WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
30 May 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 30 May 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

Subjects discussed: Page

1. United States – Laws, regulations and methodology for calculating dumping margins ("Zeroing")

(a) Implementation of the recommendations of the DSB

1. 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 the Appellate Body reports, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on 9 May 2006, the DSB had adopted the Appellate Body Report in the case: "United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')" and the Panel Report on the same matter, as modified by the Appellate Body Report. He then invited the United States to inform the DSB of its intentions in respect of implementation of the recommendations.

2. The representative of the United States said that his delegation was able at the present meeting to inform Members that the United States intended to implement the DSB's recommendations and rulings. The United States would need a reasonable period of time in which to do so, and stood ready to discuss this matter with the EC, in accordance with Article 21.3(b) of the DSU. However, the United States remained of the view that the Appellate Body Report in this dispute was a deeply

flawed document. The United States had considered the comments made by other Members at the 9 May DSB meeting regarding the Appellate Body Report, and had continued its own examination of the Report. Unfortunately, the more the United States examined the Report, the greater its concerns became. To further assist Members in their review of the Report, the United States had provided some responses to comments it had heard and had set forth some additional concerns in a written document, which currently was being distributed in the meeting room, and which supplemented the document that the United States had submitted at the 9 May DSB meeting. In that regard, the United States requested that this communication be circulated to all Members as a DS document.[1] Rather than reading this document in its entirety, he wished to simply summarize the areas of concern that the United States discussed at greater length in the written document.

3. First, there was the fact that in certain key areas the Appellate Body had based its analysis not on the text of the Anti-Dumping Agreement, but rather on its own prior reports, particularly its report in "US – Softwood Lumber V" (DS264). As just one example, the Appellate Body had relied heavily on its interpretation of the term "product as a whole". However, "product as a whole" was a term that was not found anywhere in the Anti-Dumping Agreement nor in Article VI of the GATT 1994. Instead, it was a term that the Appellate Body had used specifically in the context of the first sentence of Article 2.4.2 of the Anti-Dumping Agreement and the average-to-average comparison method, the method that was at issue in the original Softwood Lumber V dispute. Moreover, the Appellate Body had misinterpreted its prior reports, thereby arriving at the erroneous conclusion that any kind of aggregated comparison required an offset, regardless of context. The Appellate Body had compounded its error by finding that the margin of dumping could not be calculated on a transaction-specific basis. The Appellate Body had relied on Article 6.10 of the Anti-Dumping Agreement to find that margins of dumping must invariably be established on an exporter- or producer-specific basis, which it had assumed was inconsistent with calculating a margin of dumping on a transaction-specific basis.

4. However, Article 6.10 simply provided that a Member must calculate a margin for each individual exporter or producer – as opposed to one margin for all exporters or producers. Article 6.10 said nothing about whether the margin must be based on more than one transaction, and it did not prohibit the calculation of a margin of dumping on a transaction-specific basis. There was also the matter of the Appellate Body's reliance on Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement. As the United States had previously explained, these provisions did not change as a result of the Uruguay Round negotiations. The Appellate Body's conclusion essentially required one to believe that the Uruguay Round negotiators had dealt with "zeroing" by secretly agreeing to a new interpretation of the unchanged text of Article VI and Article 2.1. This was not plausible.

5. Moreover, the logic of the Appellate Body's conclusion was that all of the Members that continued to use "zeroing" after the entry into force of the WTO – including at least the EC, the United States, and Canada – had done so in contradiction of this secret agreement and so had acted in bad faith. And whether one accepted the Appellate Body's reading as permissible or not, the fact remained that other official, impartial experts reviewing these same provisions at the mandate of the DSB had concluded that there were other permissible interpretations of these same provisions. Under the standard or review articulated in the Anti-Dumping Agreement, where a Member's measure rested on a permissible interpretation, the measure was required to be found in conformity with the Agreement.

6. Finally, he said that he could go on, but he would not do this at the present meeting. Instead, he wished to conclude by reiterating that the United States considered the issues presented by the Appellate Body Report to be important, and welcomed a discussion of them with Members.

[1] Subsequently circulated in document WT/DS294/18.

