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Dispute Settlement Body
3 December 2015

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 3 DECEMBER 2015

Chairman: Mr. Harald Neple (Norway)

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1 INDONESIA – MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS

A. Request for the establishment of a panel by Brazil (WT/DS484/8 and Corr.1)

1.1. The Chairman recalled that the DSB had considered this matter at its meeting on 25 November 2015 and had agreed to revert to it. He drew attention to the communication from Brazil contained in document WT/DS484/8 and Corr.1, and invited the representative of Brazil to speak.

1.2. The representative of Brazil said that this was the third time that Brazil was requesting the establishment of a panel in this dispute. Unfortunately, Indonesia had objected to this request on two occasions. The previous objection was based on the argument that the corrigendum had not been circulated ten days in advance of the DSB meeting at which Brazil had made its first request, even though this did not harm Indonesia. Apart from the procedural discussion which, in Brazil's view, was unnecessary, was the fact that Indonesia, unequivocally, continued to illegally restrict the importation of chicken meat and chicken products from Brazil, through a series of specific individual prohibitions and restrictions, which, also had the effect of imposing a ban on Brazilian chicken exports to Indonesia. As mentioned at previous DSB meetings, since 2009, Brazil had been trying to overcome the barriers imposed by Indonesia against its exports. As it had not been possible to reach a negotiated solution, Brazil expected that the present dispute would bring an end to the unjustifiable obstacles placed by Indonesia and hoped that it may help pave a new direction for both countries towards the exploration of new business opportunities.

1.3. The representative of Indonesia said that her country wished to recall that Indonesia and Brazil had held consultations pursuant to the DSU provisions on 15 and 16 December 2014 in Geneva. During these consultations, Indonesia had provided a clear explanation to address Brazil's concerns in an effort to find a mutually agreed solution. Indonesia reiterated its view that the measures concerned were fully consistent with its obligations under the WTO Agreements.

Regardless of those efforts, Indonesia was disappointed with Brazil's decision to bring this dispute before a panel. Indonesia, therefore, stood ready to defend its measures before the panel.

1.4. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

1.5. The representatives of Argentina, Australia, Chile, China, the European Union, India, Japan, Korea, New Zealand, Norway, Paraguay, Chinese Taipei, the United States and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

2 UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

A. Report of the Appellate Body (WT/DS381/AB/RW and Add.1) and Report of the Panel (WT/DS381/RW, Add.1 and Corr.1)

2.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS381/27 transmitting the Appellate Body Report in the dispute: "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by Mexico", which had been circulated on 20 November 2015 in document WT/DS381/AB/RW 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 Mexico said that his country thanked the members of the Appellate Body, the Panel, and their respective Secretariats for their work carried out in the compliance proceedings. It had taken a long time to arrive at the adoption of the Reports by the DSB with a complete victory for the complaining party. Seven years had passed since Mexico had initiated the "Tuna II" dispute, and over 25 years since it had initiated the "Tuna I" dispute. With the adoption of the Reports at the present meeting, it was time for the United States to fully comply with its international trade obligations and to take effective action to meet the stated objectives of its measure, without unfairly rewarding or exempting those who did not achieve these objectives. After so many years of suffering the consequences of discriminatory measures, Mexico found it important to underscore several points which, thanks to the WTO, were finally being brought to light and examined objectively, without prejudice or particular interests. First, the Appellate Body Report did not concern the protection of dolphins provided by the Mexican fleet in the eastern tropical Pacific (ETP) Ocean. It rather highlighted the lack of protection of dolphins in other ocean regions in which fleets from other countries carried out fishing operations. Second, Mexico hoped that this dispute would lead to the protection of dolphins in other regions where many dolphins were killed, which the US measure had ignored to date. Third, the main fishing method used by the Mexican fleet had been recognized and distinguished by the Food and Agriculture Organization of the United Nations (FAO) for being a sustainable method, and yet it continued, unjustifiably, to be subjected to discriminatory measures supported and welcomed by non-governmental organizations with questionable goals, which defended particular interests.

