

Dispute Settlement Body
5 April 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 5 April 2002

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

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1. United States – Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea

(a) Implementation of the recommendations of the DSB

1. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the adoption of the Panel or Appellate Body Report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 8 March 2002, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report in the case on "United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea".

2. The representative of the United States said that it was his country's intention to implement the DSB's recommendations and rulings in the Korea – Line Pipe dispute in a manner that respected its WTO obligations. The United States had begun to evaluate options for doing so and would need a reasonable period of time in which to do this. In this regard, his delegation stood ready to discuss this matter with Korea, in accordance with Article 21.3(b) of the DSU.

3. The representative of Korea said that his country welcomed the statement by the United States that it intended to fully comply with its WTO obligations and hoped that the United States would implement the DSB's recommendations as promptly as possible. Korea looked forward to holding consultations with the United States on how it intended to implement the DSB's recommendations.

4. At the present meeting, Korea wished to raise some concerns about the recent use of safeguard measures on steel by both the US and the EC. In Korea's view, the actions taken by both parties were equally threatening to the integrity of the WTO. The US action violated WTO rules since steel imports, which were subject to US measures, had fallen in the past three years. In this regard, he noted that a prerequisite for imposing safeguard measures was an increase in imports. Contrary to the claim of the United States that there had been both a relative and absolute increase in steel imports during the investigated period, the statistics of the US Department of Commerce indicated otherwise. The United States was ambiguous with regard to the specific representative period of investigation it had referred to. The 2001 US statistics showed that imports were at their lowest level in five years, and that since 1998 imports had fallen by more than 10 million tons: i.e. by approximately 27 per cent.

5. The measures of the United States were also unjustifiable in light of the Appellate Body's ruling that similar US measures were WTO-inconsistent in the case on Korea – Line Pipe. Repeated recourse to safeguard measures regardless of a series of panels and the Appellate Body rulings against similar measures ran the risk of frustrating the purpose and effectiveness of the dispute settlement system. Korea could not agree with the argument that panels and the Appellate Body legislated new rights and obligations through their judicial interpretations. On the contrary, Korea together with the overwhelming majority of Members, believed that since its inception, the dispute settlement mechanism had shown remarkable objectivity and, as a result, panel rulings had been faithfully implemented even when such rulings were against Members' positions. To claim that WTO rules were being rewritten by panels and the Appellate Body undermined the credibility of the dispute settlement system.

6. Since the US recent decision to impose safeguard measures, steel exporting countries had been working together to find a solution through the dispute settlement mechanism. Korea appreciated the fact that the EC had taken a leading role in this regard. However, it was concerned that the EC had taken its own safeguard measures. The EC's actions might encourage many other affected countries to take their own actions or to react similarly, which would result in a rapid proliferation of protectionism across countries. Furthermore, the concern that the EC market was going to be flooded by steel products diverted from the United States remained conjectural. At this stage, there was no statistical data to support such a conclusion. Korea was aware of the importance of the leadership roles played by the US and the EC in preserving the multilateral trading system. Their actions could have profound implications for the international trading system. The recent use of safeguard measures by both sides, and the likely adoption of similar measures by other countries might, in the long run, create an obstacle to the successful conclusion of the recently launched negotiations by setting a negative tone. Therefore, Korea strongly requested the United States and the EC to revoke their safeguard measures and to reaffirm their commitment to the rules-based multilateral trading system.

7. The representative of the European Communities said that the EC, which had participated as a third party in this case, regretted that the United States was not in a position to announce that it would lift the safeguard measure immediately, which had been found to be in violation of WTO rules. The DSB's recommendations left no room for manoeuvre for the United States in this regard. It was regrettable that, once again, legitimate exports of Members were being subjected to delaying tactics by the United States. The abusive recourse to safeguard measures and maintenance of measures which had been found to be WTO-inconsistent was a major systemic problem. At the present meeting, the EC was not in a position to respond to the points raised by Korea. However, it wished to assure Korea that it had been forced to take these measures in response to the US action. The EC's measure was temporary and would be removed once the United States lifted its safeguard measure. Furthermore, the EC respected the traditional level of imports and did not surcharge imports above that level. It did not wish to induce price changes but to avoid the situation in which its market would be flooded with steel products. As a result of the US measure countries had to protect their own interests. The EC did not wish to further distort trade and reassured Korea that its imports would

continue on a first-come, first-served basis. He indicated that the EC was prepared to discuss this matter with Korea.

