

WORLD TRADE ORGANIZATION

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Dispute Settlement Body
1 June 2004

MINUTES OF MEETING

Held in the Centre William Rappard
on 1 June 2004

Chairperson: Ms Amina Mohamed (Kenya)

Prior to the adoption of the agenda, the item concerning the Panel Report in the case on "Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain" was removed from the proposed agenda following the United States' decision to appeal the Panel Report.

1. Mexico – Measures affecting telecommunications services

(a) Report of the Panel (WT/DS204/R)

1. The Chairperson recalled that at its meeting on 17 April 2002, the DSB had established a panel to examine the complaint by the United States. The Report of the Panel, contained in document WT/DS204/R, had been circulated on 2 April 2004 as an unrestricted document pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. The Panel Report was before the DSB for adoption at the request of the United States. This adoption procedure was without prejudice to the rights of Members to express their views on the Panel Report.

2. The representative of the United States said her delegation was pleased to request the adoption of the Panel Report. As Members were aware, this dispute had been the first WTO panel proceeding to deal with telecommunications services. The United States welcomed the Panel's thorough analysis of both the GATS Annex on Telecommunications and the Reference Paper. She said that delegations would recall that the Reference Paper was included in many Members' Schedules. At the present meeting, the United States wished to take the opportunity to highlight a number of specific aspects of the Panel Report. First, the United States noted with approval the Panel's recognition of the importance of the pro-competitive regulatory principles contained in the GATS Annex on Telecommunications and the Reference Paper. The United States welcomed the Panel's careful analysis of the nature of cross-border telecommunications services and the regulatory concepts of major supplier status and cost-orientation. Second, the United States welcomed the Panel's confirmation that international interconnection, including through accounting rate regimes, was included within the scope of Section 2 of the Reference Paper. Third, her delegation wished to underscore the Panel's finding that the obligations of the GATS Annex on Telecommunications applied to measures of a Member that affected suppliers of basic telecommunications services of any other Member, as the obligations would apply to measures affecting any other service supplier of another Member. Fourth, as a general matter, the United States noted that in undertaking its analysis, the Panel made reference to a number of documents outside the agreements themselves, specifically the Draft Model Schedule and a Note by the Chairman of the Negotiating Group on Basic Telecommunications. The United States commended the Panel's use of these documents for the sole purpose of confirming the ordinary meaning of the relevant agreement text, as provided under

Article 32 of the Vienna Convention on the Law of Treaties (Vienna Convention). Panels should not overstate the legal significance of such documents.

3. Fifth, her delegation disagreed with the Panel's conclusion that a specific provision in Mexico's GATS Schedule allowed Mexico to prohibit the supply of cross-border services using leased capacity in Mexico. The United States strongly disagreed with some of the Panel's discussion in reaching that conclusion concerning the obligations of Article XVI:2 of the GATS, particularly as those elements of the discussion did not derive from the actual text of that provision. However, on the whole, the United States, once again, commended the Panel for its careful and diligent work in this dispute and thanked the members of the Panel and the Secretariat for their efforts. Finally, the United States was pleased to inform the DSB that it had been able to reach an agreement with Mexico with respect to the steps necessary to comply with the recommendations and rulings that the DSB was about to adopt and on the reasonable period of time for compliance. A copy of the agreement was provided for circulation to all Members. The careful structure and discussion of the Panel Report provided a useful framework under which the parties were able to reach agreement. The US experience in this dispute provided an excellent example of the ways in which Members could use the dispute settlement procedures to facilitate the resolution of a dispute in a mutually satisfactory manner.

4. The representative of Mexico said that his country had strong concerns of a systemic nature about some of the Panel's findings and recommendations, especially regarding the way Mexico's commitments under the GATS had been interpreted. However, Mexico had decided not to exercise its right to challenge the Report in view of the understanding reached with the United States as to the actions needed to comply with the Panel's recommendations. A copy of that agreement had just been notified to the DSB and Mexico hoped that it would be circulated shortly to all Members. Mexico had thus placed its interest in resolving this dispute before its systemic concerns. Mexico understood that the main purpose of the WTO dispute settlement mechanism was to resolve disputes. For Mexico, this was not merely a diplomatic statement. He noted that out of the 11 cases initiated by WTO Members against Mexico seven had been solved in consultations. Mexico had avoided going as far as appeal in the great majority of the cases and in only one instance there had been an Article 21.5 procedure.

