WORLD TRADE ORGANIZATION

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Dispute Settlement Body
24 March 2006

MINUTES OF MEETING

Held in the Centre William Rappard
on 24 March 2006

Chairman: Mr. Muhamad Noor Yacob (Malaysia)

Subjects discussed: Page

1. Mexico – Tax measures on soft drinks and other beverages

(a) Report of the Appellate Body (WT/DS308/AB/R) and Report of the Panel (WT/DS308/R)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS308/12 transmitting the Appellate Body Report on: "Mexico – Tax Measures on Soft Drinks and other Beverages", which had been circulated on 6 March 2006 in document WT/DS308/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that, the Appellate Body Report and the Panel Report pertaining to this case 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. The representative of the United States said that his country wished to thank the members of the Panel, the Appellate Body, and the Secretariat for their hard work. The Panel and the Appellate Body Reports were solid, well-reasoned Reports, and the United States was pleased to propose their adoption. He recalled that this dispute involved Mexico's tax on soft drinks and other beverages made with any sweetener other than cane sugar. Under the tax, soft drinks and other beverages made with imported sweeteners, such as high-fructose corn syrup (HFCS) and beet sugar, were subject to a 20 per cent tax on their sale and distribution. The Panel had correctly found Mexico's beverage tax to be inconsistent with Articles III:2 and III:4 of the GATT 1994. Mexico had not appealed these findings.

3. The Panel had also correctly rejected Mexico's defense that, although discriminatory, its beverage tax was nonetheless justified under Article XX(d) of the GATT 1994. The Appellate Body had upheld this finding, and the United States generally supported the analysis of the Appellate Body.

In the course of the dispute, the Panel had also rejected Mexico's request for the Panel to decline jurisdiction. The Panel had rightly concluded that a WTO panel may not decline to exercise jurisdiction over disputes properly brought before it. The Appellate Body had upheld this finding and the obligation of WTO panels to make findings, and WTO Members' right to obtain them, in disputes properly brought before the WTO dispute settlement system.

4. The Panel Report was a clear indication that Mexico must eliminate its discrimination against US sweeteners and beverages made with those sweeteners. The United States found it difficult to conceive how Mexico could do so without eliminating its beverage tax. For that reason, the United States was particularly troubled by the decision of the Mexican Congress to renew the beverage tax for 2006 and by reports of statements by Mexican officials that Mexico would impose prohibitive tariffs on US HFCS imports if in the future it eliminated the tax. The United States hoped that Mexico would act quickly to eliminate its discriminatory tax, and that in doing so it would not simply replace one prohibitive barrier to US HFCS with another.

5. The Panel and Appellate Body reports provided clear guidance on what Mexico needed to do to implement the DSB's recommendations and rulings in this dispute. The United States called upon Mexico to bring itself into compliance with its WTO obligations promptly.

6. The representative of the European Communities said that the EC had been a third party in this dispute because of its systemic interest in the important substantive and procedural legal issues at stake. Accordingly, the EC wished to thank the Appellate Body, the Panel and the Secretariat for their work, and notably for giving consideration to the views which the EC had expressed before the Panel and the Appellate Body. The EC agreed with the Panel's and the Appellate Body's conclusions regarding the issues of jurisdiction and Article XX(d) of the GATT 1994. The EC particularly appreciated the careful analysis of Article XX(d) by the Appellate Body, including the clarification that international agreements might be regarded as "laws and regulations" where they had direct effect within the domestic legal order of a WTO Member.

7. However, the EC had some concerns regarding the Appellate Body's reasoning, where it had ruled out a determination whether a WTO Member acted consistently or inconsistently with non-WTO international obligations and where the Appellate Body had argued that this would mean adjudicating non-WTO disputes. Of course, Panels and the Appellate Body did not have the function to "adjudicate" non-WTO disputes. But interpreting and applying non-WTO law and ruling on non-WTO obligations, where this was legally relevant for deciding a WTO dispute, did not mean "adjudicating" a non-WTO dispute. It could even be required, as WTO law and dispute settlement practice showed, for example in relation to the Vienna Convention, the Lomé Convention, the UN Charter and IMF Understandings. The EC would therefore caution against a broad reading of the Appellate Body's statement regarding the permissibility to "adjudicate non-WTO disputes."

8. The EC also had some doubts regarding the Appellate Body's reasoning on countermeasures and Article 23 of the DSU. Of course, Article 23 made clear that there could be no countermeasures against WTO breaches, but it did not regulate whether countermeasures were permitted to redress non-WTO violations. This issue was not at stake in the present case, given that Mexico had relied only on Article XX(d) of the GATT 1994, so there was no need to take a position in this respect.