8. The representative of the United States said that, at the present meeting, he did not wish to enter into a discussion on steel safeguards since there would be other occasions to deal with both US and EC safeguards. However, in light of the statement made by Korea at the present meeting, the United States thought it might be helpful to elaborate on the concerns that had been expressed at the 8 March DSB meeting, and the United States would consider doing so.

9. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations in this case.

2. India – Measures affecting the automotive sector

(a) Report of the Appellate Body (WT/DS146/AB/R – WT/DS175/AB/R) and Report of the Panel (WT/DS146/R and Corr.1 – WT/DS175/R and Corr.1)

10. The Chairman recalled that at its meeting on 27 July 2000, the DSB established a panel to examine the complaint by the United States pertaining to this matter. Subsequently, at its meeting on 17 November 2000, the DSB had agreed that in accordance with Article 9.1 of the DSU, the Panel established on 27 July 2000 to examine the complaint by the United States should also examine the complaint by the European Communities pertaining to the same matter. The Report of the Panel contained in document WT/DS146/R and Corr.1 – WT/DS175/R and Corr.1 had been circulated on 21 December 2001 as an unrestricted document. He further recalled that on 31 January 2002, India had notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. Subsequently, on 14 March 2002, India notified the Appellate Body of its decision to withdraw its appeal, in accordance with Rule 30(1) of the Working Procedures for Appellate Body Review. As a result of India's withdrawal of the appeal, the Appellate Body had completed its work and on 19 March 2002 it had issued a short Report outlining the procedural history of the case, which had been circulated as an unrestricted document in WT/DS146/AB/R – WT/DS175/AB/R. In accordance with Article 17.14 of the DSU an Appellate Body report shall be adopted by the DSB within 30 days following its circulation to Members. The Appellate Body and the Panel Reports were now before the DSB for adoption at the request of the European Communities and the United States. This adoption procedure was without prejudice to the right of Members to express their views on the Reports.

11. The representative of the United States said that his country was pleased that these Reports were before the DSB at the present meeting. The analysis in the Panel Report showed that the Panel had considered the various issues seriously and thoughtfully. Not only had the Panel conducted a thorough examination of the GATT-consistency of the measures identified in the panel requests, it had also thoroughly examined several novel procedural issues, including the relationship between this dispute and previous disputes between the parties. The United States wished to commend the Panel on its rigorous and well-reasoned analysis of both the procedural issues and the issues relating to Articles III and XI of the GATT 1994 and wished to thank the members of the Panel and the Secretariat for their hard work and fine product.

12. The United States also wished to mention India's withdrawal of its appeal, particularly in light of India's reservations about Section VIII of the Panel Report. As noted in its appellee's submission, the United States shared some of those concerns. In the view of the United States, after concluding its excellent analysis of the measures identified in the panel request, the Panel should have proceeded directly to issuing the standard recommendation called for by Article 19.1 of the DSU. Like India, the United States did not believe the Panel should have undertaken its second review of India's measures before deciding whether to make that recommendation. The United States also agreed with India that systemic considerations militated against reading the DSU to require the

analysis that the Panel had undertaken in Section VIII of its Report. The United States appreciated India's willingness to withdraw its appeal, which it considered to be a very constructive step towards a full resolution of this dispute. In this connection, the United States wished to thank the Appellate Body for promptly issuing its Report in response to India's withdrawal of its appeal. The United States supported the adoption of these Reports and looked forward to hearing India's intentions with respect to the recommendations contained in the Panel Report as well as to engaging in constructive discussions on prompt implementation with India.

