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WORLD TRADE ORGANIZATION

DISPUTE SETTLEMENT BODY
25 February 1997

MINUTES OF MEETING

Held in the Centre William Rappard
on 25 February 1997

Chairman: Mr. Wade Armstrong (New Zealand)

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1. Election of Chairperson

The Chairman said that at its meeting on 7 February 1997[1], the General Council had taken note of the consensus on a slate of names for chairpersons to a number of WTO bodies including the DSB. On the basis of the understanding reached by the General Council, he proposed that the DSB elect Mr. W. Armstrong (New Zealand) as Chairman of the this body by acclamation.

The DSB so agreed.

The outgoing Chairman invited Mr. W. Armstrong to preside over the proceedings of the present meeting.

Mr. W. Armstrong thanked Members for electing him to this position and conveyed sincerest thanks of Members to the outgoing Chairman for his pivotal role in chairing the DSB over the past year. In a notable combination of diplomatic and legal skills, Mr. C. Lafer had made an important contribution to the functioning and consolidation of the DSB and to the implementation of the DSU. The WTO had benefited greatly from Mr. C. Lafer's role. He hoped that the foundations laid by his two predecessors over the past two years would make his task as Chairman of the DSB in 1997 somewhat easier. He wished Mr. C. Lafer well in his new role as Chairman of the General Council.

2. Surveillance of implementation of recommendations adopted by the DSB
- United States - Standards for reformulated and conventional gasoline: status report by the United States (WT/DS2/10/Add.1)

The Chairman recalled that this item was on the Agenda pursuant to Article 21.6 of the DSU which stated 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". At the DSB meeting on 22 January 1997, the United States had submitted its first status report on this matter. Document WT/DS2/10/Add.1 contained a further report by the United States pursuant to Article 21.6 of the DSU.

The representative of the United States said that as provided for in Article 21.6 of the DSU, his country had submitted its second report on the implementation of the DSB's recommendations,

[1]WT/GC/M/18.

which was contained in WT/DS2/10/Add.1. Given the short time since the first report, there were only limited developments to report at the present meeting. Nevertheless, he emphasized that work was proceeding apace and the United States remained committed to a 15-month period for implementation of the DSB's recommendations as stated at the DSB meeting in December 1996.

The representative of Brazil said that his country looked forward to the publication of the proposed amendments to the gasoline rule which would enable the United States to comply with its WTO obligations. He hoped that this would take place at an early date. Brazil wished to underline its understanding that the 15-month period for implementation of the DSB's recommendations had started on 20 May 1996, the date of adoption of the panel report and the Appellate Body report, and noted that nine months had already elapsed.

The representative of Venezuela said that his delegation noted the statement made by the United States, in particular, the reiteration of its commitment to implement the DSB's recommendations within the 15-month period scheduled to elapse in August 1997.

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

3. Hungary - Export subsidies in respect of agricultural products
   - Request by Australia for the establishment of a panel (WT/DS35/4)
   - Request by New Zealand for the establishment of a panel (WT/DS35/5)
   - Request by the United States for the establishment of a panel (WT/DS35/6)
   - Request by Argentina for the establishment of a panel (WT/DS35/7)

The Chairman recalled that the DSB had considered this matter at its meeting on 22 January 1997, and had agreed to revert to it at the present meeting. He proposed that the above-mentioned requests be considered together since they pertained to the same matter. He first drew attention to the communication from Australia contained in document WT/DS35/4.

The representative of Australia said that, as his delegation had stated at the DSB meeting in January 1997, his country attached high priority to compliance with the Uruguay Round commitments in agriculture, in particular in the area of export subsidies. Australia and other concerned Members had been actively working with Hungary in order to find a mutually satisfactory solution that would bring Hungary's practices into conformity with its WTO commitments. To date, these consultations had unfortunately failed to find such a solution. Australia therefore requested the establishment of a panel. However, in the hope that a mutually satisfactory outcome, fully consistent with the WTO, might be found, his country was ready to continue to work with Hungary toward this objective.

The Chairman drew attention to the communication from New Zealand contained in document WT/DS35/5.

The representative of New Zealand said that his country's request for the establishment of a panel on this matter was first made at the DSB meeting on 22 January 1997. New Zealand continued to be concerned at Hungary's export subsidies in excess of its budgetary outlay and quantity commitment levels. It had been hoped that Hungary would bring its practices into conformity with its WTO obligations. Since this was not the case, New Zealand had to put forward its request for the establishment of a panel for the second time. However, it had welcomed Hungary's willingness to consult with New Zealand and other concerned Members even though so far there had been no resolution of the matter. His country hoped that Hungary would continue to work in good faith towards a mutually

acceptable solution through formal dispute settlement proceedings or through any consultations that might progress in tandem with the panel process.

The Chairman drew attention to the communication from the United States contained in document WT/DS35/6.

The representative of the United States said that as noted by the previous speakers the United States and other interested Members had worked long and extensively to resolve this dispute. Unfortunately, these efforts had not been successful thus far. Therefore, he requested the DSB to establish a panel as this matter was under consideration for the second time. It was the United States' understanding that the four requests would be consolidated so that a single panel would examine these complaints in accordance with Article 9.1 of the DSU. Notwithstanding the establishment of a panel, the United States, like the previous speakers, remained interested in pursuing consultations with Hungary aimed at resolving this dispute in a mutually satisfactory manner.

