WORLD TRADE ORGANIZATION

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Dispute Settlement Body
30 August 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 30 August 2002

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

Prior to adoption of the agenda, the item concerning the Panel Report in the case on: "United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany" (WT/DS213/R and Corr.1) was removed from the proposed agenda following the notification by the United States of its decision to appeal the Report.

Subjects discussed: Page

1. United States – Anti-dumping and countervailing measures on steel plate from India

(a) Implementation of the recommendations of the DSB

1. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 29 July 2002, the DSB had adopted the Panel Report in the case on "United States – Anti-Dumping and Countervailing

Measures on Steel Plate from India". He said that the 30-day period in this case had expired on 28 August and, on 27 August, pursuant to the agreement by the parties to the dispute, the United States had informed the DSB in writing of its intentions in respect of implementation. He noted that the relevant communication was contained in document WT/DS206/6.

2. The representative of the United States said that his country had reached an agreement with India that the United States would inform the DSB in writing of its intentions concerning implementation of the DSB's recommendations and rulings in this dispute. He said that the United States had done so by letter of 27 August 2002. Thus, he was pleased to reaffirm at the present meeting that the United States intended to implement the DSB's recommendations in a manner that respected the WTO obligations of the United States. He said that the United States would need a reasonable period of time in which to do so. His delegation stood ready to discuss this matter with India, in accordance with Article 21.3(b) of the DSU.

3. The representative of India confirmed that an agreement had been reached between the United States and India that the latter would inform the DSB in writing of its intentions to implement the recommendations and rulings of the DSB in the dispute under consideration. India welcomed the statement by the United States expressing its intention to implement the DSB's rulings in this dispute. India noted that the United States had indicated that it had already begun to evaluate the options for doing so. This would speed up the implementation process. Since compliance with the DSB's rulings in this dispute did not involve a change or a modification of any laws or regulations, India was confident that the United States could implement this decision in a very short period of time. His delegation was ready to discuss the issue of reasonable period of time.

4. The DSB took note of the statements and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.

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

(a) Request for the establishment of a panel by Canada (WT/DS257/3)

5. The Chairman recalled that this matter had been before the DSB at its meeting on 29 July 2002. However, following that meeting Canada had decided to withdraw its request for the establishment of a panel and had filed a new panel request which was now before the DSB in document WT/DS257/3.

6. The representative of Canada recalled that on 3 May 2002 his country had requested consultations with the United States regarding the final countervailing duty determination made by the US Department of Commerce on 21 March 2002 with respect to certain softwood lumber from Canada. These consultations had been held on 18 June 2002 and had addressed all of the issues covered by Canada's new panel request, including Canada's claims with respect to Expedited and Administrative Reviews. Unfortunately, these consultations had failed to resolve the dispute. On 29 July 2002 Canada had made its first request for the establishment of a panel in this matter. On 19 August 2002 Canada had withdrawn its original request, and had placed this new request on the agenda of the present meeting. As set out in its panel request, Canada considered that the final countervailing duty determination violated the obligations of the United States under the SCM Agreement, in particular: (i) the investigation had been initiated on a basis that made the objective and meaningful determination of the degree of industry support impossible; (ii) the final determination impermissibly treated the Canadian stumpage practice as a financial contribution in the form of a "provision of goods"; (iii) the final determination found a "benefit" through an illegal comparison with benchmarks outside of the market under investigation; and (iv) the final determination inflated the alleged subsidy rate by a number of means not permitted under the SCM Agreement. Furthermore, Canada also considered that the United States violated its obligations

under the SCM Agreement and the GATT 1994 with respect to the provision of expedited and company-specific administrative reviews. Consequently, and in accordance with the relevant provisions of the DSU, the GATT 1994 and the SCM Agreement, Canada was requesting the establishment of a panel to consider these matters.