7. The representative of the European Communities said that the EC welcomed the statement by the United States that it intended to implement the DSB's recommendations and rulings. The EC stood ready to discuss with the United States the appropriate period of time for implementation and hoped that prompt and full compliance would follow, both with regard to the required changes in US anti-dumping practice and the 31 anti-dumping measures identified in the EC panel request. In that respect, the EC was aware that the United States still had to decide on the final liquidation of anti-dumping duties which were based on measures found to be WTO-incompatible. The EC would closely monitor these liquidation decisions. The EC would also invite the United States again to refrain from taking a "minimalist" approach to implementation in this dispute. The DSB's ruling had inevitably wider implications that the United States could not ignore. In particular, it would be unacceptable if the United States contrived to increase dumping margins in the guise of implementation. The definition of "margin of dumping" was applicable in duty assessment proceedings, in new-comer reviews and in changed circumstances reviews. It was also applicable in sunset reviews whenever a dumping margin was calculated or relied on. It was equally applicable whether the comparison of export prices and normal values was made on a weighted-average-to-weighted-average basis, or on a transaction-to-transaction basis. Maintaining "zeroing" in duty assessment proceedings, in reviews, or when the comparison was conducted on a transaction-to-transaction basis (a type of comparison which was almost never appropriate) would only lead to a multiplication of disputes that the United States was bound to lose.

8. As a general remark, the EC wished to recall that, at this stage, the Appellate Body Report had been adopted and must be unconditionally accepted by the parties to the dispute, in accordance with Article 17.14 of the DSU. The critical remarks by the United States were all the more misplaced as they had been raised under a point on the agenda on its intentions in respect of implementation of the DSB's recommendations and rulings. The United States was sending a mixed message that could only raise concerns as to how serious these intentions were.

9. The EC noted that the United States seemed not to be satisfied with the outcome of the dispute, but this did not change the fact that all points of criticism raised by the United States had been subject to an extensive exchange of arguments and discussion both before the Panel and the Appellate Body. The EC would not re-enter into that discussion and referred Members to the Panel and the Appellate Body Reports. They would find, for each of the points raised by the United States, the EC arguments, which explained how the definition of "margin of dumping" as being for the product as a whole and for an exporter was perfectly reconcilable with other provisions of the Anti-Dumping Agreement, such as the rules on targeted dumping or the duty assessment on the basis of a prospective normal value. The EC would only comment on the point which related to the item on the agenda of the present meeting, namely, the alleged difficulty of the United States to respond to the finding that it maintained a "zeroing" methodology WTO-incompatible *per se* in original investigations.

10. He noted that on 6 March 2006, the US Department of Commerce had announced its intention to cease the practice of "zeroing" in weighted-average-to-weighted-average comparisons in original investigations. The EC could not judge at this stage if this was sufficient to fully implement the DSB's ruling on the "zeroing" methodology in original investigations. But obviously, the logical outcome of this approach was that the United States should simply stop "zeroing" in all new investigations. Any other approach was bound to result in a multiplication of disputes on the same issue, which could only have the same outcome, only with much greater expenditure of time and resources for all concerned.

11. The representative of Japan said that his country was challenging the US "zeroing" methodology in its own separate dispute settlement proceedings that were currently underway (DS322). Japan had also actively participated in the proceedings in this case as a third party. Japan, therefore, was very much interested in the implementation of the DSB's recommendations and rulings

by the United States. Japan noted the fact that the United States had informed the DSB of its intentions in respect of implementation of the DSB's recommendations and rulings and expected the United States to implement them promptly.

12. The representative of the United States said that he wished to respond briefly to the EC's reference to Article 17.14 of the DSU, which stated that adopted Appellate Body reports shall be unconditionally accepted by the parties to a dispute. The United States noted that, from the inception of the WTO, Members had expressed their concerns with Appellate Body reports. For example, he recalled that the EC's statements regarding the Bananas report (WT/DSB/M/37), the Mexico – Rice report (WT/DSB/M/202), as well as the Frozen Poultry report (WT/DSB/M/198). In so doing, Members had taken seriously their responsibility to the WTO dispute settlement system and had attempted to ensure that it was serving its function well. Expressing concerns with a report did not mean that a Member was "conditioning" its acceptance of the report. So, for example, in this dispute, the United States had not set any "conditions" on its acceptance of the Report.

