WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/119
6 Marcch 2002

(02-1142)

Dispute Settlement Body
1 February 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 1 February 2002

Chairman: Mr. K. Bryn (Norway)

Prior to the adoption of the agenda, the item concerning the Panel Report in the case on "India – Measures Affecting the Automotive Sector" was removed from the proposed agenda following India's decision to appeal the Panel Report. Also the item concerning negotiations on improvements and clarifications of the DSU was removed from the proposed agenda pending consideration of the overall structure of negotiations by the TNC.

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities

(b) United States – Section 110(5) of the US Copyright Act: Status report by the United States

(c) United States – Anti-Dumping Act of 1916: Status report by the United States

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the three sub-items to which he had just referred be considered separately.

(a) European Communities – Regime for the importation, sale and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.25)

2. The Chairman drew attention to document WT/DS27/51/Add.25 which contained the status report by the EC on progress in the implementation of the DSB's recommendations concerning its banana import regime.

3. The representative of the European Communities recalled that, as had been stated at the 18 December DSB meeting, the EC Council had adopted Regulation (EC) No. 2587/2001 on 19 December 2001, which had been published in the EC Official Journal No. L 345 of 29 December 2001, and had been circulated to all Members. Pursuant to this Regulation, as from 1 January 2002, 100,000 tonnes of bananas had been transferred from tariff quota C to B, and quota C had been reserved for imports from ACP countries. Thus, the EC had implemented on schedule the second phase of the Understandings on Bananas concluded with the United States and Ecuador in April 2001, and had complied with its international obligations. He said that the regime set out in the Regulation would be applicable until the time the EC's banana import regime would become a tariff-only regime. This would take place by 1 January 2006 at the latest, following the negotiations under Article XXVIII, which in principle would begin in 2004. Under these circumstances, the EC considered that this matter should now be withdrawn from the DSB agenda. The EC remained ready to reply to questions from any Member in the appropriate fora.

4. The representative of Ecuador recalled that five years ago his country, together with other Members, had requested consultations with the EC on its banana import regime. At that time, Ecuador had just completed its process of accession to the WTO. At the present meeting, the EC had submitted its twenty-fifth status report and Ecuador hoped that this would be the last report. Since 1992 the EC banana import regime had appeared on the agenda of almost every DSB meeting. He noted that countries which believed that this dispute would end were not only optimists but also believed in the WTO dispute settlement system. This case involved several parties with competing interests and opposing objectives. Ecuador continued to defend its trade interests and avail itself of its rights to request the EC to comply with its WTO obligations. The banana dispute transcended the bounds of the system. Ecuador preserved its legal position and placed its trust in the WTO dispute settlement system and it would do so in future. Throughout this dispute, Ecuador had continued to insist that a modified banana import regime would not only redress discriminatory aspects directed at Ecuador, but would also restore the balance of rights and obligations under the WTO Agreements by putting into place a WTO-consistent banana import regime.

5. During the dispute settlement process, Ecuador had demonstrated patience and flexibility and had, in this spirit, signed a bilateral Understanding on Bananas with the EC on 30 April 2001. This Understanding constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place. The transitional regime contained various phases, stages and elements to be implemented. One element was to obtain waivers from Articles I and XIII of the GATT 1994. However, the decision to grant these waivers included new stages which would have to be carried out in order to ensure a proper transition to a tariff-only banana import regime, as from 1 January 2006. Accordingly, insofar as the EC continued to implement the DSB's recommendations by meeting its commitments, Ecuador wished to reserve its rights under Article 21 of the DSU. Therefore if there was any disagreement concerning the measures applied by the EC, the matter could be referred to the original Panel pursuant to Article 21.5 of the DSU. Ecuador, like other countries, also considered that this item should no longer appear on the agenda of future DSB meetings.

6. The representative of Honduras expressed his country's expectation that in order to implement the Understandings on Bananas in accordance with the agreement reached at Doha, the EC would not impose a prohibitive tariff that would make it impossible for Honduran bananas to enter the EC market. Honduras hoped that this agreement would be honoured in good faith. It should be kept in

mind that Honduras had taken into account the interests of all parties as well as the integrity of the world trading system. Honduras wished to reserve its rights, including the right to request that this matter be placed on the DSB agenda in the future.

7. The representative of Colombia noted the status report submitted by the EC which contained information on the adoption and publication of Resolution 2587 of 2001. Colombia wished to reiterate its understanding concerning the obligations of the EC under its Schedule that once new countries joined the EC, the current access of 2,653,000 tonnes would be increased in order to fulfil the commitments undertaken in the context of the Framework Agreement, which remained in force.

