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Dispute Settlement Body
9 May 2016

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 9 MAY 2016

Chairman: Mr. Xavier Carim (South Africa)

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1 UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

A. Recourse to Article 21.5 of the DSU by the United States: request for the establishment of a panel (WT/DS381/32)

1.1. The Chairman recalled that the DSB had considered this matter at its meeting on 22 April 2016 and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS381/32, and invited the representative of the United States to speak.

1.2. The representative of the United States said that, as discussed at the April DSB meeting, the rule issued by the US National Oceanic and Atmospheric Administration ("NOAA") directly addressed the DSB's findings on the US dolphin safe labelling measure, and brought the United States into compliance with its WTO obligations. Despite discussing this rule with Mexico on a number of occasions, Mexico continued to indicate that it was not prepared to refer the matter of compliance back to a compliance panel. Rather, Mexico continued to insist that the arbitration under Article 22.6 of the DSU to review Mexico's request for authorization to suspend concessions must move forward immediately. At the DSB meeting on 23 March 2016, Mexico had gone so far as to say that it considered that the US compliance action was not legally pertinent for the arbitration. Mexico appeared to be pursuing a course of action that would have the DSB ignore that the measure at issue was changed and that Mexico could require the WTO to act to authorize suspension of concessions even if the United States had come into compliance. This was not correct. As a result, the United States respectfully requested that the DSB establish a compliance panel pursuant to Article 21.5 of the DSU to confirm that the United States had brought its measure into compliance with the DSB's recommendations and rulings.

1.3. The representative of Mexico said that, as his country had explained at the previous DSB meeting, the United States did not request consultations under the new Article 21.5 compliance proceedings, and therefore its panel request was incomplete. Even if the panel requested by the United States was established at the present meeting, it would be demonstrated that establishing

such a panel was incorrect. In 2001, in the "Mexico – Corn Syrup" (Recourse to Article 21.5 of the DSU by the United States) dispute, the Appellate Body had addressed procedural aspects relating to the absence of consultations under Article 21.5 compliance proceedings. The Appellate Body had found that it was necessary for a party to raise objections regarding the failure to hold consultations at the DSB meeting when such a panel was being established as well as before the panel during the early stages of the proceedings. Mexico had failed to do so in that dispute. At the present dispute, Mexico wished to explicitly express its objection to the US failure to hold consultations before requesting the establishment of a panel. The jurisdiction of this panel was therefore deficient. The "Mexico – Corn Syrup" (Recourse to Article 21.5 of the DSU by the United States) dispute had taken place at a time when compliance procedures under Article 21.5 were being developed. Since then, a new procedure had been adopted whereby consultations were held before the panel request was made. The only exception was where there was a sequencing agreement providing for an exemption from consultations. In the present case, there was no sequencing agreement for this second stage of compliance proceedings. The United States had followed the new practice regarding consultations. It had, for instance, requested consultations in the "China – GOES" dispute (WT/DS414/15). Other Members, for their part, had also complied with the consultation requirement under Article 21.5 proceedings in other cases where the United States had been party to the dispute, such as in the disputes: "EC – Fasteners" (China) (WT/DS397/17), "US – Large Civil Aircraft" (2nd complaint) (WT/DS353/16), "US – Stainless Steel" (Mexico) (WT/DS344/18), "EC – Hormones" (Canada) (WT/DS48/21) and "US – Zeroing" (EC) (WT/DS294/22), to name but a few.

1.4. In light of the foregoing, Mexico was of the view that the establishment of the panel was inappropriate, at least until the correct procedures had been complied with. Furthermore, as stated at the previous DSB meeting, Mexico would request the establishment of a compliance panel under Article 21.5 of the DSU, including formal consultations, in respect of the US measures that had been amended in March 2016. Mexico would submit its request for consultations to the United States shortly, and hoped that its request for a panel would be considered by the DSB at a future meeting. As Mexico had stated on previous occasions, the 2016 IFR was not consistent with the obligations of the United States under either the TBT Agreement or the GATT 1994, and did not resolve the Tuna dispute. In conclusion, Mexico was glad that the Director-General had appointed a third individual to serve as the Arbitrator in the proceedings under Article 22.6 of the DSU[1], and hoped that these proceedings would progress expeditiously. As Mexico had pointed out previously, the correct sequence was Article 22.6 proceedings first, followed by the proceedings under Article 21.5 of the DSU.

