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(18-3448) Page: 1/21

Dispute Settlement Body
28 February 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 28 FEBRUARY 2018

Chairman: Mr. Junichi Ihara (Japan)

Table of Contents

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.180)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.155)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.118)

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.2)

E. China – Anti-dumping measures on imports of cellulose pulp from Canada: Status report by China (WT/DS483/7/Add.1)

1.1. The Chairman noted that there were five 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 of the DSU 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 also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings, "[r]epresentatives 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.180)

1.2. The Chairman drew attention to document WT/DS184/15/Add.180, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Hot-Rolled Steel".

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 15 February 2018, 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 thanked the United States for the latest status report and the statement made at the present meeting. Japan called, once again, on the United States to fully implement the DSB's recommendations and rulings so as 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.155)

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

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 15 February 2018, 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 made at the present meeting. The EU referred to its previous statements on this matter, and reiterated that it would like to resolve this case as soon as possible.

1.9. The representative of China recalled that, in 2000, the Panel had found that Section 110(5) of the US Copyright did not meet the requirements under Article 13 of the TRIPS Agreement, and Article 11bis(1)(iii) and Article 11(1)(ii) of the Berne Convention, which had been incorporated into Article 9.1 of the TRIPS Agreement. Nevertheless, the law in question was still in effect to the detriment of the legitimate interests of copyright holders of musical work. China reiterated its statements made at previous DSB meetings under this Agenda item. China urged the United States, once again, to fully implement the DSB's recommendations and rulings by amending or withdrawing the said law to meet its obligations under the TRIPS Agreement, which set out only the minimum standards of protection that WTO Members were required to provide to intellectual property right holders.

1.10. The representative of the United States said that as the United States had previously stated, China's criticisms were completely unfounded. The intellectual property protection that the United States provided within its own territory equalled or surpassed that of any other Member. The United States indeed found it interesting that the Member that continued to criticize the US commitment to strong intellectual property rights had domestic records of protecting intellectual property rights that appeared less than robust.

1.11. 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.118)

1.12. The Chairman drew attention to document WT/DS291/37/Add.118, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case "EC – Approval and Marketing of Biotech Products".

1.13. The representative of the European Union said that his delegation continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. On 16 January 2018, the draft authorizations for one GM maize[1] and the renewal of one GM maize[2] for food and feed had been submitted for a vote to the member States Committee, resulting in "no opinion". Thereafter, they had been submitted for a vote to the Appeal Committee on 26 February 2018, also resulting in

[1] Maize: MON 87427 x MON 89034 x NK603.
[2] Renewal of maize: 59122.

"no opinion". The Commission would now need to decide on these two authorizations. The EU continued to be committed to acting in line with its WTO obligations. As stated many times before, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.14. The representative of the United States thanked the EU for its status report and its statement made at the present meeting. The United States noted its continuing concerns that the EU measures affecting the approval of biotech products involved prolonged, unpredictable, and unexplained delays at every stage of the approval process. These delays had affected the products previously approved by the EU, and continued to affect the dozens of applications still awaiting approval. The United States further noted that even when the EU finally approved a biotech product, the EU had facilitated the ability of individual EU member States to impose bans on the approved product. The United States urged the EU to ensure that its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were based on scientific evidence, and that decisions were taken without undue delay.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.2)

1.16. The Chairman drew attention to document WT/DS464/17/Add.2, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Washing Machines".

1.17. The representative of the United States said that the United States had provided a status report in this dispute on 15 February 2018, in accordance with Article 21.6 of the DSU. On 15 December 2017, the United States Trade Representative had requested that the US Department of Commerce make a determination under Section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce had initiated a proceeding to make such determination. Since that time, the Department had issued initial and supplemental questionnaires seeking additional information necessary to conduct the Section 129 proceeding. The United States continued to consult with interested parties on options to address the recommendations of the DSB relating to anti-dumping measures challenged in this dispute.

1.18. The representative of Korea said that his country thanked the United States for its status report, which had been circulated on 16 February 2018. Korea was of the view that there had been hardly any progress in the recent status report by the United States. Korea reiterated its concern with the United States' delayed implementation in this dispute. Specifically, the United States had stated in its status report that it "continues to consult with interested parties on options to address the recommendations of the DSB relating to anti-dumping measures challenged in this dispute". At this point, 17 months had already passed since the adoption of the Panel and Appellate Body Reports in this dispute. Korea found it difficult to comprehend why it had taken so long to start the initial implementation stage. Thus, Korea, once again, called on the United States to step up its efforts in good faith to ensure prompt compliance with the DSB's recommendations and rulings relating to both the United States' anti-dumping and countervailing duty measures.

1.19. The representative of Canada said that his country also remained concerned that the United States had not implemented the DSB's recommendations and rulings in this dispute. In particular, Canada was deeply disappointed that, despite the expiry of the reasonable period of time, the United States continued to collect cash deposits from Canadian exporters based on a methodology that had been found to be "as such" inconsistent with WTO obligations in this dispute.

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

E. China – Anti-dumping measures on imports of cellulose pulp from Canada: Status report by China (WT/DS483/7/Add.1)

1.21. The Chairman drew attention to document WT/DS483/7/Add.1, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case "China – Cellulose Pulp".

1.22. The representative of China said that his country had provided a status report in this dispute on 15 February 2018 in accordance with Article 21.6 of the DSU. China intended to comply with the DSB's recommendations and rulings within the agreed reasonable period of time, which would expire on 22 April 2018. China had launched a re-investigation, which was ongoing, and interested parties had the possibility to submit their comments.

1.23. The representative of Canada noted that China had indicated to the DSB on 19 June 2017 that it had intended to implement the DSB's recommendations and rulings in this dispute. Canada thanked China for its status report at the present meeting with regard to its implementation efforts. Canada looked forward to the completion of China's review in the near term and expected that a negative injury finding, prior to the expiry of the reasonable period of time on 22 April 2018, would resolve this dispute.

1.24. 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

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

2.2. The representative of the European Union said that, once again, the EU requested that the United States stopped transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance 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 to submit implementation reports in this dispute. The EU would continue to put this point on the Agenda as long as the United States did not implement the DSB's recommendations and rulings.

2.3. The representative of Canada said that his country thanked the European Union for having placed this item on the Agenda of the present meeting. Canada shared the position of the EU that the Byrd Amendment dispute should remain under DSB surveillance until the United States fully complied with the DSB's recommendations and rulings.

2.4. The representative of Brazil thanked the EU, once again, for keeping this item on the Agenda of the DSB. As an original party to the Byrd Amendment dispute, Brazil referred to its previous statements on this matter. In particular, with regard to the continuation of illegal disbursements, despite allegations to the contrary, these continued to this day, ten years after the Repeal Act. Brazil requested that these disbursements should cease immediately. Brazil renewed its call on the United States to fully comply with the DSB's recommendations and rulings in this dispute. Until then, the United States was under the obligation to submit status reports.

2.5. 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, more than 10 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. And as the United States had noted many times previously, the EU had demonstrated repeatedly that it shared this understanding, at least when it was the responding party in a dispute. Once again, this month the EU had provided no status report for disputes in which there was a disagreement between the parties on the EU's compliance.