5. At the present meeting, Mexico wished to make some comments on the Panel Report. In Mexico's view, certain parts of the reasoning and findings of the Panel showed a number of flaws. This was particularly important in light of the ongoing services negotiations and in view of the implications for all WTO Members. For the reasons that Mexico would summarize in its statement, the Report could not and must not be used as a reference or a basis for interpreting WTO services commitments. He said that Mexico's statement would address the following points: (i) the international telecommunications regime; (ii) cross-border trade in services; (iii) the interpretation of limitations on Members' GATS Schedules; (iv) the interpretation of Section 1 of the Reference Paper; and (v) Annex on Telecommunications.

6. With regard to the international telecommunications regime, Mexico noted that in the early days of the basic telecommunications negotiations a clear distinction had been made between the terms: accounting rate, termination charge and interconnection charge. There had never been an intention to regulate the accounting rate regime. The fact that the Reference Paper, entered by many Members, could not logically be applied to the accounting rate regime was reflected, *inter alia*, by the fact that settlement payments were made on the basis not of each minute of international telecommunications traffic, but of the excess generated by carriers that originated more traffic than they terminated. In other words, accounting and settlement rates differed substantially from the charges associated with interconnection. Mexican international accounting rates were consistent with both ITU and US Federal Communications Commission benchmarks. Therefore, Mexico was surprised that the Panel should find them to be inconsistent with WTO obligations. Mexico also

failed to understand why, in finding that Mexico's rates were not cost-based, the Panel had examined rates for telecommunications traffic that were illegal under the law of Mexico and that of other WTO Members. Were the Panel's findings regarding Mexico's Reference Paper and the Annex on Telecommunications to be applied as benchmark for the interpretation of other cases, the adverse effect on the accounting rate regime would be substantial for all Members, irrespective of whether they had obligations of the kind set forth in the Reference Paper.

7. With regard to cross-border trade in services, Mexico said that the Panel's approach to interpreting mode 1 of service supply – cross-border supply – was highly problematic. First, the Panel had found that the service supplied was not the simple transmission of a voice message "up to" the connecting operator's network; rather, it had defined the service as spanning both operators' networks. It had suggested that the service be considered as a "single, cross-border service". Such an interpretation negated the meaning of the terms "trade in services" and "supply of services" in paragraphs 1 and 2 of Article I of the GATS. Properly interpreted, the definition of the service described only what was traded or supplied, it did not describe how the service was traded; i.e., it did not indicate which supplier provided the service and by what mode the service was delivered to the consumer. The Panel's definition of services wrongly combined two distinct legal categories. To illustrate that point, Mexico referred to the following definition of services given by the Panel – "long distance call transmission services between international points". A correct definition would simply have been "long distance call transmission services".

8. Second, the Panel had essentially found that there was "cross-border" supply of a service where a US supplier sold to US customers services from the United States to Mexico. It had found that the fact that such a service must be supplied jointly by US and Mexico service suppliers was legally irrelevant. It had also found that an entity could be regarded as supplying all aspects of the service even when elements of the service were sub-contracted to another firm in another country. In making these findings, the Panel had overlooked the fact that two service suppliers were involved in the transaction and that each one supplied its own services. The "joint provision" of a service could never be treated as cross-border supply through mode 1, since it involved the participation of two suppliers of the same service. To find otherwise would be inconsistent with the recognition that a commercial presence or nationality requirement prevented cross-border trade. The "zero quota" on cross-border trade that was associated with a commercial presence or nationality requirement would simply be avoided by sub-contracting with a national service supplier. If the Panel's interpretation were accepted, the fact that a WTO Member required a foreign service supplier to contract with a national supplier would not be a limitation on cross-border trade. Thus, a WTO Member would be free to impose the requirement to sub-contract with its own nationals without this being considered a barrier to cross-border trade and a breach of its market access commitments. Such a result would be absurd and was clearly not the intent of the negotiators. If they were to be applied outside the context of this dispute, the Panel's reasoning and findings would have serious implications for the interpretation of the GATS Schedules of other WTO Members, particularly those that included limitations on commercial presence and specifically in respect of services such as pipeline transmission services and electricity transmission services, which involved similar integration services on both sides of a border.

