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Dispute Settlement Body
26 May 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 26 May 1999

Chairman: Mr. Nobutoshi Akao (Japan)

Subjects discussed: Page

Prior to adoption of the agenda, the item concerning the Panel Report on "India - Quantitative Restrictions on Imports on Agricultural, Textile and Industrial Products" (WT/DS90/R) was removed from the agenda following India's appeal of the Report.

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Measures concerning meat and meat products (hormones): Status report by the European Communities (WT/DS26/17/Add.4 - WT/DS48/15/Add.4)

(b) Argentina - Measures affecting imports of footwear, textiles, apparel and other items: Status report by Argentina (WT/DS56/15/Add.4)

The Chairman recalled that Article 21.6 of the DSU 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 proposed that the two sub-items be considered separately.

(a) European Communities - Measures concerning meat and meat products (hormones): Status report by the European Communities (WT/DS26/17/Add.4 - WT/DS48/15/Add.4)

The Chairman drew attention to document WT/DS26/17/Add.4 - WT/DS48/15/Add.4 which contained the EC's status report on its progress in the implementation of the DSB's recommendations concerning meat and meat products.

The representative of the European Communities said that on 30 April 1999, the EC Scientific Committee on Veterinary Measures relating to Public Health had unanimously adopted a scientific opinion on the assessment of potential risks to human health from hormone residues in bovine meat and meat products. The Commission had requested the Committee to deliver an opinion on this matter in the context of the complementary risk assessment. In addition, a separate draft report on control issues and problems of misuse had been prepared by the EC and sent for comments to the US and Canadian authorities. On 12 May 1999[1], the EC had notified the DSB that it was not in a position to propose lifting the existing import ban, and that it had intended to study in greater depth the results of the risk assessment in order to evaluate what legislative steps might be necessary in light of its WTO rights and obligations. The scientific opinion had been made public and had been shared with the United States and Canada in order to facilitate a thorough and transparent dialogue on this issue. The EC had informed the United States and Canada that it was ready to an exchange of views, once they had had a chance to study that opinion.

The representative of the United States said that the EC had failed to comply with its WTO obligations to lift its ban on beef treated with hormones by 13 May; i.e. expiration of the reasonable period of time. The United States was disappointed that after 15 months, the EC was still unable to come into compliance with its WTO obligations. The United States had not been able to reach agreement on acceptable compensation. As a result, the United States had requested that a DSB meeting be held on 3 June 1999. At that meeting, the United States would request, pursuant to Article 22.2, authorization from the DSB to suspend the application, to the EC and its member States of tariff concessions and related obligations to an amount of US$202 million. That level of suspension was equivalent to the level of nullification or impairment of benefits accruing to the United States that resulted from the EC's failure to bring its measures into compliance with the WTO rules. The United States intended to implement the suspension of tariff concessions and related obligations by directing the US Customs Service to impose duties in excess of bound rates on a list of products to be drawn from the preliminary list of products, which had been published in the US Federal Register on 25 March 1999. The US objective was not to withdraw concessions, which would not help its exports and would not benefit US importers. The United States would prefer to resolve this dispute and would continue to strive to reach a mutually acceptable solution with the EC.

[1] WT/DS26/18-WT/DS48/16.

