WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/117
15 February 2002

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Dispute Settlement Body
18 January 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 18 January 2002

Chairman: Mr. K. Bryn (Norway)

Subjects discussed: Page

1. Argentina – Definitive safeguard measure on imports of preserved peaches

(a) Request for the establishment of a panel by Chile (WT/DS238/2)

1. The Chairman recalled that the DSB had considered this matter at its meeting on 18 December 2001 and had agreed to revert to it. He drew attention to the communication from Chile contained in document WT/DS238/2.

2. The representative of Chile said that since the 18 December DSB meeting, the situation had not changed and Chile's exports of preserved peaches continued to be prevented from entering Argentina's market as a result of a measure that was inconsistent with the GATT 1994 and the Agreement on Safeguards. Therefore, Chile had no choice but to submit, for the second time, its request for the establishment of a panel. At the same time, Chile wished to reiterate its readiness to seek, at the bilateral level, a WTO-consistent solution.

3. The representative of Argentina said that his country recognized that Chile's request for the establishment of a panel was on the agenda for the second time, and that in accordance with the DSU provisions, such a panel would have to be established at the present meeting. He reiterated that Argentina's measure was consistent with WTO rules, including those referred to by Chile. Argentina welcomed Chile's decision to request the suspension of the DSU proceedings, and hoped that the parties would be able to reach a mutually acceptable solution.

4. 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.

5. The representative of Chile said that without prejudice to his country's position in this case or any other case, and bearing in mind that both parties expressed their readiness to settle this dispute bilaterally, Chile would not proceed with the Panel's composition at this stage. The composition process would be resumed if the consultations to be held shortly failed to bring any positive results.

6. The DSB took note of the statement.

7. The representatives of the European Communities, Paraguay and the United States reserved their third-party rights to participate in the Panel's proceedings.

2. United States – Anti-Dumping Act of 1916

(a) Recourse to Article 22.2 of the DSU by the European Communities (WT/DS136/15)

(b) Recourse to Article 22.2 of the DSU by Japan (WT/DS162/18)

8. The Chairman proposed that the DSB take up these two sub-items together since they pertained to the same matter. He then drew attention to the communication from the European Communities contained in document WT/DS136/15.

9. The representative of the European Communities said that the EC was disappointed that the United States had not complied with its WTO obligations within the extended deadlines. The EC had done its best to facilitate US compliance with the DSB's recommendations. He recalled that at the July 2001 DSB meeting the EC had not opposed the US request to extend the reasonable period of time. However, following the expiry of the reasonable period of time on 20 December 2001, the 1916 Act continued to be in force. Even if a law to repeal the 1916 Act and to terminate pending cases had been introduced in the US Congress, compliance would only be achieved once the law was effectively repealed. The EC was concerned about this situation and in order to safeguard its WTO rights, it had no choice but to request the authorization to suspend obligations under Article 22.2 of the DSU. It was the EC's understanding that the matter would be referred to arbitration pursuant to Article 22.6 of the DSU and that the parties to the dispute would request the arbitrator, once appointed, to suspend proceedings for a period of time, with the expectation that the US Congress would act quickly to repeal the law and that all pending cases would be terminated. In this way, the EC hoped that compliance with the Panel and the Appellate Body rulings would be assured.

10. The Chairman drew attention to the communication from Japan contained in document WT/DS162/18.

11. The representative of Japan recalled that on 20 December 2001, the US Congress had adjourned its session without passing the Bill to repeal the 1916 Act. As a result, on the same date the reasonable period of time approved by the DSB on 24 July 2001 had expired, resulting in the US non-compliance with the DSB's recommendations. Japan regretted that the United States had failed to comply in this case. Japan's ultimate goal was to secure prompt compliance by the United States. Therefore, even after the expiry of the reasonable period of time, Japan had consulted with the United States and had found an agreement on procedural steps. In accordance with that agreement, Japan would first request authorization from the DSB to take appropriate measures under Article 22.2 of the DSU to preserve its legitimate rights under the DSU. He noted that in its consideration of the measures, Japan had observed the principles and procedures prescribed in Article 22.3 and 22.4 of the DSU. The measures were similar in nature and intended to be equivalent to the level of benefits being nullified or impaired under the GATT 1994 and the Anti-Dumping Agreement as a result of the 1916 Act. Subsequently, following the DSB's authorization, once the arbitrator was appointed, Japan

and the United States would jointly request the arbitrators to suspend the arbitration procedure until either party requested a resumption. Japan believed that this would give the United States the necessary extra time to comply with the DSB's rulings and recommendations. Japan hoped that the above-mentioned arrangements would enable the parties to reach a mutually satisfactory solution and urged the United States to complete its implementation while the arbitration process was suspended.

