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WT/DSB/M/411

28 June 2018

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Dispute Settlement Body
9 April 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 9 APRIL 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in the dispute "Korea – Import Bans, and Testing and Certification Requirements for Radionuclides (Japan)" (DS495) was removed from the proposed Agenda following Korea's decision to appeal the Report.

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1 UNITED STATES – COUNTERVAILING MEASURES ON SOFTWOOD LUMBER FROM CANADA

A. Request for the establishment of a panel by Canada (WT/DS533/2)

1.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 27 March 2018 and had agreed to revert to it. She drew attention to the communication from Canada, contained in document WT/DS533/2, and invited the representative of Canada to speak.

1.2. The representative of Canada said that, on 27 March 2018, his country had requested the establishment of a panel to review countervailing measures, which had been imposed by the United States, on certain softwood lumber products from Canada. Consultations, which had been held in January 2018, had failed to resolve the matter. Canada found it unfortunate that the United States had decided to block this request. Canada considered that the United States' measures were inconsistent with its obligations under the Agreement on Subsidies and Countervailing Measures and the GATT 1994. Therefore, Canada was requesting, once again, the establishment of a WTO panel to examine this matter with standard terms of reference. The duties, which had been imposed as a result of the United States' countervailing measures, were having a negative impact on Canadian softwood lumber producers in various Canadian provinces. Canada remained open to continue its dialogue with the United States in a manner, which would address Canada's concerns.

1.3. The representative of the United States said that the United States was disappointed that Canada had chosen to move forward with a request for panel establishment. As the United States had explained to Canada, the measures identified in the request were fully consistent with US obligations under the WTO Agreement. Additionally, as had been noted at the 27 March 2018 DSB meeting, the United States had serious concerns with this panel request. Aside from the flawed substance of the request, the panel request included an item that had not been identified in Canada's request for consultations, and thus had not been the subject of consultations. Further, the panel request included claims against so-called "measures" that did not exist and could not be challenged "as such". The United States was disappointed that Canada had not addressed these concerns, but had instead immediately requested a special DSB meeting to consider its panel request for a second time.

1.4. The representative of Canada said that his country had requested consultations concerning the United States' final countervailing and anti-dumping determinations. Canada had identified the United States countervailing and anti-dumping duty orders as measures that would subsequently form part of these proceedings. The fact that these orders had been issued after the consultations request had been filed, had not changed the scope or the essence of this dispute between the parties. Therefore, these orders fell properly within the Panel's terms of reference.

1.5. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

1.6. The representatives of Brazil, China, the European Union, Japan, Kazakhstan, Korea, the Russian Federation, Turkey and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

2 UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA

A. Request for the establishment of a panel by Canada (WT/DS534/2)

2.1. The Chairperson recalled that the DSB considered this matter at its meeting on 27 March 2018 and had agreed to revert to it. She drew attention to the communication from Canada, contained in document WT/DS534/2, and invited the representative of Canada to speak.

2.2. The representative of Canada said that, on 27 March 2018, his country had also requested the establishment of a panel to review the United States' application of the Differential Pricing Methodology in its anti-dumping determinations regarding certain softwood lumber products from Canada. Canada and the United States had held consultations in January 2018, which had not resulted in the resolution of this dispute. Canada had requested the establishment of a panel to examine this matter, and had been disappointed that the United States had decided to also block this request. As had been outlined in Canada's panel request, Canada considered that the United States' application of the Differential Pricing Methodology was inconsistent with its obligations under the Anti-Dumping Agreement and the GATT 1994. As a result, Canada reiterated its request for the establishment of a WTO panel to examine this matter with the standard terms of reference. Furthermore, Canada was requesting that this matter be referred to the original panel that considered the Differential Pricing Methodology in "US – Washing Machines" (DS464), in accordance with Article 10.4 of the DSU. For Canadian softwood lumber producers and communities across Canada, these anti-dumping duties represented a considerable hardship, which only furthered the negative impact of the punitive countervailing measures imposed by the United States on the same products. Canada remained open to continuing its dialogue with the United States in a manner, which would address Canada's concerns.

2.3. The representative of the United States said that the United States was also disappointed that Canada had chosen to move forward with a request for panel establishment on this second dispute. As the United States had explained to Canada, the measures identified in the request were fully consistent with US obligations under the WTO Agreement. In addition, as had been noted at the 27 March 2018 DSB meeting, the United States had serious concerns with this panel request. The panel request raised an item that had not been identified in Canada's request for consultations and thus had not been the subject of consultations. The panel request included an unwarranted assertion of urgency. Canada's allegation of harm appeared to be no more urgent

than those alleged by nearly all complainants in WTO dispute settlement. The panel request included the baseless argument that the measures at issue were already the subject of a panel proceeding. This argument had no basis in fact. The measure at issue was the final determination in the anti-dumping investigation of softwood lumber from Canada, and that determination had been made only in this past November 2017. The United States was disappointed that Canada had not addressed these concerns, but instead had immediately requested a special DSB meeting to consider its panel request for a second time.

