WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/146
19 May 2003

(03-2674)

Dispute Settlement Body
31 March 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 31 March 2003

Chairman: Mr. Shotaro Oshima (Japan)

Subjects discussed: Page

1. United States – Subsidies on upland cotton 1

(a) Designation by the DSB of a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the SCM Agreement 1

2. Canada – Measures relating to exports of wheat and treatment of imported grain 5

(a) Request for the establishment of a panel by the United States 5

1. United States – Subsidies on upland cotton

(a) Designation by the DSB of a representative to serve the function of facilitating the information-gathering process, pursuant to paragraph 4 of Annex V of the SCM Agreement

1. The Chairman recalled that at its meeting on 18 March 2003, the DSB had agreed to establish a panel to examine Brazil's complaint regarding US subsidies on upland cotton (WT/DS267/7). He recalled that in addition to the panel request, Brazil had also requested that the DSB initiate the procedures provided in Annex V of the SCM Agreement. In accordance with these procedures, the DSB was required to designate a representative to serve the function of facilitating the information-gathering process needed by the parties and the panel. He said that in order to meet Brazil's request, he had been consulting with the parties to the dispute on this matter. However, these consultations had not yet been completed. Therefore, he was not in a position to make a proposal at the present meeting, but hoped to be able to do so shortly. He then invited delegations to speak, if they so wished.

2. The representative of Brazil said that on 18 March 2003, at the request of Brazil, the DSB had established a panel to examine the subsidies granted by the United States on upland cotton. In its request for the establishment of a panel, dated 7 February 2003, Brazil had also requested that the DSB initiate the procedures provided in Annex V of the SCM Agreement, pursuant to paragraph 2 of that Annex. These procedures aimed to obtain information from the government of the subsidizing Member, as necessary, to establish the existence and amount of subsidization as well as information required to analyze the adverse effects caused by the subsidized product. Pursuant to paragraph 4 of Annex V, the DSB was required to designate a representative to serve the function of facilitating the information-gathering process. He noted that according to paragraph 1 of Annex V, every Member shall cooperate in the development of evidence to be examined by a panel pursuant to the procedures

under Article 7 of the SCM Agreement. He said that two names had been proposed to the parties on 5 March 2003; i.e. 26 days ago and a representative should have been designated by the DSB at the 18 March meeting. However, at that meeting, the United States had stated that it was not in a position to agree on the designation of the representative. As a pretext, the United States had questioned whether the item was properly included on the agenda and had stated that Brazil was required to identify the third-country markets relevant to the process. While Brazil did not agree with the US arguments, it had requested that a special DSB meeting be convened for the purpose of the designation of a representative and had included this matter on the agenda as a separate item. Brazil had also provided the list of third-country markets in document WT/DS267/9, circulated on 21 March 2003. He noted that 13 days had elapsed since the establishment of the panel and since the day when the DSB should have designated a representative to serve the function of facilitating the information-gathering process. It was, therefore, high time that the DSB fulfill its obligation under paragraph 4 of Annex V of the SCM Agreement. He reiterated that paragraph 4 of Annex V provided that "The DSB shall designate a representative to serve the function of facilitating the information-gathering process".

3. The representative of the United States said his country believed that it was premature to appoint a DSB representative at the present meeting under Annex V of the Subsidies Agreement. As the United States had explained in informal consultations held in the previous week, Brazil was not entitled to use the Annex V procedures at this point. The United States had maintained throughout the dispute that the measures at issue were covered by Article 13 of the Agreement on Agriculture, also known as the Peace Clause. In this dispute, Brazil was claiming adverse effects, including serious prejudice. Both the Subsidies Agreement and the Agreement on Agriculture made clear that such claims were precluded in the case of measures covered by the Peace Clause. The Annex V process could only be applied for claims of serious prejudice. Since the Peace Clause precluded actions based on such claims, the Annex V process could not be applied in this dispute to the measures at issue. However, just as it had entered into consultations with Brazil in good faith and had responded to well over one hundred consultation questions, the United States was proposing a pragmatic way to safeguard both parties' positions. Under the US proposal, if the panel were to determine that the Peace Clause did not apply, the parties could then engage in the Annex V process. Of course, just to be clear, the United States believed that the Peace Clause did apply and so one would never reach this point. The United States remained prepared to consult further with a view to agreeing on an appropriate DSB representative. In fact, the United States had been prepared to seek a consensus at the present meeting. However, it was premature to appoint a DSB representative when the parties had not yet agreed on the time when the Annex V procedures should begin.

