WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
14 October 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 14 October 1999

Chairman: Mr. Kåre Bryn (Norway)

Prior to adoption of the agenda, in opening the meeting, the Chairman of the General Council, Mr. A. Mchumo, said that due to the departure of Mr. N. Akao from Geneva, he had held informal consultations on the Chairmanship of the DSB. As a result of these consultations, at its meeting on 6 October 1999, the General Council had agreed that Mr. K. Bryn (Norway) replace Mr. N. Akao as Chairperson of the DSB. He therefore proposed that the DSB elect Mr. K. Bryn as Chairman of the body by acclamation in order to serve out the remaining term of office of Mr. N. Akao.

The DSB so agreed.

Subjects discussed: Page

1. Australia – Subsidies provided to producers and exporters of automotive leather 1
(a) Recourse to Article 21.5 of the DSU by the United States 1
2. India – Quantitative restrictions on imports of agricultural, textile and industrial products 3
(a) Implementation of the recommendations of the DSB 3

1. Australia – Subsidies provided to producers and exporters of automotive leather

(a) Recourse to Article 21.5 of the DSU by the United States (WT/DS126/8)

The Chairman drew attention to the communication from the United States contained in document WT/DS126/8.

The representative of the United States expressed his country's regret that this matter had to be brought back to the DSB. He recalled that on 16 June 1999, the DSB had adopted the Panel Report which had found that Australia had bestowed an $A30 million export subsidy on Howe Leather in 1997 and 1998, and had recommended that the subsidy be withdrawn. The subsidy was very significant and most of the benefit of the subsidy was attributable to the period following the adoption of the Panel Report by the DSB. Despite the fact that Howe continued to receive the benefit of the export subsidy, and that most of that benefit would be received in future years, Australia claimed to have "withdrawn" the subsidy by: (i) having Howe repay a mere $A8 million - only 27 per cent of the face value of the subsidy; and then (ii) reimbursing Howe's parent company for even this insufficient

"withdrawal" through the grant of a non-commercial loan. The United States believed that this did not constitute "withdrawal of the subsidy" under the SCM Agreement or the Panel's recommendation. In the United States' view the repayment of the subsidy, to be considered a "withdrawal", should be from the recipient's own funds, and not from funds reimbursed by the Australian Government. Therefore, the United States did not consider that Australia had withdrawn any portion of the export subsidy.

It might come as a surprise to many delegations that the United States had agreed with Australia to pursue Article 21.5 of the DSU first and only later pursue Article 22 of the DSU and/or Article 4.10 of the SCM Agreement. This was not a fundamental change in the United States' position on the applicability of those Articles. The dispute under Article 4 of the SCM Agreement presented special circumstances and unique opportunities. In particular, unlike in normal dispute settlement proceedings, under the SCM Agreement the parties could agree to extend the deadline for exercising the right to request Article 22 procedures. The United States and Australia had done so. This permitted the parties additional time to resort to Article 21.5 proceedings, and the United States was willing to accommodate Australia's desires in this respect. This approach, which was not required under the DSU, was a special agreement for the dispute at hand only. However, it reflected a process supported by many Members in the current discussions on the DSU Review. The United States hoped that it would demonstrate that such a process - and timetable - was workable, efficient and prompt.

The representative of Australia said that his country considered that it had implemented the rulings and recommendations of the Panel Report adopted by the DSB in good faith in conformity with the findings of the Panel Report. He recalled that Australia had accepted the Panel Report without appealing and had implemented the conclusions in line with that Report. Australia had notified the DSB of its implementation in document WT/DS126/7 in accordance with Article 21.6 of the DSU for a case under Article 4 of the SCM Agreement. He expressed his country's disappointment that the United States had decided to pursue this case. However, Australia recognized that the United States had a right to do so under the DSU provisions and had agreed procedures with the United States to be followed in this case. Accordingly, Australia did not object to the establishment of an Article 21.5 panel in the context of the DSU and the SCM Agreement to allow for a review by the original panel. However, the scope of the terms of reference of the panel would be limited by the fact that this was an Article 21.5 panel regarding compliance with recommendations and rulings adopted by the DSB, and not a more general panel about consistency of measures with the SCM Agreement.

The representative of the European Communities noted with satisfaction that the United States was requesting a panel under Article 21.5 in order to resolve its disagreement with Australia on the implementation in this case. He recalled that in the beginning of 1999, the DSB had to face a very difficult situation because the United States had refused to initiate an Article 21.5 procedure to examine the EC's implementation on bananas. On that occasion, the United States had made a number of arguments to try to justify its disregard for the Article 21.5 procedure. The United States had considered that the EC's interpretation, that Article 21.5 was required in case of disagreement on implementation, would render Article 22 completely inoperative because all actions under that Article had to take place within the 60-day period after the end of the reasonable period of time. The EC had also been told that the United States could only benefit from the negative consensus rule with respect to its request for suspension of concessions, if it had made its request within 30 days after the expiry of the reasonable period of time. At the present meeting, the United States was not only recognizing the existence of Article 21.5, but also agreed to extend the time periods to which it attached great importance. The EC welcomed that the United States now accepted to act within the multilateral framework to settle its disagreements on implementation. The EC had an interest in the Article 21.5 proceeding and wished to participate therein as a third party.