12. The representative of the United States recalled that on 17 January 2002, her country had informed Members in writing that, pursuant to Article 22.6 of the DSU, it was objecting to the levels of suspension of obligations proposed by the EC and Japan in documents WT/DS136/15 and WT/DS162/18, respectively. Furthermore, the United States claimed that Japan had not followed the principles and procedures of Article 22.3 of the DSU. Under the DSU provisions, the filing of these objections automatically resulted in the matters being referred to arbitration, and no further action by the DSB was required. She noted that Article 22.6 of the DSU did not refer to any decision by the DSB in this regard. Consequently, the matters raised by the United States were already being referred to arbitration. At the same time, the United States had no objection if the DSB wished to take note of that fact and confirm that it may not consider the requests for authorization made by the EC and Japan, which were before the DSB at the present meeting, since the matters had already been referred to arbitration. Discussions on how to resolve this dispute were ongoing. Therefore, the United States, the EC and Japan would be requesting their respective arbitrators, at the earliest possible moment, to suspend their work. The United States was confident that should the arbitrators ever have to consider the matter, they would find that the US objections to the EC's and Japan's proposed actions were well founded.

13. The representative of Chile said that his country was concerned about the case under consideration since this was another instance where a Member failed to comply with the DSB's recommendations and rulings. Chile recognized that they were special cases with particular problems. However, it was concerned that the level of non-compliance continued to rise. This lack of compliance undermined the dispute settlement system and raised some questions in political, academic, administrative and business circles, including civil society. These included the following: (i) What was the point of the system if its rulings were not accepted? (ii) Why should efforts be made to comply with WTO obligations when some countries had no problem violating these obligations? (iii) Do major trading powers enjoy a special status which enabled them to ignore their obligations? Like other Members, Chile expected the United States, as well as any other Member, to make the necessary political and economic efforts to comply with DSB's recommendations. In this regard, he recalled that compliance was one of the cornerstones of the Developmental Agenda.

14. He said that some additional problems were involved in the case under consideration. Chile recognized that the EC and Japan might encounter some difficulties in determining the best way to suspend equivalent concessions. It was Chile's understanding that the United States had not offered compensation. The EC's recourse to Article 22.2 of the DSU indicated that as a result of the United States' inability to comply with the DSB's recommendations, a number of companies faced judicial proceedings in the United States on the basis of the 1916 Act. All companies which exported to the United States were faced with the threat of legal action as a result of the 1916 Act. In this regard, he wished to make two observations. It was highly probable that the companies subjected to such action had incurred or would incur some cost: i.e. they would be required to pay for professional services and their executives and employees would need to devote time defending the company. It was also possible that legal actions would generate uncertainty among buyers, discouraging them from buying from that source, thus increasing transaction costs. Therefore, even though no measure had yet been applied by a court under the 1916 Act, there was a cost, or injury that was measurable and could be calculated. As the EC pointed out, it was possible that other exporting companies would face a similar situation in the future. Consequently, this cost could be converted into equivalent retaliation measures in the form of tariffs. He believed that this had never been done because of technical and intellectual difficulties involved. This situation was not fully covered by the DSU provisions, and as a result of this lacuna it was more difficult to take effective retaliatory measures.

15. The EC and Japan sought authorization to suspend their obligations under the GATT 1994 and the Anti-Dumping Agreement in order to treat US products in the same way as the United States treated EC products. In other words, to use "mirror legislation". Chile was concerned about this approach which could be described as "two wrongs don't make a right". It would give rise to an arms race, the outcome of which would be difficult to determine. For example, US parliamentarians could consider that the 1916 Act was consistent with the principles of equity and justice, and denied that the Act was inconsistent with WTO rules. If others wished to have similar laws so much the better, and they would even be flattered that others copied their laws and procedures. In other words, instead of encouraging compliance, countries would be invited to do the same with respect to the United States, thus legitimizing perverse legislation and encouraging proliferation of protectionist measures.