9. With regard to the interpretation of limitations in Members' GATS Schedules, Mexico noted that although efforts had been made during the services negotiations to standardize the scheduling of limitations, there was significant variation in the approaches used by Members. This, in itself, created ambiguity in the language of the Schedules. In such circumstances, it was most important to apply rigorously the rules of interpretation laid down in the Vienna Convention. Clearly, the Panel had overlooked these rules in its interpretation of Mexico's mode 3 limitation for commercial agencies. The Panel had found that Mexico's scheduling in the market access column of the services supplied by commercial agencies through commercial presence was not a market access limitation within the meaning of any of the sub-paragraphs of paragraph 2 of Article XVI of the GATS. In making this

finding, the Panel had overlooked the broad context provided in Article XVI of the GATS. In view of that entry in the market access column of Mexico's Schedule, the question the Panel ought to have asked was not whether the entry fell within any of the sub-paragraphs of Article XVI:2 of the GATS, but in which of the sub-paragraphs the entry fell. Bearing in mind the variation in the approaches of different Members, to the extent that there was ambiguity in the wording of the entry the finding ought to have been that the entry fell under at least one of the sub-paragraphs of Article XVI:2 of the GATS. By finding that the entry fell under none of the sub-paragraphs, the Panel had given no meaning to the limitation. Such an outcome was plainly contrary to the general rule of interpretation embodied in Article 31 of the Vienna Convention. If it were to be applied in another context, the Panel's interpretation would mean that entries properly made in a Member's Schedule could be devoid of meaning in a dispute settlement procedure. Such a precedent was dangerous.

10. With regard to the interpretation of Section 1 of the Reference Paper, Mexico said that the Panel's interpretation of the obligations in Section 1 of Mexico's Reference Paper represented an unprecedented effort to apply competition law to government measures in a manner never contemplated by the GATS negotiators. The Panel had held that each of the following government-imposed requirements were "anti-competitive practices": (i) the requirement of uniform settlement rates: i.e., all national carriers had to charge the same, uniform settlement rates; (ii) the requirement of proportionate return; i.e., national carriers had to share the revenue from incoming calls in proportion to their share of outgoing calls; and (iii) the requirement that the carrier with the greatest market share of outgoing calls to a particular country must negotiate the settlement rate with that country. In so holding, the Panel had rejected the argument that these requirements were government measures and not "anti-competitive practices" by entities. It had specifically rejected the plea that mandatory government actions should not be subject to Section 1 of the Reference Paper. In doing so, it had adopted an interpretation that could place government regulation in telecommunications at risk, since any regulation would, to some extent, be anti-competitive. This was certainly not the outcome that had been expected by Mexico or any other WTO Member that had undertaken commitments under Section 1 of the Reference Paper. Indeed, as was argued by the EC in its third-party submission to the Panel, Section 1 of Mexico's Reference Paper did not require a Member to open its market to full competition and, if Mexico chose not to allow competition between telecommunications operators on a certain matter, there was no scope for anti-competitive practices relating to that matter. It was not possible to restrict competition where competition was not allowed. In that context and in light of Article VIII of the GATS, which provided for limited competition between service suppliers, it was particularly troubling that the Panel had found that Mexico might not in fact restrict competition between its telecommunication operators. It was also significant that the Panel had disregarded the evidence that the measures at issue had pro-competitive purposes and effects. In other words, they had been adopted in order to promote competition in the Mexican market. Instead, the Panel had viewed the market in question as a limitation on the ability of US carriers to obtain the lowest possible rate for purchasing telecommunications transport services in Mexico. This narrow and one-sided view of the market distorted the Panel's analysis and had set a precedent that could easily be abused in future. Finally, the Panel had acted as though it were an authority on competition, without having conducted the type of detailed economic analysis of the pertinent market, and of the effects of the measures at issue that would normally be expected of an authority on competition. In Mexico's view, the Reference Paper did not authorize a WTO panel to play such a role, nor did WTO panels have the means or the authority to conduct the type of investigation and analysis needed for a proper analysis of competition.

