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Dispute Settlement Body
15 August 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 15 AUGUST 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

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1 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT

A. Recourse to Article 21.5 of the DSU by the European Union and certain member States: Request for the establishment of a panel (WT/DS316/39)

1.1. The Chairperson drew attention to the communication from the European Union and certain member States contained in document WT/DS316/39, and invited the representative of the EU to speak.

1.2. The representative of the European Union said that his delegation requested, at the present meeting, the establishment of a panel with respect to a set of additional measures taken by the EU to comply with the DSB's recommendations and rulings adopted on 28 May 2018 in the original compliance proceedings in the "EC – Large Civil Aircraft" dispute (DS316). Through the specific measures detailed in the EU's second compliance communication, contained in document WT/DS316/34 and notified to the DSB on 17 May 2018, the EU had informed the DSB that the EU had achieved full compliance with its WTO obligations and, more specifically, that the EU had withdrawn the remaining subsidies and/or taken appropriate steps to remove their adverse effects.

1.3. At the DSB meeting on 28 May 2018, the United States had expressed the view that the EU had not yet fully complied with the DSB's recommendations and rulings. The United States had also requested the re-initiation of arbitration proceedings, indicating that it disagreed that the measures in the EU's second compliance communication contained in document WT/DS316/34 had achieved full compliance with the EU's WTO obligations. To address this disagreement, on 29 May 2018, the EU had requested consultations with the United States. Consultations had been held in Geneva on 27 June 2018. Unfortunately, the consultations had failed to resolve the dispute. Accordingly, the EU requested at the present meeting the establishment of a panel pursuant to Article 21.5 of the DSU and Article 7.4 of the SCM Agreement, with the standard terms of reference, as stipulated in Article 7 of the DSU.

1.4. The EU also recalled that under paragraph 2 of the Sequencing Agreement, contained in document WT/DS316/21 and which applied "for the exclusive purposes of this dispute", the parties to this dispute had agreed to accept the establishment of a panel at the first DSB meeting at which this request would appear on the Agenda.

1.5. The representative of the United States said that the EU's decision to move forward with a request for yet another compliance panel in this 14-year dispute did a disservice to the WTO and its dispute settlement system. When the EU had circulated its communication outlining the latest alleged steps it had taken to comply, the United States had expressed deep scepticism about the seriousness of the EU's claim of compliance. This scepticism had been based on the long history of the EU's failure to take any meaningful steps to end launch aid subsidies, the significant overlap with a previous EU communication that a WTO compliance panel had found to be almost entirely inaccurate, and the lack of even basic details about the new steps, let alone copies of the relevant measures.

1.6. The EU's behaviour had only reinforced the United States' initial scepticism. If the EU, France, Germany, Spain, and the United Kingdom had been seriously interested in demonstrating that they had brought their WTO-inconsistent subsidies into conformity with WTO rules, and if they had been seriously interested in finding a resolution to this dispute, then the United States would have expected them to explain their alleged compliance actions, candidly and in detail, to the United States. As Members sat at the present meeting, the EU and these four member States still had not provided even the most basic information about alleged amendments made to certain launch aid contracts. That they had avoided such an explanation, or any attempt to resolve this dispute, and instead had moved to request the establishment of a panel, exposed this request as just one more step in the long EU history of tactics to drag out this dispute, instead of addressing their WTO-inconsistent behaviour.

1.7. The United States noted that the EU's panel request referred to agreed procedures between the EU and the United States in relation to this dispute.[1] Specifically, the EU asserted that, under paragraph 2 of the Agreed Procedures, "the Parties agreed to accept the establishment of a Panel at the first DSB meeting at which this request appears on the agenda". The United States said that the EU's assertion was so obviously misleading that it was hard to regard it as anything but an intentional, and flagrant, misrepresentation. The United States invited other Members to look at the language of paragraph 2 of the Agreed Procedures contained in document WT/DS316/21 in order to understand how concerning this was. Paragraph 2 unambiguously addressed the US request an Article 21.5 panel that had been at issue at the time the Agreed Procedures had been concluded in January 2012. Paragraph 1 explicitly discussed the timeline for consultations that the United States had already requested, and the timeline for when "the United States may request the establishment of a panel pursuant to Article 21.5 of the DSU". Paragraph 2 then stated: "[a]t the first DSB meeting at which the US request for the establishment of an Article 21.5 panel appears on the agenda, the European Union shall accept the establishment of that panel". Accordingly, the provision very obviously did not apply to the present situation. Accordingly, the United States was not required to accept at the present meeting, and therefore was not accepting at the present meeting, that the DSB should act on the EU's request for the establishment of a panel. The United States said that, with respect to the EU's reference to Article 7.4 of the SCM Agreement, the EU and certain other Members had included references to other provisions in the covered agreements in a few past requests under Article 21.5 of the DSU but they had been without legal effect, as the DSB had referred the matter exclusively under Article 21.5 of the DSU, without reference to any other provision. Should the EU again seek the establishment of a panel at a future DSB meeting, the United States understood that referral under Article 21.5 of the DSU alone was what was contemplated. The United States considered that there was no legal basis for the DSB to establish a panel under any other provision. All the DSB could do at a future DSB meeting was to refer the matter to the original panel under Article 21.5 of the DSU, if possible. Indeed, the EU panel request referenced a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply" and thus made it clear that the matter at issue was only what was provided in Article 21.5 of the DSU.

