WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/66
23 September 1999

(99-3947)

Dispute Settlement Body
27 and 28 July 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 27 and 28 July 1999

Chairman: Mr. Nobutoshi Akao (Japan)

1. Australia - Measures affecting importation of salmon

(a) Recourse to Article 22.2 of the DSU by Canada (WT/DS18/12)

(b) Recourse to Article 21.5 of the DSU by Canada[1]

The Chairman said that this item was on the agenda at the request of Canada.

The representative of Canada said that his delegation had requested a special meeting of the DSB in order to seek the DSB's authorization to suspend concessions under Article 22.2 of the DSU in the Salmon case. This was a difficult issue and Canada was working closely with Australia in order to create conditions so that the meeting could proceed as smoothly as possible. However, Canada would need a further 24 hours to continue its discussions with Australia. He therefore proposed that the meeting be adjourned until 28 July. He added that given the current DSU provisions, Canada had no other way to protect its rights than to make a request for the authorization of suspension of concessions under Article 22.2. However, under the circumstances, a multilateral determination of the consistency of the measures should proceed the DSB's authorization to suspend concessions. It was therefore Canada's intention to request the establishment of a panel under Article 21.5 in order to determine the consistency of the measures in question. Furthermore, Canada would request that the panel complete its work prior to a DSB's determination on the suspension of concessions. Further details concerning Canada's approach would be provided on 28 July.

The representative of Australia said that his delegation supported Canada's proposal to adjourn the meeting until the next day. Thus far, Australia had not had the opportunity to inform the DSB that it had fully implemented the DSB's recommendations in the Salmon case. He therefore announced that his country's Quarantine and Inspections Service Decision of 19 July had brought Australia into full conformity with its WTO obligations.

The representative of the United States said that her delegation appreciated the difficulties of the parties to the dispute and was interested in the proposed approach. The United States hoped that the parties would be able to resolve their differences within the next 24 hours.

The DSB took note of the statements and agreed to adjourn the meeting until 28 July.

[1]This sub-item was included after adoption of the agenda in accordance with Rule 7 of the Rules of Procedure for meetings of the DSB.

Upon resumption of the meeting on 28 July 1999, the representative of Canada requested that the agenda be amended in order to include a new sub-item, namely, "Recourse to Article 21.5 of the DSU by Canada".

The Chairman said that pursuant to Rule 7 of the Rules of Procedure for DSB meetings, the DSB could amend the agenda or give priority to certain items at any time in the course of the meeting. Accordingly, he proposed that the DSB agree to amend the agenda of the present meeting as requested by Canada.

The DSB so agreed.

The representative of Canada said that first he wished to draw attention to Canada's request under Article 22.2. He recalled that Canada would also make a request under Article 21.5 of the DSU. On 15 July, Canada had notified the DSB of its intention to request the DSB's authorization to suspend the application to Australia of tariff concessions and related obligations under the GATT 1994, covering trade in the amount of Can$45 million. Canada's intention was to suspend concessions and related obligations by imposing a surtax of 100 per cent on the existing customs duties with respect to a list of products. Canada's request was based on Australia's failure to comply with the DSB's recommendations by the deadline of 6 July 1999, which had been set by the Arbitrators pursuant to Article 21.3 of the DSU.[2] He noted that on 15 July 1999, when Canada's request under Article 22 was made, Australia had neither removed nor modified its import ban which had been determined to be inconsistent with its obligations under the SPS Agreement. On 19 July, Australia's Quarantine and Inspections Service (AQIS) had issued a memorandum announcing policies that, when implemented, might partially lift Australia's ban. However, Canada considered that Australia had not complied with the DSB's recommendations. In its memorandum, Australia had indicated that its risk analyses conclusions "will be incorporated (where appropriate) into legal instruments and procedures for the importation of non-viable salmonids products…". It was Canada's understanding that, thus far, this had not been undertaken by Australia as no implementing instruments had given effect to its AQIS policy decision of 19 July. Even if Australia did implement the policies as announced on 19 July, the measures would be inconsistent with the SPS Agreement, including Articles 2.2, 2.3, 5.5, 5.6, and 6 as well as Annex C. Canada's concerns were reinforced by the statement made by Australia's new Trade Minister, Mr. Vaile. That statement which was posted on the Website of the Australian Broadcasting Corporation on 20 July read as follows: "AQIS will put tight controls on the fish which is allowed in and it might be so restrictive that the impact on the local industry is minimal". The Minister had further stated that there were indications that the AQIS decision "may not be too substantial because of the requirements that AQIS is going to put on any product being imported… …It might make it unviable for countries like Canada to export salmon to Australia and uncompetitive against the Australian product." Canada expressed regret that due to Australia's failure to comply with the DSB's recommendations, it was obliged to proceed with its request under Article 22.2. Under the strict time-period specified in Article 22.6, Canada had to request the suspension of concessions within 30 days of the expiry of the reasonable period of time. If, at the present meeting, Australia did not object to the proposed level of suspension, Canada's request would be authorized by the DSB through negative consensus. If Australia requested arbitration on the proposed level of suspension, the DSB's authorization would be deferred. He said that in the course of the meeting, Canada would request the establishment of a panel pursuant to Article 21.5 in order to determine the WTO-consistency of the Australian measure.

