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Dispute Settlement Body
14 March 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 14 March 2006

Chairman: Mr Muhamad Noor Yacob (Malaysia)

Subjects discussed: Page

1. United States – Tax treatment for "Foreign Sales Corporations": Second recourse to Article 21.5 of the DSU by the European Communities

(a) Report of the Appellate Body (WT/DS108/AB/RW2) and Report of the Panel (WT/DS108/RW2)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS108/35 transmitting the Appellate Body Report on: "United States – Tax Treatment for 'Foreign Sales Corporations': Second Recourse to Article 21.5 of the DSU by the European Communities", which had been circulated on 13 February 2006 in document WT/DS108/AB/RW2, in accordance with Article 17.5 of the DSU. He reminded delegations that, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. He noted that Article 17.14 of the DSU required that: "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. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

2. The representative of the European Communities said that the repeal of the FSC/ETI legislation represented a welcome step towards solving this long-standing dispute. Although it had taken more than four years to arrive at that result, the EC remained appreciative of the efforts put into this by all relevant actors in the United States, notably the US Congress. However, the repeal Act (i.e. the American Jobs Creation Act), included certain WTO-incompatible transitional and grandfathering provisions. Their WTO-incompatibility had now been confirmed by the Article 21.5 Panel and the Appellate Body in turn. The EC thanked the Appellate Body, once again, for having produced a clear and convincing Report on this dispute. In particular, the repeal Act provided that FSC/ETI benefits remained available to US exporters up to the end of 2006 and, in some cases, for a potentially unlimited period thereafter. Similar provisions had already been condemned in the past. The Article 21.5 Panel and the Appellate Body had clearly confirmed the WTO-incompatibility of the challenged US provisions. Furthermore, they had made it absolutely clear that the United States had yet to come into full compliance with earlier rulings and recommendations adopted by the DSB. The EC requested that the DSB adopt the latest Appellate Body Report on this matter and called upon the United States to ensure full compliance with the applicable rulings and recommendations. He recalled that throughout this dispute, the EC had shown the utmost restraint in terms of applying countermeasures. Hence, these had initially been introduced at a level significantly lower than the amount allowed by the WTO arbitrator in 2002, and had even been suspended pending the proceedings of the last Article 21.5 Panel and the Appellate Body. However, absent US compliance with its WTO obligations, mandatory EC legislation provided that the suspended sanctions would be reintroduced 60 days from the DSB's confirmation of the WTO-incompatibility of certain aspects of the US legislation. Finally, he stressed the EC's continuing readiness to explore with the United States ways and means to put an end to this long-standing dispute. In that regard, the EC had noted with interest the "Trade Sanction Avoidance Act" (HR 4909), a bill which had been introduced on 8 March 2006 into the US Congress. In tabling this bill, its sponsor noted the fact that the US tax breaks had been found WTO-incompatible on three occasions. The bill called for the repeal of both the remaining transition period; i.e. 2006, and the grandfathering of FSC/ETI as contained in the American Jobs Creation Act. Finally, he said that the EC would appreciate if the United States could inform the DSB on the further steps and timing in the treatment of this legislative proposal and whether the US administration intended to support that bill.

3. The representative of the United States said that his country would first like to thank the Panel, the Appellate Body and the Secretariat for their work on this dispute. This was the second Article 21.5 proceeding brought by the EC. The United States was pleased that the Appellate Body had explicitly found that the US "measure taken to comply with the DSB recommendations from the original and first Article 21.5 proceedings – the Jobs Act – has in large part withdrawn the prohibited subsidies." At the same time, the United States noted that other than confirming that the United States had largely withdrawn the subsidies at issue, the second proceeding had done little more than confirm the results of the first proceeding. One might wonder why the EC had used the time and resources of the Panel, the Appellate Body, the Secretariat and Members in that fashion, although the United States suspected most Members had seen reports as to the likely reason why.

