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Dispute Settlement Body
22 May 2017

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 22 MAY 2017

Chairman: Mr. Junichi Ihara (Japan)

Prior to the adoption of the Agenda, the representative of the European Union noted that Agenda items 10 and 11 related to the same matter. In the EU's view the proposal under Agenda item 11 was more far-reaching than the proposal under Agenda item 10. The EU had raised this matter with the countries that had put forward the proposal currently under Agenda item 10 and they had agreed to reverse the order of these two items. The EU considered that the proposal under item 11 was most far-reaching than the proposal under item 10 and should therefore be considered first. The EU noted that this was in line with the rules of procedure for meetings of the DSB.

The Chairman proposed that, in light of the EU's request, the proposed Agenda be modified and that item 11 be taken up before item 10.

The Agenda was adopted as amended.

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1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.172)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.147)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.110)

1.1. The Chairman noted that there were three sub-items under the Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 required that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". Under this Agenda item, the Chairman invited delegations to provide up-to-date information about compliance efforts and to focus on new developments, suggestions and ideas on progress towards the resolution of disputes. He also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "Representatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record". He then turned to the first status report under this Agenda item.

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.172)

1.2. The Chairman drew attention to document WT/DS184/15/Add.172, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in DS184 on 11 May 2017, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for its statement and its status report. Japan called on the United States to fully implement the DSB's recommendations and rulings in order to resolve this matter.

1.5. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.147)

1.6. The Chairman drew attention to document WT/DS160/24/Add.147 which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 11 May 2017, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union said that his delegation thanked the United States for its status report and its statement. The EU referred to its previous statements made on this matter and said that it would wish to resolve this dispute as soon as possible.

1.9. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.110)

1.10. The Chairman drew attention to document WT/DS291/37/Add.110, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.11. The representative of the European Union said that the draft authorisation decision for one type of genetically modified maize[1] (for food and feed uses) and the draft proposals for the authorisation of three types of maize[2] (for cultivation) had been submitted to the Appeal Committee for a vote on 27 March 2017, with a "no opinion" result. Furthermore, on 16 May 2017 the draft authorisation decisions for one type of genetically modified maize[3] and one type of cotton[4] (for food and feed use) had been submitted to the Appeal Committee for a vote, with a

[1] Maize Bt11 × 59122 × MIR604 × 1507 × GA21.
[2] Bt11, 1507 and MON810 (renewal).
[3] DAS-40278-9.
[4] GHB119.

"no opinion" result. It was now for the Commission to decide on these authorisations. The EU said that it continued to be committed to acting in line with its WTO obligations. More generally, and as it had stated previously on many occasions, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.12. The representative of the United States thanked the EU for its status report and its statement made at the present meeting. As the United States had noted repeatedly, the EU measures affecting the approval and marketing of biotech products continued to result in lengthy, unpredictable, and unexplained delays in approvals. The delays and uncertainty in approvals caused adverse effects on trade. The failure to approve biotech corn products was a source of particular concern to the United States. A number of corn products had received the approval of the EU's scientific authority, yet remained stalled at the level of the EU Appeals Committee or the EU Commission. The United States encouraged the EU to make decisions on biotech approvals without unnecessary or further delays.

1.13. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2 EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS ON CERTAIN POULTRY MEAT PRODUCTS

A. Implementation of the recommendations of the DSB

2.1. The Chairman recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned should inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. The Chairman recalled that at its meeting on 19 April 2017, the DSB had adopted the Panel Report in the dispute on: "European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products". As Members were aware, the 30-day time-period in this dispute had expired on 19 May 2017, and on 16 May 2017 the EU had informed the DSB in writing of its intentions with respect to implementation of the recommendations and rulings of the DSB. The relevant communication was contained in document WT/DS492/5. The Chairman invited the representative of the EU to make a statement.

2.2. The representative of the European Union said that his delegation wished to confirm that the EU intended to implement the recommendations and rulings of the DSB in this dispute in a manner that respected its WTO obligations. The EU would need a reasonable period of time in which to do this. The EU stood ready to discuss this matter with China, in due course, in accordance with Article 21.3(b) of the DSU.

2.3. The representative of China said that her country thanked the EU for its statement at the present meeting informing the DSB of its intentions to implement the DSB's recommendations and rulings in this dispute. China noted that the EU would need a reasonable period of time for implementation, and said that it was ready to discuss this matter with the EU at the earliest convenience to both sides. China said that it hoped that the EU could fully implement the DSB's recommendations and rulings in an expeditious manner.

2.4. The representative of Brazil said that his country would like to comment on the implementation of the Panel's recommendations in this dispute. Brazil said that it was confident that, in implementing the recommendations of the Panel, the parties would ensure full compliance with Article 3.5 of the DSU, pursuant to which decisions within the WTO dispute settlement system "shall not nullify or impair benefits accruing to any Member under the covered agreements, nor impede the attainment of any objective of those agreements". In particular, Brazil said that it expected that its rights, obtained through negotiations under Article XXVIII of the GATT 1994 with the EU, would not be affected by the implementation of the Panel Report, both in terms of the overall size of the TRQ allocated to Brazil under those procedures and with regard to the administration regime of such quotas. Brazil emphasized the importance of the Panel's reasoning with regard to the dynamic nature of quotas established under Article XIII of the GATT 1994,

stating that the Panel had, in different paragraphs of its report, acknowledged the impact of changes in market share following initial TRQ allocations as well as other "special factors" for the purposes of Article XIII of the GATT 1994.

2.5. The representative of Thailand thanked the EU for its statement and referred to the statement made at the 19 April 2017 DSB meeting. Thailand supported the statement made Brazil.

2.6. The DSB took note of the statements, and of the information provided by the European Union regarding its intentions in respect of implementation of the DSB's recommendations.

3 UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. Statement by the European Union

3.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union and invited the representative of the European Union to speak.

3.2. The representative of the European Union said that his delegation wished to inform the DSB that the authorized level of retaliation against the United States had been adjusted starting on 1 May 2017. The regulation containing the EU's measures had been published on 29 April 2017 and had been circulated to all Members. The EU, once again, requested the United States to stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with DSB's recommendations and rulings. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports on implementation in this dispute. The EU would continue to place this matter on the DSB Agenda as long as the United States had not implemented the WTO ruling.

3.3. The representative of Brazil said that her country thanked the EU for keeping this item on the Agenda of the DSB. As a party to the Byrd Amendment disputes, Brazil wished to refer to its previous statements made on this matter. In particular, Brazil wished to refer to its statements regarding the continuation of illegal disbursements, which should cease immediately. Brazil renewed its calls on the United States to fully comply with the DSB's recommendations and rulings in this dispute. Until then, the United States was under an obligation to submit status reports, pursuant to Article 21.6 of the DSU.

3.4. The representative of the United States said that, as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, over nine years ago. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. As the United States had noted previously, the EU had demonstrated repeatedly it shared this understanding, at least when it was the responding party in a dispute. Once again, the EU had not provided a status report at the present meeting for one or more disputes in which there was a disagreement between the parties on the EU's compliance. Finally, the United States noted the EU's recent announcement to maintain its suspension of concessions on US goods. The United States said that it continued to review the action by the EU and would not accept any characterization of such continued countermeasures as consistent with the DSB's authorization. As the EU was aware, the United States had announced that it had implemented the DSB's recommendations and rulings. If the EU disagreed, there would appear to be a disagreement between the parties to the dispute about the situation of compliance.

3.5. The representative of Canada said that his country thanked the EU for having placed this item on the Agenda of the DSB. Canada shared the EU's standpoint, according to which: the Byrd Amendment had to be submitted to the monitoring of the DSB until it was no longer applied.

3.6. The DSB took note of the statements.

4 UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN PIPE AND TUBE PRODUCTS FROM TURKEY

A. Request for the establishment of a panel by Turkey (WT/DS523/2)

4.1. The Chairman drew attention to the communication from Turkey contained in document WT/DS523/2 and invited the representative of Turkey to speak.

4.2. The representative of Turkey said that his country's panel request reflected its concerns with the US conduct of several countervailing duty proceedings and the preliminary and final countervailing duty measures that had been imposed on certain Turkish steel pipe and tube products. As detailed in Turkey's panel request, the measures at issue appeared to be inconsistent with the provisions of the GATT 1994 and SCM Agreement. Turkey raised concerns regarding certain US determinations during the countervailing duty proceedings at issue, but the United States had not taken any actions to resolve Turkey's concerns. Turkey had then requested and held formal WTO consultations with the United States on 28 April 2017. These efforts had also, unfortunately, failed to resolve the dispute. Accordingly, Turkey requested that the DSB establish a panel to examine the matter set forth in its panel request, with the standard terms of reference.

4.3. The representative of the United States said that the United States was disappointed that Turkey had sought the establishment of a panel in this matter. As the United States had explained to Turkey, the determinations identified in Turkey's request for panel establishment were fully consistent with WTO rules. Furthermore, Turkey sought to challenge certain alleged "practices". These matters, however, were not measures and would not fall within the scope of a dispute settlement proceeding. Further, the United States said that it failed to understand why Turkey was pursuing a challenge to a determination that had been vacated in the course of domestic litigation. The United States regretted that Turkey would seek to use WTO resources in this manner, particularly when WTO dispute settlement resources were overburdened. For these reasons, the United States did not agree to the establishment of a panel at the present meeting.

4.4. The DSB took note of the statements and agreed to revert to this matter.

5 INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

A. Recourse to Article 21.5 of the DSU by India: Request for the establishment of a panel (WT/DS430/21)

5.1. The Chairman recalled that the DSB had considered this matter at its meeting on 19 April 2017. He drew attention to the communication from India contained in document WT/DS430/21, and invited the representative of India to speak.

5.2. The representative of India said that his country had sought the establishment of a panel, pursuant to Article 21.5 of the DSU, in this dispute at the DSB meeting on 19 April 2017. India said that it strongly considered that it had complied with the DSB's recommendations and rulings by bringing its measures into conformity with its WTO-obligations and by addressing all the concerns raised by the United States during bilateral discussions. However, in spite of the efforts made by India to resolve the dispute bilaterally, by providing the relevant information and requested clarifications to the United States, the United States had not yet agreed to resolve the dispute. Furthermore, the United States had not accepted India's request to suspend the Article 22.6 proceeding in this dispute. The United States had not agreed to a sequencing agreement, to first seek a compliance panel to determine whether there was compliance, before proceeding with the arbitration proceedings. As Brazil had rightly pointed out at the 19 April 2017 DSB meeting, whenever there was disagreement about the existence or consistency of measures

with the covered agreements, the logical procedural order could only be the one set out in the DSU. That order was to first have recourse to Article 21.5 of the DSU. In light of these facts, and in order to safeguard its interests, India had no option but to proceed with the second request under Article 21.5 of the DSU to establish whether India had complied with its obligations under the covered agreements. Therefore, India requested that a Panel be established, pursuant to Article 21.5 of the DSU, with standard terms of reference, as set forth in Article 7.1 of the DSU. Finally, India also requested that the DSB refer the matter to the original Panel, if possible. Nevertheless, India said that it was still open to discussion with the United States on their concerns, if any, on the extent of India's compliance with its WTO obligations in these proceedings.

5.3. India also wished to highlight the existence of two parallel proceedings in this dispute – the compliance panel under Article 21.5 and the arbitration proceedings under Article 22.6. At the 19 April 2017 DSB meeting, Brazil had raised a number of pertinent questions with respect to the difficulty in proceeding with an Article 22.6 proceeding before the completion of the compliance proceeding. It had stated that Article 22.6 proceedings could not be transformed into a "mini-implementation dispute". This could risk curtailing the due process guarantees safeguarded by the procedure under Article 21.5, which was, in the DSU, the mechanism suitable to resolving divergences regarding implementation of adopted decisions. During the same DSB meeting, the EU had maintained that arbitration under Article 22.6 should be preceded by a multilateral determination of compliance in case there was a disagreement on this question. India had also noted Canada's point that the disputing parties ought to consider their procedural options with due regard both systemic considerations and their own interest in reciprocal treatment in future disputes. India noted that Australia had encouraged 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.

5.4. India said that the United States had, unfortunately, not agreed to enter into a sequencing agreement in this dispute. India still looked forward to such an agreement. It understood that the United States' position was that it had reserved its rights to move forward on the pending arbitration under Article 22.6 on the level of nullification and impairment resulting from India's measure, but that the United States continued to seek to work cooperatively with India toward the goal of compliance. At the 19 April 2017 DSB meeting, the United States had also noted that the DSU did not require Members to enter into a sequencing agreement but that Members had found it appropriate to do so in many circumstances. India did not wish to engage in a legal analysis as to whether there was a requirement to enter into a sequencing agreement under the DSU at this stage. India only wished to state that, as it had sought a compliance panel in this dispute, obviously on account of the reasons it had mentioned, it considered that it would be logical and more efficient to determine compliance under Article 21.5, before proceeding with Article 22.6 proceedings.