13. The representative of the European Communities said that his delegation wished to thank the Panel for its well-reasoned and well-drafted Report. The EC considered that the Panel's findings and conclusions were in line with established GATT/WTO jurisprudence. Overall, the Report constituted a very positive step in consolidating even further the GATT/WTO *acquis* in this area of law. Following the adoption of the Report at the present meeting, the EC wished to see a rapid implementation of the conclusions and recommendations of the Panel Report. This was both necessary and feasible. Furthermore, the EC expected that for implementation purposes, India's authorities would honour the assurances given during the Panel's proceedings on the scope of the respective trade-balancing commitments assumed by the signatories of the Memorandum of Understanding (MOU). The EC would closely follow this matter. It was fully aware of the positive steps taken by India in removing certain WTO-inconsistent measures related to the dispute under examination and, most notably, the withdrawal of Public Notice No. 60. However, these measures were not sufficient. Only the effective and irrevocable termination of all local content and trade balancing requirements assumed by the MOU signatories would be in line with the findings and conclusions of the Report. The EC urged India to take all appropriate steps in this direction. This would allow India to continue deepening its trade relations unencumbered by unnecessary trade irritants.

14. The representative of India said that the Panel's findings had been submitted to the DSB for consideration at the present meeting because of India's decision to withdraw its appeal against serious shortcomings in the Panel Report. While India continued to hold the same view with regard to the Panel's findings, it had in the meantime introduced nationally a new auto policy, which had rendered the Panel's findings to be of no practical relevance. For that reason, India had decided to invoke its rights under Rule 30(1) of the Working Procedures for Appellate Review. While this step might have been somewhat unusual, India believed that this was in the interest of all concerned. It would have been a waste of resources of the parties to the dispute if this matter had been pursued. In India's view, the matter was fully resolved as a result of its new policy, which was now fairly open and permitted automatic approval of foreign equity investments up to 100 per cent in the manufacture of automobiles and components.

15. However, at the present meeting, India wished to raise its serious systemic concerns with respect to the Panel's findings. He noted that while the Panel had agreed "with India's contention that hypothetical future measures which it could, but might not take ... would not fall within the scope of this Panel's terms of reference", in Section VIII of its Report, it had examined the measures taken by India after the date of the requests for the establishment of a panel, and had concluded that the measures taken by India after the establishment of the panel did not make the measures under dispute consistent with WTO-provisions. India considered the findings contained in Section VIII of the Report to be outside the Panel's terms of reference as well as both factually and legally incorrect. Contrary to the assertion of the Panel, Article 19.1 of the DSU did not authorize panels to settle a dispute on the question of whether or not a measure taken during the course of the panel's proceedings had brought the measure at issue into compliance. If a panel found that the measure at issue ceased to exist, it should refrain from making the recommendation that the measure be brought into conformity with WTO rules, in accordance with the Appellate Body's ruling in the case on "United States – Import Measures on Certain Products from the European Communities" (DS165). However, this did not mean that panels were competent to rule on measures outside their terms of reference for the purpose of determining whether the measure at issue had been brought into compliance. Neither India

nor the complainants had requested the Panel to rule on the general question of whether the measures at issue were consistent with the GATT as of the date of the Panel's interim review. India's request for a factual finding that certain of the measures falling within the Panel's terms of reference ceased to exist had been treated by the Panel as a request for a legal ruling on the question of whether measures falling outside the Panel's terms of reference had brought the measure at issue into conformity with the GATT.

16. The Panel's novel approach had serious implications for the proper functioning of the DSU. As pointed out by the United States at the interim review meeting, this would be tantamount to pursuing "moving targets" which was not a mandate of the DSU. India was surprised that the Panel had gone out of its way to prove its point and had based its findings on evidence submitted only at the interim review stage. It was also unfortunate that after finding that it was not in a position "to assess the exact modalities under which existing MOU signatories still have to discharge their indigenization obligations", the Panel had nevertheless concluded that the indigenization conditions in the MOUs remained in violation of Article III of the GATT 1994. Any Member that had been confronted with the findings of inconsistency by a judicial body of the WTO had the right to expect that such findings would only be made provided that: (i) the matter was covered by the terms of reference; (ii) the complainants had requested the Panel to make such findings; (iii) all relevant facts had been examined and had supported the rulings; and (iv) WTO provisions prohibited the measures at issue.

17. The Panel, in its analysis contained in Section VIII of its Report, had made rulings on matters outside its mandate, beyond the request submitted by the parties and without the required legal and factual basis. No panel had ever interpreted Article 19.1 of the DSU as giving panels the competence to determine whether the measures at issue remained. Panels had left such issues to compliance panels established under Article 21.5 of the DSU. No panel had based its rulings on evidence that had become available only at the interim review meeting. Nor had a panel ever found a formally repealed law to be inconsistent with WTO law. Furthermore, no panel had imposed the obligation on a Member to refrain from enforcing a WTO-consistent contractual commitment merely because it had been assumed in connection with a WTO-inconsistent measure, as had been ruled in this case, with regard to export obligations.

