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(20-1462) Page: 1/3

Dispute Settlement Body
8 January 2020

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 8 JANUARY 2020

Acting Chairperson: H.E. Ms. Sunanta KANGVALKULKIJ (Thailand)

Prior to the adoption of the Agenda, the Chairperson of the General Council, Ambassador Sunanta Kangvaljulkij (Thailand), welcomed delegations and said that she had the pleasure of chairing the present meeting in the absence of Ambassador David Walker (New Zealand), the Chairman of the Dispute Settlement Body (DSB). She said that this was in accordance with the Rules of Procedure for meetings of the DSB.

1 MOROCCO – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL FROM TURKEY

A. Report of the Appellate Body (WT/DS513/AB/R and WT/DS513/AB/R/ADD.1) and Report of the Panel (WT/DS513/R and WT/DS513/R/ADD.1)

1.1. The Chairperson recalled that, at its meeting on 20 February 2017, the DSB had established a panel to examine the complaint by Turkey pertaining to this matter. The Report of the Panel contained in document WT/DS513/R and Add.1 had been circulated on 31 October 2018. On 20 November 2018, Morocco had notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. Subsequently, on 4 December 2019, Morocco had notified the Appellate Body of its decision to withdraw its appeal in this dispute. As a result of Morocco's withdrawal of the appeal, on 10 December 2019, the Appellate Body had issued a short Report circulated in document WT/DS513/AB/R and WT/DS513/AB/R/Add.1 outlining the procedural history of the case. In accordance with Article 17.14 of the DSU, an Appellate Body Report had to be adopted by the DSB within 30 days following its circulation to Members. The Appellate Body Report and the Panel Report were now before the DSB for adoption at the request of Turkey. She said that this adoption procedure was without prejudice to the right of Members to express their views on the Reports.

1.2. The representative of Turkey said that the Panel Report in this dispute had been circulated on 31 October 2018. Morocco had initially appealed the Panel Report but on 4 December 2019, Morocco had notified the Appellate Body of the withdrawal of its appeal, pursuant to Rule 30(1) of the Working Procedures for Appellate Review. Consequently, on 10 December 2019, the Appellate Body Report, which had set out Morocco's request, had been circulated to Members. Therefore, in accordance with Article 17.14 of the DSU, his country requested that the DSB adopt the Panel Report and Appellate Body Report in this dispute. Turkey wished to thank the Panel and the Appellate Body for their service. Turkey also wished to thank Morocco for its cooperation throughout this dispute. In its Report, which had been circulated to Members on 31 October 2018, the Panel had found that numerous aspects of Morocco's anti-dumping investigation on certain hot-rolled steel products from Turkey had been inconsistent with multiple provisions of the Anti-Dumping Agreement, including Articles 3.1, 3.4, 5.10, 6.8 and 6.9. Turkey considered that the Panel's findings correctly reflected both the record of Morocco's investigation and the obligations contained in the provisions of the Anti-Dumping Agreement invoked by Turkey. The measures at issue in this dispute had expired on 26 September 2019. Unfortunately, however, on the following day, Moroccan authorities had imposed a preliminary safeguard duty of 25% on imports of a number of steel products that had

previously been subject to the WTO-inconsistent anti-dumping duty. Turkey regretted that Morocco had chosen such a course of action. Turkey would continue to monitor the effects of this provisional safeguard measure on its exports of hot-rolled steel products to Morocco. In any event, Turkey hoped that this matter could be resolved amicably through consultations under Articles 8.1 and 12.3 of the Agreement on Safeguards. Turkey also wished to take this opportunity to emphasize its support for the WTO dispute settlement system. The existence of a binding dispute settlement system, with the possibility of appellate review, was a crucial feature of the rules-based multilateral trading system and was especially important to developing countries like Turkey. His country, therefore, hoped that the current situation could be resolved as quickly as possible.

