WORLD TRADE ORGANIZATION

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Dispute Settlement Body
28 July 2011

MINUTES OF MEETING

Held in the Centre William Rappard
on 28 July 2011

Chairperson: Mrs. Elin Østebø Johansen (Norway)

1. European Communities[1] – Definitive anti-dumping measures on certain iron or steel fasteners from China

(a) Report of the Appellate Body (WT/DS397/AB/R) and Report of the Panel (WT/DS397/R)

1. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS397/10 transmitting the Appellate Body Report on: "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", which had been circulated on 15 July 2011 in document WT/DS397/AB/R, in accordance with Article 17.5 of the DSU. She reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. She 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 decided by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure was without prejudice to the right of Members to express their views on an Appellate Body report.

2. The representative of China said that her country thanked the Panel and the Appellate Body, as well as the respective Secretariats for their considerable time and efforts devoted to the resolution of this dispute. They had, once again, demonstrated the fundamental importance of the dispute settlement mechanism for the proper functioning of the multilateral trading system. China also thanked the EU and third parties for their constructive participation in the proceedings. As a WTO Member, the EU was one of the most frequent users of anti-dumping measures. Since 1979, the EU had initiated over 160 anti-dumping investigations against products from China. This unwarranted use of anti-dumping measures had not only distorted world trade, but had also seriously undermined the legitimate interests of exporting countries, especially developing countries such as China. In responding to certain of these measures, on 31 July 2009, China had launched its first dispute against the EU in the WTO and complained that the anti-dumping duties on certain iron or steel fasteners from China were discriminatory and violated WTO rules. Moreover, China had also challenged certain systematic wrong doings that the EU had carried out repeatedly in its anti-dumping investigations for years. After two years of WTO litigation, China was pleased that the Panel had

[1] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a verbal note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

found in favour on many of its claims, and that the Appellate Body had upheld not only most of the Panel's findings challenged by the EU, but had additionally reversed two of the Panel's findings that had originally rejected China's claims. In particular, China welcomed the unequivocal confirmation by the Appellate Body of the Panel's conclusion that the individual treatment regime laid down in Article 9(5) of the EU's Basic Anti-Dumping Regulation was, both "as such" and "as applied" in the fasteners investigation, inconsistent with WTO law. This provision required suppliers from certain WTO Members, such as China, to meet additional conditions before they could qualify for individual treatment and be granted an individual duty and dumping margin. The Panel's and Appellate Body's findings had clearly confirmed that this provision violated, "as such", Articles 6.10 and 9.2 of the Anti-Dumping Agreement and that the EU had acted inconsistently with its obligations under Article XVI:4 of the GATT 1994 and Article 18.4 of the Anti-Dumping Agreement.

3. The Appellate Body had also concluded that Section 15 of China's Accession Protocol did not contain an open-ended exception and did not provide a legal basis for the EU's presumption in Article 9(5) of the EU's Basic Anti-Dumping Regulation. Rather, Section 15 only permitted a temporary and limited derogation in respect of the use of domestic prices and costs, i.e. the determination of the normal value under the special condition contained in paragraph 15(a)(ii) before 2016. The Appellate Body's and the Panel's finding that no support could be found in the WTO rules for a special regime for alleged non-market economy countries under which their exporters were made subject to a country-wide duty, unless they met the individual treatment criteria of Article 9(5) of the EU's Basic Anti-Dumping Regulation, was not only important for China, but also represented a significant victory from the perspective of the multilateral trading system at large. China also welcomed the Appellate Body's finding that the EU had failed to ensure that the domestic industry definition would not introduce a material risk of distortion to the injury analysis by relying on a minimum 25 per cent benchmark irrelevant to the issue of what constituted a "major proportion" and by excluding certain-known producers that provided relevant information. As was stated by the Appellate Body, in doing so, the domestic industry defined in the fasteners investigation had covered a low proportion of domestic production, which had significantly restricted the data coverage for conducting an accurate and undistorted injury determination. The Appellate Body had, therefore, reversed the Panel's finding that the EU had not acted inconsistently with its WTO obligations in the way it had defined the domestic industry in the fasteners anti-dumping investigation.

4. China also welcomed the Appellate Body's finding that, due to the EU's failure to provide a timely opportunity to see information concerning the basis of the price comparisons, the Chinese exporters had been unable to exercise their rights under Article 2.4 of the Anti-Dumping Agreement and thus could not ensure that the EU had conducted a fair comparison of the export price and normal value. China was aware that a number of its claims had not been upheld by the Panel and the Appellate Body. It noted, however, that the Reports contained a number of important criticisms of the EU's measures even where China's claims had not been upheld. As an example, China wished to refer to the Appellate Body's statement that the granting of a 15-day deadline for responding to the Market Economy Treatment claim form was too short and did not provide parties with an "ample opportunity" to submit all evidence in support of their requests, and could, therefore, be considered as a violation of Article 6.1 of the Anti-Dumping Agreement.