4. He said that the United States had not filed its appeal in order to obtain a reversal of the Panel's findings regarding the consistency of the American Jobs Creation Act ("AJCA") with what he would call the "substantive" obligations of the SCM Agreement, the Agriculture Agreement and the GATT 1994. Instead, the United States had been troubled by some systemic issues raised by the Panel Report, in particular some language used by the Panel in its findings, and believed that the Panel's misstatements needed to be corrected. In this regard, the United States agreed with the EC's statement to the Appellate Body in this dispute that an appeal might sometimes be necessary "to avoid the creation of troublesome precedents."

5. Therefore, while the United States was disappointed that the Appellate Body had not reversed the Panel in the issues on appeal, it was pleased that the Appellate Body had provided clarification on the issues, recognizing for example that the Panel could have used "more precise" language in

describing the task of a panel under Article 21.5 of the DSU. While the United States did not necessarily agree with every word used by the Appellate Body in its characterization of a panel's task, it was a marked improvement over that of the Panel.

6. However, the United States remained troubled by the approach used by the Appellate Body and the Panel in analyzing a panel's terms of reference. The United States had found particularly disturbing the Appellate Body's statement that "the assessment of the panel request should not be confined to the content of its section 2 entitled 'The Subject of the Dispute'", particularly when it had been followed by the statement that "the European Communities' panel request does identify the continued operation of Section 5 of the ETI Act sufficiently to put the United States on notice." It was hard to see how a Member could be on "notice" when it was supposed to disregard the very section of a panel request that appeared specifically to constitute that notice. The United States was also struck by the Appellate Body's statement that: "When such a recommendation is adopted by the DSB, it must be, by virtue of Article 17.14 of the DSU, 'unconditionally accepted by the parties to the dispute', and it thus becomes effective and binding on the parties." The citation to Article 17.14 of the DSU appeared to be an error. For example, the Appellate Body's statement had not explained why Article 17.14 of the DSU would apply to panel recommendations, whether or not there were an appeal.

7. The representative of Brazil said that his country had participated as a third party in the proceedings related to the second recourse by the EC to Article 21.5 of the DSU in this dispute. Brazil wished to join the previous speakers in thanking the Appellate Body, the Panel and the Secretariat for their work in the case. The systemic relevance of the Reports at issue was certainly way above the number of pages of the Reports. Brazil was pleased to note that the findings of both the Panel and the Appellate Body had confirmed the central role of the principle of prompt and full compliance with the DSB's rulings and recommendations in the architecture of the WTO dispute settlement mechanism. As Brazil had stated before the DSB many times, prompt and full compliance was the most faithful measure of the effectiveness of the system and, consequently, of its credibility. In that context, Brazil wished to draw Members' attention to the following statements contained in the Appellate Body Report: "The obligation to comply with an Article 4.7 [of the Subsidies Agreement] recommendation remains in effect, even if several proceedings under Article 21.5 become necessary, until the prohibited subsidy is fully withdrawn." (para. 84). "The determination of whether 'measures taken to comply' challenged by the complaining party implement fully, or only in part, the DSB recommendations and rulings and the entire range of measures covered by them." (para. 93). "If this [the making of new Article 4.7 of the Subsidies Agreement recommendation by an Article 21.5 panel] were to result in an extension of the time-period set for withdrawal of the subsidy found to be prohibited in the original proceedings, compliance proceedings could have the effect of extending implementation periods through new Article 4.7 recommendations in successive Article 21.5 proceedings. This could lead to potentially 'never-ending cycle' of dispute settlement proceedings and inordinate delays in the implementation of recommendations and rulings of the DSB." (para. 86).

