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Dispute Settlement Body
6 March 2017

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 6 MARCH 2017

Chairman: Mr. Xavier Carim (South Africa)

1 COLOMBIA – MEASURES RELATING TO THE IMPORTATION OF TEXTILES, APPAREL AND FOOTWEAR

A. Recourse to Article 21.5 of the DSU by Colombia: Request for the establishment of a panel (WT/DS461/17)

1.1. The Chairman recalled that the DSB had considered this matter at its meeting on 20 February 2017. He then drew attention to the communication from Colombia contained in document WT/DS461/17, and invited the representative of Colombia to speak.

1.2. The representative of Colombia said that, first of all, his delegation thanked the Chairman for agreeing to convene the special meeting pursuant to footnote 5 to Article 6.1 of the DSU. He recalled that, on 20 February 2017, Panama had objected to Colombia's panel request to examine Panama's implementation of the DSB's recommendations and rulings in DS461. In accordance with Article 21.5 of the DSU, Colombia was requesting, for the second time, that the matter be referred to the original Panel, if possible, to determine whether, the expiry of the compound tariff provided for in Decree 456 of 2014, and the new tariff applicable to imports of certain apparel and footwear products under Decree 1744, issued by Colombia in 2016 had brought Colombia into conformity with the covered agreements, pursuant to the DSB rulings and recommendations of 22 June 2016. Colombia noted that, as it had indicated in WT/DS461/17, in spite of the fact that Colombia had already notified its compliance with the DSB recommendations and rulings (WT/DS461/15, dated 15 December 2016), and had done so promptly and effectively, before the expiry of the reasonable period of time, Colombia was forced to seek recourse to Article 21.5 of the DSU because Panama did not recognize Colombia's implementation and had requested authorization to suspend the application of concessions or other obligations to Colombia, without first referring the matter to a panel under Article 21.5 of the DSU. Panama had made this request despite the fact that Colombia had already notified its compliance with the DSB's recommendations and rulings. Colombia recalled that at the 20 February 2017 DSB meeting, it had stated that Panama's reasons for objecting the establishment of a panel were not supported by the text of Article 21.5 of the DSU. Furthermore, Colombia considered Panama's objection to be contrary to the principles set out in Article 3.10 of the DSU, specifically where Panama had stated that "[c]onsultations prior to a panel request are a fundamental requirement of the DSU. To the extent that the preference expressed in the DSU of promoting and arriving at a mutually agreed arrangement among the parties is a core principle of the Understanding, this requirement cannot be simply disregarded. Colombia has not requested consultations to address the subject of its request."[1]

1.3. At the 20 February 2017 DSB meeting, some delegations had stated that Panama's opposition was inappropriate and that it amounted to a procedural remedy that was contrary to Article 3.10 of the DSU. This was because it reflected a contentious strategy that sought to block Colombia's right to demonstrate its compliance with the recommendations and rulings of the DSB.[2]

[1] Statement made by Panama at the 20 February 2017 DSB meeting.
[2] See the minutes of the 20 February 2017 DSB meeting (WT/DSB/M/392).

At the same time, some delegations had stated that nothing in Article 21.5 of the DSU indicated that consultations were required. Members had supported Colombia's position that consultations prior to the establishment of a panel under Article 21.5 of the DSU were not a prerequisite in certain circumstances. Such circumstances included when the complainant had refused to initiate proceedings under Article 21.5 of the DSU where there was disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB, as was the case in DS461. Colombia reiterated that Article 21.5 of the DSU was silent with respect to the obligation to request consultations under Article 4 of the DSU. Consequently, such consultations could not be interpreted as a mandatory procedural remedy. This was particularly the case because, in DS461, Panama had initiated proceedings under Article 22.6 of the DSU in the absence of any determination of Colombia's compliance with the DSB recommendations and rulings or the existence of nullification or impairment affecting Panama.

1.4. In Colombia's view, Panama had failed to comply with the logical sequence of the WTO dispute settlement process. Despite this, Colombia said that it had reasserted its good faith by proposing to Panama the conclusion of a sequencing agreement (WT/DS461/20) on 22 February 2017. This would allow the parties to organize different stages of this dispute, in accordance with the DSU and Members' practice for the past 20 years. Colombia had also reasserted its good faith through the request for consultations (WT/DS461/19) it had submitted to Panama on 27 February 2017. The request was made with a view to establishing the meaninglessness and absurdity of Panama's essentially procedural opposition to Colombia's request for the establishment of a compliance panel. Colombia's request for consultations was made without prejudice to Colombia's position that, even if consultations were necessary, Colombia and Panama had already held extensive consultations on this and on Decree 1744.[3] Colombia regretted that Panama had not responded either to invitation to conclude a sequencing agreement or to the invitation to hold consultations. Colombia hoped that the panel established at the present meeting would find a "reasonable way" to expedite the proceedings and settle all outstanding issues in this dispute in order to guarantee the proper functioning of the dispute settlement mechanism. Prompt findings by the DSB would assist the parties in securing a positive solution to the dispute, in accordance with Article 3.7 of the DSU. Finally, he said that, as had already been stated on several occasions, Colombia had replaced the compound tariff found to be inconsistent with an ad valorem tariff that did not exceed its WTO bound tariff and therefore it had brought the measure subject to the DSB's recommendations and rulings into compliance with its WTO obligations. On 2 November 2016, the Colombian Government had issued Decree 1744 of 2016 modifying the tariffs applicable to imports of products classified in Chapters 61, 62 and 63 of the Customs Tariff, and certain items in Chapter 64. By doing so, Colombia had complied fully, and timely, with the DSB's rulings. This had been notified to the WTO in document WT/DS461/15 of 15 December 2016. In the light of the above, Colombia looked forward to the establishment of a compliance panel in DS461.