1.3. The representative of Morocco said that his country wished to thank the Appellate Body, the Panel as well as the Appellate Body and the WTO Secretariats for their work on this matter. As indicated in the communication circulated by the Appellate Body on 4 December 2019, the relevant anti-dumping measure in this dispute had expired on 26 September 2019. With the expiry of this anti-dumping measure, the Panel's findings had become moot. Morocco had, therefore, decided to withdraw its appeal. However, Morocco continued to have major reservations regarding the Panel's conclusions. The Moroccan investigating authority had conducted the anti-dumping investigation at issue with diligence, rigour, fairness and, above all, in full conformity with Morocco's obligations under the Anti-Dumping Agreement. The Panel had correctly rejected certain claims made by Turkey. First, the Panel had correctly found that some of Turkey's claims fell outside its terms of reference. Second, the Panel had correctly rejected Turkey's claim that the Moroccan investigating authority had acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose essential facts concerning a certain amount of export sales in sufficient time for the two Turkish producers that were under investigation to defend their interests. As the Panel had correctly found, the producers had actually been able to defend their interests. Third, the Panel had correctly rejected Turkey's claim that the Moroccan investigating authority had acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by supposedly failing to evaluate factors which affected domestic prices in its injury analysis. As the Panel had explained, Turkey's claim had rested on a factually incorrect premise. Unfortunately, other Panel findings and conclusions in this case were incorrect. With regard to a large number of these questions, the Panel had clearly overstepped its limited terms of reference. With regard to the use of available facts under Article 6.8 of the Anti-Dumping Agreement, Morocco considered that the Panel had erred in finding that the Moroccan investigating authority had not made an affirmative determination that the producers had failed to report their export sales. The Panel had reached this incorrect finding even though it had not been disputed by the parties that the Moroccan investigating authority had, in fact, made such an affirmative determination. The Panel had aggravated its error by applying an incorrect legal criterion under Article 6.8 which required an investigating authority to "engage meaningfully" before being authorized to apply available facts. This requirement was not included in Article 6.8 of the Anti-Dumping Agreement. The Panel's findings regarding establishment of the industry also suffered from serious flaws. The Panel had agreed with Morocco that Turkey's claim under footnote 9 to Article 3 of the Anti-Dumping Agreement, a provision that referred to establishment, was outside its terms of reference. The Panel had also rejected Turkey's argument that the Moroccan investigating authority had been required to make a finding with regard to establishment. However, the Panel had incorrectly found that the Moroccan investigating authority had acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in its analysis of establishment. In other words, the Panel had criticized Morocco for the way in which it had carried out an evaluation that was not clearly required by the Anti-Dumping Agreement. Finally, the representative of Morocco wished to emphasize that Morocco recognized that investigating authorities had to comply with the requirements of the Anti-Dumping Agreement. However, the Anti-Dumping Agreement had to be interpreted and applied with a certain degree of pragmatism, in view of the practical realities with which investigating authorities were faced, in particular those of developing countries such as Morocco, which were not frequent users of the Anti-Dumping Agreement. Indeed, it was too easy for panelists who examined the case and who possessed a broader view of the situation that was unhindered by the constraints faced by a small investigating authority to propose additional analyses that an investigating authority could have undertaken or additional explanations that an investigating authority could have provided in its determination. However, this was not the intention expressed in the wording of the Anti-Dumping Agreement, as made clear by Article 17.6(i) of the Agreement.

1.4. The representative of the United States said that the United States wished to raise an important systemic concern: that is, the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU. Morocco had formally notified the DSB of its intention to appeal on 20 November 2018, pursuant to Article 16.4 of the DSU. Over one year later, on 4 December 2019, Morocco had informed the Appellate Body of its decision to withdraw its appeal. The Appellate Body

had circulated a report on 10 December 2019, noting Morocco's withdrawal of its appeal. As this document had not been issued consistent with the requirements of Article 17 of the DSU, that is, within 90 days of Morocco's notification to the DSB of its intention to appeal, it was not an "Appellate Body report" under Article 17, and therefore it was not subject to the adoption procedures reflected in Article 17.14. The United States noted that the document set out, at paragraphs 1.18-1.19, certain comments relating to the procedures for adoption of panel and Appellate Body reports. Those comments were erroneous as they did not address whether the document had been issued consistent with Article 17 of the DSU. In addition, the procedures for adoption of any report were not part of the appeal that Morocco had filed. Therefore, those comments were simply an advisory opinion issued by the Division. As the United States had been repeatedly explaining, and as many WTO Members increasingly recognized, the DSU did not assign the mandate or authority to WTO adjudicators to render advisory opinions. For this item, the United States did not understand either party to oppose adoption of the reports, nor had any other WTO Member raised an objection. As set out explicitly in Article 3.7 of the DSU, the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute". As Morocco had withdrawn its appeal and Turkey had requested adoption of the panel and appellate reports, the United States understood that the parties considered that adoption of these reports would assist them in finding a positive solution to their dispute. The United States would seek to support the parties' interests in finding a solution. Therefore, the United States would expect there to be a consensus to adopt the reports before the DSB at the present meeting.

1.5. The representative of China said that his country took note of Morocco's decision to withdraw its appeal in this dispute, taking into account the heavy workload of the Appellate Body. China agreed that the appellant was entitled to withdraw its appeal according to Rule 30(1) of the Working Procedures for Appellate Review. More importantly, the withdrawal of the appeal in this dispute reminded Members, once again, of the importance of immediately launching the AB selection processes and restoring its functioning. There would be 10 out of the 14 existing appeals which could not be completed, while Members continued to bring more disputes to the WTO dispute settlement system. While the dispute settlement system was still operating at such a high level, the loss of a functioning Appellate Body would inevitably undermine the stability and predictability of the current system which should be of grave concern to the entire Membership. The Appellate Body was an indispensable component of the single undertaking agreed by all Members that arose out of the Uruguay Round. No Member had the right to unilaterally change that undertaking by stopping the Appellate Body from functioning. Article 17.2 of the DSU was crystal clear: "[v]acancies shall be filled as they arise". China, therefore, urged the United States to work with other Members constructively by expeditiously reaching a concrete solution to the current deadlock.

1.6. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS513/AB/R and WT/DS513/AB/R/Add.1, and the Panel Report contained in WT/DS513/R and WT/DS513/R/Add.1.