2.6. The representative of the European Union said that the EU disagreed with the last part of the statement of the United States. The EU reminded the DSB that the EU had provided status reports on all disputes that had involved the EU as a defending party. For the present meeting, the only dispute was "EC – Approval and Marketing of Biotech Products" (DS291).

2.7. The DSB took note of the statements.

3 CANADA – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN CARBON STEEL WELDED PIPE FROM THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

A. Statement by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

3.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Chinese Taipei. He then invited the representative of Chinese Taipei to speak.

3.2. The representative of Chinese Taipei said that the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requested this Agenda item for transparency purposes. Chinese Taipei considered it appropriate to keep the DSB informed about progress in the implementation of this dispute. At the DSB meeting of 22 January 2018, Canada had announced that it had implemented the DSB's recommendations and rulings, and had, thus, delivered its last status report in light of the completion of its compliance efforts. The agreed reasonable period of time was set to expire on 25 March 2018. Chinese Taipei thanked Canada for announcing its intention to ensure full compliance two months prior to the expiry of the reasonable period of time. A bilateral exchange of views was, however, ongoing to clarify certain aspects of the measures at issue, and Chinese Taipei reserved its rights under the DSU. Chinese Taipei hoped to complete its bilateral exchanges with Canada swiftly, with a view of resolving this dispute as soon as possible.

3.3. The representative of Canada said that, as his country had indicated in its statement at the DSB on 22 January 2018, Canada's amendments to its legislation and to the determinations on the relevant measure had brought Canada into compliance with the DSB's recommendations and rulings in DS482. Nevertheless, Canada had addressed technical questions that Chinese Taipei had posed since that date. Canada remained open to consulting on additional questions regarding its implementation.

3.4. The representative of the United States said that given Canada's position under Agenda item 2 (Byrd Amendment dispute) in past DSB meetings that the item should remain on the DSB Agenda where a complaining party disagreed with a responding party's claim of compliance, the United States would ask Canada whether it could confirm that it would provide a status report in this dispute at the next DSB meeting.

3.5. The representative of Canada said that, to respond to the question from the United States, Canada had complied with the DSB's recommendations and rulings. Canada also pointed out that Chinese Taipei had not contested that Canada was now in compliance.

3.6. The DSB took note of the statements.

4 INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

A. Recourse to Article 21.5 of the DSU by India: Request for the establishment of a panel (WT/DS456/20)

4.1. The Chairman recalled that the DSB had considered this matter at its meeting on 9 February 2018 and had agreed to revert to it. He drew Members' attention to the communication from India contained in document WT/DS456/20, and then invited the representative of India to speak.

4.2. The representative of India said that her country referred to its communication of 23 January 2018, in which it had requested the establishment of a panel under Article 21.5 of the DSU. Therein, India had explained the actions, which it had taken, to comply with the DSB's recommendations and rulings. In the 9 February 2018 DSB meeting, India had requested the establishment of a panel under Article 21.5 of the DSU to determine India's compliance with the DSB's recommendations and rulings in "India - Solar Cells" (WT/DS456). The United States had objected to India's request at that meeting. India was of the view that in the event of any disagreement between the parties with respect to the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings", the logical course of action would be to first have recourse to Article 21.5 of the DSU. While India believed that it had brought the measures at issue into full compliance with its WTO obligations, the United States appeared to disagree. Therefore, India's compliance had to be evaluated by a panel pursuant to Article 21.5 of the DSU. India reiterated that it was confident that compliance proceedings pursuant to Article 21.5 of the DSU would address any doubts regarding India's compliance with the DSB's recommendations and rulings, and would thereby nullify the need for any DSU Article 22.6 proceedings. India, therefore, requested the establishment of a panel, pursuant to Article 21.5 of the DSU, to resolve the disagreement between India and the United States regarding India's compliance with the DSB's recommendations and rulings. India also requested that, if possible, the DSB refer the matter to the original Panel. India thanked the WTO Secretariat assisting in this dispute and thanked the DSB for its attention on this matter.

4.3. The representative of the United States said that, as the United States had noted at two prior DSB meetings, India had no basis for asserting compliance with the DSB's recommendations in this dispute. The United States said that, to recall, the DSB found that India's domestic content requirement, or DCR, measures for solar cells and modules had breached India's national treatment obligations under the TRIMs Agreement and the GATT 1994. In its request, India claimed that it had complied with the DSB's recommendations in this dispute because it "no longer enters into any [Power Purchasing Agreements] involving the DCR measures". India's panel request, however, appeared to indicate that India would, in fact, continue to apply the WTO-inconsistent DCR measures contained in Power Purchase Agreements that India had entered into before December 2016. The United States did not understand how India could claim compliance while it continued applying these WTO-inconsistent DCR measures. The United States did not see the utility of establishing a compliance panel under these circumstances. The United States had reserved its rights to move forward under DSU Article 22.6 to obtain authorization to take countermeasures in relation to India's DCR measures. However, as the United States had communicated to India on several occasions, the United States remained willing to work with India to find a bilateral resolution to this dispute without the need for further dispute proceedings.

4.4. 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/DS456/20. The Panel would have standard terms of reference.

4.5. The representatives of Canada; China; the European Union; Indonesia; Japan; Korea; Norway; the Russian Federation; Singapore and Chinese Taipei reserved their third-party rights to participate in the Panel's proceedings.

5 CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

A. Report of the Panel (WT/DS427/RW and WT/DS427/RW/Add.1)

5.1. The Chairman recalled that at its meeting on 22 June 2016, the DSB had agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel the matter that had been raised by the United States concerning the implementation by China of the DSB's recommendations and rulings pertaining to this dispute. He also recalled that the Panel Report contained in documents WT/DS427/RW and WT/DS427/RW/Add.1 had been circulated on 18 January 2018 as unrestricted documents. The Panel Report was now before the DSB for adoption at the request of the United States. This adoption was without prejudice to the right of Members to express their views on the Panel Report.

5.2. The representative of the United States said that the United States was pleased to request the DSB to adopt the Report of the compliance Panel in this dispute. The United States thanked the compliance panelists, and the WTO Secretariat that had assisted them, for their work on this matter. The United States was a world leader in broiler chicken production. Prior to China's imposition of anti-dumping duties and countervailing duties on US broiler products, China had been one of the United States' largest markets. The duties had cost the US industry billions of dollars in lost sales. The DSB would recall that the Panel in the original dispute had agreed with the United States that China's anti-dumping and countervailing duties measures had suffered from significant procedural and substantive deficiencies. The United States said that, regrettably, China had chosen to continue the duties through a re-investigation process that had also contained significant procedural and substantive deficiencies. The key findings by the compliance Panel included the following: China had failed to provide US respondents notice of the information that MOFCOM had required from China's domestic industry, in breach of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement. China had failed to provide US respondents timely opportunities to see the requests for information that had been made by MOFCOM and to prepare presentations, in breach of Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement. China had improperly resorted to facts available for a US respondent that had submitted appropriate and verifiable data, in breach of paragraph 3 of Annex II and Article 6.8 of the Anti-Dumping Agreement. China had failed to properly allocate costs in calculating US producers' cost of production, in breach of Article 2.2.1.1 of the Anti-Dumping Agreement. China had failed to make a proper injury determination because its pricing analysis had not controlled for differences between imported and domestic products, in breach of Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. China had failed to make a proper injury determination because its analysis of impacts had relied on a flawed evaluation of capacity utilization and an irrelevant economic factor, in breach of Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement. China had failed to make a proper injury determination because its causal link analysis had relied on its faulty pricing and impact analyses, in breach of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and 15.1 and 15.5 of the SCM Agreement.

