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Committee on Anti-Dumping Practices

MINUTES OF THE SPECIAL MEETING HELD ON 28 JULY 1994

Chairman: Mr. J. Graca-Lima (Brazil)

1. The Committee on Anti-Dumping Practices (hereinafter "the Committee") held a special meeting on 28 July 1994.

2. The Chairman noted that the agenda for this meeting was circulated in GATT/AIR/3613 and Corr.1. The purpose of this meeting was:

(a) to continue the Committee's discussion of the Report of the Panel established by the Committee in October 1991 in a dispute between Mexico and the United States regarding the United States' anti-dumping duties on gray portland cement and cement clinker from Mexico (ADP/82).

(b) to inform the Committee about a communication from the Chairman of the Panel on "Canada - Anti-Dumping Duties on Imports of Beer from the United States".

3. The Committee adopted the agenda for this special meeting.

(a) United States - Anti-dumping Duties on Grey Portland Cement and Cement Clinker from Mexico - Report of the Panel (ADP/82)

4. The Chairman recalled that the Report of this panel was first considered by the Committee at its regular meeting in October 1992. Since then, it had been considered at every regular meeting of the Committee, and the delegation of Mexico had requested the adoption of this panel report at each of these meetings. On these occasions, the representative of the United States had informed the Committee that the parties were seeking a mutually satisfactory solution to the dispute or that further consultations could yield a mutually satisfactory solution to the dispute. The representative of Mexico had also agreed on these occasions to consult further on this matter.

5. The representative of Mexico said that it was the fifth time that Mexico was requesting the adoption of this panel Report by the Committee. He recalled that the Panel had recommended that the United States should revoke the anti-dumping duty Order on gray portland cement and cement clinker from Mexico and should re-imburse any anti-dumping duties paid or deposited under this Order. The Panel's conclusions were based on the following elements: lack of standing, the requirements for determining regional injury not being fulfilled, errors in assessing the injury with regard to cumulation of Japanese and Mexican imports, and errors in the evaluation of prices. At the request of the United States, Mexico had conducted bilateral consultations in order to reach mutually satisfactory solution for this case. These consultations had not been successful. Mexico was facing a situation that after it had justifiably won the Panel case, it had not only not obtained satisfaction but the administrative reviews by the side that had infringed its obligations under the Agreement had progressively increased the anti-dumping duties. In September 1993, the anti-dumping duties increased from 30.74 per cent determined in the first administrative review to 42.74 per cent in the second administrative review,

resorting to constructed value arguing, incorrectly (i.e. due to lack of information not requested), that Mexican cement exports of type 2 and type 5 were not made in the ordinary course of trade. Subsequently in May 1994, the United States Department of Commerce issued a remand determination, increasing the anti-dumping duty rate to 61.85 per cent. On the other hand, the market conditions of the domestic United States showed that domestic cement production was inadequate to satisfy a growing demand by consumers. Clear evidence of this was provided by the United States home building market, where the National Association of Home Builders, an Association representing 175,000 member firms in the United States, had expressed its concern regarding the cement shortages and the consequent increase in prices due to a large extent to the high anti-dumping duty rates imposed on imports of cement, particularly those from Mexico. It was highly significant that such an association had written to the United States Trade Representative, Mr. Micky Kantor, to urge him to adopt the GATT Panel Report. The representative of Mexico said that the United States should comply with its responsibilities in the multilateral trading system and adopt the Panel Report, not only when these were favourable to them but even when they were justifiably not in their favour. In this way, the United States would be fulfilling their obligations through action and thus sending positive signals in terms of its credibility before the Committee in particular, and the international trading rules in general. Mexico strongly requested the adoption of the Panel Report contained in document ADP/82, so as to revoke the anti-dumping duty Order on gray Portland cement and cement clinker from Mexico and to reimburse the anti-dumping duties paid or deposited under this Order to the exporters involved.