18. Several panels had emphasized that all remedies under WTO law were of a prospective nature. All parties to the dispute under consideration had expressed their dissatisfaction with the Panel's approach regarding Section VIII of the Report. Not only India but also the United States had requested the Panel at the interim review stage to strike out Section VIII from the Report. Moreover, the United States had supported India's appeal on the Panel's finding that Article 19 of the DSU required it to examine the events that had occurred during the course of the proceedings. The EC recognized that the Panel had failed to make a sufficiently clear finding to the effect that, following the repeal of Public Notice No. 60, the indigenization condition contained therein, as opposed to those contained in the MOUs, ceased to apply and, therefore, was GATT-inconsistent. Consistent with its decision to withdraw its appeal, India did not object to the adoption of this Panel Report by the DSB. However, it doubted whether the DSB would fulfil its function if it were to simply rubber stamp a report with a completely novel approach that had given difficulties to all the parties to the dispute and contained systemic issues of concern to all Members and rulings totally unsupported by facts. It was appropriate, therefore, for the DSB to adopt at the present meeting only the part of the Panel Report ending with the conclusions on the measures that the complainants had referred to the DSB and to consider the adoption of Section VIII at the next meeting. This would enable Members to form their considered views on this matter and enable the DSB to play a role in guiding panels in future cases in which new measures were adopted during the course of the Panel's proceedings.

19. The representative of Korea said that his country had participated in this dispute as a third party. He recalled that Korea had stated in the Panel's proceedings that the post-1 April measure was inconsistent with the WTO Agreement because even though the import licensing scheme had been abolished as from 1 April 2001 India's continuation of the Memorandum of Understanding (MOU)

requirements could not be separated from the existing regime. The Panel had correctly found that India's post-1 April measures, which still required MOU signing companies to observe the local content and export obligation, was inconsistent with the WTO Agreement. In this regard, Korea believed that the remaining obligation of car manufacturers under the existing MOU should be removed as soon as possible, in accordance with the Panel's rulings and recommendations.

20. The representative of the European Communities said that he wished to respond to the statement made by India and to make comments in particular with regard to India's request regarding Section VIII of the Panel Report and the so-called ruling on matters outside the Panel's mandate. He recalled that India's disputed trade practices had been introduced through Public Notice No.60 and had been made operational and enforceable through the Memoranda of Understanding (MOU), which private operators were required to sign in order to be able to operate in India. The repeal of Public Notice No. 60 was not sufficient. India should have repealed the MOU. Furthermore and despite the elimination of import licenses on 1 April 2001, India had officially indicated that export obligations incurred by MOU signatories in respect of imports made up to 31 March 2001 should be fulfilled by them. Therefore, it was imperative that India bring its measures into full conformity with the DSB's recommendations as soon as possible. Under these circumstances it might be necessary for India to announce a termination of the WTO-inconsistent requirement through the issuance of a Public Notice.

21. With regard to the procedure, the EC considered that India's request to adopt only part of the Panel Report was unusual. He drew attention to Article 17.14 of the DSU which provided that Appellate Body reports should be adopted unconditionally. A corresponding provision was contained in Article 16 of the DSU in relation to panel reports. He further stated that at the present meeting, the DSB was already confronted with the unusual situation of India's withdrawal of its appeal and it be highly unusual for the DSB to consider India's request to adopt the Panel Report in part. In addition the DSB was required not only to adopt a short factual Report of the Appellate Body, but also the Panel Report in full, since it had not been modified by the Appellate Body. Pursuant to Article 16.2 of the DSU, India could have expressed its objections to the Panel but had not done so. In the EC's view there was no justification in terms of substance or procedure for such an unusual step of partial adoption. Thus, as provided for in Articles 16 and 17 of the DSU, both the Panel and the Appellate Body Reports should be adopted unconditionally and in full.