7. The representative of the United States said that his country regretted that Canada had chosen to request the establishment of a panel. As a substantive matter, the United States believed that Canada's claim lacked merit. Of more immediate concern, however, was that in its request for the establishment of a panel, Canada had raised new claims on which there had not been any consultation. Specifically, Canada's panel request for the first time identified issues relating to the US Commerce Department's initiation of expedited reviews as an inconsistent "measure". Canada's consultation request did not, however, mention the initiation of these reviews, nor had Canada and the United States consulted on these claims relating to the initiation of the expedited reviews. The US Commerce Department had not in fact initiated the expedited reviews until 17 July, almost a full month after the consultations had been held. Accordingly there was no basis to request the establishment of a panel on this claim. Finally, the United States wished to raise a systemic concern with Canada's panel request. This request continued a troubling trend of Canada filing lumber-related panel requests regarding legal provisions that had never been applied and investigations that had not been completed. This panel request was in fact the fourth panel request that Canada had filed relating to the lumber dispute. The first three requests involved (i) Canada's dispute over whether "export restraints" could be countervailed as subsidies despite the fact that the US Commerce Department had never countervailed an export restraint since the WTO Agreement had entered into force, (ii) its challenge to Section 129 of the Uruguay Round Agreements Act despite the fact that the United States had never applied that provision in a case involving Canadian products, and (iii) its challenge to the US Commerce Department's preliminary countervailing duty determination on lumber despite the fact that the Department had not yet completed its investigation and, by the time the panel issued its report, had already refunded all of the preliminary bonds and cash deposits. This fourth lumber-related panel request was the first to actually challenge the US Commerce Department's final countervailing duty determination. And yet Canada continued the previous trend by improperly including a claim in this request relating to a "proposed methodology" for expedited reviews that the US Commerce Department had yet to apply. As previously noted, the US Commerce Department had initiated these reviews only a few weeks ago. Canada's increasing tendency to bring hypothetical disputes should cause Members concern from a systemic viewpoint. The dispute settlement system was overburdened enough with actual disputes. The representative of the United States noted that the Section 129 Panel Report was on the agenda for adoption at the present meeting. The United States believed the Panel's findings contained in that Report demonstrated the lack of basis for Canada's approach. For all of these reasons, the United States could not agree to the establishment of a panel at the present meeting.

8. The DSB took note of the statements and agreed to revert to this matter.

3. United States – Equalizing excise tax imposed by Florida on processed orange and grapefruit products

(a) Request for the establishment of a panel by Brazil (WT/DS250/2)

9. The Chairman drew attention to the communication from Brazil contained in document WT/DS250/2.

10. The representative of Brazil said that on 20 March 2002, pursuant to Article 4 of the DSU and Article XXII of the GATT 1994, Brazil had requested consultations with the United States (WT/DS250/1, dated 26 March 2002) concerning the imposition by the State of Florida of an excise tax on the processing of "citrus products" – principally juice – made from oranges and grapefruit grown outside the United States. Brazil raised its concerns that this tax unfairly burdened Brazilian

exports of frozen concentrated orange juice to the United States, in violation of the requirements of GATT 1994. Consultations concerning this tax had been held on 2 May, and again on 27 June 2002. Despite a cordial exchange of views and information with the United States, these consultations had not resulted in a mutually acceptable solution to the problem. The State of Florida had imposed an excise tax on "processed citrus products" – in other words, juice - made from oranges or grapefruit grown outside that State. Florida had not imposed an equivalent tax on a "like product" made from oranges and grapefruit grown in Florida. In fact, as originally drafted, the Florida law exempted from the excise tax citrus products made from fruit grown anywhere in the United States. The law had been amended following a Florida court decision that it was unconstitutional, and the amendment had ended the exemption for juice made from fruit grown in states other than Florida. Nevertheless, even after the amendment, juice made from Florida oranges was exempt from the tax, while non-Florida juice was subject to the tax. Moreover, the excise tax on non-Florida juice was higher than any other taxes that might be imposed on juice made from Florida oranges. This was a direct violation of the provisions of Article III:1 and III:2 of GATT 1994. While the excise tax was in itself a clear violation of GATT 1994, an even more pernicious violation arose from the way that the proceeds of the tax were applied. By Florida law, over 3/4 of the proceeds from the tax on imported juice had to be applied to an advertising fund whose purpose was to promote the consumption of Florida juice. Since the excise tax on imported juice had first been imposed, the advertising fund had entirely promoted consumption of Florida juice; not one penny of the tax revenues had ever been used to promote imported juice. In other words, Brazilian exporters not only found themselves taxed more than Florida producers of the "like product", they found that they were paying the tax solely to promote the sale of the product they compete with the Florida product. This was a direct violation of Article III:4 of the GATT 1994. The existence of this tax and its application had resulted in a serious and unfair burden being imposed by the State of Florida on imports of Brazilian orange juice, which was one of Brazil's principal exports to the United States. Florida producers would not allow the removal of the tax because they perceived it as another form of "tariff" protection, used to reduce the competitiveness of Brazilian juice. For years they had also relied on the revenues from the excise tax to fund the promotion of their own products, without providing any benefits to and discriminating against imported juice. These unfair measures nullified or impaired the benefits accruing to Brazil under the GATT 1994. Accordingly, Brazil wish to draw Members' attention to document WT/DS250/2, dated 19 August 2002, and was requesting that a panel be established at the present meeting, with standard terms of reference as set out in Article 7 of the DSU. Brazil regretted that this issue had come to this point and hoped that continued consultations, even while the panel process were to move forward, could lead to a constructive and mutually acceptable solution.

