WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/64
21 July 1999

(99-3022)

Dispute Settlement Body
16 June 1999

MINUTES OF MEETING

Held in the Centre William Rappard
on 16 June 1999

Chairman: Mr. Nobutoshi Akao (Japan)

Subjects discussed: Page

1. Surveillance of implementation of recommendations by the DSB

(a) Argentina . Measures affecting imports of footwear, textiles, apparel and other items: Status report by Argentina (WT/DS56/15/Add.5)

(b) Indonesia - Certain measures affecting the automobile industry: Status report by Indonesia (WT/DS54/17-WT/DS55/16-WT/DS59/15-WT/DS64/14)

(c) European Communities - Regime for the importation, sale and distribution of bananas - Recourse to Article 21.5 of the DSU by Ecuador

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 three sub-items be considered separately.

(a) Argentina - Measures affecting imports of footwear, textiles, apparel and other items: Status report by Argentina (WT/DS56/15/Add.5)

The Chairman drew attention to document WT/DS56/15/Add.5 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 said that, as indicated in the status report submitted by Argentina at the 26 May DSB meeting, Decree 108/99, pursuant to which no import transactions covered by the statistical tax would be taxed in excess of the amounts agreed by Argentina and the United States, had entered into force on 30 May 1999. With the entry into force of the Decree, Argentina considered that it had fully implemented the DSB's recommendations.

The DSB took note of the statement.

(b) Indonesia - Certain measures affecting the automobile industry: Status report by Indonesia (WT/DS54/17-WT/DS55/16-WT/DS59/15-WT/DS64/14)

The Chairman drew attention to document WT/DS54/17 - WT/DS55/16 - WT/DS59/15 - WT/DS64/14 which contained Indonesia's first status report on its progress in the implementation of the DSB's recommendations on measures affecting imports of footwear.

The representative of Indonesia said that in accordance with Article 21.6 of the DSU, Indonesia was submitting its first status report on implementation of the DSB's recommendations, which concerned two measures; (i) the National Car Programme of February and June 1996; and (ii) the 1993 Car Programme. Indonesia had not appealed the Panel's decisions because it did not intend to maintain the National Car Programme of February and June 1996. Prior to the circulation of the Panel report her Government had issued, on 21 January 1998, various decrees to this effect. Indonesia believed that these measures constituted appropriate implementation of the DSB's recommendations. With regard to the 1993 Car Programme, Indonesia had requested a reasonable period of time to implement the DSB's recommendations in order to consider appropriate compliance options. She recalled that on 7 December 1998, the Arbitrator had determined that a reasonable period of time for Indonesia to implement the DSB recommendations would be twelve months.[1] As indicated in the status report, the adoption of a new policy did not materialize as soon as had been expected, due to

[1] WT/DS54/15-WT/DS55/14-WT/DS59/13-WT/DS64/12.

Indonesia's decision to broaden the scope of participants in internal discussions by including not only related authorities and domestic industries, but also automotive producers in the complaining countries as well as potential investors. The new policy would dismantle the WTO-inconsistent elements and would maintain only a tariff and tax system consistent with Indonesia's WTO obligations and commitments. She wished to inform the DSB that most of the new tariffs would be much lower than those existing at present, despite the fact that the automotive sector had been excluded from Indonesia's schedule of commitments under the Uruguay Round Agreement. Under the new policy, import duty on completely built-up cars would be reduced significantly. It was expected that a Government Regulation and several Ministerial Decrees would be issued before the end of June.

The representative of the European Communities said that as regards the implementation of the DSB's recommendations on the 1993 Car Programme, the information provided by Indonesia concerning the imminent introduction of a new decree that would eliminate sales tax discrimination and local content requirements seemed to go in the right direction. However, the EC was looking forward to receiving the text of the new decree before taking any position as regards its WTO compatibility. With respect to the 1996 National Car Programme, the EC had noted different measures taken by Indonesia to implement the DSB's recommendations. The EC requested information regarding follow-up taken by Indonesia in accordance with its Law on Customs to recover the foregone benefits from PT Timor Putra Nasional (TPN) due to its non-compliance with the 1996 Programme requirements. If actions had already been taken by Indonesia, the EC wished to know whether they had already resulted in effective reimbursement of the previously foregone duties and taxes.

The representative of Japan said that his Government welcomed the first status report provided by Indonesia. Japan hoped that Indonesia would comply fully and promptly with the DSB's recommendations. To this end, Japan looked forward to receiving further information from Indonesia on the content and implications of the new automotive policy.

In response to the question by the EC, the representative of Indonesia said that her Government had taken several measures in order to recover the forgone revenue from TPN. Under the judicial process taken in the framework of bankruptcy law, TPN had been declared as financially unable to meet its obligations, including the foregone taxes and import duties. Indonesia's Government had decided to confiscate the assets of TPN. Furthermore, the Government had taken over the management of TPN. The company was now under the control of the Indonesian Banking Restructuring Agency with a mandate to manage the debt settlement of TPN, including tax and duty payments.

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

(c) European Communities - Regime for the importation, sale and distribution of bananas: Recourse to Article 21.5 of the DSU by Ecuador

The Chairman recalled that at its meeting on 3 June 1999, the DSB had agreed that the EC would provide a status report on its progress in the implementation of the DSB's recommendation on this matter. However, since the DSB's decision had been taken on 3 June, which was also the deadline for inscription of items on the agenda of the present meeting, the EC was not in a position to provide its written status report within the required 10-day period prior to the present meeting. He therefore invited the EC representative to make an oral report on its progress in the implementation of the DSB's recommendation.

