WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/164
12 March 2004

(04-1088)

Dispute Settlement Body
26 January 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 26 January 2004

Chairman: Mr. Shotaro Oshima (Japan)

1. United States – Continued Dumping and Subsidy Offset Act of 2000

(a) Recourse to Article 22.2 of the DSU by Chile (WT/DS217/21)

(b) Recourse to Article 22.2 of the DSU by the European Communities (WT/DS217/22)

(c) Recourse to Article 22.2 of the DSU by India (WT/DS217/23)

(d) Recourse to Article 22.2 of the DSU by Japan (WT/DS217/24)

(e) Recourse to Article 22.2 of the DSU by Korea (WT/DS217/25)

(f) Recourse to Article 22.2 of the DSU by Canada (WT/DS234/25)

(g) Recourse to Article 22 of the DSU by Mexico (WT/DS234/26)

(h) Recourse to Article 22.2 of the DSU by Brazil (WT/DS217/20)

1. The Chairman proposed that the DSB take up the eight sub-items together since they pertained to the same matter. First, he drew attention to the communication from Chile contained in document WT/DS217/21.

2. The representative of Chile said that a year ago the DSB had adopted the Reports of the Appellate Body and the Panel concerning this dispute. Those Reports had concluded that the Byrd Amendment was a non-permissible specific action against dumping or a subsidy contrary, *inter alia*, to the Anti-Dumping and the SCM Agreements. Since the Amendment was inconsistent with those Agreements, it nullified or impaired benefits accruing to Chile in these areas. The DSB had not only recommended that the United States bring the Continued Dumping and Subsidy Offset Act of 2000 (the CDSOA) into conformity with its WTO obligations, but had also noted that the Panel had found difficult to conceive of any more appropriate and/or effective way for the United States to bring the Byrd Amendment into conformity than to repeal it. Indeed, at the DSB meeting on 23 January 2004, the United States had reiterated its administration's position that the means of complying was to terminate the Byrd Amendment. The reasonable period of time granted to the United States to comply with the DSB's recommendations and rulings had expired on 27 December 2003. To date, however, the United States had not brought the CDSOA into conformity with the covered Agreements, nor had it complied with the DSB's recommendations and rulings within the reasonable

period of time. Even though the Appellate Body had concluded that there was no need for an economic assessment of the implications of the Byrd Amendment on the conditions of competition under which domestic products and dumped/subsidized imports competed in order to define what constituted a measure against dumping or a subsidy, it noted that the Amendment "has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors – producers of like products – through the transfer to the latter of the duties collected on those exports". The above had led Chile to conclude that the level of nullification or impairment suffered by Chile was equivalent to the financing of US producers of like products to those produced in Chile, and in the amount of the anti-dumping or countervailing duties applied and collected on Chilean products. That amount was known only each year, when the US authorities, on the basis of the duties assessed and the amounts requested by the US companies, determined how much was to be transferred to each company. In the light of the above, Chile requested the DSB's authorization to suspend concessions or other obligations *vis-à-vis* the United States in an amount equivalent to the level of nullification or impairment suffered. That level would be determined each year according to the offset payments made to the affected US producers, in the most recent annual distribution of anti-dumping or countervailing duties collected and assessed on products from Chile under the CDSOA. That suspension would be achieved by applying, on an annual basis, an additional tariff on products from the United States.

3. The Chairman drew attention to the communication from the European Communities contained in document WT/DS217/22.

4. The representative of the European Communities said that the EC, like most of the complainants in this case, had requested the authorization of the DSB to suspend the application to the United States of tariff concessions. The details of the EC's request were contained in document WT/DS217/22. The EC had been informed, on 23 January 2004, that the United States had requested arbitration proceedings on this matter, pursuant to Article 22.6 of the DSU. The EC considered that its request was equivalent to the level of nullification caused by the US inconsistent measures and that it was in line with the proviso of Article 22.3 of the DSU. The EC would strongly defend its position before the Arbitrators.

