RESTRICTED

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4 October 2013

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Dispute Settlement Body
23 August 2013

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 23 AUGUST 2013

Chairman: Mr. Jonathan Fried (Canada)

1 UNITED STATES – MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES

A. Recourse to Article 22.2 of the DSU by Indonesia (WT/DS406/12)

1.1. The Chairman said that the present meeting had been requested by Indonesia in order to seek authorization from the DSB to suspend the application to the United States of tariff concessions and related obligations, in light of the alleged failure by the United States to comply with the DSB's recommendations, regarding the dispute: "United States – Measures Affecting the Production and Sale of Clove Cigarettes" (DS406). He recalled that, under Article 22.2 of the DSU, a Member must take action within 30 days from the date of expiry of the reasonable period of time for implementation. He noted that in this dispute, the reasonable period of time for implementation had expired on 24 July 2013. It was his understanding that before requesting this special DSB meeting, Indonesia and the United States had held discussions aiming at reaching a procedural agreement under Article 22.2 and Article 21.5 of the DSU, a so-called "sequencing agreement" in this dispute. Notwithstanding those discussions, Indonesia had decided to exercise its rights under Article 22.2 of the DSU by filing a request for authorization to retaliate, as well as a request for a special meeting to deal with this matter. As Members were aware, Article 22.6 of the DSU, which governed retaliation and arbitration, specified that "when the situation described in [Article 22.2] occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request". However, Article 22.6 of the DSU also provided that if the Member concerned objected to the level of suspension proposed, the matter shall be referred to arbitration. In that regard, he noted that the United States had filed its objection to Indonesia's request. The US communication, contained in document WT/DS406/13, was circulated to Members on 22 August 2013. It was his understanding that the parties to the dispute would each explain their positions on this matter for the record.

1.2. The Chairman drew attention to the communication from Indonesia contained in document WT/DS406/12, and invited the representative of Indonesia to speak.

1.3. The representative of Indonesia said that his country thanked the Chairman for convening this meeting to consider Indonesia's request for authorization to impose countermeasures, as a result of the US failure to comply with the DSB's rulings and recommendations in the Clove Cigarette dispute. Indonesia had brought this case in 2010 based on its strong view that the US ban on flavoured cigarettes under Section 907(a)(1)(A) of the Federal Food, Drug and Cosmetic Act was inconsistent with the US WTO obligations because it banned all flavoured cigarettes, including clove cigarettes from Indonesia, but excluded menthol cigarettes, which were predominantly produced in the United States. The Panel established by the DSB had found that Section 907(a)(1)(A) of the Federal Food, Drug and Cosmetic Act was inconsistent with the US obligations under Articles 2.1, 2.9.2, and 2.12 of the TBT Agreement. The United States had appealed the Panel's findings with respect to Articles 2.1 and 2.12, and on 4 April 2012 the

Appellate Body had affirmed the Panel's findings, although on other grounds. On 24 April 2012 the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report. In particular, the DSB had recommended that the United States bring its measure into conformity with its obligations under the TBT Agreement. The reasonable period of time agreed by the United States and Indonesia for the United States to come into compliance with its obligations had expired on 24 July 2013. On 23 July 2013, the United States had announced a series of measures that it claimed brought it into compliance with the findings of the Appellate Body in this dispute. However, those measures did not address the less favourable conditions of competition imposed on clove cigarettes in the United States under Section 907(a)(1)(A). Moreover, no measures at all had been announced to bring the United States into compliance with its obligations under Articles 2.9.2 and 2.12 of the TBT Agreement. Indonesia was disappointed that the United States had not taken steps to comply with the DSB's rulings and recommendations.

1.4. On 12 August 2013, Indonesia and the United States had met in Washington to explore the possibility of negotiating compensation. Those negotiations had not been immediately successful, but Indonesia remained willing to continue those discussions in good faith. In light of the time-table set forth in the DSU, Indonesia had to exercise its right to seek authorization from the DSB to impose countermeasures in an amount equivalent to the nullification and impairment to Indonesia accruing from the failure of the United States to comply with the DSB's rulings and recommendations in this dispute. Indonesia was requesting authorization in the amount of US$50.5 million. This amount was based on the value of Indonesia's clove cigarette exports to the United States in the three year period before the ban on clove cigarettes was imposed, adjusted for inflation, and utilizing a multiplier of three to account for the impact of those lost exports throughout the Indonesian economy. In making this request, Indonesia had complied with the principles of Article 22.3 of the DSU and accordingly would suspend concessions and other obligations through one or more of the following: (i) suspension of tariff concessions and other related obligations under the GATT 1994 on a list of US products to be established in due course; (ii) suspension of concessions and other obligations under the TBT Agreement, and (iii) suspension of concessions and other obligations under the Agreement on Import Licensing.