16. Furthermore, Chile was concerned that the requests by the EC and Japan would create a precedent as how the equivalent level of suspension of concessions would be determined. For example, one could envisage a situation in which the United States did not repeal its law but it would not be invoked in the courts over the next four years. During that time the EC and/or Japan, with the DSB's authorization, would copy the US legislation and would apply it in all anti-dumping investigations concerning products from the United States over the next four years. In such cases, the suspension would be equivalent to the terms of obligations under the Anti-Dumping Agreement and the GATT 1994, but would not be equivalent to the actual trade and financial effects. He asked if Members wished to create such a precedent.

17. Chile's concerns and questions did not only apply to one particular dispute and should warrant further reflection by Members. Chile did not wish to criticize the EC or Japan, but some aspects of their requests raised concerns even if one sympathized with the fact that the parties to the dispute wished to defend their rights. Chile urged the United States to repeal the 1916 Act and to bring it into conformity with its WTO obligations.

18. The representative of Hong Kong, China said that his delegation had an interest in the case under consideration due to some systemic implications. While Hong Kong, China recognized the US efforts towards implementation, it regretted that the United States had not been able to comply with the DSB's recommendations within the extended reasonable period of time. Hong Kong, China urged the United States to take prompt action to bring the 1916 Act into conformity with its WTO obligations as soon as practicable. However, it had some reservations as to whether the imposition of measures, found to be inconsistent with WTO rules, was the appropriate approach to follow in cases involving the suspension of concessions. Hong Kong, China encouraged all parties concerned to carefully consider the systemic implications before taking a decision on whether the imposition of such measures was the best way forward. His delegation noted that Article 22.5 of the DSU provided that "[t]he DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension".

19. The representative of Brazil expressed its satisfaction with the Panel and the Appellate Body Reports which, with solid legal reasoning, had found the 1916 Act to be inconsistent with the United States' WTO obligations. However, the failure of the United States to implement the DSB's rulings represented a serious problem for the rule-based multilateral trading system. In accordance with Article XVI:4 of the Marrakesh Agreement, a Member should ensure the conformity of its laws, regulations and administrative procedures with its obligations under the Agreements. Through recourse to Article 22.2 of the DSU, Japan and the EC were now trying to overcome that problem. Brazil had carefully examined the requests for suspension of concessions which had been prompted by the US lack of implementation and wished to present its views with regard to systemic implications of the measures, in particular an equivalent regulation to the 1916 Act, which had been considered by the Panel and the Appellate Body to be WTO-inconsistent.

20. Two fundamental principles governed the WTO dispute settlement system: (i) the need to preserve the balance of rights and obligations of Members, as stipulated in Article 3.3 of DSU; and (ii) the need to ensure that all solutions were consistent with the covered agreements, as provided for in Article 3.5 of DSU. The remedies provided under the DSU provisions aimed first and foremost at the withdrawal of inconsistent measures. The next step was compensation and then as the last resort, the suspension of concessions, as provided for in Article 3.7 of the DSU. Thus, in accordance with the two principles, Article 22.7 of the DSU authorized the arbitrator to determine whether the proposed suspension was allowed by the covered agreement. In this regard, Article 22.4 and 22.7 of the DSU established that the suspension of concessions or obligations had to be equivalent to the level of nullification or impairment. Therefore, a necessary and prior step was to determine the level of nullification or impairment. In the absence of such a determination, any proposal to suspend concessions would lack a point of reference and the arbitrator would have no basis on which to conduct the equivalency test required by 22.7 of the DSU, first sentence.

21. The case in question concerned legislation that had either never been applied or had not formally been applied, but could serve as a threat to the interests of other countries. This was a special but not uncommon case. Brazil believed that in addressing the remedies available in the dispute settlement mechanism, the DSU drafters had not intended to allow open-ended solutions that would enable a Member to go as far as enacting "mirror" legislation, which had been declared to be WTO-inconsistent. Therefore the question was, if the 1916 Act was WTO inconsistent because it contained specific actions against dumping not provided for in the Agreement, how could the WTO endorse a solution for non-compliance which was not compatible with the same Agreement. This mirror solution would have deleterious effect on the system and would distort the fundamental principles of good faith and the abidance by the rules.