5.5. The representative of the United States said that, as the United States had noted at the 19 April 2017 DSB meeting, India had no basis for asserting compliance with the DSB's recommendations in this dispute. To recall, the DSB had found that India's measures blocking the importation of US poultry and other agricultural products were not based on science and breached several of India's obligations under the SPS Agreement. The DSB had adopted these rulings in June 2015, nearly two years ago. Despite that, India continued to maintain a complete ban on US poultry and other agricultural products. The United States had made concrete proposals to India and had yet to receive a substantive reply from India to those proposals. It was regrettable that India remained focused on litigation instead of on actually achieving compliance in this dispute. Regarding India's comments about sequencing agreements, the United States found it puzzling that so much of India's panel request was dedicated to the issue of a sequencing agreement rather than explicating how India was ensuring its trading partners had access consistent with India's WTO obligations. In any event, the DSU did not require Members to enter into a sequencing agreement. The fact was that India had taken no steps to address the DSB's recommendations as of the time when the United States had taken procedural action to preserve its rights under Article 22 of the DSU. Regarding India's comments that Article 21.5 proceedings should come before Article 22.6 proceedings, Members had often agreed, through sequencing agreements or otherwise, to conduct proceedings in such an order, but as Members were well aware, this was not required under the DSU. Regarding India's comments about the United States' request for authorization, under Article 22.6 of the DSU, the negative consensus rule applied within 30 days of the end of the period for compliance. By submitting the Article 22.2 request, the United States had preserved its negative consensus rights. Taking this step was neither surprising nor unusual.

Similar actions had been taken in other disputes. The United States noted that as of the end of the reasonable period of time, and indeed as of the time of the United States' request under Article 22.2 of the DSU, India was not even claiming that the measures that were the subject of the DSB's rulings and recommendations had been withdrawn or modified.

5.6. The representative of Japan said that the request for the establishment of an Article 21.5 panel had been made by India, the original respondent in this dispute. Japan did not disagree that an original respondent had the right to resort to compliance proceedings. As observed by the Appellate Body, "the text of Article 21.5 does not preclude an original respondent from initiating proceedings under [Article 21.5] to obtain confirmation of the consistency with the WTO-agreements of its implementing measure".[5] The scope of compliance proceedings under Article 21.5 was parties' "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". And an Article 21.5 compliance panel was tasked with determining or confirming whether the respondent had achieved substantive compliance by resolving this "disagreement".[6] Japan questioned whether, in cases like the present one where an original respondent had initiated the compliance proceedings, the panel request which formed the compliance panel's terms of reference would be both narrow enough and broad enough to identify precise "disagreement" and to enable a compliance panel to carry out its task of determining whether the respondent had come into substantive compliance. The panel request by an original respondent could be too broad in its scope. As had been observed by the Appellate Body, what the original respondent was required to do was to identify the measures it had taken to comply and make a claim that these measures had rectified the inconsistencies found in the DSB recommendations and rulings.[7] The original complainant could then challenge the original respondent's claims of compliance before the panel.[8] At that stage, the scope of "disagreement" as to the respondent's claims of compliance would become clear. Even then, the original respondent could seek the compliance panel's review of its claims, which the complainant had decided not to challenge, in order to obtain multilateral confirmation of compliance, even though there was no genuine "disagreement" between the parties as to such particular claims. The respondent's panel request could be too narrow in its scope as well. As acknowledged by the Appellate Body, "the original respondent that has taken a measure to comply cannot be expected to speculate as to the violations that could possibly be raised against its measure by other Members, and this is not what the original respondent is expected to do if it initiates Article 21.5 panel proceedings".[9] Because of this possible deficiency, the Appellate Body had anticipated the possibility that "if … the original complainant considers that the implementing measure is inconsistent with provision of the WTO agreements not covered in the request for the establishment of a panel by the implementing Member, it may file its own request for the establishment of a panel".[10] These observations revealed that the original complainant would play a pivotal role in identifying "disagreement" to be resolved by a compliance panel. Indeed, in Japan's view, an original complainant was in a far better position than an original respondent to identify "disagreement" that defined and delimited the scope of compliance proceedings, as Members' 20-some-years of practices and operations of the dispute settlement system had amply demonstrated.

5.7. Japan said that it would now turn to the existence of active parallel proceedings. Once the DSB had established a compliance panel at the present meeting, there would be two parallel dispute settlement proceedings in this dispute: the Article 22.6 arbitration and the Article 21.5 compliance proceedings initiated by India. Japan recalled that in July 2016, the United States had requested authorization from the DSB to suspend concessions or other obligations under Article 22.2 of the DSU and, upon objection by India, the matter had been referred to arbitration under Article 22.6 of the DSU. Japan said that it was not in a position to know how, and to what extent, the arbitration proceedings had progressed. Japan could not speculate as to how the compliance Panel, the Arbitrator and the parties to this dispute envisaged these two parallel proceedings organizing, coordinating and/or harmonizing their respective works either.

[5] Appellate Body Reports, "US – Continued Suspension"/"Canada – Continued Suspension", para. 348.
[6] Appellate Body Reports, "US – Continued Suspension"/"Canada – Continued Suspension", paras. 337, 338.
[7] Appellate Body Reports, "US – Continued Suspension"/"Canada – Continued Suspension", para. 353.
[8] Appellate Body Reports, "US – Continued Suspension"/"Canada – Continued Suspension", para. 354.
[9] Appellate Body Reports, "US – Continued Suspension"/"Canada – Continued Suspension", para. 353.
[10] Appellate Body Reports, "US – Continued Suspension"/"Canada – Continued Suspension", para. 354.

5.8. However, given the potential overlap between the mandates of these two proceedings, Japan observed that there appeared to be at least three possible scenarios from the Article 22.6 Arbitrator's perspective: first, the Arbitrator could examine and decide the WTO-consistency of the compliance measures on its own and then decide the level of nullification or impairment. This could potentially lead to conflicting outcomes between the two proceedings, especially because an appellate review was only available in the compliance proceedings (and the Appellate Body could reverse the compliance Panel's findings). Second, the Arbitrator could determine the level of nullification or impairment based on the original measures found to be WTO-inconsistent in the original proceedings. Since, under Article 22.7 of the DSU, the Arbitrator's decision had to be accepted as final, and there would be no second arbitration, the outcome of the compliance proceedings, whatever it was, would not be reflected in the arbitral award. Unless the outcome of the compliance proceeding confirmed that India's compliance measures had achieved substantive compliance, the authorized level of suspension would be maintained regardless of the level of nullification or impairment caused by the compliance measures. Third, the arbitrator could wait for the completion of compliance proceedings before proceeding. This was the equivalent of a sequencing arrangement; but it could certainly delay and prolong the entire process. Japan hoped that the compliance Panel and the Arbitrator, in consultation with the parties, would take a proper course of action that would serve the purpose of "prompt"[11], "positive"[12] and "effective"[13] resolution of this dispute, to the satisfaction of all parties involved in these two proceedings.

5.9. The representative of European Union said that his delegation wished to refer to its statement made at the special DSB meeting on 19 July 2016. The EU said that it hoped that India and the United States would ensure that the procedures of the DSU, with regard to compliance and suspension of obligations in this dispute, could be conducted efficiently and in the correct sequence. In that regard, the EU noted India's request to establish a compliance panel pursuant to Article 21.5 of the DSU. These developments raised a number of systemic issues which the EU intended to closely follow in the upcoming proceedings. India restated its view that arbitration under Article 22.6 of the DSU should be preceded by a multilateral determination of compliance in case there was a disagreement on this question. The EU had participated as a third-party in the panel and appeal proceedings, and would request third-party rights in the compliance proceeding, pursuant to Articles 10.1 to 10.3 of the DSU, including with respect to any disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB.

5.10. The representative of Canada said that his country referred to its previous statement made in respect of this panel request at the 19 April 2017 DSB meeting. In particular, Canada noted that recent practice clearly demonstrated the relevance and appropriateness of the right of the responding party to initiate compliance proceedings under the DSU. Canada said that it presumed that the concerns outlined by previous speakers had been borne in mind by the responding Members that had recently initiated compliance proceedings in the DS381, DS430, and DS461 disputes.

5.11. The representative of Australia said that her country wished to refer to its statement made at the 19 April 2017 DSB meeting which had observed the potential systemic issues arising in relation to the sequencing of compliance and retaliation proceedings in the current dispute. Australia recalled that all Members shared a responsibility to support and improve the efficiency, effectiveness and operation of the WTO dispute settlement system. In that light, Australia continued to encourage the parties in this dispute to work together to reach an agreement which would address the systemic issues arising in this dispute.

5.12. The representative of Colombia said that his country did not wish to take position on the substance of this dispute, and hoped that the United States and India would be able to settle their differences with respect to the implementation of the rulings and recommendations of the DSB. However, Colombia wished to highlight the recent DSB practice, which would be adopted at the present meeting with regard to this dispute. This practice recognized that the responding party in a dispute, which had complied with the recommendations and rulings of a panel, had the right to recourse to Article 21.5 of the DSU before the DSB could proceed with the suspension of concessions process under Articles 22.2 and 22.6 of the DSU. In Colombia's view, this practice

[11] DSU Article 3.3.
[12] DSU Article 3.7.
[13] DSU Article 21.1.

clarified how the principle of sequencing functioned in the framework of the DSB. Finally, Colombia wished to refer to its statement made at the 19 April 2017 DSB meeting.

5.13. The representative of Brazil said that his country wished to reiterate its statement made at the 19 April 2017 DSB meeting, in which it had emphasized the consequences of not taking into account the correct procedural order between Articles 21.5 and 22.6 of the DSU. Brazil asked whether the procedural precariousness in several disputes regarding the issue of sequencing was the intention of the original drafters of the DSU. At the 19 April 2017 DSB meeting, Brazil had raised several questions to see whether the procedural confusion currently witnessed by the DSB was possibly what the DSU prescribed to Members. Brazil said that the answer was clearly no and hoped that Members could soon revert to the correct, logical and procedurally-sound sequence between Articles 21.5 and 22.6 of the DSU.

5.14. 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 India in document WT/DS430/21. The Panel would have standard terms of reference.

5.15. The representatives of Australia, Brazil, China, the European Union, Guatemala, Japan, Kazakhstan, Korea, the Russian Federation, Singapore and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.

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

A. Recourse to Article 21.5 of the DSU by Panama: Request for the establishment of a panel (WT/DS461/22)

6.1. The Chairman drew attention to the communication from Panama contained in document WT/DS461/22 and invited the representative of Panama to speak.

6.2. The representative of Panama said that on 9 March 2017, her country had requested consultations with Colombia under Article 21.5 and Article 4 of the DSU, Article 19 of the Customs Valuation Agreement, and Article XXII of the GATT 1994 with respect to certain implementing measures resulting from the implementation of the DSB's rulings and recommendations in "Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear" (DS461). Those consultations had taken place in Geneva on 28 March 2017. Panama and Colombia had subsequently pursued their efforts in respective capitals in order to arrive at a solution. Unfortunately, these consultations had failed to resolve this dispute. Consequently, Panama asked the DSB to establish a panel under Article 21.5 of the DSU.

6.3. The representative of Colombia said that his country welcomed Panama's intention to settle this dispute in a manner that enabled first to examine the Colombian measures by the Article 21.5 panel before proceeding with the request for suspension of concessions. Colombia recalled that, at the DSB meeting on 16 December 2016, it had informed the DSB of its compliance with the DSB's recommendations and rulings. Colombia had complied promptly and effectively, through Decree 1744 of 2016, which had replaced the compound tariff with an ad valorem tariff that did not exceed Colombia's WTO bound-tariff rates for imports of the apparel and footwear covered by the Decree, which were subject of this dispute. Colombia noted that, since it had complied with the DSB's recommendations and rulings, there was no basis for the request to suspend concessions. Moreover, as the Arbitrator in "US – Tuna II (Mexico)" had explained, in order to have recourse to Article 22.2 of the DSU, there had to be adverse DSB's recommendations and rulings in respect of the measure taken to comply, which was not the case in this dispute. In the circumstances, Colombia had considered that the appropriate way to proceed would be for Panama to withdraw its request under Article 22.2 of the DSU which was the basis for Arbitration under Article 22.6 of the DSU.

