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Dispute Settlement Body
22 April 2016

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 22 APRIL 2016

Chairman: Mr. Xavier Carim (South Africa)

Prior to the adoption of Agenda, the item concerning the adoption of the Panel Report in the dispute on: "India – Certain Measures Relating to Solar Cells and Solar Modules" (DS456) was removed from the proposed Agenda following India's decision to appeal the Report.

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1.1. The Chairman noted that there were six sub-items under this 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, he 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 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".

A. United States – Anti–dumping measures on certain hot–rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.159)

1.2. The Chairman drew attention to document WT/DS184/15/Add.159, 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 his country had provided a status report in this dispute on 11 April 2016, 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 submitted on 11 April 2016. Japan wished to refer to its previous statements that this issue should be resolved as soon as possible.

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.134)

1.6. The Chairman drew attention to document WT/DS160/24/Add.134, 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 his country had provided a status report in this dispute on 11 April 2016, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, 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 the EU thanked the United States for its status report and its statement made at the present meeting. The EU referred to its statements made under this Agenda item at previous DSB meetings. The EU wished 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.97)

1.10. The Chairman drew attention to document WT/DS291/37/Add.97, 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, in recent meetings, the EU had already reported on authorisation decisions and other actions towards approval decisions taken up to March 2016. Two GMOs[1] were scheduled for a vote at the next meeting of the Standing Committee on 25 April 2016. More generally, and as stated many times previously, 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 said that his country thanked the EU for its status report and its statement made at the present meeting. As the United States had noted repeatedly at past meetings of the DSB, EU measures affecting the approval and marketing of biotech products remained of substantial concern to the United States. Unfortunately, the United States was unaware of any recent positive developments in relation to the EU's biotech measures. Significant delays in the consideration of biotech products were restricting US exports of agricultural products to the EU. At the present meeting, the United States wished to highlight its serious concerns regarding the EU's treatment of approval applications for three varieties of biotech soybeans. These varieties were critical for US farmers because they included important technologies that promoted weed control. Yet, the approval of these varieties was stalled in the EU system. In particular, the EU's scientific body had concluded extensive scientific reviews of these soybean varieties in June and July 2015. The reviews had confirmed that these biotech products were safe for use in the EU. The EU, however, continued to delay the final approval of these products. The United States urged the EU to complete these approvals as soon as possible. The

[1] Maize Bt11 × MIR162 × MIR604 × GA21 and cut flowers carnation line SHD-27531-4.

United States also recalled that EU Member state bans of products previously approved by the EU represented additional, serious obstacles to trade in agricultural products. Several EU Member States had "opted-out" of certain biotech approvals without providing any scientific basis. In closing, the United States again asked the EU to ensure that its biotech approval measures were consistent with its obligations under the SPS Agreement.

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

D. United States – Anti–dumping measures on certain shrimp from Viet Nam: Status report by the United States (WT/DS404/11/Add.45)

1.14. The Chairman drew attention to document WT/DS404/11/Add.45, 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 shrimp from Viet Nam.

1.15. The representative of the United States said that his country had provided a status report in this dispute on 11 April 2016, in accordance with Article 21.6 of the DSU. As the United States had noted at past DSB meetings, in February 2012, the US Department of Commerce had modified its procedures in a manner that addressed certain findings in this dispute. The United States would continue to consult with interested parties regarding matters related to the other recommendations and rulings of the DSB.

1.16. The representative of Viet Nam said that her country thanked the United States for its statement and its status report in this dispute. Viet Nam continued to expect the relevant parts of the DSB's rulings and recommendations in this dispute to be implemented by the United States in the context of the implementation of the second shrimp dispute (DS429). Any delay in the implementation of the DS429 dispute may also delay the implementation of relevant parts of the DS404 dispute.

1.17. The representative of Cuba said that her country supported the statement made by Viet Nam. Cuba expressed its concern about the prolonged situation of non-compliance with the DSB's recommendations and rulings in this dispute. Cuba urged the United States to promptly comply with its obligations in this dispute.

1.18. The representative of the Bolivarian Republic of Venezuela said that her country supported the statement made by Viet Nam. Venezuela wished to refer to its previous statements made under this Agenda item and reiterated the importance of prompt resolution of this dispute. Venezuela urged the United States to take necessary measures to end this situation of non-compliance and to report on the measures it intended to take.

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

E. United States – Countervailing measures on certain hot–rolled carbon steel flat products from India: Status report by the United States (WT/DS436/14/Add.5)

1.20. The Chairman drew attention to document WT/DS436/14/Add.5, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US countervailing measures on certain hot-rolled carbon steel flat products from India.

1.21. The representative of the United States said that his country had provided a status report in this dispute on 11 April 2016, in accordance with Article 21.6 of the DSU. On 9 March 2016, India and the United States had agreed to extend the reasonable period of time by 30 days, so as to expire on 18 April 2016.[2] The United States recalled that this dispute involved determinations by the US Department of Commerce ("USDOC") and the US International Trade Commission (USITC) on certain hot-rolled carbon steel flat products from India. On 5 October 2015, the US Trade

[2] WT/DS436/15.

Representative had requested that USDOC issue a determination that would render its determinations not inconsistent with the WTO's findings. On 6 November 2015, the US Trade Representative had requested the USITC to issue a determination in the underlying proceeding that was not inconsistent with the WTO's findings. With respect to the USITC determination, on 7 March 2016, the USITC had issued a new determination rendering the findings with respect to injury in the underlying proceeding on the product from India consistent with the DSB's recommendations and rulings in this dispute. With respect to the USDOC determination, on 14 April 2016, USDOC had issued a new final determination rendering its determination with respect to subsidization and the calculation of countervailing duty rates consistent with the DSB's recommendations and rulings in this dispute. The US Trade Representative had proceeded to complete this implementation process by directing USDOC to implement its new determinations pursuant to section 129(b)(4) of the Uruguay Round Agreements Act. Accordingly, the United States had completed implementation with respect to the DSB's recommendations and rulings concerning the countervailing duty measure on hot-rolled carbon steel flat products from India.

1.22. The representative of India said that his country thanked the United States for its status report of 11 April 2016 in this dispute in accordance with Article 21.6 of the DSU. The reasonable period of time of 16 months in this dispute had ended on 18 April 2016. India noted with concern that even after 16 months and the expiry of the reasonable period of time, the United States in its status report of 11 April 2016 had stated that the US authorities were still conferring with interested parties and working to implement the DSB's recommendations and rulings in a manner that was appropriate. Even after the reasonable period of time coming to an end, the United States seemed to have made no efforts to repeal or amend Section 1677(7)(G) of its domestic law so as to bring it into conformity with Article 15 of the SCM Agreement despite the categorical finding and recommendation of the Appellate Body to that effect. The failure to initiate any efforts in this direction, even with the reasonable period of time ending, was a cause for serious and systemic concern on the issue of compliance in dispute settlement proceedings. India also observed that the USITC had recently issued a consistency determination to remove the inconsistency of its earlier injury finding in the underlying investigation. India was closely examining these findings to ensure conformity with Article 15 of the SCM Agreement. India further observed that USDOC had also recently issued certain preliminary findings to bring into conformity, some of its determinations previously found inconsistent in this dispute. The United States needed to give utmost priority to fully implementing the DSB's recommendations and rulings in this dispute. The reasonable period of time had expired in this dispute and a lack of compliance did not bode well for the dispute settlement mechanism in general and, in particular, where a developing-country Member was seeking compliance. India, once again, urged the United States to fully implement the DSB's recommendations and rulings in this dispute promptly.

