

WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/262

9 March 2009

(09-1188)

Dispute Settlement Body
12 January 2009

MINUTES OF MEETING

Held in the Centre William Rappard
on 12 January 2009

Chairman: Mr. Mario Matus (Chile)

1. China – Measures affecting imports of automobile parts

- (a) Reports of the Appellate Body (WT/DS339/AB/R – WT/DS340/AB/R – WT/DS342/AB/R) and Reports of the Panel (WT/DS339/R – WT/DS340/R – WT/DS342/R and Add.1 and 2)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS339/13 – WT/DS340/13 – WT/DS342/13 transmitting the Appellate Body Reports on: "China – Measures Affecting Imports of Automobile Parts", which was circulated on 15 December 2008 in document WT/DS339/AB/R – WT/DS340/AB/R – WT/DS342/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Reports and the Panel Reports 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".

2. The representative of Canada said that her country wished to thank the Panel and the Appellate Body as well as the Secretariat for their work on this case. Canada also thanked the other parties – the EC, the United States and China, and the third parties for their useful participation. Canada welcomed the findings of the Panel and the Appellate Body that the specific Chinese measures at issue violated Article III of the GATT 1994 by imposing an internal charge and an administrative burden on imported auto parts that were not imposed on domestic parts. Canada urged China to bring its measures into conformity rapidly, and looked forward to discussions with China regarding a reasonable compliance period. Compliance would ensure that Canadian auto parts received open and non-discriminatory access to the Chinese market at the import duty rate that China had committed to when joining the WTO. Canada also welcomed the helpful guidance provided by the Panel and the Appellate Body on the scope of the obligations in Articles II and III of the GATT 1994 and the relationship between them. Canada believed that this guidance would be useful to WTO Members in the future. Canada was also pleased that the Reports in this matter had confirmed that obligations in Protocols of Accession were binding, including commitments incorporated in those Protocols from the Working Party Reports. Canada regretted that the Appellate Body had reversed the finding of the Panel that the challenged measures violated paragraph 93 of China's Working Party

Report. However, the Appellate Body had reversed only on the basis that the challenged measures did not impose an ordinary customs duty, and had not ruled on the substantive meaning of paragraph 93. Canada urged China to comply with its substantive obligations under that paragraph, on which the Panel Report provided guidance. Canada requested that the DSB adopt the Panel and the Appellate Body Reports.

3. The representative of the European Communities said that the EC wished to thank the Panel and the WTO Secretariat, as well as the Appellate Body and its Secretariat for the efforts dedicated to this dispute. The EC was particularly grateful for the thoroughness of the analysis and the very complete findings, which would certainly prove extremely helpful in solving this dispute. China's measures imposed a charge on imported parts when they were assembled into a vehicle that did not have sufficient local content. The measures also imposed highly burdensome procedures requiring a constant check of the use of imported parts and removing the flexibility needed for an economically efficient production whenever imported parts were used. The Panel and the Appellate Body had confirmed that such measures, being dependent on the internal use of imported parts, should be classified under Article III of the GATT 1994, and that they were in breach of both paragraph 2 (because no charge was imposed on domestic parts) and paragraph 4 (because they modified the condition of competition between domestic and imported parts). The EC welcomed those findings that had confirmed that, irrespective of the name or presentation of the measures, rules discriminating against imported products had no place in the WTO. Those measures were in fact discriminatory measures forcing purchases of auto parts from domestic producers and transfer of technology to allow China to become a major actor in the production of automobiles and auto parts. This was not just the complainants' and the Panel's and Appellate Body's reading of the measures, but China's own words proclaimed in its 2004 "Policy on Development of Automotive Industry".

4. The EC also wanted to praise the Panel and the Appellate Body for the thoroughness of their analysis on the difficult "threshold issue"; i.e. on the distinction between Articles II and III of the GATT 1994. Until now there had been very little guidance on the proper definition of "ordinary customs duties" and "internal charge" despite those concepts being key to fundamental WTO obligations. The Panel's and the Appellate Body's findings would undoubtedly prove extremely valuable to the whole WTO Membership in the future. The EC was grateful to the Panel for the thorough analysis under Article II, and was also grateful for the Appellate Body's brief examination of China's arguments on the HS General Interpretative Rules and for confirming that such arguments, among WTO Members, could not result in trumping the application of Article III. Like the Panel and the Appellate Body, the EC also shared the systemic concerns that "the security and predictability of tariff concessions would be undermined if ordinary customs duties could be applied based on factors and events that occur internally, rather than at the moment and by virtue of importation, and that this, in turn, would upset the carefully negotiated and balanced structure of key GATT rights and obligations, including the different disciplines imposed on ordinary customs duties and internal charges" (AB Report, para 165). The EC regretted that it had not been possible to settle this dispute at an earlier stage. The EC hoped that China would now be faithful to its obligations as a WTO Member and would fully respect the ruling by bringing its measures into conformity with the WTO Agreements within the shortest delay.