2.3. The US "dolphin-safe" label did not mean that there was no dolphin meat in cans, which was what many people believed, as revealed by the transparent public surveys conducted by Mexico in the United States. Nor did it mean what the United States intended it to mean as it did not provide any information regarding the harm caused to dolphins or guaranteed that dolphins were not killed during capturing the tuna contained in canned products with the label. Authorizing Mexico to use the label or abolishing it altogether would not change the current situation for dolphins; rather it would simply eliminate the discrimination to which Mexican exports had been subject. Finally, Mexico said that this decision, like the decision issued in the "US – COOL" dispute, did not prevent the adoption of labels, but it recognized them as valid as long as they complied with the rules agreed upon by all WTO Members. What was also interesting about this dispute, as in other disputes, was the number of opinions of the so-called "trade and environment experts" who rather

than describe the legal aspects, systemic implications and possible consequences of this decision called into question the decisions of the Appellate Body, using radical arguments with prejudice and ignorance and defending individual interests without taking into account the evidence presented before the Panels. In the "Tuna" dispute, this evidence was conclusive and clearly demonstrated the high level of protection that Mexico offered to dolphins, compared with other fishing methods, which killed and injured dolphins on a much larger scale and which unfortunately could not be measured or tracked accurately. Yet these methods were rewarded with the false "privilege" of a label that misinformed consumers. Mexico urged those who still had doubts about the meaning of the "dolphin-safe" label or rather its lack of meaning, to read the Reports that were being adopted at the present meeting and consult, in particular, the evidence put forward by Mexico, if they were truly concerned about dolphins and sustainable fishing, and not only about attracting attention by means of destructive and unfounded criticism, accusing, in bad faith, those who had been subjected to discriminatory measures for decades. Furthermore, Mexico trusted that this dispute would encourage WTO Members to reflect on the importance of multilateralism as an appropriate method to resolve multilateral issues that had a negative impact on all Members, in particular with regard to health-related, environmental and other provisions in Article XX of the GATT 1994.

2.4. Before concluding, and without entering into an analysis and defence of the legal, technical and systemic issues that had been addressed in this dispute, Mexico found it important to recognize the work of the WTO Secretariat, panelists and members of the Appellate Body, in addition to the US and Mexican lawyers who, for seven years, had been involved in analysing a series of WTO provisions, and that the Reports in the "Tuna II" dispute provided greater clarity on their correct interpretation. Mexico noted the following examples: (i) determination of whether a single but voluntary label was actually mandatory for the purpose of defining a technical regulation; (ii) the standard required by Article 2.1 of the TBT Agreement on treatment no less favourable and Article 2.2 on unnecessary obstacles that were more trade-restrictive than necessary to fulfil a legitimate objective; (iii) the characteristics of an international body or system and its relation with Article 2.4 of the TBT Agreement; and (iv) the existence of important parallels and differences between the provisions on non-discrimination contained in Article 2.1 of the TBT Agreement and Article I:1 and Article III:4 of the GATT 1994. With regard to the Mexican fishing method, Mexico reiterated what the FAO had stated when it had awarded the internationally recognized and distinguished Margarita Lizárraga Medal in 2005 to the Agreement on the International Dolphin Conservation Programme (AIDCP), "[This agreement] is an international agreement whose objective is to progressively reduce dolphin mortality in the tuna purse-seine fishery in the eastern Pacific Ocean (EPO), and to ensure the sustainability of tuna stocks and associated species in the EPO pelagic ecosystem…The AIDCP has been an unqualified success…The enormous reduction in dolphin mortality attributable to the Agreement, while maintaining sustainable fisheries, is a practical, hands-on contribution. The results are tangible and measurable. The process established by the Agreement is continuous and not a one-off phenomenon. And the success of the AIDCP has the potential to be catalytic". It should be mentioned that the parties to the Agreement were the United States and Mexico (the parties to this dispute), Bolivia, Costa Rica, Colombia, Ecuador, El Salvador, the European Union, Guatemala, Honduras, Nicaragua, Panama, Peru, Vanuatu and Venezuela. By calling into question the consistency of "dolphin-safe" labelling with the WTO rules, the WTO decisions adopted at the present meeting underlined the importance of trade issues and the plurilateral and multilateral work and endeavours of other international treaties and organizations. Finally, Mexico recognized the legitimate interest of the US authorities and their consumers towards the protection of dolphins, and the legitimate right of consumers to be informed of the characteristics of the products that they consumed. Mexico was convinced that these objectives, which were also shared and pursued by Mexico, could be achieved without affecting competition, in a WTO-consistent manner. Mexico would, therefore, closely follow the action taken by the United States to bring its measures into conformity with the WTO rules. Mexico would continue to defend the interests of the Mexican industry and the full adherence of its trading partners to international commitments, and in particular fishing and the sustainability of oceans for future generation.

