



**Dispute Settlement Body
21 September 2018**

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 21 SEPTEMBER 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

1 UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

A. Recourse to Article 22.2 of the DSU by China (WT/DS471/18)

1.1. The Chairperson drew attention to the communication from China contained in document WT/DS471/18, and invited the representative of China to speak.

1.2. The representative of China said that, as indicated in the US status report, the United States had not yet initiated any substantive implementation process to address the DSB's recommendations in this dispute, other than "consulting with the interested parties". China was very disappointed and deeply concerned with the US failure to implement the recommendations and rulings adopted by the DSB. The WTO-inconsistent measures taken by the United States had seriously infringed China's legitimate economic and trade interests, distorted the relevant international market as well as seriously damaged the rule-based multilateral trading system. This should alert all WTO Members. In the absence of an agreement on sequencing or compensation and pursuant to Article 22.2 of the DSU, China was requesting authorization from the DSB to suspend concessions or other obligations *vis-à-vis* the United States at a level equivalent to the nullification or impairment suffered as a result of the US failure to comply with the DSB's recommendations and rulings. China understood that the United States had objected to the level of the proposed suspension and that the matter was being referred to arbitration pursuant to Article 22.6 of the DSU. China, once again, urged the United States to take concrete actions, respect WTO rules, and faithfully implement the DSB's recommendations and rulings in this dispute in order to fully comply with its obligations under the covered agreements.

1.3. The representative of the United States said that, on 9 September 2018, China had requested that the DSB authorize China to suspend concessions and related obligations with respect to goods under the agreements described in Article 22.3(g)(i) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). By letter dated 19 September 2018, the United States had objected to the level of suspension of concessions or other obligations proposed by China. Under the terms of Article 22.6 of the DSU, the filing of such an objection had automatically resulted in the matter being referred to arbitration. The United States said that Article 22.6 of the DSU did not refer to any decision by the DSB, and no decision was therefore required or possible. Consequently, because of the US objection under Article 22.6 of the DSU, the matter already had been referred to arbitration. The United States said that nevertheless, although unnecessary, the DSB could take note of that fact and confirm that it could not therefore consider China's request for authorization. The United States took note of China's statement concerning implementation actions taken to date by the United States and would convey it to capital. The United States said that it was willing to discuss this matter with China on a bilateral basis. The United States said that to be clear, however, it was incorrect to suggest that the United States had taken no action. As the United States had reported to the DSB during regular DSB meetings, the United States continued to consult with

interested parties on options to address the recommendations of the DSB. That internal process was ongoing.

1.4. The representative of Brazil said that, independently of the facts of this dispute, Brazil wished to make two specific comments. First, the objection to the level of suspension proposed by a Member should be made at a DSB meeting, both for transparency reasons and because there was no participation of third parties in the arbitration proceedings under Article 22.6 of the DSU. Second, if, as the United States had stated, this was a routine and automatic procedure which rendered a DSB meeting unnecessary, it was interesting to note that the language in Article 22.6 of the DSU ("the matter shall be referred to arbitration") was the same as the language in Article 17.2 of the DSU ("vacancies [to the Appellate Body] shall be filled as they arise"). Brazil believed that this structural similarity should also allow the selection processes for new Appellate Body members to be initiated automatically.

1.5. The representative of the United States said that Brazil had stated that an objection under Article 22.6 of the DSU should be made at a meeting of the DSB. The United States said that there was no such requirement provided for in the text of the DSU. While the United States had no desire to extend a meeting that was unnecessary in light of the US objection to China's request two days prior to the present DSB meeting, the United States took the opportunity to again highlight an important issue that should be of interest to all Members concerned with the correct interpretation of the DSU. Article 22.6 of the DSU provided that, "if the Member concerned objects to" the request of another Member under Article 22.2 of the DSU for authorization to suspend concessions or related obligations under the covered agreements, "the matter shall be referred to arbitration."¹ No further action by that Member or by the DSB was set out in the text of that provision. The United States said that minutes of past meetings of DSB and past experience showed that matters had been referred to arbitration in the past without any DSB action or any DSB item having arisen under the Agenda. For example, interventions by Members and the DSB Chair reflected the understanding that no DSB action had been requested or taken at a DSB meeting at which a request for authorization had appeared on the agenda that had already been the subject of an objection. And requests for authorization had also been removed from the Agenda of a DSB meeting following objections to those requests, which also demonstrated that no DSB action had been taken to refer those matters to arbitration.²

