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Committee on Anti-Dumping Practices

MINUTES OF THE MEETING
HELD ON 18 DECEMBER 1996

Chairman: Mr. O. Lundby (Norway)

1. The Committee on Anti-Dumping Practices ("the Committee") held a special meeting on 18 December 1996, called at the request of Mexico in accordance with the Committee's decision ADP/132.
2. The Chairman noted that, as set forth in GATT/AIR/3721 (6 December 1996), Mexico had requested this special meeting to discuss the Report of the Panel in the dispute regarding the United States' imposition of anti-dumping duties on gray portland cement and cement clinker from Mexico. The delegation of Japan, noting that a special meeting had been called, also requested that the Committee 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 Mexico noted that his government had asked for this meeting of the Committee to request yet again that the Report of the Panel in the dispute regarding the United States' imposition of anti-dumping duties on gray portland cement and cement clinker from Mexico be adopted. As Parties would recall, the Panel had recommended that the United States revoke the anti-dumping measures and refund the duties collected and deposited. Mexico did not believe it necessary to repeat the elements underlying the Panel's decision. Nonetheless, it was important to note that, in Mexico's view, the investigation was biased from the outset, and during the course of the investigation, various provisions of the Tokyo Round were violated.
4. Despite Mexico's efforts to arrive at a mutually acceptable solution, consultations held at all levels on this subject did not lead to a solution that took into account the interests of the Mexican exporters. Despite Mexico's good faith during the four years since this dispute began, Mexico could only note that the Party in the right, which had fulfilled all its obligations under the Tokyo Round, and which the Panel had found was in the right, not only had not received satisfaction of its legitimate demands, but rather, had seen that the Party which had violated its obligations under the Tokyo Round Code, that is to say the United States, had increased the anti-dumping duties in the administrative reviews which had been carried out.
5. In view of Mexico's statement, and of the fact that this was probably the last opportunity Mexico would have to do so, Mexico requested the adoption of the Panel Report, so that the anti-dumping measures would be revoked and the duties collected and deposited refunded to the exporters or importers concerned.
6. The delegate of the United States noted that the US position had been made clear in a number of meetings of the Committee, and confirmed that the position had not changed. Nevertheless, as this was the last meeting of the Tokyo Round Committee, the US believed that it would be helpful to other Parties to recap the essential elements of its position.

7. In the United States' view, the Panel's decision diverged in three key respects from well-established GATT law and practice. For these reasons, the US still could not agree to the adoption of this Panel Report.

8. The United States first objected to the Panel's decision to permit Mexico to raise questions before the Panel regarding the initiation requirements of the Anti-Dumping Code. The Government of Mexico and Mexican cement exporters had the right and opportunity to raise the same issues during the administrative proceedings conducted by the Commerce Department and the ITC, but had chosen not to do so. In permitting the initiation issue to be raised for the first time in a Panel proceeding, the Panel ignored key principles of the Anti-Dumping Code, as well as fundamental principles of jurisprudence.

9. The United States' second objection to the Panel Report related to its finding that the United States did not comply with Code requirements because its "authorities did not satisfy themselves prior to initiation that the petition was submitted on behalf of producers of all or almost all of the production in the regional market". In the United States' view, the text of the Code does not impose such requirements. On the other hand, the WTO Anti-Dumping and Subsidies Agreements clearly impose an 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 had amended its anti-dumping and countervailing duty laws accordingly to incorporate this new obligation. Nevertheless, while this problem may be resolved for the future, the US could not agree to adoption of a Report that added to the rights or obligations of the Parties to a previous agreement, namely the Tokyo Round Anti-Dumping Code.

10. The Panel's third error was in directing the United States to revoke its anti-dumping order on Mexican cement and cement clinker and to reimburse Mexico for all duties collected under the order. This specific, retroactive remedy recommendation went far beyond the bounds of authority traditionally respected by GATT panels. The standard and appropriate remedy to be recommended by panels is that a country should bring its measures into conformity with its international obligations within a reasonable period of time following the issuance of a panel's decision. The new Dispute Settlement Understanding recognizes the problems inherent in making specific recommendations by instructing panels to make the following general recommendation: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement".

11. The United States did not take lightly blocking the adoption of a Panel Report. The United States had strong commitment to the dispute settlement process in the multilateral trading system. It was, however, impossible for the US to take any other course but to block where the Panel Report raised such strong concerns - particularly the specific, retroactive remedy.

12. The delegates of Japan and Hong Kong supported Mexico's request for adoption. Japan further noted the view that all Panel Reports presented to the Parties to the Agreement should be adopted.

