RESTRICTED

WORLD TRADE ORGANIZATION

WT/DSB/M/14
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DISPUTE SETTLEMENT BODY
17 April 1996

MINUTES OF MEETING

Held in the Centre William Rappard
on 17 April 1996

Chairman: Mr. Celso Lafer (Brazil)

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1. United States - Measures affecting imports of women's and girls wool coats
- Request by India for the establishment of a panel (WT/DS32/1)

The Chairman recalled that the DSB had considered this matter at its meeting on 27 March and had agreed to revert to it at the present meeting.

The representative of India recalled that all the relevant details concerning this matter had been circulated in WT/DS32/1 on 15 March 1996, and that he had made a statement on this matter at the DSB meeting on 27 March[1]. At that meeting the United States had not agreed to the establishment of a panel, and India had requested that the DSB convene a meeting in accordance with footnote 5 to Article 6.1 of the DSU. He regretted that, since the 27 March there had been no change with regard to the unilateral restraint which had been applied by the United States for one year on category 435. On 27 March the United States had made a statement in which, *inter alia*, it had mentioned that "several months ago, based on these developments, the United States became convinced that the restraint on category 435 was no longer necessary. We requested consultations with India and indicated that we wanted this subject put on the agenda for these bilateral talks". The United States had also observed that "accordingly, we are not in a position to join consensus at this meeting on the establishment of

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a panel. The United States Chief Textile Negotiator will be communicating directly to her counterpart the US decision to drop the restraint on category 435". At the 27 March DSB meeting India had questioned the need for the United States, if it had become convinced several months ago that the restraint on category 435 was no longer necessary, to consult with India prior to the withdrawal of the restraint. Subsequently a communication dated 15 April 1996 sent by the US chief textile negotiator to her counterpart in India stated, *inter alia*, that: "At the time of the TMB review of this action, I agreed to review future import data for category 435 with the view to rescinding the safeguard action if economic developments warranted it. Initially, import trends continued to worsen and it was not possible to rescind the restraint. Since this restraint has been in place for almost one year by 18 April, the United States must instruct the US Customs to continue the restraint in force for another year. That is why I hoped to meet with you earlier." The communication further stated that: "In conducting a review of the latest economic data related to this category, we have concluded this restraint might be rescinded. However, as you know and as the United States stated at the March 27 Dispute Settlement Meeting, this is an issue I intended to raise with you bilaterally. If no mutual solution is reached, I am content to leave the restraint in place and defend the safeguard action to a dispute settlement panel based on the information available to me concerning category 435 at the time of the TMB review of this matter." At the meeting on 27 March India had pointed out that the absence of consensus on this matter had indicated that the TMB had not determined this action to be justified and therefore the measure had not been justified under the provisions of Article 6 of the Agreement on Textiles and Clothing (ATC). Since the United States had a different view on Article 6, and on the basis of the data, it was India's view that the US action had not been justified, it had therefore requested the establishment of a panel. India fully recognized the United States' rights to defend the safeguard action before a panel. However, it was necessary to highlight some specific concerns on this matter.

First, at the DSB meeting on 27 March, the United States had made an unequivocal statement that it had become convinced several months ago that the restraint on category 435 was no longer necessary. The United States had also mentioned that the US Chief Textile Negotiator would be communicating to her counterpart the US decision to withdraw the restraint on category 435. What the US Chief Textile Negotiator had stated in her communication did not exactly conform to what had been stated at that meeting. He did not wish to question the US action of introducing the restraint on this category, but he profoundly regretted the misleading statement made by the United States at the DSB meeting on 27 March. He recalled that at the end of that meeting, he had not responded to delegations which had asked why India had not withdrawn its request for the establishment of a panel after the United States had made the statement. He believed that such an inaccurate statement before the DSB was neither consistent with its stature, nor conducive to its smooth functioning.