1.6. The United States said that the DSU text demonstrated why it had already been established that this was the correct reading of Article 22.6 of the DSU. The United States said that as noted, following a request by a Member under Article 22.2 of the DSU for authorization to suspend concessions or related obligations, the text of the second sentence of Article 22.6 stated plainly: "if the Member concerned objects to the level of suspension proposed, ... the matter shall be referred to arbitration". Thus, the text established that referral of the matter to arbitration resulted as a consequence "if the Member concerned objects", much as, under the second sentence of Article 16.4 of the DSU, an appeal of a panel report resulted as a consequence "[i]f a party has notified its decision to appeal". The United States said that it was significant that Article 22.6 of the DSU specifically referred in the first sentence to a decision by the DSB and furthermore provided that any such decision was by negative consensus. The United States said that the decision by negative consensus was a departure from Article 2.4 of the DSU, which required that decisions by the DSB shall be by positive consensus of Members. The second sentence of Article 22.6 of the DSU, by contrast, did not contain any reference to a decision by the DSB. Nor did it prescribe any departure

¹ The full text of this Article provides: "When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration". DSU, Article 22.6 (footnote omitted).

² See, e.g., Minutes of 4 June 2007 DSB Meeting, WT/DSB/M/233 (relating to DS268), paras. 3, 4, 5 (noting agreement of parties that the matter had already been referred to arbitration by filing of objection); Minutes of 21 January 2008 DSB Meeting, WT/DSB/M/245 (relating to DS322), p. 2 (first through fourth paragraphs) (noting agreement of parties that the matter had already been referred to arbitration by the filing of an objection; the request for authorization was withdrawn from the DSB meeting agenda).

from the DSU requirement that any DSB decision was to be taken by a positive consensus. The United States said that the absence in the second sentence of a reference to a DSB decision that was present in the first sentence should be given meaning. It further demonstrated that the referral of the matter to arbitration did not require a decision by the DSB. Instead, the referral occurred by virtue of the objection of the Member concerned. This reflected the fact that the granting of authorization and the referral to arbitration were two related but distinct acts. The United States said that under the second sentence of Article 22.6 of the DSU, it was not the complainant's request, but the respondent's objection to the request, that led to the subsequent legal event or consequence (i.e., the referral to arbitration).

1.7. The United States said that notwithstanding this fact, a few Members would insist that Article 22.6 of the DSU should be read to require DSB action for the matter to be referred to arbitration as though it contained the words "by a decision of the Dispute Settlement Body" or "at a meeting of the Dispute Settlement Body". However, those words did not appear in Article 22.6 of the DSU. The United States said that consistent with the text-based approach reflected in customary rules of interpretation of public international law, and in order to avoid adding to or diminishing the rights and obligations of Members contrary to Articles 3.2 and 19.2 of the DSU, it was not a correct legal interpretation to read into a WTO provision words that were not there.³ To the contrary, "omissions have meaning".⁴ The United States said that, furthermore, to read Article 22.6 as though it contained the words "by a decision of the Dispute Settlement Body" or "at a meeting of the Dispute Settlement Body" would mean that any such decision would need to be by positive consensus, since Article 22.6 of the DSU did not provide for a departure from the positive consensus requirement under Article 2.4 of the DSU. But that outcome would permit any Member to block the decision, which would defeat the referral to arbitration contemplated by the DSU and would leave unclear the status of the request for authorization. The United States said that to overcome this problem, perhaps certain Members would propose that Article 22.6 of the DSU should be read as though it contained the additional words "unless the DSB decides by consensus not to do so". However, the United States said that this only compounded the legal error by reading into Article 22.6 of the DSU even more words that were not there. The United States said that the fact that the referral occurred by virtue of the objection of the Member concerned was not a departure from the approach taken in other provisions of the DSU. No DSB decision was required for referral of a matter to arbitration under Article 25 of the DSU, nor was a DSB decision required for referral of a matter to arbitration under Article 21.3(c) of the DSU.⁵ The United States said that similarly, were a DSB decision required to refer the matter to arbitration, it was not clear how the Rules of Procedure for Meetings of the Dispute Settlement Body would accommodate that decision. The decision would be based on the objection of the Member concerned. Accordingly, under the DSB Rules of Procedure, the objection would need to have been submitted and an agenda item requested by the Member concerned at least 11 days in advance of the DSB meeting. It was unclear how this would proceed in light of the fact that the request for authorization would have already been placed on the Agenda for a (presumably separate and earlier) DSB meeting. Moreover, this would consume even more time and be further contrary to the expedited timeframe for the arbitration agreed under the DSU.

