



CANADA – MEASURES CONCERNING TRADE IN COMMERCIAL AIRCRAFT

COMMUNICATION FROM THE ANNEX V FACILITATOR

The following communication, dated 4 April 2018, from the Annex V Facilitator, to the Chairperson of the Dispute Settlement Body, is circulated at the request of the Facilitator.

On 23 October 2017 the Dispute Settlement Body (DSB) designated me as its representative to serve the function of facilitating the information-gathering process in the context of the above-mentioned dispute, pursuant to paragraph 4 of Annex V to the Agreement on Subsidies and Countervailing Measures (SCM Agreement). According to this paragraph, "the sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute".

After consulting with the parties, I decided to submit this communication and inform the DSB that it was impossible, given the circumstances set out below, to fulfil the mandate of Facilitator.

In a communication dated 24 October 2017 (WT/DS522/7), the respondent informed the DSB that it had asked the Panel to rule that certain measures and the claims with regard to serious prejudice under Articles 5(c), 6.3, 6.4 and 6.5 of the SCM Agreement were outside of the Panel's terms of reference. The respondent also informed the DSB that it had requested that "the Annex V process should not proceed until the Panel has made" such a ruling.

In a communication to the DSB dated 25 October 2017 (WT/DS522/8), the complainant opposed the request to suspend the Annex V procedures, arguing inter alia, that accepting the respondent's request would "effectively nullify the Annex V process and the timetable expressly provided under the SCM Agreement, because any responding Member could then simply raise any DSU Article 6.2 objection and derail the Annex V procedures, to the detriment of the complaining Member". The complainant understood the Annex V procedures to "run independently from the panel proceedings and [to be] under the authority of the Facilitator alone".

It should be noted that the Panel was only composed on 6 February 2018, i.e. more than three months after the designation of the Facilitator and the launch of the Annex V procedures and more time will be needed for the Panel to issue its preliminary ruling. By suspending the information-gathering process, I would have compromised the "timely development of the information" required by Paragraph 4 of Annex V. On the other hand, if I decline to grant the request and the respondent maintains its position, the result contemplated in paragraph 4 cannot be achieved either, because a crucial part of the information "necessary to facilitate expeditious subsequent multilateral review of the dispute" will be missing.

Paragraphs 6 to 8 of Annex V set out rules for dealing with the non-cooperation by a party during the information-gathering process, but those rules only concern the panel process. However, the issues raised by the parties in their communications to the DSB and the impossibility to fulfil the objective set out in paragraph 4 explained above go the core of the Annex V process and should therefore be brought to the attention of the DSB at the same time as I transmit my report to the Panel.

Since the DSB designated me as the Facilitator for the aforementioned Annex V process, it should be informed about the reasons that impeded the fulfilment of my mandate prior to the circulation of the Final Report of the Panel.
