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WORLD TRADE ORGANIZATION

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Dispute Settlement Body
30 July 1997

MINUTES OF MEETING

Held in the Centre William Rappard
on 30 July 1997

Chairman: Mr. Wade Armstrong (New Zealand)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

- United States - Standards for reformulated and conventional gasoline: Status report by the United States (WT/DS2/10/Add.6)

The Chairman recalled that this item was on the agenda pursuant to Article 21.6 of the DSU which required that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved." He drew attention to document WT/DS2/10/Add.6, which contained a further status report by the United States with regard to its progress in the implementation of the DSB's recommendations on this matter.

The representative of the United States said that as provided for in Article 21.6 of the DSU, his delegation had submitted its seventh status report on the implementation of the DSB's recommendations. He recalled that on 29 April 1997, the Administrator of the Environmental Protection Agency (EPA) had issued the proposed rule for comments. Consistent with normal US regulatory procedures, the EPA had invited all interested parties to comment on the specifics of its proposal by 19 June 1997. The EPA had received comments from a broad range of interested parties. These comments were available for public inspection at the EPA. The United States had also taken a very careful note of the points made and the questions raised in the DSB on this matter. However, since the EPA was in the process of its regulatory review and had not yet issued a final rule it would not be appropriate for his delegation to comment at this stage. He reiterated that all comments submitted to the EPA would be considered prior to the finalization of the regulation. He stressed that the United States took its commitments very seriously with regard to the timely implementation of its obligations and was on track toward meeting its commitments.

The representative of Brazil recalled that the 15-month period for implementation of the DSB's recommendations would expire on 20 August 1997. Since the summer holiday would give the United States a "providential" break and it would not be possible to revert to this matter before September, he wished to reiterate some points of special relevance to Brazil. He recalled that on several occasions, his delegation had expressed Brazil's concerns that the United States would not be able to meet the deadline of 20 August 1997. However, the United States had reassured his delegation that it would meet this deadline.

His Government and the Brazilian enterprise *Petrobrás* had fully participated in the process carried out by the EPA by submitting written comments prior to the issuance of amendments to the gasoline rule which would enable the United States to comply with the DSB's recommendations. *Petrobrás* had also been present at the scheduled hearings and meetings. As stated at the DSB meeting on 25 June 1997, Brazil had put forward technical questions and raised matters closely related to areas under the WTO's competence. With regard to technical questions, Brazil had submitted comments on the use of independent laboratories, testing methodology and mixtures. His Government hoped that the EPA would take into account the proposals submitted by *Petrobrás* so as to avoid burdensome and unnecessary procedures or requirements.

Brazil had also focused on two elements of the proposal directly linked to the rights and obligations under the GATT 1994 and the WTO Agreement, which were of serious concern to his country. The first was the bonding requirement for gasoline exporters to guarantee an eventual payment of fines. This could result in violation of Articles II and III of the GATT 1994. The second was the requirement with regard to a waiver of sovereign immunity which could have far-reaching negative implications on Brazil's rights under international law. These points had been made to the EPA by the Brazilian exporter and had also been directly conveyed to the US authorities by his Government. It was hoped that these issues were now being seriously considered and would be taken into account in the forthcoming amendments to the gasoline rule.

He stressed that Brazil attached importance to this case and, like other Members, had been fully aware that this first case, which had reached the implementation stage, could set an example. His Government believed that full compliance with the DSB's recommendations was fundamental for the credibility of the dispute settlement mechanism. Therefore, it was Brazil's expectation that at the next DSB meeting in September, the United States would provide Members with detailed information with regard to the regulation which would already be in effect. Brazil also expected that this regulation would fully comply with the DSB's recommendations.