13. The delegate of Mexico stated, for the record, that Mexico reserved its rights under the WTO with regard to the unjustified application of the anti-dumping duties in question. In Mexico's view, although the United States might object to adoption of the Panel Report, this abuse of the weaknesses and deficiencies of the dispute settlement procedure rules applicable to this case did not mean that the investigation was necessarily legitimate. The investigation conducted by the United States against imports of gray portland cement and cement clinker from Mexico suffered from serious procedural and substantive errors from the outset. These errors would not be resolved or legitimized by the objections of the United States to adoption of the Panel Report.

14. The Committee took note of the statements made.

15. The delegate of Japan observed that his government had also requested this meeting in order to propose adoption of the report of the audio-cassettes Panel.

16. Japan believed that the Panel's Report had made significant progress in stating rules on the issue of symmetry that were both clear and fair in their meaning. The Committee would be failing in its responsibilities if it simply discarded the Panel's contribution to the elucidation of this complex issue.

17. At the last meeting, the EC had stated that it could not agree to the adoption of the Panel Report as parts of it were unfavourable to the EC: the part regarding "asymmetry", in particular, was unsatisfactory, and the underlying reasoning of the Report was problematic. Judging by these remarks, Japan suspected that, despite the Panel's conclusions and the amendment of the EC's legislation, the EC still failed to make due allowance for differences in indirect costs and profits, and thereby failed to achieve a fair comparison. Japan feared that the EC's amendment of the regulation was deceptive, giving only the appearance of a reform, and consequently did not rectify the EC's unfair practices in the calculation of dumping margins.

18. It seemed to Japan that no one would find any problems with the Panel Report if he sincerely wanted to achieve a fair comparison, taking into account the differences in indirect costs and profits. The part of the Report that dealt with these issues could appear unsatisfactory only to those who prefer to impose anti-dumping duties with as much ease as possible, not caring whether the rules are distorted, or whether exporters are bullied, thus sacrificing the interest of consumers to those of their domestic industries.

19. It should be realized, particularly by the member States of the EC, that the time had passed when countries could be divided between those which used anti-dumping measures and those whose exporters were the targets of such measures. Countries that had used anti-dumping measures against imports were finding their own exports subjected to such measures in other countries. Although the EC was one of the most frequent users of anti-dumping measures, it was at the same time, the Member on whose exports measures were most frequently imposed. Therefore, its exporters could be the most frequent victims of such action by other countries. Under these circumstances, it became more important to have rules that were fair and clearly stated, and less important to define exactly where the balance was struck on matters of detail between the interests of exporting and domestic industries. In this context, the issue of symmetry ruled on in the Report was very important. It would do the reputation of the EC no good to be identified as the party responsible for blocking the Panel's contribution on this matter.

20. The delegate of Japan observed that anti-dumping measures are an exception to the principle of the most-favoured-nation treatment. Therefore, when imposing anti-dumping measures, Parties should take all possible steps to avoid abuses. As shown by recent economic studies, higher dumping margins have significant trade distorting effects. Consequently, Members need to be very careful when determining dumping margins. Needless to say, exaggerated dumping margins are harmful, not only to exporters, but also to consumers and users in importing countries. When unfair anti-dumping measures are used to protect specific industries, the consumer's trust in the government is betrayed. Therefore, not only exporters but also innocent consumers and users in the European markets will suffer from the continuation of the EC's unfair practices in calculating dumping margins.

21. The EC and Japan had consulted intensively since the Report was issued, and had received helpful advice from the Chairman and the Secretariat. Japan regretted that an agreement had not proved possible. Japan had tried to ease the fears of the EC over the possible implications of the Report, but unfortunately the EC had shown no inclination to rectify its unfair practices regarding fair comparison.

Although the consultations did not end successfully, Japan urged the EC to take this final opportunity to withdraw its opposition to the adoption of the Panel Report.

22. The EC regularly presented itself as an enthusiastic supporter of the GATT/WTO framework, and in particular of its dispute settlement mechanism. At the last meeting the EC's representative had again repeated this claim. In its Report, the Panel had made significant progress in stating rules on the issue of symmetry that were both fair and clear in their meaning. The Report was definitely worth adoption. If the EC were a real supporter of the dispute settlement mechanism, it would immediately withdraw its opposition. If the EC did not agree to the adoption of the report, Japan could not help but conclude that the reality of the EC in the anti-dumping field consisted of unfair trade rules and practices, the bullying of exporters, and the disregard of panel reports.

23. Japan called on the EC to reverse this position by removing its opposition to adoption of the Panel Report. Japan requested the Committee to adopt the panel report.

24. The delegates of Mexico, Hong Kong, Brazil, and Korea supported adoption of the report. Brazil further noted its support, in principle, for adoption of all Panel Reports.

