WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/304
2 December 2011

(11-6287)

Dispute Settlement Body
5 October 2011

MINUTES OF MEETING

Held in the Centre William Rappard
on 5 October 2011

Chairperson: Mrs. Elin Østebø Johansen (Norway)

1. United States – Measures affecting imports of certain passenger vehicle and light truck tyres from China

(a) Report of the Appellate Body (WT/DS399/AB/R) and Report of the Panel (WT/DS399/R)

1. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS399/8 transmitting the Appellate Body Report on: "United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China", which had been circulated on 5 September 2011 in document WT/DS399/AB/R. She reminded Members 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 the United States said that his country was pleased to propose the adoption of the Panel and the Appellate Body Reports in this dispute. The United States said that it would first like to thank the members of the Panel and the Secretariat assisting them for their work and compliment the Panel on its thorough evaluation of the issues in the dispute and for a clear and well-reasoned Report. Likewise, the United States thanked the Appellate Body and the Appellate Body Secretariat for their work on the dispute. The United States said that, with one minor exception that did not affect the conclusions, the Appellate Body had affirmed all of the Panel's analysis and conclusions. The United States took its WTO obligations seriously, and was obviously pleased with this confirmation that, as it had stated all along, US imposition of additional duties on Chinese tyres had been fully consistent with the US WTO obligations. The evidence demonstrating a surge in Chinese tyre imports had been overwhelming. Over the period of investigation, imports of tyres from China had grown by 215 per cent, increasing from some 14 million tyres in 2004 to almost 46 million tyres in 2008. Chinese tyre imports more than tripled their share of the US market, growing from 4.7 per cent in 2004 to 16.7 per cent in 2008. The evidence also demonstrated a clear coincidence in trends between the rapidly increasing imports and their effects on the US domestic industry. Given such a massive increase, and the market disruption that had resulted, the United States had a clear basis to impose the safeguard measure to protect US workers and businesses.

3. Before the Panel, China had challenged the tyres investigation by the US International Trade Commission, the remedy imposed by President Obama, and the US Section 421 legislation. The

Panel had rejected all of China's claims. China had then appealed some, but not all, of the Panel's legal conclusions and interpretations. The Appellate Body had rejected all of China's appeals. As a result, China had not prevailed on any of its challenges to the US tyres safeguard or the US safeguard legislation. This was the first time, under the WTO, that any kind of safeguard measure had been completely upheld. Indeed, one would have to reach back to 1951 for the last such occurrence under the GATT system. And so, the United States commended both the Panel and the Appellate Body for their well-reasoned Reports, with analysis firmly grounded on the text of China's Protocol of Accession. The Reports also reflected a clear appreciation and understanding of the practical issues that administering authorities must grapple with as they conducted investigations consistent with a Member's obligations.

4. While the United States was obviously very pleased with the substantive content of the Panel and Appellate Body Reports, and would welcome their adoption by the DSB at the present meeting, the United States nonetheless believed that it was important to draw Members' attention to certain systemic issues related to the delay in the issuance of the Appellate Body Report beyond the 90 days specified in the DSU. In this dispute, the United States wished to affirm the value both of transparency and of meaningfully consulting with, and obtaining the agreement of, the parties to the dispute with respect to any delay in issuing the Report beyond 90 days. The United States recalled that Article 17.5 of the DSU provided, in its last sentence: "In no case shall the proceedings exceed 90 days". Concerns with regard to a lack of transparency had been expressed by the United States and other Members in prior DSB meetings. Pursuant to Article 17.5 of the DSU, the Appellate Body had notified the DSB through a letter circulated on 27 July that it would not be able to complete its Report within 60 days.[1] While the notice had informed the DSB of the expected circulation date, it had not noted that this date was beyond the 90-day deadline. Moreover, contrary to past practice, the notification had 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 mention these issues. And in fact, both parties had not agreed that the Report could be provided beyond the 90-day deadline specified in Article 17.5 of the DSU. On 30 July, following receipt of the 60-day notice, the United States had written to the Appellate Body Division hearing the appeal, seeking further information as to why it would not be possible to circulate the Report within the 90-day deadline. On 12 August, the Division had replied that it "considers the DSB should be notified of the reasons for the delay … and will furnish such reasons when it circulates the Report". This letter, together with the 5 September communication[2] from the Appellate Body to the DSB furnishing those reasons, suggested that the Appellate Body had known at the time of the 60-day notice and the US inquiry what the reasons for the delay were and could have provided them to the DSB and to the parties at that time. This lack of transparency on the reasons for the delay and whether there had been agreement of the parties was unfortunate.