5. The Chairman drew attention to the communication from India contained in document WT/DS217/23.

6. The representative of India said that, through a binding arbitration in this dispute, it had been determined that the reasonable period of time required for the United States to bring its measure into compliance had ended on 27 December 2003. The United States had already indicated that the repeal of the Byrd Amendment was the correct way to implement the DSB's recommendations and rulings. It was a matter of considerable concern that the Byrd Amendment had still not been repealed. The DSU was the central element in providing security and predictability to the multilateral trading system. Failure by countries to implement the DSB's decisions within the reasonable period of time not only perpetuated the adverse trade effects caused by the inconsistent measure, but also undermined the dispute settlement mechanism.

7. Distributions under the Byrd Amendment to the US producers amounted to US$231 million in 2001 and US$330 million in 2002. The total disbursements for 2003 were estimated to be US$245 million. These disbursements had given a "double hit" to India's exporters thereby affording double protection to the US industry. The US companies that supported anti-dumping and countervailing duty investigations against competing imports not only benefitted from the imposition of anti-dumping and countervailing duties, but also from the disbursements under the Byrd Amendment. These payments were not consistent with the obligations of the United States under WTO Agreements and had caused widespread concerns among WTO membership. It was crucial that

the United States comply with its obligations without further delay. In order to preserve its rights under the DSU in this dispute, India sought authorization from the DSB to suspend concessions or other obligations against the United States, in the form of imposition of additional import duties above the bound customs duties on products originating in the United States. The annual level of retaliation would be linked to actual disbursements under the Byrd Amendment during the previous year. India hoped that this request along with that from certain other co-complainants in this dispute would actively encourage the United States to comply with the DSB's decision immediately.

8. The Chairman drew attention to the communication from Japan contained in document WT/DS217/24.

9. The representative of Japan reiterated her country's deep disappointment and regret that the United States had failed to implement the DSB's recommendations and rulings in this case by 27 December 2003. The Continued Dumping and Subsidy Offset Act of 2000, the so-called Byrd Amendment, was kept intact, and the payments under the Act, which were not permitted actions against dumping or subsidy under the WTO Agreement, still continued. As her delegation had stated at the 23 January DSB meeting, this situation had left Japan with no choice, but to preserve its right under the DSU by requesting the DSB's authorization to suspend concessions or other obligations. Since the United States had submitted its objection to Japan's request on 23 January 2004, her country was aware that the matter had been referred to arbitration. Japan was confident that the Arbitrators would find that Japan's request fully satisfied the requirements of Article 22 of the DSU, and that it was more than specific so as to enable them to perform their functions under Article 22.7 of the DSU.

10. The Chairman drew attention to the communication from Korea contained in document WT/DS217/25.

11. The representative of Korea said that his country was seriously concerned about the US failure to implement the DSB's recommendations and rulings in this dispute. The Continued Dumping and Subsidy Offset Act of 2000 (the CDSOA) had been found to be WTO-inconsistent and it had yet to be brought into conformity with the US obligations under the covered agreements. The reasonable period of time determined by an arbitration under Article 21.3(c) of the DSU had already expired on 27 December 2003 without the US compliance. It was unfortunate that Korea had no other choice, but to request authorization from the DSB to suspend the application to the United States of concessions or other obligations under the covered agreements, in accordance with Article 22.2 of the DSU. The purpose of Korea's exercise of its right under Article 22.2 of the DSU was to ensure prompt compliance with the DSB's recommendations or rulings, which was essential for effective resolution of disputes to the benefit of all Members. In its request, Korea proposed that the DSB grant authorization to suspend concessions or other obligations for an amount that would be determined annually by the amount of offset payments made to affected domestic producers in the United States in the latest annual distribution under the CDSOA. Further details were contained in document WT/DS217/25, dated 16 January 2004. In this regard, the United States had made known its opposition to the level of proposed suspension in its letter to the DSB dated 23 January 2004. To the extent that the United States persisted in its objection to the proposed level of suspension, the matter would be referred to and settled through arbitration under Article 22.6 of the DSU.