2.4. The representative of Canada said that, with respect to the assertion by the United States that an item in Canada's panel request had not been identified in Canada's request for consultations, Canada referred to its second intervention under the first Agenda item at the present meeting. With respect to the concerns, which had been raised by the United States regarding Article 10.4 of the DSU and Canada's claim of urgency under Article 4.9 of the DSU, Canada referred to its comments on these matters at the last regular DSB meeting.

2.5. The representative of the United States said that with respect to Article 10.4 of the DSU, that Article concerns situations involving "a measure already the subject of a panel proceeding". The United States did not agree with Canada's assertion that the measure identified in Canada's panel request was "a measure already the subject of a panel proceeding". Canada's panel request referred to "[t]he US anti-dumping measures applying the Differential Pricing Methodology ('DPM') to certain softwood lumber products from Canada". The measure that had been the subject of the "US – Washing Machines" panel proceeding, to which Canada made reference, had been a methodology that Korea had challenged "as such", not measures on softwood lumber products. Those were different measures. Furthermore, Article 10.4 of the DSU was written in the present tense, "If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it …". Whether or not the measure Canada challenged now was the same measure that had been the subject of the "US – Washing Machines" panel proceeding, that measure was no longer the subject of the "US – Washing Machines" panel proceeding, as that panel proceeding had concluded with the circulation of the Panel Report in March 2016. Accordingly, the United States did not agree that this dispute could be referred to the original Panel in the "US – Washing Machines" dispute (DS464), as Canada requested. In the absence of consensus, the DSB could not refer this dispute to the original Panel in the "US – Washing Machines" dispute. If Canada was proposing that the DSB should refer this dispute to the original Panel in "US – Washing Machines", the United States did not agree to such proposal, and thus there was no consensus to take that action. While Article 6.1 of the DSU provided for the establishment of a panel at this meeting, pursuant to the negative consensus rule, nothing in Article 10.4 of the DSU suggested that referral of the dispute to the "original panel" in another dispute could be taken by the DSB in the absence of consensus to do so. For these reasons, the United States could not agree that this dispute should be referred to the Panel in "US – Washing Machines", and there was, as a consequence, no consensus for the DSB to take that action.

2.6. The representative of Canada said that, in response to the concern raised by the United States regarding Article 10.4 of the DSU, Canada reiterated that all it was requesting from the DSB was to establish a panel to consider this matter, with standard terms of reference. The composition of the panel would be dealt with in due course.

2.7. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

2.8. The representatives of Brazil, China, the European Union, Japan, Kazakhstan, Korea, the Russian Federation and Viet Nam reserved their third-party right to participate in the Panel's proceedings.

3 RUSSIA – ANTI-DUMPING DUTIES ON LIGHT COMMERCIAL VEHICLES FROM GERMANY AND ITALY

A. Report of the Appellate Body (WT/DS479/AB/R and WT/DS479/AB/R/Add.1) and Report of the Panel (WT/DS479/R and WT/DS479/R/Add.1)

3.1. The Chairperson drew attention to the communication from the Appellate Body, contained in document WT/DS479/10 transmitting the Appellate Body Report in the dispute: "Russia –

Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy", which had been circulated on 22 March 2018, in document WT/DS479/AB/R and Add.1. The Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. She noted that as Members were aware, 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".

3.2. The representative of the European Union said that the EU thanked the Appellate Body, the Panel and the WTO Secretariat for their work on this dispute. The EU welcomed the overall outcome of the dispute. The rulings of the Panel and of the Appellate Body confirmed most of the claims, which had been made by the EU, with regard to Russia's anti-dumping measures on light commercial vehicles from Germany and Italy. The verdict was clear; Russia's anti-dumping measures were inconsistent with the WTO Anti-Dumping Agreement and Article VI of the GATT 1994. Most importantly, the Appellate Body had confirmed the Panel's findings that an investigating authority could not exclude, from the domestic industry, a domestic company, which had participated in the investigation and produced the products concerned. Furthermore, the Appellate Body had confirmed that the price suppression analysis, which had been conducted by the Russian investigating authority, had not met WTO standards. In particular, the Appellate Body had considered that an investigating authority could not disregard evidence that called into question that dumped imports led to significant domestic price suppression. Furthermore, an investigating authority had to ensure that its price suppression methodology assessed price increases, "which otherwise would have occurred" in the absence of dumped imports. The EU was very pleased, including from a systemic point of view, that the Appellate Body had upheld the EU's cross-appeal and had considered that a Panel should examine the validity of a "confidential investigation report" and assess whether it had formed part of the contemporaneous written record of the investigation before accepting it as evidence. Likewise, the EU was pleased that the Appellate Body had acknowledged the importance of disclosure of essential facts. Overall, the Appellate Body had retained the systemic concerns, which had been raised by the EU throughout the case. In this regard, the Appellate Body had recognized that, in certain circumstances, evidence concerning a related dealer could be pertinent to the evaluation of the state of the domestic industry. In light of these clear-cut findings of the Appellate Body and the Panel, the EU expected that the Russian Federation would promptly comply with all recommendations and rulings by repealing the anti-dumping measures at issue.