5. Members, of course, were well aware of the workload of the Appellate Body and had been cooperating, including through DSB decisions to extend the time period for adoption or appeal of panel reports, in the scheduling of appeals. In 2011, for example, the United States had joined with other Members to propose three such DSB decisions, including in this very dispute. In certain appeals, these mechanisms had not been sufficient. For example, where the issues that were raised on appeal had been numerous or complex or the Appellate Body's workload had indicated a need for more time, the Appellate Body had, in the past, made a request to the parties for time beyond the 90 days. In those instances, parties had, in the US experience, always engaged constructively with the Appellate Body to agree on an overall time-period and suitable filing dates for the appeal. The United States had so agreed in two appeals just this year. The Appellate Body had then been able to inform the DSB that, with the agreement of the parties, its report would be issued beyond the 90-day deadline. Members had not objected to such an arrangement.

[1] WT/DS399/7.
[2] WT/DS399/8.

6. In this case, however, the Appellate Body had not sought the agreement of the parties or even consulted meaningfully with them on this issue. This was the first time that the Appellate Body had operated in this fashion. The United States considered that the issuance of a report by the Appellate Body beyond the 90-day deadline in Article 17.5 of the DSU, without meaningful consultation with the parties, and even more importantly without the affirmative agreement of the parties, should not be repeated in the future.

7. In sum, the United States was very pleased with the substantive content of the Panel and Appellate Body Reports. And it would have been easier for the United States to focus only on the positive elements at the present meeting. Where systemic issues were implicated, however, the United States considered that Members should seek to act systemically, and that was what the United States had tried to do in its statement. With that said, given the circumstances of this dispute, the United States welcomed the adoption of the Reports at the present meeting.

8. The representative of China said that her country thanked the Appellate Body, the Panel and the Secretariat for their work in this dispute. At the present meeting, China wished to express views on the Reports, pursuant to Article 17.14 of the DSU. In China's view, all Members recognized the fact that the US economy and the global economy had taken a nose dive in late 2008. The economic crisis adversely affected countries worldwide, including the United States, where the financial crisis had originated. The economic crisis also adversely impacted upon the industries worldwide, including the US tyre industry. In the wake of the economic crisis, the United States, in April 2009, had initiated its product-specific safeguard investigation against tyres from China. However, China wished to draw Members' attention to the fact that the investigation had neither been requested nor supported by the US tyre industry. The domestic producers, who were usually the petitioners in such cases and the intended beneficiaries of the product-specific safeguard measures, had stated that they had not been injured by China's imports, and that they had no plans to change their operations if a remedy was imposed. Nonetheless, the United States had decided to impose product-specific safeguard measures for the domestic producers. It was puzzling that the United States expected to rescue its tyre industry out of the economic crisis by imposing punitive duties on China's tyres through the product-specific safeguard measures. Predictably, the measures did not work. They injured China's legitimate trading interests, but did not help reduce the US imports of tyres. For the past two years, the decline in China's imports had simply been replaced by imports from other countries. Tyres imported from China had declined 23.6 per cent in 2010 compared to 2009 and had further declined 6 per cent in the first half of 2011. During that same period, however, the total tyre imports of the United States had increased 20.2 per cent in 2010 compared to 2009, and had further increased 9 per cent in the first half of 2011. The US measures merely distorted international trade.