22. The representative of India said that his country wished to respond to the second intervention made by the EC. He said that the trade-balancing provisions set out in Public Notice No. 60 and the MOUs signed by the car manufacturers did not apply in the absence of import restrictions on cars or car components. Furthermore, the indigenization provisions in the MOUs did not apply to car manufacturers that had attained the 70 per cent indigenization target. In accordance with the agreement reached with the United States and the EC, India had ceased to apply import restrictions on cars and car components as from 1 April 2001. Since then no additional export obligations had been incurred by car manufacturers, which had imported cars or components or had purchased imported cars or components. Moreover, in May 2001 all the main foreign car manufacturers, except one, had attained the 70 per cent target and had consequently ceased to be bound by the indigenization requirement. Against this background, India had first attempted to convince the complainants to withdraw their complaints. It had subsequently urged them to limit their complaints to issues that would arise in the absence of import restrictions. After the removal of the import restrictions and the attainment of the indigenization target by all but one manufacturer, India had sought the complainants' recognition that a compliance recommendation was required only in respect of the last remaining indigenization requirement. India had also attempted to convince the Panel that the dispute before it had been settled because India was already bound to remove the import restrictions at issue as a result of the complainants' earlier invocations of the DSU, and that a compliance recommendation was required only in respect of the last remaining indigenization requirement. At the same time, India had repeatedly stated that the Panel was not competent to make legal rulings on the measures applied after 1 April 2001 and that the complaints by the United States and the EC were premature.

23. In paragraph 8.4 of its Report, the Panel had therefore correctly noted India's argument that "any future measures which India might take as of [or] after 1 April would be outside the Panel's terms of reference". If there was any doubt as to the nature of India's request on the scope of the compliance recommendation, India had removed that doubt at the interim review meeting when it had requested the Panel to strike out the legal findings contained in Section VIII of its Report. Therefore, India failed to understand how the EC could seriously assert that India was objecting to findings that it had requested itself. India also failed to understand how the EC could assert that it had requested the Panel to make the findings included in Section VIII. The EC had not made such a request. Moreover, in response to India's arguments in the first submission, the EC had stated that its complaint was not addressed against the enforcement measures that might be taken by India after 1 April 2001. The panel request and the EC's first submission to the Panel made it perfectly clear that the EC's complaint was directed against Public Notice No. 60 and the MOUs as such. Public Notice No. 60 and the MOUs had been adopted by India well before the EC had submitted its panel request and were unquestionably within the terms of reference of the Panel. The EC had not requested the rulings that the Panel made in Section VIII of its Report, nor had it supplied any evidence in support of such rulings. Therefore, the Panel's approach in Section VIII could not be reconciled with the principle enunciated by the Appellate Body in the EC – Hormones case that panels could not "rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it" and that they could not "make the case for a complaining party". It was true that this was an unusual request for partial adoption of a panel report, but the circumstances of this Report warranted such a request.

24. With regard to the EC's point on Article 16.2 of the DSU, it was India's intention to invoke that Article. However, India was under the impression that the Report would be placed on the agenda of the regular DSB meeting to be held on 17 April 2002. However, as the complainants had decided to place it on the agenda of the present meeting, India did not have time to exercise its rights and to give written reasons explaining its objections for circulation at least 10 days prior to this meeting as required under Article 16.2 of the DSU.

25. The Chairman noted the statements made at the present meeting and said that the minutes of the meeting would reflect the views expressed by Members on the Panel and the Appellate Body Reports, including the concerns regarding certain parts of the Panel Report as indicated by India and other parties. With regard to the adoption of the Report, he noted that the provisions of Articles 16.4 and 17.14 of the DSU stipulated that the panel and the Appellate Body reports had to be adopted unconditionally and that there was no precedent in the DSB of the Report being adopted only in part. In view of the withdrawal by India of its appeal by letter dated 14 March 2002, the subsequent notification of the withdrawal to the DSB and the short report by the Appellate Body, it should be considered that the Appellate Body had completed its work within the meaning of Article 16.4 of the DSU. Therefore, unless there was a consensus not to adopt the Reports, they should be adopted in full in accordance with Article 17.14 of the DSU. He then proposed that the DSB take note of the statements made and adopt the Reports submitted at the present meeting in accordance with Article 17.14 of the DSU.

26. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS146/AB/R – WT/DS175/AB/R and the Panel Report in WT/DS146/R and Corr.1 – WT/DS175/R and Corr.1.