22. According to the DSU provisions, the suspension of concessions was the last resort under the dispute settlement system and required the determination of the level of nullification and impairment. If this was not possible then the suspension of concessions or obligations would not be a viable solution. The alternative solution requested by Japan and the EC could not be accepted because it would amount to granting power to a party to unilaterally decide to suspend concessions when and to the extent it saw fit. The authorization had to be based on the level of nullification and impairment caused by the infringing measure. In the present case this could certainly leave a feeling of dissatisfaction and would amount to flawed enforcement. However, if all Members were to benefit from a proper settlement of disputes and a correct implementation of the DSB's recommendations – even under the proceedings of Article 22 of the DSU – all countries would suffer from a retaliation that was in violation of the rules that the system was supposed to maintain. It was no coincidence that Article 23 of the DSU which set the limits to redress violations was entitled: "Strengthening of the Multilateral System". Brazil supported the EC's and Japan's rights to assure the proper balance between the rights and obligations of Members, which was affected by the US non-compliance. However, this should not be done at the expense of the systemic values embedded in the agreements.

23. The representative of Venezuela said that his country supported the statements made by Chile and Brazil. In the past, Venezuela had been severely and unjustly affected by the US Anti-Dumping Act, in particular, through the discretion of US trade officials with regard to the imposition of anti-dumping measures. In Venezuela's view such discretion was excessive, unilateral and not in line with the WTO rules.

24. The representative of Australia said that the issues raised by previous speakers required further reflection. Like other Members, Australia hoped that the US Congress would repeal the legislation in question and, as a result, the requests for arbitration would lapse. If this was the case, the exchange of views on this issue would be considered academic. The points about systemic implications, in particular those raised by Chile and Brazil were valid. It was possible to envisage other cases currently under the DSU provisions or future cases where a country sought authorization to impose illegal export subsidies to counter subsidies imposed by other countries. These were

legitimate issues. The question was whether it was appropriate to enter into a situation in which a WTO-inconsistent retaliation would be authorized. At the present meeting, he did not wish to make further comments on this matter and hoped that delegations would reflect on legitimate systemic concerns raised by some Members and that these issues would be addressed in the context of the DSU negotiations.

25. The representative of the European Communities said that the EC's position on legal conditions on which this request for authorization of suspension of concessions or other obligations was made was well-known. The EC did not share the view of the United States that the matter was automatically referred to arbitration once a request for arbitration was filed. The EC had already made its position known in 1999 and in 2000, as reflected in relevant minutes of DSB meetings. The EC thus considered that a decision of the DSB to refer the matter to arbitration would be taken at the present meeting. He underlined that the EC did not change its position on this matter.

26. He also wished to make some comments on statements made by Chile and Brazil at the present meeting. It was clear that under Article 22 of the DSU, any party could ask for a suspension of concessions or for a suspension of obligations. Since one had the choice to ask for a suspension of concessions or a suspension of obligations, there was really no difference between requesting a suspension of concessions, i.e. the possibility to apply additional customs duties, and a suspension of obligations, applying a law contrary to the WTO, but which was identical to illegal legislation of the other side. If the United States did not conform to the Anti-Dumping Agreement in the framework of the 1916 Act, there was nothing wrong with the fact that the EC could apply the same type of legislation. Since the matter would be referred to arbitration, the arbitrators would have to verify whether the suspension of obligations proposed by the EC was equivalent to the nullification of benefits resulting from the lack of implementation by the United States. The United States had to bear the burden of proof in this case. He hoped that while waiting for arbitration, no Brazilian or Chilean exporter would have to face the application of the 1916 Act.

27. The Chairman noted the references which had been made to the systemic implications involved and the appeals to the parties.

28. The DSB took note of the statements and it was agreed that the matters raised by the United States in documents WT/DS136/16 and WT/DS162/19 are referred to arbitration, as required by Article 22.6 of the DSU.