6.4. Colombia noted that, with respect to the other apparel and footwear products covered by the measure, which was considered to be inconsistent with Colombia's obligations under Article II of the GATT 1994 that under Decree 1744, they were subject to the national tariff, i.e. Colombia's MFN tariff which did not exceed the bound levels. Panama's complaints in this request for the establishment of an Article 21.5 panel concerned Decree 1745 of 2016, which was a customs

measure that was not inconsistent with any of Colombia's obligations under the Marrakesh Agreement, and which had nothing to do with the compound tariff measures that were the subject of the DSB's recommendations and rulings in DS461. By Decree 1745, Colombia had adopted measures to strengthen the customs risk management and control system in the face of possible situations involving customs fraud associated with the importation of certain goods, whatever their origin. In other words, the Decree was an effort to ensure that trade operations were governed strictly by the principles underlying legal and fair trade, and accordingly, it was in line with WTO rules. For Colombia, Panama's current request raised systemic concerns in that it meant disregarding the limited nature of Article 21.5 procedures. This placed the responding Member at the considerable disadvantage of possibly being subjected to suspension of concessions without having had a reasonable period of time to bring itself into conformity with the WTO rules. Colombia and Panama had been discussing their mutual concerns in this respect, and would deal with them through dialogue between the two governments. Consequently, Colombia said that it believed that the best thing to do, for the moment, was to continue this dialogue. As such Colombia was not in a position to agree to the establishment of an Article 21.5 panel. In the meantime, Colombia looked forward to an agreement which the delegations of both countries had been working so hard to achieve. Colombia noted that the position it had adopted at the present meeting would not stand in the way of a speedy and prompt resolution of the dispute: in view of the DSB's workload, the failure to establish a panel at the present meeting would not have any influence on the process.

6.5. The representative of Panama said that her country shared Colombia's concern regarding the sequencing issue. The complexity of this matter was apparent in other areas of the WTO's work, such as the DSU negotiations where this important issue remained unresolved. Panama considered it essential that the proceedings in this case, which had been ongoing for a decade, were conducted in an orderly and expeditious manner so that the measures applied by Colombia did not continue to nullify and impair the benefits accruing to Panama directly or indirectly under the GATT 1994. Panama had followed the provisions of the DSU and had complied with the existing time-frames in order to safeguard its rights. Panama had challenged Colombia's measures concerning textile and footwear imports in two WTO proceedings, in which two Panels and the Appellate Body had confirmed that Colombia was in breach of its obligations under the WTO-rules. Nonetheless, Colombia still failed to implement the DSB's recommendations and rulings and continued to impose restrictions on trade in these products from Panama.

6.6. Panama had been requesting, for over a decade of WTO proceedings, that Colombia regulate its imports of textiles and footwear without violating its obligations under the WTO Agreements. It was therefore critically important for Panama, especially at this stage in the proceedings, that this case be concluded in an expeditious and orderly manner. Panama also pointed out that it had complied with all the relevant procedures in submitting this panel request under Article 21.5 of the DSU. The proceedings would be heard by the same panel or arbitration panel which comprised the members of the original panel and which Panama hoped would coordinate matters in the most pertinent way.

6.7. The representative of the European Union said that, with regard to the panel request at the present meeting, his delegation considered that this situation fell under Article 9.1 of the DSU and hence both compliance proceedings could be merged. In this regard, and taking into account the second sentence of Article 9.1 of the DSU, the EU considered that the matter should be referred to the compliance panel which had been established at the requested of Colombia since this would appear to be feasible.

6.8. The representative of Brazil said that, as her country had already pointed out on previous occasions, Brazil was concerned about the way Members used, or misused, the procedures under Articles 21.5 and 22.2 of the DSU. In Brazil's view, the correct interpretation of these provisions required that Members first obtain a multilateral decision concerning implementation before requesting authorization to suspend concessions and other obligations. This dispute was another example of the procedural precariousness generated by disregarding the sound and reasonable procedural order of those provisions. Once the panel requested by Panama were established, there would be two compliance panels (requested by both Colombia and Panama) and one arbitration proceeding running in parallel. Had the proper procedural order been respected from the beginning, a second compliance proceeding would not have been necessary, as Panama could have included the full spectrum of Colombian measures "taken to comply" in the terms of reference of the Article 21.5 panel. The recurrence and multiplication of these procedural anomalies were

noteworthy and pointed out to the fact that this was not what the original drafters had intended for the dispute settlement system. Given the current situation, Brazil encouraged the parties to work constructively in order to harmonize all the proceedings.

6.9. The representative of Japan said that his country wished to refer to the statement made under Agenda item 5.

6.10. The representative of Australia said that her country referred to its statement made at the DSB meeting on 6 March 2017 reflecting Australia's concerns regarding the systemic issues arising in these dispute proceedings, as well as its statement made under item 5 of the DSB Agenda.

6.11. The DSB took note of the statements and agreed to revert to this matter.

7 UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

A. Recourse to Article 22.7 of the DSU by Mexico (WT/DS381/44)

7.1. The Chairman drew attention to the communication from Mexico contained in document WT/DS381/44 and invited the representative of Mexico to speak.

7.2. The representative of Mexico said that his country had initiated this dispute on 24 October 2008. In July 2012, the DSB had determined that the United States had violated its trade commitments with the original tuna measure. In 2013, the United States had amended the measure, and in December 2015 the DSB had again determined that the Member concerned had failed to comply with its international trade obligations. Under those circumstances, on 10 March 2016 Mexico had filed a request for authorization to suspend concessions. In response, on 22 March 2016 the United States had taken two actions: the first action was to challenge the level of suspension of concessions proposed by Mexico, and the second one was to amend the measure at issue for the third time. Mexico thanked the Arbitrator, the Secretariat staff that had assisted the Arbitrator and the translators for the Report issued on 25 April 2017. Regarding the Arbitrator's decision, Mexico said that it would take this opportunity to comment on some of the Arbitrator's reasoning and conclusions, which would serve to guide future arbitrators in proceedings in which the level of nullification or impairment was challenged.

7.3. Regarding procedural matters, the following points had emerged from the Arbitrator's Decision. At the United States' request, the Arbitrator had authorized a delayed closed circuit television broadcast of the US statements at the hearing, notwithstanding Mexico's objection. In "EU- Biodiesel", the Appellate Body had received a similar request from only one of the participant and therefore the request had been denied in the absence of mutual agreement.[14] DSU provided that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". The fact that an arbitrator or panel departed from precedent and decided a matter differently from previous cases undermined the security and predictability of the system. The US request for delayed closed circuit television broadcasting had also placed a heavier burden on the WTO Secretariat and on the parties to the dispute, since it had entailed the recording, review of the recording, a meeting with the parties to edit the video and the viewing of the video itself at the WTO. Even the Arbitrator had acknowledged that "[p]artially open meetings impose a greater burden on a WTO adjudicator".[15] There had been more WTO Secretariat staff than members of the public at the hearing. To distract Secretariat staff with such forms of activity was disturbing in that it affected their workload, which was heavy enough.

7.4. The United States also stated that the Arbitrator should have determined the level of nullification or impairment in the light of the amended 2016 tuna measure and not the amended 2013 tuna measure. The Arbitrator had noted that Article 22.6 of the DSU "does not specify which measure should form the basis of the request for, or authorization of, suspension of concessions".[16] The Arbitrator had thus considered that a full reading of Article 22 of the DSU showed that the level of nullification or impairment caused had to be construed to mean the original or compliance measure that had been found to be inconsistent "at the time of expiry of the

[14] Appellate Body Report, "EU-Biodiesel", (WT/DS473/AB/R/Add.1), paras. 6 and 7.
[15] Decision by the Arbitrator, "US-Tuna II (Mexico)", (WT/DS381/ARB), para. 2.29.
[16] Ibid., para. 3.18.

RPT".[17] In this case that had been the amended 2013 tuna measure. Mexico agreed with the Arbitrator's conclusion that "the present arbitration takes place in response to DSB recommendations and rulings that the 2013 tuna measure had failed to bring the United States into compliance within the RPT"[18] and that "[t]he adverse DSB recommendations and rulings covering the 2013 tuna measure therefore continue to provide a valid basis for the suspension of concessions".[19] The Arbitrator had also addressed Mexico's systemic concerns. In particular, that of whether interrupting the suspension of concessions proceedings by giving precedence to the compliance proceedings would render Article 22 of the DSU ineffective, thus undesirably creating an endless loop that could indefinitely preclude the right to suspend concessions or other obligations. The Arbitrator had agreed with Mexico's systemic concern.[20] This concern had in fact been shared by other Members such as Guatemala, Canada, Japan, Korea, Australia, Norway and Chinese Taipei at the DSB meetings held on 22 April 2016[21] and 9 May 2016.[22]

7.5. The Arbitrator had decided that it was "appropriate […] to undertake a prompt assessment of the level of nullification or impairment on the basis of the 2013 tuna measure and leave the analysis of the WTO consistency of the 2016 tuna measure to the two compliance panels established to undertake that precise task".[23]

7.6. Regarding the substance of this dispute the following emerged from the Arbitrator's Decision. The Arbitrator had found that many – albeit not all – of the assumptions underpinning the Mexican model were reasonable. In this regard the Arbitrator had based its calculation on a re-specified version of Mexico's model, since it "is a reasonable methodology to estimate the export losses caused by the Tuna Measure".[24] By contrast, the Arbitrator had refrained from using the US model, based on Mexico's historical share in the US market prior to the adoption of the tuna measure. In this regard, the Arbitrator had determined that the level of nullification or impairment was US$163.3 million per annum, between 19 and 7 times more than the amounts suggested by the United States with its model, which had been US$8.5 million and US$21.9 million per annum. Both parties to the dispute had agreed that withdrawal of the Tuna Measure would constitute an appropriate counterfactual. The Arbitrator had concurred, and the value of Mexico's exports of canned yellowfin to the United States had therefore been determined.

7.7. With regard to the time-frame, the parties had agreed – and the Arbitrator had shared their view – that a short-term assessment of the withdrawal of the measure would be appropriate. The Arbitrator had also shared Mexico's view in taking calendar-year 2014, which had been the year that had followed the expiry of the reasonable period of time for compliance and the year for which there had been the most data available as the period for assessing the short-term impact of the withdrawal of the amended 2013 tuna measure. Mexico agreed with the Arbitrator's conclusion in the sense that "following the adoption of the original Tuna Measure, there was an important decline in the volume of US imports of yellowfin tuna from Mexico and purchases of yellowfin by US canneries".[25]

7.8. The model proposed by Mexico had been based on: "(i) the demand for canned tuna in the United States and Mexico, respectively; (ii) the supply of canned tuna in the United States and Mexico, respectively; and (iii) the market equilibrium conditions in the US and Mexican markets for canned tuna".[26] The Arbitrator had indicated that the Tuna Measure restricted the supply of canned yellowfin tuna from Mexico to the United States, which it had concluded was reasonable according to Mexico's explanations. The Arbitrator had recognized that "yellowfin is a premium [or gourmet] product"[27] and also that "US consumers have a preference for […] yellowfin tuna"[28] and would

[17] Ibid., para. 3.21. See also para. 3.22.
[18] Ibid., para. 3.21. See also para. 3.34.
[19] Ibid., para. 3.21. See also paras. 3.42 and 3.66 and 3.67.
[20] Ibid., para. 3.21. See also para. 3.53.
[21] Minutes of DSB meeting, document WT/DSB/M/377, paras. 7.6-7.11, 7.13 and 7.17, and document WT/DSB/M/378, para. 1.5.
[22] Minutes of DSB meeting, document WT/DSB/M/378, para. 1.5.
[23] Decision by the Arbitrator, "US – Tuna II (Mexico)", (WT/DS381/ARB), para. 3.21. See also para. 3.55.
[24] Ibid., para. 5.157.
[25] Ibid., para. 5.33.
[26] Ibid., para. 5.3.
[27] Ibid., para. 5.67.
[28] Ibid., para. 5.71.

therefore have been willing to pay a premium for it. This was precisely the tuna produced by Mexico.

7.9. The Arbitrator had unfortunately not recognized that certain statements had been "manufactured". In Mexico's view, a simple reading of the letters obtained from the private sector showed them to have the same wording, which could not have been a coincidence unless the writers had received a format in which, or some indication as to how, to draft the letters. Nonetheless, the Arbitrator had found that US retailers, which accounted for 73.1% of total US consumption of tuna products, would not have refused to sell tuna caught by setting on dolphins if the measure at issue had not existed. The Arbitrator had also determined that "Mexico does have a competitive advantage in the US market vis à vis other foreign canned yellowfin producers".[29] Given these circumstances, the Arbitrator had found that it could reasonably be expected that Mexico would increase its tuna exports to the United States following the withdrawal of the Tuna Measure.