The representative of the European Communities said that, for the reasons outlined by the Chairman, he was making an oral report on the EC's progress in implementing the DSB's recommendations. A written text of his statement would be made available to delegations upon request. The EC continued its process of implementing the DSB's recommendations. The EC Council was currently examining three options: (i) a tariff only system with preferences for the ACP countries; (ii) a tariff quota system with unlimited volume preferences for ACP countries; and (iii) introduction of a new tariff quota with duty free access for ACP imports. The EC was currently discussing the distribution of quotas by auction in the event its regime were to include one or more tariff quotas. At this stage, all options were under consideration. The internal work in the EC was carried out in close consultations with all third countries concerned.

The representative of Ecuador said that at the 3 June DSB meeting, his delegation had expressed disappointment with the EC's approach, which he believed should not be accepted by DSB members. There was no specific indication by the EC that it was making serious efforts to comply with the DSB's recommendations. He was not sure whether the EC was trying de facto to impose a further period of time which would result in a new banana regime in the year 2000. This was not acceptable to certain countries, including Ecuador which had an interest in the EC's banana market. Members had already waited seven years for the EC banana regime to be modified. Several developing countries were in a situation of inequity. On the one hand, they had to respect their WTO obligations and they were constantly required to do so in a strict fashion, on the other hand, their rights were watered down and actions were taken to delay respect for these rights.

The representative of Panama thanked the EC for the information provided at the present meeting. Panama had not yet received any official notification from the EC concerning its future actions. However, on the basis of informal indications, Panama became aware that the manner in which the EC's options would be applied would not resolve the dispute at hand. Panama hoped that the EC in its recommendation would take into account what had been stated by Panama in previous meetings. He noted that the agenda item under consideration was limited to Article 21.5 proceedings. It was his understanding that at the 3 June informal DSB meeting, delegations had agreed that matters that had not been resolved would continue to remain on the DSB's agenda pending their resolution. He therefore sought confirmation whether that understanding applied only to Article 21.5 proceedings. He noted that a number of panels and Appellate Body reports remained pending and sought some clarification as to the understanding reached with regard to this matter. Panama's interpretation of Article 21.6 was that once the issue of implementation had been placed on the DSB's agenda, it would remain therein until the matter was resolved. This was mandatory unless the DSB decided otherwise. He asked the Chairman to confirm the understanding reached at the 3 June informal DSB meeting which his delegation had not attended.

The Chairman said that at the 3 June informal DSB meeting, there was a clear understanding that in accordance with Articles 21.6 and 22.8 of the DSU, the issue of implementation of the DSB's recommendations, including Article 21.5 panels, had to be placed on the DSB's agenda. However, since the agenda of the present meeting had to be closed on 3 June − which was the date of the informal DSB meeting when this matter had been discussed − the EC had not been in a position to provide a written status report. He said that as from the next DSB meeting, the EC would place this item on the DSB's agenda, and it was his understanding that the EC status report covered not only the Article 21.5 Panel Report but also the reports of the original Panel and Appellate Body.

The representative of Guatemala thanked the EC for its oral report. His delegation shared the concerns expressed by Ecuador. In particular, Guatemala expected prompt compliance by the EC in order to resolve this dispute.

The representative of Colombia thanked the EC for its oral report. Colombia was in the process of examining the EC's options and would make its comments thereon in due course. Her

delegation wished that the EC had provided more information on its procedures and time-frames for implementation.

The representative of Honduras supported the statement made by Ecuador. As stated previously by her delegation, due to economic and employment implications, Honduras attached great importance to its banana production. She reiterated that her country was willing to discuss this matter with the EC with a view to finding a solution to this dispute.

The representative of the Philippines wished to reiterate that the suspension of concessions was the ultimate enforcement mechanism under the WTO Agreement. However, in practice, the suspension of concessions was difficult, if not impossible, for developing countries and small economies. Therefore, under the present circumstances while concessions were suspended by the United States, one was witnessing the helplessness of the other parties to the dispute even if it could be assumed that the defending party had an obligation to act in good faith.

The representative of the European Communities said that his delegation had noted the comments made at the present meeting. In response to the statement by Colombia, he informed the DSB that the matter was included on the agenda of a meeting of the Council of Ministers to be held on 21 and 22 June. The EC hoped to be soon in a position to take a decision on this matter. He confirmed that a written status report on progress in implementation would be submitted to the DSB.

The representative of Ecuador recalled the statement made by the Philippines and said that Ecuador was being pushed in the direction of legal proceedings under Article 22. He noted that the Panel report had recognized that Ecuador had the right to compensation and that Article 22.2 provided for the suspension of concessions. He reiterated his country's position to invoke the provisions of that Article.

The Chairman said that in future this item would appear on the agenda as "European Communities - Regime for the Importation, Sale and Distribution of Bananas: Status report by the EC".

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

2. 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 recalled that the DSB had considered this matter at its meeting on 26 May 1999 and had agreed to revert to it. He drew attention to the communication from the EC contained in document WT/DS165/8.

The representative of the European Communities said that the EC had examined the explanation provided by the United States at the 26 May DSB meeting. However, no new development had taken place since then which would change the EC's position. Therefore, the EC maintained its request for the establishment of a panel which was before the DSB for the second time.

The representative of the United States said that at the 26 May DSB meeting, his delegation had explained that the EC's complaint was addressed to a US announcement that it would, if authorized by the DSB, suspend concessions on EC goods as of 3 March 1999. The Arbitrators in the banana dispute were to have issued their decision prior to that date pursuant to Article 22.6 of the DSU. The EC had failed to implement a WTO-consistent banana regime, and had not been in compliance with its WTO-obligations since the end of the reasonable period of time on 1 January

1999. In spite of the EC's attempts to block or delay the procedure, the DSB had authorized the United States to suspend concessions with respect to EC products. The United States regretted the EC's decision to persist in these proceedings. The United States continued to prefer a negotiated solution to the banana dispute and failed to see how the EC's panel request would help in this regard.