5. The representative of the United States said that his delegation wished to begin by thanking the Panelists, the Appellate Body, and the Secretariat for their work in this matter. The United States was pleased to propose the adoption of the Panel and the Appellate Body Reports in the dispute brought by the United States. The United States might not agree with every point in the Reports. For example, the United States did not agree with the Appellate Body's statement of its authority to review the meaning of a municipal law on its face. In the US view, the manner in which a challenged measure operated within a Member's domestic system was a factual issue in a dispute, not a legal issue concerning the applicability of, and conformity with, the covered agreements. That said, however, the Reports overall were thorough and well-reasoned, and they had made a substantial

contribution to ensuring the integrity of the national treatment obligation contained in the GATT 1994.

6. As delegations would recall, China's measures at issue in this dispute imposed a 25 per cent charge on all the imported parts included in a motor vehicle assembled in China if the number or value of the imported parts exceeded specified thresholds. The measures also imposed extraordinarily burdensome administrative requirements on any auto manufacturer within China that chose to use even a single imported part. In order to avoid the charge and the burdensome administrative requirements, auto manufacturers within China must either purchase local parts, or relocate parts manufacturing operations to China. The measures were essentially a local content requirement in plain breach of the national treatment obligations of Article III of the GATT 1994. China's only defense was that it could avoid its national treatment obligations by labeling the charge as an "ordinary customs duty". But this defense was untenable. The measures were not applied to auto parts in the form in which they were imported, but instead were applied to complete vehicles assembled within China. Accordingly, both the Panel and the Appellate Body had found, as all three complainants maintained, that China's measures imposed internal charges. Once China's measures had properly been found to be internal charges, China had not contended that its measures were consistent with its national treatment obligations. Accordingly, the Panel and the Appellate Body Reports both had gone on to find that China's measures breached China's obligations under Articles III:2 and III:4 of the GATT 1994.

7. The United States would further note that the findings of this case had great systemic importance with regard to fundamental WTO rules governing trade in goods. In essence, China had asserted that the level of local content of a finished good produced in China might be used to determine the classification of an imported part used to make that good, and that an unsatisfactory level of domestic content provided a basis for imposing higher charges on parts imported for manufacturing purposes. Under that approach, no WTO Member would be protected from domestic content requirements that favored domestic parts over imported parts. If China's reasoning had been accepted, the central national treatment principles of the GATT 1994 – as applied to international trade in manufacturing parts – would have been eviscerated. The United States was gratified that both the Panel and the Appellate Body had taken note of these systemic consequences, and had firmly rejected China's arguments.

8. Members were well aware of the situation facing the automotive industry around the world. China's measures served as a major trade barrier to the use within China of imported parts. Particularly in the current circumstances, it was essential for China to promptly remove those measures. As the US delegation had explained to the DSB when the United States had requested the establishment of the panel, the United States had commenced this dispute after extensive dialogue with China, both formal and informal, which had failed to lead to a resolution of the dispute. The United States welcomed the adoption of the Panel and the Appellate Body Reports at the present meeting. China had consistently affirmed its intention to act consistently with WTO rules and to respond swiftly to any findings of non-compliance. In that spirit, the United States looked forward to China moving promptly to bring its measures into compliance with its obligations.