2.5. The representative of the United States said that his country thanked the members of the compliance Panel, the Appellate Body, and the Secretariat assisting them for their work on these proceedings. The United States said that it would first make some overarching comments on these Reports, and then move to some specific points. These compliance proceedings were supposed to be concerned with whether the amendments made by the United States in 2013 in response to the findings of the Panel and the Appellate Body in the original proceeding had brought the

United States into compliance with the DSB's recommendations and rulings. The DSB's recommendations and rulings were that the US dolphin safe labelling measure was inconsistent with Article 2.1 of the TBT Agreement because the United States did not require a certification for tuna caught outside the Eastern Tropical Pacific Ocean ("ETP") that no dolphins were killed or seriously injured, while noting that this did not require that the certification be made by an observer on board the vessel.[1] The United States had amended its measure in direct response to the DSB's recommendations and rulings, and had fully addressed the concerns with the US measure that were identified in the Panel and Appellate Body Reports. In this regard, the United States appreciated that both the Panel and the Appellate Body had agreed that the amended measure moved the measure towards compliance. The Reports reaffirmed that the objectives pursued by the US measure, consumer information and protecting dolphins, were proper ones for WTO purposes. Nothing in the Panel or Appellate Body findings to be adopted at the present meeting called for the United States to reduce or compromise consumer information or the protection of dolphins. Furthermore, the United States appreciated that the Appellate Body had reversed two of the Panel's findings that the amended measure was inconsistent with the TBT Agreement. That said, the Panel and Appellate Body Reports raised a number of very serious concerns. The Appellate Body had found the amended dolphin-safe labelling measure to be inconsistent with the WTO because of one element of the measure, but that element was in the original measure, was unchanged, and was not argued by Mexico. That element was the so-called "determination provisions". These provisions provided for the possibility of requiring observers on board vessels to certify to the dolphin-safe nature of tuna where the Secretary of Commerce determined: (i) for purse seine fisheries outside the ETP that there was a "regular and significant tuna-dolphin association"; and (ii) for non-purse seine fisheries that there was "regular and significant mortality or serious injury of dolphins". The Secretary had never made a determination under these provisions, for the simple reason that there was no evidence that such a fishery existed. The Appellate Body had faulted these provisions not for what they provided but for what they did not provide. In particular, the Appellate Body had considered that the possibility of a purse seine fishery in which there was "regular and significant" dolphin mortality without a regular and significant tuna-dolphin association, or of a non-purse seine fishery where there was a harmful "regular and significant" tuna-dolphin association without "regular and significant" dolphin mortality, had rendered the US measure not even-handed.

