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WORLD TRADE ORGANIZATION

DISPUTE SETTLEMENT BODY
29 October and 1 November 1996

MINUTES OF MEETING

Held in the Centre William Rappard
on 29 October and 1 November 1996

Chairman: Mr. Celso Lafer (Brazil)

Subjects discussed:

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On 29 October 1996, prior to the adoption of the agenda the representative of Japan requested a clarification concerning the rule of quorum for the conduct of business.

The Chairman said that the rule on quorum provided for a simple majority of Members, namely 63 delegations under the present WTO Membership. According to past practice the quorum was verified only when a request to this effect was made at the beginning of meetings. He also noted that this was the first time in the WTO that a request to verify the quorum was made. He then requested the Secretariat to take a count of delegations present. Since only 38 delegations were present, he asked the delegation of Japan whether it would agree or not to proceed with the business of the meeting.

The representative of Japan said that his delegation would continue to be very flexible in normal meetings devoted to exchange of views but when the DSB had to make important decisions which required consensus, he believed that the quorum requirement should be observed.

The Chairman therefore proposed to adjourn the meeting and to reconvene it on 1 November.

The DSB so agreed.

The meeting was reconvened on 1 November 1996.

1. Japan - Taxes on alcoholic beverages
   - Report of the Appellate Body (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R) and report of the panel (WT/DS8/R, WT/DS10/R, WT/DS11/R)

The Chairman drew attention to the communication from the Appellate Body circulated in document WT/DS8/10, WT/DS10/10, WT/DS11/7, transmitting the report of the Appellate Body in "Japan - Taxes on Alcoholic Beverages", in accordance with Article 17.5 of the DSU, circulated in

document WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1) adopted by the General Council on 18 July 1996, the Appellate Body report had already been issued as an unrestricted document. The panel report which had been issued as a restricted document prior to the Decision of the General Council had become unrestricted in pursuance of that Decision. He then cited Article 17.14 of the DSU which stipulated that "an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members".

The representative of the European Communities said that the Communities were satisfied that the Appellate Body had confirmed the main thrust of their arguments. The Communities accepted the conclusions of the Appellate Body that: (i) vodka and shochu were like products, but vodka was taxed in Japan in excess of shochu; (ii) distilled spirits and liqueurs were directly competitive or substitutable products to shochu, but they were not similarly taxed under the Japanese Liquor Tax Law which afforded protection to domestic production of shochu in violation of Article III:2, second sentence, of GATT 1994.

The Communities requested that the DSB adopt the Appellate Body report at the present meeting, which would be within the 30-day period following its circulation on 4 October 1996, as stipulated in Article 17.14 of the DSU. Having conducted dispute settlement procedures against Japan on this issue for a total of ten years, and having won two panel reports and one Appellate Body report, the Communities sincerely hoped that Japan would now bring its legislation into conformity with its obligations under the GATT 1994 speedily, fully and correctly. Any other course of action by Japan would undermine the credibility of the WTO dispute settlement system. There was too much at stake in this system for all Members, and not least for Japan, to take such a risk. Therefore, the Communities expected Japan to inform the DSB, within the next 30 days, of its intentions in respect of implementation of the recommendations of the Appellate Body. The Communities hoped and expected that the necessary changes to the Japanese legislation would be made in time for the new tax structure to apply in the forthcoming Japanese fiscal year. The Communities would continue discussions with Japan with regard to the nature of these necessary changes.

The representative of Canada said that her country was pleased with the recommendations of the panel and the Appellate Body. It regretted the fact that Japan had not implemented the findings of the GATT panel[1], and that a second panel had become necessary. Canada had a strong systemic and commercial interest in this case as reflected in a statement issued on 4 October 1996, by Canada's Minister for International Trade, Mr. A. Eggleton, in which he had urged Japan "to carry out the ruling quickly". Accordingly, Canada requested that Japan implement the recommendations without delay, in order to bring this long-standing dispute to an end. In this connection, Canada would closely examine the details of the information which it expected to receive from Japan on the implementation of the recommendations.

The representative of the United States welcomed that the Appellate Body report and the panel report, to the extent not modified by the Appellate Body report, would be adopted at the present meeting. His country was pleased that the Appellate Body had confirmed the panel's findings that the Japanese Liquor Tax Law was inconsistent with Japan's obligations under Article III:2 of the GATT 1994. It was also gratified that the Appellate Body had agreed with points raised by the United States in the course of the appeal process. The Appellate Body had demonstrated its willingness to thoroughly review and modify panel reports, and to work toward providing Members greater clarity with respect to their

[1]"Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages", BISD 34S/83.

rights and obligations. This could only strengthen the WTO system and reinforce confidence in the quality of WTO dispute settlement. The United States looked forward to hearing from Japan on the timing and manner of implementation of the recommendations of the DSB. The DSB meeting had come in good time for the necessary changes to be made in the budget for the next Japanese fiscal year and to be implemented on 1 April 1997. An early implementation of the recommendations was appropriate, considering that this dispute had a history covering a ten-year period.