6. The representative of the United States said that his delegation had four basic objections regarding the Report. First, was the issue of exhaustion of administrative remedies. The United States objected to the Panel's decision to permit Mexico to raise questions before the Panel regarding initiation requirements of the Agreement. The representative of the United States said that the Government of Mexico and the Mexican exporters of cement had the right and the opportunity to raise the same issues during the administrative proceedings conducted by the Department of Commerce and the United States International Trade Commission, but chose not to do so. The United States anti-dumping law allows the Government of the country from which the investigated merchandise is exported to participate fully in all administrative proceedings. The Agreement also provides that the Government of the exporting country shall be afforded an opportunity to present arguments to the national investigating authorities. In permitting the initiation issues to be raised for the first time in a panel proceeding, the Mexican cement Panel ignored key principles of the Agreement as well as fundamental principles of jurisprudence. The arguments made by the United States previously on this point were well known. In this case, he emphasised that depriving investigating authorities of the right to consider arguments in the first instance was unfair to these authorities and to the private parties which were excluded from the panel proceedings. This deprived the private parties of their express and unqualified rights under Articles 6:1 and 6:7 of the Agreement to present all relevant evidence, defend their interests and confront opposing parties.

7. The representative of the United States then objected to the Panel's findings that the United States did not comply with the Agreement's requirement because its authorities did not satisfy themselves prior to initiation that the petition was on behalf of producers of all or almost all of the producers in the regional market. He said that the Panel stepped over the line between adjudication and legislating. Nevertheless, the substantive issue in question should not recur once the WTO enters into force. The new Agreement imposed a new and clear obligation on Members to determine support for the petition prior to initiation and define the minimum level of support sufficient for initiation. The United States will amend its anti-dumping and countervailing duty laws as necessary to incorporate this new obligation.

8. The representative of the United States further argued that the specific and retroactive remedy prescribed by the Panel went against the bounds of authority traditionally respected by GATT panels. In virtually every case that had found a country's practices to be inconsistent with GATT, panels had issued the general recommendation that the country bring its measures into conformity with the GATT.

This was true in cases involving Article VI and the Subsidies and Anti-Dumping Agreements, as well as other Articles. The wisdom of this approach was confirmed in the Uruguay Round Dispute Settlement Understanding which recognized the problems inherent in making specific recommendations and instructs panels to make a general recommendation where a panel concludes that a measure is inconsistent with the current Agreement, i.e. a panel shall recommend that the Member concerned brings the measure into conformity with the General Agreement. He said that the Committee was well aware of the United States' fundamental objections to specific retroactive remedies. The task of a panel was to assist the Committee in determining if there had been a violation of the Agreement. It was not their job to provide technical assistance or advice on how parties should meet their obligations. Specific remedies were not within the ambit of a panel's expertise. The expertise of panels was in interpreting the provisions of the General Agreement, or Agreements negotiated under the auspices of the GATT, and determining whether a country's legislation was applied in a manner consistent with its obligations under the Agreement. The panels were not experts in legal systems and jurisprudence of the parties. It was not appropriate for a panel to mandate precisely what a sovereign government must do to comply with its international obligations.

9. The representative of the United States said that a retroactive remedy such as a recommendation to refund the duties suggested that a GATT dispute settlement proceeding was a private right of action for the exporters and importers who paid the duty. However, this was not the purpose of the GATT dispute settlement system. A party to an Agreement was entitled to assume that it was acting consistently with its international obligations until a measure was successfully challenged. Recommendation of a retroactive remedy flew in the face of this entitlement. Also, retroactive remedies provided favourable treatment to complainants in the anti-dumping area that was not available to complainants of numerous other GATT fora. The harm done to exporters was no less where, for example, a subsidy or import licensing scheme was found to be inconsistent with the GATT, or due to a measure that was inconsistent with Article I or Article III of the GATT. Yet, in those cases no panel had ever recommended that benefits conferred by the subsidy be given back, or that the imports shut out by the licensing scheme be exported to the offending country. The standard and appropriate remedy recommended by GATT panels was that a country should bring its measure into conformity with its international obligations within a reasonable period of time following the issuance of panel's decision. The panel that provided a general recommendation appropriately allowed the country with the GATT inconsistency to decide how best to bring itself into conformity with the Agreement. That country was the best possible judge in this area because it best understood its domestic legal system. The country would know whether a change in law, a regulation or an administrative order presented the most appropriate solution to a certain GATT inconsistency.

