WORLD TRADE ORGANIZATION

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Dispute Settlement Body
10 July 2012

MINUTES OF MEETING

Held in the Centre William Rappard
on 10 July 2012

Chairman: Mr. Shahid Bashir (Pakistan)

Prior to the adoption of the proposed Agenda, the Chairman informed delegations that Canada, Mexico and the United States had requested, by letter addressed to the DSB Chair, that item 2 of the proposed Agenda entitled: "United States – Certain Country of Origin Labelling (COOL) Requirements: Joint Request by Canada, Mexico and the United States for a Decision by the DSB" be removed from the proposed Agenda. Therefore, he said that, in light of the request made, item 2 was removed from the proposed Agenda.

The representative of the United States said that his country would like to confirm the announcement just made by the Chairman that Canada, Mexico, and the United States had withdrawn item 2 from the proposed Agenda through a letter earlier that day. He said that Canada, Mexico, and the United States would like to make statements under "Other Business" to explain the withdrawal of the item to Members.

The Agenda was adopted as amended.

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1. China – Measures related to the exportation of rare earths, tungsten and molybdenum

(a) Request for the establishment of a panel by the United States (WT/DS431/6)

(b) Request for the establishment of a panel by the European Union (WT/DS432/6)

(c) Request for the establishment of a panel by Japan (WT/DS433/6)

1. The Chairman proposed that the three sub-items to which he had just referred be considered together since they pertained to the same matter.

2. The Chairman drew attention to the communication from the United States contained in document WT/DS431/6 and invited the representative of the United States to speak.

3. The representative of the United States said that his country was concerned about Chinese measures that restrained the exportation of certain raw materials – i.e., rare earths, tungsten, and molybdenum – that were critical to manufacturing industries in the United States and in other Members. The export restraints at issue included export quotas, export duties, various restrictions on the right to export, as well as administrative requirements that limited exports of these materials from China by increasing the burdens and costs for exporting. These measures were similar to the policies that the United States, the European Union, and Mexico had successfully challenged in the "China - Raw Materials" dispute.[1] And, as in that dispute, while the United States had seen assertions by China that the measures were intended to protect the environment, neither the history nor the design of the measures supported those assertions. Instead, the measures appeared to be designed to tilt the playing field in favour of Chinese domestic industries purchasing these raw materials over their foreign competitors. In fact, because of China's position as a leading global producer of these materials, China's export restraint measures gave China the ability to affect significantly global supply and pricing. These measures could provide important advantages to China's downstream producers, to the detriment of their counterparts in the United States and other Members. These measures could also create substantial pressure on foreign producers to move their operations, jobs, and technologies to China. The materials at issue were key inputs in the production of a wide range of important products, such as hybrid car batteries, wind turbines, energy-efficient lighting, steel, advanced electronics, automobiles, petroleum, and chemicals. As described in more detail in the US panel request, these restraints appeared to be inconsistent with provisions of the GATT 1994 and China's Protocol of Accession. The United States had attempted to resolve its concerns through dialogue with China, and formal WTO consultations had been held on 25 and 26 April 2012. Unfortunately, these efforts had failed to resolve the dispute. Accordingly, the United States requested that the DSB establish a panel to examine the matter set out in its panel request with standard terms of reference.

4. The Chairman drew attention to the communication from the European Union contained in document WT/DS432/6 and invited the representative of the European Union to speak.

5. The representative of the European Union said that, regrettably, the EU found itself left with no choice but to request the establishment of a panel to examine this dispute. While the consultations had been helpful in clarifying the Chinese measures and their application, there had been no basis for a negotiated solution to the dispute. The EU noted that the export restrictions imposed by China on raw materials were by no means a recent phenomenon. They had been a problem when China acceded to the WTO and continued to be a problem to date. The EU regretted that China had not signalled any intentions to remove these export restrictions, despite the clear ruling issued by the

[1] "China – Measures Related to the Exportation of Various Raw Materials" (WT/DS394; WT/DS395; WT/DS398).

Panel and Appellate Body earlier in 2012 on a similar set of measures. The EU believed that the export restrictions at issue in this dispute constituted a violation of China's WTO commitments undertaken under the GATT, as well as commitments undertaken in its Accession Protocol specifically aiming at these types of restrictions. The export restrictions at issue significantly distorted the market and created competitive advantages of the Chinese manufacturing industry to the detriment of foreign competitors. Furthermore, those policies put pressure on foreign producers to move their operations and technologies to China, as companies outside China were either cut off from supplies or had access only at much higher prices than Chinese companies. The EU supported and encouraged all countries to promote a cleaner and sustainable production of raw materials. Environmental protection and sustainable resource management were legitimate aims, recognized and fully achievable within WTO rules. However, the EU strongly believed that export restrictions were not the appropriate tools to promote those aims and thus welcomed the clear findings of the Panel in the first raw materials dispute. The EU was, therefore, seeking the establishment of a level playing field by ensuring that China played by the rules and respected its WTO obligations.