1.8. The representative of the European Union said that his delegation regretted that the United States called into question the commitments it had undertaken, together with the EU, in the

[1] Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 7 of the SCM Agreement ("Agreed Procedures"), WT/DS316/21.

2012 Sequencing Agreement contained in document WT/DS316/21. That Agreement set out jointly agreed procedures for the exclusive purposes of this dispute, which were designed to facilitate the resolution of this dispute. These procedures also applied to the request made by the EU at the present meeting, under Article 21.5 of the DSU and Article 7.4 of the SCM Agreement. The EU had expected the United States to honour its commitments undertaken in the Sequencing Agreement in the interest of a prompt resolution of this dispute, notably its commitment to accept the establishment of a panel at the first DSB meeting at which such a request would appear on the Agenda. More generally, it was regrettable that the United States had not agreed that the second set of the EU's compliance measures achieved the EU's full compliance, and that during the consultations the United States and the EU had not managed to find a mutually agreed solution. While it was not the intention of the EU to prolong these dispute resolution proceedings endlessly, faced with the US disagreement and given that the United States had re-initiated the sanctions arbitration in this dispute, the EU had no other choice but to defend its interests in line with WTO rules and to seek a multilateral determination on the EU's full compliance.

1.9. The representative of the United States said that the EU's insistence that the Agreed Procedures required the United States to accept the EU's request for establishment of a panel under Article 21.5 of the DSU at the present meeting was plainly contrary to the text of those Procedures. These Procedures had been circulated as document WT/DS316/21, and the United States invited every delegation to read them. Paragraph 1 stated that "the United States" – not the EU – "may request the establishment of a panel pursuant to Article 21.5 of the DSU at any time". And paragraph 2 referred to the first DSB meeting at which "the US request" – not the EU request – for the establishment of a panel appeared on the Agenda. It then indicated that "the European Union" – not the United States – shall accept the establishment of that panel. The EU's suggestion that this text was applicable to the EU's panel request, and that the United States was not honouring a commitment, was frankly absurd.

1.10. The representative of Canada said that his country noted that the EU's recourse to Article 21.5 of the DSU in this dispute provided another example of responding parties initiating compliance proceedings. Other recent examples occurred in the "US – Tuna II (Mexico)" dispute (DS381), the "India – Agricultural Products" dispute (DS430), the "India – Solar Cells" dispute (DS456), and the "Columbia – Textiles" dispute (DS461). The number and frequency of these recent examples underscored the utility and appropriateness of the right of a responding party to initiate compliance proceedings. Canada wished to register its appreciation for the EU's recognition of its right under Article 21.5 of the DSU to initiate compliance proceedings as a responding party. Canada took note of and welcomed the departure that this represented from the position that the EC had adopted in the "Canada – Continued Suspension" dispute (DS321) where it had argued that, "an implementing Member cannot have recourse to Article 21.5 of the DSU to confirm the consistency with the WTO agreements of its own measures".[2]

1.11. The DSB took note of the statements and agreed to revert to this matter.

2 INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

A. Recourse to Article 22.2 of the DSU by the United States (WT/DS478/20)

2.1. The Chairperson drew attention to the communication from the United States, contained in document WT/DS478/20, and invited the representative of the United States to speak.