1.5. Regarding the legal basis, Article 22 of the DSU, in particular paragraph 2, provided that "[i]f the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the [RPT] … such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations … with a view to developing mutually acceptable compensation." Article 22.6 of the DSU provided that when the situation described in Article 22.2 occurred, "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the [RPT] unless the DSB decides by consensus to reject the request." Indonesia believed it was entitled to recourse under Article 22 of the DSU in light of the fact that the United States had not announced any measures to comply with the Panel's and Appellate Body's findings on Articles 2.9.2 and 2.12 of the TBT Agreement. Furthermore, the measures announced by the United States, the publication of a Federal Register notice seeking comments on how menthol cigarettes might be regulated in the future and publicizing information on health risks of youth smoking and menthol cigarettes, were facially insufficient to be considered measures taken to comply with the rulings and recommendations in this case with respect to Article 2.1 of the TBT Agreement. In fact, many of the measures (for example, publicizing health risks of youth smoking) had not even been at issue in the dispute. Indonesia had agreed from the outset that smoking was bad for youth.

1.6. In this situation, there was no need to refer the case to a compliance proceeding under Article 21.5 of the DSU. In fact, for two of the issues (Articles 2.9.2 and 2.12 of the TBT Agreement) there was no measure for a panel to consider. Indonesia was a developing country and the production and sale of clove cigarettes was important to its economy. Clove cigarettes had a long history in Indonesia and were part of its culture. When the United States banned the sale of certain flavoured cigarettes, the burden of that measure fell almost entirely on Indonesia. As a result of the contested measure, Indonesia's exports of clove cigarettes to the United States had fallen to zero. The Indonesian people were following this dispute closely. Indonesia had told the United States earlier that month that retaliation was the last resort and was the least desirable outcome. Indonesia had implored the United States to find a solution to the clove cigarette dispute, but if none was found, Indonesia would be prepared to seek the authorization from the DSB to impose countermeasures pursuant to Article 22 of the DSU.

1.7. The Chairman drew attention to the communication from the United States contained in document WT/DS406/13, and invited the representative of the United States to speak.

1.8. The representative of the United States said that as the Chairman had noted, on 22 August 2013, the United States had submitted an objection to Indonesia's request for authorization to suspend the application to the United States of concessions or other obligations. Therefore, by operation of Article 22.6 of the DSU, this matter had already been referred to arbitration. In this circumstance, there was no need for a DSB meeting as there was no action the DSB may take with respect to Indonesia's request. However, in light of the fact that the present meeting had not been cancelled, the United States had no objection to the DSB agreeing that the matter had been referred to arbitration. Turning briefly to the US objection, the United States had both objected to the proposed level of the suspension of concessions and had claimed that the principles and procedures in Article 22.3 of the DSU had not been followed. The United States would further note two types of substantial concerns with Indonesia's request for authorization. First, as the United States had notified the DSB at the 23 July 2013 meeting, the United States had complied with the recommendations and rulings in this dispute. In these circumstances, the United States did not see a basis for Indonesia to request authorization to suspend concessions – at any level. Second, the United States was concerned by the erratic behaviour of Indonesia in relation to whether to sequence proceedings under Article 21.5 and Article 22 of the DSU. Indeed, Indonesia had initially proposed a sequencing agreement to the United States, with which the United States had agreed in principle. Subsequently, however, Indonesia had stated that it was no longer interested in entering into a sequencing agreement and proceeded to file its request for authorization to suspend concessions. There appeared to be no question that the parties disagreed whether the United States had brought its measure into conformity with the DSB's recommendations and rulings. The issue was whether there would be agreement between the parties on the procedures to be followed to resolve that disagreement. It would appear that Indonesia was of the view that sequencing was not required under the DSU and that issues of compliance may be resolved as part of the Article 22 arbitration. WTO Members and reports adopted by the DSB appeared to have reached disparate views on this issue. Regardless, the United States considered that the parties had agreed in principle to procedures to govern any questions relating to compliance. The United States would, therefore, expect Indonesia to revert to its original proposal to first obtain a DSB ruling on the issue of compliance before engaging in and completing an Article 22.6 arbitration. Even at this juncture, it was open to the parties to enter into an agreement to suspend the Article 22.6 arbitration during the pendency of an Article 21.5 compliance proceeding.