12. The Chairman drew attention to the communication from Canada contained in document WT/DS34/25.

13. The representative of Canada said that the United States had not brought itself into compliance with the DSB's ruling and recommendations within the implementation period in the matter of United States – Continued Dumping and Subsidy Offset Act of 2000. Canada had already noted the systemic and direct commercial harm done to it by the continued operation of this measure. Therefore, he would not repeat those points again at the present meeting. To protect Canada's rights

under the WTO, and with a view to encouraging the United States to bring itself into compliance, pursuant to Article 22.2 of the DSU, Canada requested, at the present meeting, authorization to suspend concessions or other obligations to the United States under the WTO Agreement. More specifically, Canada was seeking authorization to suspend tariff concessions and other obligations in an amount linked to the annual disbursements under the Byrd Amendment.

14. Canada took this action in concert with seven other WTO Members. This was the first time in the WTO history that so many Members had acted under Article 22.2 of the DSU in a single case. It was the clearest possible signal of the breadth and depth of concern about this measure among the Membership. All eight authorization requests were before the DSB for consideration at the present meeting. Canada considered that its request, and those of its fellow complainants pursuing this action, was conservative because it was restricted to the extent of disbursements each year so long as the Byrd Amendment remained in force. Apart from the chilling effects the Byrd Amendment had on trade flows and the financial inducement it provided to US firms to bring trade remedy cases, at a minimum, the disbursements themselves served as a measure of nullification or impairment because those payments were what had been found impermissible by the DSB.

15. It was only this claim that Canada and the other seven complainants made – a combined authorization request that would add up to the total annual disbursements under the Byrd Amendment. Canada, therefore, called upon the DSB to approve these authorization requests. As Canada had already stated on another occasion, retaliation was not a course of action it relished. To the contrary, retaliation typically brought further disruption to international trade. Regrettably, seeking authority to retaliate was the only option left to a Member to protect its rights in the face of another Member simply choosing not to comply with the rules. One year ago, the DSB had adopted the Report of the Appellate Body which was the final legal condemnation of the Byrd Amendment. The year had passed without serious action in the US Congress to do what it knew it must. Canada, therefore, called upon the United States to do the right thing by repealing the Byrd Amendment. This was important for avoiding any further disruptions to international trade by ensuring that the complainants did not need to exercise their retaliation rights.

16. The Chairman drew attention to the communication from Mexico contained in document WT/DS234/26.

17. The representative of Mexico said that since the entry into force of the Byrd Amendment in 2000, US producers had benefited from more than 550 million dollars worth of illegal contributions, and a further 240 million dollars were expected to be handed out this year. Mexico, like many other affected countries, had made great efforts to obtain a determination obliging the United States to bring its legislation into conformity. Unfortunately, all diplomatic contacts, negotiating bodies and statutory measures had failed. The United States had simply not complied with the DSB's recommendations and rulings. It was for that reason that, at the present meeting, Mexico was obliged to submit to the DSB for the first time its request for authorization to suspend concessions or other obligations to the United States. This was not Mexico's preferred option, but it was the only statutory tool that remained available to it in order to seek compliance by the United States and to prevent its exporters' interests from continuing to be impaired. The amount of Mexico's request was measured on the basis of the annual distributions made in accordance with the Byrd Amendment, year by year. Mexico considered that this amount covered only part of the damage that this legislation had actually caused. Mexico agreed with Canada that this was a conservative approach and it was confident that the Arbitrator would agree with Mexico. At the 23 January DSB meeting, many Members had spoken of how failure to comply affected the credibility of the system, a view with which Mexico concurred. Mexico believed that the central problem of the DSU was that it offered a system of incentives to impose or maintain unlawful measures. If there was one problem that needed to be resolved in the DSU, it was that system. This need was growing ever more urgent. There had already been so many cases of failure to comply within the reasonable period of time, or cases where time-period had been

renegotiated, that the very concept had become meaningless. Unless this fundamental defect in the dispute settlement mechanism was rectified, the mechanism would be further eroded, and the benefits gained in the negotiations would gradually become a dead letter.