1.5. The representative of Panama noted that Colombia had requested the establishment of a panel under Article 21.5 of the DSU for a second time. He recalled that Panama had already expressed its concerns with regard to Colombia's panel request. Based on past experience in similar situations, Panama believed that it was appropriate for the panel requested by Colombia to be established at the present meeting. However, Panama reserved the right to raise its concerns before the panel.

1.6. The representative of the United States said that the United States regretted that a second meeting was necessary in order to move forward with this proceeding. It was in both parties' interest, in order to reach a final resolution of this dispute, to move efficiently to resolve the fundamental issue of compliance. With regard to the issue of consultations, the United States noted that there was no requirement to request consultations under Article 4 of the DSU as a

[3] For example, the meeting between the Vice Ministers of Trade of Colombia and Panama held in Bogota on 8 February 2017, and the constant telephone communication at that level between the capitals. Furthermore, on 9 February 2017, the Ministers of Foreign Affairs and the Ministers of Trade of the two countries met in Cartagena to hold consultations on this matter. Finally, on 22 February 2017 Colombia formally submitted to Panama a proposal for a sequencing agreement, recognizing the specificities of the current situation in the dispute, a proposal to which Panama has not responded.

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.[4] Consultations were not referred to in Article 21.5 of the DSU, and the parties had already consulted on the initial matter giving rise to the situation under Article 21.5 of the DSU. The United States said that, indeed, it could not see how Article 4 of the DSU could apply to an instance in which – as in this instance – it was the Member concerned who was requesting a compliance panel to confirm that Member's compliance. As the compliance panel would be established at the present meeting, and an arbitration proceeding had been commenced under Article 22.6 of the DSU, the parties and the individuals comprising the Panel and the Arbitrator should consider how to efficiently structure the two proceedings. In doing so, whether the measure at issue achieved compliance could and should be taken into account in determining, in the Article 22.6 proceeding, the level of nullification and impairment. Specifically, any level of suspension of concessions determined in that proceeding must be equivalent to the current level of nullification and impairment.

1.7. The United States considered that the issue of whether Colombia's actions removed the WTO-inconsistency found by the DSB could be addressed in the context of the Article 22.6 proceeding or in a proceeding under Article 21.5 of the DSU. The United States recalled that the WTO dispute settlement system was designed to support the prompt resolution of disputes and must fulfil that function if the system was to function efficiently, as the Members intended. The United States said that it regretted that these rules were, at times, being used to impede, rather than further, resolution of disputes among Members.

1.8. The representative of Australia said that her country would like to comment on some of the systemic issues raised in the current dispute. In Australia's view, Colombia was entitled to request the establishment of an Article 21.5 panel to determine whether its new measure was consistent with the GATT 1994. As this was Colombia's second such request, Australia expected that a Panel would be established at the present meeting. Further, Australia recalled that the dispute had also been referred to arbitration under Article 22.6 of the DSU at the 20 February 2017 DSB meeting. Therefore, the establishment of a compliance panel at the present meeting gave rise to questions as to the appropriate sequencing of the related proceedings. Members had raised this issue at the 20 February 2017 DSB meeting. In Australia's view, there was no legal basis for the DSB to require the suspension of an Article 22.6 arbitration contingent on an Article 21.5 panel finding. This would prevent a complaining Member from exercising its rights under the DSU and would unfairly delay the rights of a Member to seek suspension of concessions for WTO-inconsistent measures. However, Australia was mindful of the complex systemic issues, and the potential for uncertainty, arising from holding parallel compliance and retaliation proceedings in the current dispute. In principle, in the absence of agreement from the Membership on codification of appropriate procedures, Australia considered that an agreement between parties on the sequencing of compliance and retaliation proceedings was the preferred mechanism to resolve any uncertainty about sequencing in a particular dispute. This was consistent with established practice, and had been effective in the past. Australia recalled that all Members shared a responsibility to support and improve the efficiency, effectiveness and operation of the WTO dispute settlement system. Australia, therefore, supported calls made by other Members for the parties to cooperate with a view to finding a pragmatic solution that both protected the rights of each party and took into account the systemic interests of all Members.