8. The representative of the United States said that her country was pleased to note that the EC had increased the quota for Latin American banana exporting countries by 100,000 tonnes effective from 1 January 2002. The United States had, therefore, terminated the suspension of concessions in effect since 1999. The United States would continue to work closely with the EC and other Members to address any issues that might arise as the EC moved to a tariff-based system for bananas and implemented the terms of the bilateral Understanding on Bananas.

9. The DSB took note of the statements.

(b) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18/Add.1)

10. The Chairman drew attention to document WT/DS160/18/Add.1 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

11. The representative of the United States said that on 21 January 2002 her country had provided an additional status report, in accordance with Article 21.6 of the DSU. As noted in the status report, the United States had been engaged in discussions with the EC to find a positive and mutually acceptable resolution of the dispute.

12. The representative of the European Communities said that while the EC had held useful discussions with the United States on this matter, it remained concerned about the lack of progress on compliance. He noted that the US status report did not address how the United States intended to comply. The EC hoped that this would not set a precedent for other cases, especially in the TRIPS area.

13. The representative of Australia said that at the 18 January DSB meeting, Australia had registered its concern about the delay in the US implementation of the DSB's recommendations and rulings in this dispute and the apparent discriminatory nature of the proposed compensation arrangements that had been agreed between the United States and the EC. Australia reiterated its concerns and in doing so it expected that any such compensation arrangement would be applied by the United States on a non-discriminatory basis.

14. The representative of the United States, responding to the point raised by Australia, said that his country wished to assure Members that any compensation arrangement reached by the United States with the EC would be consistent with the WTO covered agreements.

15. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(c) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.1 – WT/DS162/17/Add.1)

16. The Chairman drew attention to document WT/DS136/14/Add.1 – WT/DS162/17/Add.1 which contained the status report by the Unites States on progress in the implementation of the DSB's recommendations in the case concerning the US Anti-Dumping Act of 1916.

17. The representative of the United States said that on 21 January 2002 his country had submitted an additional status report, in accordance with Article 21.6 of the DSU. He noted that, as indicated in that report on 20 December 2001, proposed legislation H.R. 3557 had been introduced in the US Congress which would repeal the 1916 Act. This legislation would also provide that no judgements pursuant to actions under such Act will be entered on or after 26 September 2000 if inconsistent with the legislation. The United States continued to work with the EC in an effort to reach a mutually satisfactory resolution to this dispute.

18. The representative of the European Communities said that his delegation noted that a law to repeal the 1916 Act and to terminate judicial cases pending under that Act had been introduced in the US Congress. The EC believed that this was the first step towards compliance. However, compliance would only be achieved once the law was effectively repealed and pending cases terminated.

19. The representative of Japan said that his country had noted the US status report. He recalled that Japan had already expressed its views on this matter at the 18 January DSB meeting. Since the matter had been referred to arbitration in accordance with Article 22.6 of the DSU, Japan together with the EC was consulting with the United States on the appointment of arbitrators. He noted that the United States had not mentioned in its statement Japan's participation in the discussions. He hoped that the United States would also work closely with Japan in finding a solution in this dispute as it was Japan's objective to find a mutually satisfactory solution as soon as possible. Japan urged the United States, once again, to complete promptly its implementation of the DSB's recommendations.

20. The representative of Mexico said that his country had participated as a third party in this dispute. Mexico hoped that the United States would implement the DSB's recommendations in this case in a non-discriminatory manner.

21. The representative of the United States said that his country was looking forward to working with Japan in order to reach a mutually satisfactory solution.

22. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. United States – Section 211 Omnibus Appropriations Act of 1998

(a) Report of the Appellate Body (WT/ DS176/AB/R) and Report of the Panel (WT/DS176/R)

23. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS176/8 transmitting the Appellate Body Report on "United States – Section 211 Omnibus Appropriations Act of 1998", which had been circulated in document WT/DS176/AB/R in accordance with Article 17.5 of the DSU. He recalled that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He also recalled that under Article 17.14 of the DSU "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. He noted that

this adoption procedure was without prejudice to the right of Members to express their views on an Appellate Body report".