9. China was disappointed that the Panel and the Appellate Body had upheld the product-specific safeguard measures imposed by the United States in 2009 against imports of tyres from China. In particular, China noted that the Appellate Body Report concluded that the requirement of "a significant cause" in Article 16 of the Protocol on the Accession of China did not elevate the causal standard over other trade remedy agreements which only required "cause". China was concerned that the word "significant" used in Article 16 of China's Protocol of Accession, which did not appear in other trade remedy agreements regarded as context by the Appellate Body, must be given meaning. It was incorrect and inappropriate to render the additional word "significant" futile, and such an interpretative approach increased uncertainties to the interpretation of other WTO Agreements. Furthermore, the application of the causal standard to the facts in this case was troubling. The increase of Chinese imports of tyres did not adequately relate to the declining of the US industry conditions, especially where the competition between Chinese imported tyres and the US produced tyres was at best tenuous and there were other causes affecting the US industry conditions. The WTO was an international organization that had been dedicated to improving global free trade, resisting trade protectionism, and eliminating discriminatory treatment in international trade relations. However, under the current uncertainties and difficulties of the global economy, China was concerned

that the findings of the Appellate Body and the Panel Reports in this dispute, upholding trade protectionist measures, conveyed the wrong signal to WTO Members. The Chinese industry had suffered for over two years of the punitive duties imposed by the US measures. China continued to urge the United States to discard the measures promptly and to maintain a market of fair competition for Chinese enterprises.

10. The representative of the European Union said that the EU welcomed the findings of the Appellate Body and Panel Reports. The Appellate Body had upheld all Panel findings and had, *inter alia*, unequivocally confirmed that the standards for triggering the application of the product-specific safeguard mechanism ("TPSSM") were laxer than the general safeguard's standards. The TPSSM was part of the carefully negotiated accession of China and was available to other WTO Members until the 12th anniversary of China's accession. The EU also wished to ensure that the specific nature of the TPSSM was duly recognized and that no confusion arose between the requirements of that mechanism and those of the extraordinary remedy against injurious imports provided in Article XIX of the GATT 1994 and the Agreement on Safeguards. The preservation of the specific interpretation of the general safeguard rules was another systemic element of key importance to the EU. The EU was, therefore, satisfied to see it confirmed by the Appellate Body together with the Panel's interpretation of the relationship between the TPSSM and the global safeguards confirmed by the Appellate Body. Finally, and as the EU had already stated in the context of some oral hearings of the Appellate Body, the EU had significant sympathy for the situation of members of the Appellate Body, the staff and their families resulting from the current workload of the Appellate Body.

11. The representative of Japan said that his country thanked the Appellate Body, the Panel, and their respective Secretariats for their work in this dispute. At the present meeting, Japan would not discuss the substance of the Reports but would, instead, briefly comment on the issue of the 90-day time-period for the appellate proceedings stipulated in Article 17.5 of the DSU. Japan recalled that the past five Appellate Body Reports in a row had not been issued within the 90-day period. The Report in this dispute, which was being proposed for adoption by the DSB at the present meeting, was the latest in a series of such reports. Therefore, Japan had a number of observations to make at the present meeting. First, Japan took note of and appreciated, as a positive development, the communication of 5 September 2011 from the Chairperson of the Appellate Body to the DSB Chairperson[3] explaining the reasons for the delay. That communication and the reasons for the delay set out therein had certainly provided greater transparency. Japan trusted that the Appellate Body would continue to provide "the reasons for the delay" in a detailed manner in the event that it "considers that it cannot provide its report within 60 days", pursuant to Article 17.5 of the DSU.

12. Second, Japan understood that the "workload [that] reflects an overall trend of a greater number of increasingly complex appeals, with longer submissions by parties and more issues being appealed"[4] was the major reason for the delay in this proceeding. Japan certainly appreciated that the heavy workload was posing a difficult challenge that may require additional time for the Appellate Body to produce a high-quality report. However, Article 3.3 of the DSU set out the general principle of "prompt settlement" of disputes in WTO dispute settlement, and time-limits in the process provided for throughout the DSU, including the time-period in Article 17.5 of the DSU, were specific expressions of this general principle of "prompt settlement". Furthermore, Japan noted that the 90-day time-limit, imposed on both the Appellate Body and parties to the dispute, was written in categorical terms. Because of this categorical language and the general principle of "prompt settlement", and given the adjudicatory function assumed by the Appellate Body to decide the consistency or inconsistency of WTO Members' actions with a covered agreement, any departure from the clear text of the DSU must be of temporal or emergency nature to be limited to address very

[3] WT/DS399/8.
[4] WT/DS399/8, para. 3.

exceptional circumstances. In other words, exceeding the 90-day period should not become a norm or general rule, it must remain an exception.