7.10. Mexico said that it did not wish to go into details in analysing the Decision. Suffice it to point out that the Arbitrator had considered the model proposed by Mexico to be reasonable. Lastly, the Arbitrator had concluded in the Decision of 25 April 2017 that Mexico "may request authorization from the DSB to suspend concessions or other obligations as indicated in document WT/DS381/29 at a level not exceeding US$163.23 million per annum".[30] Therefore, in accordance with document WT/DS381/44, Mexico requested the DSB's authorization to suspend concessions to the United States.

7.11. The representative of the United States said that the United States regretted the request for authorization put forward by Mexico at the present meeting. But as had been discussed at previous DSB meetings, in March 2016, the US National Oceanic and Atmospheric Administration ("NOAA") had issued a rule modifying the US dolphin safe labelling measure. That rule had directly addressed the DSB's findings and had brought the United States into compliance with its WTO obligations. As a result, if the compliance panel confirmed that the current dolphin-safe labelling measure was no longer WTO-inconsistent, there would be no basis under WTO rules to apply any countermeasures. The United States did appreciate the hard work of the Arbitrator, and the Secretariat staff assisting it, in the Article 22.6 proceeding. Nonetheless, the United States had concerns with the Arbitrator's award. First, the Arbitrator had based its report on a measure that no longer existed. This choice was inconsistent with the purpose and proper operation of an Article 22.6 proceeding, as was made clear by the text of the DSU. The level of suspension of concessions determined in any arbitration under Article 22.6 of the DSU had to be equivalent to the current level of nullification and impairment. The text of DSU Article 22.4 was clear that the appropriate level of suspension of concessions may not exceed "the level of nullification or impairment" currently caused by the measure found to be WTO-inconsistent. Article 22.7 also made it clear that the relevant inquiry was focused on the present level of nullification and impairment, and Article 22.8 of the DSU was explicit that there could be no suspension of concessions where there was compliance. Therefore, as the US tuna measure had been brought into compliance, there was no basis for a suspension of concessions in this dispute.

7.12. With respect to the trade effects analysis in the Award, the United States noted that the Arbitrator's analysis erroneously overestimated the trade impact of this measure. Most importantly, the Arbitrator had used Mexico's model as a basis for calculation, even though the model had been based on three major assumptions that were unproven and, in fact, were contrary to the evidence on US consumer preferences and the global supply of canned tuna. First, the Arbitrator had accepted Mexico's claim that the US measure restricted the supply of canned yellowfin to the US market, despite significant evidence to the contrary. The Arbitrator had claimed that the adoption of the US tuna measure in 1990 was "the main reason" for declining yellowfin imports and purchases by US canneries. But the Arbitrator had ignored the fact that all tuna purchases by US canneries declined in the 1990s. The Arbitrator had also asserted that yellowfin prices had "generally increase[d]" after 1990. But the Arbitrator had relied on evidence related to fresh yellowfin for sale in the direct consumption/sashimi markets, not cannery-grade frozen yellowfin. They were two different markets – as any lover of sushi would appreciate – and could not be confused. Second, the Arbitrator had found that, on average, US consumers preferred canned yellowfin over other types of canned tuna. But no evidence suggested more than a tiny

[29] Ibid., para. 5.104.
[30] Ibid., para. 7.1.

fraction of US consumers had such a preference. To the contrary, the evidence had established that US consumers had a strong preference for canned albacore and skipjack-based light meat tuna, as skipjack was the least expensive type of tuna and was low in mercury. Multiple surveys had confirmed that only a tiny percentage of consumers buying canned tuna (2-6%) looked for yellowfin. Additionally, US consumers, for decades, had been deeply concerned about the harmful effects of dolphin sets and had wanted to purchase tuna caught by other methods. In response to this concern, all major US retailers had, for decades, decided not to purchase canned tuna produced by setting on dolphins. The United States had presented statements by all of the largest US retailers showing that their purchasing policies regarding canned tuna would not be affected by removal of the tuna measure. Some of the retailers had declared explicitly that they would never purchase tuna caught by setting on dolphins, while others had explained that their purchasing decisions were not affected by the official label and would not be changed by its removal. The Arbitrator had ignored the evidence about US consumer preferences and how they had shaped the decisions of all major US retailers. Instead, the Arbitrator had assumed that any retailer in the United States that had not explicitly vowed to never purchase tuna caught by setting nets on dolphins would start purchasing Mexican tuna if the measure were withdrawn. This included retailers that had confirmed that removal of the measure would have no effect on their purchasing decisions. Third, the Arbitrator had agreed that Mexico would be the only supplier of canned yellowfin in the US market. To repeat, no other WTO Member would successfully compete to sell canned yellowfin tuna in the US market. This was unrealistic, and the assumption had been made without any evidence as to the cost structure of the Mexican tuna industry compared to other industries or any evidence of the Mexican industry's ability to compete successfully in any market outside Mexico. In combination, these findings had resulted in a large overestimation of the trade effects from the previous version of the dolphin-safe labelling measure. But as the United States had noted at the outset, the Arbitrator's analysis was of a measure that no longer existed. If the compliance panel confirmed that the current, 2016 dolphin-safe labelling measure was no longer WTO-inconsistent, there would be no basis under WTO-rules to apply any countermeasures in relation to the award being discussed at the present meeting.

7.13. The representative of Canada said that his country had carefully reviewed the Report of the Arbitrator and would like to comment briefly on the Arbitrator's findings in Section 3 of its Report in view of Canada's systemic interest in the proper interpretation of Article 22 of the DSU. Canada commended the Arbitrator for its cogent analysis and for taking due account of the systemic considerations at issue. In particular, Canada welcomed and supported the finding that, under Article 22.6 of the DSU, an Arbitrator was mandated "to assess the level of nullification or impairment caused by the WTO-inconsistent original measure (where no compliance measure was subsequently taken), or a subsequent WTO-inconsistent compliance measure, that was in existence at the time of expiry of the RPT". Like the Arbitrator, Canada shared the concern expressed by Mexico regarding an interpretation of Article 22.6 of the DSU according to which a new assessment of compliance would be necessary before the DSB could authorize the suspension of concessions whenever: (i) a compliance measure subject to adverse DSB recommendations and rulings was further modified; (ii) the responding party claimed to have come into compliance as a result of that modification; and (iii) an Article 22.6 arbitration was subsequently conducted. As the Arbitrator rightly noted, such an interpretation "could very substantially delay, and… effectively thwart, a complaining party's efforts towards obtaining DSB authorization to suspend concessions". This was consistent with the view that Canada had expressed in this forum, most recently at the DSB meeting of 20 February 2017, that it would be appropriate for the complaining party to be able to exercise its rights under Article 22 of the DSU in all circumstances where the DSB had ruled that a measure taken to comply in fact did not comply. The adoption of successive modifications to a compliance measure could not undermine the ability of a complaining party to seek to suspend concessions, which was the remedy provided for in Article 22 of the DSU in cases of non-compliance. That remedy effectively contributed to preserving the rights and obligations of Members under the covered agreements. Canada, therefore, congratulated the Arbitrator for this well-reasoned and important section of the decision.

7.14. The representative of Japan said that, in this Arbitration, an interpretive issue of systemic importance had been raised, which should concern all WTO Members. Specifically, the Arbitrator had been confronted with a difficult choice to make in determining the basis for its assessment of the level of nullification or impairment. This was the choice between the 2013 tuna measure, on the one hand, which had existed at the time of expiry of the RPT and had been found to be WTO-inconsistent as a result of the first compliance proceedings, and the 2016 tuna measure, on the other, which the United States had taken in response to the outcome of the first compliance

proceedings and was currently subject to the ongoing 2nd compliance proceedings. The Arbitrator had chosen the 2013 tuna measure as the proper basis for its assessment. Japan understood that the ultimate conclusion by the Arbitrator was specific to the factual circumstances and procedural histories surrounding this dispute, as well as the particular claims and arguments that had been advanced by the parties before the Arbitrator. Thus, Japan said that it would not take any position on the propriety of the Arbitrator's ultimate conclusion. However, given the systemic nature of the issue addressed by the Arbitrator, and because Japan had had no opportunity to express views on this systemic issue in the arbitration (which did not contemplate third-party participation) Japan said that it would like to offer some observations.

7.15. First, after examining the text and context of the relevant provisions of Article 22 of the DSU[31], the Arbitrator had found that "the text of Article 22.6 of the DSU mandates an arbitrator to assess the level of nullification or impairment caused by the WTO-inconsistent original measure (where no compliance measure was subsequently taken), or a subsequent WTO-inconsistent compliance measure, that was in existence at the time of expiry of the RPT".[32] This was certainly a plausible reading of Article 22.6. However, the Arbitrator's emphasis on the existence of the measure at the time of expiry of the RPT begged the question: what if, as had often been the case, the implementing Member adopted the compliance measure subsequent to the expiry of the RPT? The Arbitrator could say, "well, in that case, depending on the timing of the adoption of such compliance measure, the parties would be most likely to agree that that compliance measure is the relevant measure to assess the level of nullification or impairment". In its discussion on the Arbitrator's decision in "US – Upland Cotton", specifically, its treatment of "Step 2 subsidy" which existed when the RPT expired but was subsequently withdrawn, the Arbitrator had stressed the importance of the parties' agreement.[33] In essence, the Arbitrator appeared to observe the following: as the parties had agreed on the withdrawal of the Step 2 subsidy, there was no "disagreement" within the meaning of Article 21.5 as to the compliance with respect to that subsidy. Since there was no genuine issue of compliance to resolve, the compliance panel had simply declined to rule on the WTO-consistency of that subsidy and hence there were no DSB recommendations and rulings. In this particular context, the lack of the DSB recommendations and rulings would amount to the multilateral confirmation of the full compliance with respect to the Steps 2 subsidy; and further consideration of that subsidy in the assessment of the level of suspension would serve no purpose of inducing compliance. But, in Japan's view, the fact remained that the parties' agreement on the subsequent withdrawal of the measure would neither change the status of the expiry of the RPT as "the relevant point of reference"[34], nor would otherwise extinguish the existence of the measure and its effect during the period between the expiry of the RPT and the time of withdrawal. Nevertheless, if the parties' agreement could justify the consideration of the withdrawals or any other compliance actions that occurred subsequent to the expiry of the RPT in assessing the level of nullification or impairment, then any other intervening events that could contribute to achieving substantive compliance would equally deserve serious considerations, especially, as noted by the Arbitrator, "given that the purpose of [the] suspension is precisely to induce compliance".[35]

7.16. Second, the Arbitrator had stated that "the existing adverse DSB recommendations and rulings remain in effect until such time as there are new, overriding panel and/or Appellate Body findings that have been adopted by the DSB"[36] and such "overriding panel and/or Appellate Body findings" could "affect[] the continued validity of the adverse DSB recommendations and ruling" previously made in the same dispute.[37] Japan was not sure how the subsequent DSB recommendations and rulings could "override" or "affect the continued validity of" the previous DSB recommendations and rulings in the same dispute. As the Appellate Body had explained, the DSB's recommendations and rulings in the original proceedings, as well as in the subsequent compliance proceedings, "form part of a continuum of events relating to compliance with the recommendations and rulings of the DSB in the original proceedings"[38] and "[t]he determination of whether 'measures taken to comply' challenged by the complaining party implement fully, or only in part, the DSB recommendations and rulings requires a panel to examine all of the previous DSB

[31] Decision by the Arbitrator, footnote 48.
[32] Decision by the Arbitrator, para. 3.24.
[33] Decision by the Arbitrator, paras. 3.40 – 3.41.
[34] Decision by the Arbitrator, para. 3.60.
[35] Decision by the Arbitrator, para. 3.41.
[36] Decision by the Arbitrator, para. 3.35.
[37] Decision by the Arbitrator, para. 3.36.
[38] Appellate Body Report, "US – FSC" (Article 21.5 – EC II), para. 87.

recommendations and rulings and the entire range of measures covered by them".[39] It could well have been that what the Arbitrator meant was that the DSB's findings that the implementing Member had achieved substantive compliance would confirm that all of the prior DSB recommendations and rulings had been fully implemented. But, in Japan's view, the choice of words by the Arbitrator had been unfortunate.

7.17. Third, the Arbitrator had agreed with "the systemic concern"[40] raised by Mexico about so-called: "an endless loop that could indefinitely preclude the right to suspend concessions or other obligations pursuant to Article 22".[41] Given the prolonged and complicated procedural histories of this dispute, this concern could be understandable. However, the Arbitrator had described this concern in the following terms: "[i]f, in a situation such as ours where an Article 22.6 arbitration is conducted, new compliance panel proceedings under Article 21.5 needed to be undertaken every time a measure already found to be inconsistent at the expiry of the RPT were modified and compliance was claimed, this could very substantially delay, and in theory effectively thwart, a complaining party's efforts towards obtaining DSB authorization to suspend concessions".[42] In Japan's view, such scenario could be theoretically possible but was highly unlikely. Putting aside this remote possibility, this Arbitrator appeared to presuppose that compliance proceedings under Article 21.5 had to be conducted to determine the WTO-consistency of the new modified compliance measure, when it was introduced, before an Article 22.6 arbitration could proceed to examine the level of nullification or impairment. Japan said that it would return to this issue.