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 representative of the Philippines said that he did not wish to comment on the merits of the case or the right to a panel. He noted that the EC's request for a panel was related to the banana case and the US response thereto. The EC was compelled to request the establishment of a panel which meant long panel and appeal proceedings. He said that as it had been discussed in the DSU review, resort to Article 21.5 was allowed in case of disagreement on the measures taken to comply. He believed that all disagreement arising from one dispute should be resolved through Article 21.5 procedures.

The DSB took note of the statements.

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

3. Australia - Measures affecting the importation of salmonids

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

The Chairman recalled that the DSB had considered this matter at its meeting on 26 May 1999, and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS21/4.

The representative of the United States said that his country was requesting the establishment of a panel to examine Australia's import prohibition of fresh, chilled or frozen salmonids, including salmon. The DSB had already adopted the findings of the Panel and the Appellate Body in a dispute brought by Canada[2] with respect to Australia's import prohibition on salmon, which was determined to be inconsistent with Articles 2.2, 2.3, 5.1 and 5.5 of the SPS Agreement. It was the United States' understanding that Australia had until 6 July 1999 to bring its measures into compliance with the DSB's rulings and recommendations. At the 26 May DSB meeting, Australia had stated that it would comply by 6 July, and that it would do so on a non-discriminatory basis. The United States welcomed that statement and hoped that Australia would remove its import prohibition by that date, thereby obviating the need for further panel proceedings. However, the United States had little choice at the present meeting but to assert its rights in requesting a panel. Australia's import prohibition was precluding US salmonid exports. This import prohibition might not and could not be justified through the studies recently conducted by Australia. At the 26 May DSB meeting, Australia had objected to the fact that consultations on its measure had been held three and a half years ago. Contrary to Australia's claim, its measure had not changed since that time. The measure which had been the subject of consultations was Australia's import prohibition on salmonids and that measure had been in place since the consultations. Furthermore, nothing in the DSU placed a time-limit on when after consultations, a panel might be established, as long as the measure in question had not changed. Article 10.4 of the DSU specifically provided for the situation at hand as follows: "If a third party to a dispute considers that a measure already the subject of a panel proceeding nullifies or impairs

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

benefits accruing to it under a covered agreement, that Member may have recourse to normal dispute settlement procedures". The fact that, as Australia had stated on 26 May, "WTO legal processes had been completed on a closely related matter" in no way affected the right of the United States to have a panel established at the present meeting. The United States reiterated its hope that Australia would comply with the DSB's rulings and recommendations and obviate the need to pursue a second panel process through to conclusion. If Australia complied, the United States and Australia would report to the panel that a mutually satisfactory solution had been found as provided for in Article 12.7 of the DSU.

The representative of Australia recalled that at the 26 May DSB meeting, his delegation had raised important due process concerns with regard to the US panel request. These due process concerns were directly connected to the legal authority of the DSB to establish a panel. The legal authority of the DSB in regard to the establishment of a panel was derived from the DSU. The architecture and structure of the DSU provided legal guarantees of procedural fairness and equity. In the case of establishment of panels, the legal guarantees were explicit. A panel could not be established unless prior consultations had taken place (Article 4.7 of the DSU). Moreover, the DSB had to be satisfied that the provisions of Article 4.4 of the DSU had been met. In the case at hand, the United States was requesting the establishment of a panel with regard to some matters which had not been the subject of prior consultations under Article 4 of the DSU. Specifically, the US request for a panel referred to a decision of 13 December 1996, which was not - and could not have been - the subject of Article 4 consultations, since the only relevant consultations had been held in 1995. The US request for a panel went beyond the scope of the consultations in other respects as well, including in relation to Articles 7 and 8 of the SPS Agreement. In requesting a panel at this time, the United States was, in fact, seeking to extinguish Australia's legal right to prior consultations, as well as asking the DSB to exceed its legal authority by establishing a panel with terms of reference covering matters not previously raised in consultations. The absence of the DSB legal authority in this instance did not serve to deprive the United States of procedural fairness and equity. The United States had chosen not to exercise its DSU legal right to request consultations on the matters not addressed in the 1995 consultations. The legal guarantee of procedural fairness and equity was not found in Article 7.1 of the DSU. Article 7.1 was post sequential to Article 6. With regard to the request before the DSB in this instance, the DSB did not have the legal authority to establish a panel on the basis of the US request as currently framed. The United States requested that a panel be established with standard terms of reference as set out in Article 7 of the DSU. In this instance, the only means by which the DSB could acquire the legal authority for panel establishment was through the application of Article 7.3. Accordingly, if the United States was determined to proceed with its panel request at the present meeting, then Australia had to request that the DSB do so only on the basis of the application of Article 7.3 of the DSU.

The Chairman said that Australia had raised the question of the terms of reference of the panel and he asked whether the United States was ready to discuss the terms of reference of the panel with Australia. He noted that if no agreement was reached within 20 days from the date of the establishment of a panel, standard terms of reference would apply.

The representative of the United States said that if Australia wished to raise an issue with his delegation on terms of reference, the United States would be happy to listen. However, Article 7 of the DSU provided specifically for standard terms of reference to apply unless otherwise agreed within 20 days from the date of the establishment of a panel.