9. The EC also wished to comment on the part of the Panel Report which had not been appealed. The EC broadly agreed with the Panel's analysis of Articles III:2 and III:4 of the GATT 1994, where the Panel had based its violation findings on the observation that the sweetener exempted from taxation; i.e. cane sugar, was almost exclusively a domestic product in Mexico, whereas the taxed beet sugar and corn syrup were produced in the United States, but not in Mexico. This was indeed the very feature which had resulted in the *de facto* discriminatory nature of the challenged Mexican taxes. However, the EC was puzzled that the Panel, while basing itself on these central facts for establishing

a violation of Articles III:2 and III:4 of the GATT 1994, at two of the relevant points explicitly "refrains from ruling on whether such a finding is necessary in order ... to establish [a] claim under Article III:2, first sentence, [and Article III:4] of the GATT 1994". If such a finding were not necessary, virtually any differential taxation of products that were "like" would amount to a violation of Article III:2, and virtually any non-fiscal differentiation would amount to a violation of Article III:4 of the GATT 1994 – even where the differentiation affects imports and like domestic products in the same manner or where the differentiation predominantly burdened domestic like products.

10. In a similar vein, the EC wondered whether the Panel had always sufficiently considered the extent to which the current absence of corn syrup in the domestic production and in the use of sweeteners in Mexico was due to the very taxes that were challenged in this dispute. The EC did not have a basis to believe that, in the absence of the challenged taxes, there would be a similarly large production and use of corn syrup in Mexico as among products to be exported from the United States. Accordingly, the Panel's ultimate conclusions might be unaffected by this aspect in this case. In other cases, however, the facts might well be different and might well warrant a more cautious approach to Article III of the GATT 1994, in order to avoid that measures without discriminatory effect were found to be in violation of national treatment obligations.

11. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS308/AB/R and the Panel Report contained in WT/DS308/R, as modified by the Appellate Body Report.

2. Selection process for appointment of an Appellate Body member

12. The Chairman, speaking under "Other Business", said that he wished to make a brief statement regarding the selection process for appointment of an Appellate Body member. He recalled that at its meeting on 17 February 2006, the DSB had agreed to launch the process for selecting an Appellate Body member to replace the late Mr. John Lockhart for the remainder of his term, until 11 December 2009, in accordance with Article 17.2 of the DSU. He also recalled that, at that meeting, in accordance with the procedures set out in document WT/DSB/1, the DSB had agreed to establish a Selection Committee consisting of the Director-General and the 2006 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB. At the present meeting, he wished to remind delegations that WTO Members had been invited to submit nominations of candidates, together with their curricula vitae, by no later than 5 p.m. on 31 March 2006. In this context, he noted that no nominations had yet been received.

13. The representative of China recalled that at its 17 February 2006 meeting, the DSB had launched the selection process for appointment of an Appellate Body member to replace the late Mr. John Lockhart for the remainder of his term. At that meeting, the DSB had also agreed to establish a Selection Committee, and had set the deadline of 31 March 2006 for nominations of candidates. After the 17 February meeting, China, as well as some other Members, had started its domestic selection procedures with a view to nominating capable and qualified candidates. China's domestic selection process was ongoing and might not come to an end before the deadline of 31 March 2006. In light of this, China requested that the DSB and the Selection Committee postpone the deadline of 31 March until 30 April 2006. China believed that such postponement would also benefit domestic selection processes of some other WTO Members, and be helpful to the selection process for appointment of an Appellate Body member.

14. The Chairman said that, in light of what had just been stated by China, he wished to invite other delegations to express their views on this matter.

15. The representative of Canada said that his delegation fully understood that Members needed time to go through the selection process internally. However, his delegation would have appreciated if it had received advance notice of China's request. His delegation had not had a chance to consult the possibility of extension of the deadline with the capital, and this was not a matter to be consented to without instructions from the capital. He was not in a position to agree to such an extension at the present meeting. He did not wish to suggest that on behalf of his government he would disagree with China's request, but that he was not in a position to agree to it at the present meeting.

16. The representative of Japan said that, like Canada, his delegation considered that the matter before the DSB was important, but it was not in a position at the present meeting to take a decision on China's request without any instructions from the capital. Like Canada, his delegation could not, at the present meeting, indicate whether it would agree to or disagree with China's request.

17. The representative of Australia said that her country noted the Chairman's statement that no nominations had yet been received and considered that an extension of the deadline might indeed become necessary. However, it could accept and completely understand the positions of Canada and Japan that since no notice of the proposal had been given in advance, it would be difficult to accept the proposal at this time. Bearing that in mind, perhaps delegations should be given some time to consider China's proposal and then to come back to this, but obviously this would have to occur quite quickly. Australia just wished to emphasize the importance of getting the process right and ensuring, as mentioned by China, that a qualified candidate be appointed.

