WORLD TRADE ORGANIZATION

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Dispute Settlement Body
24 April 2003

MINUTES OF MEETING

Held in the Centre William Rappard
on 24 April 2003

Chairman: Mr. Shotaro Oshima (Japan)

Prior to the adoption of the agenda, the item concerning the Panel Report in the case on: "European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil" (WT/DS219/R) was removed from the proposed agenda following Brazil's decision to appeal the Panel Report.

1. European Communities – Anti-dumping duties on imports of cotton-type bed linen from India: Recourse to Article 21.5 of the DSU by India

(a) Report of the Appellate Body (WT/DS141/AB/RW) and Report of the Panel (WT/DS141/RW)

1. The Chairman recalled that, at its meeting on 22 May 2002, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by India concerning the implementation by the EC of the DSB's recommendations in this case. The Report of the Panel contained in document WT/DS141/RW had been circulated on 29 November 2002. On 8 January 2003, India had notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel in this case. The Report of the Appellate Body had been circulated on 8 April 2003. In accordance with the decision on Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452, the Report of the Appellate Body and the Report of the Panel had been circulated as unrestricted documents. He noted that the Reports were before the DSB for adoption at the request of India and that this adoption procedure was without prejudice to the right of Members to express their views on the Reports.

2. The representative of India said that his country welcomed the findings of the Appellate Body in the compliance proceedings under Article 21.5 of the DSU in the above-mentioned dispute. Specifically, India considered that the finding in respect of Article 3.1 and 3.2 of the Anti-Dumping Agreement as how to deal with dumped imports in the context of injury analysis in cases involving a large number of exporters, was historic and had systemic implications. It had left the investigating authorities with no choice, but to deal with the non-dumped imports in an "objective manner". India recalled that in the original dispute, the Panel and the Appellate Body held that the EC had failed to comply with the requirements of the Anti-Dumping Agreement while having imposed anti-dumping duties on bed linen imports from India in November 1997. On 7 August 2001, the EC Council had adopted Regulation 1644/2001 amending the original definitive anti-dumping duties on bed linen from India, purporting to comply with the DSB's recommendations and rulings in the original dispute, while simultaneously suspending its application. India had disagreed that this re-determination complied with the DSB's rulings. In India's view the re-determination, as amended, as well as further actions, had failed to bring the EC into compliance with the DSB's recommendations and rulings in the original dispute and was inconsistent with the covered agreements. Accordingly, India had sought

the establishment of a compliance Panel under Article 21.5 of the DSU to examine the existence or consistency of action taken by the EC to implement the DSB decision in the dispute.

3. In India's view, the EC had failed to determine the volume of dumped imports attributable to non-examined producers on the basis of "positive evidence" and an "objective examination". Although the Indian producers that had been examined individually, and found to be dumping, accounted for only 47 per cent of imports attributable to all examined producers, the EC had assumed for the purpose of injury analysis that all imports attributable to non-examined producers were dumped. The Appellate Body had concluded that that the EC's determination that all imports attributable to non-examined producers were dumped, even though the evidence from examined producers showed that producers accounting for 53 per cent of imports attributed to examined producers, were not dumping and did not lead to a result that was unbiased, even-handed, and fair. Therefore, the EC had not satisfied the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that was "objective". This ruling added to the list of violations which had been committed in this case during past several years of repeated investigations into Indian bed linen.

4. India welcomed the findings of the Appellate Body regarding Article 3.1 and 3.2 of the Anti-Dumping Agreement. Moreover, the ruling made clear that the EC had not brought its measure into conformity with the Anti-Dumping Agreement, as mandated by the original DSB's recommendation by the end of the reasonable period of time. This non-conformity, therefore, gave India the right to seek the DSB's authorization to suspend concessions or other obligations. He recalled that India and the EC had notified to the DSB the Agreed Procedures under Articles 21 and 22 of the DSU (WT/DS141/11) whereby India had preserved its right to seek recourse to Article 22 of the DSU beyond the 30-day period stipulated in the provisions of that Article. India reserved its right to bring the matter before the DSB in the future and to seek recourse to Article 22 of the DSU. The Appellate Body had recommended that the DSB request the EC to bring its measure, found to be inconsistent with its obligations under the Anti-Dumping Agreement, into conformity with that Agreement. In light of the Appellate Body's findings, India expected the EC to immediately terminate the ongoing partial interim review as well as the sunset review on imports of cotton-type bed linen from India as these were based on a measure that had been found to be inconsistent with the Anti-Dumping Agreement.