5. Following the adoption of the Reports at the present meeting, this dispute would move on to the implementation stage. China invited the EU to take the necessary positive steps to ensure prompt and full compliance with the findings and recommendations in the Reports. In that respect, China noted that the EU's obligations were twofold. First, the EU would have to amend its basic anti-dumping legislation with a view to removing the "as such" violations. Second, the EU would have to address the numerous WTO inconsistencies found in relation to the anti-dumping measures currently in force on fasteners from China. In view of the far- reaching consequences that these inconsistencies may have for both the dumping margin and injury determination, China was of the view that the measures should be withdrawn. China confirmed its willingness to cooperate with the EU to resolve this dispute and to achieve a WTO-consistent solution within a reasonable period of time. In that

regard, China looked forward to the EU's prompt implementation of the findings in this dispute and would monitor this issue vigilantly. In conclusion, she said that China was requesting that the DSB adopt the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, pertaining to this dispute and called upon the EU to implement the findings and recommendations promptly.

6. The representative of the European Union said that the EU thanked the members of the Appellate Body, the Panel and the Secretariat for their work on this dispute. The EU also acknowledged their time and efforts dedicated to this dispute. The EU regretted that Article 9.5 of the EU Basic Anti-Dumping Regulation had been found to be WTO-inconsistent "as such" and "as applied" in the fasteners investigation. The EU conceived Article 9.5 as an important provision which prevented the State from channelling all the dumped exports via the State company with the lowest duty rate. The EU noted, however, that the Appellate Body had reached its findings on the basis of a reasoning which was different from that developed by the Panel. In that regard, the EU was particularly satisfied with two considerations put forward by the Appellate Body. First, the Appellate Body had recognized that there may be circumstances where exporters and producers from non-market economies could be grouped in a single entity when calculating a dumping margin and imposing a duty. For instance, several distinct exporters may be treated as one single exporter because of structural and commercial integration or due to control or material influence by the State. Second, the Appellate Body had stated that the economic structure of a Member may be used as evidence before an investigating authority to determine whether the State and a number of exporters or producers subject to an investigation constituted a single entity. With regard to the EU regulation imposing anti-dumping duties on imports of iron or steel fasteners from China, the EU was pleased with the fact the Panel and the Appellate Body had rejected a great number of claims of WTO-inconsistency and that the circumscribed violations of WTO law did not affect the general soundness of the measure.

7. Pursuant to Article 21.3 of the DSU, the EU had an obligation to inform the DSB of its intentions in respect of implementation of the DSB's recommendations and rulings within 30 days after the date of adoption of the Reports. Since no DSB meeting was scheduled during that period of time, a special DSB meeting should normally be convened for that purpose. However, to avoid the need to organize a DSB meeting only for that purpose during the holiday period, the EU would inform the DSB by means of a written communication within the prescribed 30 days, and then it would reconfirm the information on implementation at the next regular DSB meeting scheduled for 2 September 2011.

8. The representative of the United States said that his country had followed this dispute as a third party, in particular the issues raised with respect to the interpretation and application of Articles 6.10 and 9.2 of the Anti-Dumping Agreement and Articles 3.1 and 4.1 of the Anti-Dumping Agreement, among others. The United States thanked the Panel, the Appellate Body and the Secretariat for their work on this dispute. The United States was concerned about the Panel and Appellate Body's consideration of Articles 6.10 and 9.2 of the Anti-Dumping Agreement because the Panel and Appellate Body may not have appreciated fully the difficulties that investigating authorities encountered when determining anti-dumping margins for non-market economy exporters. Importantly, the Appellate Body did recognize that "Article[] 6.10 ... of the Anti-Dumping Agreement do[es] not preclude an investigating authority from determining a single dumping margin ... for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 ...".[2] This conclusion was grounded in the text of Article 6.10 which required that individual dumping margins be determined for each exporter or producer. Therefore, before assigning an individual dumping margin to a firm, the investigating authority must decide whether that firm was an "exporter" or "producer" within the meaning of Article 6.10.

[2] Appellate Body Report, para. 376.

9. The United States said that it would also highlight the Appellate Body's statement that "the test in Korea – Certain Paper may not capture all situations where the State effectively controls or materially influences and coordinates several exporters such that they can be considered a single entity" for purposes of Articles 6.10 of the Anti-Dumping Agreement and can be assigned a single dumping margin.[3] This statement correctly recognized that the Anti-Dumping Agreement neither defined "exporter" nor "producer", nor set out the specific criteria for the investigating authority to examine before concluding that a particular firm or group of firms constituted an "exporter" or "producer". With regard to the Appellate Body's findings regarding Article 4.1 of the Anti-Dumping Agreement, the United States noted that the Appellate Body had underscored the importance of properly defining the domestic industry for purposes of the injury analysis. The United States concurred with the Appellate Body's statement that, "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product".[4]

10. The United States said that it would also like to draw Members' attention to the Appellate Body's articulation of the standard of review for a claim of error under Article 11 of the DSU.[5] The Appellate Body usefully reminded Members that "[a]n attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope" of Article 11 of the DSU. Further, the Appellate Body highlights that "[i]t is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim". The United States agreed with these statements and believed that they were a useful reminder to Members regarding the proper scope of Article 11, as well as reflecting the limited scope of appellate review under Article 17.6 of the DSU.