8. Brazil also welcomed the Appellate Body's finding that "full withdrawal of a prohibited subsidy within the meaning of Article 4.7 of the SCM Agreement cannot be achieved by a 'measure taken to comply' that replaces the original subsidy with yet another subsidy found to be prohibited." (para.83). To put it another way, as Brazil had argued before the Panel and the Appellate Body, unless and until a WTO Member really and completely removed the WTO-inconsistency of its challenged measures, every compliance proceeding must conclude that the illegality found in the original proceeding remained, maybe "wearing different clothes". Brazil expected that the United States would now fully implement the DSB's recommendations in this case in the shortest period possible, as it was bound to.

9. The representative of the European Communities said that first, the EC did not believe that the continuing benefits were insignificant. Although the United States had refused to provide precise

information, the EC believed the remaining benefit to be over US$750 million and this was, as all would agree, not insignificant. Second, these benefits would last over a long period of time, distorting competition well into the future possibly until 2012 and even beyond.

10. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS108/AB/RW2 and the Panel Report contained in WT/DS108/RW2, as upheld by the Appellate Body Report.

2. United States – Measures affecting trade in large civil aircraft

(a) Initiation of the procedures for developing information concerning serious prejudice under Annex V of the SCM Agreement and designation of the representative referred to in paragraph 4 of that Annex (WT/DS317/5)

11. The Chairman said that the above-mentioned item was on the agenda of the present meeting at the request of the EC. He then drew attention to the communication from the EC contained in document WT/DS317/5, and invited the representative of the EC to speak.

12. The representative of the European Communities said that the item under consideration had been included on the agenda of the present meeting due to the position of the United States at the previous DSB meeting. He recalled that, at the previous DSB meeting, a panel to examine this case had automatically been established, but the United States had stated that it could not agree to the resumption of the Annex V process at that point. He then stated it was worthwhile to recapitulate the milestones in this case. At the time of the establishment of the first panel on this matter, the United States had argued that 13 programmes were not properly before the panel since they were not explicitly listed in the original consultation request. The EC had disagreed with this and had filed a preliminary ruling request aimed at obtaining clarity concerning the inclusion of these 13 programmes. The United States had not provided any information concerning these programmes in the Annex V process arguing that they had not been properly consulted on. In an additional consultation request filed by the EC, followed by an additional panel request, these 13 programmes were explicitly mentioned. So despite disagreement regarding the justification for the US refusals to provide information, the EC had acted to remove the procedural flaws perceived by the United States.

13. In light of this, the continuing refusal by the United States to provide this information was untenable. The very purpose of the Annex V exercise was to obtain relevant information concerning actionable subsidies. And the Annex V process was not a favour granted to the other party. To obtain information under Annex V was a right – and the United States had simply been denying this right to the EC. The reasons that delayed the start of the Annex V procedure following the establishment of the original panel were no longer applicable. A facilitator had already been designated by the DSB in this case and procedures had been agreed for the protection of confidential information. Also no party was requesting an extended time-table or any other special rules. The EC remained open to explore with the United States a pragmatic approach to the conduct of the Annex V process, for example by limiting the information-gathering exercise to particular sets of questions. This should decrease the administrative burden which was – as the EC knew from its own experience – considerable.

14. The representative of the United States said that it was surprising that the EC was seeking initiation of an Annex V process at this time. As the United States had pointed out in February 2006, the EC had, in the past, forcefully insisted that the Annex V process could not begin until the parties had mutually agreed on initiation and on modalities. For example, at the 31 August 2005 DSB meeting, the EC had stated that "an Annex V procedure could not be initiated unilaterally by only one party to a dispute, but required a meeting of the minds; an actual agreement between the parties." The EC had also stated that it "was of vital interest to ensure that the content of any agreement on an Annex V procedure was carefully crafted so as to take the particularities of the disputes properly into

account." (WT/DSB/M/196, para. 45). The EC had made similar statements at other DSB meetings. (WT/DSB/M/194, para. 52; WT/DSB/M/195, para. 24).

