

Dispute Settlement Body
11 July 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 11 July 2003

Chairman: Mr. Shotaro Oshima (Japan)

1. Canada – Measures relating to exports of wheat and treatment of imported grain

(a) Request for the establishment of a panel by the United States (WT/DS276/9)

1. The Chairman drew attention to the communication from the United States contained in document WT/DS276/9.

2. The representative of the United States said that, as described in the consultation request of 17 December 2002, the United States was concerned that Canada's measures relating to wheat exports and to the treatment of imported grain appeared inconsistent with Canada's obligations under the GATT 1994 and the TRIMs Agreement. He recalled that at its meeting on 31 March 2003, the DSB had established a panel pursuant to Article 6 of the DSU to examine these matters. As a result of a request for a preliminary ruling submitted by Canada, the United States was now requesting the establishment of a second panel to examine these measures. The United States understood that Canada would agree to the establishment of that second panel at the present meeting. The United States and Canada had also agreed that, pursuant to Article 9.3 of the DSU, the same persons would serve as panelists as those who were currently serving on the existing panel, and the timetable of the two panels would be harmonized. The United States would like to take this opportunity to express its appreciation to Canada for its cooperation in this connection. This was a good demonstration of how Members could and should seek to resolve procedural issues in disputes by agreement. In order to provide Members with background for this request for a second panel, the United States had circulated to all Members a letter explaining that it would be making the request for the establishment of a panel (WT/DS276/8). The United States had also asked the current Panel to circulate its preliminary ruling so as to further assist Members in understanding the reason for its panel request submitted at the present meeting. The United States was grateful to the Panel for having done so. That letter and the preliminary ruling explained the reasons for the DSB meeting. Members who had had an opportunity to read that preliminary ruling would know that Canada had asserted that the US panel request failed to comply with Article 6.2 of the DSU in six respects. The Panel had rejected Canada's challenge to five of the six aspects, but had agreed with one of the arguments. The United States continued to believe that its first panel request did, in fact, comply with the requirements of Article 6.2 of the DSU. Further, the United States regretted that Canada did not raise its Article 6.2 allegations prior to the establishment of the current panel, the course of action called for in the Appellate Body Report on the Foreign Sales Corporation dispute. Had Canada raised its concerns over the specificity of the panel request in a timely manner before the DSB took action on the request, the United States would have had the opportunity to review the request and the DSB could have avoided the need to meet in order to establish a second panel on the same matter. Nevertheless, in response to the preliminary ruling, and as suggested in the final paragraph of that ruling, the United States had submitted on 30 June 2003, a panel request that described Canada's laws and regulations

relating to wheat exports and to the treatment of imported grain with more particularity. The United States requested that the DSB establish a panel pursuant to Article 6 of the DSU with the standard terms of reference to examine those matters.

3. The representative of Canada said that on 25 June 2003, the Panel in the Canada – Wheat case had found that the US panel request of 7 March 2003, was inconsistent with Article 6.2 of the DSU. As a result, the Panel had decided it would refrain from considering the substance of the US claim under Article XVII of GATT 1994. In its ruling, the Panel had suggested that, if the United States had filed a new panel request, the parties would agree to have a panel established at the first DSB meeting at which the panel request was on the agenda. On 30 June 2003, the United States had filed a new panel request, which was being considered at the present meeting. It was unfortunate that the original panel request did not meet the requirements of Article 6.2 of the DSU. In a letter dated 7 April 2003, Canada had made a good-faith effort to clarify with the United States the grounds for its panel request. Since no reply was forthcoming, Canada had taken the "unusual" step of asking the Director-General to compose the Panel so that Canada could make its request for a preliminary ruling at the earliest possible juncture. Canada had filed its request for a preliminary ruling as it had felt that it had suffered prejudice in the preparation of its defence. Based on the original US panel request, Canada did not know what case it had to answer and what violations were being alleged. In its panel request of 30 June 2003, the United States had now stated the specific measures at issue and the legal basis for its complaint. Canada might only now begin to prepare a full defence, but contrary to normal practice, it would not be allowed for several months to do so. However, in deference to the suggestion of the Panel, Canada would agree to the establishment of a panel at the present meeting. Canada and the United States had agreed that the current panel, composed of Ms. Claudia Orozco, Mr. Alan Matthews and Mr. Hanspeter Tschani, would continue its excellent work and continue to examine this matter. It was Canada's view that its grain sector and transportation policies were fully consistent with the WTO's rules and obligations. Canada looked forward to working with the Panel and the United States for the prompt, fair and effective resolution of this dispute.

