

ANNEX K

**CORRESPONDENCE BETWEEN THE PANEL AND PARTIES
REGARDING SECTION VII.G OF THE PANEL REPORT**

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ANNEX K-1

**LETTER DATED 6 AUGUST 2007 FROM THE UNITED STATES
TO THE PANEL**

The United States wishes to thank the Panel for its hard work in this dispute and for providing the parties with the final report of the Panel. Upon review of that report, my authorities have instructed me to submit the following request.

In the final report issued to the parties, the Panel has added a new section VII.G on "Special and Differential Treatment" that had not appeared in the Panel's interim report and in which, *inter alia*, the Panel "notes that Turkey is a developing country Member".¹ However, neither party requested the Panel to make findings on this issue as part of its written request for the Panel to review precise aspects of the interim report.² Therefore, neither party has commented on this issue as part of the interim review of the Panel's report. Nor has either party provided any arguments and supporting facts as part of its submissions in this dispute for the Panel to make findings on this issue. As the Panel itself notes, "in the course of these Panel proceedings Turkey did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require additional consideration".³

The United States does not consider that an entirely new finding, not requested by either party, should be made at the interim review stage, particularly as the basis for that finding was not addressed by the parties during the dispute. Accordingly, the United States respectfully requests that the Panel delete Section VII.G from the report to be circulated to Members.

The United States thanks the Panel for its consideration of this request. The United States is providing a copy of this letter directly to Turkey.

¹ Panel Report, para. 7.304; *see also id.*, para. 7.305 (noting "the Panel took into account the respondent's status as a developing country Member").

² *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 15.2 ("DSU"). The final sentence of DSU Article 15.2 establishes that, "[i]f no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to Members".

³ Panel Report, para. 7.304.

ANNEX K-2

**LETTER DATED 8 AUGUST 2007 FROM TURKEY
TO THE PANEL COMMENTING ON THE UNITED STATES' LETTER
DATED 6 AUGUST 2007**

Turkey is grateful to the Panel for the opportunity to comment on the request put forward very recently by the United States.

Turkey believes that Section VII.G to the Panel Report accurately describes the reality of Turkey being a developing country and the fact that, despite Turkey not having invoked any special and differential provision under the DSU during the panel proceedings, the Panel did occasionally take into account the respondent's status as a developing country when preparing and revising the timetable for the process. Turkey appreciated the Panel's efforts to accommodate both parties' requests during the course of the proceedings and, in particular, Turkey's developing country status.

With respect to the request now being put forward by the United States, it states that "*(T)he United States does not consider that an entirely new finding, not requested by either party, should be made at the interim review stage*". Turkey disagrees with this statement and believes that, pursuant to Article 12.11 of the DSU, the Panel has correctly indicated what occurred during the panel proceedings with respect to Turkey's developing country's status and the absence of specific requests by Turkey for special and differential treatment. Turkey does not believe that a specific request by either party was necessary for this statement to be made by the Panel.

For this reason, Turkey finds Section VII.G appropriate and accurate and respectfully requests the Panel not to delete Section VII.G from the report to be circulated to the Members.

Turkey is providing a copy of those comments directly to the United States.

ANNEX K-3

FAX DATED 9 AUGUST 2007 FROM THE PANEL TO THE PARTIES

The Panel thanks the United States for its communication dated 6 August and has taken note of its request that Part VII.G be deleted from the final report. The Panel also thanks Turkey for its communication of 8 August and takes note of its view that Part VII.G should not be deleted from the report.

The Panel notes that this part was only included in the final version of the report that was issued to parties. Having considered both parties' views on the issue, however, the Panel feels that Part VII.G should not be deleted from the final report. This part is only a statement that reflects what occurred during the panel proceedings and does not affect the rights and obligations of either party in the current dispute.

As stated in Part VII.G, Turkey is a developing country Member. In the course of the Panel proceedings, Turkey did not make reference to any substantive provisions on differential and more-favourable treatment for developing country Members in the covered agreements that required particular consideration. However, in the light of Article 12.10 of the DSU, the Panel took into account Turkey's status as a developing country Member when preparing and revising the timetable for the process, including when considering Turkey's requests for extensions of deadlines to submit responses and comments.

