WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/136
31 January 2003

(03-0641)

Dispute Settlement Body
11 November 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 11 November 2002

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

Subjects discussed: Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States

(b) United States – Anti-Dumping Act of 1916: Status report by the United States

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the four sub-items to which he had just referred be considered separately.

(a) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/18/Add.8)

2. The Chairman drew attention to document WT/DS160/18/Add.8 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

3. The representative of the United States said that his country had provided an additional status report in this dispute on 31 October 2002, in accordance with Article 21.6 of the DSU. As noted in that report, the United States and the EC had been seeking a positive and mutually acceptable resolution of the dispute. The United States had continued to work hard to reach a mutually acceptable arrangement consistent with WTO rules. The US Administration would continue to engage the US Congress following the Congressional recess with a view to concluding a mutually acceptable resolution of the dispute.

4. The representative of the European Communities said that his delegation wished to express disappointment that 27 months had lapsed since the adoption of the Panel Report, but no action had yet been taken by the United States to comply with the rulings in this case. The EC urged the United States to take rapid and concrete action to settle this dispute and to comply with the DSB's recommendations.

5. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(b) United States – Anti-Dumping Act of 1916: Status report by the United States (WT/DS136/14/Add.8 – WT/DS162/17/Add.8)

6. The Chairman drew attention to document WT/DS136/14/Add.8 – WT/DS162/17/Add.8 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US Anti-Dumping Act of 1916.

7. The representative of the United States said that his country had provided an additional status report in this dispute on 31 October 2002, in accordance with Article 21.6 of the DSU. As noted in that report, bills repealing the 1916 Act had been introduced in both the US House of Representatives (H.R. 3557) and the US Senate (S.2224). The bills would apply to all pending court cases. The US

administration would continue to work with the US Congress following the Congressional recess to achieve further progress in resolving this dispute with the EC and Japan.

8. The representative of the European Communities said that the EC noted with surprise that the present status report, like the previous ones, did not mention a third bill introduced in the House of Representatives in June by representative Henry Hyde. This bill provided for a repeal of the 1916 Act, which would leave the ongoing court cases unaffected. Clearly, a repeal of the 1916 Act with effects only to future cases could not be considered a satisfactory solution to this dispute, especially since the EC had agreed to give the United States extra time for implementation, on the express understanding that the repeal legislation would terminate the pending court cases. The EC recalled that three cases were pending before US courts against EC companies and that two of these cases had been initiated after the initial deadline for implementation. These companies were bearing substantial litigation costs to defend themselves against claims based on legislation that was clearly condemned and should have been repealed long time ago. The EC expected the United States to secure the repeal of the 1916 Act and the termination of the pending court cases before the end of the current session of the US Congress. In the absence of immediate progress on the repeal of the 1916 Act and the termination of ongoing cases, the EC would proceed to resume arbitration under Article 22 of the DSU.

9. The representative of Japan said that, as had been repeatedly pointed out at the previous DSB regular meetings, the date agreed among the parties for the reactivation of the arbitration procedure upon the request of either party had passed long time ago. Japan was aware that the bill repealing the 1916 Act had been introduced to the US Congress. However, Japan had to, once again, express its deep concern that the United States had not implemented the DSB's recommendations and rulings. Such delay in implementation undermined the credibility of the dispute settlement system, which was one of the fundamental pillars of the WTO. While the bill was still before the US Congress, the suspended proceedings in the US domestic courts under the 1916 Act had been reopened as of 8 August, and the Japanese companies were suffering serious and real financial consequences, such as litigation costs. Japan strongly urged the United States to implement the DSB's recommendations and rulings as soon as possible in order to ensure and preserve the credibility of the WTO dispute settlement system.

10. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(c) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.1)

11. The Chairman drew attention to document WT/DS176/11/Add.1 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

12. The representative of the United States said that his country had provided a status report in this dispute on 31 October 2002, in accordance with Article 21.6 of the DSU. The reasonable period of time for implementation in this dispute would expire on 31 December 2002, or on the date on which the current session of the US Congress were to adjourn, whichever would be later, and in no event later than 3 January 2003. In the time since the US previous status report was submitted, on 19 September 2002, the US administration had continued to work with the US Congress on resolving this dispute.