The representative of Australia said that, at the outset, his country wished to make it clear that it did not agree with Canada's decision to proceed to Article 22. Canada's request was unwarranted and unnecessary. It did not need to take this path to protect its interests. It could have taken the approach of Ecuador in the bananas dispute, and adhered to WTO dispute settlement practice.

[2] WT/DS18/9.

Australia was concerned that Canada should have sought to exploit what it had previously described as "drafting ambiguities" at the expense of other substantive provisions, particularly when there were better options available. His delegation was also surprised that Canada should proceed down this path, given that it was currently a respondent in a number of disputes and might have to bear the consequences of its own actions. Australia's position at the present meeting would be conditioned by two factors: (i) in light of the procedural ambiguities attached to Articles 21.5 and 22, the need to proceed with abundant legal caution in order to protect those exporters who were faced with considerable commercial uncertainties and instability following Canada's circulation of a draft retaliatory list; and (ii) the need to avoid further damage to the credibility and integrity of the WTO system. The course that Australia might be forced to follow at the present meeting was entirely without prejudice to its interpretation of WTO procedural and substantive rules, including the balance of rights and obligations pertaining between Australia and Canada. Whatever the outcome of the meeting, Australia did not regard it as a precedent for the handling of future issues of this nature.

Regarding the legal situation, it was Australia's view that Canada's request was legally deficient and could not be considered by the DSB in its present form. Canada's request referred to a measure which was no longer in existence, and to a level of suspension of concessions that was based on a measure which was more trade restrictive than the measure that had been applied since 19 July. There were several legal impediments to proceeding with Canada's request: (i) the DSB could not act on the basis of a measure that had ceased to exist: the DSB was a legal, not historical, institution; (ii) Canada's request did not identify any WTO inconsistency in relation to the measures now in force; (iii) in accordance with the provisions of Article 22.8 of the DSU, Canada was legally prevented from applying any suspension of concessions in light of the measures introduced on 19 July; and (iv) the DSB must therefore operate on a presumption that its authorization was no longer required, in the light of changed circumstances. Should however the DSB determine that it was authorized to approve Canada's request, Australia would request arbitration in accordance with the provisions of Article 22.6. In the event that the DSB considered that it was authorized to proceed on the basis of Canada's request of 15 July, a letter to the DSB Chairman formally requesting such arbitration would be provided at the end of the present meeting. From a practical perspective, an arbitrator could not proceed to commence work leading to a determination of a level of suspension in the absence of knowledge of any nullification and impairment legally decided by the DSB in relation to the measure now in effect. If an arbitrator was to proceed to a determination, there must first be WTO legal findings of nullification and impairment, and in the absence of such findings, the arbitrator had no other choice but to determine a zero level.

Regarding the factual situation, in the interests of transparency and to ensure that the DSB was in full possession of the facts, he asked for the indulgence of DSB members and the Chairman to explain the background to this issue. Also, in light of some wildly inaccurate media reporting and evident misperceptions on the part of some, Australia wanted to make sure that Members were in full possession of the facts and that they would allow the facts to speak for themselves. He wished to assure Members that there was no hidden agenda on Australia's part as all of the quarantine requirements for the importation of salmon were publicly documented. Australia had proceeded to implement the WTO findings with the full intention of completing the implementation processes by the 6 July deadline. In accordance with the requirements of Australia's legal system, the implementation process involved quarantine decision-making on the basis of import risk analyses (these were all now available on the Internet). Risk analyses had been conducted on salmon and trout, as well as on certain other fish identified in the dispute settlement processes as having diseases in common with salmon. The risk analysis process was based on all available scientific evidence and had been conducted in accordance with the risk assessment requirements identified by the Appellate Body. In order to ensure the scientific integrity of the process, some 14 independent scientists had been engaged to comment on and evaluate scientific evidence. Some time was lost in the process because of delays in receipt of scientific comment and, towards the latter stage of the process, because a severe bout of influenza had incapacitated many of the specialists on the implementation team.