11. Finally, turning to a procedural matter, the United States noted that the Report of the Appellate Body had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. Unfortunately, this proceeding raised the same concerns regarding lack of transparency on this issue as the United States had noted during the DSB's consideration of the last Appellate Body Report.[6] In this dispute, the Appellate Body's Article 17.5 notification to the DSB that it could not provide its report within 60 days had been submitted on 24 May but was not circulated until 5 July.[7] Contrary to past practice, this notification made no mention of whether the parties had been consulted on this issue or whether each party had agreed. Neither did the Appellate Body Report refer to these issues. In fact, as a third party, the United States was aware that the parties to the dispute had provided a letter informing the Appellate Body that each party would deem a report issued in this proceeding to have been circulated pursuant to Article 17.5. That letter was dated 30 June, prior to the circulation of the Article 17.5 notice and the Appellate Body Report. The approach followed by the Appellate Body in this dispute again resulted in less transparency for Members on the circumstances leading to consideration by the DSB of a report circulated outside the 90-day period stipulated in Article 17.5. While the United States noted that the parties to the dispute, China and the EU, had been consulted and had agreed to deem this Report to be an Appellate Body report for purposes of Article 17.5 of the DSU, the United States did not see how less transparency for other Members and for the DSB as a whole was desirable. Once again, the United States considered that, in future disputes, Members should be provided with the level of transparency on these issues as had been provided by the Appellate Body in the past.

[3] Appellate Body Report, para. 380.
[4] Appellate Body Report, para. 414.
[5] Appellate Body Report, para. 442.
[6] "Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines", WT/DS371/AB/R (adopted on 15 July 2011).
[7] WT/DS397/9 (5 July 2011).

12. The representative of Costa Rica said that his country had not participated as a third party in this dispute. However, Costa Rica wished to be associated with the statement made by the United States regarding the circulation of the Appellate Body Report outside the 90-day period stipulated in the DSU. Article 17.5 of the DSU clearly stated that in no case shall the appeal proceedings exceed this 90-day time-limit. When, in exceptional and very specific circumstances, after consultations with the parties to the dispute, and in view of the complexity of the case, it would not be possible to comply with this 90-day time-limit, then in accordance with the DSU, the DSB must be informed of the reasons for the delay in order to ensure due transparency for all WTO Members. However, the approach taken by the Appellate Body in this dispute – not to mention the agreement between the parties – resulted in less transparency for other WTO Members than in the past.

13. The representative of Australia said that her country shared the concerns expressed by the United States and Costa Rica concerning the procedural aspects of the Report, including circulation of the Appellate Body Report outside the normal appellate time-frames and the apparent lack of transparency on this issue in the Report. Australia recognized that, in exceptional circumstances, it might not be possible to meet the deadlines contained in Article 17.5 of the DSU and that apparently such exceptional circumstances had arisen in this case. As Australia had stated upon the adoption of the Appellate Body Report on: "Thailand - Cigarettes" (WT/DS371/AB/R) in which it had participated as a third party, Australia recognized that, where a balance had to be struck between the quality of reports and adhering to appellate time-frames, quality should not suffer. However, in the exceptional circumstances where it would not be possible to adhere to Article 17.5 time-frames, it was particularly important that there be full transparency on the extension of the time-frames. Such transparency was important for the Membership as a whole, including those Members that had been neither parties nor third parties to the dispute.

14. The representative of Japan said that her country also shared the concerns expressed by the United States about the lack of transparency. It appeared that the Appellate Body had departed from the practice it had established. Less transparency was undesirable, to say the least because Article 17.5 of the DSU was drafted in categorical terms.

15. The representative of Norway said that her country had participated in this dispute as a third party and wished to thank the Panel, the Appellate Body and the Secretariat for their work on this dispute. Norway had no comments with regard to the findings of the Appellate Body. However, Norway noted that the Report had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. As pointed out by previous speakers, this proceeding raised concerns about the lack of transparency with regard to this issue. Norway agreed with the United States, Costa Rica, Australia and Japan that in future disputes, Members should be provided transparency in line with what the Appellate Body had provided in previous disputes.

16. The Chairperson noted the concerns raised by Members and said that she had communicated to the Chairperson of the Appellate Body similar concerns raised upon the adoption of the Appellate Body Report in the dispute on: "Thailand - Cigarettes" (WT/DS371/AB/R) at the DSB meeting on 15 July 2011. She said that she had expressed her hope that this type of situation would be avoided in the future.

17. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS397/AB/R and the Panel Report contained in WT/DS397/R, as modified by the Appellate Body Report.