The representative of the Philippines said that he had listened with great interest and attention to Australia's statement, and his preliminary reaction was that Australia had raised important systemic issues. At the present meeting, the DSB had to deal with the request for a panel with standard terms of reference, which referred, *inter alia,* to a measure which had been put in place in 1996. However, the consultations had been held in 1995, one year prior to the existence of the measure. It was his

understanding that the parties to the dispute intended to discuss the terms of reference of the panel within the next 20 days. However, he was concerned that before the parties had the opportunity to discuss the terms of reference, the DSB had to establish a panel. He therefore questioned whether the DSB could establish a panel on the basis of the request which indicated that consultations had been held prior to the measure referred to in the request. He believed that the matter had to be resolved before the parties could agree on terms of reference.

The representative of the United States said that procedural allegations similar to those raised by Australia had in the past been addressed by panels. Therefore, the issues raised by Australia at the present meeting could also be raised before the panel. He noted that the issue of the scope of consultation requirements had been dealt with by panels, and was the subject of an appeal currently under way. His delegation believed that the DSB could move forward on this matter without pre-judging any outcome of the discussion.

The representative of Australia said that he wished to clarify the point raised by his delegation. The point being made was quite separate from the issue that had been raised in recent disputes concerning the measures covered by a panel's terms of reference namely the adequacy or inadequacy of consultations. Australia's concern was focussed on the legal authority of the DSB to establish a panel with standard terms of reference when it was clear that the request for a panel included measures which had not been the subject of Article 4 consultations. Australia was concerned with the legal authority of the DSB to establish a panel as opposed to the scope of a panel's jurisdiction once such a panel had been established.

The representative of Hong Kong, China said that Australia had raised important issues, in particular with regard to the legal authority of the DSB to establish a panel at this juncture while it was clear that the 1995 consultation did not cover the 13 December 1996 policy decision. He noted that the United States did not dispute this fact. Therefore, the DSB had to consider that if a panel was established, then the DSB would take a decision that would be legally void. In accordance with Article 7 of the DSU, if both parties could not reach agreement within 20 days on terms of reference, then standard terms of reference would have to apply which would include the 1996 policy decision referred to by the United States in its request. Potentially, the DSB's decision at the present meeting would be illegal. The legal authority as stated by Australia had to be carefully considered before the DSB agreed to establish a panel.

The representative of the Philippines said that the questions of specificity of panel requests had, in the past, been decided by panels. However, the issue at hand was a separate matter since it related to the authority of the DSB to establish a panel. It was not a matter of evidence which could be resolved in panel proceedings, but the DSB was requested to establish a panel on, *inter alia,* a measure which had not been considered in the 1995 consultations. He did not know how the DSB could act in this regard at this stage. It would be a political risk to refer to a panel the very prerogative of the DSB to establish panels. His delegation believed that Members should not allow such an outcome. Once a panel had been established, it was a conclusive action, but the DSB had to be certain of the legal basis for the establishment of panels. Normally, panels were established as a matter of routine on second requests, but this did not mean that the DSB should forego legal grounds for the establishment of a panel.

The representative of the United States drew attention to the following wording contained in its panel request: "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…" He queried why delegations were pre-judging, or questioning the merits of the status of the 1996 policy decision. He

said that delegations that had these concerns could reserve their third-party rights and make their legal arguments before the panel.

The representative of Australia said that both Hong Kong, China and the Philippines had elaborated on his delegations concerns, namely that the establishment of a panel on this matter with subsequent consultations on the terms of reference would create the potential for the illegal establishment of a panel. The question raised by Hong Kong, China in this regard was an important one which should be considered carefully. With regard to the US comments, he wished to reiterate Australia's concern that the 1995 consultations did not include the 13 December 1996 policy decision. He said that Australia's concerns went beyond this question, and as he had previously mentioned, the United States had also referred in its panel request to Articles 7 and 8 of the SPS Agreement which were not covered in the 1995 consultations.

The Chairman said that the arguments made at the present meeting could be raised before the panel.

The representative of the United States said that the issue of the provisions referred to in panel requests compared to the provisions referred to in requests for consultations, had been discussed many times before panels. He therefore considered that Australia's concerns could also be raised before the panel. He noted that the US request for consultations stated that the provisions of these agreements with which these measures appeared to be inconsistent "include but are not limited to the following…" so there was no basis for the claim related to this point.

The representative of Australia said that he wished to emphasize his delegation's concern with procedural safeguards prior to the establishment of a panel.

The Chairman said that under Article 6.1 of the DSU, when a request for the establishment of a panel was made for the second time, unless there was negative consensus then the panel would have to be established. With regard to the terms of reference, Article 7 of the DSU was very clear. If there was no agreement between the parties within the next 20 days standard terms of reference would apply. In the latter case, the panel would deal with all the US claims as well as the scope of the case. Whether the US claims were legitimate or not would be decided by the panel since under the current practice panels decided on such matters. The phrase referred to by the United States "including but not limited to" had already been argued before panels. The panel would be fully aware of the discussion at the present meeting and the parties to the dispute would make their arguments before the panel. It was his understanding that the panel would be competent to decide on the issues raised at the present meeting. He noted that if Australia would implement the ruling of the panel and the Appellate Body in its dispute with Canada by 6 July 1999, then the new panel proceedings would be terminated.

The representative of India said that he recognized the point made by the Chairman that there was a certain amount of automaticity built into the process of the establishment of panels, and that there was very little that the Chairman could do unless the DSB decided otherwise. The United States had stated that its request for consultations referred to the phrase "including but not limited to". In a case involving India and the United States, it had been clearly and categorically ruled that this phrase could not be used to expand the scope of a panel request. The procedural issue raised by Australia was very important and increasingly the DSB was going to face this dilemma. But the purpose for which consultations had been provided for in the DSU had to be appreciated and the procedural requirements had to be respected by all Members. Otherwise the compulsion would be that the DSB had no option because of the negative consensus rule to establish a panel. He suggested that it would be appropriate to consider this matter in the DSU review. He noted that the provisions relating to the SPS Agreements were not explicitly included in the US request for consultations. However, one had no choice under the existing DSU provisions but to establish a panel. He believed that Members should find a way to deal with such situations.