13. The representative of Hong Kong, China said that her delegation wished to join other Members in urging the United States to implement the recommendations of the Appellate Body as adopted by the DSB and to bring its practices and measures into conformity with its obligations under the WTO as soon as possible. She noted that the key arguments set out in further communications of the United States had been put forward before the Appellate Body for its consideration. The Parties to the dispute, including third participants, had also presented their views and arguments. The Appellate Body had then taken an informed and considered decision on the matter, which was final. Hong Kong, China understood that "zeroing" remained a sensitive matter to Members, but it was time to move forward in the interest of the multilateral trading system and its dispute settlement mechanism.

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

2. Japan – Countervailing duties on dynamic random access memories from Korea

(a) Request for the establishment of a panel by Korea (WT/DS336/5)

15. The Chairman drew attention to the communication from Korea contained in document WT/DS336/5, and invited the representative of Korea to speak.

16. The representative of Korea said that his country had serious concerns regarding the countervailing duties imposed by Japan on 27 January 2006 against dynamic random access memories ("DRAMS") originating in Korea. His country considered these measures by Japan to be inconsistent with Japan's obligations under the relevant provisions of the GATT 1994 and the SCM Agreement. Korea, therefore, requested consultations on 14 March 2006 with Japan regarding these determinations, pursuant to Article 4 of the DSU, Article 30 of the SCM Agreement and Article XXII of the GATT 1994. Consultations had been held with Japan on 25 April 2006. These consultations, however, had failed to resolve the dispute between the parties. Korea believed that the panel would find that Japan had acted inconsistently with its obligations under Articles 1, 2, 10, 11, 12, 14, 15, 19, 21, 22 and 32 of the SCM Agreement, as well as Articles VI:3 and X:3 of the GATT 1994. Accordingly, Korea requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, and Article 30 of the SCM Agreement regarding the Japanese determinations and the resulting countervailing duties imposed on DRAMS from Korea, with standard terms of reference as provided for under Article 7 of the DSU.

17. The representative of Japan said that his country's imposition of countervailing duties on DRAMS produced by Hynix that Korea challenged had been imposed due to the fact that it had been found, based on ample evidence in an objective and impartial investigation, that the Government of

Korea granted subsidies to Hynix, which consequently caused injury to Japan's domestic industry. Japan was confident that this CVD measure was consistent with the WTO Agreements in light of the evidence obtained in the investigation, as well as with WTO jurisprudence. Japan had repeatedly explained to Korea in the investigation procedures, and in the consultation held pursuant to Article 4 of the DSU, that the investigation and the resulting imposition of the CVD were consistent with the WTO Agreements. Therefore, Japan was surprised and disappointed that Korea had chosen to request the establishment of a panel despite lacking foundation to support its claim. Furthermore, turning to Korea's panel request, he said that Korea did not sufficiently indicate the legal basis of its complaint. In view of the above, Japan did not agree to the establishment of a panel.

18. The DSB took note of the statements and agreed to revert to this matter.

3. United States – Anti-dumping measures on oil country tubular goods (OCTG) from Mexico

(a) Statement by Mexico

19. The representative of Mexico, speaking under "Other Business", recalled that on 28 November 2005, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, in the case on: "United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico".[2] On 17 February 2006 the United States and Mexico had mutually agreed that, pursuant to Article 21.3(b) of the DSU, the reasonable period of time for the United States to implement the DSB's recommendations and ruling would be six months as of the date of the adoption of the Appellate Body and the Panel Reports. That period of time had expired on 28 May 2006 and, as of 29 May 2006, Mexico was unaware of the US compliance with the DSB's rulings and recommendations. As it might be the case that the United Stated had not complied within the agreed period of time with the DSB's rulings and recommendations, Mexico wished to reserve its rights under the DSU in this regard.

20. The representative of the United States said that his country thanked Mexico for its statement, which he would convey to capital. The United States had been in close contact with Mexico during the reasonable period of time regarding the re-determination in this matter, and would continue to apprise Mexico with respect to this matter.

21. The DSB took note of the statements.

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[2] WT/DS282.