and authorized its Chairman to hold further informal consultations on this matter.

5. Malaysia - Prohibition of imports of polyethylene and polypropylene
- Recourse to Article XXIII:1 of the GATT 1994 by Singapore (WT/DS1/1)

The Chairman drew attention to the communication from Singapore contained in document WT/DS1/1.

The representative of Singapore recalled that his Government had requested consultations with the Government of Malaysia under Article XXIII:1 of the GATT 1994 in connection with the prohibition on imports of polyethylene (HS 3901.10 000 and 3901.20 000) and polypropylene (3902.10 300 and 3902.30 000) which had been instituted and maintained by the Malaysian Government under the Customs (Prohibition of Imports) (Amendments) (No.5) Order 1994 (WT/DS1/1). Those prohibitions had been imposed on 7 April 1994, unless an import licence or Approved Permit (AP) had been obtained from the Director-General of Customs. These measures were in violation of Malaysia's obligations under the Agreement Establishing the WTO, inter alia, Article X and XI of the GATT 1994, and the Agreement on Import Licensing Procedures. Singapore had previously expressed its deep concern over the Malaysian import restrictions of plastic resins which were a serious matter of urgency to Singapore. Since the imposition of the import prohibitions, Singapore's exporters and manufacturers of polyethylene and polypropylene had been adversely affected. Given the failure of its previous approaches, Singapore, in accordance with Article XXIII:1 and paragraph 3 of Article 4 of the Dispute Settlement Understanding, had requested consultations with Malaysia with a view to a satisfactory resolution of the matter. The consultations under Article XXIII:1 were scheduled for 13-15 February 1995. Should these consultations fail to lead to a satisfactory resolution of the matter, Singapore reserved the right to request the establishment of a panel under Article XXIII:2 of GATT 1994.

The representative of Malaysia confirmed his country's readiness to enter into bilateral consultations with Singapore between 13 and 15 February 1995. Notwithstanding this trade dispute between the two countries, ASEAN remained committed to one common bond, namely the confidence and belief in the multilateral dispute settlement system. He hoped that the bilateral consultations could bring about an amicable resolution of the problem.

The Dispute Settlement Body took note of the statements and that the parties were consulting further.

6. United States - Standards for reformulated and conventional gasoline
   - Request for consultations by Venezuela under Article XXIII:1 of GATT 1994 with the United States (WT/DS2/1)

The representative of Venezuela, speaking under "Other Business", recalled that on 11 January 1995 Venezuela withdrew its request for consultations under Article XXIII:2 of the GATT 1947 with regard to the Regulation on Reformulated Gasoline adopted by the United States Environmental Protection Agency. On 20 January 1995 Venezuela requested consultations with the United States. This request, subsequently circulated in WT/DS2/1, was made pursuant to Article XXII:1 of the GATT 1994, Articles 14.1 of the Agreement on Technical Barriers to Trade and Article 4 of the Understanding of Rules and Procedures Governing the Settlement of Disputes. The United States accepted Venezuela's request for consultations which would be held in the up-coming weeks.

The representative of Brazil said that his Government supported Venezuela's request for consultations with the United States and wished to reserve its rights to participate in the panel, if it was established, as an interested third-party.

The Dispute Settlement Body took note of the statements.

Future meetings of the Dispute Settlement Body

Before closing the meeting, the Chairman raised two points concerning future meetings of the Dispute Settlement Body. First, as provided by the Rules of Procedures of the General Council and the Dispute Settlement Body, contained in PC/IPL/9, meetings of the Dispute Settlement Body will be convened in accordance with the ten-day rule i.e. meetings of the Dispute Settlement Body shall be convened by the Director-General by a notice not less than ten calendar days prior to the date set for the meeting. In addition, it should also be noted that a list of items proposed for the Agenda of the meeting shall be communicated to Members together with the convening notice for the meeting. It shall be open to any Member to suggest items for inclusion in the Agenda, up to and not including, the day on which the notice of the meeting is to be issued. Secondly, he drew attention to the question of frequency of meetings of the Dispute Settlement Body. It would appear that, in order to maintain maximum efficiency in the functioning of the Body, while respecting the disciplines and the deadlines established by the DSU, meetings of the Dispute Settlement Body should be held on a regular basis. A tentative schedule might be established for such meetings every six weeks, with the necessary flexibility to take into account exceptional circumstances. Consultations would be held in the near future on this matter. He proposed that the next meeting of the Dispute Settlement Body be scheduled in the second half of March 1995.

The Dispute Settlement Body took note of this information.