[4] See "Mexico – HFCS" (Article 21.5) (AB), para. 65 ("[W]e conclude that even if the general obligations in the DSU regarding prior consultations were applicable in proceedings under Article 21.5 of the DSU – a matter which we do not decide – non-compliance with those obligations would not have the effect of depriving a panel of its authority to deal with and dispose of the matter. It follows that, in this case, the Panel was not required to consider, on its own motion, whether the lack of consultations deprived it of its authority to assess the consistency of the redetermination with the Anti-Dumping Agreement."); "US - Continued Suspension" (AB), para. 340 ("Thus, it is important to distinguish between these consensual means of dispute resolution, which are always at the Members' disposal, and adjudication through panel proceedings, which are compulsory. It is in this sense that Article 21.5 is cast in obligatory language. In this dispute, it is clear that a mutually acceptable solution was not reached and the European Communities decided to resort to adjudication. In addition, the parties to this dispute were unable to agree on an arbitration procedure pursuant to Article 25 of the DSU. The issue before us, therefore, is which procedure must be followed when parties do not avail themselves of the consensual and alternative means of dispute resolution provided in the DSU, and the dispute must proceed to the adjudication phase").

1.9. The representative of Mexico said that his delegation had previously expressed its views on the procedural matters involved in this dispute. Mexico believed that consultations under Article 21.5 of the DSU were necessary before proceeding with the compliance panel, unless the parties to the dispute agreed otherwise in their sequencing agreement. However, in this dispute there was no sequencing agreement. Therefore, consultations were necessary and it would now be for the panel to rule on this matter.

1.10. The representative of Canada said that, in his country's view, Members should be pragmatic with respect to the issue of consultations at the compliance phase of a dispute. While the DSU was ambiguous as to whether or not consultations were required at that stage, it nevertheless provided that the prompt settlement of disputes was essential to the effective functioning of the WTO. As a result, where the parties disagreed as to whether or not consultations were required, they should try to reach a compromise. For instance, they could agree on a shorter period of time for consultations, and to establish a panel at the first DSB meeting at which it was requested. In the context of this dispute, it was Canada's understanding that Colombia considered that it had complied with the DSB's recommendations and rulings. Panama disagreed with this claim. Otherwise, Panama would not have insisted on proceeding with its request to suspend concessions. As such, it was unclear to Canada what purpose consultations would serve in the compliance phase of this dispute.

1.11. The representative of the Russian Federation said that without commenting on the merits of this dispute, her country wished to join other Members who had made statements at the previous DSB meeting and at the present meeting expressing some systemic concerns regarding this dispute. As some Members had pointed out, disagreements over WTO-consistency of measures taken to comply should be resolved through recourse to the dispute settlement proceedings, including, wherever possible, resorting to the original panel. Consequently, Russia welcomed Colombia's recourse to Article 21.5 of the DSU to resolve the disagreement between the parties over compliance issues. Russia hoped that the parties would find a constructive solution to address their disagreements without any prejudice to their respective rights and obligations under the DSU.

1.12. The representative of India said his country did not intend to comment on the merits of this dispute. India noted that Colombia had made a second request for the establishment of a compliance panel and believed that Colombia was within its rights to do so. India also agreed with Colombia and the United States that consultations were not required in this context. India believed that the best way to resolve this issue or impasse would be through mutual discussions and understanding. India noted that, unfortunately, there was no sequencing agreement in this dispute and expressed its disappointment with the systemic implications involved in this situation. Although many Members had stated that a sequencing agreement was not legally mandated and that a practice had evolved in this regard to ensure certainty under the DSU. As Australia had rightly stated, there were complex systemic issues surrounding the holding of parallel processes under arbitration and a compliance panel. Members should be pragmatic in taking this process forward. Colombia's proposal on agreed procedures (WT/DS461/20), in paragraph 2 of the sequencing agreement, clearly stated that, even after a request for suspension had been made, there was still scope for the parties to enter into a sequencing agreement, in view of a suspension and a subsequent compliance panel. Therefore, India urged both parties to explore the possibility of entering into a sequencing agreement which would provide legal certainty and avoid inefficiency in the dispute settlement process, in light of the significant workload issues that the system was facing.

1.13. The representative of China said that his country had systemic concerns with regard to the procedural issues raised in this dispute. In order to ensure the smooth operation of the WTO dispute settlement mechanism, China encouraged both parties to act in good faith and to follow the current practice of entering into sequencing agreements, as soon as possible, so as to resolve the dispute in an orderly manner.

1.14. 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 Colombia in document WT/DS461/17. The Panel would have standard terms of reference.

1.15. The representatives of Australia, China, Ecuador, the European Union, Guatemala, Honduras, India, the Russian Federation, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.