13. The representative of the European Communities said that the EC remained open to all solutions that could favour compliance and hoped that a satisfactory solution to this dispute would be found. The EC would like, however, to raise its concerns on recent declarations of the US administration. The US administration was apparently of the opinion that there was no need to clarify

that Section 211 did not apply to cases where the trademark had been abandoned by the original owner. It should be noted that the Panel had accepted the affirmations expressly made by the US representatives in the course of the proceedings that Section 211 would not apply to a new trademark after a former trademark – to which Section 211 might have applied – had been abandoned. However, US Federal Courts had come to the opposite conclusion. They applied Section 211 to trademarks succeeding an abandoned trademark. It was, therefore, essential that any solution to this dispute address the question of the abandonment of trademarks.

14. The representative of Cuba said that Cuba wished to reiterate its basic position which had already been expressed in previous DSB meetings, namely, that the United States had to comply, as soon as possible, with the DSB's recommendations in this case and that Section 211 should be repealed.

15. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(d) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.1)

16. The Chairman drew attention to document WT/DS184/15/Add.1 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

17. The representative of the United States said that his country had provided a status report in this dispute on 31 October 2002, in accordance with Article 21.6 of the DSU. As noted in that report, the US Department of Commerce had published a proposed change to its "arm's-length" test. Any final changes to this test would be applied to the products involved in the hot-rolled steel investigation underlying this dispute as well as to products in future anti-dumping proceedings. At the same time, the United States intended to implement the other recommendations and rulings of the DSB with respect to the respondents in the hot-rolled steel investigation. With respect to the US anti-dumping duty statute, the US administration continued to consult and to work with the US Congress on resolving the dispute.

18. The representative of Japan said that the reasonable period of time for implementation in this case would expire on 23 November 2002. Japan was concerned as to whether by then the United States would complete its implementation, including statutory amendments that were consistent with the WTO Agreement. The US status report refered to the progress in implementation concerning the US Department of Commerce and the US Congress, but not the International Trade Commission (ITC). Since the ITC's application of the US law was found to be inconsistent, Japan requested the United States to provide information on the implementing status concerning the ITC. The efforts that Japan was making thus far in the US capital had not, unfortunately, succeeded in obtaining the US commitment towards implementation within the reasonable period of time. If the United States failed to comply in this case, Japan would be obliged to request the DSB's authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU. Japan strongly urged the United States to implement the DSB' recommendations and rulings as soon as possible.

19. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. Implementation of the recommendations of the DSB

(a) Chile – Price band system and safeguard measures relating to certain agricultural products

(b) European Communities – Trade description of sardines

20. 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) Chile – Price band system and safeguard measures relating to certain agricultural products

21. The Chairman recalled that at its meeting on 23 October 2002, the DSB had adopted the Appellate Body Report in the case on "Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products" and the Panel Report on the same matter, as modified by the Appellate Body Report. He then invited Chile to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

22. The representative of Chile recalled that on 23 October 2002, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the former, in the dispute regarding the price band system and safeguard measures relating to certain agricultural products. In accordance with Article 21.3 of the DSU, Chile wished to inform the DSB that it was currently holding consultations with Argentina in an effort to find a mutually satisfactory solution to this dispute, which would take into account the DSB's recommendations and rulings and was WTO-consistent. To that end, Chile would need a reasonable period of time.

23. The representative of Argentina said that his country wished to thank Chile for the information provided and confirmed the statement made by Chile that the parties to the dispute were holding consultations. Argentina understood that bilateral contacts were already under way between the respective capitals to discuss alternative time-periods and modalities for implementation. He said that the question as to how the DSB's recommendations should be implemented would have to be examined in the light of the concrete amendments to be proposed by Chile. He stressed that any implementation proposal in order to be accepted would have to comply with the object and purpose of Article 4.2 of the Agreement on Agriculture; i.e. it would have to achieve the kind of transparency and predictability that could only be provided by ordinary customs duties. The Reports adopted by the DSB on 23 October confirmed that variable levy schemes, minimum import prices or similar mechanisms such as the Chilean price band system were inconsistent with Article 4.2 of the Agreement on Agriculture as their automaticity, their lack of transparency and predictability, and the partial isolation that they caused were not features of ordinary customs duties, regardless of whether or not they had a "cap" or "ceiling" mechanism. As the Appellate Body recognized, "[t]his lack of transparency and this lack of predictability were liable to restrict the volume of imports" and "will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market" (paragraph 234 of the AB Report). Compliance with the DSB's recommendations and rulings in this case implied that the system had to allow the adequate transmission of international prices to the Chilean market and that the characteristics responsible for the system's tendency to "overcompensate" for the effect of decreases in international prices on the domestic market, when weekly reference prices were set below the lower threshold of the relevant price band, had to be eliminated (paragraph 260 of the AB Report). The Argentine authorities were in the process of examining a number of "unofficial proposals" informally transmitted to them through the Chilean Embassy in Buenos Aires on 7 November. Ultimately, it was only once Argentina knew