15. The United States had observed that the SCM Agreement and the DSU did not require a procedural agreement to commence Annex V procedures for the first time. However, the concern raised by the EC – that "an Annex V procedure" must "take the particularities of the dispute properly into account" – clearly did apply when the Annex V request covered measures that had already been subject to a completed Annex V process. Yet the EC had to date made no concrete proposal to the United States or to the DSB about the relationship between the Annex V procedures that it sought to initiate now and the procedures that had already ended.

16. Perhaps equally troubling was the EC's apparent disregard for the carefully negotiated provisions of Annex V and the EC's apparent desire to re-write the provisions of Annex V to suit the EC's convenience. The EC had ignored the fact that Annex V provided a limited information-gathering procedure, lasting 60 days without any provision for resumption or repetition. For example, in its statement made at 17 February DSB meeting, the EC had claimed that "the DSB has already designated, pursuant to paragraph 4 of Annex V of the SCM Agreement, Mr. Mateo Diego-Fernández to serve as facilitator in the information-gathering process." However, that designation was for the Annex V process that had begun on 23 September 2005, which had now concluded – the information gathering was over and the facilitator had submitted his report. If the EC sought to rely on this designation, then it was only demonstrating that it was seeking to resume the Annex V process that had ended.

17. In fact, there had already been extensive procedures under Annex V with regard to the EC allegations of subsidization of large civil aircraft. The United States had already agreed to expand the period for information gathering by 50 per cent, from the 60 days provided under Annex V to 90 days. The United States had already submitted more than 40,000 pages of information, the majority of them pertaining to NASA and Defense Department programs. The only rationale the EC had put forward for again seeking procedures under Annex V was its assertion "that the US non-cooperation in the Annex V process deprives the EC of access to documents relevant to the dispute, in particular regarding NASA and Department of Defense subsidies." In fact, any non-cooperation was on the part of the EC, which had refused to fix obvious errors in the panel request that had given rise to the original Annex V procedures, even though the United States had pointed out those errors well in advance. As a result, the EC had left the Panel, the facilitator, and the United States facing a mismatch between the questions asked and the measures that were properly before the panel. The fact that the EC had waited until after the end of the Annex V information-gathering process to attempt to fix errors in its panel request did not entitle it to escape the express limitations in Annex V.

18. Members should recognize that what the EC was really asserting was a unilateral right for a complaining party to re-open an Annex V process that had ended, simply by adding some new measures to a panel request. On this view, a responding party could then be subject to an endless cycle of burdensome Annex V processes. Annex V of the SCM Agreement did not provide for that right. Therefore, there was no basis for the EC's request at the present meeting, and the United States was not in a position to consent to the initiation of Annex V procedures.

19. The representative of the European Communities said that the EC regretted that the United States persisted in denying access to information the EC was entitled to under WTO rules. This was a serious matter which might have repercussions not only for this case, but for the operation of the provisions of Annex V in general. The EC would continue to take actions in order to preserve its rights under the SCM Agreement. According to the United States, agreement on the initiation and procedural rules by both parties was required before an Annex V process could be initiated. In this context, the United States had also referred to previous EC statements. One thing had to be made crystal clear: There was no positive consensus rule to start an Annex V procedure and the EC had

never taken such a position. The Annex V procedure was established automatically by the DSB upon request. There needed to be an agreement on matters such as the name of the facilitator and how to address specific confidentiality problems. Parties were required to cooperate, as provided in paragraph 1 of Annex V. The current situation was not analogous to that prevailing in 2005 since now there was a facilitator as well as agreed confidentiality rules. There was no reason not to resume the Annex V procedure immediately. The United States by continuing to block the proceedings was violating its basic duty to cooperate.