9. The representative of China said that his country wished to thank the Panel, the Appellate Body, and the Secretariat for their hard work and dedication during the Panel and the Appellate Body's proceedings. China was pleased to notice that the Appellate Body Reports had made clear that the challenged measures were not inconsistent with China's commitment in paragraph 93 of China's Accession Working Party Report. However, it was regrettable that the Appellate Body, by denying the HS as appropriate context in interpreting relevant GATT Articles, had upheld the Panel's finding concerning the "threshold" issue and the alleged violation of Articles III:2 and III:4 of the GATT 1994. Having said that, China would like to make two general observations concerning the Panel and the Appellate Body Reports in this matter. First, China welcomed the finding of the

Appellate Body that a panel's interpretation of a Member's municipal law was a matter of legal interpretation to be reviewed by the Appellate Body under Article 17.6 of the DSU. The Appellate Body had correctly concluded that, when a panel examined a Member's municipal law for the purpose of determining whether the Member had complied with its WTO obligations, this was a legal characterization by the panel. Often, the interpretation of a Member's municipal law would be central to a determination of whether the Member had complied with its WTO commitments, particularly in "as such" challenges. It would undermine the critical importance of appellate review under Article 17 of the DSU if those findings by a panel were subject to appellate review solely as a matter of the panel's assessment of the facts. Moreover, China did not consider that panels were in a better position than the Appellate Body to interpret a Member's municipal law for the purpose of determining whether the Member had complied with its WTO commitments. The process of interpreting municipal law was not materially different than the process of interpreting the covered agreements, at least where municipal law was interpreted on its face. The Appellate Body was, of course, eminently qualified in matters of legal interpretation. Therefore, the general principle that the Appellate Body should give some degree of deference to the factual determinations of a panel was not implicated by a panel's interpretation of a Member's municipal law. Those were not factual determinations.

10. The second general observation that China would like to make concerned the Panel's "alternative" findings set forth in Section VII.D of the Panel Reports, and the related "alternative" conclusions and recommendations of the Panel set forth as item "(b)" in each of the conclusions and recommendations sections of the Reports. Those "alternative" findings pertained, generally, to the consistency of the measures with Article II:1(a) and (b) of the GATT 1994, on the assumption that the charge imposed under the challenged measures was an ordinary customs duty. China appealed certain of those "alternative" findings of the Panel. On appeal, the Appellate Body had considered that there was "no reason" to examine these alternative findings, in light of its finding that the charge imposed under the challenged measures was an internal charge under Article III:2 of the GATT 1994, found it unnecessary to rule on the Panel's "alternative" finding. China considered that, in light of the findings and conclusions of the Appellate Body on the Panel's "alternative" findings, the "alternative" findings of the Panel set forth in Section VII.D of the Reports, and the related conclusions and recommendations of the Panel, did not form part of the recommendations that the DSB would adopt at the present meeting as the result of modification by the Appellate Body Reports to the Panel Reports. Having exercised its right to appeal those findings under Article 17 of the DSU, China was entitled to have those findings reviewed on appeal. Article 17.12 of the DSU provided, in this respect, that "[t]he Appellate Body shall address each of the issues" that an appellant raised in its notice of appeal.

11. China understood that the Appellate Body, on occasion, determined that it was unnecessary to address certain issues raised on appeal in light of its disposition of other issues in that appeal. The Appellate Body appeared to have considered that, in light of the alternative nature of the Panel's findings, and in light of its finding that the charge imposed under the challenged measures was an internal charge, it was unnecessary to address China's claims of error in respect of the Panel's alternative findings. Under those circumstances, the Panel's alternative findings, and the related conclusions and recommendations, could not form part of the recommendations adopted by the DSB. This followed directly from Article 16.4 of the DSU, which clearly provided that the adoption of panel reports by the DSB was contingent upon a party's right to seek review by the Appellate Body under Article 17 of the DSU. This right was not fulfilled unless the Appellate Body addressed the claims of error on appeal, as required by Article 17.12. Finally, China thanked for the opportunity to express its views on the Reports in this matter. China would be examining those Reports carefully and would inform the DSB of its intentions in respect of the implementation of the recommendations and rulings, as provided for under Article 21.3 of the DSU.

12. The DSB took note of the statements and adopted: (i) the Appellate Body Report contained in WT/DS339/AB/R and the Panel Report contained in WT/DS339/R and Add.1 and Add.2, as upheld by the Appellate Body Report; (ii) the Appellate Body Report contained in WT/DS340/AB/R and the

Panel Report contained in WT/DS340/R and Add.1 and Add.2, as modified by the Appellate Body Report; and (iii) the Appellate Body Report contained in WT/DS342/AB/R and the Panel Report contained in WT/DS342/R and Add.1 and Add.2, as modified by the Appellate Body Report.