1.23. The representative of the United States said that, as noted, the USDOC's recent determinations fully complied with the findings of the Panel and Appellate Body in this dispute regarding subsidization and the calculation of countervailing duty rates. Also, the USITC's determination rendered the injury findings in the underlying proceeding regarding subsidized hot-rolled steel imports from India consistent with the findings of the Panel and Appellate Body in this dispute.

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

F. United States – Countervailing duty measures on certain products from China: Status report by the United States (WT/DS437/18)

1.25. The Chairman drew attention to document WT/DS437/18, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the US countervailing duty measures on certain products from China.

1.26. The representative of the United States said that his country had provided a status report in this dispute on 11 April 2016, in accordance with Article 21.6 of the DSU. The United States recalled that the findings in this dispute involved fifteen separate countervailing duty (CVD) determinations by the US Department of Commerce (USDOC). On 14 December 2015, the US Trade Representative had requested USDOC to issue new determinations as necessary to render the challenged measures consistent with the recommendations and rulings of the DSB. The

United States had completed the implementation process with respect to nine separate investigations, as well as with respect to the one "as such" finding in this dispute. Specifically, USDOC had issued new final determinations with respect to eight separate CVD investigations, and the US Trade Representative had completed the implementation process by directing USDOC to implement these determinations. In one other investigation covered by the DSB's recommendations and rulings, USDOC had revoked the CVD order, making unnecessary any determination in that proceeding. The United States had also completed implementation with respect to the one "as such" finding adopted by the DSB. As detailed in the status report, USDOC had withdrawn the approach addressed by that finding prior to the DSB's adoption of the reports in this dispute. With respect to the remaining "as applied" findings in six investigations, USDOC had made a series of preliminary determinations in December 2015 through March 2016. USDOC had then sought and had accepted comments from interested parties on those preliminary determinations. On 31 March 2016, Commerce had held a hearing requested by interested parties. Commerce was currently reviewing comments received from interested parties and would address those in its final determinations. The United States was working to complete the ongoing administrative process in the remaining six CVD proceedings as soon as possible. The United States also noted that, as notified to the DSB[3], the United States and China had reached a procedural understanding regarding possible further proceedings under Articles 21 and 22 of the DSU that was designed to facilitate the resolution of the dispute.

1.27. The representative of China said that her country wished to express its concern that the United States had failed to comply with the DSB's recommendations and rulings in this dispute. The reasonable period of time for the United States to implement those recommendations and rulings had expired on 1 April 2016. Notwithstanding the fact that as of today, 22 April, the USDOC had yet to complete the so-called "Section 129" proceedings by which it issued revised determinations. On 16 January 2015, the DSB had adopted the Panel and Appellate Body Reports in this dispute. The DSB had identified numerous respects in which certain countervailing duty determinations issued by the US Department of Commerce were inconsistent with the obligations of the United States under the SCM Agreement. After the United States had announced its intention to comply, the parties had held consultations regarding the length of the reasonable period of time. The parties had failed to reach an agreement, and the reasonable period of time had been determined by arbitration, pursuant to Article 21.3(c) of the DSU. In an award issued on 9 October 2015, the arbitrator had determined the reasonable period of time to be 14 months and 16 days. China had considered that a reasonable period of time of 14 months and 16 days was already considerably longer than the United States needed to implement the DSB's recommendations and rulings. There simply was no justification for the US failure to bring itself into compliance within that period of time. China noted that the USDOC did not even begin its compliance proceedings until nearly three and a half months after the adoption by the DSB of the Panel and Appellate Body Reports. The USDOC had then conducted the Section 129 proceedings in an entirely desultory fashion. After issuing burdensome questionnaires with inadequate amounts of time for interested parties to respond, the USDOC had then sat on the parties' responses for over six months, making no apparent progress towards compliance. It was not until 7 March 2016 that the USDOC had issued all of its preliminary determinations, less than four weeks prior to the expiration of the reasonable period of time. On 30 March 2016, two days before the expiration of the reasonable period of time, the United States had approached China and had requested a two-month extension orally. China had refused that request not only because it considered an extension of the reasonable period of time to be unnecessary and unwarranted, but also because the US request had ignored the fact that the reasonable period of time in this matter had been established through binding arbitration. The purpose of Article 21.3(c) of the DSU was clearly undermined when a responding Member ignored the Arbitrator's decision and tried to grant itself what amounted to a unilateral extension. This was not the first time that the United States had failed to adhere to the reasonable period of time in a dispute relating to trade remedies. China had witnessed similar conduct by the USDOC in the DS379 dispute, another dispute relating to unlawful AD/CVD measures. The USDOC appeared to have a pattern and practice of dragging its heels and ignoring deadlines when it came to complying with the DSB's recommendations and rulings. China called upon the United States to bring itself into compliance immediately with the DSB's recommendations and rulings in this dispute.

1.28. The representative of the United States said that his country clearly did not agree with China's description of USDOC's actions. The United States recalled that the scope of this dispute

[3] WT/DS437/19.

was one of the most extensive in the history of the dispute settlement system. The DSB's recommendations and rulings called for further administrative action with respect to 15 separate CVD investigations. That is, the claims here could have been brought in 15 separate disputes. For most of these separate investigations, the recommendations and rulings involved multiple obligations under the SCM Agreement. As the United States had noted, the United States was able to implement all of the DSB's recommendations and rulings with respect to nine separate CVD proceedings, as well as the one "as such" finding in this dispute. Given the tremendous volume of work arising from the extensive scope of this dispute, the remaining six proceedings could not be completed by the end of the reasonable period of time, and the United States was committed to doing so as soon as possible. The United States regretted that China questioned the US commitment to implementing the DSB's recommendations and rulings in this dispute. The record showed that China had no basis for doing so. Again, due to China's decision to bring one single, combined dispute challenging multiple CVD determinations on multiple grounds, rather than 15 separate disputes each covering one CVD proceeding and advancing multiple claims, this single dispute was one of the most extensive in the history of the dispute settlement system. Nonetheless, through the expenditure of extensive administrative resources, the United States had managed to complete implementation with respect to the majority of the CVD proceedings within the reasonable period of time. As explained, the United States was committed to completing the remaining work as soon as possible.

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

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

A. Statement by the European Union and Japan

2.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union and Japan, and he invited the respective representatives to speak.

2.2. The representative of the European Union said that the EU, once again, requested the United States to stop transferring anti-dumping and countervailing duties to the US industry. These disbursements were incompatible with the 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 and to submit status reports in this dispute.

2.3. The representative of Japan said that, since the distributions under the CDSOA had been continuing, Japan, once again, urged the United States to stop the illegal distributions in order to resolve this long-standing dispute. As it had stated at previous meetings, Japan was of the view that the United States was under obligation to provide the DSB with a status report in this dispute, in accordance with Article 21.6 of the DSU.

2.4. The representative of Canada said that his country thanked the EU and Japan for having placed this item on the DSB's Agenda. Canada shared their view that the Byrd Amendment should remain under the DSB's surveillance until the United States stopped implementing it.