1.5. The representative of Chinese Taipei said that since many delegations had expressed their views on this matter at the previous DSB meeting, his delegation would only briefly share some of its thoughts at the present meeting. Chinese Taipei agreed with Mexico, Guatemala, Australia and some other delegations that, in the absence of an agreement between the parties, the pending Article 22.6 arbitration could not be suspended simply because of a declaration of compliance by the Member concerned or due to the establishment of another compliance panel under Article 21.5 of the DSU. Chinese Taipei found no legal basis for such a suspension. In addition, it was Chinese Taipei's understanding that if the Article 21.5 compliance panel was established at the present meeting, it should be carried out in parallel with, and independently from, the pending Article 22.6 arbitration, unless the parties agreed otherwise. In particular, Chinese Taipei noted that paragraph 8 of the US and Mexico's "Sequencing Agreement" (WT/DS381/19) provided that the parties would cooperate to enable the Arbitrator to circulate its decision within 60 days. On the other hand, the panel to be established at the present meeting would have at least 90 days to review the compliance dispute. Chinese Taipei was of the view that neither time-period should be compromised for the other if there was no agreement between the parties. Chinese Taipei agreed with the other delegations that, in the end, the most effective solution to the complex issue was an agreement between the parties. It may be further mediated by the Arbitrators or the panelists.

1.6. The representative of the United States said that, first, the United States regretted that Mexico was raising the issue of consultations at the present meeting. The United States would explain why Mexico's view was incorrect as a matter of substance. But just as importantly, the United States regretted that this issue had not been discussed and resolved by the parties prior to the present meeting. The United States had sought to engage with Mexico in more depth on this issue, including through discussion with the DSB Chair, but Mexico had not been willing to have

[1] See document WT/DS381/34.

such a conversation. The United States did not consider it helpful for parties to avoid direct discussion of these DSB issues which helped to reach a deeper understanding of the DSU. The responsibility for the effective functioning of the DSB and the dispute settlement system ultimately resided with WTO Members, and it was in that spirit that the United States had sought, unsuccessfully, to engage in a meaningful dialogue with Mexico and the DSB Chair. With respect to the disputes Mexico cited at the present meeting, the United States would encourage Mexico to review the procedures agreed by the parties to those disputes. While parties may sometimes agree in the context of a particular dispute to hold consultations prior to the establishment of a compliance panel, it did not mean that the DSU required such consultations. In fact, when agreeing to hold consultations, parties often made explicit their agreement that the DSU did not require such consultations.[2] Turning to the substance, Mexico's position was not correct. There was no requirement to request consultations under Article 4 of the DSU as a condition for requesting the establishment of a compliance panel pursuant to Article 21.5 of the DSU, a point that the Appellate Body had made in two reports, one of which had involved Mexico as a party.[3] Indeed, while recourse to the original panel was mentioned as a possible step in Article 21.5, consultations were not referred to. The United States could not see how Article 4 of the DSU could apply to an instance in which it was the Member concerned who was requesting a compliance panel to confirm that Member's compliance. Accordingly, any objection to the US panel request based on the failure to request Article 4 consultations could not prevent the establishment of a panel. The United States also noted that, in any event, the parties had already consulted on the initial matter giving rise to the situation under Article 21.5. Further, the United States had discussed the recent rule with Mexico on a number of occasions, including under the Understanding between the United States and Mexico Regarding Procedures under Articles 21 and 22 of the DSU.[4] Of course, as the United States had mentioned previously, the United States stood ready to consult further with Mexico on this matter as long as those consultations did not cause any delay in the compliance panel proceedings. Finally, the United States would note that this was consistent with the approach agreed under that same Understanding, which had specified that Mexico was not required to hold consultations with the United States prior to requesting the establishment of an Article 21.5 panel.[5]

1.7. The representative of Mexico said that, with regard to the comments made by the United States concerning an informal meeting with the US, Mexico and the DSB Chairman prior to the present meeting, Mexico wished to state that the forum for discussing DSB matters was the DSB meeting in the presence of all Members. Mexico did not consider it appropriate to address DSB issues in advance of formal meetings without the rest of the Membership being aware of and having the opportunity to share their points of view. Mexico had attended one meeting with the US and the DSB Chair as a matter of courtesy and diplomacy in order to discuss aspects on which Mexico and the United States clearly did not agree, as mentioned at the previous DSB meeting. However, Mexico viewed a second meeting as an abuse. In its view, it was not right to hold that type of meetings. The right thing was to discuss such matters at the DSB meeting in front of all Members. Regarding the comments made by the United States on sequencing agreements, Mexico was aware that sequencing agreements existed, but, in this case, the United States was not entitled to be exempted from consultations. Article 21.5 of the DSU was clear, the proceedings must be decided "through recourse to these dispute settlement procedures". This included consultations, appeals, etc., as Mexico had made clear in its first statement made at the present meeting. The United States could read paragraphs 45, 47, 50 and 64 of the Appellate Body report in the dispute "Mexico - Corn Syrup" (Recourse to Article 21.5 of the DSU by the United States), which explained what Mexico had referred to in its first statement. Mexico stressed that it was, in this case, the complainant. Mexico had initiated this dispute eight years ago and hoped to be able to resolve it. As had been mentioned previously, the DSU provisions indicated that inconsistent measures were to be removed or eliminated. The United States had failed to do so and had done so unsuccessfully on two occasions, and Mexico would demonstrate, for the third time, that the United States was not meeting its obligations.