4. The representative of Brazil recalled that the DSB should have designated a representative as mandated by paragraph 4 of Annex V at its 18 March meeting. Brazil noted with concern that the United States continued to object to the designation of a representative at the present meeting. Brazil also noted that the United States had raised some arguments which related to the application of the Peace Clause and Annex V. Brazil recalled that the only requirement for the development of evidence under the procedures of Annex V was the referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement. This had been done pursuant to Brazil's panel request. The information-gathering process under Annex V as well as the designation of the facilitator should have been properly in place since at least the establishment of the panel on 18 March. The argument related to the Peace Clause raised by the United States at the present meeting was a false argument which sought to introduce confusion in a straightforward process. The so-called Peace Clause protection was not an absolute or unconditional right. It had to conform to criteria which were set out in the Agreement on Agriculture. Brazil believed that information gathered under Annex V might be useful before the panel, including claims in relation to the Peace Clause.

5. Brazil noted that the objection raised by the United States amounted to a Catch-22 situation whereby the United States tried to prevent Brazil from gathering the information necessary to demonstrate its claim. The Peace Clause had different scopes according to the categorization of the

measures at issue. The United States would have to be more specific about the provisions which it considered applicable. Brazil would reserve for the panel stage some more specific references to Article 13 of the Agreement on Agriculture. However, for the record, Brazil wished to recall that paragraph 1 of Annex V established an obligation for the parties to cooperate with the development of evidence to be examined by a panel in the procedures under Article 7 of the SCM Agreement. It was not the best endeavour clause, and the panel had already been established under Article 7.4 of the SCM Agreement and Article 6 of the DSU. Brazil also wished to point out that the new allegations raised by the United States at this meeting had not been raised at the time when the procedure under paragraph 2 of Annex V had been initiated.

6. Brazil noted that it was hard to escape the feeling that the United States was trying to delay and impair the procedures. If the United States had any doubts about the relevance of Annex V in these proceedings, it could raise this matter before the panel. The reasonable solution would then be for the DSB to designate a respresentative, as mandated by paragraph 4 of Annex V, to conclude the information gathering process and, in accordance to paragraph 5 of Annex V, to submit this information to the panel. By blocking the consensus to designate such a representative, the United States was clearly demonstrating its unwillingness to cooperate with the information-gathering process. Brazil would draw the appropriate conclusion from the US attitude. It regretted that the procedures under Annex V were being impaired, but would nonetheless proceed with the collection of information as it was entitled to. Brazil would send its request for information to the United States as well as to third countries and would count on their cooperation for the fulfilment of the purpose of Annex V.

7. The representative of the European Communities recalled that the EC had reserved its third-party rights to participate in the Panel's proceeding. The EC assumed that questions asked and information provided under the Annex V procedure would be available to third parties, as they could become key elements for the panel to make its judgement in this case. The EC would like to have confirmation of such assumption and recalled that the organisation responsible for the administration of Annex V within the territory of the European Communities was the EC Commission. Accordingly, any requests for information concerning the markets of Germany, Italy and Portugal should be addressed to the delegation of the EC Commission in Geneva.

8. The representative of Argentina said that with regard to the references made concerning the Peace Clause, it was his country's understanding that the exception contained in the Clause did not afford absolute immunity from complaints under the DSU. The Clause provided for exemption from the measures based on Article XVI of GATT 1994 and Articles 3, 5 and 6 of the SCM Agreement only to the extent that the conditions stipulated therein were fulfilled. Argentina emphasized that the due restraint granted until 31 December 2003 could not apply unless those conditions had actually been met. Argentina was, therefore, concerned about the US interpretation. Argentina wished to reiterate its statement made at the 18 March DSB meeting concerning the participation of third parties in the Annex V procedures under the SCM Agreement.

9. The representative of Benin said his delegation wished to know if the Chairman of the DSB had received a communication which had been sent to him on 24 March 2003 informing the DSB that Benin wished to participate as a third party in the Panel's proceedings on "United States – Subsidies on Upland Cotton".

10. The Chairman said that he had received Benin's communication and that Benin would participate as a third party in the Panel's proceedings on this matter.

11. The representative of Benin said that his country was a cotton producing and exporting country. Cotton farming employed a large segment of Benin's rural population. Cotton production accounted for around 93.8 per cent of the country's agricultural exports, 19.3 per cent of its total exports and 8.8 per cent of its GDP. In recent years, the level of Benin's cotton exports in the world

market had fallen sharply in terms of both volume and revenue. This trend was the result of distortive practices by other cotton producing countries, including the United States, with regard to their cotton production and exports. The ensuing injury to Benin's agricultural production and economy, and the worrying prospects for this sector, had prompted Benin, following the failure of the consultations between Brazil and the United States on upland cotton subsidies, to request to be joined as a third party in the complaint lodged by Brazil. Benin stressed that as a cotton producer and exporter, it had an economic and trade interest in the ongoing proceedings as well as a systemic interest in the implementation of the WTO rules, disciplines and procedures, including those concerning market access, domestic support and export subsidies.