2.5. The representative of Brazil said that her country thanked the EU and Japan for keeping this item on the DSB's Agenda. Brazil referred to its previous statements made under this Agenda item, in particular regarding the continuation of illegal disbursements. Brazil renewed its call on the United States to fully comply with the DSB's recommendations and rulings in this dispute.

2.6. The representative of China said that her country thanked the EU and Japan for placing this item on the Agenda of the present meeting. China urged the United States to fully comply with the DSB's rulings in this dispute.

2.7. 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, Japan, and other Members had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, over eight years ago. The United States therefore did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter, as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports which would repeat, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Indeed, as these very WTO Members had demonstrated repeatedly when they had been a responding party in a dispute, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented those DSB recommendations and rulings, regardless of whether the complaining party disagreed about compliance.

2.8. The DSB took note of the statements.

3 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. Statement by the United States

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

3.2. The representative of the United States said that his country continued to have serious concerns that China had failed to bring its measures into conformity with its WTO obligations. To recall, the DSB had adopted its recommendations and rulings in this dispute in August 2012, and the reasonable period of time had expired in July 2013. But, as the United States had noted at past meetings of the DSB, China continued to impose its ban on foreign suppliers of electronic payment services ("EPS") by requiring a license, while at the same time failing to issue the specific measures or procedures for actually obtaining that license. Meanwhile, China's domestic supplier continued to do business as usual. The United States previously had taken note of an April 2015 State Council decision, which indicated China's intent to open up its EPS market following issuance of implementing regulations by the People's Bank of China and the China Banking Regulatory Commission. That decision, however, was issued over a year ago, and, to date, China had not issued the implementing regulations. As required under its WTO obligations, China must adopt the implementing regulations necessary for allowing the operation of foreign EPS suppliers in China. Furthermore, once adopted, any regulations must be implemented in a consistent and fair way. The United States continued to seek the prompt issuance and implementation of all measures necessary to permit foreign EPS suppliers to do business in China. The United States also expected that the applications of foreign EPS suppliers should be approved without delay.

3.3. The representative of China said that her country regretted that the United States had, once again, brought this matter before the DSB. China referred to its statements made at the previous DSB meetings under this Agenda item and emphasized that it had taken all necessary actions and had fully implemented the DSB's recommendations and rulings in this dispute. China hoped that the United States would reconsider the systemic implications of its position.

3.4. The DSB took note of the statements.

4 THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

A. Statement by the Philippines

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

4.2. The representative of the Philippines said that her country once again wished to express its deep concerns about Thailand's recent action of prosecuting an importer of Philippine cigarettes for the alleged under-declaration of customs value. The circumstances underlying the prosecution had a close relationship to the circumstances surrounding the measures at issue in the original proceedings. Both concerned the same exporter, the same exporting country, the same product,

the same declared customs values for the same brands, and the same circumstances of sale. Moreover, Thailand's criminal prosecution was based on the same type of legal determination that Thailand itself had abandoned as grounds for its valuation decision in the original proceedings. As the WTO Panel had found, Thailand had no legitimate grounds to reject the customs values that it now sought to criminalize. The Thai Customs' Board of Appeals had explicitly accepted those customs values, in a ruling heralded by Thailand itself as a measure taken to comply. In addition to the criminal prosecution, there remained a series of outstanding compliance issues, nearly four years after Thailand was supposed to have complied fully with the DSB's rulings. The Philippines reiterated the particular importance of a ruling by the Thai Customs' Board of Appeals, rejecting transaction value for 210 entries that had been covered by the DSB's rulings and recommendations in the original proceedings. As the Philippines had previously noted, the ruling was based on the application of a WTO-inconsistent methodology with respect to the customs valuation of related party transactions. Furthermore, the Philippines was deeply disturbed that Thai Customs had explicitly advised the Thai court that they did not need to follow the WTO ruling because it supposedly bound only the Philippines, as the party that had brought the dispute, and did not bind Thailand. In achieving compliance with WTO rulings, all levels of the Thai government, whether executive, legislative or judicial, were bound by the WTO rulings and Thailand's WTO obligations, in particular those under the WTO Customs Valuation Agreement where, as in this dispute, the measures concerned customs valuation. While the Philippines once again reiterated its openness to resolving these issues bilaterally, the recent developments compelled it to reserve its right to return to dispute settlement proceedings.

4.3. The representative of Thailand said that his country noted the statement made by the Philippines at the present meeting. As stated in its status reports and at the DSB meetings, Thailand had taken all actions necessary to implement the DSB's recommendations and rulings in this dispute.

4.4. The DSB took note of the statements.

5 PERU – ADDITIONAL DUTY ON IMPORTS OF CERTAIN AGRICULTURAL PRODUCTS

A. Statement by Guatemala

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

5.2. The representative of Guatemala said that the reasonable period of time for Peru to bring into compliance the measure found to be inconsistent with the covered agreements had expired on 29 March 2016. On that date, Peru had informed the DSB that it had adopted two Supreme Decrees to put its measure into conformity with the covered agreements. Guatemala had carefully reviewed both Decrees, in light of the DSB's findings and recommendations. Guatemala noted that the duties resulting from the Price Range System and the main features of this System remained in place. Contrary to its beliefs and assertions, Peru had not put its measure into conformity with the DSB's rulings and recommendations. Guatemala recalled that this dispute concerned an additional duty imposed by Peru on imports of certain agricultural products, such as milk, maize, rice and sugar. The additional duty consisted of a variable levy which had been imposed in addition to the ordinary customs duty. The additional duty had been determined using a mechanism known as the "Price-Range System", which operated on the basis of two components: (i) a range made up of a floor price and a ceiling price, which reflected the international price of the relevant product over the last 60 months; and (ii) a c.i.f reference price which was published every two weeks and which reflected the average international market price for the affected products. When an international reference price calculated by the authorities was below the floor price, Peru had charged an import levy in addition to the ordinary customs duty. The international reference price varied periodically as a result of the application of certain formulae to the circumstances in the markets for the affected products. These key elements of the system remained in place. After the amendment, there was still a price range with a floor price and a ceiling price, reflecting the average international price over the past 60 months; there was still a reference price which reflected the current average international price; and there was still an additional duty calculated as the difference between the reference price and the floor price. Peru had made very minor, cosmetic amendments to the Price-Range System, but had left intact the basic operation, design, structure and architecture of the original measure.

5.3. None of the amendments addressed any of the DSB's rulings and recommendations. In particular, Guatemala noted the following. First, the measure maintained its inherent variability. Both the Panel and the Appellate Body had concluded that Peru's measure was inherently variable because the duties had changed automatically on the basis of a mathematical formula. The revised measure continued to utilize mathematical formulae for the calculation of the additional duties. This was the very heart, the very core of what the Appellate Body had defined as the "inherent variability", which was what made the measure inconsistent with Article 4.2 of the Agreement on Agriculture. The only discernible change in the basic functioning of the price band mechanism concerned the periodicity of the changes of the additional duties. The period had been increased from 15 days to 1 month. Guatemala failed to see how this could in any way remedy the previously-determined WTO-inconsistency. The inherent variability of a measure did not depend on how frequently the measure automatically updated itself. In any event, even if one could eliminate the inherent variability by simply lengthening the interval, Guatemala noted that in the dispute: "Chile - Price Band" (Article 21.5), the Appellate Body had confirmed the inherent variability of Chile's measure that changed every two months, a period of time much longer than that of Peru's recent amendment. As part of the amendment, Peru also had imposed a 20% *ad valorem* cap on the additional duties. This cap only limited the numerical range within which the additional duty could fluctuate but, in no way, had a bearing on the measure's inherent variability. It may be recalled that the original system also had a cap, albeit a higher one. The existence of that cap had not prevented the Panel and the Appellate Body from finding a violation of Article 4.2 and Article II:1(b) of the GATT 1994.

