WORLD TRADE ORGANIZATION

WT/DS294/32
10 June 2009

(09-2803)

Original: English

UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

Recourse to Article 21.5 of the DSU by the European Communities

Communication from the United States:
Request by the United States for a Corrigendum to the Appellate Body Report

The following communication, dated 22 May 2009, from the delegation of the United States to the Appellate Body is circulated at the request of the United States.

The United States thanks the Appellate Body for its report[1] in the appeal in the above-referenced proceeding. My authorities have instructed me to call your attention to an unfortunate factual and legal error in this report and to request respectfully that the Appellate Body issue a corrigendum to correct this error.

This error relates to "Case 31", related to imports of antifriction ball bearings from the United Kingdom. The Appellate Body report addresses and makes findings with respect to a supposed US administrative determination in this Case that, in fact, the United States did not make. The report erroneously assumes that this determination was made, in part based on the assumption that no administrative review of a company was requested in May 2007, but the evidence before the Appellate Body shows that a review was requested and initiated. Because this supposed determination was not identified or addressed by any participant during the panel or Appellate Body proceedings, the participants did not have an opportunity to bring to the Appellate Body's attention the evidence on the record demonstrating that this supposed determination did not take place.

In the original proceeding, the Appellate Body found that the 2000-2001 administrative review determination in Case 31 was inconsistent with Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* and Article VI:2 of the *General Agreement on Tariffs and Trade 1994*.[2] The compliance Panel found that the United States continues to apply the cash deposit rate established in that administrative review determination to one exporter, NSK Bearings Europe Ltd. ("NSK").[3] The United States did not appeal this finding.

---

[1] Appellate Body report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (Recourse to Article 21.5 of the DSU by the European Communities)*, WT/DS294/AB/RW, circulated 14 May 2009, para. 345 ("Appellate Body report").

[2] Appellate Body report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, para. 263(a)(i).

[3] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (Recourse to Article 21.5 of the DSU by the European Communities)*, WT/DS294/RW, circulated 9 May 2006, para. 8.216 ("Compliance Panel report").

At issue in the present request is what the Appellate Body report has called the "duty liability determination on 31 May 2007", described in paragraphs 156(d)(iii), 345, 346, and 469(f) of the report, with respect to NSK. The Appellate Body report states that the United States assessed definitive anti-dumping duties at the cash deposit rate on imports from NSK on 31 May 2007, when the deadline for requesting an administrative review for certain imports from NSK expired.[4] No such supposed determination was ever raised or discussed at the compliance panel stage or on appeal. In fact, the factual material before the compliance Panel – and thus the record before the Appellate Body – makes clear that this "determination" did not occur and was not made.

It appears that the Appellate Body report deduced the existence of this supposed determination[5] by reasoning that, if an interested party wished to request an administrative review in Case 31 in 2007, the request had to be made no later than 31 May 2007,[6] and that, according to the provisions of "19 C.F.R. § 353.53a" [*sic*][7], if no review was requested by that date, the United States would mechanically assess final duties at the cash deposit rate.[8] The Appellate Body report also says that no such review was requested.[9] From this, the report concludes that the United States mechanically assessed final duties on NSK at the cash deposit rate on 31 May 2007.[10]

This reasoning thus depends on the premise that no interested party requested the initiation of an administrative review of NSK in Case 31 by 31 May 2007. In fact, this premise is incorrect, as the following review of the materials before the compliance Panel and Appellate Body shows.[11]

First, the Appellate Body report cites to the request for establishment of the compliance panel by the European Communities ("EC") as support for the proposition that no review was requested.[12] To be sure, that panel request does not identify any administrative reviews of NSK in Case 31 as a "subsequent review" being challenged in this proceeding. However, the fact that the panel request challenges no administrative review *results* with respect to NSK as of the date of the request provides no evidence with respect to any administative reviews *ongoing* as of that date.[13] The absence of any mention of the 2007 review in the EC panel request fails to show that no administrative review was requested.

Further, the existence of the ongoing review is demonstrated by evidence on the record before the compliance Panel. Exhibit EC-21 contains a letter from NSK's counsel to Commerce, dated 12 July 2007, requesting guidance as to Commerce's intentions with respect to the implementation of

---

[4] Appellate Body report, para. 345.

[5] No party made any reference to a "31 May 2007 determination", or to any other specific assessment of duties in Case 31 after the end of the reasonable period of time, in any submission to the compliance Panel, and no participant made any reference to such a measure in a submission to the Appellate Body.

[6] Appellate Body report, para. 345.

[7] We note in passing that Part 353 of Title 19 of the US Code of Federal Regulations was superseded and removed from the Code of Federal Regulations on 19 May 1997. See *Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements: United States (Supplement)*, G/ADP/N/1/USA/1/Suppl.2, circulated 25 August 1997.

[8] Appellate Body report, para. 345.

[9] Appellate Body report, para. 345.

[10] Appellate Body report, para. 345.