Accordingly, the Panel intends to circulate its final report, including Part VII.G, to Members on Friday, 10 August, as earlier announced to parties.

ANNEX K-4

**LETTER DATED 9 AUGUST 2007 FROM THE UNITED STATES
TO THE PANEL IN REPLY TO TURKEY'S LETTER DATED 8 AUGUST 2007**

The United States is in receipt of Turkey's letter of 8 August, as well as the Panel's communication of 9 August. With respect to Turkey's letter, it confirms that at no point in this dispute – including in the interim review comments – did either party raise the question of Turkey's status as a developing country Member, let alone provide evidence or arguments on the question. Nor did Turkey refer to or invoke Article 12.11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

The United States appreciates the Panel's efforts and diligence in raising this issue. In the Panel communication of 9 August, the Panel indicates that Part VII.G of the Panel report "is only a statement that reflects what occurred during the panel proceedings and does not affect the rights and obligations of either party in the current dispute". However, Article 15.1 of the DSU requires that any descriptive sections of a panel report be provided to the parties in advance for comment. Part VII.G was not provided as part of the descriptive part of the Panel report in this dispute and so does not accord with Article 15.1.

In addition, the United States recalls that Article 15.2 of the DSU provides, in pertinent part, as follows:

"... Within a period of time set by the panel, a party may submit a written request for the panel to review *precise aspects* of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties *on the issues identified in the written comments*. If no comments are received from any party within the comment period, the interim report shall be considered the final report" (Emphasis added).

The panel in *Australia – Salmon* interpreted this language to mean that "it is not open to the Panel to consider anything other than comments dealing with 'precise aspects' of the interim report."¹ In light of Article 15.2, and inasmuch as neither party commented at the interim review stage on the absence of a discussion in the Panel Report of the S&D provisions of the DSU and Turkey's decision not to invoke them, the United States respectfully submits that this issue was "not open to the Panel to consider".

Furthermore, the United States respectfully disagrees with the Panel's statement that the new Part VII.G of the final Panel Report "does not affect the rights and obligations of either party in the current dispute." In Part VII.G, the Panel makes a finding that Turkey is a developing country Member. This finding has obvious implications for various provisions of the WTO Agreements, with the Panel's discussion of Article 12.10 and 12.11 of the DSU offering but one example. Moreover, the manner in which this determination was made is unexplained, although Article 12.7 of the DSU requires a panel to set out the findings of fact and basic rationale behind any findings that it makes.

The inclusion of panel findings and descriptions of the panel proceedings in the final report that were never submitted to the parties for review and comment in accordance with Article 15 of the DSU raises significant, important systemic issues. It would be a precedent of deep concern to many Members and the cause of substantial discussion among Members and at the Dispute Settlement

¹ Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, para. 7.3.

Body. And it appears unnecessary in this dispute since Turkey never raised the issue, never requested the Panel to include any such findings or description, and the Panel itself has characterized Part VII.G as simply descriptive and not intended to affect either party's rights and obligations.

Accordingly, for the foregoing reasons, the United States respectfully requests the Panel to reconsider Part VII.G and delete it from the report to be circulated to Members.

ANNEX K-5

FAX DATED 10 AUGUST 2007 FROM THE PANEL TO THE PARTIES

The Panel takes note of the United States' communication received in the evening of 9 August and of its request that the Panel delete Part VII.G from the report to be circulated to Members.

In the light of this request, the Panel has decided to delay, until further notice, circulation of the final report to the Members, originally scheduled for today.

The Panel will inform parties early next week on any further steps regarding the United States' request.

ANNEX K-6

**FAX DATED 13 AUGUST 2007 FROM THE PANEL
TO THE PARTIES**

Pursuant to the message sent to you on Friday, 10 August, the Panel invites the United States, **by close of business, Monday, 20 August**, to elaborate or supplement, if it so wishes, its arguments regarding Part VII.G of the report and the inclusion of that Part in the final report to be circulated to Members.