Second, he was concerned that having concluded "several months ago", that a restraint was no longer necessary and having made a statement to that effect before the DSB, an importing country continued to maintain its restraint. He was raising this point without reference to either justification or lack of it, for the US action at the time action was initiated and a new restraint was introduced. He questioned whether an importing country could continue to maintain a restraint while acknowledging that it was no longer necessary, even assuming that the action was originally justified. Article 6.1 of the ATC stated that transitional safeguards should be applied as sparingly as possible. Under Article 6.12 of the ATC a Member may maintain measures invoked pursuant to these provisions up to a maximum period of three years. This time-limit was the same whether a restraint was applied unilaterally or agreed bilaterally. In this case, an importing country had stated before the DSB that it was entitled to continue a unilateral restraint even after it had reached a conclusion, many months ago, that it did not consider this restraint necessary. This was a very strange interpretation of the ATC. It was up to the collective wisdom of the DSB to decide how to deal with this situation.

Third, India was concerned that the United States had treated every textile matter as being purely bilateral despite the fact that the ATC -- a multilateral agreement -- had entered into force on

1 January 1995. Since then, India's greatest grievance with regard to what was happening in the textile area had been that at every stage efforts were being made to undermine multilateralism and promote bilateralism. On more than one occasion and in more than one forum, strong concerns had been expressed on this matter by exporting countries. At present, India was being told that in order to withdraw the restraint considered by the importing country as unnecessary, bilateral consultations should be held. The ATC provided for bilateral consultations prior to the introduction of a restraint but, for the United States, consultations seemed necessary in order to withdraw the restraint. At the 27 March DSB meeting, India had mentioned that the United States probably sought a significant concession for the removal of the restraint on category 435 even after it had reached the conclusion that the continuation of such restraint was not necessary. Previously, in other fora, India had pointed out that a large number of requests, including those which the importing country itself knew to be totally unjustified, were deliberately being initiated in order to pressure exporting countries to accept some of the restraints, by giving the impression that restraints on some other categories were being rescinded. In other words, the United States was offering to withdraw gracefully one unjustified restraint, if the exporting country applauded and accepted another unjustified restraint. India felt that this was euphemistically referred to as a "mutual solution" in the letter from the United States dated 15 April. India did not believe that this was in conformity with the letter or the spirit of Article 6 of the ATC. India's great concern regarding the functioning of the TMB was that instead of deciding on the merits of each restraint individually, as expected under Article 6 of the ATC, the TMB appeared to be promoting the so-called "mutual-solution", implying trade-offs. This approach, besides being contrary to the letter and the spirit of the ATC, encouraged importing countries to issue more requests for consultations than they themselves believed to be warranted. He hoped the DSB understood the predicament in which he found himself at the present meeting, namely whether to believe the US statement made at the DSB meeting on 27 March or the communication to India dated 15 April. Within its rights, India wished to request the establishment of a panel unless the United States would make an explicit and unconditional commitment at the present meeting to withdraw the restraint on this category with immediate effect.

The representative of the United States recalled that at the 27 March DSB meeting his delegation had noted that well before India had initiated dispute settlement procedures on 14 March, the United States had tried without success to schedule bilateral consultations to resolve this matter. The initial safeguard action on category 435 was fully justified by the economic situation at that time. Although it was not required by the ATC, the United States had reviewed this case with a view to withdrawing the restraint. The United States had proposed to discuss withdrawing its safeguard action and had repeatedly attempted to arrange a meeting between the Chief Textile Negotiators who were the most competent representatives to adequately resolve the problem. The United States could not stand in the way of a consensus on the establishment of a panel at the present meeting, however, it regretted that India was unable to postpone its request to allow for the proposed meeting between the two textile negotiators.

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

The representatives of Canada, Costa Rica, the European Communities, Norway, Pakistan, and Turkey reserved their third-party rights to participate in the panel proceedings.

The DSB took note of this information.

2. United States - Measures affecting imports of woven wool shirts and blouses
- Request by India for the establishment of a panel (WT/DS33/1)

The Chairman recalled that the DSB had considered this matter at its meeting on 27 March and had agreed to revert to it at the present meeting.