5.4. Second, the variable additional duties were not ordinary customs duties. They were other duties and charges, which were not recorded in Peru's Schedule of Concessions. Third, the measure still lacked predictability and transparency. The Panel and the Appellate Body had found that Peru's measure lacked predictability and transparency because it was difficult for operators to predict the additional duties that were linked to fluctuations in world market prices. Peru did not make any change in this respect and the measure was still linked to fluctuation in world market prices. Fourth, the amended measure maintained its feature of preventing the transmission of evolution of international prices to the domestic market. As a matter of fact, Peru had not changed the declared objective of the PRS, which was to act as "a stabilization and protection mechanism that makes it possible to neutralize fluctuations in international prices and limit the negative effects of falls in such prices". Neither had Peru changed the structure and design of the PRS, which remained the same. Finally, the elimination of elements like the adjustment factor for sugar, the c.i.f adjustments, the "importation costs" or the use of the consumer price index in the formulae, to mention some examples, did not address any of the DSB's rulings or recommendations. These features played no role in the reasoning of the Panel or the Appellate Body. The measure continued to be inconsistent with the covered agreements and Guatemala was disappointed with Peru's lack of compliance with the DSB's rulings and recommendations. Guatemala exhorted Peru to bring its measure into compliance without delay.

5.5. The representative of Peru said that, on 29 March 2016, upon the expiry of the reasonable period of time of 7 months and 29 days, Peru had circulated a report regarding the implementation of the DSB's recommendations and rulings in this dispute. This report was circulated to Members on 5 April 2016, pursuant to Article 21.6 of the DSU. As stated in its report, Peru had conducted in advance, in accordance with its tariff policy guidelines and in line with the DSB's recommendations and rulings, a full revision of the additional duties resulting from the Price Range System established by Supreme Decree No. W 016-91-AG, as amended by Supreme Decree No. W 115-2001-EF, in order to bring these duties into line with Peru's WTO obligations. Following that revision, the duties resulting from the application of the Price Range System were modified through the enactment of two pieces of legislation: Supreme Decree No. W 103-2015-EF, published in Official Journal "*El Peruano*" on 1 May 2015, and Supreme Decree No. W 055-2016-EF, published on 28 March 2016. The main changes introduced were as follows. The additional duties resulting from the application of the Price Range System, added to the c.i.f. *ad valorem* duties, must not exceed a maximum of 20% of the c.i.f. value of the goods. The adjustment factor that had been used specifically to calculate the additional duties applicable to imports of sugar was eliminated, as was the factor associated with import costs for the determination of the specific duties. The additional duty resulting from the application of the Price Range System applied as from the entry into force of the Resolution issued by the Deputy Minister of the Economy determining the reference prices and the additional duties to be applied. The update of the customs tables applicable to the importation of products included in the Price Range System had been approved; these tables would remain in force until 30 June 2016. Peru

considered that, with the implementation of those measures, it had complied with the DSB's recommendations and rulings in this dispute, in conformity with its commitments under the multilateral trading system.

5.6. The DSB took note of the statements.

6 UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

A. Request for the establishment of a panel by the Russian Federation (WT/DS493/2)

6.1. The Chairman recalled that the DSB had considered this matter at its meeting on 23 March 2016 and had agreed to revert to it. He drew attention to the communication from the Russian Federation contained in document WT/DS493/2, and invited the representative of the Russian Federation to speak.

6.2. The representative of the Russian Federation said that, at the previous DSB meeting held on 22 March 2016, Russia had requested the establishment of a panel in the DS493 dispute with standard terms of reference as set forth in Article 7.1 of the DSU. Russia still believed that all other ways of settling this matter were exhausted. Russia recalled that its request was made following its attempts to find an acceptable solution with Ukraine bilaterally, in particular in the course of formal consultations between Russia and Ukraine as the first stage of the DS493 dispute. These consultations had taken place on 25 June 2015. Unfortunately, the matter had not been resolved during those consultations and the situation had not changed since the previous DSB meeting. Ukraine's anti-dumping measures imposed on imports of ammonium nitrate originating in Russia following expiry and interim reviews were still active. Russia believed that they were imposed and were currently applied in violation of numerous provisions of the WTO Agreements. Therefore, Russia reiterated its request for the establishment of a panel to rule on this matter.

6.3. The representative of Ukraine said that her country regretted that Russia had considered it necessary, for the second time, to request for the establishment of a panel in respect of anti-dumping measures on ammonium nitrate applied by Ukraine. As Ukraine had stated at the previous DSB meeting, the measures at issue were the result of a thorough and objective investigation by the competent authorities in Ukraine and had been applied in full conformity with the WTO Agreements, in particular the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Ukraine wished to reiterate that it had engaged in constructive and meaningful consultations with Russia in an effort to find a mutually agreed solution that would be respectful of Ukraine's rights under the relevant WTO Agreements. Ukraine had provided extensive comments on issues in Russia's request for consultation and believed that it had provided the necessary information and clarification explaining its position. Moreover, Ukraine was deeply concerned that among the legal issues in Russia's request for panel establishment were aspects of the measures not discussed previously in the course of consultations. Specifically, the legal claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 significantly changed the essence of the complaint and could not have evolved from the consultations. As these claims considerably expanded the scope of the present dispute, the willingness of Russia to proceed with the panel establishment without consulting on these matters with Ukraine first was both unexpected and disturbing. Still, Ukraine understood that a panel would be established at the present meeting, in accordance with Article 6.1 of the DSU. Ukraine was prepared to engage in the panel proceedings and to explain that Russia had no legal basis for its claims.

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

6.5. The representatives of Australia, Canada, China, Colombia, the European Union, Japan, Kazakhstan, Norway and the United States reserved their third-party rights to participate in the Panel's proceedings.

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

A. Recourse to Article 21.5 of the DSU by the United States: Request for the establishment of a panel (WT/DS381/32)

7.1. The Chairman drew attention to the communication from the United States contained in document WT/DS381/32 and invited the representative of the United States to speak.

