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Dispute Settlement Body
12 February 2016

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 12 FEBRUARY 2016

Chairman: Mr. Harald Neple (Norway)

1 EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA: RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

A. Report of the Appellate Body (WT/DS397/AB/RW and Add.1) and Report of the Panel (WT/DS397/RW and Add.1)

1.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS397/24 transmitting the Appellate Body Report in the dispute: "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China: Recourse to Article 21.5 of the DSU by China", which had been circulated on 18 January 2016 in document WT/DS397/AB/RW and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. 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".

1.2. The representative of China said that his country thanked the Appellate Body members, the compliance Panel and the respective Secretariats for their work in these proceedings. China highly appreciated the time and effort they had dedicated to resolving this dispute. China also thanked the EU and the third parties for their constructive participation throughout the compliance proceedings. This was an important moment for China. After nearly seven years of WTO litigation, this latest ruling of the Appellate Body left no doubt whatsoever that the EU's anti-dumping measures against Chinese imports of fasteners continued to violate the EU's WTO obligations. As Members would recall in 2009, China had challenged the original anti-dumping measures imposed by the EU. In 2011, the Appellate Body had found that those measures violated the GATT 1994 and the Anti-Dumping Agreement. Yet, despite this clear ruling, the EU had failed to bring its measures into compliance. In its Report of 18 January 2016, the Appellate Body had confirmed that the EU had failed to comply with the DSB's recommendations and rulings and continued to violate its obligations under the Anti-Dumping Agreement. China was pleased that the compliance Panel had found in favour of many of its claims, and that the Appellate Body had not only upheld all of these findings but that it had also agreed with China's cross-appeal and had reversed several of the Panel's initial findings which were in favour of the EU position.

1.3. For China, the outcome of this dispute was of great significance not only because of its economic impact for the specific sector concerned but also because of its systemic implications. In particular, China welcomed the Appellate Body's findings concerning the transparency and due process obligations that must be observed by an investigating authority while carrying out anti-dumping investigations. In that regard, China noted that the Appellate Body had upheld the Panel's conclusion that the EU had acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by according confidential treatment to the information concerning the analogue country

producer's products without making an objective assessment of the "good cause" allegedly justifying such treatment. The Appellate Body had found that it was not for the Panel to conduct a *de novo* review of whether such information was confidential by nature or whether good cause had been shown by the analogue producer. The Appellate Body had also agreed with the Panel that by withholding this information, the EU acted inconsistently with Articles 6.4 and 6.2 of the Anti-Dumping Agreement. Notably, with regard to Article 6.4, the Appellate Body had confirmed that the information at issue was not to be treated as "confidential" because the EU accorded confidential treatment without following the requirements of Article 6.5. The Appellate Body had also reaffirmed that the "relevance" of information must be examined from the perspective of the interested party requesting to see that information. The Appellate Body had finally clarified that the information was "used" by the investigating authority if it related to a "required step" in the investigation, such as the calculation of dumping margins.

1.4. Furthermore, China welcomed the Appellate Body's decision to reverse the Panel's findings under Article 6.1.2 of the Anti-Dumping Agreement. That provision required that evidence presented in writing by one interested party was made available promptly to other interested parties participating in an investigation. According to the Appellate Body, although there was no evidence that the EU had formally recognized the analogue country producer as an "interested party" within the meaning of Article 6.11, the record of the investigation demonstrated that it effectively treated that producer as an interested party in the review investigation. As a consequence, the Appellate Body had reversed the Panel's finding and had concluded that the EU had acted inconsistently with Article 6.1.2 of the Anti-Dumping Agreement because it had failed to provide the Chinese producers with information concerning the products of the analogue country producer. Likewise, the Appellate Body had agreed with the Panel that the EU had acted inconsistently with its obligation under the last sentence of Article 2.4 of the Anti-Dumping Agreement because it had failed to provide Chinese producers with information regarding the characteristics of the analogue producer's fasteners that were used to determine normal values. The Appellate Body had considered that the Panel was correct in finding that the confidentiality of information did not annul the obligations under Article 2.4. In other words, even if the information was to be treated as confidential under Article 6.5 of the Anti-Dumping Agreement, the last sentence of Article 2.4 would still require the EU to make some disclosure in order to allow the interested parties to make informed decisions regarding possible adjustments.

1.5. China also welcomed the Appellate Body's decision to correct the Panel's findings under Article 2.4 of the Anti-Dumping Agreement concerning the obligation to make a fair comparison between export price and normal value, and to that end, to make adjustments for differences affecting price comparability. China had challenged the compliance Panel's findings because they were based on the assumption that the use of the analogue country methodology waived the investigating authority's obligation to make adjustments for differences in taxation and certain costs differences. Following China's reasoning, the Appellate Body had considered that an investigating authority had to determine whether the adjustment was warranted because it reflected a genuine difference affecting price comparability or whether it would lead to reintroducing costs or prices that were found to be distorted. By rejecting the Chinese producers' requests for adjustments for differences in taxation and costs, the EU had failed to make such an adequate assessment and had therefore acted inconsistently with Article 2.4 of the Anti-Dumping Agreement. That finding was of particular importance not only for this anti-dumping investigation, but for all investigations in which the analogue country methodology was used. Indeed, it confirmed that the use of the analogue country methodology could not, in itself, justify the refusal to account for comparative advantages existing in the exporting countries.

