WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/244
29 February 2008

(08-0850)

Dispute Settlement Body
15 January 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 15 January 2008

Chairman: Mr. Bruce Gosper (Australia)

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1. European Communities – Anti-dumping measure on farmed salmon from Norway

(a) Report of the Panel (WT/DS337/R)

1. The Chairman recalled that, at its meeting on 22 June 2006, the DSB had established a panel to examine the complaint by Norway pertaining to this matter. The Report of the Panel, contained in document WT/DS337/R, had been circulated on 16 November 2007 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Norway. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

2. The representative of Norway said that, first of all, his country wished to thank the Panel and the Secretariat for their hard work they had put into presenting the Panel Report in this case. Norway welcomed the adoption of the Panel Report at the present meeting. This was an important step in this long-standing dispute between Norway and the EC due to a cascade of unjustified measures imposed by the EC since the early 1990s. The Panel Report was long. It had to be so, because the number of violations committed by the EC were so great. However, his delegation would not go through them all at the present meeting. Suffice it to say that the Panel had found a continuum of violations touching every aspect of the anti-dumping investigation from its inception until the imposition of the measure. To highlight but a few, Norway said that the Panel had found that the EC had violated its obligations under the Anti-Dumping Agreement as regards: (i) the initiation; (ii) the selection of the sample; (iii) the dumping margin calculations for each and every company; (iv) the industry definition; (v) the injury analysis; (vi) the causation analysis; (vii) the level of the minimum import prices actually imposed; as well as (viii) due process obligations.

3. At each and every turn, there was a violation committed by the EC. The violations committed by the EC were not just numerous; perhaps more numerous than in any previous WTO panel case. They were also very significant. And they had led to the one, inescapable conclusion, namely, that the EC had no choice now, but to remove the measure and lift all restrictions on Norwegian salmon. Re-calculations could not remove the violations. It was Norway's impression that the EC honoured its international commitments and abided with the recommendations and rulings of the DSB. Norway, therefore, had no doubt that the EC would now do what it had to do, which was to repeal the unjustified anti-dumping measure and restore normal trading conditions. This could be done very quickly. Indeed, the EC had a specific Regulation allowing it to "fast-track" such repeals after losing a WTO-dispute. Norway expected the EC to make use of that possibility now. But Norway stood, of course, ready to pursue the matter in the WTO, as and when necessary.

4. The representative of the European Communities said that the EC was grateful for the work that the Panel and the Secretariat had done on this matter. While the Panel Report had found in favour of Norway on certain points, the Panel had likewise found in favour of the EC on numerous of the points raised by Norway. Overall the Report had made clear that the exaggerated claims by Norway – both in terms of sheer number, but also accusations – had been often off mark. The EC would not take up the Chair's and Members' time by providing a resumé of the Panel Report. However, the Panel Report had addressed a particular feature which investigating authorities might be faced with (regardless of the product and sector in question) and which would be of importance to Members more broadly on the definition of the "domestic industry" in trade defence investigations. The underlying economic feature in this specific case was that there was an "upstream" activity or sector (salmon growing) and a "downstream" activity or sector (filleting), in both Norway and in the EC, which activities might or might not be carried out by separate legal entities, and which entities might or might not be related.