1.8. The United States noted that in its statement, Brazil had also referred to the text of Article 17.2 of the DSU. If Brazil intended to suggest that vacancies on the Appellate Body were somehow to be filled automatically, the United States would disagree. Article 2.4 of the DSU required that decisions by the DSB shall be taken by positive consensus of Members.

³ See, e.g., Appellate Body Report, "United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea", WT/DS202/AB/R, para. 250; Appellate Body Report, "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products", WT/DS50/AB/R; Appellate Body Report, "India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products", WT/DS90/AB/R, para. 94; Appellate Body Report, "European Communities – Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS48/AB/R. See also, Appellate Body Report, "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India", WT/DS141/AB/R; Appellate Body Report, "European Communities – Customs Classification of Certain Computer Equipment", WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 83; and Appellate Body Report, "European Communities – Measures Affecting Importation of Certain Poultry Products", WT/DS69/AB/R, para. 146.

⁴ See, e.g., "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WT/DS379/AB/R), para. 567.

⁵ Note 12 to Article 21.3(c) reads in part: "[i]f the parties cannot agree on an arbitrator within 10 days after referring the matter to arbitration, ...".

1.9. The representative of Brazil thanked the United States for its statement. With regard to the issue of transparency raised by Brazil, she wished to reiterate that since third parties could not participate in the Arbitration proceedings under Article 22.6 of the DSU, it was important for the DSB meeting to take place. Holding such a meeting would enable interested Members to express any doubts or clarify issues related to the information provided by the parties to the arbitration proceedings under Article 22.6 of the DSU. With regard to the issue of the Appellate Body appointments, Brazil wished to refer to its previous statement made at the present DSB meeting.

1.10. The representative of the United States said that the United States disagreed with Brazil's statement that a DSB meeting must be held so that Members were informed of a DSU Article 22.6 proceeding, and to allow them to express any doubts or clarify issues relating to such a proceeding. The United States said that in light of the role of the DSB in granting any request for authorization to suspend concessions or other obligations, Members should be, and were, fully informed about arbitration proceedings under DSU Article 22.6 when the matter was referred to arbitration by virtue of the objection of the Member concerned. The United States said that in this regard, the fact was that, in particular: (i) the request for authorization to suspend concessions was circulated to Members; (ii) the communication of the Member concerned objecting to that request was also circulated to Members; and (iii) the notification of the constitution of the Arbitrator was also circulated to Members. Accordingly, there was no basis to assert that Members would not be informed about DSU Article 22.6 proceedings absent a DSB meeting. The United States said that similarly, Members always had an opportunity to express their views at a meeting of the DSB with respect to a particular arbitration if they so wished.

1.11. The DSB took note of the statements and that the matter raised by the United States in document WT/DS471/19 has been referred to arbitration, as required by Article 22.6 of the DSU.
