

AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF SALMONIDS

Communication from the Chairman of the DSB

The following letter, dated 6 July 1999, from the Chairman of the DSB to the Permanent Mission of Australia, is circulated at the direction of the Chairman of the DSB.

Thank you for your letter of 24 June 1999 [attached hereto with the response of the United States]¹ concerning the terms of reference of the panel on "Australia – Measures Affecting the Importation of Salmonids" (WT/DS21). My views on this matter are as follows:

1. There is some uncertainty as to whether the DSB authorized me to draw up terms of reference for this panel pursuant to Article 7.3 of the DSU. While Australia made such a request, the records of the meeting indicate that the following action was taken:

The Chairman proposed that the DSB take note of the statements and agree to establish a panel in accordance with the provisions of Article 6 of the DSU. With regard to the terms of reference, he said that Australia had raised some issues, and that the parties to the dispute would make efforts to see whether they could reach agreement on terms of reference. If not, then standard terms of reference would apply. He noted the systemic issues raised by delegations could be raised before the panel. Although there were many systemic issues for consideration in the DSU review, it would also be appropriate to take up this issue in the DSU review.

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

The representative of Australia pointed out that Article 7.3 of the DSU indicated that the DSB may authorize its Chairman to draw up terms of reference of a panel in consultation with the parties to the dispute. He assumed it would not simply be a question of Australia consulting with the United States.

The Chairman said that the DSB would take note of Australia's statement.

While it could be argued that the DSB did not in this case decide to authorize the Chairman to draw up terms of reference, I have nonetheless consulted representatives of Australia and the United States in respect of the terms of reference for this panel.

¹ See Annexes, page 4.

2. Article 7.3 of the DSU provides as follows:

In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

There has been only one case to date (Brazil – Measures Affecting Desiccated Coconut) where the DSB has explicitly authorized its Chairman to draw up terms of reference. See Minutes of Meeting held on 5 March 1996, WT/DSB/M/12, p.1. In that case, consultations were held with the parties by the preceding chair of the DSB, as the current chair was from Brazil. As a result of the consultations, the parties reached an agreement on the terms of reference. See WT/DS22/6.

3. The terms of Article 7.3 are not clear as to the extent that the Chairman may impose terms of reference on parties in the absence of agreement. Normally, a requirement in the DSU to consult parties does not imply that the parties must reach agreement on the issue under discussion. For example, panels are required to consult parties on procedures under Article 12.1 of the DSU, but it is accepted that panels may establish their procedures without the agreement of the parties. In the case of Article 7.3, the authorization of the Chairman is made "subject to the provisions of paragraph 1". It is unclear whether this reference to paragraph 1 means only that the Chairman must act within 20 days or whether it suggests that the parties must agree on non-standard terms of reference. The latter limitation would greatly reduce the utility of Article 7.3, although the *Desiccated Coconut* case demonstrates that consultations with the DSB Chairman can be effective in promoting an agreement of the parties on non-standard terms of reference. Finally, the last sentence of Article 7.3 refers to the situation "[w]here other than standard terms of reference are agreed upon". If applicable only to Article 7.3, it would suggest that agreement of the parties is necessary. If applicable generally, it seems out of place in Article 7.3.

4. In light of the uncertainty as to whether the DSB acted pursuant to Article 7.3 and the meaning of that article, I believe that I should proceed cautiously in this case. I will proceed, however, to consider Australia's proposed terms of reference as contained in your letter.

5. Australia requests that the phrase "including a 13 December 1996 policy decision of AQIS Executive Director Paul Hickey" should be deleted from the first paragraph of US request for establishment of a panel. In this regard, I note that the US request reads as follows:

Australia currently maintains a prohibition on imports of fresh, chilled, or frozen salmonids, including Quarantine Proclamation 86A, dated 19 February 1975, and subsequent Australian legislation, regulations and administrative measures which implement, supplement, amend and affirm the import prohibition, including a 13 December 1996 policy decision of AQIS Executive Director Paul Hickey.