18. The Chairman drew attention to the communication from Brazil contained in document WT/DS217/20.

19. The representative of Brazil said that due to the lack of implementation by the United States within the reasonable period of time, his country had now to make a request under Article 22.2 of the DSU in order to seek the DSB's authorization to suspend concessions to the United States. Brazil's request to this effect had been circulated in document WT/DS217/20. He then asked the DSB to agree to include in the minutes of the present meeting the full text of Brazil's statement since the representative of Brazil, who had been designated to deliver that statement, had been held up in traffic due the severe weather conditions in town that day (snowstorm).

20. The Chairman noted that there was no objection to the request by Brazil that the full text of the statement be included in the minutes of the present meeting.

21. The full text of Brazil's statement reads as follows: "Although other complainants have suffered nullification and impairment from higher disbursements under the so-called Byrd Amendment, the concern here is not only the amounts involved. It is, in fact, the blatant illegality of the Continued Dumping and Subsidy Act of 2000 (CDSOA), an illegality which has been confirmed by the Appellate Body. It is also, furthermore, the number of countries that can be and are being affected by that illegal measure. Thus, all the WTO Membership, not only the complainants in this dispute, should feel concerned about the lack of implementation by the United States, within the reasonable period of time set by the Arbitrator, of the recommendations and rulings of the DSB. The seriousness of the breach, however, is amplified by the fact that the incompatibility of the measure with the WTO rules could hardly have gone unnoticed in the very moment it was being introduced and discussed in the United States. It was described as a "double hit", intended to provide an additional remedy to dumping and subsidy. It was designed as a mechanism to permit US companies to recover losses monetarily rather than simply have the right, as allowed in the Agreements, to file a complaint. It was, in essence, meant to assist US companies at the expense of its foreign competitors. The adverse effects of the CDSOA, to be sure, were not hypothetical. Taking the amounts for 2001 and 2002 and the projections for 2003, the disbursements totalled about U$800 million. Brazilian companies have been enduring concrete adverse consequences of the non-compliance by the United States, despite the long reasonable period of time granted by the Arbitrator. In light of the failure of he United States to implement the recommendations and rulings of the DSB with respect to the CDSOA to this date, Brazil, under Article 22.2 of the DSU, requests the authorization of the DSB to suspend the application to the United States of tariff concessions and other related obligations under GATT 1994 in an amount that will be determined every year, in observance of Article 22.4 of the DSU, according to the method and form explained in the request circulated as document WT/DS217/20. Since the level of suspension is thus clearly specified in the request and easy to determine on the basis of the disbursements incurred in the previous year, it fully conforms to the requirements of the DSU. Brazil, as a Member that has always objected to measures that unduly restrict trade, still hopes that the United States will bring the Byrd Amendment into conformity and will abide by its multilateral commitments, so that it will become unnecessary to suspend concessions or obligations *vis-à-vis* the United States."

22. The representative of the United States said that his country regretted that some of the complaining parties in the disputes concerning the Continued Dumping and Subsidy Offset Act of 2000 had requested authorization to suspend concessions or other obligations. As these Members knew, legislation to bring the Act into conformity with the WTO obligations of the United States was pending in the US Congress, and the US Administration had proposed repeal. The United States