2.6. The Appellate Body's analysis was of deep concern in a number of respects. First, this was a question of *de facto* discrimination. Yet the Appellate Body had concluded that the US measure was inconsistent with the covered agreements based solely on provisions that had never been applied. Consequently, there were no facts beyond the face of the measure on which the Appellate Body had relied. The Appellate Body itself had stated that its "analysis regarding the determination provisions is premised on the existence of risks outside the ETP large purse-seine fishery that are comparably high to the risks existing in the ETP large purse-seine fishery".[2] This premise, however, was not supported by any factual findings that such risks existed. Instead, the Appellate Body had based its findings of *de facto* discrimination on "the design, structure, and expected operation of the measure". The Appellate Body did not identify whose expectations were being considered or what the evidence was for the "expected operation". Indeed, there was no evidence on the record that either type of fishery specified in the "determination provisions" had existed anywhere in the world. Further, neither the Panel nor the Appellate Body had suggested that there was any evidence that a fishery falling into either theoretical "gap" in the provisions had existed. Consequently, there could be no basis to expect that the "determination provisions" would ever be operational. On closer examination then, the Appellate Body's "expected operation" appeared to be based not on facts, but on speculation as to what might happen in a hypothetical situation. That hypothetical situation was one for which there were no facts and no basis to expect that it could occur. The United States did not see how this could be reconciled with the legal requirements for a finding of a *de facto* inconsistency. Instead, the Appellate Body appeared to have found the measure to be "as such" inconsistent due to purely hypothetical situations it considered could represent "gaps". In this regard, the Appellate Body Report was also troubling because it appeared to signal that a measure with purely hypothetical gaps would be found inconsistent unless the responding Member proved that a challenged measure could never be discriminatory, even in relation to hypothetical scenarios. Furthermore, the "determination provisions" had nothing to do with the complaint of Mexico regarding trade. Since these provisions had never been applied and there were no facts to support that they ever would apply, they were not affecting the conditions

[1] "US – Tuna II" (Mexico) (AB), paragraph 296.
[2] "US – Tuna II" (Article 21.5 – Mexico) (AB), paragraph 7.265.

of competition for Mexican tuna products and they had never affected the labelling of tuna products. Reaching out to address this hypothetical situation involving provisions that had never been applied did nothing for trade with Mexico. Rather, it would appear to be an academic exercise unrelated to trade in Mexican products. Thus, the finding of inconsistency was based on speculation about a hypothetical situation removed from the trade issue involved in the dispute. This would appear contrary to the reason for the dispute settlement system of the WTO. That system was there to settle actual trade disputes, not to engage in speculation or make findings about hypothetical situations.

2.7. The Panel and Appellate Body findings were also troubling because the "determination provisions" were unchanged from the original measure. Mexico could have made claims against them in the original proceeding but did not. Allowing Mexico to challenge for the first time in the compliance proceeding an element of the measure that it could have, but did not, challenge in the original proceeding undermined the functioning of the WTO dispute settlement system. An Article 21.5 proceeding had a compressed time-line and a limited scope, compared to the original proceeding, and the responding party was not afforded any reasonable period of time to come into compliance with the findings in a compliance proceeding. Further, the amended measure was found to be inconsistent based solely on an element that Mexico had never raised as part of its affirmative case but that the Panel had raised on its own initiative late in the proceedings. In fact, Mexico did not advance any legal arguments concerning the "determination provisions" until its response to Panel question 60, in its seventh written submission, well after the Panel meeting. The Appellate Body Report had confirmed this, in that it did not refer to any legal argumentation in Mexico's affirmative case that concerned the design, structure, or operation of the "determination provisions".[3] This was contrary to the well-established principle that a panel may not use its interrogative powers to make the case for the complaining Member.[4]

2.8. With respect to the Appellate Body's reversal of the Panel findings on other elements of the measure, the Appellate Body had found that it could not complete the analysis. In fact, however, the Panel had made factual findings on which the Appellate Body could have relied in completing the analysis. In particular, the Panel had found that the evidence on the record established that the risks faced by dolphins in the ETP from repeated chasing and capturing by large purse seine vessels were quantitatively and qualitatively distinct from the risks dolphins faced in other fisheries, such that the ETP large purse seine fishery had a different "risk profile" than other fisheries.[5] Further, the Panel had explicitly disagreed with Mexico's argument that "the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries".[6] Later in its Report, the Panel had again referred to "the higher risk posed to dolphins by setting on dolphins in the ETP" and to the "special risk profile of the ETP large purse seine fishery".[7] The Panel findings had thus provided an ample basis on which the Appellate Body could have completed the analysis of the aspects of the amended measure in order to reject contentions by Mexico that were actually part of Mexico's affirmative challenge in this dispute.