3.3. The representative of the Russian Federation said that her country thanked the Panel, the Appellate Body and the WTO Secretariat for their work on this dispute. The Russian Federation also thanked the European Union and third parties for their constructive participation in this dispute. The dispute had provided an opportunity to develop certain interpretations of the Anti-Dumping Agreement, which the Russian Federation found to be of systemic importance. While the Russian Federation was disappointed with certain aspects of the findings, it considered that the Reports provided useful clarifications of certain provisions of the Anti-Dumping Agreement. The Russian Federation considered some of these findings as a positive contribution to a better understanding of the Anti-Dumping Agreement. The Russian Federation welcomed the fact that the Appellate Body had agreed with the Russian Federation and had found that the Panel had erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement by considering that, where essential facts were not properly treated as confidential in accordance with Article 6.5 of the said Agreement, this automatically led to an inconsistency with Article 6.9 of the Anti-Dumping Agreement. The Appellate Body had made an important conclusion, namely that a panel had to always examine whether any disclosure, which had been made, including those through non-confidential summaries under Article 6.5.1 of the Anti-Dumping Agreement, met the requirements of Article 6.9. The Russian Federation noted that the EU's claim that the DIMD had acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement was not upheld, when it did not consider the inventories data of a related dealer in the investigation report. The Appellate Body had upheld the Panel's finding on the mentioned issue and had clarified that an investigating authority's assessment of the state of the domestic industry did not focus on the nature of the relationship between related companies, but focused instead on whether the relevant economic factors and indices had a bearing on the state of the domestic industry. The Russian Federation also welcomed the Panel's findings with regard to the selection of periods for the injury and causation analyses, as well as the Panel's findings with regard to several "other factors" in the non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement.

Specifically, the Panel had correctly rejected the EU's claim that the DIMD had acted inconsistently with Article 3.1 of the Anti-Dumping Agreement by purportedly using "non-equal and non-consecutive" periods in the examination of developments in injury indicators for the domestic industry. In the context of the non-attribution analysis, the Panel had found that an investigating authority was not required to address every argument and element of evidence, which had been raised by interested parties, and that such a requirement would make the investigating authority's task largely impossible.

3.4. Some findings, however, also raised serious concerns. The Russian Federation drew attention to the Appellate Body's approach to the permissible ways of disclosure of essential but confidential facts under consideration. The Appellate Body had decided to complete its examination with regard to the DIMD's disclosure of the essential facts and had found that the Russian Federation had acted inconsistently with Article 6.9 of the Anti-Dumping Agreement. The Russian Federation was concerned about the fact that the Appellate Body had dedicated only one paragraph to the examination of this issue, which was sensitive to any investigating authority, and had stated that "information on a change in relation to the preceding period in percentage terms" had been an "uninformative" method of disclosure of essential but confidential facts under consideration. Taking account of past Panel and the Appellate Body findings, the Russian Federation considered such conclusion vague, broad and, hence, did not contribute positively to the common understanding of possible ways of acting consistently with Article 6.9 of the Anti-Dumping Agreement when disclosing confidential essential facts. The Russian Federation also took note of the Appellate Body's clarifications concerning the definition of the domestic industry. The Appellate Body suggested a number of tools to address the inaccuracy and incompleteness of data, including the use of facts available. The Appellate Body had also clarified that the provisions of Articles 3.1 and 4.1 of the Anti-Dumping Agreement did not prevent an investigating authority from undertaking an initial examination of the information, which had been submitted by the domestic producers, before defining the domestic industry, to the extent that the information, which had been submitted or collected was pertinent to defining the domestic industry. While these clarifications could provide useful guidance for the purposes of defining the domestic industry, from a practical point of view however, the issue of absence of reliable data from a domestic producer and the ability to base an injury determination on "positive evidence" remained unresolved. These findings could have serious systemic implications for the investigating authorities across the world and their ability to implement Articles 3.1 and 4.1 of the Anti-Dumping Agreement. The Russian Federation intended to comply with the DSB's recommendations and rulings.

3.5. The representative of the United States said that the United States had participated as a third party in this dispute, and had shared the concern of the European Union in relation to a number of approaches by the Eurasian Economic Commission and the application of anti-dumping duties by the Russian Federation. The United States was therefore pleased with the findings of the reports before the DSB at the present meeting that these duties were not consistent with the Anti-Dumping Agreement. In particular, the United States wished to note that, in relation to the EU's appeal concerning the disclosure of methodologies, its appreciation for the finding on appeal that certain types of calculations may be essential facts under Article 6.9 of the Anti-Dumping Agreement. As the United States had argued, and certain previous reports had found, some calculations or uses of data, sometimes described as methodologies, could be necessary for participants to understand the basis of the investigating authority's decision and to defend their interests. Therefore, it had not been correct to say categorically that, under Article 6.9 of the Anti-Dumping Agreement, methodologies could never qualify as essential facts. The United States therefore welcomed the panel and appellate reports and was pleased to support their adoption.

3.6. The DSB took note of the statements and adopted the Appellate Body Report, contained in WT/DS479/AB/R and Add.1, and the Panel Report, contained in WT/DS479/R and Add.1, as modified by the Appellate Body Report.