The representative of India recalled that all the relevant details concerning this matter had been circulated in WT/DS33/1 on 15 March and that he had made a statement on this matter at the DSB meeting on 27 March[2]. At that meeting, the United States had not agreed to the establishment of a panel and India had requested the DSB to convene a meeting in accordance with footnote 5 to Article 6.1 of the DSU. He regretted that to date there had been no significant change with regard to the unilateral restraint which had been in place for one year. On 27 March, the United States had regretted India's decision to request the establishment of a panel despite the TMB's recommendations. This regret had been conveyed to India in a letter dated 15 April from the United States. He reiterated that India's request for a panel was an exercise of its right under Article 8.10 of the Agreement on Textiles and Clothing (ATC) and the DSU. India did not accept the United States' argument that its action undermined the credibility or effectiveness of the TMB process, just as the credibility of the panel system was not undermined by any Member appealing a panel report to the Appellate Body. Since this matter remained unresolved, he requested the DSB to establish a panel. He then drew attention to Article 3.10 of the DSU which, *inter alia*, stated that "the use of dispute settlement procedures should not be considered as contentious acts and that if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute". This was what India intended to do and hoped that the United States would also approach these proceedings with the same spirit.

The representative of the United States said that the TMB had twice reviewed the United States' safeguard action on category 440 and had found, by consensus, that the restraint was fully justified. India had the right to request a panel under Article 8.10 of the ATC. However, the United States urged India and the other Members to reflect on the wisdom of establishing a panel in a case where the TMB had issued an unequivocal finding, particularly in a case as clear as this, where the TMB had twice reviewed the circumstances and had twice reached the same conclusions. The United States held the strong view that the effective functioning of the TMB required that a Member gave full regard to Article 8.9 of the ATC and endeavoured to comply with TMB findings and recommendations. In considering action under this item, Members should note the differences between rulings by dispute settlement panels and TMB recommendations. The ATC did not require TMB recommendations to be adopted by another body nor did it provide for an appeal. Panel reports must be adopted by the DSB and their precedential importance was such that an appeal procedure had been established as a safeguard against errors of law. Article 8.10 of the ATC was intended to allow the dispute settlement process to come into play if the matter remained unresolved even after the TMB had made "further recommendations".

The representative of India wished to register that he did not fully understand the statement by the United States. In his view what was being suggested was a fundamental amendment to the ATC. However, he did not want to go into details at this stage.

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

The representatives of Canada, the European Communities, Norway, Pakistan and Turkey reserved their third-party rights to participate in the panel proceedings.

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The representative of Norway said that his country did not contest India's right to request the establishment of a panel. However, Norway was concerned that since a consensus had been reached on this matter twice by the TMB, this request could undermine the effectiveness and authority of the TMB. Another equally important aspect was that requesting a panel in a situation where the TMB had reached a consensus might have negative effects in the future on the implementation of recommendations in cases where a consensus had been reached. Norway was not fully convinced that there was a parallel between the relationship of the TMB and a dispute settlement panel, to that of the latter and the Appellate Body.

The representative of the European Communities agreed with Norway, that this dispute involved an important question of principle, namely under what conditions when the TMB had reached a consensus, a matter would then be contested in dispute settlement. The DSB was not the right forum to discuss this in greater detail, but clearly the matter under consideration had a bearing on the rôle of the TMB in the WTO. The Communities wished to discuss the matter further at a later stage and made it clear that it considered this a very important issue in the WTO.

The representative of Canada said, that although her country did not question the right of a Member to bring a matter before a panel, it was concerned that a Member could not just abide by a consensus decision of the TMB. It hoped that the fact that India had requested the establishment of a panel would not create a precedent which in the long run could possibly undermine the effectiveness of the TMB.

The representative of Pakistan said, that for his country this matter also involved issues of general systemic interests and implications, in particular those related to the submission of information, the invoking of transitional safeguard provisions of the ATC, the functioning of the TMB and reasons for its recommendations. Therefore, Pakistan wished to reserve its rights to consider the systemic implications of the issues which it hoped would be considered by the panel.

The representative of the United States said that his country noted that the matters at issue in each of the requests by India to establish a panel were similar and related. Therefore, in the interest of economy, efficiency, and consistency of results in these cases, the United States suggested that a single panel examine these complaints as provided for in Article 9.1 of the DSU. If action on the suggestion was not appropriate at the present meeting, the United States would take up this question with India during consultations on the composition of the panel.