18. The representative of Brazil said that his delegation had taken careful note of the Chairman's statement that the deadline was approaching. His delegation appreciated China's efforts to complete its domestic selection procedures as soon as possible. It fully understood that sometimes it was very difficult to meet deadlines when high standards of quality were at stake as in this case. However, as pointed out by previous speakers this was the first time that his delegation had become aware of China's request. His delegation would need some time to consult with the capital in order to get instructions on this very important matter. He said that, following consultations with the capital and the relevant authorities in Brazil, China's request could be considered positively.

19. The Chairman noted that delegations were not in a position at the present meeting to decide on this matter and said that he would reflect on this issue and would consult with delegations as necessary.

20. The representative of Mexico said that his delegation noted the statements made and had no problem with the substance. However, there was a procedural issue to which he wished to refer, namely, that the agenda of the present meeting did not contain any "Other Business" item. The only item for consideration at the present meeting was the adoption of the Appellate Body and the Panel Reports. Therefore, considering the number of delegations at the present meeting, only a few delegations would be able to take a decision on this important matter at the present meeting. Other delegations would have probably been able to participate in the present meeting had they been informed in advance that this matter was going to be discussed. He reiterated that Mexico had no problem with the statements made by previous speakers, but believed that Members of the DSB should adhere to the rules of procedure.

21. The representative of United States said that first of all his delegation wished to thank the delegation of China for having raised this matter with the DSB and for making Members of the DSB aware of its particular concerns in advance of the deadline. This was very helpful. At the same time, his delegation wished to say as well that, like others, it had had no opportunity to consult the capital and, therefore, it had no instructions on this matter. His delegation shared the point of view just expressed by Mexico with respect to the procedures to be followed by the DSB. It was his delegation's understanding that the Chairman would be reflecting or consulting on ways forward.

Since the Chinese delegation had made it clear to all what it was that it would be hoping for, and that all now were aware of that, one possibility could be for China to inscribe its request on the agenda of a meeting of the DSB, either a regular or one especially called for that purpose in the ordinary way, pursuant to the rules of procedure. That would be a way for the DSB to consider the issue so as to take account of the concerns expressed by Mexico, which his delegation shared.

22. The representative of European Communities said that his delegation was very pleased to hear that Members were actively looking for suitable candidates to fill the vacancy which had arisen on the Appellate Body following the sad passing away of John Lockhart. The EC had stated previously in the DSB that the most important criterion was the highest quality of the successor of the late Mr. John Lockhart. The EC understood that this search might require time and that indeed a certain amount of time beyond the deadline set by the DSB might be needed. However, his delegation wished to be associated with previous speakers who had stated that this should be done in accordance with the rules of procedure. He then drew attention to rule 25 of the rules of procedure for meetings of WTO bodies, which provided that normally decisions were not taken under "Other Business", in particular when a matter had been put on the agenda without any advance notice. He added that his delegation had no instructions at this point and proposed that this matter be dealt with within the proper procedural framework.

23. The representative of Canada said that he had asked for the floor in response to a suggestion that had been made earlier in respect of the next steps that China might undertake. He thought that one had to be careful in the sense that the next meeting of the DSB, either special or regular, would only take place after the 31 March deadline. Therefore, to seek the extension of the deadline after the deadline had passed would probably send a signal about the procedures to be followed in the WTO that would not necessarily be helpful in future. Of course, if there were no qualified candidates and if that was the judgement of WTO Members at the time, that was one thing, but to extend a deadline *ex post facto* seemed to be problematic. He added that he did not have instructions one way or another and that this was only his initial reaction to procedural circumstances at hand.

24. The representative of India thanked the Chairman for bringing to Member's notice the issue about the possibility of extending the deadline, but as others, he also had no instructions from the capital for obvious reasons. Nevertheless, he appreciated the reasons given by China for seeking an extension of the deadline up to 30 April. He could fairly assume that his capital might not have any objections to such an extension. At the present meeting, he wished to raise systemic concerns about Member's rights and obligations regarding matters raised under "Other Business". India had already stated its concerns in this regard on previous occasions, namely, that some Members were tempted to raise under "Other Business" matters related to WTO rights and obligations; i.e. either to state that they had implemented the DSB's recommendations or to make similar assertions. However, his delegation recognized that the matter under discussion was of much more paramount collective importance for the DSB and the WTO and, as stated by the EC, the quality of the person that would be selected was as important as meeting the deadline that had been set by the DSB.

25. The Chairman said that, in response to what had just been stated, he wished to note that, in his statement under "Other Business", he had only wished to draw Members' attention to the deadline of 31 March and to the fact that thus far no nominations had been received. He had not drawn attention to the possibility of the extension of the deadline. He reiterated that he would reflect on this matter and would consult with Members[1], bearing in mind the time constraint as pointed out by delegations.

26. The DSB took note of the statements.

[1] Informal consultations on China's proposal were held on 28 March 2006.