5.3. In short, the Panel's comprehensive findings supported the view of the United States that China should never have imposed the duties, let alone continued them for years following the original WTO findings. As the United States had noted in the past, this was one of a series of disputes involving what appeared to be retaliatory use by China of anti-dumping and countervailing duties measures in response to unrelated trade measures adopted by its trading partners. The United States was therefore pleased that the DSB was adopting this important Report. The United States hoped China would address the systemic deficiencies that had been highlighted in the Report and ensure that all of its anti-dumping and countervailing duties investigations comported with its WTO obligations. Yesterday, on 27 February 2018, China had informed the United States that China had decided to terminate the anti-dumping and countervailing duties on US broiler products. That news was welcome. The United States was in the process of reviewing this information. The United States looked forward to the prompt restoration of market access for high-quality US chicken products.

5.4. The representative of China said that his country first wished to thank the Article 21.5 Panel and the Secretariat for their work. China recognized that the proceeding had been complex and had involved a considerable amount of legal and factual issues. Nonetheless, throughout the

proceeding, the Panel had always worked towards keeping the proceedings on track to arrive at a result quickly and efficiently. China wished to thank the Panel for this. China welcomed the Panel's rejection of the US claims concerning Articles 6.9 and 9.4(i) of the Anti-Dumping Agreement. The Panel had found that the United States had not established its claim that MOFCOM had not informed the US interested parties of the essential facts in respect of their dumping margin calculations and the respective underlying data from the original investigation and the reinvestigation. The Panel had also not found that MOFCOM had been, as claimed by the United States, under an obligation to allow "unknown" exporters, which had not registered for the original investigation, to participate in the reinvestigation. The Panel had therefore rejected the US position that, in the reinvestigation, MOFCOM had been precluded from establishing a "residual" duty rate based on facts available for all other "unknown" exporters, without regard to the limitation set forth in Article 9.4(i) of the Anti-Dumping Agreement. China also welcomed the Panel's findings that the claims by the United States under Articles 6.1.2 and 6.2 of the Anti-Dumping Agreement and Article 12.2 of the SCM Agreement had fallen outside of the Panel's terms of reference. In addition, the Panel had rejected nearly the entirety of the United States' claims regarding causation under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, as well as other claims. China regretted that the Panel had found that China had failed to comply with the DSB's recommendations and rulings to "bring its measures into conformity" under the Anti-Dumping Agreement and SCM Agreement. He said that China would like to take this opportunity to provide some comments with regard to this finding, which could also be of interest to other WTO Members at the present meeting. Specifically, China was alarmed by one systemic issue in light of the Panel's ruling in this dispute. The Panel had ruled that some of China's conduct had been inconsistent with its WTO obligations. However, the original Panel had exercised judicial economy and not examined the alleged WTO-inconsistency in question. The consequence of this was worrying because it meant that China has had no opportunity to address these alleged inconsistencies prior to the Article 21.5 proceedings. Yet, China found it fundamentally unfair that it faced a finding of WTO-inconsistency.

5.5. China further explained that in the original Panel proceedings, the United States had claimed that China had acted inconsistently with Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement. The Panel had exercised judicial economy and had not ruled, or otherwise addressed, these claims. As such, there had been no recommendations by the Panel with regard to these claims. China had implemented the original Panel Report in good faith and had addressed the recommendations, which had actually been made by the original Panel. However, in its redetermination, China had not addressed any aspects on which the original Panel had remained silent. Thus, China had not taken any action with regard to the claims, for which the Panel had exercised judicial economy. In these Article 21.5 proceedings, the United States had made almost the exact same claim, namely, that China had acted inconsistently with Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement. But contrary to what had happened in the original proceedings, the Article 21.5 Panel had agreed with the United States and had found that China had acted inconsistently with its WTO obligations. China believed this could lead to systemic problems. First, China had not had an opportunity to address the alleged inconsistency. In implementing the original Panel's recommendations, China had not seen the need to address those issues where the Panel had had made no recommendations. If the Panel had found an inconsistency, China would have remedied, or at least would have had an opportunity to remedy, such WTO-inconsistency. However, there had been no finding and China could not know that it had to address the claims in question. China was of the view that it was unfair to have a ruling of WTO-inconsistency appear for the first time in an Article 21.5 proceeding because the responding party would not have had the opportunity to address such finding following the original Panel. In other words, the compliance Panel's finding essentially transformed a finding of judicial economy by the original Panel into a finding of WTO-inconsistency, albeit late into the process, not giving China a chance to address it. In keeping with international law and its WTO obligations, China had decided to implement the compliance Panel's decision. China added that, on 27 February 2018, MOFCOM had issued an announcement that it would terminate the anti-dumping and countervailing duties on broiler products from the United States. China attached great importance to the rule-based multilateral trading system, and was confused that, on the one hand, the United States was expecting the WTO dispute settlement system to continue operating "as usual" as in this dispute, while on the other hand, the United States appeared to actively work towards undermining the system by blocking the Appellate Body selection processes. China called on the United States to make every effort to sustain the WTO's dispute settlement system. China, once again, thanked the Panel and looked forward to continuing its work in building a stronger WTO.

5.6. The representative of the United States said that with respect to China's purported "alarm" regarding what it considered to be certain "unfair" findings by the compliance Panel, the United States noted that the original Panel had exercised judicial economy on certain US claims, taking the view that China would have to re-examine its analysis on account of other findings of inconsistency. In the redetermination, China had done nothing to address the problems and, instead, had continued to rely on a flawed and WTO-inconsistent analysis. The fault for that decision rested with China, not the compliance Panel. With respect to China's comments concerning the US position on Appellate Body matters, the United States would address that issue under Agenda item 7.

5.7. The DSB took note of the statements and adopted the Panel Report contained in WT/DS427/RW and WT/DS427/RW/Add.1.

6 EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA

A. Report of the Panel (WT/DS480/R and WT/DS480/R/Add.1)

6.1. The Chairman recalled that, at its meeting on 31 August 2015, the DSB had established a Panel to examine the complaint by Indonesia in the case "EU — Biodiesel (Indonesia)" (DS480). The Panel Report, contained in documents WT/DS480/R and WT/DS480/R/Add.1, had been circulated on 25 January 2018 as unrestricted documents. The Panel Report was before the DSB for adoption at the request of Indonesia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