20. As a final point, the EC wished to react to the US statement made at the previous DSB meeting that the EC had not satisfactorily cooperated in the Annex V process in the DS316 case by objecting to questions which were both covered by consultation and panel requests. This was – so the United States had argued – due to "inadequate Annex V rules". It would not come as a surprise that the EC would disagree with the substance of that statement. Unlike the United States, the EC had filed a preliminary ruling request concerning a number of matters, which were also subject to the Annex V process. By contrast, the US had chosen to unilaterally withhold information, without reference to a future decision by the panel, citing numerous reasons, such as their export controls laws. This being said, the EC was open to discuss improvements to the existing Annex V modalities. However, since the United States was apparently not prepared to engage in such a discussion, the EC considered that the Annex V procedure was now initiated and reserved its right to request the facilitator to invite the United States to respond to questions.

21. The representative of Brazil said that his country followed with great interest the developments of this dispute. This interest was not only due to the importance of trade in civil aircraft for the Brazilian economy, but also due to the systemic implications of the issues dealt with in the case under consideration. At the present meeting, he said that he would basically use the same words presented by Brazil to the DSB on 3 August 2005. On that occasion, the United States had requested the initiation of the Annex V procedures in the context of the dispute "EC – Measures Affecting Trade in Large Civil Aircraft" (DS316), and the EC was then in the position of the United States at the present meeting.

22. Once again, Brazil regretted the lack of systemic coherence concerning the positions of some Members on Annex V of the SCM Agreement. He recalled that in 2003, Brazil had requested the DSB to initiate the procedures provided for in Annex V of the SCM Agreement in the context of the dispute "United States – Subsidies on Upland Cotton". At that time, Brazil had expressed its understanding, which remained unchanged, about the mandatory nature of that Annex. Brazil noted with concern the inconsistency displayed by two of the main players in the dispute settlement mechanism. This impaired the functioning and the predictability of the system. The provisos of Annex V were clear and unconditional. Paragraphs 2 and 5 set out no additional requirement for the establishment of the fact-finding procedure, but the request itself and the "referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement". With regard to the designation of the facilitator, paragraph 4 of that Annex was even more straightforward: "The DSB shall designate a representative to serve the function of facilitating the information-gathering process." None of the paragraphs mentioned included any reference whatsoever to a consensus rule. There was no need for mutual agreement between the parties to a dispute as a pre-condition for establishing the fact-finding procedure. There was no need for designating a facilitator for the information-gathering process. The only requirements for the development of evidence under the mentioned procedures were the request for the initiation of the process and the referral of the matter to the DSB under paragraph 4 of Article 7 of the SCM Agreement.

23. In Brazil's view, the information gathered pursuant to the Annex V procedures was a key element for the panel to make its judgment on the case. As a third party to the dispute, Brazil wished to reserve its rights to participate in the Annex V procedure and to receive the information to be gathered by the representative that the DSB would designate for that purpose.

24. The representative of Canada said that his country noted the earlier statements made by the EC in respect of the lack of automaticity of Annex V process, and observed that the EC had expressly relied not only on practice but on "jurisprudence", which it had nevertheless never identified. The new position of the EC that Annex V process was "automatic", that it was a "right" and that it did not "require positive consensus" risked, therefore, a measure of confusion among Members and at capital. Canada further observed that it would naturally be quite interested in the fluid movement of the EC position.

25. The representative of the United States said that his delegation wished to reply briefly to several points made by the EC. The US representative believed that he had just heard that the EC had claimed that it had a right to resumption of the Annex V process. This issue had already been addressed by the United States in its statement and so he would merely reiterate that Annex V did not provide a unilateral right for a complaining party to re-open an Annex V process that had ended. With respect to the statement made by the EC that the rules of the completed Annex V process could apply to a new Annex V process, the EC had erred in assuming that the United States could agree to accept the same working procedures in the future for an Annex V process as had been used in the process recently concluded. The US experience indicated that the old rules were inadequate. For example, the EC had ignored specific instructions from the facilitator who was the DSB's designated representative in that process regarding the bracketing of business confidential information and highly sensitive business information. The EC's actions undermined the integrity of that Annex V process. Finally, with respect to the last point made by the EC in its second intervention, he wished to state that there was no basis in the DSU for one Member, the EC, to unilaterally determine that the DSB had taken a decision and again, the United States was not in a position to consent to the initiation of Annex V procedures.