10. Finally, the representative of the United States objected to the Panel taking a step further in its specific remedy by enumerating measures that the United States could not take in order to comply with the Agreement. The Panel had specifically directed that the United States could not bring itself into conformity with the requirements of Article 5:1 of the Agreement by re-examination of the case. It had said that a re-examination could only take place in the context of a new initiation meeting the requirements of the Agreement. This peremptory directive from the Panel was completely without precedent in the GATT, particularly given that neither Mexico nor the United States ever requested the Panel to consider these hypothetical responses. The United States did not take lightly the step of blocking the adoption of the Panel Report. It had a strong commitment to the dispute settlement process in this and other Committees. It was however impossible for the United States to take any other course of action when the Panel Report raised such a strong concern, particularly the specific retroactive remedy advocated by the Panel.

11. The representative of Japan supported the adoption of the Panel Report.

12. The representative of Canada expressed strong support for Mexico's request for the adoption of the Panel Report. He regretted that the United States was not in a position to adopt the Report. He disagreed with the United States with respect to their views regarding the Panel Report. He said that issues on which the Panel pronounced were important and were heavily negotiated in the Uruguay Round. The findings of this Panel with respect to the action that must be taken in order for authorities to satisfy themselves that support had in fact been given by the industry affected, and the reasoning used by the Panel in this case were relevant under the new Agreements as well as under the existing Agreements.

13. The representative of Canada commented on the United States' argument relating to the doctrine of exhaustion of administrative remedies that the private parties were deprived of their rights under the Agreement as a result of the Panel's decision on this point. He said that the negotiations on the Agreement were with the Governments and not with private parties. Canada was not aware that rights of action was being given to the private parties in this context. He also noted that this point raised by the representative of the United States was fundamentally inconsistent with the point made later in his statement that the remedy provided by the Panel was inappropriate and that there was concern about the Panel's reasoning, because the GATT dispute settlement did not give private rights of action.

14. The representative of Hong Kong confirmed that his delegation continued to support the adoption of the Panel Report by the Committee, and continued to be in full agreement with the Panel findings, particularly in the area of standing in regional industry and the specific remedy that the Panel had recommended. Regarding the four objections raised by the United States, he agreed with the comments by the Canadian delegation, and expressed disagreement with the United States' views. He emphasized the importance of the dispute settlement mechanism, and said that as the WTO Agreements will enter into force next year, his delegation would like the Committee to aim to adopt all the outstanding Panel Reports to this Committee before the end of this year and to implement the panel recommendations contained thereof.

15. The representative of New Zealand reiterated his delegation's support for the adoption of the Panel Report and agreed with the representative of Canada with regard to the latter's response to the points raised by the United States.

16. The representative of Brazil expressed support for the adoption of the Panel Report. His delegation was in agreement with the findings of the Panel and did not subscribe to the United States' objections. He agreed with the statement of the representative of Canada. He said that the specific recommendations were very relevant to this case. He noted that in one previous dispute that Brazil had with the United States, Brazil had heard a different view from the North American delegations. They had said that they could not implement a certain panel Report specifically because there was no specific recommendation. This was contradictory to the position that had been expressed by the delegation of the United States.

17. The representative of EC sympathized with the United States' position concerning the remedy, in particular the injunction made to the United States to revoke its measure to reimburse the duties retroactively and not to initiate a new investigation. He said that it would have been sufficient for the Panel to note that the United States should bring their legislation in conformity, leaving the necessary flexibility to the parties to reach a mutually satisfactory solution. He hoped that the bilateral discussions will succeed on this matter.

18. The representative of Australia shared the concerns raised by the United States regarding the inappropriateness of Panels to make specific remedies. He opposed the practice in a number of Panel Reports under the Agreement of going beyond making recommendations to the Committees about the conformity of measures by making recommendations on remedies, particularly in respect of refunding

monies collected before the adoption of the Panel report, i.e. collected in good faith before the Committee agrees that there is an inconsistency with the Agreement. The representative of Australia did not regard this as being the proper function of panels. He also noted that under the WTO, specifically Article 19 of the Dispute Settlement Understanding, it was clear that panels will at most be able to make suggestions about the way in which a member could implement the recommendation of bringing a measure into conformity with an Agreement. He suggested that a sensible way of approaching the issue would be for the Committee to separate the conclusion of inconsistency in paragraph 6.1 of the Panel Report from the recommendations of the Panel on revoking of the anti-dumping order and reimbursing duties deposited (paragraph 6.2 of the Panel Report). It was in the hands of the Committee to do whatever it would like to do with the Panel's Report to the Committee. He proposed that the Committee adopt the Panel's conclusion in paragraph 6.1 and recommend to the United States that it brings its anti-dumping order into conformity with the Agreement. This would represent what would have been more appropriate for the Panel to have recommended in the first place.