6.2. The representative of Indonesia said that her country thanked the Panel and the WTO Secretariat for their work during this dispute. The Panel Report had affirmed Indonesia's claim in this dispute, namely, that the EU had imposed illegal anti-dumping measures on biodiesel from Indonesia. Her country considered it significant that by taking account of the claims and evidence, the Panel had not only substantively reaffirmed, but had gone beyond, the conclusions of the Report in the dispute "EU – Biodiesel" (DS473). Not only should the costs be based on the records of the company and based on the country of origin, but the Panel had also made important findings concerning the proper determination of profit, constructed export price and injury. Indonesia underscored several specific findings by the Panel. First, profit in the constructed value of Indonesian exporters had been overstated by failing to establish the cap and by failing to heed the actual facts on the record evidence. Second, the export price had been wrongly constructed by not basing it on the price to the first independent customer. Third, injury had been erroneously established by failing to establish the existence of significant price undercutting. Indonesia also highlighted that the EU had indirectly acknowledged the significance of these inconsistencies through its recent withdrawal of Court appeals. Specifically, these Court appeals had sought to overturn the judgments of the General Court (EGC) of the EU on the same subject, but had been dropped by the European Council almost simultaneously with the circulation of the Panel Report in this dispute. This also highlighted the excellent work of the Panel in discerning the substantive aspects of the case, as well their implications and importance. Nonetheless, the Panel's disagreement with Indonesia's claim, namely, that provisional duties that had been wrongly imposed and collected should be refunded, could have been a clear case for an appeal. However, given the present significant strain on the Appellate Body and the fact that the EU had committed during the Panel proceedings that it would work on an actual refund during the implementation phase, Indonesia had decided that an appeal was, thus, unnecessary. Indonesia thanked the EU for its commitment to refund the erroneously collected provisional duties. Indonesia hoped that, pursuant to Article 21.3 of the DSU, the EU would inform the DSB of its prompt and full implementation of the DSB's recommendations and rulings. Indonesia was pleased to have inscribed an item on the DSB Agenda requesting for the adoption of the Panel Report.

6.3. The representative of the European Union said that his delegation thanked the Panel and the Secretariat for their work on this case, and acknowledged the time and effort dedicated to this dispute. The EU was pleased that the Panel had rejected a number of Indonesia's claims of WTO-inconsistency with regard to the EU regulation imposing anti-dumping duties on imports of biodiesel from Indonesia. Regarding the Panel's findings reproducing the Appellate Body's findings in "EU – Biodiesel" (DS473), the EU referred to its statement made at the DSB meeting on 26 October 2016. Specifically, the EU took note of the Panel's and Appellate Body's clarification that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 did not preclude an investigating authority from using information on the cost of production "in the

country of origin" from sources outside the country as long as this information was apt or capable of yielding a cost of production in the country of origin. Regarding the other findings of the Panel, the EU took note of the Panel's clarifications, which were relevant for the specific circumstances of the case. In particular, the EU regretted that the Panel had rejected the EU's claim that the phrase "profits normally realized", within Article 2.2.2(iii) of the Anti-Dumping Agreement, permitted an investigating authority to disregard data on sales that were not considered compatible with normal commercial practice. The EU intended to comply with its WTO obligations and with the DSB's recommendations and rulings that would be adopted at the present meeting.

6.4. The DSB took note of the statements and adopted the Panel Report, contained in WT/DS480/R and WT/DS480/R/Add.1.

7 APPELLATE BODY MATTERS

A. Appellate Body Appointments: Proposal by Argentina; Australia; Plurinational State of Bolivia; Brazil; Canada; Chile; China; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; the European Union; Guatemala; Honduras; Hong Kong, China; India; Israel; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam (WT/DSB/W/609/Rev.2)

7.1. The Chairman said that this item was placed on the Agenda of the present meeting at the request of Mexico, on behalf of several delegations. He drew Members' attention to the proposal contained in document WT/DSB/W/609/Rev.2 and invited the representative of Mexico to introduce the proposal.

7.2. The representative of Mexico said that the following delegations: Argentina; Australia; Plurinational State of Bolivia; Brazil; Canada; Chile; China; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; the European Union; Guatemala; Honduras; Hong Kong, China; India; Israel; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam, had agreed to submit a joint proposal to launch the selection processes for the vacancies of the Appellate Body members. Mexico, speaking on behalf of the 63 Members, wished to state the following. The considerable number of Members submitting this joint proposal reflected the common concern about the current situation in the Appellate Body, which was seriously affecting the WTO's work and the overall functioning of the dispute settlement system and was against the best interest of WTO Members. The WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the selection processes for new Appellate Body members, as set out in the proposal submitted to the DSB. This proposal sought to, first, start the three selection processes, namely, one to replace Mr. Ricardo Ramírez-Hernández, whose second term of office had expired on 30 June 2017; a second process to fill the vacancy that had arisen with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; and a third process to replace Mr. Peter Van den Bossche, whose second term expired on 11 December 2017. Second, to establish a Selection Committee. Third, to set a 30-day deadline for the submission of candidacies. Fourth, to request that the Selection Committee circulate its recommendation within 60 days after the deadline for the nomination of candidates. While the proponents were flexible with regard to the deadlines for the selection processes, these should, however, reflect the urgency of the situation.

7.3. The representative of the European Union referred to the statements made by the EU on this matter in past DSB meetings since February 2017. With each passing month, the gravity and urgency of the situation increased. WTO Members had a shared responsibility to resolve this issue as soon as possible. The EU thanked all Members that co-sponsored the proposal, and invited all other Members to endorse this proposal, so that the new Appellate Body appointments could be made as soon as possible.

7.4. The representative of the United States said that the United States thanked the Chairman for his continued work on these issues. The United States was not in a position to support the

proposed decision. The United States had listened carefully to the interventions of other Members at the last meeting and appreciated the willingness expressed by some Members to engage on the important issues and concerns that the United States had raised. However, the DSB had yet to take any action to address the problem of persons continuing to hear appeals well after their terms of appointment, as set by the DSB, had expired. One former Appellate Body member continued to serve on an appeal, despite ceasing to be a member of the Appellate Body eight months ago. Another former member continued to serve on five appeals, more than any actual Appellate Body member, despite ceasing to be a member of the Appellate Body in December 2017. The representative of the United States said that some WTO Members may be comfortable with this situation, but it was not legal under the WTO's multilaterally agreed rules. Under the DSU, it was the DSB that had the authority to appoint Appellate Body members and to decide when their term in office expired.3 It would also be for the DSB to decide whether a person who was no longer an Appellate Body member could continue to serve on an appeal. The Appellate Body simply did not have the authority to "deem" someone who was not an Appellate Body member to be an Appellate Body member. Appointing Appellate Body members, or determining that a private individual could nonetheless serve on an appeal, was not a power that WTO Members had assigned to the Appellate Body.

7.5. The United States had heard a few Members say that Rule 15 did not raise any legal concerns for them because the DSU did provide to the Appellate Body the authority to establish its working procedures, or because it represented long-standing practice. Those assertions, however, were in error. Neither the Appellate Body's authority to draw up its Working Procedures nor "practice" could amend the DSU. As the Appellate Body itself had noted many years ago, "Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute'. Yet that is all that it says. Nothing in the DSU gives a panel the authority to disregard or to modify other explicit provisions of the DSU".4 Just as a panel may not disregard or modify the DSU through adoption of its working procedures, so too the Appellate Body may not disregard or modify the DSU through its working procedures. Similarly, the fact that the Appellate Body had taken the same action repeatedly did not change the rules in the DSU. The DSU set out the multilaterally agreed rules for WTO dispute settlement. If those rules were to be modified, this could only occur through agreement of all WTO Members.