The representative of Venezuela thanked the United States for its status report and recalled that this was the last meeting before the expiry of the agreed deadline of 20 August 1997 for

implementation of the DSB's recommendations. At the DSB meeting on 25 June 1997, his delegation had expressed concern with regard to a series of provisions in the proposed amendments which had, once again, established discriminatory treatment against imported gasoline. These included: (i) provisions containing complex requirements for imported gasoline, which would be stricter than those for domestic gasoline; and (ii) provisions establishing certain requirements which, in practical terms, implied that Venezuela would have to give up its sovereign immunity rights. His country was seriously concerned that, with only a few days before expiry of the deadline, it was still not known whether the EPA had incorporated the comments and suggestions made by trading partners. In order to preserve the credibility of the multilateral trading system, the United States -- as the Member that had most frequently resorted to the dispute settlement mechanism -- had the responsibility to comply faithfully and promptly with the DSB's recommendations. Anything to the contrary would cause serious trade problems for Venezuela and would be against the interests and image of the United States.

The representative of the European Communities noted the importance of the timely implementation of the DSB's recommendations as emphasized by the previous speakers, and supported their statements. It was clear that this case was important and was being closely followed. While it was not appropriate to comment on representations made to the EPA, he recalled that the questions raised by his delegation at the DSB meeting on 25 June 1997, had been addressed to the US Government. These questions concerned the possibility that the new system could be so designed as to revert to the situation of discriminatory measures being applied on imported products as opposed to domestic ones. The Communities had expected to receive some answers to these questions which had been addressed to the US authorities rather than to the EPA.

The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. European Communities - Measures affecting importation of certain poultry products
- Request for the establishment of a panel by Brazil (WT/DS69/2)

The Chairman recalled that the DSB had considered this matter at its meeting on 25 June 1997, and had agreed to revert to it. He then drew attention to document WT/DS69/2.

The representative of Brazil said that his country's request for the establishment of a panel was before the DSB for the second time. He recalled that Brazil's complaint contained two main elements. The first related to a full implementation of a compensatory agreement negotiated under Article XXVIII:4 of GATT 1994. Brazil contended that the implementation of the tariff-rate quota for poultry meat contained in the bilateral agreement had not properly maintained, " … a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided … prior to such negotiations."[1] The compensatory adjustment had not materialized as a result of the allocation and administration of the quota.

The second element concerned the possibility of a nullification or impairment of Brazil's rights with regard to trade outside the quota. The lack of transparency in the Communities' administration concerning the reduced share of the tariff-rate quota allocated to Brazil had affected trade outside the quota. His country was not in a position to determine whether its dutiable exports, subject to special safeguard provisions under Articles 4 and 5 of the Agreement on Agriculture, benefited from market access opportunities agreed in the Uruguay Round. Brazil wanted full compensation with respect to chicken meat as agreed in the Article XXVIII:4 negotiations. His country also believed that the tariff-rate

[1]Article XXVIII:2 of GATT 1994.

quota should be administered in a transparent manner so as to enable identification of sales made inside and outside the quota as well as to determine whether Brazil's rights under the WTO Agreement were being respected.

Unfortunately, since the DSB meeting on 25 June 1997, Brazil had not received any additional information from the Communities with regard to the administration of the tariff-rate quota on poultry meat which could clarify certain doubts raised during the consultations. To date, it had also not received any indication that a bilateral solution, in accordance with the spirit of Article 3.7 of the DSU, could be found. Therefore, Brazil requested that pursuant to Article 6.1 of the DSU a panel be immediately established to examine this matter, and that this panel consider and find that the Communities' poultry import regime was inconsistent with, *inter alia*: (i) Articles II, III, X, XIII and XXVIII of GATT 1994; (ii) Articles 1 and 3 of the Agreement on Import Licensing Procedures; (iii) Articles 4 and 5 of the Agreement on Agriculture. The Panel should also find that the Communities' measures had distorted trade and thereby nullified or impaired benefits accruing directly, or indirectly, to Brazil under the above-mentioned Agreements, and impeded the objectives of the WTO. Brazil further requested that a panel be established with standard terms of reference as set out in Article 7 of the DSU.

The representative of the European Communities said that his delegation accepted Brazil's request for the establishment of a panel at the present meeting. In an effort to resolve some of the issues, the Communities had hoped to have further contacts after the DSB meeting on 25 June 1997. This, however, had not been possible and the Communities therefore accepted that a panel examine this matter.

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

The representatives of Thailand and the United States reserved their third-partly rights to participate in the Panel proceedings.