11. The representative of the United States said that his country was surprised and disappointed to learn that Brazil was requesting the establishment of a panel in this matter. The United States and Brazil had held two rounds of consultations in this matter. Brazil had posed numerous questions concerning Florida's equalizing excise tax, and the United States had provided detailed answers. In its panel request, Brazil had stated that these "consultations promoted an important exchange of information". The United States agreed with this and also believed the information it had provided made clear that Florida's equalizing excise tax was consistent with the WTO obligations of the United States. As a procedural matter, the United States also noted that Brazil's consultation request was on a different measure than the one referred to in its panel request. A court had struck down aspects of the Florida law at issue and the State of Florida had amended the challenged provision (Florida Statutes, section 601.155) after Brazil's consultations request. As Brazil conceded in its panel request, the amended law had entered into effect on 1 July 2002. Therefore, there was no basis for Brazil's panel request, which asked for a panel to examine a measure on which Brazil had not requested consultations. Therefore, the United States was not prepared at this time to accept the establishment of a panel. The United States remained willing to discuss with Brazil any concerns that it might have. The United States believed that further dialogue should result in a mutually satisfactory solution to this matter.

12. The DSB took note of the statements and agreed to revert to this matter.

4. European Communities – Provisional safeguard measures on imports of certain steel products

(a) Request for the establishment of a panel by the United States (WT/DS260/4)

13. The Chairman drew attention to the communication from the United States contained in document WT/DS260/4.

14. The representative of the United States said that his country was requesting the establishment of a panel to examine the safeguard measure imposed by the EC on certain steel products from the United States and elsewhere. The EC had imposed these safeguard measures without following the required due process investigatory procedures and without clear evidence that increased imports were causing or were threatening to cause serious injury, as required by the Agreement on Safeguards and Article XIX of the GATT 1994. The United States considered, therefore, that the EC's safeguard measures were inconsistent with these Agreements. In the view of the United States, in addition to the specific measures at issue, there was an important principle at stake in this dispute, namely, that Members should not be able to impose safeguard measures in the absence of clear evidence and due process, even if such measures were only in place for a short time. Accordingly, the United States was requesting the DSB to establish a panel at the present meeting.

15. The representative of the European Communities said that the EC regretted the US unjustified and premature decision to request the establishment of a panel on this matter. The EC considered that the provisional safeguard measures at issue had been imposed in conformity with the relevant WTO rules and, moreover, they fully preserved traditional trade flows. These measures, as well as many other similar ones established by other Members, had been provoked by the need for the EC to protect its producers from a highly probable flood of injurious imports of steel products following the introduction of the notorious US safeguards measures. The EC considered that safeguard measures were needed to prevent serious injury caused by increased imports resulting from US protectionism. It noted that that eight co-complainants had challenged the US measures, while the United States was alone in arguing the illegality of the EC's measures. For these reasons, the EC could not agree to the establishment of the panel at the present meeting.

