WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/223
15 January 2007

(07-0164)

Dispute Settlement Body
11 December 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 11 December 2006

Acting Chairman: Mr. Eirik Glenne (Norway)

Prior to the adoption of the agenda, Ambassador Eirik Glenne (Norway), the Chairman of the General Council welcomed delegations and said that he had the pleasure of chairing the present meeting at the request of the Chairman of the Dispute Settlement Body, Ambassador Muhamad Noor who had asked him to preside on his behalf due to his absence from Geneva. He noted that this was in accordance with the Rules of Procedure for meetings of the Dispute Settlement Body which provided that: "If the DSB Chairperson is absent from any meeting or part thereof, the Chairperson of the General Council or in the latter's absence, the Chairperson of the Trade Policy Review Body, shall perform the functions of the DSB Chairperson."

1. European Communities – Selected customs matters

(a) Report of the Appellate Body (WT/DS315/AB/R) and Report of the Panel (WT/DS315/R)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS315/14 transmitting the Appellate Body Report on: "European Communities – Selected Customs Matters", which had been circulated on 13 November 2006 in document WT/DS315/AB/R, in accordance with Article 17.5 of the DSU. He recalled that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He noted that 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".

2. The representative of the United States said that his country wished to thank the Panel, the Appellate Body, and the Secretariat for their hard work. This dispute raised several novel issues, and the United States appreciated the thoughtfulness with which these issues had been considered. In this dispute, the United States had raised concerns about the way in which the EC administered its customs law and the way in which EC courts reviewed customs administrative actions. The United States had focused on administration by 25 separate, independent customs agencies without mechanisms or procedures to adequately reconcile differences among them. It had also focused on review by 25 different judicial systems, no one of which had the power to issue decisions that governed the practice of customs agencies throughout the EC. The United States called Members' attention to the Panel's detailed discussion of key elements of the EC's customs administration system, culminating with the finding that the system was "complicated and, at times, opaque and confusing". The Panel had gone on to state: "We can imagine that the difficulties we encountered in our efforts to understand the EC system of customs administration would be multiplied manifold for traders in

general and small traders in particular who are trying to import into the European Communities." This conclusion and the findings that preceded it were important, as they had confirmed that traders faced a serious, structural barrier when they tried to bring goods into the EC. The United States looked forward to the EC addressing the structural problems identified by the Panel.

3. Regrettably, the Panel had declined to reach the legal question of whether the EC's customs administration system as a whole was inconsistent with Article X:3(a) of the GATT 1994. As the Appellate Body had found, this was an error resulting from the Panel's misunderstanding of the US panel request. The Appellate Body had been unable to reach this question either, given that the Panel had not made the necessary factual findings. Therefore, contrary to public statements by the EC, the EC system of customs administration had not been found to be consistent with the WTO. That remained an open question which, given the Panel's findings, had serious implications for traders.

4. Of course, the Panel and the Appellate Body had found a breach of Article X:3(a) with regard to the EC's tariff classification of LCD monitors. The United States was pleased that this finding demonstrated that, in the particular instance examined, the Panel and the Appellate Body had agreed that the EC administered its customs laws in a non-uniform manner. The United States highlighted two other key findings. First, the Appellate Body had clarified that if divergent penalty laws and audit procedures regulated the application or implementation of EC customs laws, then those divergent provisions were susceptible to challenge under Article X:3(a). Second, the Panel had recognized – and the Appellate Body had not disagreed – that the non-uniform administration of classification rules was not cured by a temporary suspension of duties.

5. Finally, the US claim under Article X:3(b) of the GATT 1994 was that there was no EC review tribunal whose decisions governed the practice of "the agencies entrusted with administrative enforcement" in the EC – i.e. "the agencies," and not just some of them. However, the Appellate Body had found that the use of the plural form in Article X:3(b) – "the agencies" – did not mean that the decisions of a given review tribunal must govern all of the EC's customs agencies. In the Appellate Body's view, this would read the word "all" into the text. In fact, it was the Appellate Body's construction that read words into the text. Specifically, it seemed to read the unqualified phrase "*the* agencies" to mean instead "*at least one of* the agencies." Moreover, the Appellate Body's approach seemed at odds with its approach in its recent Softwood Lumber V report (WT/DS264/AB/RW). There, the Appellate Body had explained that reference to a thing (in that case, "export prices") "in the plural, without further qualification" must be understood as comprising "all" of that thing. Although the United States had raised this point in its appeal, the Appellate Body had not addressed it in its report.

6. The implication of the Article X:3(b) finding was troubling. It meant that a Member might establish different review tribunals within its territory that could reach conflicting decisions about administration of that Member's customs law. The Appellate Body had alluded to the possibility of conflicting decisions being reconciled through appeals. However, as the Panel had noted, "Given the cost and time implicated by such an appeal, it is unclear whether traders will resort to such an option in all cases in which non-uniform application of EC customs law among the customs authorities of the member States becomes apparent." And, there was no requirement in Article X:3(b) to provide for the opportunity to appeal.

7. The United States concluded by saying that it was pleased that the Panel and the Appellate Body had recognized the serious difficulties faced in even trying to understand the EC system of customs administration, difficulties the United States and several other Members believed to pose a serious impediment to trade. Furthermore, those findings provided useful clarifications with respect to the measures that were susceptible to claims under Article X:3(a) and with respect to how a panel identified its terms of reference.