3. Indonesia - Certain measures affecting the automobile industry
   - Request for the establishment of a panel by the United States (WT/DS59/6)

The Chairman recalled that the DSB had considered this matter at its meeting on 25 June 1997, and had agreed to revert to it. He said that this item was on the agenda of the present meeting at the request of the United States and drew attention to the communication contained in WT/DS59/6.

The representative of the United States said that, for nearly one year, his Government had consulted with Indonesia with regard to the latter's measures affecting the automobile industry. The United States was seriously concerned about this matter and hoped that all Members would adhere to WTO rules in the formulation of their measures in this sector. His country had held intensive discussions with Indonesia in June 1997, and had made some exchanges in July 1997 on this matter. While these discussions had been positive, it had not been possible to reach a mutually satisfactory solution to this matter. As a result, the United States again requested the establishment of a panel to consider its claim concerning Indonesia's measures. It also requested that, pursuant to Article 9.1 of the DSU, the panel previously established at the request of the European Communities and Japan[2] also examine the US complaint. The United States had borne in mind the provisions of Article 3 of the DSU, in particular those with regard to securing a positive solution to disputes, and hoped to continue constructive discussions with Indonesia with the aim of reaching a mutually satisfactory solution to this matter in the near future.

[2]DSB meeting on 12 June 1997 (WT/DSB/M/34).

The representative of Indonesia said that this was the second meeting of the DSB at which the United States had requested the establishment of a panel on this matter and he recognized that such a panel would be established at the present meeting. It was not his intention to comment on this automatic procedure, but rather to express his Government's appreciation for the sincere efforts of the United States to explore the basis for a bilateral resolution. Unfortunately, despite efforts by the United States and his Government, this had not been possible. His delegation, like the United States, also preferred that a single panel be established to examine these complaints provided that separate panel reports would be circulated in accordance with Article 9.2 of the DSU.

The representative of the European Communities said that his delegation had noted the request by the United States that its panel be consolidated with the existing panel which was already in the process of examining two complaints by the European Communities and Japan. In principle, his delegation had no problem with this request. It believed that one single panel to examine these complaints would permit these matters to be dealt with in a more efficient way. The Communities had only one reservation, namely, that they did not wish any delays resulting from the addition of a third complaint. To date, progress had been made with regard to the selection of members of the panel and the information-gathering process under the Annex V procedure of the Agreement on Subsidies and Countervailing Measures (SCM). His delegation wished these procedures to be completed expeditiously and not delayed as a result of the US request. He reiterated that the Communities had no problem of principle and that, in their view, this was the most efficient way to conduct business.

The representative of Japan said that his delegation had no problem with a single panel provided that the date of establishment of that panel would be 12 June 1997, i.e., the date of the panel established at the request of the European Communities and Japan.

The Chairman said that his understanding was that, in response to the statements made by the European Communities and Japan, there should be no problem with regard to timing or concerns raised with regard to possible delays in the process.

The DSB took note of the statements, agreed to accept the United States' request for the establishment of a panel with standard terms of reference, and agreed that as provided for in Article 9 of the DSU with respect to multiple complainants, the panel established on 12 June 1997 to examine the complaints by the European Communities (WT/DS54/6) and Japan (WT/DS55/6-WT/DS64/4) would also examine the United States' complaint as contained in WT/DS59/6.

The Chairman recalled that in its request, the United States had also requested the DSB to initiate the information-gathering procedure provided for in Annex V of the SCM Agreement. In view of the fact that the parties had sought a single panel to examine all the claims raised by the complainants under the SCM Agreement, it would be desirable to pursue this information-gathering process as quickly as possible in order to avoid delays in the panel procedure. There would be a need to establish deadlines with respect to the United States' involvement in the Annex V procedure. The time available for this would be short because the panel had already been established. He asked the United States and Indonesia to provide Mr. S. Harbinson -- the representative designated by the DSB under the Annex V procedures -- as soon as possible in writing, with any questions they wished to be asked of any party. This would allow Mr. Harbinson to prepare and transmit requests for information to the United States or to Indonesia with a minimum of delay. He also asked Mr. Harbinson to work with the parties to determine such deadlines and other working procedures necessary for completion of this task. He recalled that Mr. Harbinson had already been engaged in the Annex V procedure in relation to the request by the European Communities. It would, therefore, only be natural that he should now take this task on in relation to the United States' request.

