WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/137
3 February 2003

(03-0659)

Dispute Settlement Body
28 November 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 28 November 2002

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

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

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

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: 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 four sub-items to which he had just referred be considered separately.

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18/Add.9)

2. The Chairman drew attention to document WT/DS160/18/Add.9 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.

3. The representative of the United States said that his country had provided an additional status report in this dispute on 15 November 2002, in accordance with Article 21.6 of the DSU. As noted in that report, the United States and the EC had been seeking a positive and mutually acceptable resolution of the dispute. The United States continued to work towards a mutually acceptable arrangement consistent with WTO rules. The new US Congress would convene early next year. The US administration would continue to engage the US Congress on this issue when it resumed work.

4. The representative of the European Communities said that at the previous regular DSB meeting, his delegation had expressed disappointment that 27 months had lapsed after the adoption of the Panel Report, but no action had yet been taken by the US to comply with the Panel's ruling. He said that there was not much to add to the previous statement, except that now one more month had lapsed. The EC urged, once again, the United States to take rapid and concrete action to settle this dispute and to comply with the DSB's recommendations.

5. The representative of Australia said that his country continued to follow this matter closely given its commercial and systemic interests. At the present meeting, he did not wish to repeat his country's position on this matter, but only to refer Members to Australia's previous interventions under this agenda item.

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

(b) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.9 – WT/DS162/17/Add.9)

7. The Chairman drew attention to document WT/DS136/14/Add.9 – WT/DS162/17/Add.9 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Anti-Dumping Act of 1916.

8. The representative of the United States said that his country had provided an additional status report in this dispute on 15 November 2002, in accordance with Article 21.6 of the DSU. As noted in that report, bills repealing the 1916 Act had been introduced in both the US House of Representatives (H.R. 3557) and the US Senate (S. 2224). The bills would apply to all pending court cases. The new US Congress would convene early next year. The US administration would continue to work with the US Congress when it resumed its work to achieve further progress in resolving this dispute with the EC and Japan.

9. The representative of the European Communities said that it was with great disappointment that the EC learned that the US Congress had adjourned without having made any progress towards implementation regarding the 1916 Act dispute. The EC understood that all bills would have to be reintroduced in the next Congress. In this respect, the EC recalled its statement made at the previous DSB meeting regarding a third repealing bill, which would leave the ongoing court cases unaffected. A repeal of the 1916 Act with effects to future cases only could not be considered a satisfactory

solution of this dispute and would only serve to prolong the dispute. Three cases were pending before US courts against the EC companies and two of these cases had been initiated after the initial deadline for implementation. These companies were bearing substantial litigation costs to defend themselves against claims based on a legislation that was clearly condemned and should have been repealed long time ago. The EC expected that the new Congress would treat the 1916 Act and the termination of ongoing cases as first priority.

10. The representative of Japan said that it was extremely regrettable that the bills introduced to both the US Senate and the US House of Representatives repealing the 1916 Act did not pass the US Congress by the end of the 107th session. As had been repeatedly stated, 30 June, the date agreed among the parties for the reactivation of the arbitration proceeding had passed long time ago. Such delay in implementation undermined the credibility of the dispute settlement system, which was one of the fundamental pillars of the WTO. Moreover, the fact that the bill introduced to the House of Representatives in June by representative Henry Hyde had no effects, did not ease Japan's concern in this regard. This bill would leave unaffected the cases initiated before, or pending on, the date of the repeal of the 1916 Act. Any future bill repealing the 1916 Act had to ensure that no judgement be rendered under the Act on any pending case. The suspended proceedings in the US domestic courts under the 1916 Act had been reopened as of 8 August, and the respondent Japanese companies were suffering serious and real financial consequences, such as litigation costs. Japan again urged the United States to implement the DSB's recommendations and rulings as soon as possible in order to ensure the credibility of the WTO dispute settlement system.

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

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.2)

12. The Chairman drew attention to document WT/DS176/11/Add.2 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

13. The representative of the United States said that his country had provided a status report in this dispute on 15 November 2002, in accordance with Article 21.6 of the DSU. He said that the new US Congress would convene early next year. The US administration would continue to engage the US Congress on this issue when it resumed its work.

14. The representative of the European Communities said that the EC would like to restate its position expressed at the previous DSB meeting on the legal status of abandoned trademarks under Section 211. The United States should stand by the affirmations expressly made by the US representatives in the course of the proceedings on which the Panel had relied. It should be clarified that Section 211 did not apply to a new trademark after a former trademark, to which Section 211 might have applied, had been abandoned. The EC understood that the US Congress had adjourned without taking measures for the implementation of the DSB's rulings. In light of the forthcoming deadline, the EC would like to know what the US administration intended to do. The EC remained open to all solutions that could favour compliance and hoped that a satisfactory solution to this dispute would be reached.

