Committee on Anti-Dumping Practices

MINUTES OF THE MEETING
HELD ON 3 DECEMBER 1996

Chairman: Mr. O. Lundby (Norway)

1. The Committee on Anti-Dumping Practices ("the Committee") held a special meeting on 3 December 1996, called at the request of Japan in accordance with the Committee's decision (ADP/132).

2. The Chairman noted that, as set forth in GATT/AIR/3720 (21 November 1996), Japan had requested this special meeting to discuss the Report of the Panel in the dispute between Japan and the European Community regarding the EC's imposition of anti-dumping duties on audio cassettes originating in Japan.

3. The delegate of Japan observed that his government had requested this meeting in order to again propose adoption of the report of the audio-cassettes Panel. The report was over one and one-half years old, but no concrete steps had been taken to implement the Panel's recommendations. It appeared that the lengthy discussions in the Committee on the Panel's report would be unproductive. The EC's objections to adoption of the report were, in Japan's view, not plausible. Japan had, in the previous meetings of the Committee at which this matter was addressed, dealt comprehensively with the EC's concerns on the issues of due allowances and detailed proof. The EC's objections were to the ambiguity of some parts of the report and the potential for conflicting interpretations by Parties. The EC had not demonstrated any further potential for conflicting interpretations of the report. The fears of the EC were, in Japan's view, of no significance and completely unwarranted. Moreover, a recent decision of the WTO's Appellate Body reaffirmed that adopted panel decisions were not binding on later panels. Whatever weaknesses might be in the Panel report were no justification for refusing adoption of the report. No doubt some points in the report would have to be further refined by future panels. But if this justified declining to adopt, few panel reports would be adopted.

4. The Japanese delegate continued by observing that failure to adopt the report had ramifications far beyond the particular case. It deprived Japan of a proper basis for rectifying another Member's improper trade rules and practices by undermining the effectiveness of the Anti-Dumping Committee and casting doubt on the credibility of the GATT/WTO dispute settlement mechanism. It weakened the principles on which the GATT and the WTO rest.

5. He noted that many Parties had expressed support for adoption at past meetings. Only the EC was blocking adoption. The EC, as an important trading entity and a user of anti-dumping measures, was an opinion leader in setting global rules for fair trade and one of most influential members of WTO. This carried certain responsibilities, not least of which was to set an example regarding the conformity of its trade rules with GATT rules and the respect to be afforded the results of panel proceedings. The EC presented itself as an enthusiastic supporter of the GATT/WTO framework and particularly of dispute settlement mechanism, but its actions were not consistent.

6. Japan called on the EC to remove its opposition to adoption of the Panel report, and urged the Committee to adopt the report.
7. The delegates of Mexico, Korea, and Brazil supported adoption of the report.

8. The delegate of the EC noted that it was not alone in opposing adoption - other Parties had expressed doubts concerning adoption of the report. Moreover, Japan was not correct in saying that no concrete steps had been taken to implement the Panel's recommendations. The EC had taken action to amend its basic regulation to take account of some of the recommendations in the panel report. The amendment had been adopted the previous day by the Council of Ministers of the EC, and would shortly be published.

9. Moreover, the underlying trade dispute in this matter had been settled in the meantime, as the measures in question before the panel were terminated in May 1996.

10. The EC's position had been stated clearly in previous meetings, and its position had not changed, except that it had taken the action to amend its legislation that had been promised. The EC's position had been reached after long and difficult consideration, taking into account that the report was in part favourable to the EC, and in part unfavourable, and the EC's commitment to effective dispute settlement.

11. In the EC's view, the report did not appropriately deal with the issue of asymmetry in two respects. It had concluded that the EC had failed to consider making due allowance on its merits for differences in costs and profits between the two markets concerned, and second, that the EC's anti-dumping legislation was inconsistent with Article 2.6 of the Code in that it contained an exhaustive list of factors for which an allowance could be made. The EC had difficulty with these findings because of the underlying reasoning of the report.

12. In particular, paragraph 371, which while it did not go so far as to say that indirect expenses must be the subject of an allowance, suggested that there were certain circumstances in which allowances could be refused, but gave no guidance on this matter. Paragraph 372 appeared to complicate the matter further by advocating a case-by-case decision on treatment of indirect expenses, suggesting that Members could not develop a consistent and transparent policy in this area.