The representative of Australia said that it was not the intention of his delegation to block the establishment of a panel, but he wished to make clear that Australia was not seeking to have a panel adjudicate on its terms of reference. He had tried to state clearly that he was aware of the discussions that had taken place in other panels on this issue, and these were not the concerns that Australia was raising. Australia's concern was with the legal authority of the DSB to establish a panel with terms of reference that did not flow from Article 4 consultations. It was Australia's understanding that the panel would be established, and that Australia would consult with the United States on the terms of reference of the panel. However, if the DSB established a panel prior to the results of consultations on the terms of reference, the potential would exist that the panel was established illegally.

The representative of Malaysia said that his delegation fully shared the concerns expressed by Australia, India, Hong Kong, China and the Philippines, and believed that this matter should be addressed in the DSU review.

The representative of Korea said that his delegation shared the concerns expressed by previous speaker. He wished to comment on the wording referred to by the United States, namely, "including but not limited to". Korea believed that this wording could not cover measures which were not in existence at the time of the consultations. Such a broad interpretation of the coverage of the claims was not only against the specificity requirement of Article 6 of the DSU, but also undermined the predictability of the system.

The representative of Hong Kong, China said that in the spirit of finding a way out of this situation and without compromising the procedural rights of the United States under Article 6.1 and, at the same time, preserving the legal rights of Australia to procedural fairness, he suggested that the United States and Australia consider whether they could agree that the DSB decide to establish a panel at the present meeting. At the same time, the DSB should affirm the legal requirements of consultations before the establishment of a panel, and should give directives to the panel to take into account only those matters raised during the 1995 consultations. The DSB should make such directives in order to provide a way out. He urged the United States and Australia to consider this option.

The representative of the European Communities said that no precedent should be set at the present meeting. It was not the first time that the United States had used automaticity under the DSU provisions and had forced the DSB's decisions , the legality of which were dubious. He regretted that a similar situation was taking place at the present meeting. If a panel were to be established, the EC would reserve its third-party rights in order to state its position on the systemic problem at hand, and also due to its commercial interest related to its exports of salmonids. He underlined that although automaticity was a good thing it should not be abused.

The Chairman said that there was no disagreement on the establishment of the panel under Article 6.1, therefore the panel had to be established. He asked whether the parties to the dispute wished to respond to the suggestion made by Hong Kong, China.

The representative of the United States said that his delegation appreciated the effort that Hong Kong, China had made in an attempt to deal with the concerns raised. His delegation did not think that this was the best way to deal with the problem, and the DSB should not give directives to panels, but the parties to the dispute should take up these issues before the panel.

The representative of Australia said that his delegation could agree with the United States on this matter. Australia accepted the principles of negative consensus and to that extent it understood that it could not block the establishment of a panel. If the DSB were to ask his delegation whether it agreed to the establishment of a panel, the answer would be negative. Australia was aware that under

the DSU it could not block the establishment of a panel, and this was not what it had tried to do. However, Australia had serious concerns about the potentially illegal status of the panel that would be established at the present meeting.

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 the standard terms of reference would apply. He noted that 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 might authorize its Chairman to draw up the 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.

The representatives of Canada, the European Communities, India, Norway and Hong Kong, China reserved their third-party rights to participate in the Panel's proceedings.

The representative of Canada said that her delegation wished to state that Australia had to implement the DSB's recommendation before 6 July, and the United States had made it clear that it was looking forward to Australia's implementation to obviate the need for this panel process to continue. Canada was the complaining party in that dispute, and was also looking forward to implementation by Australia within the reasonable period of time. In the event that this did not happen, Canada reserved its third-party rights in this panel proceeding.

The DSB took note of the statements.

4. Korea - Measures affecting government procurement

(a) Request for the establishment of a panel by the European Communities (WT/DS163/4)

The Chairman recalled that the DSB had considered this matter at its meeting on 26 May 1999, and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS163/4.

The representative of the United States said that Korea was engaged in airport procurement practices that were inconsistent with its obligations under the Agreement on Government Procurement (GPA). Prior to, and during consultations, Korea had not once contested the GPA-inconsistency of its practices. Instead, Korea had asserted that the entities responsible for Inchon Airport procurements were not within its obligations under the GPA, and therefore not subject to the provisions of the GPA. However, the United States' GPA commitments with respect to Korea, and its acceptance of Korea as a party to the Agreement, had been based on a balance of rights and obligations that included the coverage of Korean airport procurements under Annex 1 of the GPA. Korea's subsequent assertion that these entities were not covered seriously disrupted this mutually-agreed balance. In an effort to resolve this matter, US Government officials had engaged the Korean Government in dispute

settlement consultations on 17 March 1999 as well as in multiple 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 at the 26 May DSB meeting, when the United States had requested the establishment of a panel, his delegation had stated that Korea's measures related to procurement in the construction of the new Inchon International Airport were not subject to the provisions of the GPA. Entities responsible for Inchon International Airport procurement were not covered by the GPA. Korea recognized, however, that a panel should be established at the present meeting in accordance with the provisions of Article 6.1 of the DSU. Korea was prepared to defend its airport procurement practices before the panel. Korea also agreed that the panel would be established with standard terms of reference as set out in Article 7 of the DSU.

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 the European Communities and Japan reserved their third-party rights to participate in the Panel's proceedings.

5. Argentina - Measures affecting the export of bovine hides and the import of finished leather

(a) Request for the establishment of a panel by the European Communities (WT/DS155/2)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS155/2.