24. The representative of the European Communities said that the EC and its member States were pleased that the Panel and the Appellate Body had confirmed their view that Section 211 of the US Omnibus Appropriations Act was incompatible with the TRIPS Agreement. This legislation adopted in 1998 was rightly found to be in breach of both the most-favoured-nation and the national treatment provisions of the TRIPS Agreement as well as the 1967 Paris Convention. The decision was also satisfactory from a systemic viewpoint to the extent that it confirmed that trade names fell under the discipline of the TRIPS Agreement. The EC and its member States stressed the importance of the Panel's observations that Section 211 did not apply in cases in which a trademark had been abandoned. However, they were disappointed by other aspects of the Panel and the Appellate Body rulings. The Appellate Body had ruled that the TRIPS Agreement did not regulate the question of the determination of the ownership of intellectual property rights. This was a rather narrow interpretation of Articles 15 and 16 of the TRIPS Agreement and of the 1967 Paris Convention. Moreover, in the view of the EC and its member States, the Appellate Body's interpretation of Article 42 of the TRIPS Agreement was problematic. There was no interest for a party to obtain a mere "procedural" right to have access to courts if this party was *ab initio* prevented from substantiating its claims, and if the outcome of the proceedings was pre-empted a priori by legislation. Therefore, the Panel was right in interpreting Article 42 as a substantive obligation to provide "effective access" to courts. The EC and its member States considered that, overall, the Appellate Body Report read in conjunction with the Panel Report, was satisfactory. The United States would have to act expeditiously to comply with the recommendations and rulings of the Appellate Body and of the Panel.

25. The representative of the United States expressed his country's appreciation to the Panel and Appellate Body for the considerable time, effort and professionalism that they had dedicated to this complicated dispute. The United States was pleased that first the Panel, and more emphatically, the Appellate Body had confirmed the view that the US had maintained all along, namely, that the TRIPS Agreement did not prevent WTO Members from establishing ownership criteria for trademarks and trade names that excluded those claiming ownership through a confiscation. Further, both the Panel and the Appellate Body had agreed that Section 211, which excluded certain claims of ownership related to confiscation, dealt with such ownership criteria. The United States was also pleased that the Appellate Body had overruled the Panel's decision that Section 211 denied fair and equitable procedures to parties seeking to enforce trademark rights. As found by the Appellate Body, this was not the case under Section 211 and the Appellate Body was correct to conclude, contrary to the Panel's findings, that the TRIPS Agreement included obligations with respect to protecting trade names. While the United States was disappointed that the Appellate Body had concluded that certain aspects of Section 211 were WTO-inconsistent, it noted that these aspects were narrow.

26. At the present meeting, the United States wished to make two comments from a systemic point of view. First, the United States highlighted the importance of the Panel's findings with respect to the complaining party's burden of presenting a prima facie case in dispute settlement proceedings. Since the Panel had found that several claims of WTO-inconsistency had not been "proved", it had declined to make a finding of inconsistency. The United States applauded the Panel's rigor in analysing whether the EC, as a complaining party, had presented sufficient evidence and legal arguments to sustain its burden of establishing a prima facie case. As noted by the Panel, if a complaining party failed to sustain its burden, not only was the panel improperly put in the position of speculating to make the complaining party's case for it, but the responding party was at risk of being effectively denied the opportunity to present its counter-arguments. The Panel was correct to respect the principle that, for both these reasons, no finding of WTO-inconsistency should be made if the complaining party had not satisfied its burden of presenting a prima facie case.

27. The second systemic comment related to the Appellate Body's revised position on municipal law and the scope of appellate review. Under Article 17.6 of the DSU, the Appellate Body's review

was limited to issues of law and legal interpretation, not issues of fact. In this dispute, the Appellate Body had blurred this distinction by concluding that an examination of the meaning of municipal law – in this case Section 211 – was within its mandate. The Appellate Body had reached this conclusion based on a logical misstep. In paragraph 105 of its Report, the Appellate Body had correctly noted that a panel's assessment of whether a municipal law was consistent with WTO obligations was a legal characterization that was within the scope of appellate review. However, from this it had incorrectly concluded in the following paragraph that the Panel's finding as to the meaning and operation of the municipal law was also within the scope of appellate review. This did not follow logically. It was one thing to determine what a municipal law meant and how it operated. It was an entirely different matter to determine whether – given a particular meaning and operation – the municipal law was consistent with WTO obligations. The meaning and operation of municipal law fell within the panel's role as finder of fact, and was outside the scope of appellate review unless the finding was inconsistent with the obligation to make an objective assessment of the facts, in accordance with Article 11 of the DSU. Once the panel had made these factual findings, its legal findings as to whether the municipal law was consistent with a WTO agreement were subject to appellate review. In the US view, the Appellate Body Report had not sufficiently distinguished between these factual and legal findings of a panel and thus risked encroaching on a panel's fact-finding role. A better approach, according to the United States, was that of the International Court of Justice (ICJ) which was cited by the Appellate Body in its earlier report in the India – Mailbox dispute (WT/DS50). The ICJ has noted that from the standpoint of international law "municipal laws are merely facts". The Appellate Body had a special role with respect to the interpretation of WTO Agreements, and Appellate Body proceedings – which were expedited and permitted only limited briefing and hearings – reflected this. In the US view, this special role did not extend to ascertaining the meaning and operation of municipal laws, and Appellate Body proceedings were ill-suited to such fact-finding.