The Chairman drew attention to the communication from Argentina contained in document WT/DS35/7.

The representative of Argentina said that his delegation supported the inclusion of this item on the DSB's agenda for the second time for reasons already stated at the previous meeting. His government attached high priority to compliance with the Uruguay Round disciplines and commitments on agriculture where the major progress had been in the area of export subsidy commitments. He recalled that consultations had been initiated 18 months ago in the Committee on Agriculture. Subsequently on 27 March 1996, a request for consultations with Hungary had been made pursuant to Article 4 of the DSU and Article 19 of the Agreement on Agriculture. The lengthy consultation process undertaken with Hungary by Argentina and other Members had failed to resolve this dispute. For these reasons, Argentina reiterated its request for the establishment of a panel with standard terms of reference as provided for in Article 7.1 of the DSU. His delegation would have preferred to avoid the establishment of a panel and still hoped that after the establishment of a panel his country could continue to work with Hungary towards a mutually satisfactory solution which would safeguard the systemic and trade interests involved in this dispute.

The representative of Hungary regretted that despite his country's continuing efforts to find a mutually satisfactory solution, four complaining parties had decided to proceed with their request for the establishment of a panel. He reiterated the view that given the unique nature of this matter, Hungary believed that the establishment of a panel was not a suitable way to provide a positive solution to a problem caused by errors in its Schedule. Since the protection of its national interests related to the preservation of agricultural activity was at stake, Hungary thought that a panel was not an appropriate way to deal with this matter and could pose risks to the dispute settlement system.

However, since this request appeared on the DSB's agenda for the second time his country no longer objected to the establishment of a panel. Due to the unique conditions which lay at the root of the problem, he requested the complaining parties to hold consultations on the terms of reference of the panel pursuant to Article 7.3 of the DSU in order to take account of the exceptional circumstances outlined in WT/L/144. This was indispensable for the achievement of a positive solution which was the ultimate objective of the dispute settlement mechanism within the meaning of Article 3.7 of the DSU. He assured that Hungary was ready to make further efforts to find a mutually acceptable solution to this dispute outside the panel procedure, which would enable Hungary to produce and export agricultural products, and to make the necessary adjustments in this sector under socially acceptable conditions.

The representative of the United States said that his delegation noted Hungary's request for special terms of reference. The United States would be ready to give serious consideration to any proposal that would be made by Hungary but had some doubts with regard to the applicability of Article 7.3 of the DSU. There was no need for the Chairman of the DSB to draw-up the terms of reference in this particular case. Therefore, his delegation would not be in a position to join in a consensus, pursuant to Article 7.3 of the DSU, to authorize the Chairman to do so. This however, did not exclude consultations among the parties pursuant to Article 7.1 of the DSU within the next 20 days.

The representative of New Zealand supported the view expressed by the United States.

The Chairman said that with respect to the terms of reference and in light of the request made by Hungary, his intention would be to invite the parties to the dispute to consult and to draw-up the terms of reference of the panel in accordance with Article 7 of the DSU.

The representative of Australia said that his country would be willing to consult bilaterally with Hungary on the terms of reference.

The representative of Hungary supported the Chairman's proposal with regard to the terms of reference.

The representative of Argentina said that his delegation was ready to enter into consultations pursuant to Article 7 of the DSU, as suggested by the United States.

The DSB took note of the statements and agreed to establish a single panel pursuant to Article 9.1 of the DSU and to the Chairman's proposal that the parties to the dispute consult and draw-up the terms of reference of the panel in accordance with Article 7 of the DSU.

The representatives of Canada, Japan, Thailand and Uruguay reserved their third-party rights to participate in the panel proceedings.

4. Taxation of foreign film revenues
   - Request by the United States for the establishment of a panel (WT/DS43/2)

The Chairman said that the DSB had considered this matter at its meeting on 22 January 1997, and had agreed to revert to it at the present meeting. He drew attention to the communication from the United States contained in document WT/DS43/2.

The representative of the United States said that at the previous meeting of the DSB his delegation had explained why the United States considered Turkey's municipality tax to be inconsistent with its obligations under Article III of GATT 1994. The United States had engaged in consultations with Turkey with the aim to resolve this dispute. His delegation had hoped that at the present meeting it would have been in a position to announce that this dispute had been resolved. While the United States remained hopeful that a mutually agreed solution might be reached, unfortunately, thus far the consultations had not yet resulted in such a solution. Accordingly, in order to preserve its rights, the United States requested the DSB to establish a panel as this matter was under consideration for the second time.

The representative of Turkey said that his government continued to hope that a mutual understanding with the United States on this matter could be reached.

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 Canada reserved his government's third-party rights to participate in the panel proceedings.

5. Argentina - Measures affecting imports of footwear, textiles, apparel and other items - Request by the United States for the establishment of a panel (WT/DS56/5)

The Chairman recalled that the DSB had considered this matter at its meeting on 22 January 1997, and had agreed to revert to it at the next meeting. This item was on the agenda of the present meeting at the request of the United States. He drew attention to the communication from the United States contained in document WT/DS56/5.