Because of these developments, which were outside of the control of the implementing team, implementation had been delayed by 13 days, until 19 July. Canada had been contacted as soon as it became apparent that the 6 July date could not be met. Both parties then proceeded to preserve the legal options provided by Articles 3.7 and Article 22.2 of the DSU, and in accordance with the relevant time limits imposed by Article 22.2. Prior to 6 July, Australia had formally requested Canada to enter compensation negotiations. Canada had also taken action to preserve its right to request authorization of suspension of concessions and a request had been lodged on 15 July, in order to comply with the 10-day rule for the DSB agenda. Canada's request had now been overtaken by events. The request for authorization was based on non-implementation. It was not in dispute that Australia implemented on 19 July and that the measure referred to by Canada had been removed and replaced with a quarantine measure, with effect from 19 July, that permitted the entry of salmon subject to quarantine conditions specified in the 19 July announcement. The Australian Quarantine and Inspection Service (AQIS) had taken immediate steps to engage the relevant authorities in Canada and elsewhere in order to complete the certification requirements. This included an offer for AQIS officials to travel to overseas capitals to expedite arrangements. In contrast to the steps taken by other exporters, Canada had not to date responded and was apparently not seeking to engage with AQIS on finalization of arrangements that would allow commercial trade to flow. At the commercial level, the response to the 19 July AQIS announcement had been extremely positive. Australian importers expected commercial trade to flow quickly and there was no evidence to suggest that they considered that the conditions attached to importing would impede realisation of their interest in importing.

In conclusion, it was therefore evident that, from both a legal and commercial perspective, there was no import ban being maintained by Australia. Therefore, the request set out in WT/DS18/12 was invalid and could not be considered by the DSB. Moreover, in accordance with the provisions of Article 22.8 of the DSU, Canada was legally prevented from applying any suspension of concessions, whether or not authorized by the DSB. If Canada considered that the replacement measures were inconsistent with Australia's WTO obligations, the proper course of action was for Canada to initiate a complaint in accordance with the provisions of Article 21.5 of the DSU, or under the standard DSU procedures if it so wished. Australia recognised that the 13-day delay had limited the time period for Canada to examine and evaluate the new measures from both a legal and commercial perspective. Australia had been responsive to Canada's concerns to proceed with an abundance of legal caution and, to this end had suggested that, by agreement between the parties, the reasonable period of time could be extended for the purposes of the time-limited exercise of rights under Articles 22.2 and 22.6 of the DSU. Regrettably, Canada had not been able to agree to this suggestion. As there were no time limits on the initiation of Article 21.5 processes, Canada had not been disadvantaged by the 13-day delay in implementation. As Canada had advised that it intended to provide detailed questions to Australia by the end of the current week, it was also apparent that Canada's WTO legal evaluation was not completed. It would therefore seem premature to seek the establishment of a panel under Article 21.5 until the areas of disagreement were clearly identified.

Australia believed that Canada's request for DSB authorization could not now be acted upon in the light of developments since the request had been lodged. Australia believed that the DSB was not in a position to approve Canada's request in the form presented. Should however the DSB determine that it was empowered to approve Canada's request in its present form, Australia wished to have the request referred to arbitration, in accordance with the provisions of Article 22.6 of the DSU, and would lodge a letter with the Chairman of the Dispute Settlement Body to that effect.

The Chairman proposed to turn to the next sub-item on the Agenda, namely "Recourse to Article 21.5 of the DSU by Canada".

The representative of Canada recalled that in the context of the DSU Review, both Australia and Canada had taken the same position on the interpretation of Articles 21.5 and 22: i.e. where there was a disagreement about implementation, a multilateral determination of inconsistency should

precede the authorization to suspend concessions. Canada had tabled a detailed proposal to amend the DSU provisions with a view to ensuring such sequence. Since no agreement had yet been reached on this issue, Canada had to pursue its rights in accordance with the existing provisions of the DSU. At this stage, it was not possible for Canada to proceed with the Article 21.5 panel proceedings only, because such proceedings would be concluded after the expiry of the 30-day period provided for in Article 22, within which Canada had the right to request suspension of concessions by negative consensus. Canada could have initiated such proceedings during the compliance period, if Australia had put in place its implementing measures, which it had not done. However, having taken the necessary precautions to preserve its rights under Article 22, Canada also wished to secure a definitive, multilateral determination of the consistency of the Australian measure. Article 22.7 did not provide any time-limit as to when the matter had to be brought back to the DSB after the arbitration process under Article 22.6 had been completed. This would enable Canada to request the establishment of a panel under Article 21.5 and then to await the conclusions of that process before seeking authorization from the DSB to suspend concessions. This was a constructive way forward and would enable the parties to preserve their rights and the desired sequencing.

