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**Dispute Settlement Body**  
**15 July 2011**

**MINUTES OF MEETING**

Held in the Centre William Rappard  
on 15 July 2011

*Chairperson: Mrs. Elin Østebø Johansen (Norway)*

**1. Thailand – Customs and fiscal measures on cigarettes from the Philippines**

**(a) Report of the Appellate Body (WT/DS371/AB/R) and Report of the Panel (WT/DS371/R)**

1. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS371/10 transmitting the Appellate Body Report on: "Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines", which had been circulated on 17 June 2011 in document WT/DS371/AB/R, in accordance with Article 17.5 of the DSU. She reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. She said 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 decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

2. The representative of the Philippines said that his country thanked the Panel, the Appellate Body and their respective Secretariats for their hard work in this dispute. The Philippines welcomed the adoption of the Panel and the Appellate Body Reports and expressed its deep satisfaction with the outcome in this dispute. He said that the Philippines had prevailed on virtually all the claims it had made in this dispute. However, the dispute was not about counting victories. It was about exports that directly and indirectly benefitted many Filipinos, from leaf growing through to manufacturing. It was about exports that continued to suffer arbitrary and discriminatory treatment at a tremendous cost, and not only in economic terms. The objective of initiating dispute settlement proceedings had been, and remained, to end such treatment and to put trade back on the secure and predictable ground of the rules of the WTO law. In that regard, the Panel and the Appellate Body had done an excellent job in outlining that terrain.

3. As Members were aware, this was the first dispute to interpret, in detail, the substantive rules on customs valuation. Therefore, the fact that the Panel's findings on this issue had not been appealed spoke for itself. The Panel had set out, in clear and concise terms, the obligations imposed on an importing Member in a situation where buyers and sellers were related. In such a situation, the declared transaction value constituted the customs value, unless the authority had positive evidence that the relationship influenced the import price. Before rejecting the declared customs value, customs authorities must conduct a critical and searching examination of all information before it, and work cooperatively with the importer. Before taking a decision, they must communicate their grounds for doubting the declared transaction value, including explaining why the importer's

information was deficient. The importer must be given an opportunity to respond with further information and explanation. Any confidential information obtained during this process must be protected. Finally, following the final customs value assessment, the customs authority must provide an explanation of how the customs value had been assessed, if so requested. This was clear guidance for Thailand's authorities as well as for their counterparts world-wide.

4. The Panel and the Appellate Body had also made rulings under Article X:3(b) of the GATT 1994 concerning Thailand's failure to provide for prompt and effective independent review of guarantees collected, pending the assessment of customs value and of customs valuation decisions. The Philippines hoped that recourse to effective domestic procedures would help ensure that disputes could be settled locally in the first instance. Given the narrow scope of Thailand's appeal, and the absence of a cross-appeal by the Philippines, the Appellate Body was in the comfortable position of being able to concentrate on a limited set of issues concerning the interpretation of Articles III:2 and III:4, as well as Article X:3(b) of the GATT 1994. The Appellate Body's findings on these issues were entirely in line with the Philippines' position that its goods suffered unwarranted discrimination that protected domestic production. In conclusion, the Philippines recalled its objective in pursuing this dispute and said that international trade must be based on the rules to which all Members had agreed. The Reports provided Members with clear guidance as to what those rules were. The Philippines expected Thailand to promptly and fully implement the DSB's recommendations and rulings, as adopted at the present meeting, and to afford the goods from the Philippines treatment required under the WTO rules.

5. The representative of Thailand said that her country was grateful for the opportunity to comment on the adoption of the Panel and Appellate Body Reports. Thailand thanked the Panel and the Appellate Body, as well as the secretariat for their hard work on this dispute, which involved a large number of claims. Thailand disagreed with some aspects of the Appellate Body Report. For example, Thailand was puzzled by the Appellate Body's statement that it was not appropriate for Thailand to refer to the Panel's interim report in its appeal, given that the interim report formed part of the record of the panel proceedings. Thailand also had concerns regarding the Appellate Body's view that a panel could make an objective finding on the basis of evidence on which one party had not had any opportunity to comment. Furthermore, Thailand was of the view that, in some areas, the Appellate Body could have addressed Thailand's arguments in more detail. For example, the question of whether VAT liability under Thailand's VAT system should be calculated as the difference between input and output tax and whether input tax credits were automatic under Thai law was a key issue in Thailand's appeal. This had been discussed at length in Thailand's submission and during the Appellate Body's hearing. However, the Appellate Body had discussed this issue only very briefly in its Report. Nevertheless, Thailand was strongly supportive of the existence of a binding system of dispute settlement in the multilateral trading system, which Thailand had successfully relied upon in the past to vindicate its rights under WTO law. As the highest tribunal under the dispute settlement system, the Appellate Body bore both the privilege and the responsibility of having the final word on the clarification of the rights and obligations of Members under the covered agreements. Thailand looked forward to working cooperatively with the Philippines in the next phase of this dispute.