The representative of the United States said that at the DSB meeting in January 1997, his delegation had explained that with respect to imports of footwear, textiles, and apparel, Argentina had imposed specific duties in excess of its tariff commitments. In addition, it had imposed a statistical tax of 3 per cent ad valorem on imports of textiles, apparel, footwear, and other items. The United States believed that these measures violated Articles II, VII, VIII and X of GATT 1994, Articles 1 to 8 of the Agreement on Implementation of Article VII, and Article 7 of the Agreement on Textiles and Clothing.

His country had held several rounds of consultations with Argentina, including on 10-12 February 1997. During these consultations, as indicated in document WT/DS56/5, Argentina had represented that it had modified its labelling regime, which had satisfied the US concerns. However, the United States had entered into consultations with Argentina with the aim to resolve this dispute in its entirety. Despite the resolution of the issue concerning labelling, the consultations had not yet produced a mutually acceptable solution with respect to specific duties and the statistical tax. Therefore, in order to preserve its rights in this matter, the United States requested for the second time the establishment of a panel. Notwithstanding the establishment of a panel at the present meeting, his country remained open to pursue consultations with Argentina aimed at resolving this dispute in a mutually satisfactory manner.

The representative of Argentina said that in accordance with Article 6.1 of the DSU his country accepted the establishment of a panel with the terms of reference as contained in WT/DS56/5. He underlined that most of the measures mentioned therein were no longer in force in Argentina. He noted that the United States had recognized that Argentina's modified labelling requirements had satisfied the concerns raised by the United States in this area. Despite the establishment of a panel, his delegation hoped that within the framework of ongoing consultations it would still be possible to arrive at a mutually satisfactory solution on matters which in the view of the United States were still outstanding.

The representative of Hungary said that his delegation had serious concerns with regard to Argentina's specific duties imposed on various textile items in excess of the bound rate of 35 per cent ad valorem provided in its Schedule. Due to these tariff increases Hungary's textile exports which represented a considerable part of its total exports to Argentina had practically ceased during the past year. In October 1996, Hungary had joined the consultations requested by the United States with Argentina.[2] Although these consultations had not resulted in a satisfactory solution his delegation continued to hope that the parties to the dispute would find a mutually acceptable arrangement outside the panel procedures.

[2]WT/DS56/2.

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 India reserved their third-party rights to participate in the panel proceedings.[3]

6. United States - Import prohibition of certain shrimp and shrimp products
   - Request by Malaysia and Thailand for the establishment of a panel (WT/DS58/6)
   - Request by Pakistan for the establishment of a panel (WT/DS58/7)

The Chairman proposed that the above-mentioned requests be considered together since they pertained to the same matter. He first drew attention to the communication from Malaysia and Thailand contained in document WT/DS58/6. He recalled that the DSB had considered this matter at its meeting on 22 January 1997, and had agreed to revert to it at the present meeting.

The representative of Thailand, speaking also on behalf of Malaysia, said that Malaysia and Thailand had requested the establishment of a panel because their rights under the WTO Agreement had been impaired and nullified as a result of certain measures taken by the United States. Efforts to resolve this matter through consultations had failed to achieve a desired result. At the DSB meeting on 22 January 1997, Malaysia and Thailand had requested the establishment of a panel. However, due to a lack of consensus a panel could not be established at that meeting. At the present meeting therefore, he requested that a panel be established in accordance with Article 6.1 of the DSU.

In 1989, the United States had enacted Section 609 of Public Law 101-162 which prohibited imports of shrimp or shrimp products harvested with commercial fishing technology which could affect sea turtles unless: (i) a harvesting nation was certified by the United States as having a regulatory programme to protect sea turtles governing the incidental taking of sea turtles comparable to that of the United States; and (ii) a rate of the incidental taking of sea turtles was comparable to the US rate.

As a result of this law, subsequent rulings by the US Court of International Trade, and the government's implementing guidelines, wild harvested shrimp and shrimp products from Malaysia and Thailand as well as other countries could not enter into the United States without a certification that the exporting country had a regulatory programme which required all commercial shrimp trawl vessels to use turtle excluder devices (TEDs). Shrimp and shrimp products harvested in a manner that did not affect sea turtles, such as aquaculture, could continue to be exported to the United States.

Malaysia and Thailand did not object to the goal of protecting sea turtles and as such had enacted and seriously and vigorously implemented their own sea turtle protection laws. The US law was extra-territorial in scope and its implementation was arbitrary equivalent to unilateral trade sanctions taken by the United States in order to achieve its own policy objectives. Such unilateral measures were inconsistent with the spirit and the letter of the WTO Agreement, including Articles I, XI and XIII of GATT 1994. The law which required the use of TEDs and its implementation by the United States constituted *prima facie* nullification and impairment of the benefits accruing directly or indirectly to Malaysia and Thailand.

Since its implementation, the US law had caused a substantial trade loss to Thailand and Malaysia. This drop might continue in the future unless the measures taken by the United States be

[3]After the meeting Hungary reserved its third-party rights.

brought into line with the WTO Agreement. Malaysia and Thailand had engaged in consultations with the United States in an effort to resolve this dispute. Unfortunately, these consultations had failed to produce a mutually agreed solution to this dispute. Therefore, the above-mentioned countries had no choice but to request the establishment of a panel.

The Chairman drew attention to the communication from Pakistan contained in document WT/DS58/7.