4. The representative of the European Communities said that the objective of the present request appeared to be to remedy a panel request that was found insufficiently specific under Article 6.2 of the DSU by replacing it with a new, supposedly more specific panel request, while suspending the panel proceedings on the rest of the pending claims. Such a procedure was without precedent under the DSU, and raised a number of complex legal and procedural issues. The EC would, therefore, like to raise the following questions: (i) Could the United States and Canada explain the reasons underlying the panel request and its relationship to the panel already established in DS276? (ii) What was the status of the preliminary ruling adopted by the existing Panel? Was either party intending to propose this ruling for adoption by the DSB? Was either party intending to appeal the ruling? (iii) Did the parties consider that the consultations held between them prior to the first panel request also covered the subject matter of the present request? Did they consider that the request for consultations made by the United States on 17 December 2002 was sufficiently specific? (iv) Was this panel request to be understood as a request to establish a new panel, or to extend the jurisdiction of the existing panel? (v) If this was a new panel request, why did it cover issues (i.e. the claims under Article III of GATT 1994 and Article 2 of the TRIMS Agreement) which were already validly before the existing Panel? (vi) Supposing that a new panel was established by the DSB, how would this panel relate to the existing Panel? In particular, would the same panelists be appointed? Would the new panel adopt new working procedures? Would it adopt a new timetable for the procedures? The EC was of the view that these issues and their implications for the DSU should be carefully considered by the DSB before establishing the panel.

5. The EC also would like to use the occasion to provide some comments on the procedures followed so far by the existing panel. First, with regard to the ruling on Article 6.2 of DSU, the EC wished to refer to the written and oral submissions it had made in the course of the Panel's proceedings. It regretted, however, that contrary to Article 10.3 of DSU, these submissions were not reflected in the Panel's ruling. Second, with regard to the procedures regarding the protection of confidential

information adopted by the Panel, the EC regretted that access by third parties was limited to only two designated persons, who might have access only on the premises in Geneva. The EC considered that these procedures were unnecessarily burdensome for third parties. It would therefore suggest that a new panel be established to review these procedures.

6. The Chairman noted that the EC had raised some questions and invited the United States and Canada to respond to those questions.

7. The representative of the United States said that he wished to thank the EC for its questions. The United States believed that its earlier statement and the letter as well as the Panel's preliminary ruling, which had been circulated to all Members, had already responded to these questions. The United States would of course be happy to discuss this further with Members, should they have additional questions in the future.

8. The representative of Canada said that he wished to thank the EC for its interest in the questions posed and, like the United States, Canada also considered that its statement had referred to the questions posed and that the two statements made provided ample clarity and understanding. Canada would continue to be open to discuss any concerns with any Member.

9. The representative of Japan said that her country was a third party to the proceedings of the ongoing Panel with regard to the Canadian measures that were subject to this renewed panel request by the United States, which had been established at the 31 March 2003 DSB. Japan had expressed its views on the question of the jurisdiction of that Panel at the hearing on preliminary issues. The Panel's preliminary ruling – JOB(03)/136 – circulated to Members at the request of the United States with the consent of Canada and the third parties concerned, including Japan, suggested a possible way to "cure" the deficiency of the original US panel request, after having found that the US claim concerning Article XVII of GATT 1994 was not within the Panel's jurisdiction due to its inconsistency with Article 6.2 of the DSU. Japan considered the Panel's suggestion, and the renewed panel request based on it by the United States, as pertinent only to this particular proceeding. Such procedure was quite exceptional, and should not be generally used in future with regard to similar cases. In view of the US communication to Canada and to the Chairman of the DSB (WT/DS276/8) which had been circulated to Members, Japan understood that the United States was following the Panel's suggestion to renew its panel request. Japan would welcome further clarifications from the United States on the reasons for including in the panel request those claims ruled to be properly before the ongoing Panel. The duplication of the terms of reference would have to be addressed, if two panels were to be established on extremely similar claims on the same measures. Japan did see merit in having the same panelists and harmonized schedules for the two panels for the sake of efficiency in this particular case. However, Japan would like to reserve its position on the applicability of Article 9.3 of the DSU to such an instance. Moreover, even if it was applicable, Article 9.3 of the DSU should be applied only based on the agreement of the parties concerned.

10. The Chairman said that Japan had raised some questions and invited the United States and Canada to respond to those questions.

11. The representative of the United States said that his delegation wished to thank Japan for the questions posed and, once again, he wished to refer back to the US statement and to the preliminary ruling. In response, the United States was of course happy to take the questions raised by Japan back to capital and to continue discussions with that delegation and with any other delegation that would wish to explore the issues that had been raised in further detail.

12. The representative of Canada said that in response to the statement made by Japan, at this point, beyond its opening statement, Canada would not wish to comment further, but would reflect on the issues raised by Japan and, equally, Canada would be open to discussing them. However, Canada

considered that the reasons underlying its opening statement had already addressed the issues raised, but it would reflect on the comments that had been made as well as any other comments to come.

13. The representative of Chile said that his country had no objection to the establishment of this panel. On the contrary, Chile considered this to be a practical solution to the preliminary ruling of the Panel, before which it had expressed its opinion on the substance of that decision. Moreover, Chile believed that the request considered at the present meeting reflected the inherent flexibility of the DSU, which allowed the parties to adapt the procedures with a view to achieving the final objective of the DSU, namely, the prompt and effective settlement of disputes. However, Chile wished to express its concern at the Panel's decision to circulate its preliminary ruling. This decision to circulate an internal panel communication raised important systemic questions resulting from the legal nature of these preliminary rulings as understood by Members and panels. The DSU did not provide for preliminary rulings, which had, little by little, become part of working procedures of panels. Panels had to carefully assess any determination they adopted with respect to any preliminary ruling at which they might arrive. In this respect, Chile did not recognize the authority of panels to make preliminary rulings public.