The representative of India said that, on many occasions, his country had stated that Members had the duty to uphold multilateralism which was the basic foundation of the WTO. India had always argued that Article 22 of the DSU should not be invoked when there was a disagreement on implementation. Such a disagreement should be resolved through recourse to Article 21.5 of the DSU. His country noted with satisfaction that the United States had decided to have recourse to Article 21.5. He hoped that, notwithstanding the statement made at the present meeting, the United States would see merits in the approach followed in this case. India shared most of the views expressed by the EC. He noted that, in its statement, the United States had referred to the DSU Review. India's views expressed during the discussions on the DSU Review were well-known and, therefore, he did not wish to reiterate them at the present meeting. He only wished to reserve India's position with regard to the process.

The DSB took note of the statements and agreed to refer to the original Panel pursuant to Article 21.5 of the DSU, the matter raised by the United States in document WT/DS126/8.

The Chairman noted that the EC had stated that it wished to reserve its third-party rights to participate in the Panel's proceedings. He recalled that other delegations who might wish to reserve their third-party rights should inform the Secretariat through a written communication within the next five days after the meeting.

The representative of Mexico sought clarification with regard to the reference made by the Chairman to the five-day period for reservation of third-party rights.

The Chairman said that it was his understanding that under Article 4 of the SCM Agreement time-periods were half the time prescribed in the DSU. He had, therefore, indicated five days instead of ten days. He asked whether Mexico wished that the Secretariat provide more detailed explanation on this matter.

The representative of Mexico noted the explanation provided by the Chairman. He said that it was his understanding that the requirement of five days would not be applied in all cases involving Article 21.5 of the DSU.

The DSB took note of the statements.

2. India – Quantitative restrictions on imports of agricultural, textile and industrial products

(a) Implementation of the recommendations of the DSB

The Chairman recalled that in accordance with the DSU provisions, the DSB kept 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 provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the Panel or the Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that on 22 September 1999, the DSB adopted the Appellate Body Report on "India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products" as well as the Panel Report on this matter as upheld by the Appellate Body Report. He noted that the item had been inscribed on the Agenda of the present meeting at the request of India.

The representative of India recalled that at the September DSB meeting, he had highlighted that the Panel's and the Appellate Body's interpretation of the provisions of the DSU, GATT and BOP

Understanding had serious implications for the institutional balance in the WTO between the judicial bodies, such as panels and the Appellate Body, and the political bodies, such as the BOP Committee and the General Council. The Panel's interpretation, which was upheld by the Appellate Body, removed the powers and functions that legitimately belonged to the BOP Committee and the General Council. The Panel assigned unto itself the competence to look into overall justification of BOP measures rather than the application of each individual BOP measure. The Panel's ruling, as upheld by the Appellate Body would have the effect of curtailing the scope of the substantive rights of developing countries under Article XVIII:B. India had requested that the item be inscribed on the agenda in accordance with Article 21.3 of the DSU in order to inform the DSB of its intention in respect of the implementation of the DSB's recommendations and rulings. It was India's intention to meet its WTO obligations. India would require a reasonable period of time to comply with the DSB's recommendations and rulings. In this regard, he drew attention to the Panel's recommendations and suggestions contained in paragraphs 7.5 and 7.6 of the Report. The Panel recognized the need for granting India a longer period than fifteen months in order to comply with the DSB's recommendations and rulings. Furthermore, the Panel had recommended that in establishing a reasonable period of time, the DSB should take into account not only the well-established practice of IMF, BOP Committee and GATT/WTO panels granting a gradual phase-out period for elimination of BOP restrictions, but also India's position as a developing country Member. India was in touch with the United States with a view to arriving at a mutually agreeable period of time for implementation, as provided for in Article 21.3 (b). The parties had until 6 November to arrive at a mutually agreed period of time for implementation, and his delegation would keep the DSB informed of progress in this matter.

The representative of the United States thanked India for the information in regard of its intention to comply with the DSB's rulings and recommendations. His delegation expected that India would implement those recommendations promptly. The United States looked forward to discussing with India what the reasonable period of time for implementation might be, and hoped that a meeting could be arranged shortly. His delegation could not accept India's proposed period of time for implementation and believed that India should be able to remove its quantitative restrictions sooner than that. The United States hoped that an agreement could be reached on this question in bilateral discussions and that recourse to arbitration would not be necessary.

The DSB took note of the statements and of the information provided India regarding its intentions in respect of implementation of the DSB's recommendations.