2.9. Finally, it was important to recognize the serious systemic concerns raised by the Panel and Appellate Body Reports. Each Member at the present meeting and all Members should be concerned about the implications of the approach in this dispute. As the United States and several third parties had noted, WTO rules reflect, as they must, that there was space in which Members could regulate in the public interest. The dispute settlement system must recognize the same. Panels and the Appellate Body should not make their conception of the "perfect" measure the enemy of all the possible good ones. In pursuing legitimate objectives, Members should not be held to the impossible standard of designing and applying a measure that corresponded exactly to the one that a panel or the Appellate Body would have designed to achieve the legitimate objective at issue. Regulators designed measures to address facts, risks, and situations actually presented, not premises and hypothetical scenarios. Finally, the fact that both the Panel and the Appellate

[3] "US – Tuna II" (Article 21.5 – Mexico) (AB), paragraph 7.178.

[4] "US — Wool Shirts and Blouses" (AB), page 16; "India – Patents" (US) (AB), paragraph 73; "US – COOL" (AB), paragraph 286; "US – Gambling" (AB), paragraph 140; "US – Certain EC Products" (AB), paragraph 113; "Canada – Wheat Exports and Grain Imports" (AB), paragraph 191.

[5] See "US – Tuna II" (Article 21.5 – Mexico) (Panel), paragraphs. 7.240-243 (majority opinion), paragraph 7.398.

[6] See "US – Tuna II" (Article 21.5 – Mexico) (Panel), paragraphs. 7.240-243 (majority opinion), paragraph 7.398.

[7] "US – Tuna II" (Article 21.5 – Mexico) (Panel), para 7.398.

Body had acknowledged that the United States had addressed the problem identified in the DSB's recommendations and rulings, but nonetheless found that the measure breached WTO rules for other reasons, reasons that could have been but were not raised in the original proceeding, sent a troubling signal to Members. It signalled that despite a responding Member's best efforts at compliance, Members could have no confidence that the DSB's recommendations and rulings provided clarity on what needed to be done. Rather, under the approach used in this dispute, compliance with the recommendations and rulings only opened the door for ongoing challenges, inviting complaining parties to devise new criticisms and arguments.

2.10. The representative of Mexico said that the United States had just repeated its own arguments, which had been rejected during the appeal proceedings. But, at this point, Mexico did not wish to start another 25 year-long dispute. However, it wished to add a few comments. Both the original and the compliance Reports showed that US consumers did not have access to labelling that provided them with information on the risks for dolphins arising from different fishing techniques in different areas of the ocean, and yet, the United States authorized the use of "dolphin-safe" labelling in such cases. More specifically, these Reports revealed that the tuna consumed in the United States that was labelled as "dolphin-safe" did not provide consumers with accurate information on the risk and harm caused to these mammals, despite the use of the label. Mexico wished to point out to the factual aspects of the Appellate Body Report in the compliance proceedings, which included the following: (i) Mexico had submitted evidence regarding fishing methods and by-catch arising from various fishing methods outside the ETP, including dolphin mortalities due to practices and other fishing methods such as using fish aggregating devices (FADs), gillnets, and longline fishing; (ii) the Appellate Body had observed that "in their design, the determination provisions seem to apply to all fisheries other than the ETP large purse-seine fishery where the risk of harm to dolphins approximates that existing in the ETP large purse-seine fishery"; and (iii) the Appellate Body had concluded that: "[w]e are not convinced that, in the absence of tuna-dolphin association, there is no possibility of regular and significant mortality or serious injury occurring in a fishery". As it had stated previously, Mexico did not wish to initiate another dispute at this point. Mexico simply wished to call upon the United States to put the labelling system in order and to end the discrimination against Mexican tuna that had lasted for a quarter of a century.

2.11. The representative of the United States said that the US statement was clear. The United States was not simply repeating arguments from the dispute; rather it had explained how the Panel and Appellate Body Reports raised a number of very serious concerns. The United States would encourage all Members to review these Reports carefully.

2.12. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS381/AB/RW and Add.1 and the Panel Report contained in WT/DS381/RW and Add.1 and Corr.1, as modified by the Appellate Body Report.

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