7.18. Fourth, the Arbitrator had found that Mexico was not seeking retroactive remedies when it had proposed the suspension based on the nullification or impairment caused by the 2013 Tuna Measure.[43] The Arbitrator reasoned that "the relevant point of reference is … the date of expiry of the RPT"[44] and regardless of the delay in making its request for authorization, "Mexico is still only seeking to retaliate as from the date when the United States should have come into compliance".[45] Japan agreed that the relevant point of reference was the time when the RPT had expired and the mere passage of time would not render the requested suspension "retroactive". However, Japan was still not certain what the Arbitrator meant by its statement that "Mexico is still only seeking to retaliate as from the date when the United States should have come into compliance". The Arbitrator could simply have wanted to suggest that Mexico sought to apply the suspension of concessions or other obligations prospectively after the authorization up to the level, each year, which was equivalent to the annual level of nullification or impairment caused by the 2013 tuna measures. Indeed, this was the approach the Arbitrator had taken in its determination of the arbitral award in this dispute. However, if (i) the Arbitrator had implied that any nullification or impairment caused historically by the 2013 tuna measure (as from the date of expiry of the RPT) could be counted towards the level of nullification or impairment; and (ii) that Mexico was entitled to take action to retaliate against all such nullification and impairment caused in the past (albeit after the RPT expiry), then such a remedy appeared to be retroactive.

7.19. Fifth, Japan observed that, implicit in the Arbitrator's finding on the issue of relevant measure to assess the level of nullification or impairment, was its reluctance to assess and rule on the issue of compliance on its own, presumably given the existence of the adverse DSB's recommendations and rulings with respect to the 2013 tuna measure and the on-going parallel compliance proceedings reviewing the WTO-consistency of the 2016 tuna measure. Japan said that it agreed that "panel proceedings under Article 21.5 is the proper procedures for resolving the disagreement as to whether [a compliance measure] has achieved substantive compliance".[46] And an Article 22.6 arbitrator could and should rely on the prior findings of the compliance panel in carrying out its duty to assess the level of nullification or impairment caused by the WTO-inconsistent measures at issue. After all, the Article 22.6 arbitration was "part of a continuum of events"[47] leading up to the final resolution of the dispute. However, as a matter of jurisdiction and adjudicative function, Japan did not consider that an Article 22.6 arbitrator was precluded from examining the issue of compliance where necessary, and if the circumstances so required.

[39] Appellate Body Report, "US – FSC" (Article 21.5 – EC II), para. 93.
[40] Decision by the Arbitrator, para. 3.53.
[41] Decision by the Arbitrator, para. 3.49.
[42] Decision by the Arbitrator, para. 3.53.
[43] Decision by the Arbitrator, para. 3.58.
[44] Decision by the Arbitrator, para. 3.60.
[45] Decision by the Arbitrator, para. 3.58.
[46] Appellate Body Reports, "US – Continued Suspension"/"Canada – Continued Suspension", para. 338.
[47] Appellate Body Report, "US – FSC" (Article 21.5 – EC II), para. 87.

Under Articles 22.6 and 22.7 of the DSU, an Article 22.6 arbitrator was given the mandate to "determine whether the level of [] suspension is equivalent to the level of nullification or impairment". Inherent in this mandate was the assessment of the WTO-consistency of a compliance measure. This was because, as the Arbitrator in "EC – Banana III" had explained, an arbitrator could not fulfil its task to assess the equivalence unless it had reached a view on the WTO-consistency of the compliance measure.[48] This had been noted by this Arbitrator as well when it had described the Arbitrator's decision in "EC – Banana III" as follows: the Arbitrator, in that case, had considered that an analysis of the WTO-consistency of the measure taken to comply was a prerequisite to the assessment of the level of nullification or impairment, because if the measure taken to comply had in fact brought the European Communities into compliance within the RPT, there would, legally speaking, have been no nullification or impairment to assess.[49] Indeed, the Arbitrator had recognized as much the ability of an Article 22.6 arbitrator to review the issue of compliance, albeit, in the limited situation where "there have been no prior DSB recommendations and rulings that the responding Member has failed to bring itself into compliance within the RPT" and there was no "logical way forward" other than doing so. Article 22 of the DSU regulated the critical phase of the dispute settlement process. Yet, the text of Article 22 was ambiguous and despite the best efforts by WTO adjudicators (including this Arbitrator) to make sense of this provision, such ambiguities had not been resolved. That was why WTO Members had overcome these ambiguities by concluding ad hoc procedural arrangements. There was also a lack of certain procedural mechanisms which could improve the effective operation of Article 22. For example, as had been observed by the United States in this arbitration, and noted by the Arbitrator, there was no mechanism to adjust the level of suspension authorized by the DSB.[50] The outcome of this Arbitration testified that the proper interpretation and operation of the dispute settlement phase under Article 22 of the DSU was a live issue, which WTO Members may want to address.

7.20. The representative of the European Union recalled that Article 22.7 of the DSU provided that the DSB had to be informed promptly of the decision of the Arbitrator and had to, upon request, grant authorization to suspend concessions or other obligations where the request was consistent with the decision of the Arbitrator, unless the DSB decided by consensus to reject the request. The EU also recalled that Article 22.8 of the DSU provided that the suspension of concessions or other obligations had to be temporary and could only be applied until such time as the measure, found to be inconsistent with a covered agreement, had been removed; or the Member that had to implement recommendations or rulings provided a solution to the nullification or impairment of benefits, or a mutually satisfactory solution was reached. If the conditions of this provision were fulfilled, the EU expected a complainant to not only stop any retaliation that had already been started, but also to refrain from commencing such retaliation in the first place, even if a DSB authorization had already been granted. Whether or not the conditions of this provision were fulfilled should be determined by following the guidance provided by the Appellate Body in DS320. In this respect, the EU said that it would expect all parties to act in good faith with a view to reaching agreement. If agreement was impossible, and in view of the ongoing second compliance procedures, the EU said that it would expect both parties to cooperate in order to obtain a rapid adjudication, and to consider in good faith the impact of these ongoing procedures on retaliation.

7.21. The representative of Brazil said that his delegation understood that the request made by Mexico at the present meeting was in line with the principle that a request to suspend concessions could only be made after a multilateral decision of non-compliance was made. Brazil said that Mexico was requesting authorization to suspend concessions with regard to measures found to be inconsistent in the previous compliance panel and the request was based on an amount of retaliation that had been multilaterally determined in an arbitration proceeding. Therefore, Brazil understood that Mexico's request at the present meeting contributed to the coherence and effectiveness of the dispute settlement system. Once the ongoing Article 21.5 Panel proceedings came to a conclusion, the parties would be able to reassess the situation regarding the suspension of concessions. If the current arbitration proceedings had to be stalled, so as to wait for the second Article 21.5 panel proceedings, the effective functioning of the dispute settlement system would be undermined and "an endless loop of litigation" could also undermine the system and the objective of compliance. With regard to Japan's statement, Brazil did not agree that Article 22.6 of

[48] Decision by the Arbitrator, "EC – Banana III" (US) (Article 22.6 – EC), para. 4.8, quoted in Decision by the Arbitrator, para. 3.32.

[49] Decision by the Arbitrator, para. 3.32.

[50] Decision by the Arbitrator, paras. 3.61-3.62.

the DSU could serve as a "mini-implementation" panel under the DSU. Brazil also commented on the Arbitrator's decision in this dispute, regarding the partial opening of the hearing. Disclosure of written submissions and opening of hearings had been contentious issues in the dispute settlement mechanism for quite some time. Indeed these issues had been debated at length for years in the DSU negotiations. The Arbitrator, in the current dispute, stretched the interpretation of the relevant DSU provisions and did not take into account the objection of one of the parties to the dispute. In Brazil's view, a more sensible approach would have allowed for the opening of the hearing to the public only if both parties had given their explicit consent in that regard. Given that consensus on the issue was yet to emerge and no unequivocal interpretation had yet been established, the scope to be given to the opening of hearings should correspond to degree of agreement obtained by the parties, and to the extent they are affected, also by third-parties.

7.22. The representative of Colombia said that his country did not wish to take position on the substance of this dispute and hoped that the United States and Mexico would be able to settle their differences promptly, without affecting their trade. Colombia also hoped that this suspension would be temporary and that the Article 21.5 procedures that were in the process of being decided took into account the current status of compliance with the DSB's recommendations and rulings in this dispute. Colombia referred to its statements made on this matter under Agenda items 5 and 6 and pointed out that this dispute in fact raised a number of important issues regarding the sequencing of Articles 21.5, 22.2 and 26 of the DSU.

7.23. The representative of India said that he wished to comment briefly on the points raised by Mexico on the rather comparatively simple issue of the partially open hearing in this Arbitration. India noted that this was an extremely serious issue in the context of the rights and obligations of Members under the DSU. Mexico had stated that it had clearly objected to the partial open hearing, or the full open hearing, to the Arbitrator; but had been overruled in this dispute. India noted that Article 14 of the DSU clearly mandated that panel deliberations, which included Arbitration proceedings, had to be confidential. India also noted that, under Article 18 of the DSU, Members were free to disclose their statements and own positions to the public. India said that it was also aware that the DSU negotiations had, for a long time, dealt with this issue and had failed to come to any conclusion. India noted that many Members had a great sensitivity to panels, the Appellate Body or other dispute settlement mechanisms overstretching the limits of the DSU. In India's view this was a classic example of where the DSU was clear about panel proceedings being confidential and the Arbitrator had overstretched its limits and allowed for a partial open hearing, even after a Member had objected. India noted that in paragraph 2.33 of the Arbitrator's report, the circumstances that the Arbitrator had taken into account while coming to this conclusion were quite puzzling. India quoted a paragraph, relating to the request for an open hearing, where the Arbitrator had stated: "in granting the United States request, we notably also took into account the following three circumstances: first, the present dispute concerns the protection of dolphins and thus is a conservation related measure. In this kind of dispute even a partially open meeting is apt to enhance understanding of, and confidence in, the WTO dispute settlement process." India said that it was unable to understand this logic in the present circumstances. Did it mean to say that non-conservation related disputes were not sensitive enough to be open? Or was it the case that certain kinds of disputes related to the environment were more amenable to open hearings? The Arbitrator had also stated that the parallel conduct of a second round of compliance panel proceedings had required the assembly of a substantial Secretariat support staff and that this was one of the factors for partial open hearing. India said that it, again, failed to understand the logic of this condition for partial open hearing. India said that it hoped that this was an exception and it did not find a following in subsequent proceedings. India also registered its serious concern on this development.

7.24. The DSB took note of the statements and, pursuant to the request by Mexico under Article 22.7 of the DSU contained in document WT/DS381/44, agreed to grant authorization to suspend the application to the United States of tariff concessions or other obligations consistent with the Arbitrator's decision contained in document WT/DS381/ARB.

8 CHINA – ANTI-DUMPING MEASURES ON IMPORTS OF CELLULOSE PULP FROM CANADA

A. Report of the Panel (WT/DS483/R and WT/DS483/R/Add.1)

8.1. The Chairman recalled that at its meeting on 10 March 2015, the DSB had established a Panel to examine the complaint by Canada pertaining to this dispute. The Report of the Panel,

contained in document WT/DS483/R and WT/DS483/Add.1 had been circulated on 25 April 2017 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Canada. This adoption procedure was without prejudice to the rights of Members to express their views on the Panel Report.