The representative of Pakistan said that his country's shrimp exports to the United States had been adversely affected by the US embargo. Therefore, together with India, Malaysia and Thailand, Pakistan had requested consultations with the United States on 8 October 1996. The consultations had been held on 19 November 1996. Although shrimp was harvested in Pakistan under preventive procedures with no mechanical retrieval system, parties to the dispute had failed to resolve the matter. Therefore, Pakistan joined Malaysia and Thailand in requesting the establishment of a panel in accordance with Article 6 of the DSU.

The representative of the United States said that his delegation had questioned at the previous meeting the decision by Malaysia and Thailand to request the establishment of a panel. It was his delegation's understanding that a panel would be established at the present meeting. In the light of the most recent decision of the US Court of International Trade, Section 609 of Public Law 101-162 -- which authorized the prohibition -- had only a small effect on trade from Pakistan. However, his country recognized Pakistan's right to raise this matter. His delegation did not oppose the establishment of a panel in response to Pakistan's request. This position, however, was based on the understanding that this panel would be consolidated with the panel requested by Malaysia and Thailand pursuant to Article 9.1 of the DSU, since the issues raised by Pakistan were covered in the request by Malaysia and Thailand.

The DSB took note of the statements and agreed to establish a single panel pursuant to Article 9.1 of the DSU with standard terms of reference.

The representatives of Australia, Colombia, the European Communities, Guatemala, Hong Kong, India, Japan, Mexico, Nigeria, the Philippines, Singapore, and Sri Lanka reserved their third-party rights to participate in the panel proceedings.[4]

7. Guatemala - Anti-dumping investigation regarding portland cement from Mexico
- Request by Mexico for the establishment of a panel (WT/DS60/2)

The Chairman drew attention to the communication from Mexico in document WT/DS60/2.

The representative of Mexico said that his country had included this item on the agenda of the present meeting in order to request the establishment of a panel to examine the consistency of the anti-dumping investigation carried out by Guatemala with regard to imports of portland cement from Mexico. The main arguments of this case were contained in document WT/DS60/2. In Mexico's view the anti-dumping investigation was inconsistent with, at least, Article VI of GATT 1994 and Articles 2, 3, 5, 6 and 7 of the Anti-Dumping Agreement and Annex I thereto. This anti-dumping investigation should never have been initiated due to the inconsistencies which had occurred. Both its initiation and its subsequent conduct had nullified or impaired the benefits accruing to Mexico under the WTO Agreement.

[4]After the meeting Costa Rica, Ecuador and Senegal reserved their third-party rights.

The aspects of investigation presenting the main inconsistencies with the Anti-Dumping Agreement were related to its initiation, preliminary resolution and the final stage of proceedings and indicated in document WT/DS60/2. The application for the initiation of the investigation which had been submitted by the sole cement-producing firm in Guatemala contained many shortcomings. One of them was that the alleged dumping had been based on only two invoices, each for one sack of cement, as proof of prices on the Mexican market. This could hardly be considered as representative of normal value. As proof of the export price, the only evidence submitted had been photocopies of two import certificates for a total value of about US$ 30,000. The petitioner had not submitted any evidence of existence of the threat of injury to the Guatemalan industry. Information to substantiate the threat of injury had not been available until the investigation had been initiated. With regard to the causal relationship between the dumped imports and the alleged threat of injury to the Guatemalan industry no evidence had been submitted.

Mexico believed that the Guatemalan authorities had initiated this investigation without examining the accuracy and relevance of the evidence submitted in the application. They had decided to initiate this investigation despite *inter alia* the absence of relevant data to calculate normal value, shortcomings in the methodology for comparing the normal value with the export price, absence of evidence of threat of injury to the Guatemalan industry and absence of relevant proof or even arguments to demonstrate the existence of a causal link between alleged dumping and the alleged threat of injury. Furthermore, Mexico had not been notified prior to the initiation of the investigation, and the obligation to make available the full text of the application to the exporter and to Mexico as soon as the investigation had been initiated had not been fulfilled. The above were only examples of some inconsistencies in connection with the initiation of the investigation but since there were other inconsistencies in connection with the investigation as a whole, he drew attention to Mexico's arguments in document WT/DS60/2 which contained further details on this matter and requested the establishment of a panel.

The representative of Guatemala said that consultations had been held with Mexico on 9 January 1997, in the course of which Mexico had been informed that Guatemalan industry had been adversely affected by dumped imports of portland cement from the Cruz Azul Company. Further to these consultations the Cruz Azul Company had undergone domestic administrative procedures in accordance with Guatemalan law. On 13 February 1997, there had been two appeals for review by the Cooperativa La Cruz Azul SCL and Distribuidora Comercial Molina. At the present meeting Guatemala was not in a position to join in the consensus to establish a panel until its domestic procedures, which were under way, would be finalized.

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

8. European Communities - Customs classification of some computer equipment - Request by the United States for the establishment of a panel (WT/DS62/4)

The Chairman drew attention to the communication from the United States contained in document WT/DS62/4.