1.6. Finally, China welcomed the Appellate Body's confirmation of the Panel's findings under Article 2.4.2 and Articles 4.1 and 3.1 of the Anti-Dumping Agreement. With respect to Article 2.4.2, the Appellate Body had noted that the requirement to compare all comparable export transactions meant that such comparison should be made for the product under investigation as a whole, which in the present case included all exported models of fasteners. As a consequence, the Appellate Body had upheld the Panel's findings that the EU had acted inconsistently with Article 2.4.2 by excluding, in its dumping determinations, those models of Chinese fasteners that did not match any of the models on the normal value side. The other important finding concerned the definition of "domestic industry". In this regard, the Appellate Body had rejected the EU's arguments raised on appeal and had upheld the Panel's findings that the EU had violated Articles 4.1 and 3.1 of the Anti-Dumping Agreement. The Appellate Body had considered that, by relying on the original Notice of Initiation, which stated that only those producers willing to be

included in the injury sample would be considered as cooperating and thus part of the domestic industry, the Commission had introduced a material risk of distortion in the industry definition and in the injury determination. The Appellate Body had echoed the Panel's finding that injury determination, based on the data obtained from a wrongly defined domestic industry, was also inconsistent with Article 3.1 of the Anti-Dumping Agreement. These findings of the compliance Panel and the Appellate Body had fully vindicated China's position and were a welcome reminder that, with the exception of the special rules governing the normal value determination that were due to expire on 11 December 2016, Chinese exporters should not be treated differently from exporters from other WTO Members in EU anti-dumping investigations. Those findings therefore required that the EU modify the way it currently carried out anti-dumping investigations against imports from China. China was therefore pleased to request that the DSB adopt the Reports of the Appellate Body and of the compliance Panel, as modified by the Appellate Body. China invited the EU to take all the necessary steps to ensure prompt and full compliance with the findings and recommendations of the Appellate Body. In China's view, a necessary first step towards full compliance was for the EU to withdraw immediately its anti-dumping duties on fasteners from China. Given the significant lapse of time between the start of the original proceedings and the adoption of the final Appellate Body Report at the present meeting, China considered that any further delay by the EU in bringing its measures into conformity with its WTO obligations would be unacceptable.

1.7. The representative of the European Union said that the EU thanked the Appellate Body members, the Panelists and the Secretariat for their work on this dispute. The EU acknowledged the time and efforts dedicated to this dispute. The EU recalled that this dispute dated back to 2009, when China had requested consultations with the EU with regard to, *inter alia*, anti-dumping measures on fasteners from China. In 2011, the DSB had adopted the recommendations and rulings in this dispute. The EU had taken a number of measures to implement the DSB's recommendations and rulings in good faith and within the reasonable period of time agreed with China. Only some of those measures were disputed through the compliance proceedings at issue. In particular, the EU had conducted an extensive review of the anti-dumping measures on fasteners. In that review, several aspects of the measures had been re-assessed through, *inter alia,* an extensive dialogue with the interested parties, as required by the Appellate Body Report in the original proceedings. The investigating authority had disclosed additional information, it had made further distinctions regarding the product types and further adjustments, in order to ensure fair comparison; and it had re-assessed the definition of domestic industry. As a result of this review, all dumping margins that had been found in the original investigation were revised downwards significantly. This was accomplished before the expiry of the reasonable period of time. In the compliance Reports, the Panel and the Appellate Body had found that certain aspects of this review were inconsistent with the Anti-Dumping Agreement. The EU took note of those Reports and intended to ensure that the measures at issue fully complied with those findings as soon as possible.

1.8. Keeping that in mind, the EU wished to comment on some more systemic aspects of the Reports. The EU welcomed the confirmation by the Appellate Body that in case where the analogue country methodology was used, because the exporters had not shown that market economy conditions prevailed in their industry, the investigating authority was not required, under Article 2.4 of the Anti-Dumping Agreement, to adjust for differences in costs between the non-market economy (NME) producer and the analogue country producer where this would lead to adjusting back to the prices and costs in the NME industry that had been found to be distorted. The EU took note of the Appellate Body clarifications of the terms "all comparable export transactions" under Article 2.4.2 of the Anti-Dumping Agreement. The EU, however, wished to reiterate that, in this case, through the contested methodology, the EU investigating authority had strived to perform a fair and accurate comparison on the basis of objective elements at its disposal. The EU recalled the practical difficulties that may arise more generally in this respect, in investigations concerning non-market economies. Likewise, the EU took note of the findings relating to the status of analogue country producers in the investigation and to the treatment and disclosure of information that those producers provided. This was also a systemic point arising more generally in investigations concerning non-market economies. The EU was convinced that a proper balance must be struck, and indeed could be struck, between those findings and the need to protect the confidential information provided by analogue country producers. In any event, as it had previously stated, it was the EU's clear intention to ensure that the measures at issue fully complied with the findings of the Panel and of the Appellate Body so that this dispute could be resolved as soon as possible.