14. The DSU clearly stipulated that the only document that panels should make public was the final report. Not interim reports and still less communications between the panel and the parties. Circulating a document such as a preliminary ruling breached the confidentiality of the panel deliberations as laid down in Article 14 of the DSU. It was also contrary to the rules and procedures for the circulation and distribution of documents in the WTO. Circulation created uncertainty as to the legal implications of the ruling. He questioned whether the preliminary ruling of a panel and its justification could be used by another panel to justify another decision. In other words, could this constitute a precedent? Chile also had doubts about circulating the preliminary ruling as a Job document: i.e. JOB(03)/136. Chile understood that documents circulated as Job numbers were working documents submitted by Members or prepared by the Secretariat, not by panels. Chile wished to know on what basis the Secretariat considered it appropriate and correct to circulate a preliminary ruling by a panel in a Job document. Finally, if the intention of the document was to inform Members of the background to the case justifying the present US request, the ruling should have been circulated in the three official WTO languages. Chile had indicated to the Secretariat some of these points when it had been consulted, but it understood that some of the parties had neither been consulted nor informed. Chile would not object to whatever decision were to be taken at the present meeting with regard to this matter. However, it was Chile's understanding that the circulation of the preliminary ruling in question was an isolated decision and would not be repeated in future cases.

15. The representative of the Secretariat (Legal Affairs Division) said that in response to the questions raised by Chile, he wished to say the following by way of explanation on behalf of the Secretariat. As was clear from document WT/DS276/11, the Panel in this case, had received on 2 July 2003 a request from the United States to circulate the preliminary ruling to Members. After consulting with Canada and the appropriate third parties, the Panel had agreed to the US request on 7 July; i.e. just a few days before the present meeting. After receiving the US request as agreed to by the Panel, the Secretariat had enquired its relevant services on a preliminary basis, whether it would be possible to have the 17 page preliminary ruling translated into all three official languages and circulated to Members in time for the present meeting. It turned out that this was not possible. The Secretariat understood from the Panel and the parties that it was important for the preliminary ruling to be made available to Members as background information at the present meeting since there was a possibility that the DSB would establish a new panel at the present meeting. Faced with these special circumstances, the Secretariat, in consultation with the United States, and after the panel had approved the circulation of the preliminary ruling, had decided that the best way forward was the immediate circulation of the English version of the preliminary ruling as a job number. He stressed that it was the Secretariat's intention to circulate the French and Spanish versions of the preliminary ruling as a Job number as well as soon as they were available. Once the preliminary ruling had been translated

into all three official languages, it would also be circulated as an official document in the DS series, probably as document WT/DS276/12.

16. The representative of Mexico said that there were two important points, which his delegation wished to place on record. Mexico had participated as a third party in the proceedings of the Panel that had been established on 31 March 2003. However, Mexico noted the reference to the fact that the Panel had consulted with the "appropriate" third parties. Mexico was not one of those "appropriate" third parties because it had not commented on the requests regarding the preliminary ruling concerning Article 6.2 of the DSU. He underlined that Mexico had not made comments on the preliminary ruling not because of a lack of interest, but after a well-thought decision by the Government of Mexico. His delegation was concerned about the circulation of the preliminary ruling by the Panel without consulting with all third parties to this dispute. Circulation of a panel document not only affected matters of confidentiality of the arguments submitted, it might raise other concerns and the fact that Mexico had not been consulted was inadequate. Furthermore, Mexico endorsed Chile's concern that only the English version of the preliminary ruling had been circulated. It should not come as a surprise that Mexico considered language issues to be very important. Therefore, in light of this, Mexico would not reserve its third-party rights in this panel, but considered that 10 days would count as from the time that the preliminary ruling had been circulated in Spanish and then it would decide whether or not to participate as a third party.

17. The representative of Korea said that his country had not participated as third party in this case. In Korea's view, the present meeting highlighted the importance for a complaining party to meet fully the requirements of Article 6.2 of the DSU. This was essential because the defending party had to see what was the specific measure or legal basis under Article 6.2 of the DSU in order to defend its interests fully. Korea welcomed with satisfaction the cooperative spirit between Canada and the United States in having the panel established at the present meeting.

18. 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.

19. The representatives of Australia, Chile, China, Chinese Taipei, the European Communities, and Japan reserved their third-party rights to participate in the Panel's proceedings.

20. The Chairman recalled that on 31 March 2003, the DSB had already established a panel to examine the complaint by the United States with regard to Canada's measures relating to exports of wheat and treatment of imported grain contained in document WT/DS276/6. Since the panel established at the present meeting, pursuant to the complaint by the United States contained in document WT/DS276/9, related to the same matter, it was his understanding that, for practical purposes, Canada and the United States agreed to follow the provisions of Article 9.3 of the DSU which read as follows: "If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized".

21. The DSB took note of the statement.