1.9. As the United States had reported to the DSB, US authorities had conferred with interested parties and had worked to implement the recommendations and rulings of the DSB in a manner that was appropriate from the perspective of public health. The United States recalled that in this dispute the DSB had found that the challenged US measure reflected the overwhelming view of the scientific community that banning clove and other flavoured cigarettes benefited the public health by reducing the likelihood that the youth would enter into a lifetime of cigarette addiction. At the same time, the DSB also had found that the US measure provided less favourable treatment to clove cigarettes imported from Indonesia than to menthol cigarettes that were made in the United States. To come into compliance with the DSB's recommendations and rulings, the United States had taken and was taking a number of actions in relation to menthol cigarettes. First, the US Food and Drug Administration was publishing an Advanced Notice of Proposed Rule Making concerning menthol cigarettes. The Notice would initiate a process to receive public comment on potential regulatory options that the Food and Drug Administration might consider and seek additional information. The Notice would be published in the US Federal Register. Second, the US Food and Drug Administration was releasing its Preliminary Scientific Evaluation on the Possible Public Health Effects of Menthol Versus Non-menthol Cigarettes. The Preliminary Scientific Evaluation addressed the association between menthol cigarettes and various outcomes, including initiation, addiction, and cessation. The Preliminary Evaluation included a finding that the presence of menthol in cigarettes negatively affected cessation and attempts of smokers to quit smoking. The Preliminary Evaluation would be available for public comment. Third, the US Food and Drug Administration was announcing the development of a youth education campaign that was designed to prevent and reduce demand for tobacco products and menthol cigarettes. Fourth, the US Department of Health and Human Services was sharing information through the US online hub for tobacco information and cessation tools, called BeTobaccoFree.gov, which had initially been launched in November 2012. This online hub provided information on the health risks posed by menthol cigarettes to raise awareness of those risks. Fifth, the National Cancer Institute was

educating the public on the health risks posed by menthol cigarettes through its website designed to help persons quit smoking, which was SmokeFree.gov. The health risks posed by using tobacco were well-documented, and the public health challenges posed by menthol cigarettes in particular were significant. In the United States, approximately 30% of adult smokers and 40% of all youth smokers reported smoking menthol cigarettes. Raising awareness and educating about the health risks of tobacco could be an important means to discourage its use. In light of the significant public health challenges posed by menthol cigarettes, these actions by US health authorities brought the United States into compliance with the DSB's recommendations and rulings in this dispute within the reasonable period of time for compliance, which expired on 24 July 2013. The United States looked forward to continuing to confer with Indonesia regarding these compliance actions.

1.10. The representative of the European Union said that the EU noted the statement made by the United States that it had taken measures to comply with the DSB's recommendations and rulings. The EU also noted that Indonesia did not agree that the United States had brought its measures into compliance with the TBT Agreement. It appeared that "there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU. The EU wished to recall that, pursuant to that provision, "such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible recourse to the original panel". In cases of disagreement about the existence or consistency with WTO rules of compliance measures, concessions or other obligations may be suspended under the DSU once there was a multilateral determination on the alleged compliance action. The EU hoped that the United States and Indonesia would ensure that the DSU procedures with regard to compliance and suspension of obligations in this dispute could be conducted efficiently and in the right sequence. Finally, the EU recalled that it had participated as a third party in the Panel and appeal proceedings in this dispute and, therefore, pursuant to Article 10, paragraphs 1, 2 and 3 of the DSU, it reserved its right to participate as a third party in any subsequent proceedings, including with respect to any disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the DSB's recommendations and rulings.

1.11. The representative of Japan said that, at the present meeting, his country did not wish to raise factual matters in this dispute, but only to express its disappointment with regard to unresolved sequencing issues between the United States and Indonesia. Japan believed that the parties should pursue their efforts in order to resolve this matter and to enable the WTO dispute settlement system to avoid implementation problems that it had previously faced.

1.12. The Chairman said that a number of issues had been raised but the present meeting was not a legal seminar on some of the finer points of WTO law or the DSU provisions. In taking all the comments into account, the reality was that it was agreed that the matter raised by the United States in its communication of 22 August 2013, is referred to arbitration, as required by Article 22.6 of the DSU. The DSB could, on another occasion, further reflect on the participation of third parties in Article 22 arbitrations, as mentioned by the EU. He noted that the DSB had heard differing views on whether the matter "has been", "is", "will be", "shall be" referred to arbitration. The matter was being referred to arbitration, which was a factual matter, as required by Article 22.6 of the DSU.

1.13. The DSB took note of the statements, and it was agreed that the matter raised by the United States in document WT/DS406/13 is referred to arbitration, as required by Article 22.6 of the DSU.

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