The representative of Canada said that his country regretted that the EC had not met the 13 May deadline and was now in violation of its WTO obligation to comply with the DSB recommendations in the dispute at hand. Non-compliance with the DSB recommendations was a very serious matter and Canada would in turn exercise its rights under the DSU to respond to such failure to comply. On 20 May, Canada had informed the DSB Chairman that at the 3 June meeting requested by the United States, it intended to request, pursuant to Article 22.2, authorization from the DSB to suspend the application to the EC and its member States of tariff concessions and related obligations under the GATT 1994. Canada intended to implement the suspension of tariff concessions and related obligations under the GATT 1994, by imposing 100 per cent tariffs on a list of products covering annual trade in the amount of Can$75 million. This was not Canada's preferred approach as it would have preferred the EC to comply with its obligations. With regard to the studies by the EC Scientific Committee on Veterinary Measures, Health Canada was conducting a detailed review of the "Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products". Canada appreciated the transparency shown by the EC in sharing this and other studies, but Health Canada's preliminary findings had indicated that there was no new scientific information in the report. Health Canada was working towards completing its review by the end of the month. An initial review of the EC's paper on use and control of growth promoting hormones had raised significant concerns about the scientific validity of the study. The study was not a good example of a scientific objective risk assessment since it was based on a number of assumptions, specifications and conjectures that were not supported by any scientific evidence or data. In many cases the data presented were old and no longer relevant. In other cases, data presented were based on one limited study and were not scientifically valid because they had not been substantiated with further studies. The study also questioned the effectiveness of the Canadian system of focusing controls at the slaughter and processing levels rather than on the farm. There was no evidence presented in the study to substantiate the EC's claim. In Canada's view, control programs were more effective by testing for residues in food products rather than by testing live animals on the farm. Therefore, on the basis of its preliminary analysis, Canada did not find in the material provided by the EC any reason for continuation of its violation.

The representative of Australia said that the matter under consideration raised systemic issues. Compensation and retaliation were intended to be temporary solutions only, and retaliation in particular should be seen as a measure of last resort. They were also not intended to replace implementation, and Articles 3.7 and 22.1 made this very clear. It would be contrary to the spirit and letter of the DSU if a Member could avoid implementation by deciding unilaterally that the payment of "permanent damages" in the form of compensation or retaliation could take its place. Nor was it open for disputing parties to agree to such an approach, given Members' obligations under Article 3.5 of the DSU. The integrity of the dispute settlement mechanism would be at risk if Members were able to avoid their WTO obligations on implementation through compensation or retaliation. This option was not open to the majority of Members and would create disturbing inequities in the system. It was also disturbing that the environment for acceptance of scientifically justifiable health and quarantine measures had become considerably clouded in this dispute. Australia urged the EC to be fully transparent in carrying out its current risk assessment on hormonal growth promotants in beef and in presenting the findings of those assessments for proper scrutiny.

The DSB took note of the statements and agreed to revert to this matter at its meeting on 3 June.

(b) Argentina - Measures affecting imports of footwear, textiles, apparel and other items: Status report by Argentina (WT/DS56/15/Add.4)

The Chairman drew attention to document WT/DS56/15/Add.4 which contained Argentina's status report on its progress in the implementation of the DSB's recommendations on measures affecting imports of footwear, textiles apparel and other items.

The representative of Argentina reiterated that Decree 108/99, pursuant to which no import transactions covered by the statistical tax would be taxed in excess of the amount agreed by the United States and Argentina, would enter into force on 30 May 1999.

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

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

(a) Request for the establishment of a panel by the European Communities and their member States (WT/DS160/5)

The Chairman recalled that the DSB had considered this matter at the meeting on 28 April 1999, and had agreed to revert to it. He drew attention to the communication from the EC and their member States contained in document WT/DS160/5.

The representative of the European Communities said that no new developments had taken place and no US offer had been put forward since the 28 April DSB meeting. At that meeting, the United States had merely reiterated its well-known arguments concerning the compatibility of its regulations. The EC believed that the US regulations were not consistent with its WTO obligations and therefore the matter had to be examined by a panel. Since the EC's request was on the DSB agenda for the second time, it could no longer be refused by the United States and the EC could exercise its rights.

The representative of the United States said that her country considered that Section 110 (5) of the US Copyright Act was fully consistent with its obligations under the TRIPS Agreement. In accordance with the TRIPS Agreement Members could provide limitations and exceptions to the exclusive rights of copyright holders. Section 110 (5) was a reasonable limitation. Although the "Fairness in Music Licensing Act" passed by the US Congress in Autumn 1998 had amended Section 110 (5), it had not affected its consistency with the TRIPS Agreement.

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.

The representatives of Australia, Japan and Switzerland reserved their third-party rights to participate in the Panel's proceedings.