The representative of Indonesia said that his delegation was ready to accept the United States' request concerning the information-gathering process provided that the Annex V procedure, in particular provision 5 thereof, was fulfilled. In other words, that the information-gathering process be completed within 60 days.

The DSB took note of the statements.

4. Canada - Certain measures concerning periodicals
   - Report of the Appellate Body (WT/DS31/AB/R) and Report of the Panel (WT/DS31/R and Corr.1)

The Chairman said that this item was on the agenda at the request of the United States. He drew attention to the communication from the Appellate Body contained in document WT/DS31/6 transmitting the Appellate Body Report in "Canada - Certain Measures Concerning Periodicals" which had been circulated in document WT/DS31/AB/R in accordance with Article 17.5 of the DSU. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/160/Rev.1, the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. He then drew attention to Article 17.14 of the DSU which required 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 adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

The representative of Canada said that his country acknowledged that, in accordance with Articles 16.4 and 17.14 of the DSU, the Panel and the Appellate Body Reports would be adopted and unconditionally accepted by the parties to the dispute, unless the DSB decided by consensus not to adopt the Reports. Nonetheless, Canada noted that the adoption procedure was without prejudice to the right of Members to express their views. Consequently, it wished to express its views on the Panel and the Appellate Body Reports, and to underline a number of issues of importance to Canada which had been raised in this case. It was with respect to the fundamental importance of the dispute settlement system that Canada expressed its great disappointment with the Appellate Body Report and with certain aspects of the Appellate Body's deliberations. These observations might be reflected in the future discussions in the context of the review of the DSU.

Canada noted its vested interest in an open, respected and stable international trading system. However, since international trade would lead to an increasingly globalized and homogeneous world, it would be culture that would preserve the distinctiveness of Members and ensure their ongoing sovereignty. His country was therefore committed to maintaining effective policies and policy instruments in support of its cultural development. Print-based media were still a primary means of communication in Canada and around the world. Of all the different types of print-based media, periodicals in particular were timely and topical publications. Periodicals created for and in response to the needs of the Canadian market were not like periodicals created to reflect the needs, interests and perceptions of other markets. Canada, or any Member, should not rely upon or expect media products from other countries to attempt to reflect its own reality. For it is in this reality, that its sovereign distinctiveness as a country was determined. It was therefore critically important that a way be found, within the rule-based trading system, which would allow Members to develop and maintain policies that promote their own unique culture and identity.

The dispute settlement provisions contained in the WTO Agreement ensured greater expeditiousness and fairness in the application of trade rules. Canada had been at the forefront of the reform of the dispute settlement process during the Uruguay Round negotiations and continued

to support these goals. The DSU procedures ensured an expeditious dispute settlement system by providing strict time-limits for the DSB's decisions. However, this should not result in neglect of the fundamental principles of fairness. Canada was disappointed with the handling of basic fairness requirements by the Appellate Body. Basic fairness required opportunity to present arguments and to be heard. The determination of substitutability, competitiveness and protectionism under Article III:2, second sentence, of GATT 1994 was of critical importance to the interpretation of GATT 1994 and to the outcome of this case. There had been no argument submitted on these points to the Appellate Body nor solicited by it. Had an opportunity been provided to submit a full written and oral argument, there would have been no basis to claim the absence of procedural fairness. The Appellate Body had found that it could complete the analysis of Article III:2 of GATT 1994 in this case, provided that there had been a sufficient basis in the Panel Report to allow the Appellate Body to do so. The Appellate Body had relied on the summary of arguments contained in the Panel Report with respect to Article III:2, second sentence, of GATT 1994. However, this was not a substitute for a full written and oral argument on appeal.