7.2. The representative of the United States said that his country found itself in a rather unusual position at the present meeting. As the United States had discussed at the March 2016 DSB meeting, the US National Oceanic and Atmospheric Administration ("NOAA") had issued a new rule modifying the dolphin safe labelling measure at issue in this dispute. The new rule directly addressed the DSB's findings on the US dolphin safe labelling measure, and brought the United States into compliance with its WTO obligations. The United States had discussed the recent rule with Mexico on a number of occasions. However, Mexico had indicated that it was not prepared to refer the matter of compliance back to a compliance panel at this point. Mexico had insisted that the arbitration under Article 22.6 of the DSU to review Mexico's request for authorization to suspend concessions must move forward immediately and, at the DSB meeting on 23 March 2016, Mexico had said that it considered that the US compliance action was not "legally pertinent" for the arbitration. Thus, Mexico appeared to be seeking to avoid the fact that the United States had now changed its measure to come into compliance with its WTO obligations and instead proceed as though the measure at issue was unchanged. As a result, the United States was, at the present meeting, taking the unusual step of requesting that the DSB establish a compliance panel pursuant to Article 21.5 of the DSU to confirm that the United States had brought its measure into compliance with the DSB's recommendations and rulings. The United States was aware of only one prior instance in which the Member concerned had requested the establishment of a panel pursuant to Article 21.5 of the DSU. At the same time, this was a course of action specifically endorsed in an Appellate Body Report for a Member concerned.[4] The United States understood that Mexico shared its desire to bring this dispute to a close as soon as possible and surely did not seek further delay. Initiating this Article 21.5 proceeding at the present meeting best facilitated resolving this dispute. Accordingly, the United States expected that Mexico would not object to the establishment of the panel at the present meeting, which would only mean that referral of this matter to a compliance panel was delayed by some days by the need to convene yet another DSB meeting.

7.3. The representative of Mexico said that, for more than 30 years, his country had been prevented from entering the US tuna market, and although Mexico had repeatedly demonstrated that the US "dolphin-safe" labelling measures were discriminatory, the United States continued to avoid compliance with WTO rules, notwithstanding the true impact on dolphins of fishing methods other than that used by the Mexican tuna fleet. Almost eight years ago, Mexico had initiated proceedings against the US measures at the WTO, and although it had demonstrated before the Panel and the Appellate Body, on two different occasions, that its exports were suffering discrimination, Mexico was still unable to suspend concessions vis-à-vis the United States. This cast doubt on the suggestion that the dispute settlement mechanism was "the jewel in the crown of the WTO". Though Mexico had the right to suspend concessions, given that the United States had failed to comply with the DSB's rulings and recommendations within the 13-month reasonable period of time for compliance, which had been confirmed by the Panel and the Appellate Body, Mexico had to resort to arbitration to effectively determine the amount of the suspension to which it was entitled. Meanwhile the United States, without informing Mexico in time and without requesting consultations with Mexico, was seeking new compliance proceedings under Article 21.5 of the DSU. Mexico, for its part, also reserved the right to request an Article 21.5 compliance panel against the US measures, as amended in March 2016, independently of the arbitration proceedings and the US panel request. Though the United States claimed that the scope of its request was sufficient to warrant the suspension of the Article 22.6 arbitration, that request was contrary to the DSU provisions. The correct way of proceeding would have been to suspend any panel proceedings under Article 21.5 until the Article 22.6 arbitration was concluded. The systemic consequences of what the United States was trying to do raised concerns, and it was damaging to the "jewel in the crown" for the responding Member to be able to delay proceedings for the suspension of

[4] Appellate Body Report, United States – Continued Suspension of Obligations in the "EC – Hormones" Dispute, WT/DS320/AB/R, adopted 14 November 2008, paragraph 353 ("US – Continued Suspension" (AB)).

concessions by unilaterally amending the measure at issue. The automaticity of the system would be seriously undermined, since it would mean that a Member could, every now and then, delay the proceedings *ad infinitum* and thus avoid both compliance and the suspension of concessions. Mexico, therefore, insisted that the United States comply with the other requirements prior to making a request for the establishment of a panel.

7.4. At the present meeting, Mexico wished to share a number of issues that should be of concern and of systemic interest to Members. The United States had not requested consultations with Mexico, nor had such consultations taken place, as required by the DSU. Article 21.5 of the DSU stated that disagreement on compliance "shall be decided through recourse to these dispute settlement procedures", which included Article 4 regarding consultations. The US request was incomplete with respect to this requirement pursuant to Article 6 of the DSU that stipulated that requests for the establishment of a panel "shall indicate whether consultations were held". The United States had not been exempted from holding consultations under the Sequencing Agreement (WT/DS381/19). In addition to the procedural errors, it was concerning that the United States should claim that consultations had been held regarding the "2016 interim final rule" (WT/DS381/32). That had not happened. On 10 March 2016, Mexico had requested authorization to suspend application to the United States of concessions and other obligations in accordance with the DSB's rulings and recommendations of 3 December 2015 (WT/DS381/29). On 22 March 2016, the United States had objected to the request for the suspension of concessions, and the case was referred to arbitration under Article 22.6 of the DSU (WT/DS381/30). Mexico noted that, on 23 March 2016, at the DSB meeting the DSB Chair had stated that the matter had been referred to arbitration. Now the United States wanted Mexico to delay the arbitration under Article 22.6 of the DSU because, in "its opinion", it had come into compliance (WT/DS381/32, footnote 12). In accordance with the DSB's rulings and recommendations of 3 December 2015, the date of adoption of the Panel and Appellate Body Reports (WT/DSB/M/371), the United States must comply with its obligations, and as long as there was no new determination, Mexico had the right to continue the proceedings under Article 22 of the DSU, and in particular the arbitration under Article 22.6 of the DSU. Consequently, Mexico was not in a position to accept the suspension of arbitration under Article 22.6 of the DSU, and believed that there was no legal basis for doing so. Nor, indeed, could the DSB delay it. The United States could not simply review the inconsistency of the amended measure and unilaterally declare that there was no more inconsistency or non-compliance on the basis of which Mexico would be authorized to suspend concessions. It was only when a compliance panel (and, where necessary, the Appellate Body) had determined that the measure at issue had been brought into conformity and the relevant reports had been adopted by the DSB that the current inconsistency status could be modified in such a way as to make the suspension of concessions no longer applicable (under Article 22.8 of the DSU, the suspension of concessions continued to be applicable pending the result of Article 21.5 proceedings, as reflected in the Report of the Appellate Body in the dispute: "United States - Continued Suspension", paragraphs 305, 315, 338 – 345, 355).

7.5. With regard to the 2016 interim final rule, Mexico's view was that it did not comply with the US obligation and did not resolve the tuna dispute. On the contrary, it preserved the status quo, namely discrimination against Mexican exports. Mexico reserved the right to request an Article 21.5 procedure against such measures, regardless of any actions taken by the United States. The US conduct was inconsistent with paragraph 10 of the Sequencing Agreement (WT/DS381/19), which the United States had concluded with Mexico regarding Articles 21.5 and 22.6 of the DSU. Paragraph 10 of that agreement stated that "[t]he parties will continue to cooperate in all matters related to these agreed procedures and agree not to raise any procedural objections to any of the steps set out herein". The Sequencing Agreement did not provide for any second round of Article 21.5 compliance proceedings. Instead, it had expressly provided that Mexico may request authorization for the suspension of concessions on the basis of an Article 21.5 compliance proceedings in which the DSB determined that the measure adopted for the purpose of compliance was inconsistent, and stated that "[t]he parties will cooperate to enable the arbitrator under DSU Article 22.6 to circulate its decision within 60 days of the referral to arbitration" (WT/DS381/19, paragraph 8). In particular, the new regulations would not become totally effective until the end of May, and would have no effect on tuna products entering the US market until many months thereafter. As had been made clear during the compliance proceedings, it was not enough to specify certain requirements in the measure if those requirements were not going to be enforced or enforceable, since the illegal discrimination would be able to continue in practice. In order to bring the measure into conformity, the United States had to be capable of demonstrating how the measure was being applied in reality, and that probably would not be possible until the

following year. For these reasons, Mexico could not accept, at the present meeting, the establishment of the panel as long as the correct procedures had not been complied with.