6. The Chairman drew attention to the communication from Japan contained in document WT/DS433/6 and invited the representative of Japan to speak.

7. The representative of Japan said that, as explained in its panel request, this case concerned China's export restrictions on various forms of rare earths, tungsten and molybdenum ("the materials") through export duties, export quotas and their administration, thereby challenging their consistency with several provisions of the WTO Agreement. Japan noted that, in the pre-GATT era, national policy tendencies toward exclusive exploitation of natural resources in closed economies had caused undesirable results throughout the world, which should never be repeated. Japan understood, therefore, that GATT/WTO had introduced the prohibition of export restrictions as one of the most important principles. Given China's critical role in the global market as the second largest economy, Japan encouraged China to recall the importance of the prohibition of export restrictions under the WTO Agreement. It was well known that the materials at issue were being used by many of the manufacturing sectors in Japan for productions of various final products and for products by processing enablers, such as catalysts and polishing media. Japan was of the view that China's export restrictions had caused a short supply of the materials in the international market and significant price differences between China's domestic market and export market. As a consequence of such measures, manufacturers in Japan had faced difficulty in purchasing the materials from exporters in China, while it appeared to provide a significant advantage to manufacturers in China to purchase the materials. Thus, the measures at issue had put Japanese industries in the disadvantageous position to the benefit of Chinese counterparts. Japan considered that China's export restrictions were inconsistent with various China's obligations under the WTO Agreement, as had clearly been explained in its panel request. On 13 March 2012, Japan had requested consultations and had engaged in consultations in good faith with China on 25 and 26 April 2012, with a view to reaching a mutually satisfactory solution. While the consultations had provided useful opportunities for the parties to better understand their respective positions on this matter, the parties were unable to resolve the differences. Therefore, Japan, requested, pursuant to Article 6 of the DSU, that a panel be established to examine the matter as set out in its panel request with standard terms of reference in accordance with Article 7.1 of the DSU.

8. The representative of China said that her country respected the rights of the United States, the EU and Japan under the DSU. However, China regretted that the complaining parties had requested the DSB to establish a panel to examine these disputes. After the complaining parties had requested consultations in these disputes, China had had sincere consultations with the complaining parties and had positively responded to the relevant questions. As China reiterated on many occasions, China had consistently observed the WTO rules and had positively implemented its commitments undertaken upon its accession to the WTO. China's policies concerning the products at issue were aimed at protecting natural resources and achieving sustainable economic development. China had no

intention of protecting the domestic industry through means that would distort trade. China would not defend itself in detail at the present meeting, but wished to draw Members' attention to the fact that China supplied over 90 per cent of rare earths on the global market with just 23 per cent of the world's total reserves. Therefore, China was puzzled by the complainants' request for panel establishment. China was not in a position to accept the establishment of a panel at the present meeting.

9. The DSB took note of the statements and agreed to revert to these matters.

2. United States – Certain country of origin labelling (COOL) requirements

(a) Statements by the United States, Canada and Mexico

10. The representative of the United States, speaking under "Other Business", said that his country would like to address why it had agreed that the second Agenda item should not be taken up at the present DSB meeting. The United States said that it wished to thank those delegations that had participated in a series of discussions over the past week relating to the draft DSB decision put forward by Canada, Mexico, and the United States. While those discussions had been very useful, unfortunately, there was not sufficient time to discuss fully the draft decision. Accordingly, the parties to the disputes had decided to withdraw the draft DSB decision in order to permit those discussions to continue. For context, the United States wished to share with Members some information on the discussions held over the past week. The issue the United States, Canada and Mexico had sought to address through the draft DSB decision was what should the DSB do when an Appellate Body report was circulated outside the 90-day time limit set out in Article 17.5 of the DSU. All Members valued the WTO as a rules-based trading system. The language of Article 17.5 set out a rule that did not contain any exception or mechanism for extension beyond 90 days: "In no case shall the proceedings exceed 90 days". At the same time, however, Members had recognized in a number of appeals over the years that there would be some exceptional circumstances in which it was not possible or desirable that the report be issued within that time limit. The question then was what to do in those exceptional circumstances.

11. The draft DSB decision was a joint effort to respond to those circumstances by providing transparency to all DSB Members and have Members act to affirm their respect for the rule. The draft DSB decision recognized the existence of the rule while providing a degree of flexibility by acting to deem the rule to be satisfied in the exceptional circumstances of this dispute. The draft DSB decision would, therefore, in the US view, strengthen the rules-based trading system. As had also been noted in US discussions with delegates, the draft DSB decision would also confirm the view expressed by the Appellate Body itself. In its communication to the DSB Chair transmitting the Reports for circulation, the Appellate Body had stated: "The [reports] will be circulated to Members of the World Trade Organization at 5.00 p.m. today, in accordance with paragraph 5 of Article 17 of the [DSU]".[2] Now, this statement was not technically accurate but demonstrated that the Appellate Body deemed the Report to be in conformity with the requirements of Article 17.5 of the DSU. Through the draft DSB decision, the DSB would support the Appellate Body by similarly deeming the rule to have been met. Nonetheless, the discussions over the past week had revealed that additional discussions with Members would be helpful to explore the best approach for responding to the issues presented, and the United States was willing to accommodate the desire for further discussions in order to deepen the mutual understanding of these issues with a view to finding shared approaches.