7.6. The United States also recalled that the Appellate Body provided Members with a Background Note on Rule 15.[5] As the United States had noted previously, that communication appeared to raise more questions than it answered. In several respects, this document failed to provide a correct or complete presentation and therefore did not contribute to Members' consideration of this issue. First, the Appellate Body nowhere addressed the legal basis for including Rule 15 in working procedures that otherwise related to the consideration of appeals by Appellate Body members, not persons who were not Appellate Body members. Nor did the document address how continued service by an ex-Appellate Body member related to the DSB's appointment decision under Article 17 of the DSU. Instead, the Appellate Body appeared to rely on policy considerations of efficient functioning. Second, the Appellate Body asserted that "[u]ntil recently, the application of Rule 15 has never been called into question by any participant or third participant in any appeal, nor has it been criticized by any Member in the DSB when an Appellate Body report signed by an AB member completing an appeal pursuant to Rule 15 was adopted by the DSB".[6] Unfortunately, the Appellate Body appeared to have very carefully crafted this language in a manner to avoid mentioning that in fact Rule 15 had been "criticized by [a WTO] Member in the DSB" and had been "called into question" at the time of its adoption. That WTO Member had stated explicitly that Rule 15 had raised a "systemic concern" and "was contrary to Article 17.1 of the DSU".[7] The

[3] Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 17.1, 17.2.

[4] Appellate Body Report, "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products", WT/DS50/AB/R, para. 92.

[5] Background Note on Rule 15 of the Working Procedures for Appellate Body Review: Communication from the Appellate Body (JOB/AB/3) (24 November 2017) ("Background Note").

[6] Background Note, para. 2.

[7] DSB Meeting Minutes for 21 February 1996 at 12 (WT/DSB/M/11) (19 March 1996): India raised "a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, *inter alia*, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more

omission of this statement from the Appellate Body Background Note (JOB/AB/3) was misleading at best. WTO Members deserved to be fully informed of the facts, including that Rule 15 had been a serious concern from the very beginning. Third, the Appellate Body stated that Rule 15 "as initially conceived was intended to apply for relatively short periods of transition".[8] If this was the case, the Appellate Body had acted inconsistently with its own understanding of this provision in the past, not just the present. In some cases, an Appellate Body member had been appointed to a division shortly before their term had ended. In one case, the Appellate Body member had been appointed to a division just three days before the term had ended, meaning almost the entirety of the appeal had been expected to occur after the individual had ceased to be a member.[9]

7.7. Fourth, it was misleading for the Appellate Body Background Note to analogize to the rules of "some international tribunals" that remained unnamed.[10] The rules for those other tribunals were based on their constitutive texts. For example, the transition rule for the International Court of Justice was set out in its Statute, which was annexed to and an integral part of the United Nations Charter.[11] Unlike for those other tribunals, Rule 15 was not set out in the DSU and had not been agreed by WTO Members. Fifth, it was not clear from the communication whether the outgoing Appellate Body member participated in the Appellate Body's decision to "deem" them to be an Appellate Body member after their term expired. Rule 15 applied to a person "who ceases to be" a member. But some Appellate Body decisions authorizing a person to continue to work on an appeal had been taken prior to the expiry of that person's term of appointment. This raised the question whether the Appellate Body's decision under Rule 15 would be affected by that person's participation in that very decision.

7.8. Sixth, the Appellate Body indicated that a new Appellate Body member was not permitted to participate in the exchange of views of an appeal involving a former Appellate Body member.[12] The Note did not explain what was the legal basis for denying a legitimate Appellate Body member, appointed by the DSB, the ability to participate in the exchange. Rule 4(3) of the Working Procedures for Appellate Review stated that "the division responsible for deciding each appeal shall exchange views with other [Appellate Body] Members before the division finalizes the appellate report for circulation to the WTO Members".[13] It appeared that the Appellate Body could be treating a Rule 15 situation as an exception to Rule 4(3), without having amended the Appellate Body Working Procedures. These were but some of the questions raised by the communication addressed to WTO Members. As we had stated before, the Appellate Body simply did not have the authority to deem someone who was not an Appellate Body member to be a member. It was the DSB that had a responsibility under the DSU to decide whether a person whose term of appointment had expired should continue serving. The United States was resolute in its view that Members needed to resolve that issue first before moving on to the issue of replacing such a person. The United States therefore would continue its efforts and its discussions with Members and the Chairman to seek a solution on this important issue.

7.9. The representative of Canada said that his country deeply regretted that the DSB had been unable to fulfil its legal obligation under DSU Article 17.2 to appoint Appellate Body members as vacancies arose. Canada agreed that it was time to start a process or, if necessary, several processes to select new Appellate Body members for the three current vacancies. Canada was pleased to join the proposal submitted by more than 30 delegations and urged the DSB to adopt it without further delay. Like other Members, Canada was disappointed that the United States had

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than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU".

[8] Background Note, para. 6.

[9] Communication from the AB Secretariat to the DSB Chair (29 May 2008) (related to continued service by one person in "US – Continued Suspension" (WT/DS320) (AB-2008-5) and "Canada – Continued Suspension" (WT/DS321) (AB-2008-6)).

[10] Background Note, para. 3.

[11] Statute of the International Court of Justice, Art. 13(3) ("The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun."); UN Charter, Art. 92 ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.").

[12] Background Note, para. 4.

[13] Working Procedures for Appellate Review, WT/AB/WP/6, Rule 4(3) (16 August 2010).

linked the start of the Appellate Body selection processes to the resolution of certain procedural concerns that the United States had raised. At the previous DSB meeting, the United States had remarked that it "is resolute in it view that Members need to resolve [the Rule 15] issue before moving on the issue of replacing [outgoing Appellate Body members]". Canada appreciated the additional explanations, which had been provided by the United States at the present meeting, about its concerns. Canada invited the United States to engage in discussions with interested Members with a view to expeditiously developing a solution to the concerns that the United States had raised. Canada remained committed to working with other interested Members, including the United States, with a view to finding a way to address those concerns so as to allow the selection processes to start and be completed as soon as possible.

7.10. The representative of Panama said that her country thanked the Chairman for his report and his efforts in holding consultations with Members on this matter. Panama was concerned that, since the previous regular DSB meeting, this issue had not been resolved. Panama therefore regretted that, at the present meeting, Members had to raise this matter, once again, in the hope that delegations that had expressed concerns would demonstrate flexibility and approach this matter constructively. This situation did not only affect the dispute settlement system, but also the trade interests of all WTO Members who, through this system, asserted their rights and sought compliance with their obligations and commitments. The delay in filling the Appellate Body vacancies was affecting the dispute settlement system, which had already been overloaded with disputes. This resulted in financial losses for WTO Members and had a major impact on WTO Members' economies, having to wait even longer for the settlement of trade disputes. Panama was of the view that there was no reason to continue delaying the launch of the selection processes to fill the three vacancies in the Appellate Body. Panama therefore supported the statement made by Mexico, on behalf of over 60 co-sponsors, which proposed that the launch of the selection processes be treated as a matter of urgency. Panama also supported the statement that Colombia would make, on behalf of the GRULAC countries.