2.2. The representative of the United States said that on 22 November 2017, the DSB had adopted the reports contained in WT/DS478/R and WT/DS478/AB/R, finding that Indonesia's measures on horticultural products, animals and animal products had breached Article XI:1 of the GATT 1994. Accordingly, the DSB had recommended that Indonesia bring its measures into conformity with its obligations under the GATT 1994. The United States and Indonesia had agreed that the reasonable period of time for Indonesia to implement the DSB's recommendations and rulings would expire on 22 July 2018. The RPT had now expired, and Indonesia had not brought its measures fully into compliance with WTO rules.

[2] Report of the Appellate Body, "Canada – Continued Suspension" (DS321), para. 350.

2.3. In document WT/DS478/20, the United States had requested authorization from the DSB to suspend concessions or other obligations with respect to Indonesia at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States. Based on a preliminary analysis for only certain products, the United States had provisionally estimated this level at up to approximately US$350 million for 2017. The United States would update this figure annually. The United States remained open to working with Indonesia to resolve US concerns. US farmers were eager to serve Indonesian consumers their world-class products. To fully resolve this dispute, US agricultural products must be able to access the Indonesian market as Indonesia had committed under WTO rules.

2.4. The United States noted that Indonesia had submitted to the Chairperson of the DSB an objection under Article 22.6 of the DSU to the level of suspension of concessions or other obligations proposed by the United States, thereby referring the matter automatically to arbitration. The United States noted that it had not been necessary for the DSB to take up this item in light of Indonesia's objection on 14 August 2018. Nonetheless, the United States had no objection to the DSB noting the matter had already been referred to arbitration pursuant to Indonesia's objection.

2.5. The representative of Indonesia said that her country respected the recommendations and rulings of the Panel and the Appellate Body in the "Indonesia – Importation of Horticultural Products, Animals and Animal Products" disputes (DS477/DS478). Subsequent to the adoption of the Reports of the Panel and the Appellate Body by the DSB, Indonesia had committed to implement the DSB's recommendations and rulings within a reasonable period of time. In this regard, Indonesia, New Zealand and the United States had agreed on the RPT, which had expired on 22 July 2018.

2.6. Prior to the expiry of the RPT, Indonesia had completed the amendment of relevant regulations by enacting four regulations, namely: (i) the Minister of Agriculture's Regulation No. 24 of 2018 concerning the Amendment to Regulation No. 38/Permentan/Hr.060/11/2017 of the Minister of Agriculture concerning Import Recommendation of Horticultural Products (entered into force on 28 May 2018); (ii) the Minister of Trade's Regulation No. 64 of 2018 concerning the Fourth Amendment of Regulation No. 30/M-Dag/Per/5/2017 of the Minister of Trade concerning Provisions for Import of Horticultural Products (entered into force on 31 May 2018); (iii) the Minister of Agriculture's Regulation No. 23 of 2018 concerning the Amendment to Regulation No. 34/Permentan/Pk.210/7/2016 of the Minister of Agriculture concerning the Importation of Carcass, Meat, Offal and/or its Processed Products into the Territory of the Republic of Indonesia (entered into force on 18 May 2018); (iv) the Minister of Trade's Regulation No. 65 of 2018 concerning the Third Amendment of Regulation No. 59/M-Dag/Per/8/2016 of the Minister of Trade concerning the Provisions for Export and Import of Animals and Animal Products (entered into force on 31 May 2018). Indonesia considered that these amending regulations had addressed all inconsistent measures in this dispute in accordance with the DSB's recommendations and rulings. Hence, Indonesia was of the view that full compliance with the DSB's rulings and recommendations had been achieved. In addition, these regulations had also been notified to the Committee on Import Licensing.

2.7. Considering these efforts, Indonesia was disappointed with the decision of the United States to request the DSB's authorization to suspend concessions or other obligations under the GATT 1994 with respect to Indonesia. In general, and pursuant to Article 21.5 of the DSU, if there was a disagreement as to the existence or consistency of compliance, such dispute should be decided "through recourse to these dispute settlement procedures, including wherever possible resort to the original panel". Indonesia believed that there was a need to explore with the United States the possibility of agreeing on a sequencing agreement, similar to what Indonesia had agreed to with New Zealand on 10 August 2018. For these reasons, Indonesia objected to the US request for authorization to suspend concessions or other obligations, as proposed in document WT/DS478/20. Indonesia considered that the level of proposed suspension of concessions or other obligations was not equivalent to the alleged level of nullification or impairment, bearing in mind that all the disputed measures had been brought into conformity with Indonesia's WTO obligations. Moreover, Indonesia claimed that the principles and procedures of Article 22.3 of the DSU had not been followed. Indonesia was ready to engage in further discussions with the United States regarding the settlement of this dispute.