6. The representative of the European Union said that the EU had participated as a third party in this dispute because of its systemic interest in the correct interpretation of important provisions of the Customs Valuation Agreement and of the GATT 1994. The EU was satisfied with the findings of the Panel concerning certain obligations enshrined in the Customs Valuation Agreement. The Panel set in stone that the Customs Valuation Agreement imposed an obligation on national authorities to determine the customs value of imported goods on the basis of their transaction value and, if that was not possible, to sequentially apply the other customs valuation methods. Furthermore, the Panel had usefully clarified the respective responsibilities of the customs authorities and of importers in determining the acceptability of the transaction value in related-party transactions. The EU was also pleased with the analysis carried out by the Panel and the Appellate Body under certain provisions of

the GATT 1994. In particular, the Panel and the Appellate Body had correctly found that the obligation to maintain or institute tribunals or procedures for the prompt review and correction of administrative actions related to customs matters, as contained in Article X:3(b) of the GATT 1994, was not limited to particular types of actions and covered decisions on the imposition of guarantees.

7. The representative of Australia said that her country welcomed the adoption of the Panel and the Appellate Body Reports relating to this dispute, in which Australia had participated as a third party due to its systemic interest in the interpretation and application of the Customs Valuation Agreement. Australia thanked the Appellate Body, the Panel and their supporting Secretariats for their work in this dispute, as evidenced by the Reports being proposed for adoption. However, Australia had reservations about the reasoning apparently applied by the Appellate Body in its application of the "necessity" test under Article XX of the GATT 1994. In its Report, the Appellate Body indicated that the analysis of an Article XX(d) of the GATT 1994 exception should, in this case, focus on whether the differential treatment afforded to imported versus domestic cigarettes under the measure was "necessary", rather than considering whether the measure as a whole was "necessary". Australia noted the Appellate Body's previous reasoning in "US - Gasoline", as followed by the Appellate Body in "China - Publications and Audiovisual Products"<sup>1</sup> and a number of subsequent panel reports<sup>2</sup>, that the "necessity" of a measure must be considered as a whole and that aspects of a measure "can scarcely be understood if scrutinized strictly by themselves".<sup>3</sup> Not only did this latter approach appear more logical, it more faithfully reflected the language of Article XX of the GATT 1994, which was drafted in terms of the necessity of the measure, rather than the necessity of a particular treatment. Australia looked forward to the clarification of this issue in future disputes.

8. At a broader level, Australia noted that, as stated in the DSU, the prompt settlement of disputes was essential for the effective functioning of the WTO. This principle was reflected in Article 17.5 of the DSU, which provided that in no case shall appellate proceedings exceed 90 days. In Australia's view, there may be circumstances where the legal and factual complexity of an appeal required additional time for appropriate consideration to ensure the quality of the reports. Australia would not wish to see quality compromised through enforced adherence to unreasonable time-frames for appellate proceedings. Having said that, where the facts and legal issues of an appeal were limited in complexity, Australia considered that, where possible, efforts should be made to respect the time-frames provided under the DSU. Australia was concerned that delays in less complex proceedings would contribute to delays in pending appeals. Australia looked forward to the timely implementation of the DSB's recommendations and rulings pertaining to this dispute.

9. The representative of the United States said that his country had followed this dispute as a third party, in particular with regard to the issues raised with respect to the interpretation and application of Article X:3(b) of the GATT 1994 and Article 11 of the DSU. The United States thanked the Panel, the Appellate Body and their Secretariats for their work on this dispute. The United States agreed that the obligations of Article X:3(b) served an important purpose. However, the United States was concerned about the Appellate Body's statement that "[a] basic object and purpose of the GATT 1994, as reflected in Article X:3(b), is to ensure due process in relation to customs matters".<sup>4</sup> While Article X:3(b) may reflect such a due process objective, it did not follow that this

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<sup>1</sup> Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products" ("China - Audiovisual Products"). (WT/DS363/AB/R) 21 December 2009 at para. 309.

<sup>2</sup> See for example: Panel Report, "Brazil – Measures Affecting Imports of Retreaded Tyres" (WT/DS332/R) 12 June 2007 at paras. 7.106-7; Panel Report, "Colombia – Indicative Prices and Restrictions on Ports of Entry" (WT/DS366/R) 27 April 2009 at paras. 7.511-2; and "United States – Measures Relating to Shrimp from Thailand" (WT/DS343/R) 29 February 2008 at paras 7.171-4.

<sup>3</sup> Appellate Body Report, "United States – Standards for Reformulated and Conventional Gasoline" ("US - Gasoline") (WT/DS2/AB/R) 29 April 1996 at p. 19.