At the present meeting, Canada was requesting the establishment of a panel pursuant to Article 21.5 of the DSU. He drew attention to Canada's reasons for requesting a panel, as outlined in its communication[3] to both Australia and the DSB Chairman: "…even if Australia has taken or does take measures to comply with the recommendations and rulings of the DSB by implementing the policies for non-viable salmonids products outlined in AQPM[4] 1999/51, those measures are not, or would not be, consistent with the SPS Agreement for the following reasons: (i) they are not based on a risk assessment, contrary to Article 5.1 of the SPS Agreement; (ii) they are not applied only to the extent necessary to protect animal life or health, are not based on scientific principles and are maintained without sufficient scientific evidence, contrary to Article 2.2 of the SPS Agreement; (iii) they arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between New Zealand and Canada and between Australia and Canada, and are applied in a manner that constitutes a disguised restriction on international trade, contrary to Article 2.3 of the SPS Agreement; (iv) when considered against the measures outlined in AQPM 1999/51 for non-viable marine finfish products other than salmonids and live ornamental finfish, they reflect arbitrary or unjustifiable distinctions in Australia's appropriate level of protection in different situations, resulting in discrimination or a disguised restriction on international trade, contrary to Article 5.5 of the SPS Agreement; (v) they are more trade restrictive than required to achieve Australia's appropriate level of sanitary protection, contrary to Article 5.6 of the SPS Agreement; (vi) they are not adapted to the sanitary characteristics of either all or part of Canada or Australia contrary to Articles 6.1 and 6.2 of the SPS Agreement; and (vii) they entail information requirements that are not limited to what is necessary for appropriate control, inspection and approval procedures, contrary to Article 8 and Annex C.1(c) of the SPS Agreement."

He proposed the following course of action. Canada would request the establishment of a panel under Article 21.5 in the expectation that Australia would agree to its immediate establishment. At the first organizational meeting with the arbitrator under Article 22.6, Canada would ask the arbitrators to hold the arbitration proceedings in abeyance until after the circulation of the panel report under Article 21.5. If the Article 21.5 panel were to find that Australia had acted inconsistently with its WTO obligations, then Australia and Canada would request the immediate resumption of the Article 22.6 arbitration, regardless of whether either party sought to appeal the Article 21.5 panel report. The Article 22.6 arbitrator would issue a report within 60 days after the circulation of the Article 21.5 panel report and no new reasonable period of time would be granted. Canada's proposal was based on the assumption that Australia accepted the following: (i) Australia and Canada affirm

[3] Subsequently circulated in WT/DS18/14: "Australia - Measures Affecting Importation of Salmon - Request by Canada for Determination of Consistency of Implementation Measures".

[4] Animal Quarantine Policy Memorandum

fully their rights under the WTO Agreement, including the DSU. Nothing in the proposal could be construed, in any way, as a waiver, modification or other diminution of such rights; (ii) the report of the arbitrator under Article 22.6 shall be considered as valid and binding upon Australia and Canada, notwithstanding its issuance later than the period prescribed by Article 22.6; and (iii) for greater certainty, Australia and Canada affirm that Canada had the right to receive, by negative consensus, DSB authorization to suspend the application to Australia of concessions and other obligations, provided that the Article 21.5 panel had determined Australia's measure to be WTO inconsistent, and the Canadian request was consistent with the decision of the arbitrator under Article 22.6. This way of proceeding would uphold the multilateral character of the dispute settlement system, which was in the interest of all Members, including Canada and Australia. Canada hoped that Australia would accept its constructive proposal as a way forward. He underlined that Canada's proposal was a specific solution to the particular circumstances of the case at hand and should not set a precedent with regard to future cases.