3. Korea – Measures affecting imports of fresh, chilled and frozen beef

(a) Request for the establishment of a panel by the United States (WT/DS161/5)

The Chairman recalled that the DSB had considered this matter at its meeting on 28 April and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS161/5.

The representative of the United States said that her country looked forward to the establishment of a panel to determine whether Korea's beef import regime was consistent with its WTO obligations. While the United States would have preferred to resolve this issue without recourse to the DSU procedures, US efforts to engage in meaningful discussions with Korea had failed. Despite several meetings, Korea had not indicated that it would modify its import regime to rectify its inconsistencies with the WTO obligations.

The representative of Korea said that his country believed that its beef import regime was in full conformity with its WTO obligations. Since the US request was on the agenda of the present meeting for the second time, Korea recognized that a panel would be established at the present meeting in accordance with Article 6.1 with standard terms of reference. Korea was prepared to defend its beef import regime before the panel to be established at the present meeting.

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.

The representatives of Australia, Canada and New Zealand reserved their third-party rights to participate in the Panel's proceedings.

4. United States - Import measures on certain products from the European Communities

(a) Request for the establishment of a panel by the European Communities (WT/DS165/8)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS165/8.

The representative of the European Communities said that on 3 March 1999 the United States had decided to postpone liquidation on imports of a list of products from the EC in the amount of US$520 million per year. The United States had requested the deposit of a bond for these products corresponding to a customs duty of 100 per cent, the return of which was uncertain, pending a decision by the US Administration. Thus the measure in question had unilaterally deprived importers of EC products of their rights to import the goods at a customs duty not in excess of the bound rates. The measure had resulted in the blocking of all imports of the products in question into the United States. On 19 April 1999, immediately after the DSB had authorized the United States to suspend concessions, the United States had confirmed its decision with respect to a more limited number of products extracted from the 3 March list. As a result, the United States had applied to the products contained in the 3 March list which had not been taken up in the 19 April list, a suspension of concessions which was not only unilateral but also illegal. Article 22.6 of the DSU provided that "concessions or other obligations shall not be suspended during the course of the arbitration". Furthermore, these measures applied on a total volume of US$520 million which had been disproportionate as compared to an effective injury established at US$191.4 million. With regard to the products on the 19 April list, the United States had been applying the suspension of concessions authorized by the DSB on 19 April without interruption since 3 March, i.e. retroactively in the period between 3 March and 19 April 1999 without authorization. In the EC's view, the US measures in question were not only incompatible with the provisions of GATT 1994 and the DSU, but also constituted a violation of two basic dispute settlement principles: i.e. respect for multilateral rules and prospect for settlement. Due to the importance of this matter, in particular its systemic importance, and the failure of the consultations held on 21 April 1998, the EC was requesting the establishment of a panel at the present meeting.

The representative of the United States said that at the present meeting her country was unable to accept the establishment of a panel with regard to the alleged US actions of 3 March 1999.

The EC had alleged that the United States had violated its WTO obligations because it had announced that it would, if authorized by the DSB, suspend concessions on EC goods as from 3 March 1999, after the Arbitrators were supposed to have circulated their decision pursuant to Article 22.6 of the DSU. In the past two months, the United States had renewed confirmation that the EC had failed to implement a WTO-consistent banana regime. Since the end of the reasonable period of time on 1 January 1999, the EC had not been in compliance with its obligations. In spite of the EC's attempts to block or delay, the DSB had authorized the United States to suspend concessions with respect to EC goods for that reason. The United States hoped that the EC authorities would use the time until the next DSB meeting to reflect and reconsider their request.

The DSB took note of the statements and agreed to revert to this matter.

5. Australia - Measures affecting the importation of salmonids

(a) Request for the establishment of a panel by the United States (WT/DS21/4)

The Chairman drew attention to the communication from the United States contained in document WT/DS21/4.