The representative of the United States said that his country had requested the establishment of a panel to help resolve a dispute that had its origins in mid-1995. As a result of the Regulation[5] adopted by the Commission of the European Communities which reclassified certain local area network (LAN) adapter cards together with actions taken by customs authorities of member States through

[5]Commission Regulation (EC) No 1165/95 of 23 May 1995 concerning the classification of certain goods in the combined nomenclature.

reclassification of other LAN equipment and certain types of personal computers (PCs), imports of these products from the United States had become subject to duties in excess of the bound rates in the Communities' Schedules. These actions had affected an increasing volume of trade which had already reached hundreds of millions of US dollars. The United States had hoped that the Communities would adhere to their Schedules and continue to apply duties at the rates provided for these products: i.e, duties under the computer equipment (automatic data processing) tariff category. To date, efforts to resolve this dispute bilaterally had not succeeded. Since the Communities had not met its commitments, the United States had no other recourse than to request the establishment of a panel.

The representative of the European Communities said that the US request for a panel alleged a violation by the Communities and their member States of Article II of GATT 1994, whereas the consultations that had been conducted with the Communities had only addressed an alleged violation by the Communities. The request for a panel had also mentioned the implementation of the Communities' customs rules by customs authorities in member States other than the United Kingdom and Ireland while during the consultations the implementation of the EC customs rules had been limited to the United Kingdom and Ireland.

The request for a panel had extended the scope to products not mentioned during the consultations. While the request for consultations had only covered certain LAN equipment namely, "automatic data processing machines and units thereof" as well as "telecommunication apparatus", the request for a panel referred to "all types of LAN equipment - including hubs, in-line repeaters, converters, concentrators, bridges and routers - in excess of those provided for in the Communities' Schedules".

The Communities had always taken the position that a strict relationship between consultations and the establishment of a panel be maintained in order to preserve clarity and protection of the right of defence in the panel procedure. This had not been respected by the United States. With this proviso, the Communities accepted the establishment of a panel.

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 India, Japan, Korea and Singapore reserved their third-party rights.

9. European Communities - Duties on imports of grains
   - Request by the United States for the establishment of a panel (WT/DS13/5)

The Chairman drew attention to the communication from the United States contained in document WT/DS13/5.

The representative of the United States said that his country remained very concerned about the reference price system adopted by the European Communities with regard to its tariff concessions on grains scheduled to be implemented on 1 July 1995. The United States continued to be at a loss as to how this system was consistent with the Communities' tariff bindings. While it remained hopeful that this matter might yet be resolved in a mutually satisfactory manner, the United States in order to preserve its rights, had submitted a new request for a panel to examine this matter. His delegation expected that a panel would be established at the next meeting of the DSB unless the Communities had by that time satisfactorily resolved this matter.

The representative of the European Communities said that the Communities were not willing to accept the request for a panel at the present meeting. This request was premature since consultations

were currently under way to find a solution to this matter. His delegation believed that adequate time should be allowed for these consultations, at least until a meeting of the DSB in April. He believed that it would be appropriate to pursue this panel request only if, and when, such consultations had definitely failed.

He recalled that this matter had been discussed in December 1996, and some information had been circulated[6]. The United States had stated that it continued to be at a loss as to how a reference price system was consistent with the Communities' tariff bindings. He explained that in 1996, it had become apparent that due to the particular structure of the US and other rice exporting industries, the provisions of the WTO agricultural agreement could not be applied therein without a very serious risk of fraud between importers and exporters. This had led to a joint agreement between the United States and the Communities on 22 July 1996, on the principle that the Communities would apply a reference price system, the modalities of this to be satisfactory to all concerned. Unfortunately this was not a simple case because to reach an agreement both parties had to be able to accept it.

Since autumn 1996, the Communities had been discussing this matter with the United States. Some proposals had been put forward in November and December 1996. It had taken some time to have a response from the United States which involved a number of comments. Subsequently, the Communities had drafted a regulation and were presently awaiting a response from the United States. This was not a case of unwillingness on the part of one party but a case were both parties were having difficulties in making progress. The Communities understood the problems of United States that having a divided industry had to take into account all different views. The United States' reference that this request should be considered at the next DSB meeting unless the Communities by that time had satisfactorily resolved the matter was only part of the picture. Both parties had to find a satisfactory solution to this matter.

The representative of the United States said that if this matter was not resolved by the next meeting of the DSB, his delegation would maintain its request for a panel.

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

10. United States - Restrictions on imports of cotton and man-made fibre underwear
- Report of the Appellate Body (WT/DS24/AB/R)
and report of the panel (WT/DS24/R)

The Chairman drew attention to the communication from the Appellate Body in document WT/DS24/7 transmitting the Appellate Body report in "United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear" circulated in WT/DS24/AB/R in accordance with Article 17.5 of the DSU. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1), both reports had been issued as unrestricted documents. He then drew attention to Article 17.14 of the DSU regarding the adoption of the Appellate Body reports.

The representative of Costa Rica expressed gratitude to members of the Appellate Body and the panel as well as the Secretariat for their work. Costa Rica welcomed the panel report as modified by the Appellate Body and supported the adoption of the reports. The legal rigour of the reports had further clarified the Agreement on Textiles and Clothing (ATC) which would affect its implementation in the future. His country hoped that the United States would bring the measure challenged by Costa

[6]WT/DS13/3.

Rica into compliance with US obligations under the ATC by immediately withdrawing the restriction imposed.

The representative of the United States said that his country supported adoption of the Appellate Body report and the panel report as modified by the Appellate Body report. However, his delegation wished to express the US views on these reports and requested that these views be fully recorded in accordance with Article 16.3 of the DSU.

