WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/140
6 February 2003

(03-0807)

Dispute Settlement Body
8 January 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 8 January 2003

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

Prior to the adoption of the agenda, the item concerning the Panel Report in the case on "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India" was removed form the proposed agenda following India's decision to appeal the Panel Report.

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1. United States – Final dumping determination on softwood lumber from Canada

(a) Request for the establishment of a panel by Canada (WT/DS264/2)

1. The Chairman said that the DSB had considered this matter at its meeting on 19 December 2002 and had agreed to revert to it. He drew attention to the communication from Canada contained in document WT/DS264/2.

2. The representative of Canada said that this was his country's second request for a panel in the case on "United States – Final Dumping Determination on Softwood Lumber from Canada". He recalled that this matter had been considered by the DSB for the first time at the 19 December 2002 DSB meeting. Unfortunately, the United States had blocked Canada's panel request at that meeting. At the present meeting, he did not wish to repeat the reasons why Canada was seeking the establishment of this panel, which were set out in full both in Canada's panel request as well as in the statement made by Canada at the 19 December DSB meeting. He wished to refer Members to those documents and reiterated Canada's request for a panel at the present meeting.

3. The representative of the United States said that his country regretted that Canada had chosen to proceed with its panel request. As a substantive matter, the United States believed that Canada's claims lacked merit. He said that the anti-dumping investigation at issue had been properly initiated and conducted in accordance with applicable WTO rules. The United States intended to vigorously defend the initiation and conduct of the investigation at issue before the panel.

4. 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.

5. The representatives of the European Communities and India reserved their third-party rights to participate in the Panel's proceedings.

2. United States – Countervailing measures concerning certain products from the European Communities

(a) Report of the Appellate Body (WT/DS212/AB/R) and Report of the Panel (WT/DS212/R)

6. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS212/10 transmitting the Appellate Body Report on "United States – Countervailing Measures Concerning Certain Products from the European Communities", which had been circulated in document WT/DS212/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report 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".

7. The representative of the European Communities said that the EC welcomed the Appellate Body Report and wished to thank the Appellate Body members and the Appellate Body Secretariat, as well as the Panel and the WTO Secretariat, for all the good work they had done on this case. He said that the Appellate Body had basically reconfirmed the jurisprudence it had already established in the case on "United States – Lead and Bismuth" (DS138). However, it would only appear that the United States did not understand it correctly the first time. The EC sincerely hoped that the United States would do better on this second occasion. While confirming its previous decision, the Appellate Body had reversed the Panel's finding that a provision of US legislation was WTO-incompatible. On this point, the EC wished to make a short comment. The Appellate Body had considered that a privatization at arm's length and for fair market value might not always extinguish the benefits received from the non-recurring financial contribution bestowed upon a state-owned firm because governments might impose policies aiming at inducing certain results from the market. In the view of the Appellate Body, these unqualified "policies" might "severely affect" the market's valuation of the state-owned property. Privatization did, however, always shift to the investigating authority the burden of establishing that the benefit from the previous financial contribution did indeed continue beyond privatisation. In the absence of such proof, the fact of the arm's-length, fair market value privatisation compelled a conclusion that the "benefit" no longer existed for the privatised firm and, therefore, that countervailing duties should not be levied. Although the Appellate Body had not specified what government policies could "severely affect" the market's valuation of the state-owned property and how the investigating authorities should assess them, the EC considered that the privatizations that had taken place in the EC during the past two decades were not influenced by such policies, and that the United States could no longer impose countervailing duties in respect of pre-privatization subsidies. For this reason, and given the fact that no legislative changes were required for the implementation of the DSB's recommendations and rulings, the EC expected the United States to comply immediately with them.

8. The representative of the United States said that his country was, of course, pleased that the Appellate Body had reversed the Panel's findings concerning Section 771(5)(F) of the Tariff Act of 1930, the so-called "change-of-ownership" provision of the US countervailing duty law. This reversal should not have come as a surprise to anyone because, as the parties had agreed, Section 771(5)(F) did not mandate any specific methodology and, thus, under the mandatory/discretionary distinction, could

not be deemed WTO-inconsistent as such. However, the Appellate Body's reversal of this obvious error on the part of the Panel could not offset the US disappointment with the Appellate Body's findings on the issue at the core of this dispute, namely, the Appellate Body's finding that an arm's length, fair market value privatization of a subsidized, government-owned company created a rebuttable presumption that prior subsidies were extinguished. The United States strongly disagreed. At the present meeting, the United States did not wish to repeat the arguments contained in the US written submissions, and instead limited its statement to a few observations, including some regarding what the Appellate Body Report did not contain.