The representative of the United States said that her country was requesting the establishment of a panel on Australia's import prohibition on fresh, chilled or frozen salmonids, including salmon. The DSB had already adopted the Panel and the Appellate Body's findings in another dispute brought by Canada (*Salmon* case)[2] that Australia's import prohibition on salmon was inconsistent with Articles 2.2, 2.3, 5.1 and 5.5 of the SPS Agreement. It was the understanding of the United States that Australia had, until 6 July 1999, to bring its measure into compliance with the DSB recommendations. The United States hoped that Australia would, by that date, remove its import prohibition and come into compliance. However, the United States was concerned that Australia would not comply by that date. Therefore, the United States had little choice but to assert its rights in requesting a panel. Australia's import prohibition was precluding US salmonid exports. The Arbitrators appointed to determine a reasonable period of time in the *Salmon and Hormones*[3] cases had concluded that further study to justify a measure already found to be WTO-inconsistent was not relevant to the implementation of the Panel's findings under the SPS Agreement. The United States reiterated its hope that Australia would comply with the findings and obviate the need for a second panel to work through to conclusion.

The representative of Australia said that his country could not agree to the US panel request. Australia had significant systemic objections to the timing and form of the US request. He recalled that at the 28 April DSB meeting, Argentina had raised systemic concerns about the timing of a request for a panel by Indonesia (WT/DS164/3) with regard to related matters that were at an advanced stage of panel processes. The concerns related to the timing of the request and the form of the request. Indonesia had set an excellent example with regard to its responsiveness to those concerns raised by Argentina. The US request was far more problematic than the Indonesia's request. Australia had several concerns. First, he noted that the consultations on this matter had last been held with the United States nearly four years ago. Other Members should consider the implications given the number of inactive consultation processes initiated by the United States. There had only been one round of consultations with the United States in late 1995. The United States had not requested follow-up consultations at any time since but was now requesting a panel on issues and legal

[2]Panel Report, WT/DS18/R and Corr.1 and the Appellate Body Report WT/DS18/AB/R, adopted on 6 November 1998.

[3]Panel Reports, WT/DS26/R/USA; WT/DS48/R/CAN and the Appellate Body Report WT/DS26/AB/R - WT/DS48/AB/R, adopted on 13 February 1998.

provisions that had never been the subject of the consultations. This raised important due process concerns which were adverse to the proper functioning of the WTO system. The US request effectively ignored the linkages between consultations and panel processes, including the function of consultations in shaping the substance and scope of subsequent panel proceedings.

Second, WTO legal processes had been completed on a closely related matter. Implementation on those related issues was at an advanced stage and was scheduled to be completed by 6 July 1999, the date set by the Arbitrator. The United States was fully aware that the decision-making processes associated with implementation extended beyond salmon and fully covered the product specified in the US request. The United States had been given assurances that Australia would fully observe the provisions of Article 3.5 and to this end, Australia had rejected proposals for implementation that would have in fact discriminated against the United States and others. The United States had also been kept closely informed of the processes underway. Advice of the decision-making processes on salmon and related products had been published in November 1998, following the adoption by the DSB of the reports. The time-table had been accelerated after the Arbitrator's determination of a reasonable period of time and was designed to achieve implementation within the time-period established by the Arbitrator, namely by 6 July 1999. This time-table involved decision-making processes on salmon and trout and other fish which had been identified as having diseases in common with salmon. A series of public hearings was presently underway, in accordance with the natural justice requirements of Australian law. If a panel were to be established, it could require a diversion of specialist resources from the implementation process and this would not be in the interests of US salmon and trout exporters. He reiterated that the timing and the form of the US request were adverse to the functioning of the dispute settlement system.

The representative of Canada said that his delegation welcomed the indication by Australia that it would implement the finding of the Panel as amended by the Appellate Body. It was Canada's position that compliance in the *Salmon* case meant the removal of the ban on the importation on Canadian fresh, chilled and frozen salmon by 6 July 1999.

The DSB took note of the statements and agreed to revert to this matter.

6. Korea – Measures Affecting government procurement

(a) Request for the establishment of a panel by the United States (WT/DS163/4)

The Chairman drew attention to the communication from the United States contained in document WT/DS163/4.