8.2. The representative of Canada said that his country wished to thank the members of the Panel and the WTO Secretariat for their work in this dispute. Canada also thanked the third-parties in this dispute. Canada welcomed the findings and recommendations of the Panel that had confirmed that the imposition of the duties at issue was inconsistent with China's obligations under the Anti-Dumping Agreement. The Panel had found that MOFCOM had failed to conduct a proper injury analysis. It had agreed that MOFCOM's injury analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because MOFCOM had failed to properly consider whether subject imports of cellulose pulp had depressed the prices of domestic Chinese cellulose pulp. The Panel had also agreed that MOFCOM's injury analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In this regard, it had found that MOFCOM had failed to demonstrate that subject imports caused injury to the domestic industry. It had also failed to ensure that the injuries caused by other known factors, such as the prices of cotton and the downstream product – viscose fibre, were not attributed to the subject imports. However, Canada was disappointed that the Panel had not agreed that MOFCOM's analysis regarding both the volume of subject imports and their impact on the domestic industry was inconsistent with the WTO Anti-Dumping Agreement. Canada's approach in this dispute had been to focus on only the key issues. Canada's written submissions had both been under 75 pages long and Canada had only filed 36 exhibits. For its part, China's submissions had been similarly short and focused. The Panel itself had only taken three months to render its interim report of only 65 pages. Canada had focused its claims and arguments in hopes of engaging with China on only what was of most concern to Canada and in hopes of saving the time and resources of all involved. However, from the date of the Panel's composition in April 2015, these proceedings had taken two years to complete. Most concerning was the fact that the Panel's 65-page Report had taken four months to be translated. Canada suggested that the Secretariat examine all options to shorten translation times to ensure that future disputes did not face similar delays, particularly when the disputing parties had made efforts to focus the issues to the essence of the complaint. Throughout this period, Canadian cellulose pulp producers had faced additional costs and lost sales due to the imposition of anti-dumping duties. As a result, Canadian producers of cellulose pulp had seen a 79% decline in export value to China between 2013 and 2016. Canada said that it hoped that the prompt implementation of this ruling would lead to the recovery of its industry and would benefit Chinese consumers. Canada looked forward to continuing to work with China to agree to a reasonable period of time to implement the DSB's recommendations and rulings. In any event, Canada hoped that China would implement them as soon as possible.

8.3. The representative of China said that her country wished to thank the Panel and the Secretariat for their time and for their efforts in assisting the parties to resolve this dispute. This dispute concerned an anti-dumping measure that had been taken by China in response to imports of cellulose pulp from Canada at significantly dumped prices that had caused material injury to the Chinese domestic industry. Canada had not contested MOFCOM's determination of dumping. Instead, Canada had challenged MOFCOM's injury determination. While the Panel had found some deficiencies in the final determination, the Panel had dismissed the majority of Canada's claims because MOFCOM's injury and causation analyses had complied with the requirements of the Anti-Dumping Agreement. The Panel had first found that MOFCOM had adequately considered whether there was a significant increase in the volume of dumped imports in both absolute and relative terms.[51] The Panel had also found that there was "no basis to conclude that MOFCOM was required to specifically address arguments regarding the context in which the acknowledged 43.82% increase in dumped imports occurred in its consideration of whether that increase was significant in absolute terms under Article 3.2" of the Anti-Dumping Agreement.[52] As regards the price effects analysis under the second sentence of Article 3.2, the Panel had agreed with significant aspects of MOFCOM's analysis. The Panel had agreed with China that the fact that price trends crossed at one point during the POI did not undermine MOFCOM's conclusion that the prices of dumped imports and the domestic like product followed the same or parallel trends.[53] The Panel had also agreed with China that the different rates of change in prices of the dumped imports and

[51] Panel Report, paras. 7.47-7.48.
[52] Panel Report, para. 7.50.
[53] Panel Report, para. 7.75.

the domestic industry had not undermined the finding of the parallel trends in prices *per se*, given that the prices still moved in the same direction and quickly adjusted to the price decline in the market, showing the close competition between the domestic and imported dumped products.[54] Similarly, the Panel had accepted China's position that price depression was not contingent on the existence of price undercutting.[55] The Panel had further agreed that MOFCOM had adequately considered changes in the market share of dumped imports in its consideration of price effects.[56] Moreover, the Panel had found that it was proper for MOFCOM to have relied on certain pricing documents and had recognized that these documents corroborated MOFCOM's view that the domestic prices were depressed by the declining prices and increased volume of the dumped imports.[57] The Panel had nonetheless found that MOFCOM could have better explained certain aspects of its price effects analysis.

8.4. Canada's claim under Article 3.4 of the Anti-Dumping Agreement had been rejected by the Panel in its entirety. The Panel had found instead that MOFCOM had properly: (i) evaluated the domestic industry's market share[58]; and (ii) examined the impact of the dumped imports on the state of the domestic industry.[59] With respect to causation, the Panel had found that MOFCOM's determination had relied on both the volume and price effects of dumped imports.[60] Nevertheless, the Panel had found an inconsistency with Article 3.5 of the Anti-Dumping Agreement as a result of its earlier finding on price effects.[61] Finally, Canada had challenged MOFCOM's analysis of certain non-attribution factors under Article 3.5 of the Anti-Dumping Agreement. The Panel had expressly acknowledged that it was unnecessary for it to address Canada's non-attribution claims, yet the Panel had gone ahead and considered those claims because, in its view, this "may provide some useful guidance in the context of implementation of any DSB recommendation in this dispute".[62] In any case, the Panel had again dismissed many of Canada's allegations concerning the non-attribution factors. The Panel had found that MOFCOM had reasonably concluded that the increase in manufacturing costs accounted for such a small proportion of total production costs that it could not have broken the causal link between the dumped imports and material injury.[63] The Panel had agreed that it was reasonable for MOFCOM to consider the data pertaining to changes in the production capacity of all domestic cellulose pulp producers, not merely that of the industry defined by MOFCOM.[64] The Panel had also found that MOFCOM's overall conclusion that a shortage of cotton linter was not a cause of the domestic cellulose pulp industry's low capacity utilization rate was reasonable.[65] In sum, the Panel had largely dismissed Canada's claims, finding instead that, to a large degree, MOFCOM's final determination had complied with the requirements of the Anti-Dumping Agreement. While China disagreed with certain aspects of the Panel Report, it said that it had decided not to appeal the Report.

8.5. The DSB took note of the statements and adopted the Panel Report contained in WT/DS483/R and Add.1.

9 UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

A. Report of the Appellate Body (WT/DS471/AB/R and WT/DS471/AB/R/Add.1) and Report of the Panel (WT/DS471/R and WT/DS471/R/Add.1)

9.1. The Chairman draw attention to the communication from the Appellate Body contained in document WT/DS471/11 transmitting the Appellate Body Report in the dispute: "United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China", which was circulated on 11 May 2017 in document WT/DS471/AB/R and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated

[54] Panel Report, para. 7.76.
[55] Panel Report, para. 7.86.
[56] Panel Report, para. 7.100.
[57] Panel Report, para. 7.105.
[58] Panel Report, para. 7.126.
[59] Panel Report, para. 7.138.
[60] Panel Report, para. 7.149.
[61] Panel Report, para. 7.147.
[62] Panel Report, para. 7.152.
[63] Panel Report, paras. 7.180 and 7.182.
[64] Panel Report, para. 7.177.
[65] Panel Report, paras. 7.198-7.202.

as unrestricted documents. He recalled that 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".

9.2. The representative of China said that the DS471 case was a very significant dispute for his country. It had addressed methodologies that were systematically used by the US investigating authority in cases involving Chinese imports. The Reports that would be adopted at the present meeting concluded that the United States had applied, and maintained, certain methodologies that were not consistent with WTO rules. The Reports of the Panel and Appellate Body had also raised issues of systemic importance. Although the US violations had prejudiced a large number of Chinese exporters over a long period of time, most could be corrected through straightforward actions. China said that it, therefore, looked forward to prompt compliance by the United States.

9.3. According to the Panel, the manner in which the United States had resorted to and used the weighted average-to-transaction, or "W-to-T", comparison methodology was not permissible under WTO rules. In this respect, the findings of the Reports that would be adopted at the present meeting had to be read together with those in the parallel proceedings in "US – Washing Machines" (DS464). Together, the findings in DS471 and DS464 confirmed that the second sentence of Article 2.4.2 only allowed recourse to the W-to-T methodology on an exceptional basis. Article 2.4.2 of the Anti-Dumping Agreement imposed real disciplines on an authority's identification of a relevant pricing pattern. Further, the need to resort to the exceptional W-to-T methodology to take account of so-called "targeted dumping" had to be fully explained. Even if it was justified in resorting to the W-to-T methodology, an investigating authority did not have carte blanche when applying it. The exceptional W-to-T methodology had to be limited to the sales that comprised the relevant pricing pattern. Further, China appreciated the Panel's findings that an investigating authority could not disregard any of the transaction-specific comparison results generated by the W-to-T comparison methodology. In other words, the second sentence of Article 2.4.2 of the Anti-Dumping Agreement could not be abused as a backdoor way to engage in WTO-inconsistent zeroing procedures. Finally, in respect of the "targeted dumping" findings, China also welcomed the Panel's confirmation that zeroing was never permissible in reviews under Article 9.3 of the Anti-Dumping Agreement.

9.4. In addition to the findings in relation to the United States' use of the W-to-T comparison methodology, China was also pleased by the findings of the Panel in relation to the United States' presumption that all producers and exporters in China could be combined into a single "China-wide entity" and subjected to a single rate. This "single rate presumption" had been shown to be WTO-inconsistent. Contrary to the current US practice, Chinese exporters were entitled to be individually investigated, and could not be lumped by the US authority into a fictional single entity. If exporters were not individually investigated, they were entitled to a rate that was consistent with Article 9.4 of the Anti-Dumping Agreement. The single rate presumption was applied by the United States alongside another norm that led its investigating authority to apply "adverse facts available", or "AFA", in a manner that could not be reconciled with Article 6.8 and Annex II of the Anti-Dumping Agreement. In this connection, China welcomed the Appellate Body's correction of the Panel's erroneous legal standard for determining that an unwritten "rule or norm" regarding AFA had "prospective" application. The Panel had misunderstood certain statements in the Appellate Body Report in "Argentina – Import Measures" as suggesting that, in order to show prospective application, a complaining Member had to show certainty that the challenged measure would be applied in the future. The Appellate Body had reversed the Panel's finding. The Appellate Body had recognized that the AFA norm challenged by China – which had resulted in rates as high as 248% in the challenged determinations – "implement[s] an underlying policy".[66] The US authority's approach reflected "standard practice" and represented "more than mere repetition of conduct".[67] This practice "create[d] expectations" and provided "administrative guidance".[68] The Appellate Body had correctly found that these factors showed that the AFA norm had prospective application. It had also found that this norm had general application.

[66] Appellate Body Report, para. 5.159.
[67] Appellate Body Report, para. 5.160.
[68] Appellate Body Report, para. 5.160.

9.5. China was, however, deeply disappointed that, after finding that the AFA norm was a rule or norm of general and prospective application, the Appellate Body had been unable to complete the analysis of China's claim against the norm. Responsibility for the inability of the Appellate Body to complete the analysis lay with the Panel. China had presented the Panel with a rich and complete record covering many determinations embodying the norm. Indeed, China had specifically challenged 28 individual determinations in which the AFA norm had been applied. However, the Panel had failed to engage sufficiently with the extensive evidence before it. It had failed to make findings sufficient to enable the Appellate Body to evaluate whether the US authority had violated Article 6.8 and Annex II of the Anti-Dumping Agreement.[69] Thus, after more than four years of litigation, China was left without an immediate remedy in relation to the AFA norm. China nonetheless urged the United States to take note of the Appellate Body's clear description of the requirements for selecting "facts available", and to adhere closely to that standard in new determinations.

9.6. The Panel's failure to present the Appellate Body with a set of factual findings sufficient to complete the analysis of China's "as such" claim in respect of the AFA norm had been closely related to the Panel's excessive exercise of judicial economy on most of China's "as applied" claims in relation to 30 challenged determinations. In this regard, China wished to express its increasing concern at an apparent pattern in dispute settlement**.** Excessive exercise of judicial economy by panels was often coupled with an inability on the part of the Appellate Body to complete the analysis. China had faced one or both of these issues in several trade remedy disputes against the United States, namely, in DS379, DS437, DS449 and now in DS471. The DSU required Members to exercise their judgment as to whether recourse to dispute settlement proceedings would be fruitful. This behoved all Members to exercise restraint, and to bring only those matters of importance to the DSB. However, once a Member had exercised its judgment and had decided to initiate a dispute, a panel had to make an objective assessment of the matter referred to it by the DSB. It was not appropriate for panels to find justifications for avoiding rulings, or to engage with the facts in a manner that was insufficient to allow completion of the analysis by the Appellate Body. Panels thereby supplanted the judgment of Members as to when recourse to dispute settlement was fruitful. China's concerns arose particularly where a panel asked many questions and called for extensive discussion of the relevant points. Parties were expected to devote considerable resources to equipping panels to address claims that panels had then decided not to address, or address with insufficient attention to the facts. This failed to take into account that their decisions could be reversed by the Appellate Body. This recent trend should be of concern to all Members who wished to ensure that dispute settlement in the WTO – one of its great successes – remained a viable, meaningful avenue for the resolution of trade disputes. Despite these concerns, China nonetheless welcomed the adoption of the Panel and Appellate Body Reports in DS471 at the present meeting. China thanked the Appellate Body, the Panel and the Secretariat teams assisting them for their efforts.