[2] See, e.g., WT/DS414/14.

[3] See "Mexico – HFCS" (Article 21.5) (AB), paragraph 65; "US – Continued Suspension" (AB), paragraph 340.

[4] Understanding between the United States and Mexico regarding procedures under Articles 21 and 22 of the DSU, WT/DS381/19, paragraph 10 (circulated on 7 August 2013).

[5] Understanding between the United States and Mexico regarding procedures under Articles 21 and 22 of the DSU, WT/DS381/19, paragraph 2 (circulated on 7 August 2013).

1.8. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the United States in document WT/DS381/32. The Panel would have standard terms of reference.

1.9. The representatives of Australia, Brazil, Canada, China, the European Union, Guatemala, India, Japan and Norway reserved their third-party rights to participate in the Panel's proceedings.

2 ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

A. Report of the Appellate Body (WT/DS453/AB/R and Add.1) and Report of the Panel (WT/DS453/R and Add.1)

2.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS453/11 transmitting the Appellate Body Report in the dispute: "Argentina – Measures Relating to Trade in Goods and Services", which had been circulated on 14 April 2016 in documents WT/DS453/AB/R and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. 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".

2.2. The representative of Argentina said that, on 14 April 2016, the Appellate Body had circulated to Members its Report in the dispute: "Argentina - Measures Relating to Trade in Goods and Services". As a result of the amendments made to the Panel Report, the Appellate Body had not made any recommendation to Argentina under Article 19.1 of the DSU. Argentina was satisfied with the outcome of this dispute, which had various systemic implications. First, the findings of both the Panel and the Appellate Body confirmed that the GATS gave Members ample margin to maintain defensive anti-abuse measures relating to transparency and the exchange of tax information as a way of protecting public revenue, preventing risks deriving from money laundering and curbing tax evasion. The outcome of this dispute significantly supported the active efforts made by the G20, the OECD Global Forum and the Financial Action Task Force (FATF) to prevent the aforementioned risks. Furthermore, the Appellate Body's endorsement of the Panel's findings regarding Article XIV of the GATS and the "prudential exception" confirmed that Members enjoyed broad discretion to adopt this type of anti-abuse measure, provided that they met the conditions established by these provisions.

2.3. Second, Argentina had maintained throughout the dispute that the services and service suppliers originating in jurisdictions not participating in the exchange of tax information with other jurisdictions were fundamentally different from the services and service suppliers originating in jurisdictions that did, whether from a trade or regulatory point of view. For this reason, the dispute had to be resolved on the basis of a correct interpretation of the concept of "likeness". In that respect, this was the first dispute in which the Appellate Body had established the standard for determining likeness in the context of Articles II and XVII of the GATS. The Appellate Body had established that the assessment of likeness of services should not be undertaken in isolation from considerations relating to the service suppliers, and, conversely, the assessment of likeness of service suppliers should not be undertaken in isolation from considerations relating to the likeness of the services they provided.

2.4. The Appellate Body had also determined how a panel should proceed in assessing the "likeness" of services and service suppliers in the particular context of Article II:1 and Article XVII:1 of the GATS. In that respect, it had been made clear that the criteria for assessing "likeness" traditionally employed as analytical tools in the context of trade in goods were relevant for assessing the competitive relationship of services and service suppliers, provided that they were adapted as appropriate to account for the specific characteristics of trade in services. Furthermore, as maintained by Argentina throughout the dispute, establishing "likeness" on the basis of a presumption was significantly more complex in trade in services. In that respect, within the GATS framework, the scope of "presumption of likeness", on the basis of which a measure made a distinction between services and service suppliers based exclusively on origin, was limited. As had been noted by the Appellate Body, this was due, in particular, to the role that domestic