7.11. The representative of Colombia, speaking on behalf of the GRULAC countries, said that the WTO was undergoing a delicate period due to the blockage with regard to the Appellate Body selection processes. At the outset, Colombia wished to acknowledge the Chairman's efforts to seek a solution to the current problem, and thanked the Chairman for the opportunities that he had provided to Members to exchange views on this matter. Colombia reiterated its deep concern about the present situation, which affected the functioning of a key WTO body. If this problem prevailed without resolution, it would bring about the paralysis of the Appellate Body in the near future. This would, in turn, put the entire dispute settlement system at risk. With the continued delay in launching the selection processes, the WTO Membership was failing to comply with an existing mandate, and thus, breached its legal obligations under a covered agreement. This had serious systematic consequences and set a bad precedent for the WTO. This situation caused damage and affected the image and credibility of the WTO; in particular, given the complex international environment that was adversely affecting the multilateral trading system. Concerns had been raised regarding the functioning of the dispute settlement system and some specific issues regarding the decision-making process. These concerns had been linked to, present and future, Appellate Body vacancies, and thus, barred the WTO Membership from meeting its legal obligation. The proper functioning of the system should not be undermined because the concerns of some Members had not been addressed. Colombia called on the WTO Membership to understand the gravity of a continued blockage. The selection processes should be delinked from unrelated concerns and should be addressed on the basis of their own merit. In this regard, Colombia urged WTO Members to find a solution that would allow the WTO Membership to meet its legal obligation. Colombia requested the Chairman to continue to seek a solution on this matter.

7.12. The representative of Norway said that her country fully endorsed Mexico's statement. Norway also welcomed the new co-sponsors of the proposal. Norway was deeply concerned about the situation in the Appellate Body, and believed that it was essential to launch the selection processes to fill the present vacancies on the Appellate Body. There was no doubt that the WTO depended on the Appellate Body that functioned well. Norway referred to its previous statements and reiterated that it remained open to engage in a constructive dialogue with WTO Members to resolve any concerns that had been raised about the Appellate Body. Nonetheless, Norway was not ready to allow the current system to be at risk and, therefore, encouraged all WTO Members to prevent a serious crisis in the Appellate Body. In this regard, Norway urged the WTO Membership to support the immediate launch of the Appellate Body selection processes.

7.13. The representative of Australia said that her country continued to support the proposal to commence the selection processes to fill current vacancies on the Appellate Body as a matter of priority. Australia looked forward to the proposal receiving further support from the WTO Membership. Australia referred to its previous statements made before the DSB on this matter and continued to encourage all WTO Members to work together to build trust, exercise the necessary flexibility and show commitment to find a mutually acceptable way forward.

7.14. The representative of Brazil said that most of what had to be said about this Agenda item seemed to have already been said in the fourteen months that the WTO Membership had been discussing this matter in the DSB. The concerns with Rule 15 of the Working Procedures for Appellate Review, if they had ever really been the problem, could have been resolved a long time ago, especially if the United States had engaged in the discussions and submitted concrete proposals. The United States, in its statement and in reference to the issue of mandates, had mentioned Article 17.2 of the DSU, while omitting Article 17.1, which established the Appellate Body as a body composed of seven persons, and Article 17.9, which attributed to the Appellate Body the authority to draw up its own working procedures. Brazil welcomed the new co-sponsors of the joint proposal, namely, Bolivia, India and Israel. The number of co-sponsors amounted to 64 now, of diverse regions, making it a very representative proposal. As the WTO Membership seemed to be inexorably, albeit inexplicably, approaching the paralysis of the Appellate Body that 23 years ago WTO Members had designed and helped thrive, Brazil would like to extrapolate for a moment the issue of the selection processes and make two general comments.

7.15. First, Brazil invited WTO Members to contemplate on the potential absence of the Appellate Body, rather than on its presence, as a cornerstone of the dispute settlement system. Without the Appellate Body, the scenario would be the following, after the issuance of a panel report, there would be no appeal or review stage available in cases where one or several of the parties consider the report to lack solid reasoning. In a complex, important matter, there would be no opportunity to get a second assessment, which was almost an expected objective in cases, which dealt with strategic issues like industrial policy, public health and domestic subsidies. WTO Members would have to convince domestic private and governmental stakeholders to undertake serious changes in legislation on the basis of decisions, which had been taken by only one instance, which, in certain cases may have failed to make the proper assessment. In the situation of having different interpretations given by panels to similar cases, there would be no further adjudicatory instance to harmonize them. What could serve right in one case as a complainant, could come back to haunt the same Member as a defendant. From a systemic but also from a pragmatic point of view, it made sense to have the best possible decision, based on solid reasoning and interpretation of the legal provisions. Without a permanent Appellate Body, the independence of members selected by consensus would disappear. Appellate Body members were selected to decide a particular case irrespective of their nationality, while at the panel level, a panelist more than often may be objected in future cases if one of the parties was displeased with the outcome. Thus, in the absence of the Appellate Body, the WTO would be back to the GATT times. History books of that era could demonstrate that the features just described had been exactly those that Members had sought to fix and improve, and which had finally been reflected in the DSU. Although further improvement was always possible, it seemed that dismantling the Appellate Body would take us back to the past. Brazil asked the DSB whether this was really what WTO Members wanted.

7.16. A second point that deserved reflection by Members was whether or not an argument, which was frequently repeated in the recent past, merited any credit. There was the position that the Appellate Body was overstepping its duties when it "interprets" the trade agreements and when it created jurisprudence, instead of simply "applying" the provisions. This assertion did not cease to appal legal scholars because it presupposed that a panel or the Appellate Body acted in a vacuum, where there was only one crystal clear meaning in any given provision. If this had been so, then there would have not been any disputes, and provisions of the WTO Agreement would be "producing their effects smoothly over time". There seemed to be provisions that appeared to work like that. In practice, however, the 540 cases, which had been initiated thus far, indicated that disputes arose precisely because WTO Members defended different, competing interpretations about the same provision. As WTO Members had established in Article 3.2 of the DSU, panels and the Appellate Body were tasked, when WTO Members claimed and argued conflicting interpretations, to clarify the existing provisions in accordance with the customary rules of interpretation of public international law. It was interpretation that gave a voice to the legal provision; it was interpretation that allowed the specific provision to reveal its meaning. WTO Members had been very much aware of that when they had defined the scope of the WTO dispute

settlement system in Article 3.2 of the DSU. Any adjudicator under the DSU would have, in any given dispute, to assess, discern and find what claims were justified and which ones had no foundation at all, or more than often, would have to weigh between claims, which had varying degrees of legal merit. The conclusion from the above was that some of the criticism regarding the Appellate Body was not so much about specific behavioural aspects of how the Appellate Body operated, such as with regard to Rule 15, but rather revealed uneasiness about the very existence of the Appellate Body. The Appellate Body could evolve and be improved in different ways. However, its essential structure could not withstand, without ceding under the weight of internal contradictions, the attempt to change its very nature, which was typical and common for all second instance adjudicating bodies. It had to be clear to WTO Members that if the ultimate purpose of the current impasse was the transformation of the Appellate Body into something it had not been conceived for, then WTO Members should change the title of the present debate from "Appellate Body Matters" to "Alternatives to the Current Appellate Body". Brazil did not believe that the DSB wished to engage in this. On the contrary, there was the clear need by all participants in the dispute settlement system to count on a fully functioning and independent Appellate Body. It seemed the time had come for WTO Members to restore the Appellate Body to its full capacity.