The representative of the European Communities expressed regret that Argentina had not taken the necessary steps to liberalize its trade in hides. Statistics showed that despite the reduction of the export tax on bovine hides, there were still no Argentinean exports. The EC considered the following measures listed in its panel request were not in conformity with Argentina's obligations under the GATT 1994, and in particular: (i)Article XI:1, of GATT 1994 which, *inter alia*, prohibited Members to institute or maintain prohibition on the export of products destined for the territory of any other Member; (ii) Article X:3(a) of GATT 1994 which, *inter alia*, imposed the obligation on Members to administer laws and regulations pertaining to requirements on exports in a uniform and impartial manner; and (iii)Article III:2 of GATT 1994, which provided that products of the territory of any Member which were imported into the territory of any other Member shall not be subject to internal taxes in excess of those applied to like domestic products. Accordingly, the EC was requesting the establishment of a panel.

The representative of Argentina said that his delegation had two concerns. First, more than two years of negotiations and discussions with the EC, carried out within the framework of the investigation procedure provided for in the EC Council Regulation 3286/94, had led to bilateral meetings and Argentina's proposal that were not satisfactory to the EC. In that context, Argentina had modified its system of duties on exports of hides. Therefore, Argentina was surprised that the EC had decided to request a panel to resolve the dispute, the content of which was not clear. The content was not clear because Argentina had modified the coverage of the duties and had introduced a phase-out. This contradicted the EC's assertion that the situation in Argentina had not changed. The EC was no longer questioning export duties *per se*, but was trying to refer to a provision which had been explained at length. That provision was the Resolution establishing the participation of the tanning industry in the export of hides. The EC had asked Argentina about the power and the scope of this participation, in particular, the legal powers granted to the raw and semi-tanned hides industry to

block any particular export transaction. Argentina had explained in detail the scope of the Resolution and had made it clear that the experts of the raw and semi-finished hides industry did not have any legal power to prevent an export transaction. It therefore appeared that the EC had doubts about the Argentine legislation, which did not contain any provisions that could give rise to the situation alleged by the EC.

He also wished to contest the EC's claim concerning a de facto export ban since during 1999 there were exports of hides to Italy. This contradicted the EC's claim and Argentina would provide the EC with the relevant statistics. In addition, he wondered how this legal provision could possibly be brought into conformity with the WTO. The EC's second allegation concerned the collection in advance of VAT and profit tax. Argentina thought that that the EC would like to impose disciplines in the area of tax policy, which went beyond what had been established under Article III of GATT 1994. No Member, and in particular no developing country Member, might be obliged to undertake commitments that went beyond those in the WTO Agreement. This seemed to be the case of inverse special and differential treatment against Argentina. His delegation wondered if this could be considered as a case of cross-obligations since Argentina's tax policy was part of the agreement which Argentina had signed with the IMF. He therefore asked whether the EC had taken into account the scope of Article 3.7 of the DSU, namely the utility of its action under the present procedure. Accordingly, Argentina opposed the establishment of a panel at the present meeting, and hoped that the EC would take up its offer, made during the consultations held in February 1998, to carry out a further round of consultations in an effort to resolve this dispute. Argentina was ready to meet with the EC both in Buenos Aires and Geneva to deal with this question.

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

6. United States - Anti-Dumping Act of 1916

(a) Request for the establishment of a panel by Japan (WT/DS162/3)

The Chairman drew attention to the communication from Japan contained in document WT/DS162/3.

The representative of Japan said that his Government was requesting the establishment of a panel on this matter. The US Anti-Dumping Act of 1916, 15 U.S.C. 72 (1994) stipulated to the effect that the importation or sales of imported goods within the US market in certain circumstances shall be unlawful, constituting a criminal offence, as well as being subject to a civil lawsuit. Judicial decisions under the US 1916 Act were made without the procedural safeguards provided for in the Anti-Dumping Agreement. It should be noted that a court action had been brought and was presently underway under the US 1916 Act against the affiliates of Japanese companies. Japan considered that the US 1916 Act was neither consistent with nor justified by the following provisions of the WTO Agreement: (i) Article III:4 of GATT 1994 which required that imported products shall be accorded treatment no less favourable than that accorded to like domestic products in respect of all laws, regulations and requirements affecting their internal sales; (ii) Article VI of GATT 1994 and the Anti-Dumping Agreement, in particular Article VI:2 of GATT 1994 and Article 18.1 of the Anti-Dumping Agreement which permitted imposition of anti-dumping duties as the only possible remedies for dumping. Articles 1, 2, 3, 4, 5, 9 and 11 of the Anti-Dumping Agreement which stipulated necessary requirements for an anti-dumping duty to be applied only under the circumstances provided for in Article VI of GATT 1994; (iii) Article XI of GATT 1994 which provided that no prohibition or restrictions other than duties, taxes or other charges shall be instituted or maintained on the importation of any product of other Members; and (iv) Article XVI:4 of the Marrakesh Agreement establishing the WTO which confirmed the obligation of Members to ensure the conformity of their laws with their obligations as provided in the WTO Agreements, and Article

18.4 of the Anti-Dumping Agreement. On 10 February 1999, Japan had requested consultations with the United States with regard to the US 1916 Act. These consultations which had been held on 17 March in Geneva enabled the parties to have a better understanding of their respective positions, but no mutually satisfactory solution had been found. In light of the above, Japan requested that a panel be established at the present meeting in accordance with the relevant provisions of the WTO Agreement specified in its request for a panel with standard terms of reference as provided for in Article 7.1 of the DSU.