28. The representative of Cuba said that his country welcomed the Appellate Body's conclusions that Section 211 of the US Omnibus Appropriations Act of 1998 violated the most-favoured-nation and national treatment principles, which were fundamental pillars of the WTO system. He recalled that since December 1998 Cuba had raised concerns, in the WTO and other fora with regard to the discriminatory nature of Section 211, which denied the original Cuban owners or their successors – foreign enterprises with interests in Cuba – recognition and enjoyment within US territory of their rights over trademarks, trade names or commercial names relating to property nationalized by Cuba. Section 211 was based on the US historical challenge of the Cuban nationalization process, which was misleadingly described by the United States as confiscation. Although the Appellate Body noted that the issue of confiscation had not been examined in the process, Cuba wished to clarify some aspects in this regard because this was one of the US arguments used to justify Section 211 and to violate the TRIPS Agreement. The nationalization carried out by Cuba was not confiscation. Confiscation was an accessory penalty stemming from an offence, in which the perpetrator was held accountable through his property, and hence no compensation was provided. On the contrary, nationalization was an act stemming from an economic claim on grounds of public utility, social or national interest or popular benefit, and was accompanied by appropriate compensation, as provided for in Cuba's Constitution.

29. Accordingly, US property in Cuba was not confiscated but rather nationalized. Although US citizens were entitled to compensation under Cuban law, the United States did not wish to settle this issue. On the contrary, it used it as a legal basis for its policy of blockade, even to the detriment of its own citizens. He recalled that when the draft resolution condemning the blockade had been tabled in the UN General Assembly, the Cuban Minister of Foreign Affairs had stated that the Cuban Government was ready to negotiate, on an equal footing, compensation for approximately 6,000 US businesses and citizens affected by the nationalization legislation and to seek an arrangement that would also take into account the extremely serious economic and human damage inflicted on Cuba by the blockade. He said that historically the US response to Cuba's readiness had been an aggressive policy against Cuba, and it was actually the US blockade legislation which had made it impossible to

fulfil the provisions set out in Cuban law for the compensation of US citizens. These measures had become stronger over time, and Section 211 was part of the complex system of regulations for Cuba's blockade. These included the following: (i) the Torricelli Act which, *inter alia*, established penalties for countries that granted economic assistance, traded or had relations with Cuba; and (ii) the Helms-Burton Act which, among other objectives, sought to discourage foreign investment in Cuba by means of intimidation and other provisions which deserved to be described in another separate statement.

30. He recalled that Section 211 had been adopted after a suit was brought in the US courts concerning the usurpation of the right of use of the Cuban rum trademark Havana Club by a US competitor on the international market. Under US law at the time, the outcome of the trial would have been successful for Cuban interests. The economic power and political influence of this competitor led to the adoption of Section 211 by the US Congress. This was the real origin of this contested Section. The legislation had been adopted to benefit the interests of a company which, although based outside the United States, had most of its interests in that country. Furthermore, this provision had broader effects and objectives, since it created obstacles for the implementation and development of foreign investment in Cuba associated with the international marketing of Cuban products that had recognized world prestige. The Appellate Body had found that Section 211 violated the principle of national treatment, since the limitations it established were applicable only to the "successors-in-interest of Cuban nationals who were not US nationals", thus denying effective equality of opportunity to non-US nationals, i.e. foreigners.