remained fully committed to implementing the DSB's recommendations and rulings in these disputes. At the same time, the United States strongly disagreed with the proposals to suspend concessions. On 23 January 2004, the United States had objected to the level of suspension of concessions or other obligations proposed by these parties, thereby referring the matters to arbitration. Thus, as an initial matter, the United States failed to see the purpose for the present meeting. Once a Member objected to a complaining party's request for authorization, the matter was automatically referred to arbitration. No decision by the DSB was necessary. The present meeting could have been cancelled. Numerous times, a meeting to consider the adoption of a panel report had been cancelled once the notice of appeal was filed. The situation at the present meeting was analogous. There was no reason for the eight complaining parties to have insisted that the present meeting be held despite the fact that the matter was already in arbitration. It was particularly puzzling for these Members to insist on holding this meeting when the DSB had just met on 23 January and one of the agenda items had covered these very disputes. As there was no decision for the DSB to take, the present meeting was unnecessary and the United States suspected that all the DSB Members could have used the time more usefully for other purposes. However, given that the Members making these Article 22.2 requests had already intervened, the United States had some reactions.

23. First, as the United States noted in its letters setting forth those objections, the Article 22.2 requests had failed to specify a level of suspension and were inadequate for the Arbitrator to perform the functions provided under Article 22.7 of the DSU. All Members should be concerned at the difficulties that these failures posed to the operation of the DSU Article 22.7 process. Moreover, all Members should also be concerned at the apparent attempts by the requesters to divorce the suspension of concessions that they had requested from any actual level of nullification or impairment to the benefits of the Members concerned. One rather astounding aspect of these requests deserved further note, and was cause for concern for other Members. This aspect was that seven of the eight complaining parties had requested authorization to suspend concessions for other Members' alleged nullification or impairment. These seven complaining parties apparently sought to divide among themselves offset payments that could only be attributed to dumped or subsidized products of other countries, including other complaining parties. The language was the same in each request. These complaining parties asked for authorization to collect "a proportionate amount of the balance of total offset payments less the offset payments attributed to duties collected on products from other Members that are authorized by the DSB to suspend concessions or other obligations in this dispute." The requests did not attempt to explain why these seven complaining parties had rights concerning the products of other Members or why it should matter whether the other Member was authorized to suspend concessions in this dispute or not. The seven complaining parties implicitly conceded that this part of their request bore no relationship to any alleged nullification or impairment suffered by them. As the Arbitrator in the Bananas case had found: "there is no right and no need under the DSU for one WTO Member to ... request authorization to suspend concessions for the nullification or impairment suffered by another WTO Member with respect to [their] goods." There was one element of good news in these requests. Although these eight Members erred in thinking that the DSU permitted them to obtain authorization to suspend a different level of concessions from year to year, at least their proposals demonstrated that they recognized that the DSU permitted Members to change the actual suspension of concessions once authorization was granted (the so-called "carousel"). The United States was pleased to see that these Members were now themselves endorsing "carousel". The United States welcomed this recognition and hoped that it would remove at least one contentious issue from the discussions on clarifications and improvements to the DSU. The remainder of the US reactions would be reserved for the actual arbitrations that had commenced as a result of the filing of the US objections on 23 January 2004.

24. The representative of Canada said that the issue before the Arbitrators was the level of suspension. The issue before the DSB at the present meeting was the grant of the right to retaliate. The two issues being different, the present DSB meeting was necessary and indeed required by the DSU. With respect to the substantive points raised by the United States, he noted that under

Article 22.6 of the DSU "the DSB ... shall grant authorization to suspend concessions or other obligations ... unless the DSB decides by consensus" not to do so. In this instance, therefore, there was no question about the right of the co-complainants to suspend concessions or other obligations. Article 22.6 of the DSU also permitted the United States to request arbitration as to the level of the retaliatory measures. The United States had now exercised its right. Accordingly, any discussion in respect of that level should properly take place before the Arbitrators.

25. The representative of the European Communities said that the EC had taken note of the remarks made by the United States and would respond to them in due course during the arbitration process, which was the appropriate forum for such a debate.

26. The DSB took note of the statements and it was agreed that the matters raised by the United States in documents WT/DS217/26, WT/DS217/27, WT/DS217/28, WT/DS217/29, WT/DS217/30, WT/DS217/31, WT/DS234/27 and WT/DS234/28 are referred to arbitration, as required by Article 22.6 of the DSU.