The DSB took note of the statements.

3. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/21 and WT/DSB/W/24)

The Chairman drew attention to WT/DSB/W/21 and WT/DSB/W/24 which contained additional names proposed by Members for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained therein.

The representative of the United States said that it had been helpful to have more time to consider this matter since it had been first on the agenda of the DSB meeting on 27 March. The United States had considered the situation where officials of other inter-governmental organizations were nominated for inclusion on the indicative list. It noted that as a general rule, under the GATT 1947, staff members of the Secretariat did not serve on panels. One of the nominations concerned a candidate who was a staff member of the World Bank. The United States did not oppose this nomination. The relationship between the World Bank and the WTO did not necessarily present a conflict of interest. His authorities

had reviewed the curriculum vitae of the individual in question and was favourably impressed by his excellent background and competence in the field of trade policy. However, he pointed out that there may arise other instances where a nomination might concern an individual who was an official of an intergovernmental organization with a close working relationship with the WTO. An example was the International Monetary Fund which had a specific rôle to the extent provided for in the GATT and the GATS. In such cases, the United States would invite the Members to reflect on the appropriateness of including officials of those organizations on the WTO indicative list of panelists.

The DSB took note of the statement and approved the names contained in WT/DSB/W/21 and WT/DSB/W/24.

4. Turkey -Action on imports of textile and clothing products
- Statement by Hong Kong

The representative of Hong Kong, speaking under "Other Business", recalled that during the DSB meeting on 27 March his delegation had finally obtained confirmation that consultations with Turkey would be held in Geneva on 16-17 April 1996. Hong Kong was presently awaiting an indication from the Turkish delegation as to whether consultations would be held as outlined by Hong Kong in its request dated 12 February 1996, and circulated in WT/DS29/1, namely that they be limited between Hong Kong and Turkey as the consulting parties. On 20 February, Turkey had agreed to enter into bilateral consultations, but it took quite some time to find suitable dates and venue for these consultations, i.e. 2.30 p.m. on 16 April until 1 p.m.on 17 April in Geneva. There was a mutual understanding to extend the thirty-day period provided for in Article 4.3 of the DSU to 17 April, 1 p.m. In addition to the letter of acceptance dated 20 February, Turkey had forwarded a copy of a letter received from the Communities in which the latter had expressed the desire to be joined in the consultations pursuant to Article 4.11 of the DSU, given their substantial trade interest. On 16 April, Turkey and Hong Kong had met in the presence of a number of parties that had requested to be joined in the consultations under Article 4.11 of the DSU. However, it was impossible to conduct them since Turkey and the Communities did not accept Hong Kong's position that these consultations be limited to Hong Kong and Turkey as consulting parties, with the Communities and other parties participating in accordance with Article 4.11 of the DSU. Turkey had insisted that Hong Kong should hold consultations with Turkey and the Communities as a so-called "joint exercise". His delegation remained available until expiry of the consultation period in order to enter into consultations. However, in their absence Hong Kong would consider the mutually agreed period provided for in Article 4.3 of the DSU to have expired.

The representative of Thailand, speaking also on behalf of Malaysia and the Philippines, drew attention to the developments which had taken place since their request to be joined in consultations submitted to Turkey two months ago. Following this request, several follow-up communications had been made to Turkey to provide a timely response to facilitate necessary arrangements for their delegations from capitals to attend the consultations. Concerns regarding this matter had already been raised at the DSB meeting on 27 March when Turkey had indicated that, after due consideration to their request, a response would be communicated to them as soon as possible. However, despite the fact that not much time had remained, since the consultations between Hong Kong and Turkey had been scheduled on 16-17 April, efforts at inducing a response from Turkey concerning their request had failed. Turkey's response had been received less than twenty-four hours before the consultations were to take place, which raised doubts as to Turkey's desire to enter into consultations in good faith. Furthermore, Turkey's reply did not provide a clear answer as to whether the requesting parties had been accepted to be joined in the consultations under Article 4.11 of the DSU. When further clarification was requested, Turkey was not explicit and suggested their participation as observers in these consultations. Article 4.11 of the DSU did not provide the liberty for the requested Member to grant observer status to the parties requesting to be joined in the consultations. In the consultations held

so far their status under Article 4.11 of the DSU had not yet been fully and clearly addressed by Turkey. In view of such developments and difficulties, the above-mentioned delegations wished to reserve all their rights on this matter under the WTO Agreement.

