WORLD TRADE ORGANIZATION

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Dispute Settlement Body
14 January 2005

MINUTES OF MEETING

Held in the Centre William Rappard
on 14 January 2005

Acting Chairperson: Mrs. Puangrat Asavapisit (Thailand)

Prior to the adoption of the agenda, Amb. Puangrat Asavapisit welcomed delegations and said that she had the honour to chair the present meeting at the request of the Chairperson of the DSB, Amb. Amina Mohamed, who was currently absent from Geneva. This was, of course, in accordance with the Rules of Procedure for meetings of the DSB, which provided that if the DSB Chairperson was absent from any meeting or part thereof, the Chairperson of the General Council, or in the latter's absence, the Chairperson of the Trade Policy Review Body, shall perform the functions of the DSB Chairperson.

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1. United States - Final countervailing duty determination with respect to certain softwood lumber from Canada

(a) Recourse to Article 21.5 of the DSU by Canada: Request for the establishment of a panel (WT/DS257/15)

1. The Chairperson drew attention to the communication from Canada contained in document WT/DS257/15 and invited the representative of Canada to speak.

2. The representative of Canada said that on 17 February 2004, the DSB had adopted the Reports of the Panel and the Appellate Body in the dispute "United States – Final Countervailing Duty Determination on Softwood Lumber". The Panel and the Appellate Body Reports had found that the United States was in violation of its WTO obligations in respect of the alleged "pass-through" of subsidies and had recommended that the United States bring its measures into conformity with its obligations under the GATT 1994 and the SCM Agreement. At the 17 December 2004 DSB meeting, the United States had reported that the US Department of Commerce had issued a new determination, which had found that certain subsidies did not pass through and that it had revised the subsidy rate accordingly. The United States had asserted that this determination had implemented the DSB's recommendations and rulings. Canada considered that the United States had failed to comply with the DSB's recommendations and rulings. The United States continued to impose countervailing duties based on a presumption, rather than a demonstration, of the existence of alleged subsidies. The United States, therefore, continued to violate its obligations under both the GATT 1994 and the SCM Agreement. In the light of the US failure to bring its measures into conformity with its obligations, Canada sought recourse in this matter to dispute settlement under Article 21.5 of the DSU.

3. The representative of the United States said that his country regretted that Canada had chosen to request the establishment of a compliance panel under Article 21.5 of the DSU, as set out in document WT/DS257/15, with respect to the measures taken by the United States to comply with the DSB's recommendations and rulings in this dispute. The United States had fully implemented these recommendations and rulings within the agreed period of time, and, indeed, had issued a new countervailing duty determination with respect to softwood lumber from Canada prior to the 17 December 2004 expiration of the reasonable period of time. The United States disagreed with Canada's assertion that this new determination was not consistent with the SCM Agreement and the GATT 1994. In addition, Canada cited other so-called "measures" in its Article 21.5 request that it claimed "were allegedly taken by the United States to comply with the DSB's recommendations and rulings". Canada alleged that these "measures" were also inconsistent with the SCM Agreement and the GATT 1994. They were the original countervailing duty determination and order, the final results of the first administrative review of the countervailing duty order, and an issues and decision memorandum in connection with that first administrative review proceeding. However, contrary to Canada's allegations, these so-called "measures" were not "measures taken to comply with the recommendations and rulings" of the DSB in this dispute. To the contrary, the original countervailing duty determination and order – published in mid-2002 – were the subject of the original dispute. They were clearly not measures taken to comply with the recommendations and rulings adopted on 17 February 2004. Further, the first administrative review cited by Canada was a separate proceeding with a separate administrative record that covered different importations from those analyzed in the determination at issue in the original dispute. Moreover, this administrative review had been initiated at the request of Canada, among others, in mid-2003. The results of that review, as well as any associated decision or issues memoranda, were, therefore, also not measures taken to comply with the 17 February 2004 recommendations and rulings. For all of these reasons, the United States considered that Canada's request for a compliance panel was unnecessary and without basis. Nonetheless, pursuant to the agreement between the United States and Canada that had recently been submitted to the DSB for circulation to Members, the United States would accept the establishment of a panel at the present DSB meeting.

4. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by Canada in document WT/DS257/15. The panel would have standard terms of reference.

5. The representative of the European Communities reserved third-party rights to participate in the Panel's proceedings.

2. United States - Final countervailing duty determination with respect to certain softwood lumber from Canada

(a) Recourse to Article 22.2 of the DSU by Canada (WT/DS257/16)

6. The Chairperson drew attention to the communication from Canada contained in document WT/DS257/16, and invited the representative of Canada to speak.

7. The representative of Canada said that his country was also requesting authorization from the DSB, pursuant to Article 22.2 of the DSU, to suspend the application to the United States of the concessions or other obligations in an amount to be established yearly, an amount which would be equivalent to the level of nullifications and impairment caused by improper US implementation. Canada wished to inform the DSB that it had entered into an agreement with the United States that provided that any proceedings pursuant to Article 22.6 of the DSU would be suspended until adoption by the DSB of the recommendations and rulings in the Article 21.5 compliance proceedings Panel that had just been established.