5. The Panel Report had made clear (despite the technical subject matter and hence the dense accompanying language) that there were two key concepts relevant for defining the "domestic industry": the higher number of domestic producers (including all domestic production of the like product) – generally referred to as "domestic production" – and the lower number (resulting from some permissible exclusions) – generally referred to as "domestic industry". Both Article 4.1 of the Anti-Dumping Agreement and Article 4.1 of the EC Basic Regulation had been drafted so as to state that "domestic industry" was either "total domestic production" or "a major proportion" thereof. Terminologically, therefore, "domestic industry" could mean either "total domestic production" (the higher number) or "a major proportion" thereof (the lower number). The Panel was of course well aware of this important conceptual distinction, which it had set out expressly at the start of its analysis, and on which it had based its assessment. With respect to fillets, the question which the Panel had addressed was whether or not the EC was right, in this case, to exclude the EC filleting-only firms from the higher number: i.e. before even getting to any consideration of the lower number. With respect to silents, i.e. domestic producers not cooperating in the investigation, the Panel had judicially economized, whilst criticizing the EC regulation for a lack of support or explanation. The Panel had not therefore "equated" the two concepts of "domestic production" and "domestic industry". Furthermore, the Panel had expressly and repeatedly acknowledged the possibility that the injury assessment could be limited to "a major proportion" of domestic production (as also argued by the EC). While the Panel had found in favour of Norway on a number of points (predominantly of a factual nature), it had also found in favour of the EC on a similar number of points (predominantly of a legal nature). The EC also noted that the Panel had explicitly declined to use its discretionary power to recommend the revocation of the measure, despite repeated Norwegian calls for the Panel to do so. The EC accepted the findings and recommendations of the Panel and would pay close attention to these when implementing the Panel Report's findings and recommendations following its adoption by the DSB.

6. In closing, the EC noted that – unlike Norway – the EC had refrained from publicly commenting on the Panel Report prior to its circulation to Members, and fully respected the confidentiality with which reports were to be treated prior to circulation. The Panel had correctly noted that it had the discretion, but was not obliged, to recommend the revocation of a measure. In this dispute, perhaps also given the relatively minor and more technical points on which the Panel had ruled in favour of Norway, the Panel had explicitly rejected Norway's repeated calls for a recommendation that the measure be revoked.

7. The representative of Hong Kong, China said that, being a third party to these proceedings, Hong Kong, China wished to thank the Panel for its efforts in considering the case and preparing the Report. This case raised a wide range of important issues, and the comments and rulings of the Panel merited careful scrutiny and reflection. Among them, Hong Kong, China wished to refer to two particular issues, over which Hong Kong, China's views and reading of the relevant provisions of the Anti-Dumping Agreement were at variance with the Panel's. The first one concerned whether the use of sampling in injury determination was permitted under the Anti-Dumping Agreement, and the second one related to the legality of excluding *en bloc* non-producing exporters in sampling under dumping determination. Both issues carried important systemic implications, and Hong Kong, China was disappointed with the reasoning and the rulings of the Panel. In this connection, Hong Kong, China looked forward to opportunities for clarification by the Appellate Body on appropriate occasions.

8. The DSB took note of the statements and adopted the Panel Report contained in WT/DS337/R.

2. Implementation of the recommendations of the DSB

(a) Brazil – Measures affecting imports of retreaded tyres

(b) Japan – Countervailing duties on dynamic random access memories from Korea

9. 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 proposed that the two sub-items to which he had just referred be considered separately.

(a) Brazil – Measures affecting imports of retreaded tyres

10. The Chairman recalled that, at its meeting on 17 December 2007, the DSB had adopted the Appellate Body Report in the case on "Brazil – Measures Affecting Imports of Retreaded Tyres" and the Panel Report on the same mater, as modified by the Appellate Body Report. He invited Brazil to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

11. The representative of Brazil said that, on 17 December 2007, the DSB had adopted the Appellate Body and the Panel Reports in the dispute "Brazil – Measures Affecting Imports of Retreaded Tyres (DS332)". Brazil wished to inform the DSB that it intended to fully implement the recommendations and rulings of the DSB in a manner consistent with Brazil's obligations under the WTO Agreements. Since the issuance of the Appellate Body Report, Brazil's authorities had been evaluating the options available and the time frame in which such implementation could take place. However, owing to the complexity of the case and to the number of official agencies involved, Brazil anticipated that it would need a reasonable period of time to comply with the DSB's recommendations

and rulings, in accordance with Article 21.3 of the DSU. In this respect, Brazil was ready to hold discussions with the EC on the appropriate duration of the reasonable period of time for implementation.