7.17. The representative of Japan thanked the co-sponsors for the proposal to launch the selection processes to fill the three vacancies in the Appellate Body. Japan supported the proposal. The DSB was, yet again, unable to launch the selection processes. Currently seven appeals were pending before the Appellate Body, of which one appeal had been initiated in 2016 and the remaining six in 2017. Of those seven pending appeals, the oral hearings were yet to take place for four appeals. For instance, as for the two appeals initiated in September 2017, the oral hearings were not scheduled until May and June 2018, respectively. New appeals were expected, all of which had to be assigned to any three members of the Appellate Body who totalled at present four. This would mean that any new appeals could be further delayed and could take a number of months to complete and would very likely exceed a year. The WTO Membership was creating a situation, whereby a losing party at the panel stage could hinder the whole process and further delay the implementation of the DSB's recommendations and the ultimate resolution of the dispute, by filing an appeal irrespective of merits of its case. Such situation was unacceptable and inappropriate and contradicted the very principle for a prompt settlement of disputes, as enshrined in the DSU. Japan emphasized, once again, that it was the responsibility of the entire WTO Membership, acting as the DSB, to ensure the proper functioning of the dispute settlement system in a manner consistent with the DSU. To resolve an issue it was necessary to have a clear understanding of what the actual issue was. The more specific the question was, the easier it was to find a possible solution. In previous DSB meetings and at the present meeting, the United States had raised concerns with regard to Rule 15 and indicated its concerns as the basis for its position not to support the launch of the selection processes. For instance, at the DSB meeting of 22 January 2018, the United States had stated "It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving. The United States is resolute in its view that Members need to resolve that issue first before moving on to the issue of replacing such a person". At the same meeting, the United States had also questioned the applications of Rule 15 and their consequences and had asked "is this reasonable or appropriate?" The issue, which the United States viewed that "WTO Members need to resolve … first before moving on to the issue of" the selection processes, appeared to be confined to the legal question associated with Rule 15 and the "reasonableness" or "appropriateness" of the way Rules 15 applied under the current circumstances of the WTO dispute settlement system. Leaving aside the modality or sequence of the issues to be addressed, as reported by the Chairman at the DSB meeting of 22 January 2018, these were precisely the issues several concerned delegations were debating and for which they sought a solution. Japan was of the view that the question of how to ensure the proper functioning of the Appellate Body during a time of "transition" was a common thread of the concerns linked to Rule 15 and the start of the selection processes. This was indeed a good opportunity for the DSB to clarify and improve transitional arrangements for the Appellate Body in a manner consistent with the DSU. Japan noted that the United States had acknowledged "a willingness of delegations to work together on this issue to find a way forward" and had stated "We … will continue our efforts and our discussions with Members and with the Chair[man] to seek a solution on this important matter". This was the statement made by the United States on 22 January 2018 and the United States made a similar statement at the present meeting. Japan welcomed the engagement by the United States and reiterated that Japan would continue to work with other interested delegations to assist the DSB in this common endeavour.

7.18. The representative of Israel said that his country thanked the Chairman for his efforts and supported the statement and proposal, which had been introduced by Mexico, on behalf of the co-sponsors. Israel referred to its previous statements on this matter, and reiterated, once again, its call for a prompt launch of the Appellate Body selection processes. A delay to do so had serious systemic repercussions. Israel was open, willing and committed to address any concerns any Member would have in relation to the functioning of the Appellate Body, but underscored that this should not stand in the way of launching the selection processes.

7.19. The representative of Singapore reiterated his country's serious systemic concerns on the lengthy delays in launching the Appellate Body selection processes. Singapore had co-sponsored this joint proposal to launch the selection processes since its introduction at the November 2017 DSB meeting. The growing number of co-sponsors since then indicated the increasing concern that WTO Members had over this impasse. Singapore noted that a third vacancy in the Appellate Body had arisen in December 2017. Given its heavy workload and significance, a fully-staffed Appellate Body was crucial to the proper functioning of the WTO dispute settlement system. To this end, it was essential that the vacancies in the Appellate Body be expeditiously filled. Systemic concerns, which had been raised, could be discussed in a separate process. Singapore stood ready to engage constructively with WTO Members and the Chairman to help resolve this impasse.

7.20. The representative of Turkey said that his country thanked the United States for having shared its concerns with regard to the Appellate Body. Turkey endorsed the statement made by Mexico, on behalf of the co-sponsors of the proposal to launch the AB selection processes. Turkey recalled that at the DSB meeting of 22 January 2018 this issue was raised and reiterated Turkey's position that the concerns raised by the United States with regard to the Appellate Body should be dealt with separately and should not block the launch of the selection processes to fill the three vacant AB positions. Turkey shared the concerns expressed by a number of Members at the present meeting, and noted that if the selection processes were further delayed, more concerns with regard to the functioning of the Appellate Body could emerge. For this reason, Turkey believed that the selection processes had to be launched without further delay.

7.21. The representative of China said that his country welcomed the new co-sponsors of the proposal on AB appointments. China reiterated that the growing number of co-sponsors of the joint proposal demonstrated the increasing concern among the WTO Membership over the present impasse. China invited all other WTO Members to support the proposal so that the vacancies could be filled as soon as possible. China had listened carefully to the statements made by the United States. It seemed that the United States continued to use the blockage as a leverage to achieve its short-term policy objectives. China regretted that the selection processes could not be launched at the present DSB meeting as a result of the US action. China shared the concerns expressed by the previous speakers other than the United States and referred to its previous statements under this Agenda item. Although China remained open to engage in the discussion on Rule 15 of the Working Procedures for Appellate Review, China did not share the US view that this rule raised any concerns. As China had previously stated, a careful reading of the DSU suggested that the Appellate Body was acting precisely within its mandate, in including Rule 15 of the Working Procedures for Appellate Review. China held this position for two reasons. First, Rule 15 applied only to "[a] person who ceases to be a Member of the Appellate Body", and therefore, did not extend the terms of the Appellate Body members. Second, a past DSB decision supported the inclusion of Rule 15 in the Working Procedures for Appellate Review. Rule 14 of Establishment of the Appellate Body (WT/DSB/1), which had been adopted by the DSB in 1995, provided that "Matters such as guaranteeing the rotation required by the DSU…should form part of the working procedures". By allowing the Appellate Body members, whose terms had expired, to finish the cases to which they had previously been assigned, Rule 15 clearly guaranteed the rotation required by the DSU, and should, thus, form part of the Working Procedures for Appellate Review.

7.22. As Members had repeatedly pointed out, dispute settlement was one of the major WTO functions, and the Appellate Body was a critical component of this mechanism. The integrity, independence and impartiality of the Appellate Body contributed immensely to the proper settlement of disputes between WTO Members, and ensured the predictability of WTO rules. In addition, Article 17.2 of the DSU specifically provided that "[v]acancies shall be filled as they arise". Therefore, it was the responsibility and obligation of the DSB to ensure the timely appointment of new Appellate Body members when vacancies arose. By linking the initiation of selection processes and the alleged systematic concerns, the United States failed to fulfil its obligation and was undermining the proper functioning of the dispute settlement system. China

regretted this situation. At the present meeting, the United States continued to refuse to end the blockage and again refused to provide any concrete proposal on how to resolve the concerns it had raised. China urged the United States to lift the blockage. China urged Members to strengthen the dispute settlement mechanism rather than undermining its proper functioning. China also reminded the United States that if the Appellate Body were destroyed, not only the functioning of the multilateral trading system, but also the interests of the United States would be diminished. China looked forward to working with all WTO Members to launch the selection processes as soon as possible.