31. He noted that the Appellate Body had also found that this principle was infringed because it was only applied discriminatorily to Cuban owners residing in Cuba or a country other than the United States, but not to US owners or to Cubans residing in the United States. Likewise, the Appellate Body had found that Section 211 violated the most-favoured-nation treatment principle by applying discriminatory treatment to Cuban nationals who were subject to this provision whereas the nationals of any country other than Cuba or the United States were not. Cuba had a long legal tradition relating to the protection of intellectual property rights and was a signatory to many international treaties under the WIPO, WTO and the UNESCO. It also had domestic legislation to safeguard the interests of both Cuban and foreign owners without discrimination and was in the process of adjusting this legislation in order to grant more effective levels of protection for intellectual property rights in Cuba in line with the international treaties it had signed. Consequently, and despite the hostile policy pursued by the United States towards Cuba for over 40 years, the intellectual property rights of US owners had never been affected and were protected on Cuban territory. Recognition of the fact that Section 211 violated basic WTO principles, namely, national treatment and most-favoured-nation treatment, was also a recognition of the discriminatory treatment of Cuba by the United States. Consequently, the recommendation that the United States should respect its WTO commitments concerning these principles was also a call for an end to its hostile policy against Cuba which had recently been condemned for the tenth consecutive year by the US General Assembly, when the Resolution against this blockade had been passed with overwhelming support. Cuba considered that Section 211 should be repealed. The Appellate Body's examination showed that Section 211 was incompatible with the US international commitments in the area of intellectual property rights, an area to which the United States had always attached the utmost importance, repeatedly demanding that the rules of the TRIPS Agreement be strictly observed.

32. The representative of Canada said that his delegation wished to make two brief comments of a systemic nature on the Appellate Body's decision in the case under consideration. First, Canada noted that, for the first time, the Appellate Body had interpreted the principle of national treatment as it related to intellectual property rights. Canada was pleased that the Appellate Body had given a broad reading to these provisions. Indeed, the Appellate Body had rightfully described the national treatment principle as "a cornerstone of the world trading system" the significance of which "can hardly be overstated". The Appellate Body had found that part of the US measure violated the national treatment obligations of the TRIPS Agreement because it had imposed what was described as an "additional obstacle" or an "extra hurdle" on successors in interest who were not US nationals.

Such additional obstacles, or hurdles, did not apply to successors-in-interest who were US nationals. In doing so, the Appellate Body had drawn upon useful jurisprudence developed under the GATT, such as the 1989 Panel Report in the case on United States - Section 337 of the Tariff Act of 1930. The Section 337 Panel, in which Canada had participated as a third party, had found that the US measure violated the national treatment obligations of the United States under Article III:4 of the GATT 1994. In that case, it had been held that the procedures before the US ITC applicable to imported goods alleged to have infringed US patents were different, and more burdensome, than the federal court procedures applicable to domestic goods. The Appellate Body had quoted with approval the reasoning of the Section 337 Panel that even the possibility that non-US successors-in-interests faced two hurdles in seeking to assert their claims – while US successors-in-interest faced only one – constituted inherently less favourable treatment. In Canada's view this was as a very positive development that the principle of national treatment was now being interpreted as broadly under the TRIPS Agreement as under other WTO Agreements.

33. The second systemic issue related to whether trade names were covered by the TRIPS Agreement. The Panel had determined that Members had no obligation under the TRIPS Agreement to provide protection to trade names. The Panel's finding on this issue was based on what Canada considered to be an excessively narrow and incorrect reading of the TRIPS Agreement. Canada fully supported the Appellate Body's finding that trade names were included within the scope of covered obligations. Finally, Canada was pleased to join in the consensus to adopt the Reports.

34. The representative of Haiti said that his country welcomed the conclusion reached by the Appellate Body with regard to Section 211, and wished to pay tribute to the Appellate Body's sense of fairness and impartiality in this matter which had lasted for nearly four years. The Appellate Body had wisely found that the unilateral and arbitrary application of Section 211 against a country was a blatant violation of two fundamental WTO principles, namely, the most-favoured-nation and national treatment principles. Accordingly, Haiti supported Cuba's request that Section 211 should be repealed since the Cuban people had suffered enough from an embargo that had lasted for more than 40 years.

35. The representative of the Dominican Republic expressed her country's satisfaction with the Appellate Body's conclusions that Section 211 was inconsistent with WTO rules. The Dominican Republic urged the United States to comply with the DSB's recommendations and to bring its legislation into conformity with its obligations under the TRIPS Agreement as soon as possible.

36. The representative of Jamaica said that her country had not participated as a third party in the case under consideration. However, Jamaica had participated in another case involving the taking of unilateral action on the basis of domestic legislation, which had subsequently been found to be WTO-inconsistent. At that time, Jamaica had held the view and still continued at present to place great importance on the need for Members to bring their domestic legislation into conformity with treaty obligations. Jamaica noted the Appellate Body's recommendations modifying the Panel's findings and joined with other delegations in urging the United States to bring its measure found to be inconsistent with the TRIPS Agreement into conformity with its WTO obligations.

37. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS176/AB/R and the Panel Report in WT/DS176/R, as modified by the Appellate Body Report.