Some Members might find it surprising that the United States supported adoption of the panel report which had found a safeguard action taken by the United States to be inconsistent with the ATC provisions. His country would have preferred that the panel found that the safeguard action in question was not inconsistent with the ATC.

In the view of the United States the panel report should be adopted. While his country was not pleased with the final conclusions and had problems with certain parts of the report, this report as well as the panel report on "United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India"[7], had acknowledged the fundamental principle that in reviewing factual determinations made by domestic authorities, the function of dispute settlement panels was not to engage in a *de novo* review of the facts or to "second-guess" the factual judgments of domestic authorities which had considered all the factors required by a particular agreement. Instead, panels were to make an objective assessment of whether, in making a determination, the domestic authorities had respected the requirements of the particular agreement.

Two other positive aspects of the panel report related to the causation standard in Article 6.4 of the ATC and the treatment of re-imports. With respect to causation, the panel report had correctly recognized that the proper question facing domestic authorities, such as the US Committee for the Implementation of Textiles Agreements (CITA), had been whether exports from a particular country contributed to serious damage to the domestic industry, not whether exports from a single country were the principal or the sole cause of serious damage.[8] On the issue of re-imports, the panel had agreed to the US arguments that a transitional safeguard action pursuant to the ATC could be taken on re-imports and that by giving favourable treatment to re-imports there had been many options available.

The United States was nevertheless concerned with certain aspects of the panel report. One such concern involved the panel's characterization of Article 6 of the ATC as an "exception" thereto.[9] The panel had relied in part on the phrase in Article 6.1 that safeguard actions should be taken "as sparingly as possible". This characterization was improper for several reasons. First, the phrase "as sparingly as possible" came from the ATC predecessor, the Multifibre Arrangement (MFA). Under the MFA, this phrase had not been construed in the manner suggested by the panel report. The panel's interpretation, if followed and applied, would violate Article 3.2 of the DSU by adding an obligation to the ATC not included by its negotiators. Second, and more fundamentally, the right to take safeguard actions under Article 6 was an integral provision of the ATC, not an exception. The inclusion of the transitional safeguard mechanism had been a critical *quid pro quo* to the phase-out of quotas, forming part of the balance of rights and obligations under the Agreement. A "transitional" safeguard under Article 6 of the ATC was on an equal footing with the "transitional phaseouts" of textile restrictions in the ATC.

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[7]WT/DS33/R.

[8]Panel report, para. 7.47.

[9]*Idem* para. 7.17-7.21.

Although these aspects of the panel report were merely *dicta* that had not been determinative of the outcome in this case, the United States would have remained concerned if the panel report had been the last word on the subject. Fortunately, it had not been, because the Appellate Body had refused to adopt this aspect of the panel's reasoning. The Appellate Body had not accepted Costa Rica's arguments that the panel's interpretation of the "as sparingly as possible" phrase meant that the language of Article 6 of the ATC had to be interpreted "narrowly". Instead, the Appellate Body had recognized that this phrase had to be read in conjunction with other language in Article 6.1 of the ATC which provided that safeguard actions were to be applied "consistently with the provisions of [Article 6] and the effective implementation of the integration process of the [ATC]". By adopting the US arguments, the Appellate Body had acknowledged that Article 6 of the ATC reflected a "carefully drawn balance of rights and obligations of Members".

The panel report on Woven Wool Shirts and Blouses, certain narrow portions of which India had appealed to the Appellate Body, had also recognized the right of a Member to take safeguard actions, and had rejected the notion that Article 6 of the ATC was an "exceptional" provision that had to be construed narrowly, which would have imposed an extraordinary burden of proof on the Member taking a safeguard action. The United States expected that future panels would ignore the *dicta* in the panel report (WT/DS24/R), and instead would follow the sound reasoning of the Appellate Body and the panel report on Woven Wool Shirts and Blouses.

An additional problem related to the panel's improper consideration of settlements in analysing the consistency of the US safeguard measure with Article 6.4 of the ATC. In the view of the United States the panel had made a fundamental error when, in rejecting CITA's findings of attribution by reason of Costa Rican underwear imports, the panel had relied largely on the fact that the United States had settled with five of the six countries after the CITA had issued its determination of serious damage in March 1995.[10] The panel's inclination to penalize the United States for entering into settlements had contravened the objectives of Articles 3.7, 12.7 and 22.2 of the DSU which expressly encouraged the resolution of disputes by means of mutually satisfactory solutions. Should future panels or the Appellate Body take a similar approach, this could have an adverse effect on the willingness of parties to enter into settlements. It could frustrate, among other things, the negotiating flexibility of Members due to concerns that the results of mutually satisfactory solutions could be used against them in dispute settlement proceedings, in particular with non-settling Members.

While the United States accepted the principle in Article 13 of the DSU that a panel had the right to seek relevant information, it did not follow that any information became legally relevant merely because the panel had sought it. Had this error by the panel been determinative of the outcome, the United States would have appealed the finding. However, because this error had been *dicta* -- not determinative of the outcome -- and because the error was so obviously at odds with one of the fundamental principles of the DSU, his country was confident that future panels and the Appellate Body would refrain from following this particular line of reasoning.

The United States was disappointed that the Appellate Body had disagreed with the panel with regard to the effective date of temporary safeguard measures. However, it was pleased that the Appellate Body had recognized that the problem of import surges was a legitimate one and that a remedy against such surges was available under Article 6.11 of the ATC. Moreover, as noted previously, the United States was satisfied that the Appellate Body had rejected the panel's conclusions that the language of Article 6 of the ATC should be interpreted narrowly.