12. The representative of India said that his country was one of those Members who had reserved third-party rights when the panel had been established on this matter. He recalled that at the 18 March DSB meeting, India had also sought to participate in the information-gathering process under Annex V of the SCM Agreement, and wished to reiterate its desire to be associated with the information-gathering process. Brazil identified India as one of the countries from which information could be gathered along with the EC and some other Members. Accordingly, India wished to inform the DSB that the Indian Mission in Geneva was the focal point for any communications to be addressed in this regard.

13. The representative of the United States said that his delegation wished to respond to some of the points made by some delegations who had just spoken. With respect to the points regarding the relationship between the Peace Clause and Annex V of the Subsidies Agreement, he said that a Member could not use the Annex V procedures to establish "the existence and amount of subsidization" or otherwise for purposes of establishing the applicability of the Peace Clause. The Annex V process was intended to be used to establish claims of serious prejudice under the Subsidies Agreement. Nowhere did Annex V provide that a Member might use Annex V of the Subsidies Agreement for purposes of the Agreement on Agriculture. While the United States agreed that Brazil had invoked the procedures of Annex V, it could not agree that those procedures had already begun. With respect to third parties, the United States recalled its statement at the 18 March DSB meeting that Annex V did not contemplate participation by third parties in the Annex V process or access to information gathered in that process. The United States reiterated that it looked forward to further consultations on this matter in the near future.

14. The representative of Brazil noted the statements made by third parties and said that Brazil looked forward to working with them in relation to the information-gathering process and thanked them for indications of focal points for the collection of information. He noted that under Annex V in cases where matters were referred to the DSB under paragraph 4 of Article 7 of the SCM Agreement, the information could be gathered as necessary to establish the existence and the amount of subsidization. Therefore, in Brazil's view, there was a clear link with regard to the relevance of the Peace Clause in this case.

15. The Chairman proposed that the DSB take note of the statements made and agree to suspend the meeting on this agenda item until further notice. He further proposed that he would continue to consult with the parties to the dispute on this matter and, once an agreement was reached, he would send a fax to delegations informing them that the meeting would be reconvened.

16. The DSB so agreed.

2. Canada – Measures relating to exports of wheat and treatment of imported grain

(a) Request for the establishment of a panel by the United States (WT/DS276/6)

17. The Chairman recalled that the DSB had considered this matter at its meeting on 18 March 2003 and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS276/6.

18. The representative of the United States said that at the 18 March DSB meeting, his country had requested the establishment of a panel pursuant to Article 6 of the DSU to examine whether Canada's measures relating to wheat exports and to treatment of imported grain were inconsistent with Canada's obligations under the GATT 1994 and the TRIMs Agreement. As the United States had explained at that meeting, its concerns with respect to wheat exports involved the wheat sales practices of the Government of Canada and its state-trading enterprise, the Canadian Wheat Board, which appeared inconsistent with Canada's obligations under Article XVII of the GATT 1994. The US concerns with respect to imported grain involved discrimination in the rules governing the Canadian grain handling system and the Canadian rail transportation system, which appeared inconsistent with Canada's obligations under Article III of the GATT 1994 and the TRIMs Agreement. At the 18 March DSB meeting, Canada had noted its disappointment that the United States would request a panel. However, the US request could come as no surprise to Canada. Contrary to what Canada implied at the 18 March DSB meeting, the United States most certainly had never agreed that Canada's wheat trading practices were consistent with Canada's obligations under the WTO Agreement. To the contrary, the United States had repeatedly expressed serious concerns about Canadian wheat trading practices. Accordingly, the United States respectfully wished to renew its request that the DSB establish a panel pursuant to Article 6 of the DSU with the standard terms of reference to examine these matters.

19. The representative of Canada said his country realized that a panel would be established at the present meeting. Nevertheless, Canada wished to reiterate its disappointment that the United States had decided to make this second request for a panel, particularly since the United States itself had already thoroughly examined and had investigated these issues. Canada's grain sector and transportation policies were fully consistent with the WTO rules and obligations. Canada would defend its national interest in maintaining a market-driven and competitive grains sector.

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

21. The representatives of Chile, Chinese Taipei, the European Communities, Japan and Mexico reserved their third-party rights to participate in the Panel's proceedings.