5. The representative of the European Communities was pleased that the Panel and the Appellate Body had rejected – with the exception of one – all of the numerous claims brought by India in this implementation dispute. Furthermore, while the Appellate Body had found that the methodology used by the EC authorities to establish the volume of dumped imports was inconsistent with Article 3.1 and 3.2 of the Anti-Dumping Agreement, it had rejected the claim that India's own methodology was the only one permitted by those provisions. The outcome of this case confirmed the very high standards followed by the EC in complying with the WTO Agreements. Furthermore, it underlined the EC's prudent approach regarding trade defence measures, in particular *vis-à-vis* developing countries. Nevertheless, the EC would like to express its concern about the interpretation of Articles 3.1 and 3.2 made by the Appellate Body in this dispute. The EC's authorities had made a determination that the imports from the exporters that had not been examined individually were dumped. Therefore, they were entitled to treat such imports as dumped also for the purposes of the injury determination. The Appellate Body had acknowledged that this dumping determination was based on "positive evidence", but it had concluded that the EC's authorities failed to make an "objective examination" of such evidence. This finding was difficult to understand because the averaging methodology which the Appellate Body considered to be "biased" and "unfair", was the same methodology that had been agreed by the drafters of the Anti-Dumping Agreement as part of Article 9.4. The Appellate Body had emphasized that Article 9.4 was concerned with the collection of duties, something which had never been in dispute. However, contrary to the Appellate Body's views, this did not make Article 9.4 irrelevant for the interpretation of Article 3.2. There was an obvious link between the collection of duties and the determination of dumping. Anti-dumping duties were, after all, measures against

dumping. Where certain imports had been found not to be dumped, there could be no justification for imposing duties on such imports. Yet, the Appellate Body's interpretation had led to precisely that result. Failure to take all the relevant provisions of the Agreement into consideration, had led to a conclusion that, as noted by the Panel, had manifestly bizarre and unacceptable results. The EC was concerned that those results would necessarily be the cause of new disputes. In conclusion, and despite the concern expressed above, the EC intended to implement the Appellate Body's findings as soon as possible after the adoption of the reports under consideration. The Anti-Dumping Agreement was a critical part of the balance of rights and obligations assumed by Members and it was crucial that dispute settlement findings were implemented as faithfully and as rapidly as possible.

6. The representative of the United States said his country was disappointed at the conclusion of the Appellate Body with respect to the treatment of import volumes attributable to producers or exporters that had not been examined individually. The United States had set forth its position on this issue in the course of the proceeding, and it would not repeat its arguments at the present meeting. The United States would further like to draw attention to the Appellate Body's analysis in paragraph 96 of its Report. In that paragraph, the Appellate Body had continued its examination of whether India could, in this Article 21.5 proceeding, renew a claim which the original panel had earlier rejected, and with respect to which there was an adopted finding. In the final sentences of paragraph 96, the Appellate Body made a broad statement concerning an adopted finding that a complainant had failed to establish a *prima facie* case, to the effect that such adopted findings amounted to a final resolution to the issue between the parties with respect to the claim and measure. It was clear to the United States that the Appellate Body had made this statement in the context of an Article 21.5 proceeding, and that the statement should not be misread to apply beyond that context. The United States agreed that, in an Article 21.5 proceeding, a Member could not renew a challenge it had lost in the original proceeding. The scope of Article 21.5 proceedings was limited to "measures taken to comply". As the Appellate Body had concluded in paragraphs 86, the EC's re-determination did not need to be considered "as a whole new measure". India could not in this Article 21.5 proceeding renew the challenge that it had lost in the original proceeding and in respect of which the EC, therefore, did not need to change its measure in order to comply with the DSB's recommendations and rulings.

7. The representative of Korea said that his country had participated as a third party in the proceedings of the compliance panel and of the Appellate Body. Korea welcomed the Appellate Body's findings and conclusion regarding the determination of the volume of dumped imports for purpose of making a determination of injury. During the Appellate Body's proceedings, Korea had pointed out that given the "objective examination" requirement under Article 3.1 of the Anti-Dumping Agreement, the determination of volume of dumped imports from unexamined exporters should reflect the result of examined exporters rather than regarding all the exports of unexamined exporters as being dumped. The Appellate Body had correctly reversed the Panel's finding and then had found that that EC's approach in determining the volume of dumped imports had not been based on the "objective examination" requirement under Article 3.1. Korea hoped that the Appellate Body's ruling and recommendation in this dispute would provide the opportunity for rectifying similar practices of other Members in determining volume of dumping producers.

8. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS141/AB/RW and the Panel Report contained in WT/DS141/RW, as modified by the Appellate Body Report.