The representative of the United States said that his country was disappointed that Japan had taken the step of requesting a panel. The United States believed that the US 1916 Act was fully consistent with its WTO obligations. Furthermore, in the 82 years since the enactment of this Act, no party had ever been awarded money damages or any form of relief. Thus, the trade effects from the statute were *de minimis*. He said that he was aware that two lawsuits under the US 1916 Act were currently pending in US courts. However, even in the Geneva Steel case, the judge who denied the motion to dismiss the case, observed that it might be virtually impossible for Geneva Steel to satisfy the burden of proving requisite intent under the statute. The United States declined to accept the establishment of a panel at the present meeting, but if Japan decided to pursue this matter, the United States would vigorously defend the law.

The representative of the European Communities said that at its meeting on 1 February 1999,[3] the DSB had established a panel at the request of the EC to examine the WTO-compatibility of the US 1916 Act. The EC was confident that the panel would find that the US legislation was in violation of US commitments under the GATT 1994 and the Anti-Dumping Agreement. In case the panel was established at the request of Japan, the EC wished to participate in the proceedings of the panel as a third party.

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

7. United States - Definitive safeguard measures on imports of wheat gluten from the European Communities

(a) Request for the establishment of a panel by the European Communities (WT/DS166/3)

The Chairman drew attention to the communication from the European Communities contained in document WT/DS166/3.

The representative of the European Communities said that on 1 June 1998, the United States had imposed safeguard measures in the form of quantitative restrictions on imports of wheat gluten from, *inter alia*, the EC with a duration for a period of over three years. The measures were not justified under the WTO rules and impaired a significant trade interest of the EC as the major supplier of the product. The EC claims were outlined in its request for a panel and related to various violations of substantive and procedural provisions of the Safeguards Agreement, GATT 1994 and the Agreement on Agriculture. In particular, the serious injury investigation conducted by the US International Trade Commission was, in the EC's view, incomplete and thus in violation of the WTO rules. Furthermore, the measure imposed was: (i) discriminatory because, while Australia's quota allowed it to maintain its trade flow at 1997 levels, the EC by comparison had its 1997 level cut almost by half; (ii) unjustified since serious injury was not established and no causal link was shown between the imports and the situation of the US industry; (iii) overly restrictive, since no justification was given for the imposition of the most protectionist measures; i.e. quota; and (iv) the United States had committed a series of procedural violations of the Safeguards Agreement both with regard to

[3] WT/DSB/M/54

notifications and consultations. In two rounds of consultations under the Safeguards Agreement held on 24 April and 22 May 1998 and under the DSU provisions which had been held on 3 May 1999, the United States had not addressed the EC's concerns. Therefore, the EC had no other option but to request the establishment of a panel.

The EC had noticed with some concern a considerable increase in the misuse of the safeguard instrument by a number of Members. In the EC's view, in several cases, measures had been imposed without proper regard to the provisions of the Safeguards Agreement. This had led the EC to request two panels with regard to the activities in this area by Korea and Argentina. The EC was confident that its concerns would be fully vindicated in both panels. The EC would continue to have resort to dispute settlement in the face of violations of substantive or procedural provisions. The danger of a permissive approach to the imposition of safeguard measures to the multilateral trading system was obvious. The EC had expected the United States to show an example to its trading partners in this area and to take a strong line against excess.

The representative of the United States said that his country believed that it had complied with all its WTO obligations in structuring a safeguard measure that would remedy the serious injury suffered by its domestic industry, while at the same time ensuring that Members had continued access to the US market. The United States had implemented this measure only after its competent authority, the US International Trade Commission, had conducted an exhaustive investigation of the domestic industry. The US system was fully transparent, and the EC's domestic industry had actively participated in these proceedings. Moreover, the United States had consulted with the EC prior to implementing its measure. In allocating its quota, the United States had used the average of imports in the last three representative years for which statistics were available, as required by the Safeguards Agreement. Moreover, the United States had properly notified the Committee on Safeguards of the proposed and final measure as required by Article 12 of the Safeguards Agreement. If the EC decided to pursue this dispute, the United States would vigorously defend its safeguard measure. The United States declined to accept the establishment of a panel at the present meeting.

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

8. Australia - Subsidies provided to producers and exporters of automotive leather

(a) Report of the Panel (WT/DS126/R)

The Chairman recalled that at its meeting on 22 June 1998, the DSB had agreed to establish a panel to examine the complaint by the United States. The Report of the Panel contained in document WT/DS126/R which had been circulated on 25 May 1999, was now before the DSB for adoption at the request of the United States. In accordance with Article 16.4 of the DSU this adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

The representative of Australia said that his country had decided not to appeal the conclusions of the Panel simply in order to try to get rid of this relatively minor issue once and for all. This case concerned one relatively small company, which had been attacked for providing some competition in a tightly held North American market. Australia considered that it could implement the Panel's recommendations. However, at the present meeting, it wished to make a number of comments on the Report and the processes involved. Australia considered that the Panel was wrong in its findings and conclusions about the payments under the Grant Contract, and did not agree with the approach taken by the Panel on the interpretation of the "in fact" standard in Article 3.1 of the Subsidies Agreement. This was currently being clarified in another case before the Appellate Body, and there might need to be other cases before a workable view could be formulated. It was essential for the good of the system that an approach be worked out with regard to the rules of the nature of Article 3.1(a) of the

Subsidies Agreement, so that governments could have some degree of certainty about outcomes. A piecemeal approach to the issue of the "in fact" standard would be damaging to the respect of a rules-based system and could provide scope for continuing harassment by major countries. This was of particular concern for subsidies, given that governments could rarely take money back once it had been lawfully granted. How could a government operate a policy where it might be challenged on the basis of guesses at its motives, press speculation and commercial hyperbole about the market-place. Australia considered that payments under the Grant Contract were fully consistent with its obligations and that the Panel had taken the incorrect view about the circumstances involved. Australia could have appealed this but had chosen not to try to reargue this case before the Appellate Body. On the other hand the minutes of the present meeting should show that Australia did not support the adoption of the Panel Report. However, Australia welcomed certain aspects of the Report such as the common sense findings that the Loan Contract was WTO-consistent and that the legal nature of one subsidy did not taint the legal nature of a replacement subsidy.