9.7. The representative of the United States said that the United States thanked the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute. The United States welcomed the Appellate Body's rejection of virtually all of China's claims on appeal. Indeed, the United States questioned whether China's decision to appeal comported with a judicious use of the WTO dispute settlement system. The Panel had found that the specific determinations at issue, as well as an alleged unwritten measure, were not consistent with obligations under the AD Agreement. Despite this, China had sought more findings from the Appellate Body, essentially on derivative issues. Findings on those derivative issues would not have contributed to "secur[ing] a positive solution to a dispute".[70] Furthermore, China's appeal had lacked any legal merit. This was reflected in the Appellate Body's complete rejection of China's request for additional findings against the US measures at issue. In these circumstances, China's decision to bring this appeal raised systemic concerns. Given the stress on the dispute settlement system resulting from the large number of ongoing disputes, it was incumbent upon Members to act prudently when making decisions concerning the commencement of new disputes and the taking of appeals. At the present meeting, the DSB was also adopting the Report of the Panel. A number of the Panel's findings were similar to or followed recent Appellate Body findings. In particular, these findings involved two important systemic issues – targeted dumping, and the use of a single anti-dumping rate for those exporters controlled by the government of China. The

[69] Appellate Body Report, para. 5.177.
[70] See DSU, Article 3.7.

United States said that it had serious concerns with the Panel and underlying Appellate Body findings on both issues.[71]

9.8. First, with respect to targeted dumping, the Appellate Body in "US – Washing Machines" (DS464) had prescribed a particular methodological approach to the application of the AD Agreement that was not based on the text of the covered agreements, but rather was focused on the application of language from prior Appellate Body reports addressing different legal issues. The Appellate Body had essentially rewritten Article 2.4.2 of the AD Agreement by prescribing a wholly new methodology for addressing "targeted dumping". That methodology had never been contemplated at the time the AD Agreement was negotiated and adopted. Nor, to the United States' knowledge, had the Appellate Body's methodology been used by any Member at any time in the more than 20 years since the WTO Agreement had entered into force. Indeed, no party in the dispute had advocated the methodology ultimately articulated by the Appellate Body. The Panel here had adopted the same approach. In rewriting the second sentence of Article 2.4.2, the Appellate Body had incorrectly found that the use of "zeroing" in connection with the application of the average-to-transaction comparison methodology to so-called "pattern transactions" was inconsistent with the AD Agreement. As one Appellate Body member explained in dissent in "US – Washing Machines" (DS464), this finding could not be supported under the rules of interpretation provided for under the DSU. Regrettably, the Panel here had come to the same unsupportable conclusion. The Panel had also found that the use of a rebuttable presumption that Chinese firms were under state control, and the consequent application of a single AD rate, was inconsistent with obligations under the AD Agreement. This finding to a large extent had been based on prior Appellate Body findings in "EC – Fasteners" (DS397). As the United States had explained, the finding was not grounded in the AD Agreement, and failed to take account of the real-world difficulties that investigating authorities encountered when determining anti-dumping margins for large numbers of government-controlled exporters. The United States thanked the DSB for its attention to the important issues covered in its statement on this item at the present meeting.

9.9. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS471/AB/R and Add.1 and the Panel Report contained in document WT/DS471/R and Add.1, as modified by the Appellate Body Report.

10 APPOINTMENT OF APPELLATE BODY MEMBERS: PROPOSAL BY THE EUROPEAN UNION (WT/DSB/W/597)

10.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union. He drew attention to the communication contained in document WT/DSB/W/597 and he invited the representative of the European Union to speak.

10.2. The representative of the European Union said that the EU's proposal spoke for itself and strictly followed the models of similar DSB decisions taken in the past. The EU's proposal was identical to the proposal made by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru but, in addition, it also provided for the launching of the selection process to replace Professor Van den Bossche. The EU recalled that, based on past practice, it had expected the selection process, for the two vacancies arising in 2017, to have been launched in February. The EU regretted that no consensus had so far been found on this issue. The EU had fully supported, and continued to support, the selection of new Appellate Body members without delay. The EU, therefore, encouraged all Members to support its proposal, so that both selection processes could be launched at the present meeting.

10.3. The representative of the United States said that, given the ongoing transition in the United States' political leadership and the very recent confirmation of a new US Trade Representative, the United States was not in a position to support the proposed decision to launch a process to fill a position on the Appellate Body that would only become vacant in December 2017. Nevertheless, the United States was willing to join a consensus for the DSB to take the decision proposed by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico, and Peru. That decision was focused on a process to fill a position that would become vacant in just over one month's time. As the

[71] See Dispute Settlement Body, Minutes of Meeting, 26 September 2017, WT/DSB/M/385, paras. 8.8 – 8.22 (Appellate Body findings on targeted dumping); Dispute Settlement Body, Minutes of Meeting, 28 July 2011, WT/DSB/M/301, para. 8 (Appellate Body's findings on rates for government-controlled exporters).

United States had conveyed to several Members, despite the ongoing transition, it had received guidance that it would be acceptable to launch a process given the expiry of Mr. Ramirez's second term on 30 June 2017.

10.4. The representative of the European Union said that his delegation did not see any reason why both selection processes should not be launched at the present meeting. It had already been stated in the past few months that this was the most efficient way of managing the selection processes for both vacancies. The EU did not see why one should be singled out. In any event both the EU's proposal and the proposal which had been tabled under the next Agenda item indicated that a decision on the appointment of two new members of the Appellate Body could be taken at the DSB meeting to be held on 24 October 2017. Given that Professor Van den Bossche's term would expire on 11 December 2017, the EU believed that there was urgency for the selection process to be launched without delay.

10.5. The DSB took note of the statements.

11 PROPOSAL REGARDING THE APPELLATE BODY SELECTION PROCESS (WT/DSB/W/596)

11.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru. He drew attention to the communication contained in document WT/DSB/W/596 and invited the respective delegations to speak.

11.2. The representative of Mexico, speaking on behalf of Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru, recalled that, at the 19 April 2017 DSB meeting, the countries in question had expressed the intention of the Latin American proponents to submit a draft decision in order to start a new selection process to fill the vacancy that would arise by the endo of June 2017. He recalled that on 8 May 2017, the Latin American proponents had accordingly tabled a proposal concerning the Appellate Body selection process, which had been circulated in document WT/DSB/W/596. The proposal was based on past DSB decisions that comprised the following four elements: (i) to launch a selection process to replace Mr Ricardo Ramírez-Hernández, whose second term of office would expire on 30 June 2017; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 June 2017 for submitting nominations of candidates; and (iv) to request the Selection Committee to issue its recommendation by 24 October 2017 at the latest. He noted that this process should have started earlier, but this had not been possible. Given that the vacancy would arise after 30 June 2107, and that it had now become urgent to launch this process, the Latin American proponents urged Members not to delay this process any further and to agree that the selection process should begin and be agreed by the DSB at the present meeting.

11.3. The representative of the European Union said that, as it had previously stated, the EU fully supported the launching of the selection processes for new Appellate Body members as quickly as possible. In fact, the EU proposal entirely incorporated the proposal made by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru. Both proposals were identical regarding the selection process for the replacement of Mr. Ramirez. The EU said that it regretted that the Membership had not endorsed the EU's proposal. The EU failed to see any valid reasons, given past practice, why one selection process should be singled out at this point. The EU encouraged the Chairman to continue his consultations with Members so that both processes could be launched as quickly as possible.

11.4. The representative of China said that his country was making this statement in relation to items 10 and 11 of the Agenda of the present meeting. China said that it had systemic concerns about the delay of the new AB selection process. China took note of the proposals made at the present meeting by relevant Members and referred to its previous statements. To ensure the smooth operation of the Appellate Body and the WTO dispute settlement system, China called upon Members to be more flexible and constructive in order to initiate the selection process as soon as possible.

11.5. The representative of India thanked both proponents for their proposals regarding the Appellate Body selection process. As it had mentioned at the 19 April 2017 DSB meeting, India had stated that it was unable to understand the underlying rationale of not coming to an agreement. India took note of the EU's proposal and its preference for one selection process for both vacancies in terms of the time-frame. India also noted that one Member had stated that it would not be able to join a consensus with respect to that process. But, having looked at both proposals, India noted that they were not mutually exclusive. India said that it was still uncertain about where the impasse was because both the proposals were identical in terms of launching of the process for the vacancy of Mr. Ricardo Ramírez. India asked whether there was also a lack of consensus on initiating the first selection process. If that was the case it had to be stated clearly for Members' understanding because Members did not really understand the reasons for the impasse in the present situation.

11.6. The representative of Japan said that his country thanked the EU for its proposal. Japan also thanked Argentina, Brazil, Columbia, Chile, Guatemala, Mexico and Peru for their joint proposal. Given that the expiry of Mr. Ramirez's second term was fast approaching and that an extended period of vacancy was highly undesirable, Japan agreed with the general thrust of the proposals that the DSB should act expeditiously and launch the selection process or processes without further delay. Japan had no problem with either of the proposals and was ready to join a consensus to support either of the proposals. Japan had repeatedly stated in the past, and stressed again, that a member of the Appellate Body had to be a person of the highest calibre. To achieve this goal, the selection had to be made based on the candidate's own merit. The work of the Appellate Body was too important to be entrusted to someone who did not meet the required standards of quality, qualification, authority, expertise, integrity, impartiality and independence. While the balance and diversity of expertise, professional backgrounds and experience in the overall composition of the Appellate Body did matter and had to be duly taken into account, in Japan's view, there was no requirement of regional or Member-specific representations on the Appellate Body. To achieve the goal of selecting person(s) of the highest calibre, the selection process had to be competitive and WTO Members should be allowed to make the best choice available from as broad a pool of highly-qualified individuals as possible. In this respect, Japan understood that the EU had proposed the launching of two simultaneous but separate processes. Japan said that it could accept this approach. But, should the DSB agree to launch the process for two vacancies, for the purpose of making the process more competitive and further broadening a pool of candidates, one could combine the two processes into a single one and choose the two new members from a common pool of candidates based on his or her own merit.

11.7. The representative of Australia said that her country welcomed the initiative of the delegations which had put forward possible processes to commence selection processes to fill the upcoming vacancies on the Appellate Body. As Australia had stated at a number of DSB meetings during 2017, Australia regretted that the DSB was now in the position that, even if the DSB was able to agree on launching a selection process at the present meeting, it could not avoid a vacancy on the Appellate Body, following the expiry of the term of current Appellate Body member Mr. Ricardo Ramírez-Hernández. Such a vacancy looked likely to extend for at-least several months. Australia said that it was particularly concerned that the DSB had found itself in this position for a second year in a row. Australia reiterated its view that the proper functioning of the Appellate Body was best served by the appointment of new members to fill vacancies as they arose, in accordance with Article 17.2 of the DSU. With this core principle in mind, Australia confirmed that it could have supported a consensus decision to, at a minimum, commence a single process at the present DSB meeting to determine the replacement for Mr. Ricardo Ramírez-Hernández, as proposed by delegations of Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru. For clarity, Australia could also have supported a decision to commence a second process to determine the replacement for Mr. Peter Van den Bossche, whose term was due to expire in December, as proposed by the EU. Australia called on all Members to demonstrate similar pragmatism and flexibility to reach agreement as soon as possible on a process or processes to ensure the timely appointment of members to the Appellate Body.

11.8. The representative of New Zealand said that this statement was in regards to both items 10 and 11 of the Agenda of the present meeting. New Zealand thanked the Chairman for his progress report and his efforts to find consensus on this important matter. New Zealand also thanked the EU, and separately, Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru for their proposals to launch a process for the selection of Appellate Body members. New Zealand recalled its statements from the previous DSB meetings and continued to express its disappointment that

the DSB had been unable to launch either process. Again, New Zealand urged Members to reach a consensus on the process for the 2017 appointments and to be pragmatic and constructive so that candidates could be appointed as soon as possible to fill the vacant positions. Regrettably, whatever proposal was accepted, the DSB was now in the position where a vacancy would inevitably arise in the Appellate Body. Even with the full bench, the Appellate Body had workload and resource constraints and a queue of disputes to be heard. Members had to do their utmost to avoid exacerbating this situation.

11.9. The representative of Norway thanked the proponents for their proposals. Norway believed that the process of appointing Appellate Body members should not be further delayed. It was with disappointment that Norway registered that there would be no agreement on any of the proposals at the present meeting. For the sake of clarity, Norway had a preference for the EU's proposal as it had perceived this to be the most efficient way to ensure that the Appellate Body was fully equipped. This being said, Norway would also have been in a position at the present meeting to join consensus on the proposal from the group of Latin American countries in case Members were not in a position to agree on the EU's proposal. Norway said that it believed that Members' priorities should be to equip the Appellate Body with the necessary resources to ensure its proper functioning and Norway urged all Members to show flexibility on this matter.