9. First, the question of whether a subsidy could survive an arm's length, fair market value privatization was at the heart of this dispute. The United States noted that the Appellate Body Report discussed that question in three pages – at paragraphs 120 to 127. Regrettably, however, those paragraphs did not refer at all to any provision of the SCM Agreement. The situation at issue in the dispute was simple. The government had subsidized a government-owned company, then had sold that company to private buyers. The company remained the same legal person before and after the sale. The United States had pointed out that the sale of the company from one entity to another did not change the fact that the company was subsidized. In other words, the sale did not mean the company had no longer received a financial contribution that conferred a benefit. The Appellate Body had found that in some instances a subsidy to a company's shareholders could be attributed to the company itself. The United States agreed. However, the United States noted that the Appellate Body had not explained why that was relevant to the dispute, which involved subsidies to the company itself, not to the shareholders. Nor had the Appellate Body explained how the fact that subsidies to shareholders could benefit a company led to the conclusion that a subsidy to the company had been removed when the shareholders changed. The Appellate Body Report ultimately had not clarified the key question of who was the recipient of the benefit that a financial contribution conferred. The Appellate Body had rightly noted that the SCM Agreement did not contain a definition of the "recipient" of a "benefit". The Appellate Body had also disagreed with the Panel's conclusion that, for purposes of identifying the recipient, no distinction should ever be made between a company and its shareholders (para.116). Nevertheless, the Appellate Body had proceeded to conclude that the United States was wrong in always treating the company – as opposed to the company's shareholders – as the recipient of a benefit. Thus, what Members were left with was a report that stated that the recipient of a benefit might be the company, the company's shareholders, or some combination thereof – or it might not – with no explanation as to when the distinction applied or when it did not, and no explanation as to when a subsidy to a company was to be affected by changes in ownership. Indeed, a logical extension of the Appellate Body's approach would be that every exchange of stock of a subsidized company could affect the subsidy, but there was no basis in the SCM Agreement for such an approach. The United States submitted that instead of clarifying the provisions of the SCM Agreement, as called for by Article 3.2 of the DSU, the Appellate Body's approach only led to confusion over the meaning of those provisions. In addition, the Appellate Body's approach rested on certain general, unsupported assertions by the Appellate Body about the ability of governments to affect the market valuation of state-owned firms rather than on an analysis of the treaty text.

10. Finally, the United States said that the Appellate Body's analysis simply lost sight of the forest for the trees. For example, in paragraph 123 of its Report, the Appellate Body stated that "governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market". He said that the Appellate Body suggested that the United States should be particularly wary of such policies. Indeed, Members should be wary of such policies, a classic example of which were subsidies. Subsidies were provided by governments in order to induce certain results from the market by affecting the behaviour of firms. Unfortunately, at the same time as the Appellate Body was warning against government policies that interfered with the market, it was following an approach that undermined the remedy against the harmful effects of some such policies. In paragraph 115 of its Report, the Appellate Body faulted the US privatization determinations on the grounds that they could enable governments to

circumvent the SCM Agreement by subsidizing shareholders rather than firms. However, the United States respectfully submitted that this conclusion had it backwards; it was the Appellate Body's rebuttable presumption that created the risk of circumvention since governments would be free to confer unlimited subsidies on government-owned companies so long as the governments then sold the companies. To conclude, notwithstanding the Appellate Body's findings concerning the US statute, the Appellate Body's consideration of the other issues was deeply flawed. Accordingly, the United States could not support adoption of the Appellate Body and Panel Reports.

11. The representative of Mexico said that the Reports of the Panel and the Appellate Body in this case constituted the most recent expression of condemnation of the continuing US practice of unduly presuming the existence of benefits for privatized firms. He recalled that Mexico had been a third participant in these proceedings as well as in the *British Steel* or *Leaded Bars* cases. Mexico's interest in the US properly determining the existence of a benefit for privatized firms was clear. In this regard, he wished to highlight the following findings by the Appellate Body, which, in Mexico's view, were particularly significant: (i) There was a rebuttable presumption that a benefit ceased to exist after a privatization at arm's length and for fair market value (para. 127); (ii) "An investigating authority, when presented with information directed at proving that a 'benefit' no longer exists following a privatization, *must* determine whether the continued imposition of countervailing duties is warranted in the light of that information" (para. 144). "Therefore, we find that the 'same person' method, *as such*, is inconsistent with the obligations relating to administrative reviews under Article 21.2 of the *SCM Agreement*" (para. 146); (iii) "We have found also that investigating authorities have an obligation to make such a determination when conducting a sunset review. Therefore, we also find that the 'same person' method, as such, is inconsistent with Article 21.3 of the *SCM Agreement* (para. 150)"; and (iv) "We find that the 'same person' method *as such* is inconsistent with the *SCM Agreement*" (para. 151).

12. He noted that a number of lessons could be learned from this case. First, the "same person" method (as indeed the "gamma" method that preceded it) had been condemned by the WTO. Therefore, the United States could not legitimately continue to apply either of these methods in its administrative or sunset reviews. Irrespective of the method used, the Appellate Body had explained, moreover, that a Member had no right to presume the continued existence of a benefit, even where circumstances cast doubt on the matter. Mexico urged the United States to immediately cease applying the "same person" method in all ongoing reviews and to properly implement the SCM Agreement in determining a benefit, thus avoiding a continuation of the saga of disputes that Members had to deal with.

13. Finally, he wished to briefly refer to the *amicus curiae* issue raised in this appeal. In paragraph 76 of its Report, the Appellate Body noted that both the United States and the EC had agreed that the Appellate Body had the authority to accept the brief, but it had decided not to take that brief into account as it did not find it to be of assistance. Nevertheless, the Appellate Body did not mention why neither of the participants had agreed to incorporate elements of the brief in their own submissions or the numerous arguments of third participants, such as that of Mexico, rejecting the notion that the Appellate Body had the authority to accept this type of brief.

14. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS212/AB/R and the Panel Report in WT/DS212/R, as modified by the Appellate Body Report.