11. With regard to the Annex on Telecommunication, Mexico said that there were also fundamental flaws in the Panel's interpretation of the GATS Annex on Telecommunications. First, while it was true that the Annex referred to "access to and use of" a Member's Public Telecommunications Transport Networks and Services (PTTNS) for the "supply of a service included in its Schedule", its provisions could apply only to the extent that the scheduled services could be supplied through the access to and use of another Member's PTTNS. Contrary to the Panel's findings,

this was not possible for basic telecommunication services. Basic telecommunications services were correctly defined as the transport of information to customers or data. As such, they were also "public telecommunications transport networks and services". By definition, Mexico's suppliers of "public transport networks and services" could not transport telecommunications transport services supplied by other suppliers. Clearly, basic telecommunications services could only be the means of transport used for other economic activities. They could be viewed as a means of transport for the same commercial activity; i.e., the transport and transmission of data. By finding that the Annex covered measures that affected access to and use of PTTNS with regard to all services, including basic telecommunications services, the Panel had wrongly broadened the scope of the Annex. Second, foreign suppliers of basic telecommunications services relied on "access to and use of" a Member's PTTNS to supply their services; their market access rights were governed solely by the Member's Schedule of Specific Commitments. While the Panel rightly found that the Annex, by virtue of paragraph 2(c)(i), did not require a Member to authorize the supply of a basic telecommunication transport service "other than as provided for in its Schedule", it misinterpreted Mexico's Schedule of Specific Commitments and had rendered meaningless the restrictions entered by Mexico. Mexico had entered those limitations in order to prevent suppliers of other Members from supplying basic telecommunications services on a cross-border basis into Mexico, and through mode 3 (commercial presence) for commercial agencies. In finding that the limitations at issue had no such effect, the Panel imposed on Mexico obligations that Mexico had not undertaken during the negotiations. The Annex on Telecommunications had been negotiated to apply to "value added" services and to other services supplied through the PTTNS, several years before the negotiations on basic telecommunications services had been completed. The Panel had nonetheless interpreted the Annex as imposing direct limitations on international accounting rates. It must be worrying for other Members that any panel should interpret in a Member's Schedule commitments that had not been offered. Finally, he said that Mexico had serious concerns that the results of the Panel Report before the DSB at the present meeting would have an impact on the ongoing negotiations on trade in services and could set a precedent, notwithstanding the agreement reached by the parties to the dispute.

12. The representative of Japan thanked the Panel and the Secretariat for this detailed and high quality Report. Japan recognized that this was a very difficult case since it was the first major dispute settlement case in the area of services which involved telecommunication. Japan appreciated the Panel's efforts to examine difficult points of argument such as examining the applicability of the Reference Paper to "the accounting rate system", the interpretation of the term "cost-oriented" and the interpretation of the concept of anti-competitive practices. Japan had participated in this proceeding as a third party and wished to make the following observations on the Panel's findings. First, his country regretted that the Panel Report had not fully addressed the issues raised by Japan in its third-party submission in spite of their importance. For example, the Panel Report had not examined the point related to the "uniform accounting rate system", which Mexico had adopted as well as many other Members, including the United States. Second, Japan had argued in its third-party submission that the examination of "special meaning" of "cost-oriented" should be conducted with extreme care. His delegation considered that an interpretation of this term should be examined "in accordance with the ordinary meaning to be given to the terms of the treaty in their context". Only under the circumstances where it could be clearly established that Members had intended "a special meaning" to be given to the term "cost-oriented", Members should allow for such a special meaning. In other words, Japan considered that a mere existence of a "*de facto* standard", in an organization in which many WTO Members participated, was not sufficient to establish that WTO Members had intended to give a special meaning to the term. Accordingly, even if the term "cost-oriented" was used in the technical context in an international telecommunication field, such as in the International Telecommunication Union, Japan considered that such use alone would not be sufficient to conclude that it satisfied the requirement of Article 31 (4) of the Vienna Convention.

13. The representative of Canada said his country was pleased to note that the United States and Mexico had agreed to settle this matter and looked forward to receiving the text of this agreement.

Canada noted, of course, that agreements between Members in settling disputes might not detract from the rights of other Members, and so Canada would be following this settlement closely and would be reviewing the agreement in that light. With reference to Mexico's statement, his delegation would send it back to Ottawa for review, but Canada would like to emphasize the following point of systemic interest. Panel Reports, once adopted by the DSB, could not be set aside and forgotten. While there was no *stare decisis* in the WTO, the reasoning of adopted panel reports did have, and must be given, due weight in future cases.

14. The representative of Mexico said that he was surprised by the last point that had been made by Canada since it had come from the same delegation that had once called one panel report a one-time aberration.

15. The DSB took note of the statements and adopted the Panel Report contained in WT/DS204/R.