12. A number of delegations had also noted that the draft DSB decision dealt with one issue – what to do when a report was circulated outside the 90-day time limit – but did not address the underlying issue: why were reports circulated outside that time limit and what could be done to assist

[2] WT/DS384/16; WT/DS386/15 (3 July 2012).

in meeting that time limit? The United States agreed that this was an important issue for Members to discuss. Finding potential solutions to this problem would require a better understanding of the facts and circumstances leading to delays. There were clearly a number of issues that would require further investigation. Some issues may be more practical or procedural – the Chairperson of the Appellate Body had raised some ideas in her talk at the recent event to welcome a new Appellate Body member. Some issues may be legal in nature. For example, in a talk at the Graduate Institute (HEI), the Chairperson of the Appellate Body had noted the proliferation of claims under Article 11 of the DSU and the time and resources needed to deal with those claims. Members could consider the impact of those sorts of claims on the overall timeframe for appeals. And some issues may be more structural. For example, in relation to ideas to make Appellate Body members full-time, it could be useful to consider what impact outside activities may have on the Appellate Body's work. There were many more issues Members could explore and discuss.

13. Therefore, as had been suggested by a number of delegations in conversations, it would be useful to discuss this underlying issue as well. Delegations may wish to start informally and then could consult with the DSB Chair to devise an appropriate process in search of information and potential solutions. The United States believed that all Members shared a strong interest in reinforcing and strengthening the rules-based multilateral trading system. Addressing these issues would contribute importantly to this end.

14. The representative of Canada said that his country wished to make a brief statement about the decision to withdraw item 2 from the Agenda of the present meeting. In the ten days after the United States, Mexico and Canada had placed that item on the Agenda, the three parties had engaged in consultations with interested Members on the draft decision. The parties appreciated the willingness of delegations to engage with them, and very much valued the frank feedback that had been provided. As a result of that feedback, the parties had concluded that proceeding with the discussion of the item at the present meeting would not be productive at this time. The three parties had, therefore, agreed that withdrawal of the item was the best course. In the spirit of preserving the constructive nature that had characterized those consultations, Canada wished to take the opportunity to clarify its interest in raising the issue. To be clear, there had never been any question that the three sponsors of the draft decision wished to cast doubt on one of the most important features of the WTO dispute settlement system – negative consensus for the adoption of reports. With or without the draft decision, the Reports in the "US-COOL" dispute would be adopted in a future DSB meeting by negative consensus, as all others had before it. Instead, the underlying intention had always been to contribute to a process through which the DSB could exercise its responsibility to preserve another feature of the WTO dispute settlement that was equally important – the prompt settlement of disputes.

15. Article 17.5 of the DSU was a critical element of that objective such that meeting the prescriptions of that provision should be taken very seriously. The consultations over the past week had in fact revealed that there was a widely-shared interest in ensuring that the system had the capacity to deal with the increasing burdens that Members placed upon it. This view had been echoed a few weeks before by the Appellate Body Chairperson, Ms Zhang, during the recent swearing-in ceremony. In expressing her own concern about the issue of delayed reports, Madam Zhang had highlighted a number of practical ideas that might help reconcile the requirement, on the one hand, to ensure the prompt settlement of disputes with the need, on the other hand, to provide the amount of time and resources necessary to settle disputes properly. Her ideas and others, many of which had been cited by the United States, were worth considering in greater detail. In withdrawing the draft decision at the present meeting, it was Canada's wish that all parties, among the Membership and in the institution itself, continued to engage in a constructive dialogue on addressing this issue once and for all. With the cooperation of all parties, Members could develop pragmatic solutions that would minimize the occurrence of delays in the first instance, and that would ensure an inclusive, timely and transparent response to the circumstances that led to such delays when they must occur. Canada stood ready to engage in any and all discussion that would contribute to this outcome.

16. The representative of Mexico said that in this dispute, the Appellate Body had informed the DSB that it was unable to circulate the Report within the 90-day period, but had failed to consult with or notify the parties to the dispute. This had caused some uncertainty as to how the parties could ensure that a report, that had been issued outside the time-frame provided for in Article 17.5 of the DSU, was consistent with that Article. And it had put the parties in a difficult situation due to the abandonment of the practice that had previously been followed by the Appellate Body. Mexico understood the reasons for the delay in issuing reports, but noted that it would perhaps be better to analyse whether the Appellate Body had sufficient material and human resources to carry out its work within the time-frames stipulated in the DSU and, if not, necessary steps should be taken to rectify the situation.

17. The DSB took note of the statements.