Subsequently, Turkey is invited to make any comments on the United States' request and arguments **by close of business, Monday, 27 August**.

...

After receiving these comments, the Panel will decide on any further action regarding the United States' request and Part VII.G of the report.

ANNEX K-7

**LETTER DATED 20 AUGUST 2007 FROM THE UNITED STATES
TO THE PANEL**

The United States thanks the Panel for its communication of 13 August 2007, and its invitation to the United States to elaborate or supplement its arguments regarding Part VII.G of the report and the inclusion of that Part in the final report to be circulated to Members.

My authorities have instructed me to present the following elaboration and supplement to the US letter of 9 August. As indicated in that letter, a key issue presented by Part VII.G is whether a panel may, after the interim report has been issued and commented upon, include an entirely new part in its final report. As the United States described in its letter of 9 August, the answer of necessity is no.

This issue presents important systemic concerns for all Members, regardless of the substance of Part VII.G. While Turkey may believe that in this instance the added part is accurate, the United States did not have an opportunity to express a view. Further, one must consider what would happen if the new part had contained different findings. For example, the United States suspects that Members would have strong concerns if a panel were to add to its final report a new section that was not in the interim report that contained new findings and description either on claims presented or characterizing the panel proceedings (such as the views of experts consulted). Any such addition would not be in conformity with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). It would not matter what the content of that additional part might be.

Nor is this issue something that may be "cured" at the stage of a panel's final report. As past panels and the Appellate Body have concluded, it is not appropriate at the interim review stage to consider new evidence.¹

In addition to these important, systemic concerns, Part VII.G presents another systemic issue. As the United States noted in its letter of 9 August 2007, in Part VII.G the Panel's finding that Turkey is a developing country Member is unexplained, although Article 12.7 of the DSU requires a panel to set out the findings of fact and basic rationale behind any findings that it makes. The lack of citation to evidence and argument is unsurprising since both parties have confirmed that the issue was never discussed during the panel proceedings and no evidence or argumentation was presented by either party. And again, it is not appropriate to consider new evidence at the interim review stage let alone at the point of circulation of a final panel report.

Turkey's only reason for including Part VII.G is that it is "accurate" in Turkey's view. The new Part is not accurate in the view of the United States since, as discussed, this issue was never raised during the panel proceedings nor did Turkey refer to or invoke Article 12.11 of the DSU. But the issue is much larger than whether the new Part is accurate or not. As noted, adding a new part at this stage of the proceedings raises a number of important, systemic concerns and issues of conformity with several provisions of the DSU.

Accordingly, for the foregoing reasons as well as those in the US letter of 9 August, the United States respectfully requests the Panel to delete Part VII.G from the report to be circulated to Members.

¹ Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 301; Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, paras. 6.3-6.6.

ANNEX K-8

**LETTER DATED 27 AUGUST 2007 FROM TURKEY
TO THE PANEL**

Turkey wishes to thank the Panel for the opportunity to comment on the request put forward by the United States, most recently on 20 August 2007.

As we previously stated in our letter 8 August 2007, Turkey fails to understand the concern of the United States on Part VII.G of the Panel Report where Panel merely implements the provisions of Article 12.10 and Article 12.11 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU). Article 12.11 asserts that "Where one or more of the parties is a developing country Member, the panel's report *shall* explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures".¹ (*emphasis added*)

Also, Article 12.10 of the DSU states that "... In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. ...".² In Turkey's view, those two Articles should be read together in order to see the rationale behind Part VII.G where Panel notes the fact that it has taken into account Turkey's status as a developing country Member when preparing and revising the timetable for the process.

In this respect, Turkey believes that Panel is acting according to the provisions of those two Articles in Part VII.G of the Final Report and the absence of any specific request of Turkey does not create any impediment to that. In other words, Turkey believes that its developing country status is a fact independent of whether or not Turkey has invoked any of the specific substantive provisions on special and differential treatment. Thus, Turkey's developing country status itself triggers the obligation on the Panel to accord sufficient time to prepare and present argumentations.