26. The DSB took note of the statements.

3. United States – Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea

(a) Statement by the United States

27. The representative of the United States, speaking under "Other Business", said that his country was pleased to report that it had implemented the recommendations and rulings of the DSB in the dispute: "United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea" (DS296). He recalled that the only WTO-inconsistency found in this dispute involved Article 15.5 of the SCM Agreement. The Panel had found that the US International Trade Commission had failed adequately to explain how it did not attribute to the subject imports any injury caused by changes in demand. The United States had not appealed that finding, and the parties had agreed that the reasonable period of time for implementation would conclude on 8 March 2006. On 13 February 2006, the Commission had issued a redetermination in which it had clarified and elaborated upon the analysis set forth in its original determination regarding the effects of changes in demand. The redetermination had addressed the Panel's concern that the Commission not attribute to the subject imports any effects that might have been caused by the decline in the rate of growth in demand. This clarification and elaboration had not required a modification of any of the Commission's ultimate conclusions, but had rather provided additional support for those conclusions. Therefore, the Commission had continued to determine that, as of the time of the original determination, the domestic industry producing DRAMS and DRAM modules was materially injured by reason of subsidized imports from Korea. On 8 March 2006, the US Department of Commerce had published a notice in the Federal Register concerning the Commission redetermination. As a result of these actions, the United States had complied with the recommendations and rulings of the DSB in the dispute DS296.

28. The representative of Korea said that his country was concerned that the United States had made its announcement that it considered that it had complied with the DSB's ruling and recommendations in the "US – DRAMS" case (WT/DS296) under "Other Business" and in the context of a special DSB meeting. Korea questioned whether this was the proper time or place to have this discussion. If the United States wished to make a statement that it was in compliance with its obligations, then it should have placed this issue as an item on the main DSB agenda, and not under "Other Business".

29. With regard to the substance of implementation, he said that Korea believed that the United States had not faithfully implemented the Panel's decision. The ITC had resorted to an exceptionally narrow approach to the task assigned by the Panel, and had looked at the issue of changes in demand of like products in strict isolation. A review of a distinct factor was not the same as an inquiry in strict isolation. Furthermore, the ITC had misapprehended key market concepts, had ignored important evidence, and had thereby failed to fully appreciate the effects of a dramatic decline in demand on its domestic DRAM industry as distinguished from the effects of subject imports from Korea. One of the more troubling aspects of the ITC's determination was that it had rejected the Panel's findings that Korea had established an unrebutted prima facie case that the ITC had not properly examined the required factor of changes in demand. The ITC stated: "In our view, the materials that Korea submitted to the panel as 'prima facie' evidence in support of the proposition that declines in the rate by which demand increased in 2001 were responsible for price declines in the US market that year neither support that conclusion nor detract from the data in our record showing a lack of correlation between DRAM pricing and changes in the rate of growth of US consumption."[1] This was not appropriate. It was simply not up to the ITC to reject the Panel's findings in this manner, but rather to accept and implement them. Therefore, Korea did not consider that this was a full and proper implementation of the DSB's rulings and recommendations. Korea was in the process of determining an appropriate course of action in response.

30. The representative of the United States said that, with respect to Korea's statement, his country was confident that the Commission's conclusions and the process that had led to those conclusions were fully consistent with US WTO obligations. Having said that, the United States did not believe that this was the forum in which to debate highly technical case specific issues regarding determinations made by the investigating authorities and trade remedy proceedings. Of course, his delegation would communicate Korea's statement to the US authorities.

31. The DSB took note of the statements.

[1] USITC Investigation Number 701-TA-431 (Section 129 Consistency Determination), Pub. No. 3839, February 2006 at p. 13.