13. Third, Japan understood that, unlike previous appeals, this appellate proceeding had exceeded the 90-day period without the agreement of the parties to the dispute. However, Japan believed that, in the interest of legal certainty on the DSB's adoption process for Appellate Body reports, it was important, even essential, to secure the agreement by the parties for the extension of the 90-day period. This was because, by agreeing to the extension and deeming the report to be properly issued pursuant to Article 17.5 of the DSU, the parties committed themselves to abide by the rules and procedures for adoption under Article 17.14 of the DSU, including adoption by negative consensus.

14. Fourth, Japan noted that the parties to a dispute, especially a complainant, who generally would seek a prompt resolution of their dispute, had legitimate interest and expectation that appellate proceedings would be completed within 90 days and any delay in the proceedings typically went against such interest and expectation. This could raise the issue of due process as was recognized by the Appellate Body in the dispute: "Thailand - Cigarettes" (DS371). In that dispute, the Appellate Body had explained that WTO adjudicators were required, as a matter of due process, "to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close"[5] as a legitimate due process interest that "find reflection in the provisions of the DSU, including Article 3.3, which calls for '[t]he prompt settlement' of WTO disputes".[6] In the interest of fairness and due process, therefore, it was all the more important to secure the agreement for the extension of the 90 day period by the parties, whose interest could be prejudiced as a result of the further delay in the proceeding.

15. The representative of Australia said that her country had not participated as a third party in this dispute. However, Australia had previously expressed concerns in relation to delays in completion of appeals and the need for transparency for all WTO Members on the reasons for such delay, including parties, third parties, and those who had not been involved in a particular dispute. As noted in the past, Australia understood that, given the current heavy workload of the Appellate Body, and the increasingly complex nature of some appeals under consideration, it was not always possible to adhere to the time-frames provided for in Article 17.5 of the DSU. As Australia had emphasized in the past, the quality of all reports, including Appellate Body reports, was paramount. However, Australia believed that departure from the normal appellate time-frames should occur only in exceptional circumstances and with full transparency. Australia noted that the circulation of the Appellate Body Report had been accompanied by an explanation for the reasons for the delay in the completion of the appeal. This was certainly a welcome step in the right direction to full transparency. However, Australia understood that some concerns still remained, including those that had been identified by Japan. In that respect, Australia agreed with Japan's observations.

16. The representative of Chile said that his country was neither a party nor a third party in this dispute and would therefore not comment on the substance of the case. Chile shared the systemic concern expressed by other delegations with regard to the delay in the circulation of the Appellate Body Report. Chile recalled that on 5 September 2011, the Appellate Body had informed the DSB that it had not been possible to meet the 60-day deadline stipulated in Article 17.5 of the DSU. Chile noted that the Appellate Body's heavy workload and limited resources were among the reasons for the delay. Chile did not question that fact but believed that because it was likely that the heavy workload would continue in the future, the Appellate Body should comply with the deadlines stipulated in the DSU so as to ensure continued certainty in the proceedings. Members were aware that no one was expected to do the impossible. On the other hand, when exceptional circumstances prevented

[5] Appellate Body Report, "Thailand - Cigarettes" (DS371), para.150.
[6] Appellate Body Report, "Thailand - Cigarettes", (DS371), para.150.

compliance with the deadlines set out in the DSU and the circulation of reports had to be delayed beyond the stipulated 90-day deadline, the parties should not only be informed, but should also be consulted and should agree to this. Moreover, given the number of appeals expected in the future and their increasing complexity, the Appellate Body's time-table should be flexible enough to accommodate any unanticipated appeals that might arise. Chile wished to point this out since it found rather confusing the reason given for the delay in the communication of 5 September 2011, namely that the Panel Report pertaining to the dispute: "United States - Orange Juice" (DS382), had not been appealed. The fact that the mentioned Report had not been appealed should have made it possible to expedite the work on other pending appeals and should not have been used as a justification for the delay.