[10]Panel report, para. 7.49-7.51.

In concluding, while there were certain aspects of the panel report that caused concerns, as a whole and when read in conjunction with the Appellate Body report and the panel report on Woven Wool Shirts and Blouses, this panel report contained several positive elements. Accordingly, the United States would join in a consensus to adopt the Appellate Body report and the panel report, as modified by the Appellate Body report.

The representative of India said that his delegation was satisfied with the reports of the Appellate Body and the panel. He recalled that India had participated in the panel proceedings as a third party as well as in the Appellate Body proceedings. In India's view both the panel and the Appellate Body had done excellent work through an incisive analysis of the issues raised.

He highlighted certain important elements in these reports. With regard to the standard of review, the panel report in paragraph 7.10 had clearly stated that "a policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen in Article 11 of the DSU". He welcomed that the panel had clearly ruled that its task was to examine the consistency of the US action with the international obligations of the United States and not with the US domestic law implementing its international obligations. The panel had also upheld the supremacy of the ATC as a relevant legal framework, which the United States had not challenged at the present meeting.

With regard to the burden of proof, India was pleased that the panel had vindicated its position, namely, that Article 6 of the ATC was an exception to the rule of Article 2.4 of the ATC and that the party which invoked an exception had to justify its action and it carried the burden of proof that it had fulfilled the conditions for invoking such an exception. The Appellate Body had not overruled the panel's findings on the question of Article 6 of the ATC being an exception.

India thought that the panel had very clearly and succinctly interpreted the ATC as well as the structure of Article 6 thereof. It had stated in paragraph 7.20 that "finally, we recall that the relevant provisions have to be interpreted in good faith. Based upon the wording, the context and the overall purpose of the Agreement, exporting Members can legitimately expect that transitional safeguards, adopted under Article 6 of the ATC, would only be applied sparingly in order to serve the narrow purpose of protecting domestic producers of like and/or directly competitive products. Exporting Members can, in other words, legitimately expect that market access and investments made would not be frustrated by importing Members taking improper recourse to such action".

The panel had also noted that the overall purpose of Article 6 of the ATC was to give Members the possibility to adopt new restrictions on products not integrated into the GATT 1994 and not under existing restrictions. The panel had also clearly stated that Article 6 of the ATC established a three step approach required for imposing new restrictions. This view had been consistently put forward by India in other fora.

When dealing with subsequent information made available after the March statement[11], which had been the basis for the determination by the importing Member, the panel had noted that "we believe that statements subsequent to the March statement should not be viewed as legally independent basis for establishing serious damage or actual threat thereof in the present case". In particular, India was satisfied that the Appellate Body report, on page 15, noted that "one clear objective of requiring a 60-day period for consultations was to give such Member or Members a real and fair, not merely *pro forma*, opportunity to rebut or moderate those factors". This confirmed India's view that any review of the determination made by an importing Member regarding the existence of serious damage or actual

[11] Technical data supplied by the United States to Costa Rica justifying its request for consultations.

threat thereof should be based on the information taken into account by that Member at the time of determination.

India welcomed that the panel report, in paragraph 7.55, had made a clear distinction between "serious damage" and "actual threat of serious damage" and had in a way confirmed his country's often reiterated view that "serious damage" referred to a situation that had already taken place, while "actual threat of serious damage" referred to an existing situation which might lead to "serious damage" in the future.

India was particularly appreciative to the Appellate Body for its ruling on retroactivity, a position, he said, taken by most Members. Further, as pointed out by the Appellate Body, the retroactive application of a safeguard measure was no longer permissible under Article 6 of the ATC and was in fact prohibited under Article 6.10 of the Agreement.

He complimented Costa Rica for its determination to pursue this matter. Both Costa Rica and the United States had contributed to the strengthening of the rule-based multilateral trading system. His country hoped that the TMB would benefit from the findings of these reports and would deal with similar issues on the basis of these incisive analysis and convinced findings. In particular, all delegations and the TMB should carefully reflect on the panel's analysis with regard to the US attribution of serious damage to Costa Rican imports in paragraph 7.50.

His delegation believed that the adoption of the panel and the Appellate Body reports by the DSB marked a historic step towards integration of the textiles and clothing sector into a rule-based multilateral trading system. For those Members who had been rather pessimistic during the last two years about "full and faithful implementation" of the ATC, these two reports provided hope.

The representative of Hong Kong said that his authorities endorsed the panel's findings as modified by the Appellate Body. He noted the panel's emphasis on transitional safeguards under Article 6 of the ATC being applied as sparingly as possible. This reflected the exceptional nature of this mechanism. Exceptional not just because of its restrictive effect, but due to the fact that it discriminated against certain Members by subjecting only these Members to restraint. Strict disciplines under Article 6 of the ATC should be seen in this light.

In the context of Article 6.2 to 6.4 of the ATC, some importing Members might experience difficulties to provide the data required under Article 6.3 of the ATC for a determination of serious damage or actual threat thereof. Hong Kong was not rigid but justification was a basic requirement. If the data were not available, one could question whether a proper determination to justify a restraint was possible. In Hong Kong's view the requirement for proper data could be a defence for national authorities against protection-seeking domestic industries.