1.9. The representative of the United States said that his country had participated as a third-party in this dispute, and would like to offer the following observations on the Reports. This dispute involved a number of complex, fact-dependent issues involving a specific anti-dumping determination and related obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Many of the findings by the Panel and the Appellate Body depended on the specific facts at issue, and those findings may not have systemic implications. Some findings, however, would appear to have systemic implications. The United States viewed some of these findings as positive contributions to Members' understanding of the Anti-Dumping Agreement, while other findings raised concerns.

1.10. First, the Panel and Appellate Body Reports supported that under Article 6.4 of the Anti-Dumping Agreement, interested parties must be provided access to information necessary to defend their interests. As explained in the US third-party submissions, for an interested party to fully defend its interests in the course of an anti-dumping investigation, it was especially critical for the interested party to have access to information related to an investigating authority's calculation of normal value and any price comparisons that were conducted. In that regard, the United States noted that the Appellate Body had confirmed that the issue of whether information was "relevant" for purposes of Article 6.4 was to be determined from the perspective of the interested parties that had requested to see the information, not the perspective of the investigating authority.[1] The United States also noted the Appellate Body's finding that information "used" by the investigating authority, within the meaning of Article 6.4, was not necessarily limited to the narrow subset of data that the authority relied on in calculating the margin of dumping.[2]

1.11. Second, the Reports confirmed that when an authority used a normal average-to-average methodology, the authority could not omit the consideration of certain export transactions on the basis that it would be inconvenient to determine a corresponding normal value. In that regard, the United States appreciated the Appellate Body's observation that the Anti-Dumping Agreement supplied methodologies that an investigating authority could employ to take account of non-matching model types.[3] For example, authorities could make use of constructed value under Article 2.2, and difference in merchandise adjustments under Article 2.4.

1.12. Third, the Reports, in line with a number of prior reports, confirmed that for purposes of an injury determination, an authority may not select a biased sample of the domestic industry. In particular, the United States welcomed the Appellate Body's finding that an investigating authority acted inconsistently with Articles 3.1 and 4.1 where the authority defined the domestic industry on the basis of only those producers willing to be included in the injury sample.[4] Such an approach would tend to discourage healthier producers from responding to the authority's notice of initiation, thus making it more likely that weaker producers would be disproportionately represented among the producers that do respond.

1.13. Other findings in the Appellate Body Report raised concerns. First, the United States had concerns with the Appellate Body's interpretation and application of Article 2.4 of the Anti-Dumping Agreement. The United States recalled that Article 2.4 of the Anti-Dumping Agreement, by its plain text, concerned the authority's comparisons "between the export price and the normal value". In this dispute, China had disagreed with the authority's determination of normal value. China had chosen to raise these issues in the form of a claim under Article 2.4. The Panel had appropriately rejected China's claim. The Appellate Body, however, had reversed the Panel's finding. The United States had difficulty seeing how the Appellate Body's finding comported with the plain meaning of Article 2.4. Instead of applying Article 2.4 to issues of price comparability between the export price and normal value, the Appellate Body's analysis focused on, and ultimately found merit in, China's complaints regarding the normal value determined by the authority. Particularly given that the Anti-Dumping Agreement contained other provisions directly addressed to the methodology for determining normal value, the United States saw no basis in the text of the Anti-Dumping Agreement for a finding that Article 2.4 applied to the issues raised by China in this dispute. Second, the United States had concerns with the Appellate Body's interpretation of the term "interested party", as specifically defined in Article 6.11 of the Anti-Dumping Agreement. In this dispute, the Appellate Body had found that the authority was

[1] See, "EC – Fasteners" (Article 21.5) (AB), paragraph 5.92.
[2] See, "EC – Fasteners" (Article 21.5) (AB), paragraph 5.117.
[3] See, "EC – Fasteners" (Article 21.5) (AB), paragraphs 5.271-5.272.
[4] See, "EC – Fasteners" (Article 21.5) (AB), paragraphs 5.325.

required to treat an entity that provided certain information to the authority, but was not a producer of the product subject to investigation, as an "interested party". It was difficult to reconcile the Appellate Body's finding with the clear text of Article 6.11. As the United States had explained in its third-party submissions, an entity that simply provided information to an authority did not fall under any of the "interested party" categories listed in Article 6.11. In that regard, the United States considered that the Appellate Body's finding may best be understood as relating to the special facts of this dispute, in particular, the uniquely active role that the entity at issue had played in the investigation. The United States thanked the DSB for its consideration of these observations on the Reports in this dispute.

1.14. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS397/AB/RW and Add.1 and the Panel Report contained in document WT/DS397/RW and Add.1, as modified by the Appellate Body Report.

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