The Appellate Body had based its decision on a test that had not been dealt with in the Panel Report, had not been raised on appeal and had not been addressed in the written or oral arguments of the parties. No notice had been given to the parties of the Appellate Body's intention to base its decision on a test that had not constituted the basis of the appeal under Article 17.6 of the DSU. The Appellate Body, therefore, had rendered its decision without the benefit of written or oral argument by the parties, and without providing a proper opportunity to the parties to submit such argument. This procedure amounted to a denial of the right to be given notice and to be heard on all relevant issues. The Appellate Body had relied on the *United States - Standards for Reformulated and Conventional Gasoline*[3] case, where it had considered the chapeau to Article XX of GATT 1994, after deciding that one of the subparagraphs of Article XX had been applicable. This had simply been a two-step analysis of a single legal provision. Any ruling on whether an exception under Article XX of GATT 1994 applied automatically involved a consideration of the chapeau. The two sentences of Article III:2 of the GATT 1994, in contrast, were distinct obligations with different coverage and rules, and had been clearly treated as such in prior decisions, including the *Japan - Taxes on Alcoholic Beverages*[4] case.

In reviewing Canada's appeal of the Panel's decision on the excise tax as a services measure, the Appellate Body had inferred that because Canada had not appealed the Panel's ruling on Tariff Code 9958, the excise tax should be considered a tax on goods. It was inappropriate, as matter of fairness, to draw prejudicial inferences from Canada's decision not to appeal distinct issues.

Canada was most disappointed with the Appellate Body's ruling with regard to its arguments on the application of GATT disciplines to services measures. A coherent interpretation of GATT 1994 and General Agreement on Trade in Services (GATS), giving meaning to all the provisions, was essential for future compliance by Members with all their obligations and commitments with regard to trade in goods and services. When the Appellate Body was asked to rule on the relative scope of the two Agreements, it was important that it provided careful and deliberate reasoning for Members to understand how it had arrived at its decision. In this case, the Appellate Body had been asked to rule on the applicability of GATT and GATS provisions to the excise tax. Canada was disappointed that the Appellate Body had not provided considered reasoning on the question of the excise tax as a measure affecting advertising services. Instead, the Appellate Body's decision on this critical point appeared to have rested largely on its interpretation of policy linkages between the tax on advertising and the

[3]Appellate Body Report (WT/DS2/AB/R).

[4]Panel Report (WT/DS8/R, WT/DS10/R, WT/DS11/R) and Appellate Body Report (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R).

border measure targeting magazines *per se*. It was clear from the Appellate Body Report that Members had to reflect upon the relationship between obligations under the GATT 1994 and the GATS commitments. In the absence of agreement on the scope of the two Agreements, an increasing number of disputes could be left for the Appellate Body to make such a determination. He drew attention to the recent case on *European Communities - Import Regime for the Importation, Sale and Distribution of Bananas*[5] and underlined the need for further attention to this issue, if work in the services area was to make meaningful progress.

With regard to Article III of GATT 1994, the Appellate Body had considered that no decision on the issue of "like products" could properly be made because of the absence of any adequate analysis in the Panel Report. If it was not possible to make a determination of "likeness" for the purpose of Article III:2, first sentence, in view of the absence of an adequate analysis in the Panel Report, then *a fortiori*, it would also be impossible to determine whether the products were "directly competitive or substitutable" for the purpose of the second sentence. The Panel Report contained no analysis of the second sentence at all, which according to *Japan - Taxes on Alcoholic Beverages* should be made on a case-by-case basis. Canada questioned the Appellate Body's refusal to rule on an issue because the Panel's analysis was inadequate, but then to rule on a separate issue that the Panel had failed to analyze at all. The Appellate Body's finding on the question of "like products" had, in part, been based on its analysis of the examples of *Sports Illustrated* and *Harrowsmith Country Life*, neither of which had been relevant to the case. This indicated a fundamental misunderstanding of the facts. The *Sports Illustrated* split-run was a domestic not an imported product. This had been common ground between the parties. The Appellate Body had also based its conclusion on the fact that the US edition of *Harrowsmith Country Life*, a Canadian-owned periodical formerly published in the United States, had ceased production. Since this product had never been exported to Canada and had not been destined for a Canadian readership, it could not be claimed that the closure of the US edition amounted to a protective application of the tax. The measure had an effect only on a domestic operation.

