WORLD TRADE ORGANIZATION

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Dispute Settlement Body
16 November 2012

MINUTES OF MEETING

Held in the Centre William Rappard
on 16 November 2012

Chairman: Mr. Shahid Bashir (Pakistan)

1. China – Countervailing and anti-dumping duties on grain oriented flat-rolled electrical steel from the United States

(a) Report of the Appellate Body (WT/DS414/AB/R) and Report of the Panel (WT/DS414/R and WT/DS414/R/Add.1)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS414/7 transmitting the Appellate Body Report on: "China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States", which had been circulated on 18 October 2012 in document WT/DS414/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He noted that, as Members were aware, 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 thanked the Panel, the Appellate Body, and the Secretariat assisting them for their hard work in this dispute. Grain oriented flat-rolled electrical steel (GOES) was a high-tech and high-value magnetic specialty steel. The countervailing duties (CVD) and anti-dumping (AD) duties that China maintained on US exports of GOES unfairly restricted US trade to this important market. In fact, since China initiated its investigation, US exports of GOES to China had fallen to virtually nothing. Both the Panel and the Appellate Body in this dispute had found serious and pervasive deficiencies with China's measures. The United States wished to draw attention to several key findings included in the Reports. First, the Panel had found that China's initiation of the CVD investigation into several purported subsidies was inconsistent with Article 11.3 of the SCM Agreement[1], concluding that an objective investigating authority would not have initiated an investigation in the first place based on the petition's unsupported allegations. Second, the Panel had found that China failed to require non-confidential summaries of allegedly confidential information in breach of Article 12.4.1 of the SCM Agreement, and Article 6.5.1 of the

[1] Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

Anti-Dumping Agreement[2], a failure that had prevented the United States and US companies from gaining a reasonable understanding of the substance of the information.

3. Third, the Panel had found that China breached Article 12.7 of the SCM Agreement because there was no factual basis for its determination regarding the utilization rate of certain programs. In fact, China's determination had actually been contrary to facts that were on the record. Fourth, the Panel had found that China breached numerous provisions of the SCM and Anti-Dumping Agreements by improperly applying duties to other US exporters/producers of GOES based on facts available. China had compounded the error by failing to disclose the essential facts, and failing to explain the findings and conclusions that led to this result. Fifth, the Panel had found that China's price effects analysis in its injury determination underlying both its CVD and AD investigations was fundamentally flawed. Among the numerous deficiencies that had been cited by the Panel were: (a) China's failure to disclose essential facts supporting the analysis; (b) China's failure to base this analysis on positive evidence; (c) China's failure to engage in an objective examination of the evidence; and (d) China's failure to offer an adequate explanation for its price effects findings. Sixth, and finally, the Panel had found that China's causation analysis in its injury determination contained the same defects as its price effects analysis.

4. On appeal, China had only challenged the Panel's price effects findings. The Appellate Body had fully rejected China's claims and had upheld the findings of the Panel. In particular, the Appellate Body had upheld the Panel's findings that China's price effects analysis was flawed, that China had failed to disclose essential facts, and that China had failed to explain its determination. The United States was of the view that Members would agree that those were serious flaws, which had deprived respondents of the opportunity to adequately defend their interests. It was striking that China's measures were based on such pervasive errors and deficiencies. Furthermore, the problems that had been identified in the Reports were not confined to the particular anti-dumping/countervailing duties investigations on US GOES that were at issue in this dispute, but had been repeated in other investigations, several of which were also subject to WTO dispute settlement. In conclusion, the United States was pleased to propose that the DSB adopt these important Reports. The United States looked forward to action by China to address the findings in this dispute and more broadly to ensure that all of the anti-dumping and countervailing investigations that it conducted comported with its obligations.

5. The representative of China said that her country thanked the Appellate Body, the Panel and the Secretariat for the considerable efforts devoted to this dispute. China understood that the parties to this dispute had different interpretations of certain parts of the Appellate Body and Panel Reports, and appreciated the opportunity to express views on the Reports at the present meeting. At the outset, China noted that the anti-dumping duty margins determined by the Ministry of Commerce of the People's Republic of China (MOFCOM), China's investigating authority, had been upheld, and the Panel had agreed that MOFCOM properly relied upon "facts available" to determine the subsidy margins. In other words, the US exporters were selling to China on an unfair basis, and MOFCOM had properly found both dumping margins and subsidy margins.

6. With regard to the injury issues, China appreciated that the Appellate Body Report had clarified, for all Members, certain issues concerning an authority's findings of price effects. The Anti-Dumping Agreement and the SCM Agreement provided only a general blueprint as to how authorities should identify the existence of adverse price effects in the relevant market. In that respect, Members had divergent interpretations and applications of the same provisions. China understood and respected that the Appellate Body had to provide further clarification regarding the meaning of those key provisions. In doing so, China agreed with the Appellate Body's recognition in this proceeding

[2] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement").

that the Agreements did not compel the use of any single methodology for a finding of adverse price effects. More specifically, China agreed with the Appellate Body's confirmation that, although a price undercutting analysis was one possible tool in the price effects analysis, it was not a requirement in every case. In that regard, the Appellate Body had properly confirmed that authorities must be permitted to undertake their investigations in a manner that was responsive to the particular facts at issue.