the final position of Chile, it would be in a position to determine whether a modification of the price band system to provide it with these essential characteristics was possible, or whether the system would simply have to be eliminated in order to comply with the DSB's recommendations.

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

(b) European Communities – Trade description of sardines

25. The Chairman recalled that at its meeting on 23 October 2002, the DSB had adopted the Appellate Body Report in the case on "European Communities – Trade Description of Sardines" and the Panel Report on the same matter, as modified by the Appellate Body Report. He then invited the EC to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

26. The representative of the European Communities said that, as had been announced at the DSB meeting on 23 October, the EC would actively work to implement the DSB's recommendations and rulings in a manner consistent with its WTO-obligations, in particular Article 2.4 of the TBT Agreement. However, the implementation of the DSB's recommendations and rulings in this case could not be accomplished immediately. There were several ways in which the Report could be implemented and various options needed to be examined. Furthermore, the challenged measure was a legislative measure. Moreover, as the challenged measure pursued the goals of market transparency and consumer protection, there were a number of important factors that had to be carefully studied during the legislative procedure. The EC was willing to engage into discussions with Peru under Article 21.3 of the DSU with a view to agreeing on an appropriate reasonable period of time for implementation.

27. The representative of Peru said that his country wished to thank the EC for its statement notifying its intention to comply with the DSB's recommendations and rulings in this case. Prompt implementation would improve the efficiency of WTO dispute settlement system and would boost confidence in the system, in particular in relation to disputes arising from well-established and proven damage to exports of developing countries. Peru, therefore, hoped that the EC would amend its technical regulation at issue as quickly as possible in order to bring it into conformity with Article 2.4 of the TBT Agreement and with the Codex Alimentarius, thereby enabling exports of Peruvian sardines to the EC's market to be resumed. Peru was ready to enter into discussions with the EC to that end.

28. The representative of Canada said that his country had noted the statement made by the EC at the present meeting as well as the statement made at the 23 October DSB meeting that the EC would actively work to implement, within the shortest possible time-frame, the DSB's recommendations and rulings. Canada welcomed those statements, and looked forward to full implementation of the DSB's rulings as soon as possible. Canada also wished to reiterate its firm view that in order to bring its Regulation into conformity with Article 2.4 of the TBT Agreement, the EC had to permit all of the 21 species listed in the Codex Standard to be marketed as "sardines", with the appropriate qualifier.

29. The representative of Venezuela said that his country had participated as a third party in this dispute and thanked the EC for its statement. Venezuela hoped that the EC's compliance with the DSB's recommendations would make it possible to export into the EC's market other types of sardines, including those from Venezuela.

30. The representative of Chile said that his country urged the EC to comply promptly with the DSB's recommendations in this case.

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

3. Proposed nominations for the indicative list of governmental and non-governmental panelists (WT/DSB/W/208)

32. The Chairman drew attention to document WT/DSB/W/208 which contained additional names proposed for inclusion on the indicative list in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/208.