regulation may play in shaping, for example, the characteristics of services and service suppliers and consumers' preferences. Finally, in this dispute, the "prudential exception" that had been established in paragraph 2(a) of the GATS Annex on Financial Services was interpreted for the first time. Few provisions, not only of the GATS, but of all the WTO Agreements, had been as widely examined and discussed as the prudential exception. The Panel had agreed with Argentina and various third parties in this dispute that this provision reflected a "broad policy space" to ensure the integrity and stability of the financial system. The Appellate Body, for its part, had found that the prudential exception may be invoked to justify inconsistencies with all of a Member's obligations under the GATS and that there were no restrictions on the type or form of a "measure" falling under that provision. It had also been established that the Members' broad conception of the prudential exception informed the negotiation and the scope of the commitments that they had negotiated and had inscribed in their schedules of specific commitments. For this reason, a narrow interpretation of the scope of application of the provision or of the conditions under which the prudential exception could be invoked would possibly alter the balance of rights and obligations under the GATS. In conclusion, Argentina thanked the WTO Secretariat, in particular the Legal Affairs Division and the Appellate Body Secretariat, for their work in this dispute. Argentina also thanked the translators and interpreters, who had made it possible for this dispute to be conducted in Spanish.

2.5. The representative Panama said that his country thanked the Appellate Body, the Panel and the Secretariat for their work and assistance to the parties in these proceedings. The Appellate Body's decision corrected a fundamental flaw in the Panel's reasoning which, if it had been upheld, would have seriously undermined the principle of non-discrimination in trade in services. The Panel's interpretation of "less favourable treatment" with respect to the non-discrimination obligations under the GATS was erroneous from a legal point of view, and problematic from a systemic point of view. The Appellate Body was perfectly clear in its conclusion that Members may not neutralize competitive advantages enjoyed by services and service suppliers of other Members through discriminatory measures and claim not to violate the fundamental most-favoured-nation and national treatment obligations set forth in Articles II.1 and XVII of the GATS. It was also encouraging that the Appellate Body should have recognized that the presumption of "likeness" was warranted, whether between goods or services and service suppliers, when the measure at issue made distinctions on the basis of their origin. That confirmation, which set a precedent, made it easier to question less favourable treatment of services or service suppliers on the basis of lists in which distinctions were made only on the basis of origin. In a nutshell, the well-established case law on likeness in the context of trade in goods applied in the same way to trade in services. Panama regretted that the Appellate Body had reversed some of the Panel's findings on the grounds that the Panel had not conducted a sufficiently thorough analysis, without completing the legal analysis of "likeness" between the services and service suppliers in question. The DSU did not allow the Appellate Body to send a case back to the Panel when the latter had not conducted a sufficiently thorough analysis. Panama had been adversely affected by that limitation in this dispute, and would have to consider what action to take. However, in Panama's view, the Appellate Body should have completed the analysis in order to provide a prompt solution to the dispute. In spite of these concerns, Panama welcomed the fact that the Appellate Body had not endorsed a discriminatory system of lists of countries that violated the basic principles of the multilateral system and had been dictated by the regulatory environment.

2.6. The representative of the United States said that his country thanked the members of the Appellate Body, the Panel, and the Secretariat assisting them for their work on this dispute. As a third-party in this dispute, the United States had noted throughout that the facts and circumstances were unusual. In the course of the Panel proceedings, Argentina had shifted Panama to "cooperating country" status for purposes of tax treatment, a shift that Argentina had considered might resolve Panama's complaint, but which had not, and which the Panel had appeared to construe as arbitrary and had used as the basis for a number of its adverse findings. At the same time, a number of the legal positions taken by Panama concerning interpretation of GATS provisions on national treatment, most-favoured-nation treatment, and the prudential exception, had appeared to be inconsistent with a plain reading of the text of the GATS. The United States therefore appreciated the Appellate Body's reversal of the Panel's approach to "like services or service suppliers". The Appellate Body had recognized that a determination of "likeness" in a national treatment or most-favoured-nation treatment claim under the GATS required a rigorous analysis, taking into account all relevant facts that may bear on the "likeness" issue. Having resolved the appeal on the first, threshold issue of "likeness", it would have been appropriate to stop the analysis at that point. Indeed, given the unusual circumstances, there were