3. United States – Section 110(5) of the US Copyright Act

(a) Recourse to Article 22.2 of the DSU by the European Communities (WT/DS160/19)

29. The Chairman drew attention to the communication from the European Communities contained in document WT/DS160/19.

30. The representative of the European Communities recalled that on 24 July 2001, the DSB had approved the US request to extend the reasonable period of time in this case until 31 December 2001, or the date on which the first session of the US Congress adjourned, whichever came earlier. The US Congress had gone into recess on 20 December 2001 and, consequently, the reasonable period of time for implementation had expired on that date. However, the United States had not brought Section 110(5)(B) of its Copyright Act into conformity with the TRIPS Agreement. The parties had been engaged in constructive negotiations for several months. The EC and its member States hoped that those discussions would lead to a satisfactory outcome. Notwithstanding, the EC and its member States had decided to have recourse to Article 22.2 of the DSU in order to fully safeguard their rights. Accordingly, the EC and its member States were requesting the authorization of the DSB to suspend the application to the United States of TRIPS obligations, as described in document WT/DS160/19. It was the EC's understanding that the matter would be referred to arbitration, pursuant to Article 22.6 of

the DSU. Both parties intended to request the arbitrator, once appointed, to suspend the proceedings for some time so as to facilitate a positive outcome to ongoing discussions.

31. The representative of the United States said that in a letter dated 17 January 2002, the United States had informed Members that, pursuant to Article 22.6 of the DSU, it had objected to the level of suspension of obligations proposed by the EC in document WT/DS160/19, and claimed that the EC had not followed the principles and procedures of Article 22.3 of the DSU. Under the terms of the DSU, the filing of such an objection automatically resulted in the matter being referred to arbitration, and no further action was required of the DSB. Indeed, Article 22.6 did not refer to any decision by the DSB. Consequently, the matter was already being referred to arbitration. Nevertheless, the United States had no objection if the DSB wished to take note of that fact and confirm that it may not consider the EC's request for authorization, since the matter was being referred to arbitration. She added that discussions were ongoing in an effort to resolve this dispute, and the parties would be requesting the arbitrator, at the earliest possible moment, to suspend its work. The United States was confident that should the arbitrator ever have to consider the matter, it would find that the US objections to the EC's proposed actions were well founded.

32. The representative of Australia said that his delegation did not wish to comment directly on the EC's request under Article 22.2 of the DSU. However, Australia wished to register its strong concerns about the compensation arrangements that it understood had been agreed between the United States and the EC. Australia was concerned that those compensation arrangements might infringe WTO obligations on non-discrimination. They also appeared to anticipate a delay in the United States' implementation by up to three years. Australia was particularly concerned by the apparent discriminatory nature of the proposed compensation arrangements. In this regard, Australia noted that no compensation had been offered to other Members whose interests were being nullified and impaired by continued violation by the United States of its WTO obligations. Australia also wished to register its expectation that the United States would comply with the WTO's findings as quickly as possible, and would be concerned if the proposed compensation arrangements resulted in a significant delay in implementation.

33. The DSB took note of the statements and it was agreed that the matter raised by the United States in document WT/DS160/20 is referred to arbitration, as required by Article 22.6 of the DSU.

4. European Communities - Generalized System of Preferences: Request for consultations by Thailand

(a) Statement by Colombia

34. The representative of Colombia, speaking under "Other Business", recalled that on 7 December 2001, Thailand had requested consultations with the European Communities under Article XXIII of the GATT 1994 and Article 4 of the DSU with regard to the measures under the Generalized System of Preferences (WT/DS242/1). Although Colombia was aware that the request had been made under Article XXIII of the GATT 1994, it had asked to be joined in the consultations, but had been informed that these consultations would be held exclusively between the EC and Thailand. Colombia regretted that it would not be able to participate in these consultations, in particular, since this matter was of the utmost political, economic and commercial importance for Colombia. From a systemic point of view, the DSU negotiations provided an opportunity to improve internal transparency under the dispute settlement system, which was a prerequisite to the strengthening of that system. It was essential to improve the DSU provisions with regard to the participation of third parties and the obligation to inform other countries of the results of consultations. In this regard, it was also important that the issue of co-defendant be addressed in the context of the DSU negotiations.

35. The representative of Costa Rica said that his country's request to be joined in the consultations requested by Thailand with the EC had also been rejected. As a result, Costa Rica, which benefited from the EC's Generalized System of Preferences, had been prevented from participating in the consultations on the matter in which it had a substantial interest.

36. The DSB took note of the statements.