33. The DSB so agreed.

4. India – Measures affecting the automotive sector

(a) Statement by India

34. The representative of India, speaking under "Other Business", recalled that on 5 April 2002, the DSB had adopted the Panel and the Appellate Body Reports in the case on " India - Measures Affecting the Automotive Sector" (DS146 and DS175). Pursuant to Article 21.3 of the DSU and with the agreement of the complainants, the EC and the United States, on 2 May 2002 India had notified the DSB in writing of its intention to comply with the DSB's recommendations and rulings. This notification was circulated in document WT/DS146/12 – WT/DS175/12, dated 3 May 2002. India had also expressed orally its intention to implement the DSB's rulings at the DSB meeting on 22 May 2002. Pursuant to Article 21.3(b) of the DSU, India, the EC and the United States had agreed on 18 July 2002 that India would have five months – a reasonable period of time – to implement the DSB's rulings. This agreement was circulated in document WT/DS146/13 – WT/DS175/13 dated 24 July 2002.

35. At the present meeting, he wished to inform the DSB that India had fully complied with the DSB's rulings and recommendation in this case. He recalled that consequent upon the removal on 31 March 2001 of all remaining quantitative restriction imposed by India under Article XVIII:B of GATT 1994, India had taken a policy decision to terminate the indigenization requirement, but to continue to enforce export obligation imposed on automobile manufacturers pursuant to Public Notice No. 60 dated 12 December 1997 (Public Notice No. 60) issued by the Director General of Foreign Trade, which was clear from Public Notice No. 36 dated 4 September 2001. After adoption of the Panel and Appellate Body Reports by the DSB, India had taken a policy decision to terminate the trade balancing obligation as well, which was clear from Public Notice No. 31, dated 19 August 2002. Accordingly, the indigenization and accrued export obligations under the MOUs entered into with automobile manufacturers pursuant to Public Notice No. 60 were terminated and these obligations were no longer enforceable against the automobile manufacturers.

36. The representative of the European Communities said that the EC welcomed both Public Notice No. 31 of 19 August 2002, as well as the statement made by India at the present meeting. The steps/measures announced were indeed implementing the relevant DSB's rulings and recommendations in this dispute. The EC could not but express its satisfaction over this development. In particular, the withdrawal of the trade balancing requirements incurred by the MOUs signatories announced through Public Notice No. 31 in implementation of the DSB rulings and recommendations represented an appropriate course in conformity with the letter and the spirit of the Panel's findings. The EC wished to congratulate India for its prompt implementation of the Panel's ruling.

37. The representative of the United States said that his country wished to thank India for its statement and its efforts to comply with the DSB's recommendations and rulings. The United States noted the recent government notice that terminated the export obligations previously incurred by the automotive companies. The United States also noted India's assurances that the local content and export obligations incurred pursuant to Public Notice No. 60 and the MOUs were terminated and were no longer enforceable. Accordingly, the United States was pleased that this matter now appeared to

be resolved and that India appeared to have fully implemented the adopted recommendations and rulings in this dispute.

38. The representative of Korea said that his country had participated as a third party in this dispute and welcomed the prompt implementation by India of the DSB's recommendations in this case. His delegation wished to receive detailed information concerning the implementation by India.

39. The representative of India said that his delegation would provide the information requested by Korea. He noted that his country was currently a party to 10 disputes: i.e. it was a complaining party in four cases as well as a defending party in other four cases and a joint complaining party in two cases. So far as its record was concerned as a defendant, India's compliance was full. Therefore, India hoped that its trading partners would also comply with the DSB's rulings in good faith.

40. The DSB took note of the statements.

5. Amendments to Rules 1, 24 and 27 of the Working Procedures for Appellate Review

(a) Statement by the Chairman

41. The Chairman, speaking under "Other Business", recalled that at the DSB meeting held on 23 October 2002, delegations had had an opportunity to exchange views on the substantive aspects of the amendments to Rules 1, 24 and 27 of the *Working Procedures for Appellate Review*. He recalled that in his absence that meeting had been chaired by Mr. K. Bryn. At the present meeting, he wished to inform delegations that he had been briefed by Mr. K. Bryn on the outcome of the discussion related to the amendments to Rules 1, 24 and 27 of the *Working Procedures for Appellate Review*. He understood that at that meeting delegations had raised some concerns and questions regarding the amendments and had requested that the Appellate Body provide additional explanations in this regard. In light of this, he said that it was his intention to transmit to the Appellate Body the record of the DSB meeting held on 23 October in relation to the item entitled: "Amendments to Rules 1, 24 and 27 of the *Working Procedures for Appellate Review*".

42. The DSB took note of the statement.