15. The representative of Cuba reiterated her country's position that the United States should meet the deadline for the implementation of the DSB's recommendations in this case.

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

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.2)

17. The Chairman drew attention to document WT/DS184/15/Add.2 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

18. The representative of the United States said that his country had provided a status report in this dispute on 15 November 2002, in accordance with Article 21.6 of the DSU. At the present meeting, he was pleased to inform Members that after that status report had been provided, on 22 November 2002, the US Department of Commerce had issued a new final determination in the hot-rolled steel anti-dumping duty investigation, which implemented the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in that investigation. Specifically, consistent with those recommendations and rulings, the new final determination: (i) used information supplied by two companies that was originally rejected as "untimely"; (ii) removed the adverse facts available applied to another respondent with respect to certain unreported US sales, and based the margin entirely on reported US sales information; (iii) applied an even-handed arm's length test to select home market sales as a basis for normal value; and (iv) calculated an "all others" rate that was below the Anti-Dumping Agreement "ceiling", as found by the Appellate Body. With respect to the DSB's recommendations and rulings related to the US anti-dumping duty statute, the United States administration continued to consult and to work with the US Congress on resolving this aspect of the dispute in a mutually satisfactory manner. To this end, after consultations with Japan, the United States had requested, on 22 November 2002, that the reasonable period of time in this dispute be extended until 31 December 2003, or until the end of the first session of the next Congress, whichever would be earlier. That request was on the agenda of the DSB meeting scheduled for 5 December. The United States intended to continue discussions with Japan on implementation of the DSB's recommendations and rulings.

19. The representative of Japan said that her country deeply regretted that the United States had failed to implement the DSB's recommendations and rulings by the date of expiration of the reasonable period of time, which was 23 November 2002. It was also gravely concerned about the negative impact of non-compliance on the credibility of the WTO dispute settlement system. Japan noted the request for the extension of the reasonable period of time by the United States. As the United States had just stated, the two countries had held consultations on this matter. Based on the consultations thus far, Japan did not, at this juncture, intend to object to the extension of the reasonable period of time. The United States, as a responsible Member of the WTO, had to ensure compliance at the earliest possible time, while closely consulting with Japan on the status and contents of implementation. Japan reserved all its rights under the DSU, especially those that would accrue to it should the United States fail again to comply with the DSB's recommendations and rulings.

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

2. United States – Preliminary determinations with respect to certain softwood lumber from Canada

(a) Implementation of the recommendations of the DSB

21. 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 date of 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 1 November 2002, the DSB had adopted the Panel Report in the case on "United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada".

22. The representative of the United States said that the measures at issue in this dispute were no longer in effect. The provisional cash deposits that Canada had challenged in this dispute were refunded prior to the circulation of the Panel Report. Therefore, no action was required to comply with the DSB's recommendations and rulings in this dispute.

23. The representative of Canada said that his country had informed the DSB at its meeting on 1 November that it was pleased overall with the Panel Report. Canada noted its concerns with the Panel's interpretation of the phrase "provision of goods" in Article 1 of the SCM Agreement, but welcomed the Panel's confirmation that the US Department of Commerce had failed to establish that Canadian exports of softwood lumber were subsidized. Canada was deeply concerned with the position taken by the United States on implementing the DSB's recommendations and rulings regarding the Panel Report (DS236). The legal methodologies found by the Panel to be plainly illegal in the US Preliminary Countervailing Duty Determination remained unchanged in the Final Determination. Using these illegal methodologies, the United States had imposed definitive countervailing duties of just under 19 per cent on Canadian softwood lumber exports. These illegal duties continued to inflict severe damage to the Canadian forestry sector, a sector vital to the Canadian economy and the lifeblood of thousands of communities across Canada. No provision of the Marrakesh Agreement condoned the illegal imposition of countervailing duties under the SCM Agreement. The right to impose countervailing duties was not an unfettered right. It was a right governed by rules. On 1 November, the DSB had adopted the Panel's decision regarding the rules governing the imposition of countervailing duties in respect of Canadian softwood lumber exports. The Panel Report was clear. The US methodologies had used to prop up an exorbitant countervailing duty violated the rules. The ruling provided a fundamental message to the United States and to all Members as to how to meet obligations under the SCM Agreement. The United States had chosen to ignore this clear message. At the 1 November DSB meeting, when the Panel Report had been adopted, Canada had been told by the United States that the adoption by the DSB of the DS236 Panel Report changed nothing. On 1 November, the United States had advised the DSB that it believed the Report had "no practical effect on the final countervailing duties that are currently in place". This position manifestly contradicted the authoritative nature of the Panel's interpretations of fundamental legal obligations of the SCM Agreement. Moreover, it struck at the integrity of the dispute settlement system.