[11] Separately from the discussion that follows, by drawing on publicly available materials *extraneous* to the materials presented to the compliance Panel (and thus extraneous to the record before the Appellate Body), the United States can confirm that NSK did request a review; the review was initiated; and as of the date of the establishment of the compliance Panel on 25 September 2007, the review was still ongoing. The United States would be happy to supply those materials if requested to do so.

[12] Appellate Body report, para. 341.

[13] Indeed, the panel request identifies no administrative reviews for any period of review ending later than mid-2005.

the rulings and recommendations in the original dispute and stating that Commerce's reply "will directly affect whether NSK Bearings Europe will continue its participation in the current [Case 31] review".[14] This evidence, which was before the compliance Panel and the Appellate Body, confirms that an administrative review covering NSK had been initiated and was "current" on 12 July 2007.

Accordingly, the evidence before the compliance Panel and the Appellate Body does not support the proposition that there was any determination concerning anti-dumping duties in Case 31 with respect to NSK on 31 May 2007. Consequently, the analysis in paragraph 345, the factual statement in the first sentence of paragraph 341, the reference in paragraph 156(d)(iii), and the finding in paragraphs 346 and 469(f) of the Appellate Body report are based on an incorrect premise. For these reasons, the United States requests that the Appellate Body issue a corrigendum removing that discussion.

* * * * *

The United States considers that the foregoing forms a sufficient basis for the issuance of the requested corrigendum. The United States would, however, like to mention two other considerations that support the US request. *First*, the EC did not identify any assessment of duties on NSK in its request for the establishment of a compliance panel.[15] More specifically, the "31 May 2007 assessment determination" with respect to NSK that is referred to in the Appellate Body report is not mentioned anywhere in the EC panel request. As a result, in accordance with Articles 6.2 and 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), no such determination fell within the terms of reference of the compliance Panel – and therefore of the Appellate Body. While the EC asserted, in a general way, in its submissions to the compliance Panel that the United States "still issues assessment instructions and establishes cash deposits" with respect to NSK[16], the compliance Panel found, in paragraph 8.217 of its report, that the EC did not make any "identification of a precise US action" with respect to duty assessment determinations in Case 31, and accordingly refrained from making "a specific finding with respect to any duty assessment with respect to imports of NSK under Case 31 after the end of the reasonable period of time".[17] This finding by the compliance Panel reflects what was outlined above: the EC never identified, in its panel request or thereafter, any measure – neither the supposed 31 May 2007 determination nor any other measure – in which the United States allegedly "issues assessment instructions" with respect to NSK.

Second, the EC did not appeal this finding in paragraph 8.217 of the compliance Panel report.[18] Further, the EC did not identify any "precise US action" (to use the compliance Panel's term)

---

[14] Exhibit EC-21 at 2 (emphasis added).

[15] With respect to Case 31, the EC panel request merely states that there were "[n]o subsequent administrative reviews" for NSK. *See* the Annex to the Request for the Establishment of a Panel by the European Communities, WT/DS294/25, circulated 14 September 2007.

[16] EC first written submission to the compliance Panel, 11 January 2008, para. 95.

[17] Compliance Panel report, para. 8.217.

[18] None of the appeal grounds identified in the EC Notice of Appeal related to Case 31 refer, directly or indirectly, to this finding:

- The EC appealed, with respect to 12 Cases, the findings of the compliance Panel in paragraph 8.202 of its report, but these findings expressly relate to Cases other than Cases 1, 6, and 31.
- The EC requested that the Appellate Body uphold the findings of the compliance Panel in the final two sentences of paragraph 8.218 of its report, but these findings expressly relate to cash deposits rather than assessments.
- The EC requested that the Appellate Body find that the compliance Panel acted inconsistently with Article 11 of the DSU and complete the analysis by finding that the United States "continu[es] to maintain in place duty or cash deposit rates" with respect to 12 Cases,

– neither the alleged 31 May 2007 determination nor any other measure – in its submissions to the Appellate Body. The Appellate Body report states that the EC stated in response to questioning at the oral hearing that it "appeals the *analysis* of Case 31 made by the [compliance] Panel,"[19] but does not say that the EC appealed the compliance Panel's findings about the absence of any identified assessment measure in Case 31 with respect to NSK. The United States does not recall the EC making any such assertion during the oral hearing; but even if the EC had asserted for the first time at the oral hearing that it was appealing this panel finding, we would have significant concern with the Appellate Body considering an issue raised for the first time in that manner.

* * * * *

For the foregoing reasons, the United States respectfully requests that the Appellate Body issue a corrigendum to its report to eliminate all discussion of and findings relating to the supposed "duty liability determination on 31 May 2007" other related errors, including those in paragraphs 156(d)(iii), 341, 345, 346, and 469(f) of its report.

The United States thanks the Appellate Body for its consideration of this request. The United States is providing a copy of this letter to the European Communities and the third participants in this proceeding.

---

including Case 31, but the EC never suggested during the proceedings before the Appellate Body that "the relevant measures" for this point of its appeal were anything other than the subsequent reviews identified in the EC panel request, which – as set forth above – did not include the alleged 31 May 2007 determination. (*See* EC oral statement, 23 March 2009, para. 31.)

[19] Appellate Body report, para. 343 (emphasis added).