The representative of the United States said that Korea's airport procurement practices were inconsistent with its obligations under the Agreement on Government Procurement (GPA). Prior to, and during consultations, Korea had never contested the GPA-inconsistency of its practices. Instead, Korea had asserted that the entities responsible for Inchon Airport procurement did not fall within its obligations under the GPA and were therefore not subject to the GPA provisions. However, the United States' GPA commitments with respect to Korea, and its acceptance of Korea as a party to the GPA had been based on a balance of rights and obligations that had included the coverage of the Korean Airport procurements under Annex 1 of the GPA. Korea's later claim that these entities were not covered had seriously disrupted this mutually-agreed balance. In an effort to resolve this matter, the United States had entered into consultations with Korea on 17 March and had initiated several bilateral exchanges. Since no settlement had been reached, the United States was requesting the establishment of a panel at the present meeting.

The representative of Korea said that his delegation could not agree to the establishment of a panel at the present meeting. Korea believed that its measures related to procurement for Inchon International Airport were not relevant to its obligations under the GPA. However, in accordance with Article 3.7 of the DSU, Korea had made sincere efforts to seek an amicable and mutually satisfactory solution to this matter through consultations with the United States. His delegation therefore regretted that the United States had decided to request a panel at this stage.

The DSB took note of the statements and agreed to revert to this matter.

7. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/103)

The Chairman drew attention to document WT/DSB/W/103 which contained additional names proposed for inclusion on the indicative list in accordance with article 8.4 of the DSU. He proposed that the DSB approve the names contained therein.

The DSB so agreed.

8. Argentina - Measures affecting imports of footwear: Request for the establishment of a panel by the United States (WT/DS164/3)

(a) Statement by Argentina

The representative of Argentina, speaking under "Other Business", drew attention to the US request for the establishment of a panel on Argentina's measures affecting imports of footwear (WT/DS164/3) which had been placed on the agenda of the 3 June DSB meeting. Argentina was concerned that the United States had requested the inclusion of its panel request on the agenda of the DSB meeting which was a special meeting. In its letter to the Chairman, Argentina had requested a withdrawal of this agenda item and had indicated that the inclusion of this item on the agenda of the 3 June meeting contradicted the established practice in the DSB which had never been objected to by the United States. The current practice in this respect was to limit the agendas of special meetings only to those matters which required the convening of special meetings and could not be postponed in view of certain time-periods under the DSU. This would include the expiry of the time-period for adoption of panel and Appellate Body reports or authorization to suspend concessions pursuant to Article 22.6. In accordance with the current practice, items which did not involve specific deadlines should be considered in the course of regular DSB meetings. At the 21 October 1998 DSB meeting, the DSB Chairman had stated that " the current practice was to limit the agendas of special meetings only to those matters which required the convening of special meetings, without including items that could be taken up at regular DSB meetings. This practice had helped to avoid overloading the agendas of special meetings and disrupting the organization of the DSB's work through inclusion of unexpected items on agendas for special meetings." Argentina's concern did not relate to any substantive issue concerning the US request for a panel but rather that the request did not fall within the category of items for inclusion on the agenda of a special meeting. Argentina would probably not object to the establishment of a panel at the first regular meeting as it had been ready to accept the establishment of a panel at the DSB meeting on 28 April at the request of Indonesia. However, if the US request was not withdrawn from the agenda of the 3 June meeting, Argentina would not join in the consensus for the adoption of the agenda of the 3 June meeting.

The representative of the United States welcomed the statement by Argentina. While the United States did not agree with Argentina that there was a procedural problem with regard to the inclusion of the US request on the agenda of 3 June meeting, it strongly believed that there was

nothing in the DSU to distinguish between so-called special meetings and any other meetings of the DSB. There was no rule prohibiting the inclusion of particular agenda items at any DSB meeting. Her delegation noted the statement by Argentina and said that the United States was willing to work with Argentina and to discuss this matter before the 3 June meeting.

The Chairman said that he hoped that Argentina and the United States would be able to work out an amicable solution before 3 June.

The DSB took note of the statements.