11.10. The representative of Hong Kong, China said that her delegation was making its statement under items 10 and 11 of the Agenda of the present meeting. Hong Kong, China welcomed the two proposals regarding the Appellate Body selection process. Hong Kong, China's preference was the EU's proposal which endorsed the launching of two selection processes in one go. But Hong Kong, China could also go along with the consensus if Members wished to adopt the proposal from a group of Latin American Members, in order to fill the imminent vacancy which would arise at the end of June. Hong Kong, China said that it was disappointed with the delay in the Appellate Body selection process and encouraged Members to come up with an agreement as soon as possible.

11.11. The representative of Korea said that his country thanked the two proponents. Korea did not have any problem to support the EU's proposal, however, it was evident that there was no consensus on the EU's approach. This had been the case for the past five months. The EU's proposal should not be a reason to prevent the launch of the more urgent process. Korea urged Members to allow the DSB to launch the selection process for the post whose term would expire in June 2017 without any further undue delay. The later the DSB made a decision the longer the unnecessary vacancy would be. Members could not afford such a situation. Korea called for Members' flexibility and pragmatism.

11.12. The representative of Switzerland said that his country thanked the Chairman for his efforts regarding this matter and the proponents for their proposals. Switzerland noted that the current circumstances seemed unlikely to bring about consensus to move forward with the selection processes for the two upcoming vacancies in the Appellate Body. Switzerland regretted this situation and shared the concerns expressed by other delegations regarding possible impacts on the proper functioning of the WTO dispute settlement mechanism and on the integrity of the multilateral trading system. These consequences were likely to widen as time passed. Switzerland expressed its appreciation to all potential candidates, and to the Members who would nominate them. Many of those Members had already come forward unofficially with their candidates in spite of the uncertain situation, thereby showing their commitment to the system. With respect to the two proposals on the table, Switzerland's clear preference would be for the simultaneous launch and conclusion of the two selection processes, primarily for the simple reason that the possibility of any Appellate Body position not being filled should be avoided or at least minimized. Finally, Switzerland said that it understood that under Article 17.3 of the DSU there was no entitlement of any particular Member or geographical region to a seat on the Appellate Body, even if certain practices in this regard had been followed in the past. The criterion of "broadly representative of Membership" could not, in Switzerland's view, preclude highly-qualified candidates from any Member to stand for, and potentially be selected to, the Appellate Body.

11.13. The representative of Canada said that his country was making its statement in respect of both items 10 and 11 of the Agenda of the present meeting. Canada thanked the proponents of both proposals and reiterated its statement made at the DSB meeting held on 19 April 2017. Like Japan and Australia, Canada said that it could support either proposal. Canada hoped that a selection process would be launched at the regular DSB meeting held in June, at the latest.

However, Canada would be pleased to participate in a special DSB meeting before that meeting if a solution were to arise.

11.14. The representative of Chinese Taipei said that his delegation's comment was in relation to both items 10 and 11 of the DSB Agenda. Like several Members that had spoken previously, Chinese Taipei was ready to join a consensus for either of the proposals, or both of them, at the present meeting. And, like India, Chinese Taipei was puzzled about the reason why there was still no agreement on this issue after the consultations over the past five months. Chinese Taipei hoped that the DSB could achieve a positive solution on this issue soon.

11.15. The representative of Ecuador said that his country wished to make a statement with regard to both proposals. Ecuador had reviewed the proposals in detail and felt that, given the lack of consensus to approve the launch of a joint selection process, the DSB should at least move forward with the proposal made by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru at the present meeting. Ecuador said that it did not feel that that process should be delayed further and that the process, set out in document WT/DSB/W/596, should be approved at the present meeting.

11.16. The representative of Singapore said that his country was addressing both DSB Agenda items 10 and 11. Singapore thanked the proponents for their proposals and said that it could go along with the EU's proposal or the proposal made by the group of Latin American countries. Singapore was disappointed that there was no consensus on either proposal and expressed its systemic concern about the delay in the launching of the selection process. Singapore encouraged Members to be flexible and to come to an agreement as soon as possible.

11.17. The representative of Viet Nam said that her country echoed the comments made and views expressed by other Members. Viet Nam welcomed the two proposals made by the EU and the group of Latin American countries. Viet Nam supported launching of the process as soon as possible. In case that the DSB could not reach a consensus on the process proposed by the EU, Viet Nam recommended launching the process to select the Appellate Body member to replace Mr. Ramírez, as proposed by the group of Latin American countries.

11.18. The representative of the Russian Federation said that her country would like to thank the proponents of both proposals and would certainly welcome a solution based on either of the proposals that could pave the way to the launching of the AB selection process. Given the current workload of the Appellate Body and the fact that it would continue to increase in 2017, the Membership could hardly afford leaving vacancies unfilled for considerable periods of time. Registering its serious concern about the delay, the Russian Federation took note of the Member's positions and statements made at the present meeting and urged Members to find a solution to this current situation so that the selection process could be launched as soon as possible.

11.19. The representative of Mexico, speaking on behalf of Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru, expressed their disappointment about the lack of consensus, especially in view of its impact on the dispute settlement system and the Appellate Body in particular. Under these circumstances, the Latin American proponents reiterated their willingness to work with the DSB Chairman and to intensify consultations to resolve this matter.

11.20. The representative of Mexico, speaking on behalf of Mexico only, noted that many Members expressed their flexibility with regard to launching a selection process to fill the vacancy to be soon left by Mr. Ricardo Ramírez. In light of this, Mexico wished to ask the EU whether it could reconsider the option of moving ahead with the two processes, and instead agree to start the process for Mr. Ricardo Ramírez's replacement at the present meeting. Mexico wished to know whether the EU had the flexibility to do so at the present meeting.

11.21. The Chairman thanked Members for their statements and views expressed at the present meeting. He regretted that Members were not in a position to reach a consensus on this matter at the present meeting. He noted that, in his statement to be made under "Other Business", he would refer to the fact that the Appellate Body was currently dealing with five appeals and that up to two additional appeals could be filed within the next two months. He said that, in view of this situation, it was urgent for the DSB to agree to start the AB selection process, or processes, as soon as possible. He said that he would continue to consult with delegations on this matter and would be

ready to do whatever was necessary to find a solution that was agreeable to all delegations. He also invited delegations with any views or proposals on these issues to contact him directly. He thanked delegations for their support and understanding regarding this matter.

11.22. The DSB took note of the statements.

12 MECHANISM FOR DEVELOPING, DOCUMENTING AND SHARING PRACTICES AND PROCEDURES IN THE CONDUCT OF WTO DISPUTES

A. Statement by Canada

12.1. The representative of Canada, speaking under "Other Business", said that, in 2016, a broad cross-section of 17 WTO Members had endorsed the establishment of a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes. These Members had considered that this Mechanism would: (i) provide a framework within which practices and procedures could evolve so as to facilitate the resolution of disputes; (ii) reduce the scope for procedural disagreements and delays; and (iii) generate practical experience with procedural innovations. Some of these Members had endorsed practice documents related to written notifications, transparency, third-party rights, and procedures to streamline disputes. These practice documents and the Mechanism were still open to endorsements and Canada encouraged all Members with interest and questions to raise them with Canada. Participation in the Mechanism was fully compatible with active participation in the DSU negotiations and it was Canada's intention to continue to actively participate in these negotiations. The endorsing Members had recently begun discussing four additional practice documents related to panel composition, electronic filing, responses to third-party requests to join consultations, and the publication of working procedures, timetables and working schedules. Canada had copies of these four documents at the present meeting. Canada encouraged interested Members to collect them and to contact Canada with any questions about these specific documents or the Mechanism itself. Finally, Canada renewed its invitation to all Members to endorse the Mechanism and the practices documents. In particular, Canada considered that endorsing the Practices Mechanism would send a positive signal that WTO Members valued the Organization’s dispute settlement function and were committed to both tending to and improving it.

12.2. The representative of Australia said that her country thanked Canada for its statement at the present meeting regarding the next steps in the utilization of the "Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes". As Australia had said in previous DSB meetings, in its view, the information sharing mechanism promoted transparency in the dispute settlement system and supported the ongoing efforts of the WTO Secretariat and Members to streamline and improve the dispute settlement processes and reduce delays. There was no doubt that such initiatives were increasingly important in light of the current pressures facing the dispute settlement system. Australia said that it was pleased to endorse the statement which had established the mechanism in 2016 and looked forward to working with Canada and other Members in continuing the work on this initiative. In that light, Australia was also taking steps towards endorsing the four practice documents, which had been circulated in 2016 under the mechanism and endorsed by a number of other Members concerning: written notifications, transparency of dispute proceedings, participation of third-parties in dispute proceedings, and improving and streamlining dispute proceedings. Australia encouraged all Members to consider the positive contribution of this mechanism and the practice documents to the effective and efficient functioning of the dispute settlement system and to consider making similar steps to endorse these and future documents.

12.3. The DSB took note of the statements.

13 RUSSIA – TARIFF TREATMENT OF CERTAIN AGRICULTURAL AND MANUFACTURING PRODUCTS

A. Statement by the Russian Federation

13.1. The representative of the Russian Federation, speaking under "Other Business", said that her country wished to report on implementation of the DSB's recommendations and rulings in the dispute "Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products" (DS485).

Russia recalled that the Panel Report on this matter had been adopted by the DSB on 26 September 2016. On 10 November 2016, Russia and the EU had informed the DSB that they had agreed on the reasonable period of time to implement the DSB's recommendations and rulings, which had expired on 11 May 2017. Russia had successfully met that deadline and had fully implemented the DSB's recommendations and rulings. In fact for certain measures: palm oil, certain types of paper (measures 6, 7 and 8) and refrigerators (measures 10 and 11 challenged in this dispute), the Russian Federation had amended its applied rates prior to, or in the course of, these proceedings. As of 1 September 2016 the duty applied by Russia in relation to the 9th measure at issue in this dispute had also been brought into conformity with Russia's WTO tariff commitments. Further, with respect to duties on paper and paperboard products (measures 1 – 5) the Common Customs Union Tariff had been amended in accordance with the recommendations of the Panel with the Decision of the Board of the Eurasian Economic Union adopted on 31 January 2017. This Decision had come into force on 3 March 2017. Therefore, Russia had fully implemented DSB's recommendations and rulings in this dispute, prior to the expiration of the reasonable period of time.

13.2. The representative of the European Union said that his delegation thanked Russia for its statement made at the present meeting. However, the EU was surprised that Russia had not placed this matter on the regular Agenda of the present DSB meeting, but instead it had chosen to make a statement under "Other Business". The EU noted that the period of six months referred to in Article 21.6 of the DSU had expired on 10 May 2017 and the EU had therefore expected that Russia would place the issue of implementation on the DSB Agenda to provide a status report at least 10 days prior to the present meeting. The EU pointed out that, pursuant to Article 21.6 of the DSU, Russia had to provide a status report irrespective of whether it considered that it had already complied or whether progress in implementation still needed to be made. The EU hoped that Russia would take this into consideration in preparation for the next regular DSB meeting. At this stage, the EU did not take a position on whether or not Russia had fully complied in this dispute.

13.3. The DSB took note of the statements.

14 DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

14.1. The Chairman, speaking under "Other Business", said that he wished to make a report to provide the DSB with information about the Appellate Body's workload, the number of disputes before panels and at the panel composition stage, and the ability of the Secretariat to meet expected demand over the coming period. This information reflected the status of disputes up until the DSB meeting on 22 May 2016. Other developments in the course of the present meeting would be reflected in the information posted on the Members' website. The Chairman added that rather than providing a detailed report at each DSB meeting on the DS workload in the future he instead planned to do so only in the event of significant developments or changes since the preceding report. He nevertheless intended to provide a full update at the July DSB meeting so that Members had a good picture of the workload situation before the summer break. Regarding panels, currently there were 15 active panels (including four panels under Article 21.5 of the DSU) that had not yet issued a final report to the parties. Multiple disputes that were being considered simultaneously by the same panel were being counted as one. As of the present meeting, all composed panels had been assigned staff to assist them and were either active or in the process of commencing proceedings. There were a further ten panels at the composition stage. This did not count panels for which there had been no composition activity in the past 12 months. In addition, six final panel reports that had been issued to the parties were currently being translated. Regarding appeals, the Appellate Body was currently dealing with five appeals, including the extremely complex compliance proceedings in "EC and Certain Member States – Large Civil Aircraft (Airbus)". Two of these appeals could not be staffed at the present time. Up to two additional appeals could be filed within the next two months, including an appeal in the extremely complex compliance proceedings in "US – Large Civil Aircraft (Boeing)". Regarding arbitrations, two matters had been referred to arbitration under Article 22.6 of the DSU.

14.2. The DSB took note of the statement.