7.6. The representative of Guatemala said that, at the present meeting, his country would not express any view about the most recent US dolphin-safe labelling amended measure or any opinion on whether the United States had brought the measure subject to the DSB's recommendations into compliance with the covered agreements. Recourse to Article 21.5 of the DSU was the appropriate way to resolve any disagreement between the parties with regard to compliance with the DSB's rulings and recommendations. Rather, Guatemala wished to take the opportunity to comment on the US view that Mexico should suspend the arbitration proceedings under Article 22.6 of the DSU. According to the United States, "the DSB cannot grant authorization to suspend concessions in any amount where the Member concerned has come into compliance". The United States was right that the DSB could not grant authorization to suspend concessions where the Member concerned had come into compliance. However, the problem was that the DSB had not yet determined whether the United States had brought its measures into compliance. That determination was to be made through recourse to the proceedings under Article 21.5 of the DSU. Until such a determination was made, Guatemala considered that there was no obligation for Mexico to suspend the arbitration under Article 22.6 of the DSU nor would there be a basis for the DSB to be prevented from granting authorization to Mexico to suspend concessions or other obligations.

7.7. The representative of Canada said that his country was compelled to intervene on this request due to the novel and unprecedented nature of the circumstances in which it was being made, and the significant systemic implications arising from the manner in which this dispute appeared to be proceeding. Canada noted at the outset, as pointed out by Mexico, that these circumstances, in which a second compliance measure had been taken after the adoption by the DSB of initial compliance review reports, but prior to the authorization of suspension of concessions, were not clearly covered by the current provisions of the DSU. In fact, these circumstances, which involved issues raised in the DSU review discussions of both the sequencing and, indirectly, the post-retaliation proposals, would not be clearly covered even by any of those proposals, if they were to be agreed in their current form. In that respect, Members may need to revisit those proposals to see whether they could be adjusted to cover these circumstances. The fact that once this panel was established there would be parallel Article 21.5 and 22.6 proceedings would present significant systemic legal issues for both the panel and arbitrator to consider. Given that non-disputing Members may not have an opportunity to provide views to the Article 22.6 arbitrator on how these parallel proceedings should be reconciled, Canada wished to take the opportunity at the present meeting to share its views. Canada pointed out that, by letter to the DSB Chairman on 11 April 2016, Canada had reserved its third-party right to participate in the Article 22.6 proceedings should those proceedings address any disagreement between the disputing Parties concerning compliance. As a general matter, Canada agreed that where there was disagreement as to the WTO-consistency of a measure taken to comply after the expiration of the reasonable period of time, that disagreement should be resolved through recourse to compliance proceedings under Article 21.5 of the DSU. It was also established practice, and supported by the Sequencing Agreement between the United States and Mexico in this specific dispute, that if the DSB ruled that a measure taken to comply remained inconsistent with the WTO Agreement, the complaining party had the right to request authorization to suspend concessions and other obligations. Once a dispute arrived at this point, however, the adoption by the responding party of new compliance measures prior to that request did not, in Canada's view, give rise to an obligation on the complaining party to seek, or even to await the completion of, any additional compliance review before it could pursue its rights under Article 22 of the DSU. From that perspective, Canada did appreciate that it was the United States that had made the request for establishment of a panel to review compliance of its own measure.

7.8. As Canada and others had indicated for many years in the DSU negotiations, this was an appropriate way to proceed in these kinds of circumstances. However, Canada would resist any suggestion either that the Article 22.6 proceedings could not proceed, or if they did, that the DSB could not authorize suspension of concessions, pending the outcome of the compliance review. While Canada welcomed the US initiative to seek a multilateral determination of the compliance of its new measure, Canada considered that the Articles 21.5 and 22.6 proceedings should be allowed to advance in parallel. A delay in the Article 22.6 proceedings by any means other than with the agreement of the complaining party would create harmful incentives for responding parties to amend repeatedly or replace a WTO-inconsistent compliance measure and assert compliance

simply to forestall the suspension of concessions. In such parallel proceedings, Canada considered that the Arbitrator should focus on the level of nullification and impairment caused by the original compliance measure that was the subject of the DSB's recommendations and rulings. In doing so, the Article 22.6 Arbitrator could defer the assessment of the WTO-consistency of the new compliance measure to the Article 21.5 panel, as each adjudicator respected its respective mandate. Canada accepted that allowing the two proceedings to advance in parallel in this way, possibly resulting in a DSB authorization to suspend concessions even prior to the completion of the compliance review was not an entirely satisfactory result. However, any alternative approach allotted the entirety of the prejudice on the complaining party of the failure of the responding party to have complied in a timely manner. Ultimately, there would always be circumstances for which the procedures in the DSU would not immediately provide satisfactory answers. In those circumstances, all Members should support interpretations of the DSU that did not result in undue prejudice to either party, but especially to a complaining party that had prevailed on multiple occasions. The best result in these situations was of course for the parties themselves to agree to procedures that each considered adequately protected their rights. In that respect, Canada encouraged the parties to this dispute to find a way forward that reflected the very unique circumstances of this dispute, while preserving the systemic integrity of the dispute settlement system.

7.9. The representative of Japan said that, although his country was not in a position to know exactly how the factual and procedural background had led to the US request for the establishment of a compliance panel in this dispute, the US action raised a number of important issues of a systemic nature on which Members should reflect carefully. The United States had made this request at the critical stage in this dispute. Following the DSB's ruling on the issue of compliance, the United States had announced the completion of its implementation and yet Mexico had made its request for authorization to suspend concessions or other obligations. Upon objection by the United States, the matter had been referred to arbitration pursuant to Article 22.6 of the DSU. This meant that there would be parallel proceedings under Article 21.5 and Article 22.6 of the DSU. This raised some questions: (i) what was the relationship between these two proceedings? (ii) what were their respective jurisdictions, including the issue of whether the Article 22.6 arbitration could review the issue of compliance? (iii) what should be the proper procedural sequence between these two proceedings? and (iv) what if these proceedings produced different conclusions? The US action could possibly delay and defer the DSB's consideration of the request for authorization properly made by Mexico at this very critical stage in the dispute. This may potentially set a precedent which could leave room for abuse in the future. Furthermore, this panel request made by a responding party would raise questions as how to define and limit the scope of disagreement that a compliance panel should decide and which party should bear the burden of proving each of the issues properly before the panel. In order to avoid any procedural difficulties, Japan urged the parties to this dispute to discuss how the two proceedings could be treated as orderly as possible, taking into account appropriate due process for both parties. Since this case involved difficult issues and the DSU provisions were not clear in this regard, the parties may need to find a creative solution which would be consistent with the DSU. Once this panel was established, Japan would wish to participate in this dispute as a third party in order to ensure that no negative precedent was set for future disputes.

7.10. The representative of Korea said that, at the previous DSB meeting, Mexico had requested authorization from the DSB to suspend concessions in the amount of US$472.3 million annually. As the United States had objected to the level of suspension requested, under Article 22.6 of the DSU, the matter was referred to arbitration. As Mexico noted, that arbitration process was ongoing. Korea agreed with Mexico that there was no DSU provision that could impede the arbitration process. The United States argued that the DSB could not grant authorization to suspend concessions in any amount where the Member concerned had come into compliance. At the present moment, it was not known whether the United States, having revised the amended tuna measure, was in compliance with the DSB's recommendations and rulings. There was only a claim of compliance. The Article 21.5 panel would, upon establishment, make that determination in due course. Until that determination was made and the relevant report was adopted by the DSB, the arbitration proceedings should progress in parallel with any compliance panel proceedings.