9. Adoption of panel reports

(a) Statement by the Chairman

The Chairman, speaking under "Other Business", asked Members to provide their views on how to deal with a situation in which a panel report was not placed on the DSB agenda within the time-period stipulated in the DSU. Under the current practice, only the parties to the dispute had the right to place panel reports on the DSB agenda for adoption. He asked whether in case neither party wished to place a panel report on the agenda within the required time-limit, the Chairman could do so. In particular this was relevant with regard to cases in which a time-period was about to expire and the parties had no intention to place such a report on the agenda. He therefore sought authorization from Members in such cases to be able to place a panel report on the DSB's agenda for adoption.

The representative of the European Communities said that his delegation wished to maintain the current practice that panel reports were placed on the DSB agenda by the parties to the dispute, and did not wish the Secretariat to take any initiative to this effect. There was no reason to depart from the current practice. He believed that this matter could be discussed in the context of the DSU review but no decision should be taken at this stage.

The Chairman said that the work in the context of the DSU review was ongoing but the situation to which he had referred could take place in the next two weeks. He therefore sought views from delegations as how to deal with this matter.

The representative of the United States said that her delegation wished to reflect on the Chairman's question and his suggestion. She proposed to hold an informal consultation on this matter.

The representative of India said that it was his understanding that the Chairman had referred to a situation in which the inclusion of a panel report on the DSB agenda was not sought by the parties to the dispute within the time-limit stipulated in the DSU. He believed that the Legal Affairs Division could provide some clarification on this matter. He recalled that on another occasion when Members had discussed the issue on whether or not panel requests should be automatically included on the DSB agenda, it was India's position that this could be done automatically although the prevailing view was otherwise. The dispute settlement system was a multilateral process and India was concerned if panel reports were not adopted in the system. However, the problem was that of a situation in which the parties to a dispute had no interest in placing a panel report on the agenda. He thought the Secretariat could provide some help with regard to this matter.

The representative of Ecuador said that his delegation had some concerns and believed that this matter could be examined by the Secretariat, together with other questions related to implementation. He drew attention to Article 21 of the DSU which provided that issues on implementation should be placed on the DSB agenda. In Ecuador's view such issues should be

included automatically on the agenda and, if not, the Secretariat should be allowed to take the initiative to place an item on the agenda. This suggestion could also be examined by the Secretariat.

The representative of the European Communities said that some delegations had requested that the Secretariat provide legal advice on this matter. He considered that this was not a good initiative and that this matter could be discussed in informal consultations or in the context of the DSU review. However, the EC considered that it was not appropriate to request the Secretariat to prepare a paper on whether the Secretariat could take the initiative to place an item on the agenda. Without prejudice to the outcome of informal consultations, it was inappropriate not to follow the current practice that an item was included on the agenda at the request of a Member.

The representative of India said that, in response to the EC's statement, he wished to clarify that it was not India's intention to imply that the Secretariat should decide on this matter. His intention was to have some legal clarification on this issue, and to this effect a paper by the Secretariat would be helpful. On a number of occasions, the EC in other WTO bodies had strongly requested the Secretariat to provide a paper. With regard to the case referred to by the Chairman, India was one of those delegations who had stated that a losing party should have a right to seek a multilateral determination, if such a determination was not sought by the winning party. At that time, India had stated that in case of disagreement on compliance, the DSB had the right to facilitate a multilateral determination. With regard to the question of who would be the respondent, India had stated that since a panel report was the property of the DSB, the Panel could inform the DSB members of the case and interested parties could make their response. It was India's view that no panel report should be disregarded. He recalled that, during the proceedings of the Panel under Article 21.5, established at the EC's request, India had made a statement with regard to some important systemic concerns. Since the issue at hand was an important systemic issue, he called on the EC to have a discussion on this subject based on a paper by the Secretariat.

The Chairman said that the time-period in the case to which he had referred would expire on 11 June. Under Article 16.4 if no appeal was made by that date, the DSB was required to take action. He therefore sought Members' views on a possible action by the DSB in this case. He proposed that the matter be discussed in the context of the informal DSB meeting on the DSU review to be followed shortly thereafter.

The DSB took note of the statements.