The representative of India said that his delegation wished to be associated with the statement made by Hong Kong. He recalled that on 22 February 1996, India had requested to be joined in these consultations under Article 4.11 of the DSU since it had a substantial trade interest in this matter. After repeated reminders, India had received an oral confirmation from Turkey on 12 April 1996 that its request to join consultations had been accepted. This gave extremely short notice to India to participate in the consultations scheduled on 16-17 April 1996. It was unfortunate that the consultations were deadlocked on an issue of procedure. Neither the DSU nor Article XXII of GATT 1994 enabled a Member to suddenly acquire a right to conduct these consultations as a "joint exercise". His delegation reserved its rights under the WTO Agreement on this matter.

The representative of Peru supported the statement made by Thailand. He recalled that on 21 February 1996, Peru had requested to be joined in the consultations requested by Hong Kong with Turkey. However, Turkey's reply received on 15 April 1996 indicated the need for an assessment of Peru's substantial trade interest in this matter. Peru had participated in the consultations held on 16 April being unofficially treated as an observer. In this context, Peru reserved its right to participate in the consultations in accordance with Article 4.11 of the DSU.

The representative of Turkey said that a round of consultations had been held on 16 April 1996 on the measures taken by Turkey in order to adapt its commercial policy in the textile and clothing sector consequent to the customs union with the European Communities. He regretted that despite his delegation's willingness to hear Hong Kong's arguments regarding the substance of the issue at hand, and to find a solution to any difficulties which these measures might cause for Hong Kong, the consultations held on 16 April could not go beyond the issues of procedure. The procedures of Article XXII:1 of GATT 1994 and Article 4.11 of the DSU had not been designed to deal with this situation. Turkey was the first, and perhaps the only country, to have entered into a customs union with the Communities, without acceding to it as a full member. The measures which had led Hong Kong to request consultations had not been taken unilaterally by Turkey, but had been adopted in order to fulfil the obligations pursuant to Article 12 of the Decision No. 1/95 of the EC-Turkey Association Council under which Turkey was expected to transpose the Communities' Regulation No. 3030/93 into its domestic legislation. Without this, free circulation of textile and clothing products between Turkey and the Communities would have been impossible. Since 40 per cent of trade between Turkey and the Communities consisted of textiles and clothing, a régime which would exclude these products from free circulation between the two parties of the customs union would not be consistent with the commonly accepted definition of "customs union". For this reason, Turkey and the Communities had requested Hong Kong to recognize that the procedures of Article 4.11 of the DSU needed to be interpreted with a certain degree of flexibility to allow the Communities to participate in the consultations on equal terms with Turkey. Any other status given to the Communities would be a denial of the above-mentioned facts.

On 16 April his delegation had come to the meeting prepared to seek a solution to the problems of substance that Hong Kong was expected to raise. Since July 1995, soon after the modalities for the completion of the customs union had been adopted by the EC-Turkey Association Council, Turkey had repeatedly sought bilateral consultations with Hong Kong on the measures taken in the area of textiles and clothing as required by the customs union. Regrettably and unlike some thirty other countries to which similar requests had been addressed, Hong Kong had not responded favourably to this suggestion. Although Turkey was disappointed that Hong Kong, which was well-known for defending its trade interests with unparalleled effectiveness, had failed to accept its offer. Turkey continued to remain ready to discuss this matter with Hong Kong. With respect to the other countries which wished

to participate in these consultations, it was Turkey's understanding that under Article 4.11 of the DSU only countries which had substantial trade interests in the issue at hand could participate. None of the countries which had expressed their desire to participate, had submitted any information supporting their claim of substantial trade interest. With some delay, Turkey had unsuccessfully proposed bilateral consultations to all countries in order to examine the question of their substantial trade interest.

The representative of Brazil said that like other countries present at the meeting on 16 April, Brazil considered that it had been accepted as a participant in the consultations under Article 4.11 of the DSU.