7.11. The representative of Australia said that her country was mindful of the complex systemic issues the current scenario gave rise to. Australia considered that the United States was entitled to request the establishment of an Article 21.5 panel to determine whether its new measure was consistent with the GATT 1994 and the TBT Agreement. Australia noted that the United States was

required to identify in its panel request how its new measure addressed the inconsistencies identified in the DSB's recommendations and rulings. Article 21.5 of the DSU was sufficiently broad, in Australia's view, to encompass such a panel request. Equally, Mexico would also be entitled to file its own request for the establishment of a panel under Article 21.5 of the DSU identifying the element or elements of the new measure it considered were not in compliance with the GATT 1994 and TBT provisions. However, Australia considered that the arbitration proceedings commenced under Article 22.6 of the DSU should continue in parallel to any Article 21.5 panel process unless otherwise agreed by the parties. To require suspension of an Article 22.6 arbitration contingent on an Article 21.5 panel finding would prevent a complaining Member from exercising its rights under the DSU. Moreover, there was no legal basis in the DSU for such a suspension. Australia was also concerned about the systemic implications of requiring suspension of the Article 22.6 arbitration. In Australia's view, it would unfairly delay the rights of a Member to seek suspension of concessions for measures which the DSB had agreed were not consistent with WTO obligations. Further, it would undermine Members' confidence in the ability of the dispute settlement system to ensure that parties sustained efforts towards the resolution of disputes in accordance with the DSU provisions.

7.12. The representative of the European Union said that the EU noted the US request for a second compliance panel. The EU also noted that there was also a pending arbitration proceeding regarding this dispute. This appeared to raise a novel procedural situation which involved a number of complex issues. The EU recalled that, in the "EC – Bananas III" dispute, reference was made to the fact that the compliance panel and the arbitration panel would co-ordinate their work, but since they would be the same individuals, the reality was that they would find a "logical way forward", which would help to resolve all the remaining disputes, whilst respecting the rights of both parties (as well as third parties) and the integrity of the DSU. The EU expected that, in the circumstances of the present case, the adjudicators would similarly seek to find a "logical way forward", and would, in that respect, be supported by the parties and third parties. The EU considered that what exactly that "logical way forward" might be could depend, in some measure, on the information that would come to light during the ensuing proceedings, in particular the compliance proceedings. Specifically, if the second compliance effort overwhelmingly appeared to be complete, then the EU believed that could have consequences for what the "logical way forward" might be when it came to co-ordinating the two proceedings. The same would be true if, conversely, the second compliance effort would appear to be minimalist. The EU would therefore prefer to wait for such further information before expressing a view on what the "logical way forward" might be in the particular factual circumstances of this dispute. Given the systemic importance of this issue, the EU trusted that the adjudicators would ensure that, during the proceedings, the rights and interests of third parties and of the Members more generally would be fully taken into consideration, and that this would include the opportunity to comment both in writing and orally once the full set of facts and arguments were known.

7.13. The representative of Norway said that his country noted that the discussion at the present meeting raised several matters of systemic interest, including the question of sequenced or parallel proceedings when a measure had been amended after the first Article 21.5 proceedings, but prior to authorization of suspension. Without prejudice to its position on this issue, Norway noted that a Member's right to retaliate was a key part of a well-functioning dispute settlement system. In Norway's view, it was crucial for Members to ensure that all stages of a dispute could operate in an efficient and effective manner in order to secure full and prompt implementation of the DSB's rulings and recommendations.

7.14. The representative of Brazil said that many new interpretations and issues were being raised with respect to the DSU provisions and noted that this should not be seen as a shortcoming of the DSU. As Members moved along there was a need to clarify certain rules. Brazil noted that Article 21.5 of the DSU was not meant to cover the possibility of multiple recourses. As stated by the EU, the circumstances of this dispute seemed to be another variation of the Bananas dispute. There were two possibilities: (i) a prolonged litigation with repeated recourses to Article 21.5 of the DSU; or (ii) an Article 22.6 arbitration would conclude its proceedings based on the measure that was no longer in place. Therefore, if a party to a dispute wished to avoid retaliation, it should comply with the decision of the first compliance panel under Article 21.5 of the DSU. Unfortunately, the DSU provisions did not provide clear guidance on this issue. Thus, with good faith and will, the parties to this dispute would have to find a way forward in this situation. Like other delegations, Brazil encouraged Mexico and the United States to discuss, in good faith,

possible options so as to find a solution, which would not only be acceptable to the parties in this dispute, but would also constitute a more definitive solution in the future in similar circumstances.

7.15. The representative of the Russian Federation said that her country did not have any precise instructions on this matter and did not want to interfere in any way with the efforts of the parties to this dispute to reach a resolution of this matter. Without any prejudice to its position on this issue, Russia wished to express its concern about the unprecedented uncertainties faced by the parties to this dispute and the systemic implications that could potentially affect other Members. Russia expressed its hope that the parties would find a constructive solution and stood ready to engage in any multilateral efforts should that be necessary to bring more clarity to the applicable rules and procedures.

7.16. The representative of the United States said that his country wished to address a few of the comments made in Mexico's statement. Mexico asserted that there had been no consultations. However, there was no requirement to request consultations under Article 4 of the DSU as a condition for requesting the establishment of a compliance panel pursuant to Article 21.5 of the DSU, a point that the Appellate Body had made in two reports, one of which had involved Mexico as a party.[5] Consultations were not referred to in Article 21.5 of the DSU, and the parties had already consulted on the initial matter giving rise to the situation under Article 21.5. Indeed, the United States could not see how Article 4 of the DSU could apply to an instance in which it was the Member concerned who was requesting a compliance panel to confirm that Member's compliance. Accordingly, any objection to the US panel request based on the failure to request Article 4 consultations could not prevent the establishment of a panel. That said, the United States had discussed the recent rule with Mexico on a number of occasions now, including under the Understanding between the United States and Mexico Regarding Procedures under Articles 21 and 22 of the DSU. The United States, of course, stood ready to consult further with Mexico on this matter as long as those consultations did not cause any delay in the compliance panel proceedings. Finally, the United States would note that this was consistent with the approach agreed under that same Understanding, which had specified that Mexico was not required to hold consultations with the United States prior to requesting the establishment of an Article 21.5 panel. Mexico had also asserted that the rule discriminated against Mexican tuna. To be clear, most Mexican tuna was not eligible for the "dolphin-safe" label because of the manner in which most Mexican vessels had chosen to fish for tuna. The fleets of other nations had abandoned the practice, but those Mexican vessels had chosen to employ a method of fishing, setting on dolphins, that was recognized to pose a particular risk to dolphins. It involved deliberately chasing dolphins and capturing them. In so doing, it may result in dolphins being killed or seriously injured, separating dolphin calves from their mothers, reducing reproduction rates, and other harms. Simply put, tuna caught using this damaging fishing method was clearly not "dolphin safe", and it would be misleading to consumers to claim that it was. As had been mentioned, in recognition of the harms posed to dolphins from this fishing method, other countries, including the United States, had chosen not to use this fishing method. There was no finding in the DSB's recommendations or rulings that required the United States to provide access to the dolphin safe label for tuna products produced from setting on dolphins. Consequently, tuna produced from setting on dolphins remained ineligible for the dolphin safe label. The United States was disappointed, but perhaps not surprised, that Mexico had decided to object to the establishment of a panel at the present meeting. It was in both parties' interest, in order to reach a final resolution of this dispute, to move efficiently to resolve the fundamental issue of compliance. So it was ironic to hear concerns about delay when Mexico at this meeting was objecting to the establishment of a panel, thereby delaying the compliance proceeding. In light of Mexico's action, the United States wished to inform Members that the United States would request that the DSB Chair convene a special DSB meeting in order to consider the US compliance panel request for the second time.

