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Dispute Settlement Body
31 July 2015

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 31 JULY 2015

Chairman: Mr. Harald Neple (Norway)

1 PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

A. Report of the Appellate Body (WT/DS457/AB/R and Add.1) and Report of the Panel (WT/DS457/R and Add.1)

1.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS457/10 transmitting the Appellate Body Report in the dispute: "Peru – Additional Duty on Imports of Certain Agricultural Products", which had been circulated on 20 July 2015 in document WT/DS457/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".

1.2. The representative of Guatemala said that his country wished to thank the Panel, the Appellate Body and the respective Secretariats for their work in assisting the parties to resolve the matter at issue. Guatemala valued its bilateral relationship with Peru and hoped that settlement of this matter would further strengthen the friendship and solidarity between the two countries. In particular, Guatemala wished to reiterate that in this dispute it had consistently acted in strict compliance with the principles of good faith governing international relations between States. This was noted by both the Panel and the Appellate Body. The Free Trade Agreement between Guatemala and Peru, irrespective of whether or not it was in force, did not pose any impediment to Guatemala initiating dispute settlement proceedings in relation to Peru's price-range system. Guatemala welcomed the Reports of the Panel and the Appellate Body with regard to their findings that the measure at issue was a variable import levy or similar measure, in violation of Article 4.2 of the Agreement on Agriculture, and that it also constituted "other duties or charges" not recorded in Peru's Schedule of Concessions in violation of Article II:1(b) of the GATT 1994. Guatemala was also satisfied with the Appellate Body's ruling, which reversed the Panel's finding that the measure at issue was not a minimum import price, although it regretted that the Appellate Body was unable to complete the analysis.

1.3. Guatemala noted that this was the first time that the arguments of the parties were not summarized by the Appellate Body, but instead annexed to its Report in the form of executive summaries prepared by the participants in the appeal. This meant that the Appellate Body did not use the executive summaries to prepare its own descriptions of the parties' arguments. Thus, executive summaries were becoming even more important since they themselves contained the description of the participants' arguments. Guatemala welcomed this new practice by the Appellate Body. In the absence of concrete steps by Members to address the dispute settlement system's workload issues, small actions taken by panels and the Appellate Body could serve as a palliative measure in order to make better use of the limited resources available. Nonetheless, it was

important to point out that limiting the length of executive summaries to a maximum of 10% of the original submission's word count may not always be appropriate, particularly not in cases where the original submissions themselves were quite short and the number of arguments high. Guatemala invited the Appellate Body to review the limit on the length of submissions, in particular in light of the fact that executive summaries were now simply annexed to reports and should not therefore represent an addition to its workload.

1.4. Finally, he said that Guatemala hoped that Peru, as a Member that respected its WTO commitments, would comply promptly with the rulings and recommendations of the Panel and the Appellate Body that would be adopted at the present meeting.

1.5. The representative of Peru said that his country wished to thank the Panel, the Appellate Body and the Secretariat who had worked on this case. First, Peru wished to stress that it did not support the findings and recommendations of the Appellate Body Report. As Peru has rightly pointed out on a number of occasions, this case was unique in the history of the WTO dispute settlement system since it demonstrated the inconsistency in Guatemala's behaviour. Although Guatemala had clearly stated its agreement to the application of the measure when it had signed the bilateral agreement with Peru, it had then filed a dispute at the multilateral level. All Members must act in accordance with the principle of good faith, an essential prerequisite in relations between States in general, and in the WTO dispute settlement system in particular.

1.6. Peru considered that the Panel had the responsibility of interpreting Peru's obligations in accordance with the customary rules of interpretation of public international law, namely, by taking into account the provisions of Article 31 of the 1969 Vienna Convention on the Law of Treaties and also taking into consideration the implications of the Free Trade Agreement in the dispute. The Appellate Body had limited the good faith assessment and had failed to consider the obvious inconsistency in Guatemala's actions. In any case, Peru was convinced that the measure at issue was entirely consistent with its WTO obligations, as it constituted an ordinary customs duty and did not violate either Article II of the GATT 1994 or Article 4.2 of the Agreement on Agriculture. The Panel had confirmed that "the measure does not operate in a manner that is different from the way in which ordinary customs duties might operate". The Panel had also recognized that the measure was neither a minimum import price, given the conclusive evidence that it did not impede entry of the products at issue to the Peruvian market at below-range prices, nor an alleged *de facto* threshold. Moreover, Peru considered that the main finding of the Panel and the Appellate Body, namely that the measure was a variable import levy, was incorrect, and that Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 were not interpreted in accordance with the customary rules of interpretation of public international law.

1.7. Peru said that the measure challenged by Guatemala was included in the schedule of tariff commitments bound by Peru in the Uruguay Round and was simply an ordinary customs duty that varies. Peru disagreed with the standard applied by the Appellate Body, which would suggest that the presence of a formula would turn an ordinary customs duty into a prohibited measure. On the contrary, the existence of a formula made the duty more transparent and predictable and did not impede the transmission of international price developments. Thus, the measure should have been treated, by both the Panel and the Appellate Body, as a measure substantially different from those prohibited under the Agreement on Agriculture and the GATT 1994 and consequently should have been properly compared to customs duties.

1.8. Notwithstanding the above, Peru would respect its commitments under the rules of the multilateral trading system and carry out the internal coordination process to implement the recommendations of the Appellate Body Report, within a reasonable period of time.

1.9. The representative of the United States said that his country thanked the Panel and the Appellate Body for their efforts in this dispute. The United States wished to offer a few observations on the Reports. The United States noted that the Panel and Appellate Body Reports provided important guidance on the meaning and application of the terms "variable import levies" and "minimum import prices" in footnote 1 of Article 4.2 of the Agreement on Agriculture. In particular, the Appellate Body had confirmed that a "necessary and key element" of variable import levies was their inherent variability, based on a scheme or formula that caused and ensured that levies changed continuously and automatically. The Appellate Body had noted that variable import levies may have certain "additional features", such as lack of transparency and predictability, but cogently reasoned that these features were not independent or absolute

characteristics that a variable import levy must display. Instead, these additional features may serve to confirm that a measure was inherently variable. This was an important development and clarification, particularly in light of language from previous Appellate Body Reports in the "Chile - Price Band" dispute that some Members had taken to indicate that lack of transparency and predictability were necessary elements. The United States also noted the Appellate Body's rejection of Peru's argument that it was permitted to maintain its WTO-inconsistent price range system based on the terms of the Peru-Guatemala FTA, which was not in force. As the Appellate Body had observed, an FTA cannot amend or modify provisions of the WTO Agreements. The proper route for assessing whether a provision in an FTA may permit a departure from WTO rules were the legal provisions specifically addressing regional trade agreements: Article XXIV of the GATT 1994, Article V of the GATS, and the Enabling Clause. Yet Peru had not relied on any of these provisions, and had conceded that an agreement that was not in force could not benefit from a defence under Article XXIV of the GATT 1994. The Appellate Body also had appropriately declined to accept the argument that Article 4.2 of the Agreement on Agriculture should be "interpreted" in light of this FTA. In rejecting these arguments, the Appellate Body had refrained from addressing certain issues of interpretation and public international law raised by Peru that were not necessary to resolve the dispute. This approach had allowed the Appellate Body to issue a concise, high-quality report, and the United States appreciated these efforts. As the United States had noted previously, such an approach promoted the efficient resolution of disputes and helped to mitigate the workload problems currently facing the WTO dispute settlement system.

1.10. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS457/AB/R and Add.1 and the Panel Report contained in WT/DS457/R and Add.1, as modified by the Appellate Body Report.

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