19. The representative of Korea said that his delegation supported the adoption of the Panel Report.

20. The representative of the United States disagreed with the Canadian point regarding inconsistency of his arguments. He said that the bulk of the content of the Agreement was about setting out due process for the parties that had a stake in the case, including those charged with dumping and those defending, to present their case to be heard and have a fair and impartial hearing. This was not the same as the right of private action, the point emphasised by the United States could be illustrated by, for example, if the United States established under its domestic process that a complaining party could raise arguments that the defending party had no opportunity to respond to. The issue was not the private right of action. It went to the heart of due process that was provided for in the Agreement for interested parties. Therefore, there was no inconsistency in his arguments.

21. The representative of the United States said that his delegation was still engaged in consultations with the delegation of Mexico, and hoped that a mutually satisfactory solution would be found to this matter.

22. The representative of Mexico said that he could understand that the United States did not like the Panel Report. It was rare indeed for a country to be in favour of a result going against it. Mexico had no intention of reopening a Panel or to give unilateral interpretation on the result of the Uruguay Round as concerns anti-dumping. The Panel had already heard the arguments of Mexico, including those related to the objections raised by the United States, and had come to definitive conclusions. The interpretation of the Uruguay Round will be done by the members of the WTO and not by the United States. Mexico did not share the ideas expressed by Australia during this meeting. Mexico was always open to dialogue and negotiation and thus welcomed the second part of the second statement by the United States. Unfortunately, the lack of concrete results and the fact that the position for the Mexican exporters had worsened during the course of these negotiations obliged Mexico to doubt the feasibility of reaching a mutually satisfactory agreement which will settle this problem in a definitive manner. He expressed deep disappointment on the lack of consensus to adopt the Panel Report.

23. The Chairman noted that it had been useful to hear from the delegation of Mexico on the updating of the situation in this dispute. He said that the delegation of the United States was very constructive in indicating their concerns. He also took note of the interventions and of a large measure of support for the adoption of the Panel Report, and said that action be taken in this case for reasons of credibility of the dispute settlement system. He noted also some reservations which were mentioned by other delegates and the suggestion put forward by Australia.

24. The delegate of Hong Kong said that his delegation did not favour any proposal which attached conditions or qualifications to the adoption of Panel Reports. This point had already been intensively

debated during the discussion of the Norwegian Salmon Panel Report in April 1994, where several delegations raised concerns and reservations on adopting that Report with any conditions attached thereto.

25. The Chairman said that he would conduct informal consultations with the Parties to the dispute in an effort to seek a mutually satisfactory solution to this matter. The Committee took note of the statements made and decided to revert to this matter at a future meeting, special or regular.

(b) Communication from the Chairman of the panel on "Canada - Anti-Dumping Duties on Imports of Beer from the United States"

26. The Chairman recalled that at its special meeting of 9 July 1992 the Committee had established, under Article 15:5 of the Agreement, a Panel on the dispute regarding Canada's anti-dumping duties on imports of beer from the United States. He informed the Committee that in a letter dated 17 May 1994, the Chairman of that Panel had communicated to him the status of the Panel's work so that he could inform the Committee "orally when it next meets".

27. The Chairman said that the relevant information in the communication from the Chairman of the Panel was,

> "the Panel has completed its work and submitted its report to the parties on 15 February 1994. The parties subsequently requested a delay in the circulation of the report to the Committee.
>
> I have now received a joint letter from the parties indicating that they have agreed on the basis for a mutually satisfactory solution to the dispute, which is expected to be finalized in the coming months. The letter further states that in the light of this development, the parties wish to suspend the proceedings of the panel, without the issuance of a report, until such finalization occurs, at which time the parties will notify the Panel. Therefore, I would like to inform you that the Panel has decided not to submit any report to the Committee pending further notification from the parties."

28. The Chairman said that he had not received any communication regarding further notification to the Panel from the parties.

29. The Committee took note of the communication from the Chairman of the Panel on Canada's anti-dumping duties on imports of beer from the United States and the statement made by the Chairman.