<sup>4</sup> Appellate Body Report, para. 202.

was an object and purpose of the GATT 1994 itself. The customary rules of interpretation reflected in the Vienna Convention on the Law of Treaties spoke of the object and purpose of the treaty, not an individual provision, as relevant for purposes of interpretation. References to the object and purpose of an individual provision may encourage an interpreter to paraphrase the text of a provision and refer to that paraphrase as the "object and purpose" of that provision, which then in turn risked substituting that paraphrase for the actual text of the provision.

10. In its analysis of Thailand's defence under Article XX(d) of the GATT 1994, the Appellate Body had stated that it was the differential treatment that must be "necessary" to secure compliance.<sup>5</sup> However, this seemed at odds with the Appellate Body's prior reports in which it had found that it was the "measure" that must be "necessary".<sup>6</sup> Like Australia, the United States was concerned with respect to this different approach, which appeared to depart from the text of Article XX(d) of the GATT 1994. Members would also benefit from a better explanation of how the discussion of, and focus on, "due process" in connection with Thailand's appeal under Article 11 of the DSU related to the text of Article 11, in particular the provision for an "objective assessment of the matter before it". The discussion did not seem to indicate why views as to what constituted "due process" in a panel proceeding were necessarily part of an analysis of whether a panel had conducted an "objective assessment" of the matter.

11. Finally, the United States noted that, although the communication from the Appellate Body to the DSB Chair transmitting the Report stated that the Report "will be circulated to Members ... in accordance with paragraph 5 of Article 17" of the DSU<sup>7</sup>, in fact the Report of the Appellate Body had been circulated outside the 90-day period stipulated in Article 17.5 of the DSU. The United States understood from the parties to the dispute that the Appellate Body had consulted with the parties on this issue and that each party had agreed to accept a report circulated outside the 90-day period. The United States further understood that the parties had provided a letter to the Appellate Body to that effect. However, contrary to past practice<sup>8</sup>, this agreement by the parties had not been mentioned in the Appellate Body's Article 17.5 notification to the DSB that it could not provide its report within 60 days.<sup>9</sup> Further, this agreement by the parties was not reflected in the Report of the Appellate Body, as had been the practice of the Appellate Body in prior disputes.<sup>10</sup> The approach followed in this dispute resulted in less transparency for Members on the circumstances leading to the consideration by the DSB of a report circulated outside the 90-day period in Article 17.5 of the DSU. The United States did not see how less transparency for the DSB was desirable. In future disputes, Members should be provided with the level of transparency provided by the Appellate Body in the past.

12. The representative of Mexico said that his country thanked the Panel, the Appellate Body and the Secretariat for the Reports and wished to make a procedural comment. Mexico was not making any value judgement as to whether or not it was positive for the system that the Appellate Body could extend the 90-day time-period for completion of an appeal and continued to examine this matter. Mexico noted that the Appellate Body Report had been issued 115 days following the filing of the notice of appeal. The notice of appeal had been filed on 22 February 2011 and, 58 days later, on 21 April 2011, the Appellate Body had issued a communication informing Members that the time-

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<sup>5</sup> Appellate Body Report, para. 179.

<sup>6</sup> Appellate Body Report, "Korea – Measures Affecting Imports of Fresh, Frozen and Chilled Beef", WT/DS161/AB/R, WT/DS169/AB/R, paras. 158, 162-165, 178-182 (12 December 2000).

<sup>7</sup> Communication from the Appellate Body, WT/DS371/10 (21 June 2011).

<sup>8</sup> See, e.g., Communication from the Appellate Body, "US - Continued Suspension/Canada - Continued Suspension", WT/DS320/14, WT/DS321/14 (24 July 2008).

<sup>9</sup> WT/DS371/9 (26 April 2011).

<sup>10</sup> See, e.g., "Canada - Continued Suspension", WT/DS321/AB/R at para. 29; "EC - Export Subsidies on Sugar", WT/DS265/AB/R at para. 7.

frame for completion of the appeal would be extended to 115 days. Mexico noted that although the time-frame had been extended beyond 90 days stipulated in Article 17.5 of the DSU, there was no reference to this fact in the Appellate Body Report.

13. The representative of Japan said that his country shared the concerns expressed by the United States and Mexico about the lack of transparency. It appeared that the Appellate Body had departed from the practice that it had established. Less transparency was undesirable, to say the least, because Article 17.5 of the DSU was drafted in categorical terms. Japan wished to reserve its rights to express its views on the issue of "due process" in connection with Thailand's appeal under Article 11 of the DSU because the issue would have implications for the future operation of the DSU.

14. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS371/AB/R and the Panel Report contained in WT/DS371/R, as modified by the Appellate Body Report.

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