13. Paragraph 374 raised another issue of concern, as it could be read to suggest that a mere difference in costs could lead to an allowance. This could mean that there was no requirement to show that the difference affected price comparability.

14. Finally, the most controversial aspect of the report was the assertion in paragraph 376 that certain profits should be the subject of an allowance. In view of the ambiguity of some parts of the report, and the potential for conflicting interpretations by parties, the EC did not think it appropriate to adopt the report.

15. However, the EC did accept the conclusion that Article 2.6 of the Code did not provide an exhaustive list of factors for which an allowance can be made. The EC had acknowledged that its legislation contained an exhaustive list of factors for which an allowance could be made, thus precluding the possibility of an allowance for other factors, even if they were demonstrated to affect price comparability. The EC had therefore amended its legislation in this regard to allow adjustments to be made for factors other than those listed in Article 2.10 of the EC legislation. The EC was confident that the amendment was an important step to take account of an important element of the panel report. Regrettably, the EC could not support adoption of the report because of the underlying reasoning of the report. Nonetheless, it had clearly acted to eliminate aspects of its practice which could be viewed as inconsistent with the Code, thus taking a constructive approach and meeting the concerns expressed by a number of Parties to the Code.
16. The delegate of the United States noted that the EC had correctly stated that other Parties had concerns with adoption of the Report. The US had such concerns, which had been expressed in previous meetings. The US did not agree with some aspects of the substantive findings of the report, and did not agree with the recommendation of a specific and retroactive remedy.

17. The delegate of Japan expressed the view that the EC’s reasons for being unable to support adoption were groundless. Paragraph 371 did not go as far as to say that indirect expenses must always be the subject of an allowance, it simply referred to the unreasonable situation that would be created by the complete exclusion of allowances for indirect costs. The fact that it did not give guidance regarding those cases where allowance should be made could not be the reason for rejecting adoption. Paragraph 372 did not preclude Members from developing consistent and transparent policies in this area, it simply said that a case-by-case analysis was envisioned by Article 2.6 of the Code to determine whether adjustments were necessary. Paragraph 374 did not say that due allowance was necessary even when differences did not affect price comparability, and there was no evidence that any Party interpreted the report this way. Japan was of the view that due allowance was necessary only if differences in indirect costs and profits affected price comparability. Japan supported the view of Paragraph 376 of the report allowed for due allowances for profits.

18. The measures in question had not been revoked in recognition of the panel report. They had in fact expired under the EC sunset clause in May 1996. But the EC had kept the measures in force and collected duties on the basis of a calculation the panel had condemned. The expiry of the duties did not justify refusing to adopt.

19. The amendment of the EC’s legislation was the EC’s first concrete step toward compliance with the Panel’s recommendations. However, whether the changes rectified the problems Japan had raised before the panel regarding asymmetry was not certain. The legislation would have to be carefully considered to determine the extent to which it implemented the conclusions of the panel report. Moreover, to implement the panel’s recommendations while at the same time opposing adoption of the report seemed contradictory. Japan reiterated its request that the EC adopt the panel report.

20. The delegate of the EC stated that its reasons for opposing adoption while implementing some of the panel’s recommendation by amending the EC legislation were clear. Where the EC agreed with the Panel, it had taken action to implement, although it had unfortunately taken some time. The EC had explained clearly that its problem was with the underlying reasoning of the report. In the EC’s view, there was considerable ambiguity and possibility of conflicting interpretations of the report which might touch on some basic elements of the anti-dumping system. Therefore, the EC believed that adoption would leave Parties in an uncharted waters, where it would difficult to see what interpretations would be followed.

21. The delegate of Japan stated that the EC’s position was not convincing. Ambiguity could not be the reason for rejecting adoption of the Panel report. As far as the EC was willing to amend its legislation, there seemed no obstacle to adoption. All other concerns reflected unwarranted fears of no significant consequence.

22. The Chairman inquired whether the Parties intended to continue to seek a solution to the problem.

23. The delegate of Japan said it would continue efforts to seek a breakthrough for adoption of the report. Japan reserved its right to request another meeting of the Committee before the transition period expired.

24. The delegate of the EC stated that the EC’s position on the principles at issue was quite firm, but the EC would continue to take a constructive approach, as it had done in the past. He hoped that
the Japanese delegation would consider carefully the amendment to the legislation, to see if it was a satisfactory resolution of the matter.

25. The Committee took note of the statements made.

26. The meeting was adjourned.