This was the second time that Japan's trading partners had to bring this matter to dispute settlement. From the panel and Appellate Body reports it was clear that after the first time this problem had been addressed in the GATT panel report adopted in 1987[2], Japan simply had not gone far enough in resolving the problem. The United States would closely follow Japan's implementation measures with the hope and expectation that this would be the last time that this issue needed to be brought to the WTO. It urged the implementation of a market-opening solution by Japan, a country which had benefited greatly from the trade liberalization achieved in the past 50 years under the GATT and the WTO, and which had been a leading participant in and beneficiary of the Uruguay Round.

The representative of Japan expressed his country's gratitude to the Appellate Body for its efforts to examine this case and for its report. Japan had considered that the Panel in its report had erred in the legal interpretation of Article III:2 of GATT 1994, and its application to this case. Consequently, on 8 August 1996, Japan had appealed to the Appellate Body requesting the review of the legal interpretation by the Panel and its conclusions that the Japanese liquor tax system was inconsistent with the above-mentioned provision of the GATT 1994.

Japan regretted that the Appellate Body had not adopted many of its arguments and had concluded that Japan's liquor tax system was not consistent with Article III:2 of GATT 1994. It should be noted, however, that the Appellate Body had accepted some Japanese arguments and consequently made several important corrections to the errors in the panel report. For example, the Appellate Body, after having acknowledged Article III:1 of the GATT 1994 as establishing the general principle for the interpretation of the whole Article III, had found that "the Panel erred in law in failing to take into account Article III:1 in interpreting Article III:2, first and second sentences".[3] The Appellate Body report had also stated that "the Panel erred in law in failing to examine 'so as to afford protection' in Article III:1 as a separate inquiry from 'not similarly taxed' in the *Ad* Article to Article III:2, second sentence".[4] Japan appreciated that the Appellate Body had corrected such important errors in law in the panel report. It hoped that the Appellate Body, as well as panels which would be dealing with future cases, would make further efforts to make appropriate interpretations and rulings with a view to further enhancing the credibility of the dispute settlement system in the WTO. His authorities were now considering the response to the reports to be adopted at the present meeting. He was not, at this stage, in a position to provide any indication of Japan's intention with respect to the implementation of the recommendations. He would inform the DSB of Japan's intention in regard to this matter within the time-period stipulated in Article 21.3 of the DSU.

The DSB took note of the statements and adopted the Appellate Body report in WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R and the panel report in WT/DS8/R, WT/DS10/R, WT/DS11/R, as modified by the Appellate Body report.

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[2]BISD 34S/83.

[3]Appellate Body report, p. 32.

[4] Ibid.

2. Rule of quorum
- Statement by Japan

The representative of Japan, speaking under "Other Business", recalled that in the context of consideration of the Appellate Body report on Japan's taxes on alcoholic beverages, the question of the quorum requirement for conduct of business had been raised. His delegation noticed that certain DSU provisions could not be applied if certain requirements in the rules of procedure for meetings of the DSB were not met. He then drew attention to the fact that the number of delegations participating in the present meeting would not meet the quorum requirement. This was of serious concern not only to Japan but to all Members, in particular with regard to the DSB which had the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions. He believed that the application of the rules of procedure of the DSB which was entrusted with these important functions was not always possible and could be problematic, in particular with regard to the time-period requirements under the DSU and the application of the rules of procedure for DSB meetings. His delegation believed the DSU as an integral part of the WTO Agreement, ratified by Members, superseded the rules of procedure adopted by the General Council. Consequently, the rules of procedure should not hamper the smooth operation of the DSU. Therefore, the rules of procedure for meetings of the General Council and the DSB needed to be reviewed and amended at the earliest possible date. He hoped that the DSB and the Secretariat would take this into account. He was not sure whether it was appropriate to raise this question in the DSB or in other fora such as the General Council. He had raised this matter at the present meeting because of earlier developments that had taken place at the opening of this meeting.

The Chairman thanked Japan for the statement which had raised an important point. The expanded WTO membership, the increasing number of WTO meetings and the current preparatory work for the Ministerial Conference as well as the fact that a significant number of Members did not have permanent representations in Geneva tended to create frequent problems relating to attendance at meetings. He therefore requested Members to approach such problems in a spirit of constructive pragmatism which did not exclude holding of informal consultations on this matter by him or by the Chairman of the General Council. He believed that it would be advisable to consider this issue after the 1996 Ministerial Conference.

The representative of Norway agreed with the statement made by Japan concerning problems that might arise with the rules of procedure. He sought clarification with regard to Rule 16 in the rules of procedure for meetings of the General Council which stated that "a simple majority of the Members shall constitute a quorum". Since the word "quorum" in the law dictionary was defined as "the number of members who must be present in a body before business may be conducted", he enquired whether such a requirement applied to holding a debate or to a vote or a decision.

The Chairman, said that the WTO practice had been to open meetings without verifying the quorum requirement. He acknowledged that this matter was important and future consultations to be held should take into account the questions raised by Japan and Norway.

The DSB took note of the statements.