24. He then proposed to examine what the United States would have Canada believe was "moot". The Panel had confirmed that the use of cross-border benchmark prices was illegal - the text of the Agreement was clear, and it would not be any more legal if the United States used cross-border prices in any other case. The Panel was equally clear in confirming that a Member might not assume the existence of a "benefit": any alleged pass-through of a benefit had to be demonstrated by the investigating authority. The dismissal of the Panel's legal findings as moot was plainly misguided in a rules-based trading system. A panel's legal findings were essential to the task of the dispute settlement and WTO rules that were reliable, comprehensible and enforceable. The United States now had clear guidance as to the rules of the SCM Agreement and their application in respect of current illegal duties. Ignoring this guidance, ignoring the rules, did nothing for the security and predictability of the trading system.

25. Rationalizations by the United States that "measures no longer exist" or that the record before the investigating authority as reviewed by the Panel was "limited" did not remove the fundamental direction provided by the Panel's legal interpretations. To suggest that somehow a "more complete record" at the time of the Final Determination had any relevance to establishing the legal nature of such obligations was simply not credible. Rather than "vigorously" defending the untenable methodologies in its Final Determination in DS257, what the United States had to do was relieve

Canada of these illegal duties and of any need for continued litigation. In particular, the United States should revoke the countervailing duty order, refund the duties, and confirmed that it would respect the rules and ceased using these illegal methodologies. Finally, in the light of the stated intention of the United States to ignore the rules as clarified by the DSB's ruling, Canada had to now weigh further action to redress the continued imposition by the United States of illegal duties on Canadian lumber exports.

26. The representative of the United States said that his country was surprised about Canada's position that Members had to take additional action once the measure at issue was rescinded. The most that a Member could expect from the dispute settlement proceedings was the withdrawal of the challenged measure and that had happened in this dispute. There was no basis for Canada's position that this measure was still in effect. With regard to Canada's separate challenge of the final determination (WT/DS257), the United States remained of the view that this would be based on the much fuller analysis and more complete record of the US final investigation, which provided ample documentation and support for the US methodologies and decisions. The United States intended to defend the US measure at issue in DS257 vigorously.

27. The DSB took note of the statements and of the information provided by the United States regarding the implementation of the DSB's recommendations in this case.

3. Adoption of the 2002 draft Annual Report of the DSB (WT/DSB/W/209 and Add.1)

28. The Chairman said that in pursuance of the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO contained in document WT/L/105, he was submitting for adoption the draft text of the 2002 Annual Report of the DSB in document WT/DSB/W/209 and Add.1. This report covered the work of the DSB since the previous report and had been prepared in accordance with the structure of the 2001 Annual Report. For practical purposes, the overview of the state of play of WTO disputes covering the period from 1 January 1995 to 31 October 2002, prepared by the Secretariat on its own responsibility, was included in the addendum to this report. He proposed that following the adoption of the Annual Report at the present meeting, the Secretariat be authorized to update this Report under its own responsibility in order to include actions taken by the DSB at the present meeting. The updated Annual Report of the DSB would then be submitted for consideration by the General Council at its meeting on 10 December 2002. He said that it was his understanding that the Secretariat had received some comments of a technical and typographical nature on the draft Annual Report, which would be taken into account in the final version of the Annual Report.

29. The DSB took note of the statement and adopted the draft Annual Report contained in WT/DSB/W/209 and Add.1 on the understanding that it would be further updated by the Secretariat.

4. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/211)

30. The Chairman drew attention to document WT/DSB/W/211 which contained an additional name proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the name contained in document WT/DSB/W/211.

31. The DSB so agreed.

5. Turkey – Certain import procedures for fresh fruit

(a) Statement by Ecuador

32. The representative of Ecuador, speaking under "Other Business", said that in relation to the case on: "Turkey – Certain Import Procedures for Fresh Fruit" (DS237)", his country wished to

inform Members that the WTO Secretariat had been notified of a mutually satisfactory solution, reached by Ecuador and Turkey, together with a description of its terms and conditions. In this connection, he recalled that at the DSB meeting on 29 July 2002, when the Panel had been established, Ecuador had announced that it was postponing the composition of the Panel as a reciprocal gesture to the announcement made on that occasion by Turkey that it had taken steps on 20 July to amend the procedures applying to the importation of bananas in order to meet Ecuador's concerns. Ecuador had carried out a thorough review of the technical implications of that amendment and had ascertained that it did indeed respond to its concerns and brought that import regime into compliance with the covered Agreements. Furthermore, the Turkish authorities had undertaken to maintain in force the measures that had put an end to this dispute and thus Ecuador, for its part, was withdrawing the case from the DSU proceedings.

33. The representative of Turkey said that his country also welcomed the fact that a mutually satisfactory agreement had been reached, which was a result of the desire and the will of both parties to the dispute.

34. The DSB took note of the statements.