On the other hand, despite the fact that Turkey has not invoked any special and differential provision under the relevant Agreements during the Panel proceedings, it in fact did invoke Article 12.10 by its letter dated 27 February 2007 requesting the assistance of the Chairman of the DSB to extend the period of prior consultations as a developing country. According to the first part of Article 12.10; "[i]n the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long." The response of the then Chair was received on 21 March 2006 stating that "... there was no past practice in the DSB for dealing with Article 12.10 requests since yours (*Turkey's*) was the first such request ever made" and in fact, the Chair encouraged Turkey to bring this issue in the ongoing negotiations. Although that was an issue of the pre-Panel proceedings Turkey strongly believes that developing country status of Turkey has been considered at different time segments of this dispute including pre and during the Panel process.

¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 12 Panel Procedures, paragraph 11.

² Ibid, paragraph 10.

In addition, the phrase in the United States' comment on 20 August 2007: "... in Part VII.G the Panel's *finding (emphasis added)* that Turkey is a developing country Member ..." cannot be understood considering Turkey's member status within the WTO.

In conclusion, Turkey respectfully requests the Panel to consider the above-mentioned reasons together with its 8 August 2007 letter and maintain Part VII.G of the Report.

Turkey is providing a copy of those comments directly to the United States.

ANNEX K-9

LETTER DATED 30 AUGUST 2007 FROM THE UNITED STATES TO THE PANEL

The United States is in receipt of Turkey's 27 August response to the elaboration by the United States of its arguments provided on 20 August. Since that response referred to the discussion held prior to the Panel's establishment concerning the applicability of Article 12.10 of the DSU, a discussion to which the Panel was necessarily not privy, my authorities have instructed me to provide one clarification to ensure that the Panel has a more complete understanding of that discussion.

In its letter of 27 August, Turkey recalls that it invoked Article 12.10 of the DSU in a letter dated 27 February 2006¹ "requesting the assistance of the Chairman of the DSB to extend the period of prior consultations as a developing country". As the Chairman concluded, this invocation was untimely, occurring after the United States had requested the establishment of this Panel. Accordingly, the question of whether Turkey was a developing country Member was neither considered nor addressed in that discussion. Thus it is inaccurate to say that the "developing country status of Turkey has been considered at different time segments of this dispute including pre and during the Panel process". That discussion does not afford any support to Turkey's position on the issue of Part VII.G.

¹ In its 27 August letter, Turkey refers to the date of its letter to the DSB Chairman as 27 February 2007. The actual date of Turkey's letter is 27 February 2006.

ANNEX K-10

FAX DATED 11 SEPTEMBER 2007 FROM THE PANEL TO THE PARTIES

The Panel is grateful for the comments and observations you have made over the past month concerning Part VII.G of its report. In the light of Parties' comments and observations, the Panel has decided to keep Part VII.G of its report in the following, slightly modified form:

"G. SPECIAL AND DIFFERENTIAL TREATMENT

7.302. Pursuant to Article 12.11 of the DSU:

"[W]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

7.303. In addition, the DSU provides in Article 12.10 that:

"[I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation."

7.304. The Panel notes that, in the course of these Panel proceedings Turkey did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require particular consideration, nor do we find these specialized provisions relevant for the resolution of the specific matter brought before this Panel.

7.305. In any event, during the Panel proceedings, the Panel took into account the respondent's status as a developing country Member, a fact not contested by the complainant, when preparing and revising the timetable for the process. The Panel attempted, *inter alia*, to accommodate, to the extent possible, Turkey's requests for extensions of deadlines to submit responses to the questions posed by the Panel both after the first and second substantive meetings, as well as Turkey's request for time to submit comments on the United States comments to the Panel's interim report."

In addition, for reasons of transparency, the Panel has decided to reflect, in a new Annex to its report, the relevant parts of the various communications it has exchanged with the Parties concerning Part VII.G. The text of this Annex, which would be Annex K, is attached to this facsimile; as the attached shows, it will also include the text of the current facsimile.

The Panel intends to inform Parties shortly about the date of circulation of its final report to Members.