12. The representative of the European Communities said that the EC noted with satisfaction Brazil's statement that it intended to comply with the DSB's recommendation and ruling on Brazil's import ban on retreaded tyres, which had been found incompatible with the WTO Agreement. The EC also stood ready to discuss with Brazil the question of the reasonable period of time, namely, the shortest possible time-period for achieving compliance. As regards Brazil's intended steps of implementation, the EC reiterated that it expected Brazil to lift the import ban on retreaded tyres. This was the fastest and the best way to do away with the current discrimination, the continuation of which the DSB's ruling did not permit. This would also ensure that Brazil respected its Mercosur obligations, confirmed by binding arbitration rulings. In these dispute settlement proceedings, Brazil had strongly insisted that it absolutely needed to comply with these obligations. There was no reason for Brazil now to change its course of action, to belie its own words and to work in the direction of completely stopping the importation of Mercosur retreads. The Appellate Body's ruling certainly did not require any such thing. Brazil should also consider that stopping the importation of Mercosur retreads as well as the importation of casings would destroy worthy industries engaged in the retreading of tyres in Brazil and other Mercosur countries, and would further reduce the overall rate of retreading in the world. The EC stressed again that it was strongly in favour of environmental and public health protection. It would, therefore, by no means want to discourage Brazil from doing more for the protection of its citizens against diseases spread by mosquitoes that breed in abandoned waste tyres. For that purpose, however, much better, more effective measures were available as compared with the selective targeting of certain imported products that did not actually contribute to the problem.

13. The DSB took note of the statements, and of the information provided by Brazil regarding its intentions in respect of implementation of the DSB's recommendations.

(b) Japan – Countervailing duties on dynamic random access memories from Korea

14. The Chairman recalled that, at its meeting on 17 December 2007, the DSB had adopted the Appellate Body Report in the case on "Japan – Countervailing Duties on Dynamic Random Access Memories from Korea" and the Panel Report on the same matter, as modified by the Appellate Body Report. He invited Japan to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

15. The representative of Japan said that at the meeting on 17 December 2007, the DSB had adopted the recommendations and rulings in this dispute. As stated at that DSB meeting, Japan was not entirely satisfied with the findings and conclusions of the Appellate Body's Report and the Panel Report. However, pursuant to Article 21.3 of the DSU, Japan wished to inform the DSB of its intention to implement the recommendations and rulings of the DSB in this dispute in a manner consistent with its WTO obligations. Japan was currently examining possible courses of actions. Japan would need a reasonable period of time to bring the measure into conformity with its obligations under the WTO Agreement, in accordance with the recommendations and rulings of the DSB. Japan stood ready to consult with Korea in order to reach an agreement with regard to such a period, in accordance with Article 21.3(b) of the DSU.

16. The representative of Korea said that his country thanked Japan for its statement and welcomed the opportunity to comment upon the steps required to implement the Report of the Panel, as modified by the Appellate Body, in the dispute concerning Japan's imposition of countervailing duties on imports of dynamic random access memories (or "DRAMS") from Korea. As Korea had explained in December 2007 when it had presented the Reports for adoption by the DSB, the adoption

of the Reports had eliminated any basis for the continuation of countervailing duties on DRAMS exported by Hynix Semiconductor, Inc. The Panel and the Appellate Body had found that neither the October 2001 or December 2002 restructurings justified the imposition of countervailing duties. Korea noted that, under Article 21.3 of the DSU, Members' compliance with recommendations and rulings of the DSB should be immediate, whenever "practicable".[1] Given that the rulings of the Panel and the Appellate Body had confirmed the absence of fundamental legal bases, implementation of these rulings did not require any further investigation or evaluation of factual information by Japan. All it required was a ministerial step of publishing a notice rescinding the countervailing measures that Japan improperly imposed. In these circumstances, Korea called upon Japan to immediately rescind the countervailing measures imposed on imports of DRAMS from Korea. The Korean exporter had been subjected to unlawful countervailing duties for almost two years now as a result of Japan's flawed decision. There was no justification for allowing those duties to continue even one more day. Korea would welcome any opportunity to discuss these matters with Japan without delay.

17. The DSB took note of the statements, and of the information provided by Japan regarding its intentions in respect of implementation of the DSB's recommendations.

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[1] See Article 21.3 of the DSU: "If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so."