

Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, February 12, 2016

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 WT/DS397/AB/RW/ADD.1) AND REPORT OF THE PANEL (WT/DS397/RW AND WT/DS397/RW/ADD.1)
 - The United States 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 antidumping determination and related obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement). Many of the findings by the panel and the Appellate Body depend 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 views some of these findings as positive contributions to Members’ understanding of the AD Agreement, while other findings raise concerns.
 - First, the panel and Appellate Body reports support that under Article 6.4 of the AD Agreement, interested parties must be provided access to information necessary to defend their interests.
 - As explained in our third-party submissions, for an interested party to fully defend its interests in the course of an antidumping investigation, it is 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 are conducted.
 - In this regard, the United States notes that the Appellate Body has confirmed that the issue of whether information is “relevant” for purposes of Article 6.4 is to be determined from the perspective of the interested parties that have requested to see the information, not the perspective of the investigating authority.¹
 - The United States also notes the Appellate Body’s finding that information “used” by the investigating authority, within the meaning of Article 6.4, is not necessarily limited to the narrow subset of data that the authority relies on in calculating the margin of dumping.²

¹ See, *EC-Fasteners (Article 21.5) (AB)*, para. 5.92.

² See, *EC-Fasteners (Article 21.5) (AB)*, para. 5.117.

- Second, the reports confirm that when an authority uses a normal average-to-average methodology, the authority cannot omit the consideration of certain export transactions on the basis that it would be inconvenient to determine a corresponding normal value.
- In this regard, the United States appreciates the Appellate Body’s observation that the AD Agreement supplies methodologies that an investigating authority can employ to take account of non-matching model types.³ For example, authorities can make use of constructed value under Article 2.2, and difference in merchandise adjustments under Article 2.4.
- Third, the reports – in line with a number of prior reports – confirm that for purposes of an injury determination, an authority may not select a biased sample of the domestic industry.
- In particular, the United States welcomes the Appellate Body’s finding that an investigating authority acts inconsistently with Articles 3.1 and 4.1 where the authority defines 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.
- Other findings in the Appellate Body report raise concerns.
- First, the United States has concerns with the Appellate Body’s interpretation and application of Article 2.4 of the AD Agreement. To recall, Article 2.4 of the AD Agreement – by its plain text – concerns the authority’s comparisons “between the export price and the normal value.” In this dispute, China disagreed with the authority’s determination of normal value. China chose to raise these issues in the form of a claim under Article 2.4. The Panel appropriately rejected China’s claim.
- The Appellate Body, however, reversed the Panel’s finding. The United States has difficulty seeing how the Appellate Body’s finding comports 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 AD Agreement contains other provisions directly addressed to the methodology for determining normal value, the United States sees no basis in the text of the AD Agreement for a finding that Article 2.4 applies to the issues raised by China in this dispute.

³ See, *EC-Fasteners (Article 21.5) (AB)*, paras. 5.271-5.272.

⁴ See, *EC-Fasteners (Article 21.5) (AB)*, paras. 5.325.

- Second, the United States has concerns with Appellate Body’s interpretation of the term “interested party,” as specifically defined in Article 6.11 of the AD Agreement. In this dispute, the Appellate Body found that the authority was 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 is difficult to reconcile the Appellate Body’s finding with the clear text of Article 6.11. As we explained in our third-party submissions, an entity that simply provides information to an authority does not fall under any of the “interested party” categories listed in Article 6.11.
- In this regard, the United States considers that the Appellate Body’s finding may be best understood as relating to the special facts of this dispute – in particular, the uniquely active role that the entity at issue played in the investigation.
- The United States thanks the DSB for its consideration of these observations on the reports in this dispute.