On page 19 of its Report, the Appellate Body had assumed that the words "directly or indirectly" in Article III:2, first sentence, also applied to Article III:2, second sentence given the broader application of the latter. While the second sentence was broader in its product coverage, it was clearly not broader in respect of the taxation measures to which it applied.

The statement on pages 26 and 27 of the Appellate Body Report, quoted from the Panel Report, demonstrated that magazines needed both circulation and advertising revenue, and that a shortfall of advertising would affect editorial quality. It did not show that magazines were directly competitive or substitutable as consumer products. Canada contended that the quotation on page 27 of the Appellate Body Report from the *Report of the Task Force on the Canadian Magazine Industry* did not provide sufficient evidence on which to base such a conclusion when weighted against the countervailing evidence that the relevant magazines had been very "poor substitutes" as consumer products. In Canada's view, all that was left of the analysis on this issue was a political statement having a minimal probative value, either as a matter of economics or law.

The Appellate Body had stated that their textual interpretation had been supported by the context of Article III:8(b) examined in relation to Article III:2 and III:4 of GATT 1994. But the Appellate Body had not made any examination of the context of the producers' subsidy exemption in relation to national treatment disciplines. Further, the Appellate Body had relied on the object and purpose of Article III:8(b) to draw its conclusions with regard to "funded" postal rates. Unfortunately, the Appellate Body had not then explained what the object and purpose had been nor had it conducted

[5]Panel Reports (WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA).

any analysis thereof. As a result, this decision had failed to provide sufficient reasoning to enable Canada to understand why the "funded" postal rates could not benefit from the exemption permitted under Article III:8(b) of GATT 1994.

In conclusion, he said that Canada's commitment to the dispute settlement system remained firm. It was its intention to continue to abide by the rules and procedures governing the settlement of disputes. Canada would inform the DSB by 29 August 1997, of its intentions in respect of implementation of the DSB's recommendations. However, instead of making its statement at a meeting as required under Article 21.3 of the DSU, Canada would inform the DSB by letter transmitted to the Chairman for circulation to DSB members.[6] After discussion with the United States, both parties had agreed that their respective rights and obligations would be preserved through this approach, as if a meeting under Article 21.3 of the DSU had been held.

The panelists, in their concluding remarks, had stressed "… that the ability of any Member to take measures to protect its cultural identity was not at issue in the present case".[7] This ability was not to be taken for granted. In the Canadian context, where his country shared a common language and the world's longest undefended border with a neighbour having a population ten times its size, it was Canada's unique challenge to protect its cultural identity with no possibility of achieving the economies of scale available to producers of cultural products and services that reinforced the American identity. While many aspects of the Canadian problem were unique, his country believed that all Members had an interest in addressing the issue squarely. Canada was committed to policies and measures to strengthen the viability of its cultural industries, bearing in mind the need to ensure that its rights and obligations as a WTO Member were respected.

The representative of the United States said that his country fully supported adoption of the Appellate Body Report and the Panel Report. Over the years, Canada had adopted a series of measures that had prevented or hindered the ability of foreign magazines to participate fully in the Canadian market. Specifically, Canada had: (i) banned importation of all magazines that contained even small amounts of advertising directed specifically at Canadian readers; (ii) charged many domestic magazines lower postal rates, in some cases 80 per cent below the rates it charged to like imported magazines; and (iii) imposed a prohibitive 80 per cent excise tax on so-called split-run magazines -- the magazines published in different editions for different markets. The Panel and Appellate Body had found that these measures were inconsistent with Canada's obligations under Articles III and XI -- two of the key provisions of GATT 1994.

In combination, the Panel and Appellate Body Reports upheld certain important principles that applied well beyond the facts of this case or the magazine sector. First, a Member could not circumvent its obligations to provide non-discriminatory tax treatment to imported products by drafting its tax measures to appear to be non-discriminatory while, in fact, they served to insulate domestic products from import competition. In this case, the Appellate Body had confirmed that Canada's excise tax on split-run periodicals had been applied so as to afford protection to its domestic magazine production. Second, a Member could not disavow responsibility under the GATT for action of an entity it established, owned, and controlled, merely on the basis that the Member had given the entity a "legal personality" that was technically separate from the government. In this case, the Panel had found that Canada Post's discriminatory postal rates were regulations or requirements of Canada's Government. Third, a Member could not provide government services at below-cost rates exclusively to domestic products and then justify these lower rates on the grounds that they amounted to subsidies paid to domestic producers and thus were exempted from national treatment for imported products.