The representative of the European Communities wished to make some comments with regard to Article 22.2. The EC believed that since there was a divergence of views between Canada and Australia with regard to the implementing measures, it was necessary to invoke the provisions of Article 21.5. He recognized that Canada had proposed a solution which would enable the parties to respect the sequence between Articles 21.5 and 22. He noted that Canada had underlined that the course of action proposed with regard to this matter should not constitute a precedent. However, he also wished to be informed of Australia's position on this matter. The EC did not share Canada's interpretation of Article 22 and believed that the request under Article 22 could not be made until conformity of implementing measures had been determined pursuant to Article 21.5. The EC considered that in cases in which Article 21.5 was invoked, the parties should not be deprived of their rights to seek authorization from the DSB to suspend concessions after the expiry of 30 days from the end of the reasonable period of time. He noted that this issue had not yet been resolved in the DSU review and therefore Members had to seek a pragmatic solution. He considered that Canada's interpretation of the 30-day period under Article 22.6 was too narrow. He believed that in cases in which Article 21.5 was invoked, the 30-day period should be automatically postponed until the adoption of an Article 21.5 panel report. This would be a more appropriate solution than suspending the proceedings. The EC had made a proposal on this matter in the context of the DSU review and it was his understanding that Australia was flexible on this matter. He recognized that it was up to the parties to the dispute to solve this problem. In the EC's view, the approach taken at the present meeting towards resolution of this matter should not set a precedent.

The representative of Japan said that his delegation did not share Canada's interpretation of Article 22. Japan supported the EC's view that the 30-day period should not be interpreted rigidly. He reiterated Japan's position that where there was a disagreement between the parties on compliance, Article 21.5 should be invoked before recourse to Article 22 could be made.

The representative of the United States said that his country welcomed the fact that Australia and Canada had found a mutually agreed way forward in this dispute. However, this did not alter the US view that in one case in which the proceedings of Articles 21.5 and 22 had been invoked, and which had involved the United States, the Arbitrator had found the correct way of proceeding.

The representative of India said that he did not wish to take a position with regard to the substance of this matter. He appreciated Canada's efforts aimed at preserving the multilateral character of the DSU and the multilateral trading system. Like the EC and Japan, India believed that the 30-day limit stipulated in Article 22.6 should not be interpreted in a rigid manner. It was this rigid interpretation that left Canada no other option but to request authorization to suspend concessions so as to preserve its rights. At the same time, India shared Canada's concerns because there were no guarantees that no objections would be raised after the expiry of 30 days. He recalled that, on many occasions, problems had been solved through pragmatic solutions. Canada had stated that if it did not

make its request under Article 22.2, it would lose its rights. This issue was still under discussion in the DSU review and thus far it had not been possible to find a solution. He reiterated India's position that there was a clear sequence between Articles 21.5 and 22, which reflected the multilateral character of the system. Therefore, compliance or non-compliance could only be determined by an Article 21.5 panel and should not be determined unilaterally by the prevailing party. To this effect, by requesting the establishment of a panel under Article 21.5, Canada had taken the right course of action. He noted that delegations had stated that that this case should not set a precedent. However, similar statements had been made on another occasion. He therefore appealed to Members that in the course of the DSU review one should try to ensure the sequence between Articles 21.5 and 22 so that Members were not obliged, like Canada, to seek authorization to suspend concessions within the 30-day period due to a strict interpretation of Article 22.6. Otherwise, the dispute settlement system would be undermined. India recognized the difficulties of the parties to the dispute and noted Australia's explanation regarding its inability to comply with the DSB's recommendations by the end of the reasonable period of time. Both parties were in a difficult situation and both wished to preserve their rights. He regretted that while some Members were preserving their rights, the credibility of the system was being undermined.

The representative of Indonesia said that his delegation fully supported the views expressed by the EC, India and Japan.

The DSB took note of the statements and agreed that, as requested by Australia pursuant to Article 22.6 of the DSU, the matter be referred to arbitration to determine the level of suspension of concessions requested by Canada in document WT/DS18/12. The DSB further agreed that the Article 21.5 request by Canada be referred to the original Panel.

The representative of Australia said that as he had pointed out at the beginning of the discussion, Australia did not agree with Canada's decision to proceed to Article 22. It had, however, not blocked the consensus that had emerged. Moreover, Australia agreed to request the arbitrator to suspend work on the basis that: (i) there would be no loss of its WTO rights; (ii) arbitration work should re-commence on release of the Article 21.5 Panel Report, even if there was an appeal; (iii) rights to DSB authorization under Article 22.7 on the basis of negative consensus remained, provided that the arbitrator's report addressed the level of legally found nullification and impairment. This was on the basis of Australia's interpretation that the negative consensus rule would apply in any event.

The DSB took note of the statement.