16. The DSB took note of the statements and agreed to revert to this matter.

5. United States – Section 129(c)(1) of the Uruguay Round Agreements Act

(a) Report of the Panel (WT/DS221/R)

17. The Chairman recalled that at its meeting on 23 August 2001, the DSB had established a panel to examine the complaint by Canada pertaining to this matter. The Report of the Panel contained in WT/DS221/R had been circulated on 15 July 2002 as an unrestricted document pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. The Report was now before the DSB for adoption at the request of the United States. He noted that this adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

18. The representative of the United States said that his country wished to thank the members of the Panel and the Secretariat for their hard work. This was a solid and well-reasoned Report, and the United States fully supported its adoption. This dispute involved Section 129(c)(1) of the Uruguay Round Agreements Act, a provision of US law that established an effective date for new determinations that the United States issued to implement adverse WTO reports in cases involving anti-dumping and countervailing duty measures. The provision ensured that a new, WTO-consistent determination would apply to all entries that had taken place on or after the implementation date. The United States was pleased that the Panel had found that Section 129(c)(1) was not inconsistent with

WTO rules. The United States was also pleased by the manner in which the Panel had conducted its analysis. It began by noting that Canada had challenged Section 129(c)(1) "as such," and that Canada could succeed in its claims only if it established that the provision mandated a breach of WTO rules. In order for Canada to discharge this burden, it had to demonstrate two elements. First, Canada needed to demonstrate that Section 129(c)(1) mandated that the United States take or not take the action that Canada alleged. Second, if Canada succeeded in discharging that burden, it then needed to demonstrate that the mandated behaviour was inconsistent with WTO rules. The Panel understood that in cases involving a factual dispute over what actions a measure did or did not require, the proper approach was to examine the factual issues first. The dispute here was a question of fact over what Section 129 required. The Panel's approach to this case constituted a textbook example of the proper way in which to apply the mandatory/discretionary distinction. The Panel had carefully examined what actions Section 129(c)(1) actually required, and it had concluded that Canada's interpretation of the provision was wrong. Since Section 129(c)(1) did not require the actions that Canada had alleged, there was no need to determine whether taking those actions would breach WTO rules. The Panel had properly refused to issue an advisory opinion on the correct interpretation of WTO provisions that Section 129(c)(1) did not even implicate. In conclusion, the United States again wished to thank the Panel and the Secretariat for their hard work. This was an extremely well-reasoned Report that should serve as a model for applying the mandatory/discretionary distinction in future disputes.

19. The representative of Canada said that his country had decidedly mixed feelings about the Panel Report. Canada was disappointed that the Panel had focused on a technical defence raised by the United States and had not addressed the dispute before it. However, Canada was pleased that the Panel had not ruled out that Section 129(c)(1) of the Uruguay Round Agreements Act, when actually applied by the United States, would be inconsistent with its WTO obligations. Canada had two primary concerns about the Panel Report, both of which raised systemic issues for dispute settlement in the WTO. First, where the disputing parties disagreed as to whether a measure mandated a violation of WTO rules, the practice of WTO and GATT panels had been to determine first the Member's obligations under the WTO Agreement and only thereafter to determine whether the measure at issue afforded sufficient discretion such that a violation of the Member's WTO obligations was not mandated in any circumstances. The Panel had not followed this practice. Second, in interpreting its terms of reference, the Panel had unduly restricted its analysis of the effect of Section 129(c)(1) of the Uruguay Round Agreements Act to preclude any analysis of other provisions of US law. Canada's complaint in this case was that, if a Panel or the Appellate Body found that an anti-dumping or countervailing duty order was inconsistent with the United States' WTO obligations and the US Trade Representative directed the US Department of Commerce to implement an adverse DSB ruling, Section 129(c)(1) prevented the US Department of Commerce from applying that decision to prior unliquidated entries. The effect of Section 129(c)(1) was that the provisions of Title VII of the Tariff Act would continue to apply to the prior unliquidated entries. Canada suggested that there was no need, as a matter of WTO law, for it to have alleged that Title VII was a part of the infringing measure. However, the Panel had disagreed and, by narrowly construing its terms of reference, avoided addressing the dispute before it. In closing, Canada was of the view that the Panel Report in this case raised systemic issues for dispute settlement of concern to all Members.

20. The DSB took note of the statements and adopted the Panel Report contained in WT/DS221/R.