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[6]Subsequently circulated in WT/DS31/8.

[7]Panel Report (WT/DS31/R, p. 78).

In this case, the Appellate Body had found that Canada's discriminatory below-cost postal rates were in violation of Article III:4 of GATT 1994 and were not a subsidy justified under Article III:8(b). Finally, as the Panel had noted in paragraph 5.45 of its Report, this case did not concern culture. Like many countries, the United States supported efforts to promote national identity through cultural development. However, the WTO did not permit a Member to use "culture" as an excuse to provide commercial advantages to domestic products nor, as had occurred in this case, to evict foreign products from its market.

These important findings would create a more secure environment for international trade in goods, and in particular, would guard against disguised restrictions on trade. Accordingly, the United States supported adoption of these Reports. It urged Canada to implement promptly the Panel's recommendations, as modified by the Appellate Body and was ready to consult with Canadian officials regarding implementation. His delegation had noted that Canada would inform the DSB, by 29 August 1997, of its intentions with respect to implementation of the DSB's recommendations. The United States agreed that instead of holding a meeting as required under Article 21.3 of the DSU, Canada would do so by letter transmitted to the Chairman for circulation to the DSB members. It also agreed with Canada that their respective rights and obligations would be preserved as if a meeting under Article 21.3 of the DSU had been held.

The representative of Switzerland said that his country had noted with great interest the Appellate Body Report. His delegation supported the conclusions of this Report. However, he queried the way in which the Appellate Body had interpreted the terms of reference it had been given under Article 17.6 of the DSU. He recalled that this provision limited an appeal to "… issues of law covered in the panel report and legal interpretations developed by the panel". The Appellate Body had refused to re-open examination of whether imported split-run periodicals and domestic non-split-run periodicals were like products because this would require a factual analysis.[8] On the other hand, it had established that these two products were directly competitive or directly substitutable products, even though such a determination was also based on an analysis of the facts. In his delegation's view, this type of proceeding had raised a number of questions concerning the limited terms of reference given to the Appellate Body. His delegation was interested in having the views of other Members on this matter, in addition to those expressed by Canada.

The DSB took note of the statements and adopted the Appellate Body Report in WT/DS31/AB/R and the Panel Report in WT/DS31/R and Corr.1, as modified by the Appellate Body Report.

The Chairman noted that Canada had stated that it would inform the DSB of its intentions with regard to implementation of the DSB's recommendations on this matter by 29 August 1997 in the form of a letter transmitted to the Chairman. He proposed the DSB to take note of this information and agree to revert to the issue of implementation at a future meeting.

The DSB so agreed.

5. Hungary - Export subsidies in respect of agricultural products
   - Statement by Australia

The representative of Australia, speaking under "Other Business", on behalf of the complainants on Hungary's export subsidies with regard to agricultural products[9], informed the DSB that Argentina,

[8]Appellate Body Report(WT/DS31/AB/R, p.22).

[9]WT/DS35/4, 5, 6 and 7.

Australia, New Zealand and the United States had reached agreement with Hungary on a mutually agreed solution. In accordance with this agreement, Hungary would submit a request for a waiver under Article IX of the WTO Agreement to the Council for Trade in Goods at its meeting on 6 October 1997, and subsequently to the General Council. Pending consideration of the waiver request, the complainants had asked the Secretariat not to proceed with the composition of the panel established on this matter. The complainants expected to withdraw their complaints once the General Council agree to grant such a waiver on the terms discussed between Hungary and the complainants.

The DSB took note of the statement.