7. However, China had misgivings regarding other aspects of the Appellate Body's review of the Panel Report. As a general matter, China believed that it was important for the Appellate Body to pay particular attention to the findings of the authority, and how the Panel had viewed those findings. Ultimately, it was the findings of the authority that were at issue in a dispute settlement proceeding. If a panel misconstrued those findings and resolved ambiguities against the authority, the Appellate Body had an obligation to look beyond the Panel Report. In this proceeding, the Panel had essentially redrafted the language of MOFCOM's price effects finding, criticizing MOFCOM's comparison of prices even though MOFCOM had never made any findings of price undercutting. The Appellate Body, like the Panel, should base its findings and conclusions on the determination of the authority, not on a characterization of that determination. In conclusion, although China may not agree with all the findings of the Appellate Body and the Panel, as always, China respected the conclusions of the Appellate Body and the Panel, and would make an effort to work towards implementing those findings in a WTO-consistent manner.

8. The representative of the Kingdom of Saudi Arabia said that his country thanked the Panel, the Appellate Body and the Secretariat for their work in this dispute. Saudi Arabia had joined as a third party in this dispute for systemic reasons. Like other WTO Members, Saudi Arabia had a strong interest in maintaining a balanced interpretation of the Anti-Dumping Agreement and the SCM Agreement. Saudi Arabia had not taken the floor to comment on the substantive issues that were in dispute either before the Panel or the Appellate Body, nor did it intend to comment on every matter addressed in the two Reports. Instead, Saudi Arabia wished to comment briefly on three key interpretive issues arising from the Appellate Body's decision. First, Saudi Arabia wished to comment on the Appellate Body's interpretation of Articles 3.2 of the Anti-Dumping Agreement and the parallel provision of Article 15.2 of the SCM Agreement, both of which related to the determination of injury. Those provisions were critical, as they helped to define the scope of the obligations under which an investigating authority must act in order to make a WTO-consistent injury determination.

9. Saudi Arabia agreed with the Appellate Body that "an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices". This was consistent with Saudi Arabia's position during the appeal. Saudi Arabia agreed with the Panel that investigating authorities must consider whether price depression and price suppression were an "effect" of the imports. Saudi Arabia was pleased that the Panel's ruling had been upheld, and agreed with the Appellate Body that the outcome of this inquiry would enable the authority to have a "meaningful basis for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry".

10. Second, Saudi Arabia also agreed with the Appellate Body's interpretations of Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement related to the "essential facts under consideration". The Appellate Body had interpreted "essential facts" to refer to "those facts that were significant in the process of reaching a decision as to whether or not to apply definitive measures". Saudi Arabia shared that view and had argued that those provisions must permit interested parties to defend fully their interests by requiring authorities to disclose all record evidence relating to the elements that must exist for the application of definitive measures. Therefore, Saudi Arabia also agreed with the Appellate Body's view that disclosing the essential facts under consideration was "paramount for ensuring the ability of the parties concerned to defend their interests".

11. Third, Saudi Arabia also shared the Appellate Body's interpretive approach to Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement, regarding the disclosure in the public notice of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures...". Saudi Arabia agreed with the Appellate Body that those two provisions "capture the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties". Saudi Arabia also shared the Appellate Body's position that "all relevant information on the matters of fact" meant "those facts that are required to understand an investigating authority's price effects examination leading to the imposition of final measures…". Some of those issues were technical in nature but the broader principles that they raised were far from technical. The issues highlighted by Saudi Arabia at the present meeting were directed towards the broader objective of maintaining a proper balance between the efficient administration of trade remedy laws and the requirement that redress may be provided only against unfairly traded imports. Saudi Arabia considered that the Appellate Body's rulings in this dispute would help maintain the balance that was intended when the Anti-Dumping and SCM Agreements had been negotiated.

12. The representative of China said that, in its previous statement, her delegation had made comments only on the key points with regard to this dispute. However, since Saudi Arabia had expressed some concerns about other aspects, China wished to make further comments. With regard to non-confidential summary issue and the "all others" rate issue, China had some concerns, but recognized that the Panel had made further clarification with regard to the Anti-Dumping Agreement and the SCM Agreement, which gave clearer guidance for Members to implement those provisions. However, China would further discuss those provisions with other Members, in a detailed manner, at another occasion. With respect to the US remark that China maintained some measures in other investigations, she wished to note that it was China's constant position that Members should refrain from abusing trade remedy measures, which impeded free trade. Investigations by the Chinese authority had been based on the application of domestic industry, and any investigation would not have been initiated unless the authority had reviewed the application and had determined that an investigation was justified. China, like other Members, had proceeded with the investigations in accordance with the discretion permitted by the Anti-Dumping Agreement and the SCM Agreement. With respect to the initiation of the countervailing investigation, she said that China had to admit that China learned from other Members, including the United States. This was the first countervailing investigation initiated by the Chinese authority. China had initiated investigations into certain subsidy programmes, among others, which were petitioned by the domestic industry. It had eventually determined that those programmes were not countervailable and had precluded the authority from calculating the subsidy rate. As a general matter, China agreed with the Panel that the threshold of initiation as required by the SCM Agreement should be complied with and the initiation should be justified with sufficient evidence provided in the application.

13. The representative of the United States said that it may already be quite apparent but the United States wished to add that it did not share many of China's characterizations of the Reports that would be adopted at the present meeting. The United States wished to simply invite Members to take a look at the Reports. The United States was of the view that the Reports confirmed the understanding that it had advocated at the present meeting.

14. The DSB took note of the statements, and adopted the Appellate Body Report contained in document WT/DS414/AB/R and the Panel Report contained in document WT/DS414/R and Add.1, as upheld by the Appellate Body Report.