17. The representative of Argentina said that, like others, his country had not participated as a third party in this dispute, but wished to make a statement on this matter, pursuant to Article 17.14 of the DSU. Argentina noted that the United States had referred to the lack of agreement by the parties to this dispute to extend the deadline stipulated in Article 17.5 of the DSU, and that in its communication (WT/DS399/8) the Appellate Body did not make any reference to the parties' agreement. Like previous speakers, Argentina was concerned about this precedent and its impact on the functioning of the dispute settlement system. Argentina valued the quality of the Appellate Body and the Panel reports and recognized that ensuring such quality, while complying with the requirements of Article 17.12 of the DSU, would require a high standard of work of the Appellate Body. This requirement necessitated flexibility in the establishment of dispute settlement time-tables, which should be acknowledged. However, the wording of Article 17.5 of the DSU was clear as to the nature of the obligation established therein concerning deadlines. Japan had referred to Article 3.3 of the DSU and the principle of "prompt settlement" of disputes stipulated in that provision. Argentina supported Japan's statement and wished to draw attention to Article 20 of the DSU, which established the time-frames for DSB decisions and had made explicit reference to Articles 12.9 and 17.5 of the DSU. Article 20 of the DSU stipulated that the deadline may only be extended if the parties to the dispute so agreed. In Argentina's view, Article 20 of the DSU would be meaningless if proceedings could be extended without the parties' agreement given the obligation stipulated in Article 17.5 of the DSU.

18. The representative of Costa Rica said that his country had not participated as a third-party in this dispute and would not make any comments regarding the substance of this dispute. However, Costa Rica wished to be associated with the statement made by the United States and other delegations regarding the circulation of the Appellate Body Report outside the 90-day time-limit. Costa Rica underlined that Article 17.5 of the DSU clearly stated that in no case shall the appeal proceedings exceed this 90-day time-limit. Like other delegations, Costa Rica valued the quality of the Appellate Body's reports and understood that, at times, the Appellate Body might have a heavy workload, and that there may be exceptional circumstances that would prevent it from meeting this deadline. When in such exceptional and very specific circumstances, and given the complexity of the case, it was not possible to comply with this 90-day time-limit, the DSB must be informed, with prior consent of the parties to the dispute, of the reasons for the delay and requested to take a decision in order to ensure the legal certainty of the reports and transparency for all WTO Members.

19. The representative of Guatemala said that his country was neither a party nor a third-party to this dispute. However, Guatemala had followed with interest the statements made by several delegations regarding the fact that the Appellate Body's proceedings in this case had exceeded the 90-day deadline set out in Article 17.5 of the DSU. This was not the first time that this had occurred, and Guatemala understood that the Appellate Body's way of proceeding did not seem to have been the same in all cases. At the present meeting, Guatemala would not comment on the implications of failing to meet the deadlines specified in Article 17.5 of the DSU, which, incidentally, were mandatory and final. Nonetheless, Guatemala wished to draw Members' attention to two aspects. First, he noted the absence of the parties' agreement to extend the 90-day time-limit. As long as the

90-day deadline was not dealt with by Members through the mechanisms established for such purposes: i.e. by amending the DSU, it would seem prudent to seek, at least, the parties' consent to such an extension. Past experience showed that parties had always proved willing to cooperate with the Appellate Body, and this could help to avoid potential problems of legitimacy in relation to the Appellate Body's reports.

20. Second, Guatemala supported any proposal that would improve transparency. In this case, an advance communication to Members informing them that the Appellate Body's report would be circulated after the deadline stipulated in Article 17.5 of the DSU would have been desirable. Finally, in Guatemala's view, this issue did not appear to be due to unwillingness on the part of the Appellate Body to comply with the DSU provisions. As the Appellate Body had itself explained, the difficulty appeared to lie in dealing with various appeals at the same time. Guatemala believed that the Appellate Body may require more resources. The Appellate Body must be given the highest priority in the WTO, given its role in providing predictability and security to the multilateral trading system. Guatemala urged Members to discuss solutions to this problem and to maintain close contact with the Appellate Body. In the interim, Guatemala would be in favour of the Appellate Body extending the deadlines in Article 17.5 of the DSU, only when the parties to the dispute so agreed and that this information was duly circulated to the Membership.

21. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS399/AB/R and the Panel Report contained in WT/DS399/R, as upheld by the Appellate Body Report.