2.8. The representative of New Zealand said that his country was a co-complainant alongside the United States in this dispute, with New Zealand's case referenced as WT/DS477. On 22 November 2017, the DSB had also adopted the reports contained in WT/DS477/R and WT/DS477/AB/R, finding that Indonesia's measures on horticultural products, animals and animal products had been inconsistent with Article XI:1 of the GATT 1994. Accordingly, the DSB had recommended that Indonesia bring its measures into conformity with its obligations under the GATT 1994. Indonesia had reached an agreement with New Zealand and the United States that the reasonable period of time for Indonesia to implement the DSB's recommendations would expire on 22 July 2018.

2.9. As had been noted in the US request for recourse to Article 22.2 of the DSU contained in document WT/DS478/20 of 3 August 2018, "[i]n the view of the United States, Indonesia failed to bring its measures into compliance with its obligations under the GATT 1994 within that period". New Zealand shared the US view that Indonesia had still not complied fully with the recommendations of the DSB in these WTO cases. New Zealand said that the "prompt" settlement of disputes was a critical principle of the WTO dispute settlement system. At this moment in time, when the functioning of the rules-based WTO dispute settlement system was being closely examined in terms of its practical value, this obligation of prompt compliance was one that all WTO Members must be particularly vigilant to implement. WTO Members held a collective responsibility to ensure that their actions support the WTO and its dispute settlement function. Furthermore, bringing measures into compliance with WTO obligations required more than formal amendment of WTO-inconsistent regulations; it required meaningful removal of the WTO-inconsistent restrictions in practice.

2.10. New Zealand recognized that the reasonable period of time to comply in this dispute had only recently expired. New Zealand therefore encouraged Indonesia to actively bring all measures found by the DSB to be WTO-inconsistent into compliance with its obligations promptly, and in a meaningful manner. In New Zealand's view, to date, this WTO dispute had been an exemplar of the value of the WTO's rules-based dispute settlement system and its ability to resolve trade disagreements. New Zealand trusted that it would continue to serve as a key example of the value of the WTO's rules-based dispute settlement system at this moment in time. This would require Indonesia's prompt and full compliance with the DSB's recommendations. New Zealand looked forward to continuing to work alongside Indonesia and the United States to achieve that result.

2.11. The representative of Canada said that this dispute raised the issue of sequencing under the DSU for the DSB's consideration. Frequently, the uncertainty arising from the ambiguity in the DSU regarding the sequence of compliance proceedings and requests for authorization from the DSB to suspend concessions had been resolved through "sequencing agreements". These agreements set out that, for the purposes of a specific dispute, disagreements about the WTO-consistency of a compliance measure would be resolved through compliance proceedings before the grant of authorization to suspend concessions, and that the request for such authorization could be made after the expiry of the 30-day time period set out in Article 22.6 of the DSU. Sequencing agreements thus overcame the uncertainty that the text of the DSU created and contributed to the effectiveness and predictability of the dispute settlement system. Canada invited the disputing parties to consider their procedural options with due regard both for systemic considerations and for their own interests in reciprocal treatment in future disputes.

2.12. The representative of the United States said that regarding sequencing agreements, as Indonesia and Canada knew, the long-standing US position was that sequencing agreements were not required under the DSU. Under Article 22.6 of the DSU, the negative consensus rule applied within 30 days of the end of the period for compliance. By submitting a request under Article 22.2 of the DSU, to which Indonesia had objected on 14 August 2018, the United States was preserving its negative consensus rights. Taking this step was neither surprising nor unusual. For example, the United States would refer Members to the Minutes from the DSB meeting of 3 January 2018[3], where the EU had stated that "the EU had requested the suspension of concessions to preserve its rights in these dispute settlement proceedings". The United States also referred Members to the Minutes of the DSB meeting of 23 August 2013[4], where Indonesia itself had put forward a request to suspend

[3] WT/DSB/M/405 ("Russia – Pigs (EU)" (DS475)), para. 1.2.
[4] WT/DSB/M/335 ("US – Clove Cigarettes (Indonesia)" (DS406)), para. 1.3.

concessions. The United States remained prepared to engage with Indonesia to facilitate its coming into compliance with the DSB's recommendations in this dispute.

2.13. The DSB took note of the statements and that the matter raised by Indonesia in document WT/DS478/21 has been referred to arbitration, as required by Article 22.6 of the DSU.