On the other hand, Australia was disappointed that the Panel had chosen not to redress the abuse of process engaged in by the United States, both in terms of the improper establishment of the Panel and its failure to meet the requirements of Article 4.2 of the Subsidies Agreement regarding its statement of available evidence. Australia had raised these systemic issues and hoped that the same standards would be applied to the United States and other major countries when they were respondents. He suggested that where Members decided to read the Report, that they read the descriptive part as well as the findings and conclusions in assessing this and other aspects.

In particular, this case had centered on the sales performance targets in the Grant Contract. These targets had been introduced as a result of concerns expressed by the United States regarding serious prejudice, and Australia had sought to comply with the 5 per cent figure in Article 6.1(a) of the Subsidies Agreement. However, actual compliance with the targets was not required under the Contract as had been demonstrated to the Panel by what had actually happened. The fact was that the money had been paid out and was legally the company's, with no call on it by the Government. Moreover, as was clear from the descriptive part of the Report, that these sales performance targets were not export targets, they were not limited to automotive leather, indeed they were not limited to trade in goods. As demonstrated to the Panel in Business Confidential Information, a substantial proportion of the sales of the company were not only of domestic sales of automotive leather, but also sales of other products it produced as well as other trading activities, i.e. services. This had raised the systemic issue that the Panel had appeared to find a potential conflict between the "in fact" standard under Article 3.1(a) and actions by a government to comply with commitments under Article 6.1(a) in good faith. Finally, he reiterated that Australia did not support the adoption of the Panel Report and had continuing concerns about the Panel's approach.

The representative of the United States wished to express its gratitude to the members of the Panel and the Secretariat who had worked on this case. This dispute which involved many difficult issues, had to be considered under the "fast-track" time-frame of Article 4 of the SCM Agreement, and the Report was generally of high quality. With respect to the content of the Report, the United States wished to make a few comments on some of the more noteworthy aspects. First, with respect to the need for a "statement of available evidence" in a consultation request made under Article 4.2 of the SCM Agreement, the United States was pleased that the Panel had agreed that the US consultation request had satisfied the requirements of Article 4.2. However, the United States was equally pleased that the Panel recognized that Article 4.2 did in fact require something more than the DSU. Too many Members had been ignoring the requirements of Article 4.2, thereby depriving responding Members in prohibited subsidy disputes of their rights under the SCM Agreement. In addition, on another procedural matter, the United States was pleased that the Panel had rejected Australia's artificial distinction between the Grant Contract and the actual payments of the grants by Australia. If the panel had accepted Australia's arguments on this point, it would have made it much easier for a subsidizing Member to evade its obligations under the SCM Agreement.

With regard to substance, the Panel had properly approached the question of de facto export subsidization by looking at all of the facts of the case. This approach which was required by the text of the SCM Agreement and was what the drafters had intended, advanced the objectives of the SCM Agreement, by making it more difficult for a Member to circumvent the Agreement's disciplines regarding export subsidies. In particular, the Panel had properly rejected the argument that the second sentence of footnote 4 of the SCM Agreement precluded a panel from considering the fact that a subsidy was granted to enterprises which exported. The Panel had correctly found that the second sentence did not preclude a panel from taking this fact into account. Instead, it simply precluded a panel from relying solely on that fact to find a de facto export subsidy.

Finally, the United States was particularly pleased by the Panel's analysis of the "sales performance targets" upon which the grants to Howe were conditioned. The Panel had correctly concluded that because the Australian market for automotive leather was too small to allow Howe to satisfy these targets domestically, these so-called "sales performance targets" were, in reality, "export performance targets". This aspect of the Panel's findings, if followed, would ensure that Members would not be able to circumvent the prohibition against export subsidies simply by conditioning subsidies on the fulfilment of sales targets or objectives that could be met only by means of exporting. On the other hand, the United States was concerned by the Panel's finding that the loan to Howe was not also a de facto export subsidy. In the view of the United States, the evidence before the Panel could have supported the opposite conclusion. However, the United States was not interested in prolonging this long-standing dispute by means of an appeal. Therefore, while the Panel report was not perfect, there was much in it that made it worthy of adoption, and the United States could join in a consensus to adopt the Panel report.

The representative of the European Communities said that the EC was concerned that the Panel's findings seemed to have developed a rather broad definition of export contingency. Although the Panel had made an effort to consider whether conditions attached to the subsidy restricted the freedom of action of the recipient to choose between domestic and export customers, did not seem to base its findings by reference to that criterion. It seemed to be over-interested in the firm's actual or perceived export activity rather than with establishing a solid contingency between the subsidy and export earnings. It thus appeared that the Panel did not seem to consider the possibility that a government could legitimately grant a subsidy to an export-oriented firm without this being an export subsidy. The EC considered that the latter might actually be the case, provided that there was no actual obligation for the firm to restrict domestic sales in favour of exports and provided that export-oriented firms were not systematically favoured over those which sell domestically. Consequently, the EC was concerned that the Panel had not developed a solid argument to establish that the grants were in fact contingent upon export performance. The EC recognized that Australia had the right not to appeal the Panel report and wished that the EC's views be duly reflected in the minutes of the present meeting.

The DSB took note of the statements and adopted the Panel Report contained in WT/DS126/R.