WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
11 May 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 11 May 2007

Chairman: Mr. Bruce Gosper (Australia)

1. United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina

(a) Report of the Appellate Body (WT/DS268/AB/RW) and Report of the Panel (WT/DS268/RW)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS268/22 transmitting the Appellate Body Report on: "United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina", which had been circulated on 12 April 2007 in document WT/DS268/AB/RW, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He recalled that Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report."

2. The representative of Argentina said that his country wished to thank the Panel, the Appellate Body and the respective Secretariats for their work in the settlement of the dispute concerning sunset reviews of anti-dumping measures on oil country tubular goods (OCTG) from Argentina. His country, once again, welcomed an outcome that was favourable to its interests in the field of products for the international oil industry, where it was one of the main suppliers. Thanks to the work of the Panel and the Appellate Body, it had been established that the anti-dumping duties, applied by the United States to Argentina's exports of OCTG, were inconsistent with the United States' obligations under the Anti-Dumping Agreement. In 2000, the sunset review by the US Department of Commerce (USDOC) had determined a likelihood of recurrence or continuation of dumping in respect of OCTG exports from Argentina, on the basis of the original dumping margin and the decline in the volume of imports following the imposition of the order. Consequently, the order remained in force for a further five years. In 2004, the Panel and the Appellate Body Reports adopted by the DSB had established that this determination was not based on evidence and was, therefore, inconsistent with Article 11.3 of the Anti-Dumping Agreement.

3. Despite this, the United States had decided to maintain the measure and make a new determination under Section 129 of the Uruguay Round Agreements Act. In December 2005, the USDOC had, once again, determined the likelihood of continuation or recurrence of dumping, this time on the basis of the decline in the volume of imports and likely past dumping. The Panel

established under Article 21.5 of the DSU, at the request of Argentina, had clearly established that neither of the two premises put forward by the USDOC was consistent with the Anti-Dumping Agreement and that the re-determination under Section 129, therefore, lacked a sufficient factual basis. The Panel had most notably stated that "... the USDOC made a finding of likely dumping without making any effort to obtain information that is essential to the core principle of dumping as a price-to-price comparison". Moreover, with regard to the volume analysis, the Panel, following precedent set by the Appellate Body, had found that the 2005 re-determination under Section 129 failed to examine potential reasons that could have triggered the decline in the volume of imports. According to the Panel, "this is not ... the kind of determination that would be made by an unbiased and objective investigating authority. The USDOC's determination regarding the decline in the volume of imports lacks a sufficient factual basis."

4. The Panel had also found that, as in the original review, the United States had failed to observe the due process rights to which Argentina's exporters were entitled under Article 6 of the Anti-Dumping Agreement. None of these findings had been appealed by the United States and it had, therefore, been established that the 2005 re-determination against OCTG from Argentina, like the initial determination, had no legal basis consistent with the WTO. Argentina wished to remind the DSB Members that the sequence of events in this dispute highlighted the way in which Argentina's rights as an exporter had been undermined by the United States' lack of compliance. Although the DSB had established that the original anti-dumping determination of August 2000 was inconsistent with the Anti-Dumping Agreement and that during the 2005 re-determination under Section 129 the United States had not complied with the due process rights and substantive guarantees set forth under that Agreement, in October 2006 the USDOC determined, once again, that the anti-dumping duties on OCTG from Argentina were to be extended by another five years, until 2011. The adoption of the Panel and the Appellate Body Reports at the present meeting would firmly establish that the United States had wrongfully maintained a barrier against Argentina's exports for six years, despite the WTO having found on two occasions that the measure was unlawful. As at the start of the proceedings, and in the light of the Reports to be adopted at the present meeting, Argentina was convinced that the United States would be able to comply with its obligations only by lifting the measure.

5. The representative of the United States said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their work in this dispute. The United States was pleased that the Appellate Body had reversed the Panel's finding that the "waiver provisions" of US law were inconsistent with Article 11.3 of the Anti-Dumping Agreement. In a well-reasoned analysis, the Appellate Body had found that there was no evidence to support the Panel's conclusion that the statute allowing interested parties voluntarily to waive participation in a sunset review breached the Anti-Dumping Agreement. The Appellate Body had correctly concluded that the waiver provisions were not as such inconsistent with Article 11.3 because the waiver provisions did not preclude US authorities from making a reasoned determination with a sufficient factual basis. With respect to the scope of the measure taken to comply, the United States recognized the care with which the Appellate Body had articulated its findings. The Appellate Body had emphasized that it based its findings on facts particular to this dispute; i.e. the US authorities' determination of likelihood of dumping consisted of two factual bases which operated together. The United States was also pleased that the Appellate Body had rejected Argentina's appeals in this proceeding and was pleased that the Panel had rejected a number of procedural claims advanced by Argentina. Finally, the United States regretted the Panel's finding with respect to the proceeding at issue, which it had not appealed. The United States intended to comply with its obligations in this dispute. However, Argentina's argument that a Member was legally obliged to revoke a sunset review that was found to be WTO-inconsistent had been squarely, and repeatedly, rejected.

6. The representative of the European Communities said that the EC welcomed the Appellate Body Report which brought further clarity on the rules applying to sunset reviews and on other important systemic issues. The EC considered the introduction of sunset reviews to be a key

achievement of the Uruguay Round negotiations to avoid never-ending measures. Leaving excessive margin of manoeuvre to investigating authorities in conducting sunset reviews risked to reduce them to a formalistic exercise, which did not correspond to their object and purpose. In particular, the EC believed that the continuation of the duty should be the exception, and that in all cases the investigating authority had to base its decision on firm evidentiary basis. These principles had already been made clear by the Appellate Body in the case "US – Corrosion-Resistant Carbon Steel from Japan" (DS244). In that case the Appellate Body had addressed specifically the issue of past dumping margins and import volumes, finding that they were not always highly probative for the likelihood of continuation of dumping in a sunset review. It had stated that a case-specific analysis of the factors behind the import trends remained necessary. The EC, therefore, urged the United States to promptly comply with the Panel and the Appellate Body findings on volume analysis and on the analysis of likelihood of past dumping. The EC hoped that the voluminous case law on these issues would convince the United States to abandon its strict policy guidelines that tried to substitute a reasoned and adequate analysis of each case with pre-determined scenarios resulting almost automatically in a finding of likelihood of continuation or recurrence of dumping. There was no substitute for a fully fledged, objective and impartial investigation in all circumstances.

7. The representative of Hong Kong, China said that her delegation was of the view that the case under consideration, and the Appellate Body's rulings, raised a number of generic issues which merited Members' close attention. Among others, her delegation noted that the US "amended waiver provisions", which had been subject to challenge in this dispute, might have put exporters in a disadvantageous position. While Hong Kong, China was still reflecting on the findings of the Appellate Body in this regard, it was concerned whether in effect the burden of proof had been shifted in a sunset review. Her delegation was also concerned about consequential effects of maintaining an overall balance of rights and obligations between the exporting and importing ends. Also, it was disappointed that, while noting their systemic relevance, the Appellate Body had chosen not to address the questions of whether, and on what basis, an anti-dumping order may be maintained after its sunset review had been found to be inconsistent with the Anti-Dumping Agreement. In this connection, Hong Kong, China recalled that Article 1 of the Anti-Dumping Agreement had set out the fundamental principle that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of [the Agreement]". Hong Kong, China looked forward to an early opportunity for the Appellate Body to comment on these important systemic issues.

8. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS268/AB/RW and the Panel Report contained in WT/DS268/RW, as modified by the Appellate Body Report.