even greater reasons than usual to consider only those issues necessary to resolve the dispute. Regrettably, the Appellate Body Report did not take the appropriately cautious approach. Rather, it went on to consider issues on appeal that the Appellate Body itself had considered not necessary to resolve the dispute. As the Report stated at paragraph 6.83: "Our reversal of these findings [on likeness] means that the Panel's findings on 'treatment no less favourable' are moot because they were based on the Panel's findings that the relevant services and service suppliers are 'like'. Moreover, as a consequence of our reversal of the Panel's 'likeness' findings, there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel's analysis … pursuant to Article XIV(c) of the GATS and … paragraph 2(a) of the GATS Annex on Financial Services". But after clarifying that all of the Panel's findings other than "likeness" were rendered moot, the Appellate Body in paragraph 6.84 stated that "[w]ith these considerations in mind, we turn to address the issues raised in Panama's appeals". That is, after clarifying that Panama's appeals concerned "moot" panel findings, the Appellate Body went on to address those moot appeals. The United States was concerned that this approach did not reflect the role of dispute settlement as set out in the DSU. It was not the role of this system to make legal findings or interpretations outside the context of resolving a dispute. Indeed, as the Appellate Body itself had noted in its Report in the dispute "Wool Shirts and Blouses": "Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute".[6] It followed that if an issue on appeal was not necessary to resolve a particular dispute, because for example the panel findings had been rendered "moot" as a result of another legal error, then the Appellate Body should decline to make law by resolving that unnecessary issue. The DSU directed panels and the Appellate Body to make findings on those issues of law that were necessary to assist the DSB in helping resolve the dispute.[7] Indeed, while the United States may consider certain of the Appellate Body's statements in the remaining 46 pages of its Report correct in substance, those statements were unfortunately not findings but more in the nature of *obiter dicta*. Members may wish to reflect on the significant impact that the issuance of such advisory opinions would have on the functioning of the dispute settlement system.

2.7. The representative of Canada said that his country thanked the Appellate Body, the Panel and their respective Secretariats for their work in helping the parties resolve this dispute. Although it was not a third-party to this dispute, Canada wished nonetheless to take the opportunity to provide its views on certain issues raised in the Report of the Appellate Body. First, the outcome of this dispute turned on the Appellate Body's reversal of the Panel's findings that the services and service suppliers in question were "like", which came early on in the Report at paragraph 6.83. In previous reports, the Appellate Body had indicated that, where it overturned panel findings, it may complete the analysis where the panel record provided a sufficient factual basis to do so. Given the importance of the prompt resolution of disputes, Canada accepted the usefulness of the Appellate Body doing so. In light of the importance of the Panel's likeness finding to the outcome of this dispute, Canada was therefore surprised that the Appellate Body had not sought to complete the analysis following its reversal of the Panel's finding that the services and service suppliers in question were "like", nor to explain why it had been unable to do so. According to the Report, the parties seemed to have presented arguments and some evidence with respect to various criteria for establishing "likeness". Receiving an explanation from the Appellate Body as to why it had been unable to complete the analysis was useful for WTO Members as guidance for how to conduct themselves in future dispute settlement proceedings. Moreover, given the absence of a remand mechanism, the Appellate Body's decision not to complete the analysis when it might have been able to do so, deprived the complaining party of an opportunity to have all of its arguments considered.

2.8. Second, regarding the "treatment no less favourable" standard to be applied under GATS +Articles II:1 and XVII, Canada welcomed the Appellate Body's clarification, at paragraph 6.111, that the analysis should assess whether the measure at issue modified the conditions of competition to the detriment of like services or service suppliers in question, and that it did not contemplate a separate step of the analysis into the measure's "regulatory aspects". Canada also agreed with the Appellate Body that the GATS strikes a balance between a Member's obligations under the Agreement and its right to pursue policy objectives, including through various flexibilities and exceptions. Canada also considered that regulatory flexibility could be

[6] "US – Wool Shirts and Blouses", WT/DS33/AB/R and Corr.1, at page 19.
[7] See DSU, Articles 3.7, 7.1, 11.

accommodated under the "likeness" component of the GATS less favourable treatment analysis. For instance, under the GATT as elaborated in particular in the "EC – Asbestos" dispute, where otherwise like products posed different risks, they may be found to not be "like". The same concept should apply to considerations of "likeness" in the services context. Third, and finally, Canada welcomed the Appellate Body's affirmation at paragraphs 6.259-6.260 that the scope of the measures that potentially fell within the prudential exception in paragraph 2(a) of the Annex on Financial Services was broad, and that any *a priori* restriction on this scope would be incompatible with the balance of rights and obligations that was expressly recognized in the preamble of the GATS. It was important that Members continued to have the flexibility to take measures for prudential reasons to ensure the integrity and stability of the financial system. The Appellate Body's finding preserved that flexibility.

2.9. The DSB took note of the statements and adopted the Appellate Body Report contained in documents WT/DS453/AB/R and WT/DS453/AB/R/Add.1 and the Panel Report contained in documents WT/DS453/R and WT/DS453/R/Add.1, as modified by the Appellate Body Report.

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