25. The delegate of the EC noted that the Report had been discussed in the Committee on several occasions. The position of the EC had not changed since those earlier meetings. He would therefore not elaborate on that position, but would refer to what had been said in those meetings. In summary, the EC had taken into consideration its commitment to principles of dispute settlement, and had also taken into consideration the fact that the Panel had found in its favour in a considerable number of its findings. The EC had seriously considered supporting adoption of the Panel Report. However, detailed analysis of the reasoning underlying the Panel's findings led it to conclude that it could not support adoption of the Report. The Report contained certain ambiguous elements which could lead to varying, and sometimes contradictory, interpretations. This was very sensitive, because these aspects referred to the very crux of investigations, the calculation of dumping margins. The EC agreed with Japan's statement concerning the need for fair and clear cut rules in the area of anti-dumping. However, it seemed to the EC that the reasoning of the Panel did not go in that direction. Thus, the EC could not support adoption of the Panel Report. In the EC's view, the reasoning of the Panel was not clear, but was ambiguous, and could lead to diverging results with regard to the calculation of dumping margins, so that adoption of the Report would further confuse matters, rather than leading to the adoption of fair and clear rules.

26. As the EC had said in previous meetings, there was one important part of the Report with which the Community did agree, concerning the inconsistency between Article 2.6 of the Code and the EC's legislation, which had contained an exhaustive list of factors which could lead to adjustments. An amendment to its basic regulation in this regard had been adopted by the Council of Ministers of the EC and was published on 6 December 1996. The legislation would shortly be notified to the WTO.

27. Moreover, as the EC had noted at the last meeting, the measures in question before the panel were no longer in effect. In addition, consultations had been held with Japan in good faith, seeking ways in which the EC's concerns regarding possible interpretations of the reasoning in the Report could be resolved, but had been unsuccessful in reaching agreement. Other means had been considered which would enable the EC to support adoption, including an interpretative statement on the points the EC had raised, again without success.

28. Regarding Japan's more general statements regarding the EC's anti-dumping practice, the EC did not believe such comments were the purpose of the meeting, which was solely to consider the Panel's Report. This was not an appropriate time to look into the EC's anti-dumping practices in general. The EC did not agree with the statement that its practices were not consistent with the Code.

29. Although the EC regretted that it was not in a position to support adoption of the Report, it had taken a constructive approach, had taken the necessary measures to solve the inconsistency between the Code and the EC legislation, and as noted, the measures underlying the dispute were no longer in effect.

30. The delegate of Japan stated that the EC's explanation concerning ambiguities in the Panel Report as a justification for non-adoption of the Panel Report was not convincing to Japan. In Japan's views, the EC's concerns were groundless, and did not justify blocking adoption of the Panel Report.

31. Moreover, regarding the duties themselves, the delegate of Japan noted that they had expired in May 1996 under the EC's sunset clause. However, the point was that the EC had imposed and collected anti-dumping duties on the basis of a calculation which the Panel had condemned. The expiry of the duties could not justify opposing adoption.

32. As for the amendment of the EC's legislation, it was necessary to carefully analyze the extent to which the EC had respected the conclusions of the Panel. Japan suspected that despite the Panel's conclusions and the amendment of the EC's legislation, the EC failed to make due allowance for differences in indirect costs and profits and thereby failed to achieve a fair comparison in cases where importers and exporters were related. Japan feared that the EC's amendment of its regulation was deceptive, giving only the appearance of reform, and did not rectify the EC's unfair practices in the calculation of dumping margins. Furthermore, to accept implementation of the Panel's recommendations while at the same time opposing adoption of the Report seemed contradictory.

33. The delegate of the EC commented that, with regard to whether the amendment of the EC legislation sufficed to enable a fair comparison, the panel had found that the EC's legislation imposed an exhaustive and thus limited list of factors for which allowance could be made. The amendment eliminated this characteristic of the EC legislation, and therefore made it possible for any adjustment for which there was sufficient proof to be made. He asked that the Japanese delegation examine carefully and in detail the EC's practices in the future before making value judgments as to whether the amendment of the EC's legislation was sufficient to bring it into conformity with the requirement for fair comparison as set out in the Code.

34. The delegate of Japan expressed regret that the opposition of the EC had prevented adoption of the Report. Japan still believed that the Report was worth adoption, and had been encouraged in that belief by the support repeatedly expressed by other Parties. Japan urged the EC to behave fairly in its anti-dumping practices despite its rejection of the Panel report. Of course, all Parties needed to watch carefully the extent to which the EC implemented the recommendations of the Panel, and in particular to analyze how the recent amendment would be applied. He noted that the amendments would have to be notified to the WTO Anti-Dumping Committee for review. If the EC continued its unfair anti-dumping practices, Japan would be ready to consider necessary measures, including panel proceedings under the WTO, which would have the advantage of benefitting from the more effective dispute settlement mechanism. In this respect, Japan reserved all its right under the WTO.

35. The Committee took note of the statements made.

36. The final meeting of the Tokyo Round Committee on Anti-Dumping Practices was adjourned.