As I understand it, Australia argues that since the consultations in this case were held prior to December 1996, they could not have considered a 13 December 1996 decision and that it would be illegal for the DSB to establish a panel in respect of a measure on which consultations were not held. I do not find Australian argument to be conclusive. Indeed, one recent panel considered this issue and reached the opposite conclusion, i.e. so long as consultations were held with respect to a dispute, a panel request in respect of that dispute could include measures not consulted upon. See Panel Report on "Brazil – Export Financing Programme for Aircraft", WT/DS46/R, at paras. 7.4-7.11. That precise issue is now on appeal. See WT/DS46/8 (appeal includes the issue of "1. the Panel's conclusion that measures about which the Parties did not consult were properly before the Panel").

6. I do not believe that it would be appropriate for me to rule on this issue as requested by Australia, especially since a panel has ruled to the contrary and since the precise issue is on appeal. I would note that the panel's analysis of this issue suggests that the concerns raised by Australia (i.e. whether a panel may consider measures or claims not consulted upon) can be considered by a panel with standard terms of reference.

7. In this regard, I note that the European Communities have proposed modifying Article 4 of the DSU to impose the requirement desired by Australia. The EC argues that the inclusion of measures and claims in panel requests that were not consulted upon goes against the "spirit" of the DSU; it does claim that the current text of the DSU prevents such inclusion. See DSU/7, page 2 (Job No. 5602). There was not unanimous support for the EC proposal when it was discussed in the DSU review.

8. Australia also proposes that the reference to Articles 7 and 8 of the SPS Agreement be deleted from the US panel request and accordingly from the terms of reference. While this proposal is based on the failure to consult concerning a claim, as opposed to a measure, the reasoning of paragraphs 5 and 6 above still applies.

9. Accordingly, assuming that the DSB did in fact authorize me to draw up the terms of reference in the dispute "Australia – Measures Affecting the Importation of Salmonids" and assuming that I could do so even in the absence of the agreement of the parties, I determine that standard terms of reference should apply to the dispute.

ANNEXES

Letter from the Australian Mission to Ambassador Akao, Chairman of the DSB, dated 24 June 1999

At its meeting on 16 June 1999, the Dispute Settlement Body (DSB) agreed to establish a panel at the request of the United States on "Australia - Measures Affecting the Importation of Salmonids" (document WT/DS21/4 refers) and authorized the chairman of the DSB to draw up the terms of reference of the panel in consultation with the parties to the dispute in accordance with the provisions of paragraph 3 of Article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

At the 16 June 1999 DSB meeting, Australia stated that the United States, in requesting the establishment of a panel with standard terms of reference as set out in Article 7 of the DSU, was asking the DSB to exceed its legal authority by establishing a panel with terms of reference covering matters not previously raised in consultations.

Specifically, we drew attention to the fact that the United States' request referred to matters which had not been the subject of prior consultations under Article 4 of the DSU, and also included allegations on the inconsistency of Australian measures with provisions of a WTO Agreement that had not been the subject of prior consultations under Article 4 of the DSU (i.e. Articles 7 and 8 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)).

In light of this situation, and taking into account other relevant circumstances, my authorities have requested that I convey to you the following proposal setting out the deletions and additions to the text of WT/DS21/4 that would be necessary to assure the legitimacy of the process:

- (a) Delete the following words in the first paragraph: "including a 13 December 1996 policy decision of AQIS Executive Director Paul Hickey"
- (b) Delete the references to Articles 7 and 8 of SPS Agreement in Point 1 of the third paragraph
- (c) Delete the reference to standard terms of reference in paragraph 4
- (d) Add the following sentence to paragraph 4: "The terms of reference shall be further limited to the matters raised by the United States at the 13 December 1995 consultations".

Answer to the above letter from the Permanent Mission of the United States, dated 30 June 1999, through Ambassador Akao, Chairman of the DSB

My delegation received the 24 June letter from Ambassador Raby of Australia proposing that you draw up terms of reference, substantially different from the standard terms of reference, for the panel established by the Dispute Settlement Body on 16 June in "Australia - Measures Affecting the Importation of Salmonids". My authorities have requested that I draw to your attention the provisions of Article 7.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which provide explicitly that panels must have the standard terms of reference provided therein "unless the parties to the dispute agree otherwise". The United States does not agree with Australia's request. Accordingly, the standard terms of reference must apply in this case.