The representative of the European Communities wished to associate his delegation with the statement made by Turkey. The GATT 1947 had been characterized by a pragmatic approach of which delegations had been proud. The Communities had hoped that this approach could be transposed into the WTO. Members knew that although the WTO had become more legal, perhaps more legalistic, there was still a need, as in the GATT 1947, to address practical issues in a pragmatic manner. The Communities were disappointed with the formalistic approach of different participants, in particular Hong Kong, with respect to a situation in which a measure had been taken by a country as a partner in a customs union. Consequently, any changes sought with respect to these measures would also affect the interests of the other party of the customs union and therefore it should also participate in the consultations in the same manner as the one which was being requested to change its measures. The Communities believed that with a pragmatic approach this matter could be resolved easily, while it was recognized that this situation was unprecedented and was not specifically addressed in the existing procedures.

The representative of Canada wished to associate her country with the statement made by Hong Kong. As other delegations, Canada had notified its substantial trade interest in this matter and had requested to be joined in the consultations pursuant to Article 4.11 of the DSU. Canada had not received a request from Turkey to substantiate its trade interest nor had it received a request to participate in the consultations. Like Brazil, Canada had attended the consultations on 16 April and considered that it had been fully accepted as a participant.

The representative of Hong Kong expressed disappointment that consultations to date had not been substantive but he remained optimistic. Hong Kong did not agree with Turkey's statement that a round of consultations had been held on 16 April. The discussion, in fact, had been limited to establishing the basis for consultations in accordance with the dispute settlement rules. However, no such basis had been established. With respect to pragmatism and the formalistic approach referred to by the Communities, he stressed that there should be no confusion between pragmatism and tendency to operate outside the WTO rules, and between rule-abiding on the one hand and such descriptions as a formalistic approach on the other. He recalled that as outlined in WT/DS29/1 Hong Kong had requested consultations with Turkey under Article XXII:1 of the GATT 1994 and pursuant to Article 4 of the DSU, regarding the unilateral imposition of quantitative restrictions by Turkey on imports of a broad range of textile and clothing products from Hong Kong as from 1 January 1996. Turkey had responded in its communication dated 20 February 1996 that "with reference to your letter dated 12 February 1996…I would like to inform you that our authorities are ready to enter into bilateral consultations with your authorities." Finally, he drew attention to WT/DS29/2 which specified that "pursuant to the procedures laid down in Article 4.11 of the DSU the European Communities wish to be joined in the consultations under Article XXII:1 of GATT 1994 requested by Hong Kong." He requested delegations to examine these communications.

The representative of India said that like Canada his country had not been requested by Turkey to establish its substantial trade interest nor had it been invited to any bilateral consultations. India considered that its participation in the consultations held on 16 April had been pursuant to Article 4.11

of the DSU. India questioned the need for Turkey to impose quotas on countries if they had no substantial trade interest.

The representative of Turkey shared Hong Kong's disappointment with regard to the lack of progress at the meeting on 16 April. Turkey remained ready to seek solutions to all matters of substance that Hong Kong had raised in connection with adoption by Turkey of the Communities' standards with regard to textiles and clothing as a result of the completion of the customs union. There was still time before the expiry of the consultation period to make progress in this area. He could not agree with the interpretation given by other delegations with respect to their participation at the meeting on 16 April. If the Communities' rôle had been clarified during these consultations, Turkey would have then questioned the presence of a number of countries whose trade interest was extremely negligible. In 1995, one participant had no exports while exports of another had been limited to US$ 65,000. It was his understanding that because Canada had no exports of textiles and clothing to Turkey but maintained a number of restrictions on imports from Turkey that Canada had withdrawn its request to participate in these consultations. Therefore, he apologized that Turkey had failed to respond to Canada's request as a result of this misunderstanding. The participation of any delegation at the meeting on 16 April did not mean that Turkey had accepted that these delegations had a substantial trade interest in the sense of Article 4.11 of the DSU.

The representative of Hong Kong said that his delegation remained available until expiry of the consultation period to resume consultations as originally agreed and pursuant to the DSU rules and procedures.

The DSB took note of the statements.