7.17. The representative of Mexico said that his country thanked those delegations who had expressed an interest in this matter and had shared Mexico's concern regarding the proper sequencing between the Article 22.6 and Article 21.5 proceedings. With regard to the US statement, Mexico wished to reiterate that under Article 21.5 of the DSU consultations were required before one could ask for a compliance panel. It was the US practice to hold consultations under the Article 21.5 procedure. This only confirmed the requirement which had not been met in this case. The interpretation of the Sequencing Agreement between Mexico and the United States

[5] See "Mexico – HFCS" (Article 21.5) (AB), paragraph 65; "US – Continued Suspension" (AB), paragraph 340.

was clear and left no room for any doubt. While Mexico did not have an obligation under that Agreement to request consultations, this was not the case with the United States in the situation at hand. Regarding the US arguments that many different harms were being caused to dolphins, he said that this issue had been thoroughly discussed before the Panel and the Appellate Body, not just once, but on several occasions, and those arguments had not prevailed. Finally, Mexico had heard that the United States was disappointed with Mexico's attitude. He noted that Mexico was the complainant in this lengthy dispute with the United States. If one looked at the Agenda of the present meeting, out of the six sub-items under item 1, five concerned US non-compliance. He recalled that the Tuna dispute had been initiated in 2008. At the present meeting, it had been mentioned that there should be no delays. This was what Mexico had hoped for eight years ago. The DSU called for prompt compliance and the elimination of the measure, and Mexico expected this to be the best solution in these proceedings.

7.18. The representative of the United States said that his country wished to take the floor again to comment in response to Mexico's last statement. Contrary to Mexico's suggestion, the Panel and the Appellate Body had not found that setting on dolphins was not harmful. The United States would challenge Mexico to identify such a finding in any Report in this dispute. The United States would also question the link Mexico was apparently attempting to make between US compliance in this dispute and other Agenda items. But as it had explained, the United States had addressed and had complied with the DSB's rulings and recommendations in this dispute.

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

8 PROPOSED NOMINATIONS FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS

8.1. The Chairman drew attention to document WT/DSB/W/566, which contained two additional names proposed by the Philippines and Qatar for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/566.

8.2. The DSB so agreed.

9 APPOINTMENT/REAPPOINTMENT OF APPELLATE BODY MEMBERS

A. Statement by the Chairman

9.1. The Chairman, speaking under "Other Business", said that he wished to make a brief statement regarding the 2016 selection process for the appointment of a new Appellate Body member and the process for the possible reappointment of one Appellate Body member. As Members were aware, on 7 and 8 April 2016, the Selection Committee had interviewed the seven candidates proposed for the vacant position in the Appellate Body. On 20 April 2016, the Selection Committee had started its consultations with interested delegations who had expressed their wish to provide views on the candidates. The Selection Committee would resume its consultations on Monday 25 April 2016. Delegations wishing to meet with the Selection Committee were invited to contact the Secretariat, Council/TNC Division, to make an appointment. Alternatively, delegations may send comments in writing to the Chair of the DSB, in care of the Council/TNC Division, by no later than 25 April 2016 close of business. He strongly encouraged Members to indicate their positive preferences on the candidates during the consultations or in their written comments should they decide to proceed that way. As agreed by the DSB in January 2016, following the consultations with delegations, the Selection Committee would make a recommendation by no later than 12 May 2016, which would be sent by fax to delegations in order that it may be considered by the DSB at its meeting on 23 May 2016. Members were also aware that he had been consulting informally with interested delegations on the issue of possible reappointment of Mr. Seung Wha Chang for a second four-year term beginning on 1 June 2016. At the present meeting, he wished to report that, in light of his consultations, it was his intention to precisely follow the approach that had been agreed and had been taken by the previous DSB Chairman, Ambassador Neple, in November 2015. In that regard, he said that he would host an informal meeting with Mr. Chang and invited any interested delegations who would wish to participate in that meeting to contact him directly or via the Secretariat by close of business on 28 April 2016. If any delegation intended to pose questions to Mr. Chang at that meeting, they should indicate

topics that they wished to raise by the same date. This informal meeting would take place on 10 May 2016 at 3 pm in room S1. It was open to Ambassadors plus one. During that meeting, the ground rules established for the 2015 reappointment process would be followed. The ground rules were reflected in the report made by the previous DSB Chairman at the DSB meeting on 25 November 2015 (WT/DSB/M/370). He said that it would be his intention to place the issue of possible reappointment of one Appellate Body member on the Agenda of the 23 May 2016 DSB meeting. He hoped that this was agreeable to all delegations.

9.2. The DSB took note of the statement.

10 THE DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

10.1. The Chairman, speaking under "Other Business", said that he wished to provide information about the Appellate Body's workload, the number of disputes before panels, in the panel queue, and at the panel composition stage, and the ability of the Secretariat to meet expected demand over the coming period. On appeals, the Appellate Body was currently dealing with three appeals.[6] In addition, one panel report had been recently circulated[7] and two more panel reports were expected to be circulated in the next three months, all three of which may also be appealed.[8] These would be followed soon by the report of the Panel in the complex compliance proceedings in the "EC and Certain Member States – Large Civil Aircraft" (Airbus) dispute, which had been issued to the parties in March and was expected to be circulated to Members by early September. Given the limited number of staff available in the Appellate Body Secretariat, as of the second half of 2016 there was likely to be a waiting period until all these appeals could be staffed and Appellate Body members could turn to dealing with them. With regard to panels/arbitrations, currently, there were 19 active panels (including one panel under Article 21.5 of the DSU) that had not yet issued a final report to the parties. He noted that he was counting multiple disputes that were being considered simultaneously by the same panel as one. For example, the "Australia – Tobacco Plain Packaging" panels, which in fact comprised four active disputes, was counted as a single panel in his report. In addition, he said that he had excluded suspended panels. As of the present day, there were two composed panels awaiting staff to assist them[9], both of which had been composed after 31 October 2015 when the Director-General had undertaken to staff all panels in the queue at that time. Currently, there were four panels at the composition stage. In addition, one matter has been referred to arbitration under Article 22.6 of the DSU.

10.2. The DSB took note of the statement.

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[6] DS456 "India – Solar Cells"; DS464 "US – Washing Machines"; and DS461 "Colombia – Textiles".
[7] DS473 "EU – Biodiesel".
[8] DS475 "Russia – Pigs"; DS485 "Russia – Tariff Treatment".
[9] DS490/DS496 "Indonesia – Iron or Steel Products"; and DS491 "US – Coated Paper" (Indonesia).