He noted that the panel had recognized that the TMB had conducted a fact-intensive review of the case. Hong Kong considered that the TMB, given its overall responsibility for the supervision of the ATC, had a much broader role than the dispute settlement panel. His authorities believed that the TMB and panels had complementary roles, notwithstanding that panels might come up with different findings having different impacts for parties involved. How to maximize the advantage of such complementarity would be a matter for further consideration in the TMB or, if deemed appropriate by Members, in the course of the major review of the ATC pursuant to its Article 8.11.

The DSB took note of the statements and adopted the Appellate Body report in WT/DS24/AB/R and the Panel report in WT/DS24/R as modified by the Appellate Body report.

11. United States - Measure affecting imports of woven wool shirts and blouses from India - Panel report (WT/DS33/R)

The Chairman said that this item was on the agenda of the meeting at the request of the United States. He drew attention to the panel report contained in WT/DS33/R and recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1) this panel report had been issued as an unrestricted document. He also recalled that under Article 16.4 of the DSU "within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party had notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report." He informed Members that on 24 February 1997, India had notified the DSB of its decision to appeal the panel report. Therefore the panel report could not be adopted by the DSB at the present meeting.

The representative of India confirmed that on 24 February 1997, his delegation had submitted a notice of appeal to the DSB and the Appellate Body.[12]

The DSB took note of the statements and referred the matter to the Appellate Body for consideration.

12. Practice that has developed under Article 6.1 of the DSU

The representative of the United States, speaking under "Other Business", requested the Chairman -- in light of Article 3 of the DSU with regard to mutually acceptable solutions -- to hold consultations with interested delegations on the practice that had developed under Article 6.1 of the DSU.

The representative of Argentina said that his delegation shared the concerns expressed by the United States. He noted that the automaticity with which in some cases Article 6.1 of the DSU had been applied seemed to lead to a mechanical exclusion of other options envisaged under the DSU. This restricted the efforts of parties to find solutions to some disputes. He therefore supported the request made by the United States.

The representative of Uruguay said that his delegation shared the views expressed by the United States and Argentina. Uruguay would be interested in participating in the consultations to be held on this matter.

The representative of India said that although the purpose of the consultations was unclear, his delegation would like to participate therein. He expressed some reservations regarding pragmatic and flexible solutions to practical problems. Flexibility and pragmatism should not mean that the Agreement could be amended without following the prescribed procedures.

The representative of Mexico said that the purpose of the consultations was also not clear to his delegation. He shared India's concerns and requested to be included in these consultations as such participation would enable a better understanding of this matter, and would allow Mexico to assess how its interest would be affected.

[12]Subsequently circulated as document WT/DS33/3.

The representative of the European Communities said that he wished to be consistent with his earlier statement that one should not proceed to a panel stage if it was still possible to reach a settlement.

The representative of Japan said that his delegation would be interested in participating in the consultations to be held on this matter. He requested the Chairman to explain the purpose of these consultations.

The Chairman said that the subject of the consultations could be taken up at their initial stage. The concerns that had been raised related to the practice that had developed under Article 6.1 of the DSU and some delegations might have different interpretations thereof.

The representative of Hong Kong said that automaticity was an important aspect of the DSU and his delegation would be interested in participating in the consultations in order to be able to better understand the US concerns.

The representative of Peru said that his delegation wished to participate in the consultations due to its systemic interest.

The Chairman invited delegations interested in participating in the consultations to contact him directly or the Secretariat. The issue raised by the United States was important and warranted holding consultations. The initial stage of those consultations would be used to clarify the concerns of some delegations with regard to Article 6.1 of the DSU.

The DSB took note of the statements.

13. Pakistan - Patent protection for pharmaceutical and agricultural chemical products

The representative of the United States, speaking under "Other Business", informed Members that the terms of settlement concerning the US dispute with Pakistan on the latter's patent protection for pharmaceutical and agricultural chemical products, were being finalized. The parties to the dispute would notify the DSB in writing of the terms of the settlement in a very near future.

The representative of Pakistan welcomed the statement made by the United States. The Ordonnance No. XXVI of 1997 by the President of Pakistan provided that all patent applications after 1 January 1995 shall be considered validly filed. Pakistan was preparing a joint letter with the United States outlining the terms of settlement which would be submitted to the DSB in the near future.[13]

The DSB took note of the statements.

14. Chairmanship of the Appellate Body

The Chairman, speaking under "Other Business", recalled that at an informal meeting of the DSB held on 4 February 1997, the Chairman of the DSB had informed Members of the intention of the Appellate Body members to amend Rule 5(2) of the Working Procedures for Appellate Review to allow for a term of two years rather than one, for the first Chairman of the Appellate Body. Delegations wishing to express views on this matter had been invited to contact directly the Chairman of the DSB in order to convey their views to the Appellate Body. As the Chairman of the DSB had

[13]Subsequently circulated as document WT/DS36/4.

not received any views in connection with this matter, the Appellate Body had been informed accordingly. A revised and consolidated version of the Working Procedures for Appellate Review, to incorporate this amendment and the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996, would be circulated as WT/AB/WP/3. This consolidated version would take into account the comments made by the European Communities concerning the French and Spanish versions of the initial text of the Working Procedures.

The DSB took note of this information.