6. United States - Measures affecting textiles and apparel products
- Statement by Hong Kong, China

The representative of Hong Kong, China, speaking under "Other Business", drew attention to the European Communities' request for consultations with the United States concerning the changes made in 1996 with regard to the US rules of origin for textiles and apparel products. This request had been circulated in WT/DS85/1 on 3 June 1997. Together with a number of other Members, his authorities had requested to be joined in consultations in accordance with Article 4.11 of the DSU. The United States had accepted this request and had advised Hong Kong, China that the consultations had been scheduled for the morning of 16 July 1997. However, on the evening of the 15 July 1997, his authorities had received a joint communication from the United States and the Communities that the consultations would not be held until further notice. To date, no further communication from the parties to the dispute had been received. However, in the meantime, certain media reports suggested that the United States and the Communities had reached a mutually agreed solution on this matter.

Against this background, he wished to make some observations. First, the United States had held bilateral discussions with a number of its trading partners, including Hong Kong, China, on the changes in the area of rules of origin affecting textiles and apparel products. Three rounds of discussions held with his authorities had been inconclusive. Irrespective of whether or not Hong Kong, China would invoke dispute settlement proceedings in this case, it nevertheless had an interest in any dispute settlement proceedings initiated on this matter.

Second, Hong Kong, China accepted that the aim of the dispute settlement mechanism was to secure a positive solution that was mutually acceptable to the parties to a dispute and consistent with covered agreements. Notwithstanding the preference for a mutually acceptable solution, the multilateral implications of any such solutions were a matter of interest to all Members. This was recognized in Article 3.6 of the DSU which required mutually agreed solutions to be notified to the DSB and the relevant Councils and Committees where any Member might raise any point relating thereto.

In this case, the consultations had been cancelled less that 24 hours before the scheduled date. His authorities did not consider that this cancellation had been deliberately left until the last minute, although 42 days had elapsed from the time the request had been made. In any event, the other parties which had expected to be joined under Article 4.11 of the DSU could have been apprised of the circumstances which had led to the sudden cancellation of the scheduled consultations. This raised the question of whether, or how, the interests of third parties against the interests of the parties directly involved in the dispute should be balanced -- an issue, which in his authorities' view merited careful consideration during the review of the DSU to be undertaken in 1998. In the meantime, his delegation wished to know whether a mutually agreed solution had been reached between the United States and the Communities on this matter and, if so, when such a solution would be notified.

The representative of India wished his delegation to be associated with the statement made by Hong Kong, China. India had also requested to be joined in these consultations in accordance with Article 4.11 of the DSU and the United States had accepted this request. On 15 July an expert from the capital had arrived in Geneva and had been told that the consultations scheduled for 16 July had been cancelled. His delegation could understand that such special circumstances might occur. However, India's basic interest was to know whether a mutually agreed solution had been found on this matter. If so, it would wish to receive details concerning such a solution. It would be better to have such details from the parties to the dispute than be informed by the international press.

The representative of Pakistan said that his delegations wished to be associated with the views expressed by the previous speakers. Pakistan had also requested to be joined in these consultations and this request had been accepted by the United States. At the present meeting, he did not wish to enter into detail, but only to draw attention to two important points One related to the question of balancing the rights of third parties vis-à-vis the parties directly involved in a dispute. Pakistan hoped that this matter would be considered in the context of the review of the DSU in 1998. The other concerned details of a possible mutually agreed solution on this matter. His delegation wished to receive information on this subject since so far its only information was from press reports.

The representative of Switzerland said that his country had requested to be joined in consultations in accordance with Article 4.11 of the DSU. In case a mutually agreed solution had been found, his delegations wish to be informed of the details concerning this matter.

The representative of the Dominican Republic said that his delegation wished to be associated with the statement made by Hong Kong, China. His country had also requested to be joined in consultations and the United States had accepted this request. It also wished to know whether a solution had been found on this matter.

The representative of Japan said that since his delegation had also requested to be joined in these consultations, it shared the views expressed by the previous speakers.

The representative of Honduras indicated his Government's support of the views expressed by the previous speakers. His country had also requested to be joined in consultations and therefore wished to be informed as to whether an agreement between the parties to the dispute had been reached on this matter.

The representative of Argentina said that although his delegation had not requested to be joined in consultations, its interest was transparency with regard to the technical and contractual agreement between the United States and the Communities regarding the rules of origin.

The DSB took note of the statements.