8. The representative of the European Communities said that the EC was overall satisfied with the Report of the Appellate Body. This Report had confirmed that US claims on the EC system of customs administration "as a whole" had not been substantiated. In this context, the Appellate Body had confirmed that WTO Members, including the EC, had the right to decide on the best way to organize their administration, provided they complied with WTO standards. The Appellate Body had equally confirmed that the EC's system of judicial review of customs decisions was fully compatible with its WTO obligations. As regards individual instances of administration, the Appellate Body had reversed 2 out of 3 violation findings made by the Panel. As a result, the only remaining finding of violation of Article X:3(a) GATT concerned the tariff classification of LCD monitors with DVI, a highly technical classification issue which the EC had already been in the process of addressing during the Panel proceedings. As a consequence, this Report did not require any further action by the EC. The EC was already in compliance with the Panel's finding on the tariff classification of LCD monitors with DVI. Uniform classification of this product in the EC was ensured *inter alia* by the adoption of Commission Regulation 2172/2005, which had been followed by the repeal of the Dutch Decree and the German Binding Tariff Information (BTI) referred to in the Panel Report in support of the Panel's findings of violation. Moreover, the Commission had prepared an Explanatory Note on the classification of LCD monitors which would be published before the end of the year. The EC hoped that this would bring this fruitless litigation to an end and that the EC and the United States could now continue working on a more cooperative basis on customs-related issues.

9. The representative of Australia said that her country thanked the Appellate Body, the Panel and the Secretariat for their work on this case, in which Australia had participated as a third party. Australia welcomed the guidance provided by the Appellate Body on the interpretation of the term "measure at issue" under Article 6.2 of the DSU and the meanings accorded to "administer" and "uniform" in Article X:3(a) of the GATT 1994. The Appellate Body's clarification of the requirements of Article 6.2 of the DSU was helpful to Members. In particular, that the term "measure at issue" should not be interpreted in light of the specific WTO obligation raised in a particular claim.[1] Australia agreed with the Appellate Body that to have found otherwise would have resulted in future uncertainty for both complainants and respondents. Australia also welcomed the Appellate Body's clarification of the interpretation of "administer" and "uniform" in Article X:3(a) of GATT 1994. This included the finding that Article X:3(a) did not exclude a challenge to a legal instrument that regulated the application or implementation of an instrument under Article X:1 if it necessarily led to a lack of uniform, impartial or unreasonable administration.[2] Also, the finding that under Article X:3(a) it was the application of a legal instrument of the kind described in Article X:1 that was required to be uniform, not the processes leading to administrative decisions, or the tools that might be used in the exercise of administration.[3] The Appellate Body's clarification of the scope and application of Article X would usefully serve to provide guidance for all WTO Members in the administration of trade regulations, especially those Members that had multi-tiered systems of customs administration.

10. The representative of Korea said that his country wished to express its deep gratitude to the Appellate Body and the Panel, as well as to the Secretariat for devoting considerable time and effort to examine and make findings in this case. Korea had participated in this case as a third party, because several Korean exporters had complained that they had problems with the lack of uniformity in terms of the ways that the various EC customs authorities administered the relevant rules and regulations. In particular, the conflicting classification practice of EC member States on LCD monitors with DVI was a grave concern, not only for the producers in question but also for the Korean Government since the EC was the largest market for Korean computers and television sets. In this regard, Korea welcomed the Panel's finding, upheld by the Appellate Body, that the tariff

[1] Appellate Body Report, para. 132.
[2] Appellate Body Report, paras. 200-201.
[3] Appellate Body Report, para. 224.

classification of LCD monitors with DVI amounted to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Korea noted that a new EC regulation on the LCD monitors had been introduced to rectify this classification discrepancy. Korea hoped that the new regulation would be implemented in a uniform manner and the EC would ensure that similar problems were not repeated. Even though the Panel and the Appellate Body had not found an obligation that the EC had to establish an integrated and overall customs authority with the EC-wide territorial jurisdiction, Korea believed that the EC had to continuously pay particular attention to the ways and practices of how its customs rules and regulations were administered by each of the customs authorities of its member States. The individual customs regimes within the EC might be inherently susceptible to less uniformity in the administration of customs matters since the EC system was composed of fragmented, independent, and local authorities within sovereign member States. Divergence in the administration of customs matters could and actually happened even in a country which adopted a central government system. That was why the customs authority of many countries continuously educated their staff, shored up a prompt reconciliation mechanism, and computerized the customs procedures with an electronic database. The individual customs systems within the EC required the EC to be even more diligent than other WTO Members in its efforts to maintain uniform administration of customs matters irrespective of time, place and even individual officers with whom traders were interacting. Korea trusted that the EC would not be complacent with the results of this case. Korea believed that the EC, spurred by this case, would step up its continued efforts to minimize possible divergences of administration among the individual customs authorities of the 25 member States.

11. The representative of the United States said that his country was not in a position to agree with the EC's statement that it had already come into compliance with its WTO obligations. The United States would need to consider the matter further. However, the EC statement raised a procedural question. The United States wished to know if the EC's assertion that the EC was in compliance should be understood as its statement of intentions in respect of implementation as required by Article 21.3 of the DSU.

12. The representative of European Communities said that his delegation had not spoken about the EC's intention to comply, but about the fact that the EC was in compliance. He recalled that a similar situation had occurred when the DSB had adopted the Panel and the Appellate Body Reports in the "US – Steel Safeguard" dispute.

13. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS315/AB/R and the Panel Report contained in WT/DS315/R, as modified by the Appellate Body Report.