8. The representative of the United States said that his country regretted that Canada had requested authorization to suspend concessions or other obligations in this dispute in document WT/DS257/16. As noted in the US intervention under the previous agenda item, the United States had fully implemented the DSB's recommendations and rulings prior to the expiration of the agreed-upon reasonable period of time. Therefore, on 13 January 2005, the United States had informed the DSB by letter that, pursuant to Article 22.6 of the DSU, the United States objected to the levels of suspension of concessions proposed by Canada. Under the terms of the DSU, the filing of this objection automatically resulted in the matter being referred to arbitration, and no further action was required of the DSB. Indeed, Article 22.6 of the DSU did not refer to any decision by the DSB. Consequently, the matter was already being referred to arbitration. Nevertheless, the United States had no objection if the DSB wished to take note of that fact and confirm that it might not consider Canada's request for authorization, which was on the agenda of the present meeting, since the matter had been referred to arbitration. The United States wished to add that, pursuant to an agreement between the United States and Canada, once the arbitrator was constituted, the United States and Canada would request the arbitrator to suspend its proceedings until the completion of the Article 21.5 proceedings. The United States was confident that should the arbitrator ever have to consider the matter, it would find that the US objections to Canada's proposed actions were well-founded.

9. The DSB took note of the statements and it was agreed that the matter raised by the United States in document WT/DS257/17 is referred to arbitration, as required by Article 22.6 of the DSU.

3. United States – Sunset reviews of anti-dumping measures on oil country tubular goods from Argentina

(a) Statement by the United States regarding implementation of the recommendations and rulings of the DSB

10. The representative of the United States, speaking under "Other Business", said that his country intended to implement the recommendations and rulings of the DSB in a manner that

respected US WTO obligations, and it had begun to evaluate options for doing so. The United States would need a reasonable period of time in which to implement. The United States stood ready to consult with Argentina regarding a reasonable period of time to implement.

11. The representative of Argentina said that, first of all, his delegation wished to express concern that the statement of intentions in respect of implementation of the DSB's recommendations, which was an obligation under Article 21.3 of the DSU, had been placed on the agenda of the present meeting under "Other Business", instead of being treated as a main agenda item. In Argentina's view, this was not consistent with the practice followed by Members in the DSB, and constituted an inappropriate way of dealing with the obligation under Article 21.3 of the DSU. He noted that under "Other Business" only non-substantive matters could be included. Argentina believed that this set an unfortunate precedent from a systemic point of view, and did not reflect the importance that should be attached to statements of intentions made pursuant to Article 21.3 of the DSU.

12. With regard to the substance of the statement made by the United States at the present meeting, Argentina wished to make the following comments. Argentina hoped that the United States, as it had previously stated, stood ready to approach, in a spirit of good faith, the discussions necessary for allowing rapid implementation of the DSB's rulings and recommendations. Both the Panel and the Appellate Body Reports contained findings to the effect that the sunset reviews carried out by the United States were inconsistent with Article 11.3 of the Anti-Dumping Agreement, the substantive standard in that area. Argentina understood that, in the context of the present case, effective implementation by the United States must begin with the immediate lifting of its measure imposed nine years ago, which had been found to be WTO-inconsistent. Argentina stood ready to enter, as soon as possible, into discussions with the United States on a reasonable period of time, in accordance with paragraph (b) of Article 21.3 of the DSU.

13. The representative of the United States said that his delegation had taken note of Argentina's statement and wished to simply note that Article 21.3 of the DSU stated that: " At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". As such, Members were currently at a DSB meeting and moreover, the meeting was taking place within 30 days of the adoption of the DSB's recommendations and rulings, and so his country had stated its intentions. The United States did not see any reference in Article 21.3 of the DSU regarding the need for a separate DSB agenda item in order to deal with this matter.

14. The representative of Argentina said that it was Argentina's position, based on Rule 25 of the Rules of Procedure for Meetings of the DSB, that under "Other Business" a debate on substantive issues should be avoided. Furthermore, in Argentina's view, the requirement under Article 21.3 of the DSU was a substantive obligation.

15. The representative of India said that his delegation wished to add its voice to what Argentina had just stated about bringing such matters before the DSB for discussion under "Other Business". He noted that what Argentina had been referring to was the DSB practice since there was no specific requirement in the DSU provisions for not bringing such substantive matters under "Other Business". He wished to emphasize that substantive matters, which should be known to Members in advance to enable them to prepare to respond in DSB meetings, should be placed on the agenda through proper notices. This was the practice and that practice should be continued. He noted that India had expressed a similar concern on another issue which had also been brought before the DSB under "Other Business". For that reason, India supported the statement made by Argentina at the present meeting.

16. The representative of the United States said that taking into account the fact that there should be no substantive debate on this issue at the present meeting, it would be appropriate to read Rule 25 of the Rules of Procedures in its entirety: "Representatives should avoid unduly long debates under 'Other Business'. Discussions on substantive issues under 'Other Business' shall be avoided and the General Council shall limit itself to taking note of the announcement by the sponsoring delegation, as well as any reactions to such an announcement by other delegations directly concerned".

17. The DSB took note of the statements.

Prior to closure

18. The representative of Canada said that he wished to put on the record the fact that at the request of Canada, the WTO had opened for one day during the Christmas holidays, and that some members of the WTO Secretariat had been called back from vacation to allow Canada to file its notices in relation to the present meeting. He commended the professionalism of the WTO Secretariat and wished to convey that publicly and on the record.

The DSB took note of the statement.