7.23. The representative of Uruguay said that her country reiterated its concerns with regard to the current paralysis to launch the Appellate Body selection processes. In this regard, Uruguay referred to its previous statements made under this Agenda item. Uruguay endorsed the joint proposal, which had been submitted by Mexico. As was noted by a number of other delegations, the support for the proposal among the WTO Membership was diverse and significant. Uruguay also endorsed the statement made by Colombia, on behalf of the GRULAC countries.

7.24. The representative of Pakistan referred to its previous statements under this Agenda item and reiterated its concern that the DSB had been unable to fulfil its obligation enshrined in Article 17.2 of the DSU to appoint Appellate Body members as vacancies arose. Presently, there were three vacancies, which remained to be filled. Pakistan, once again, urged all Members to discuss this matter with an open mind and to delink it from the regular functioning of the Appellate Body. Pakistan also urged WTO Members to show the utmost flexibility in order to ensure that the WTO Membership surpassed this deadlock, for the benefit of the system. As co-sponsor, Pakistan supported the proposal put forward by Mexico to fill the vacancies that had arisen in the Appellate Body. The wide range of WTO Members supporting this joint proposal was ample proof of the shared concern with the present situation in the Appellate Body that was adversely affecting its workings and the overall functioning of the dispute settlement system. Thus, it was essential to launch the selection processes for the new Appellate Body members, as submitted before the DSB at the present meeting. By failing to act at the present meeting, Members would sustain the present situation, which was seriously affecting the workings of the Appellate Body against the best interest of WTO Members and the multilateral trading system.

7.25. The representative of Mexico, speaking on behalf of the 63 co-sponsors of the proposal, said that the proponents regretted that, for the ninth time, Members had not achieved consensus to start the selection processes for the vacancies of the Appellate Body and had, thus, failed to fulfil their duties as WTO Members. No discussion should prevent the Appellate Body from continuing to fully operate, and Members should comply with their obligation under the DSU, to fill the vacancies as they arose. By failing to act at the present meeting, the WTO Membership would sustain the current situation, which was seriously affecting the work of the Appellate Body against the best interest of its Members. The co-sponsors of the proposal continued to urge all WTO Members to support the proposal in the interest of the multilateral trading system and the dispute settlement system.

7.26. The representative of Kazakhstan said that her country associated itself with the statements made by other delegations who had urged the entire WTO Membership to launch the Appellate Body selection processes as soon as possible. Kazakhstan said that it would be helpful if the United States could clarify some questions with respect to some of the points the United States had made at the present meeting. First, Kazakhstan asked if its understanding was correct that the United States requested that an item should be inscribed on the DSB Agenda every time when an Appellate Body member's term would expire in order to take a decision as to whether s/he could continue serving on the appeals to which s/he had been assigned. Second, if so, Kazakhstan asked the United States to identify which provision in the DSU mandated the DSB to take such decision. Third, if such provision did not exist in the DSU, Kazakhstan requested the United States to elaborate how the WTO Membership should approach this issue. For instance, should such provision be included in the DSU or be adopted as a stand-alone rule. Kazakhstan said that it looked forward to the replies by the United States by the next DSB meeting.

7.27. The representative of Switzerland said that, as a co-sponsor of the proposal submitted by Mexico, his country had expressed its concerns about this issue on a number of occasions. Switzerland continued to believe that it would be essential for WTO Members to engage in an effective dialogue on how to resolve the crisis. Barring a willingness on all parts to do so, the spectre of the Appellate Body losing even more members, and eventually its minimal quorum, was

looming ever larger. For Switzerland, the WTO, with its dispute settlement mechanism, was the bedrock of trade policy and a key pillar of global economic governance. Accordingly, while still hoping for a solution to be found in time, the on-going crisis and, all the more so, the possibility of the Appellate Body going out of business, were deeply worrying for Switzerland.

7.28. The representative of Honduras said that her country endorsed the statement made by Mexico, on behalf of the co-sponsors of the proposal, and by Colombia, on behalf of the GRULAC countries. Honduras also thanked the Chairman for his tireless efforts in finding a solution to the present blockage. The dispute settlement system was one of the key pillars of the WTO, and Honduras had been an active participant in the dispute settlement system. Honduras reiterated its systemic concerns with the present situation, a blockage that could compromise this key pillar, and eventually, the entire multilateral trading system. Honduras, thus, urged all WTO Members to demonstrate flexibility and willingness to resolve the present problem as soon as possible, as it was in the best interest of all WTO Members and the multilateral trading system as a whole.

7.29. The representative of Chinese Taipei said that Chinese Taipei was pleased to contribute to the system by supporting the joint proposal and welcomed the new co-sponsors of the joint proposal. However, Chinese Taipei also regretted that, once again, the DSB could not initiate the selection processes at the present meeting. Chinese Taipei reiterated that it stood ready to work with other Members to find a solution without further delay.

7.30. The representative of Korea said that his country endorsed Mexico's statement, on behalf of the 63 co-sponsors. Korea was, however, disappointed that the DSB had failed to launch the selection processes at the present meeting. As many other delegations had mentioned, this was a matter of urgency, which had to be dealt with immediately. In this regard, Korea would like to invite others that had not yet joined the proposal to co-sponsor this joint effort. With regard to the statement made by the United States at the present meeting, Korea saw no basis of linking the selection processes to the issue of Rule 15. Korea was, nevertheless, willing to engage in the discussion, in good faith, with the aim of making progress to unblock the current situation.

7.31. The representative of New Zealand said that her country wished to thank Mexico, once again, for its statement and for all of its hard work. New Zealand fully supported the proposal to launch the process to fill the three Appellate Body vacancies as soon as possible. New Zealand referred to its statements made under this Agenda item at previous DSB meetings. Like others, New Zealand reiterated the urgency of appointing new Appellate Body members and underscored its disappointment that this had not been possible at the present meeting. A predictable, rules-based trading system was critical for all WTO Members. New Zealand stood ready to work constructively with other WTO Members to resolve the present impasse and ensure that the dispute settlement mechanism would continue to fulfil its essential role in the broader WTO system.

7.32. The representative of the European Union said that his delegation referred to the EU statements made at the regular DSB meeting of November 2017 and January 2018. Although the EU did not think that Rule 15 was a problem and considered that Rule 15 was legitimate, the EU was nevertheless ready to engage in discussions on Rule 15, if that would help unblock the appointments to the Appellate Body. The EU said that it was still waiting for such engagement, on the part of the delegation that was blocking the Appellate Body appointments. The EU had still not seen any such engagement. Under the current rules, the Appellate Body had the full authority to apply Rule 15 as it had done for Mr. Ramírez and Mr. Van den Bossche. This had been especially important in the current context, where the Appellate Body was not fully composed. These decisions had therefore been needed in order to maintain the stability of the dispute settlement system, to deal with the unprecedented workload of appeals and to preserve the rights of participants and third participants in pending appeals. Therefore, the EU welcomed these decisions and wished to, once again, express its gratitude to the Appellate Body and its staff for their continued work in this difficult context.

7.33. The representative of the United States said that, at the present meeting, the United States had heard only two WTO Members express the view that the Appellate Body had the authority to "deem" someone who was not an Appellate Body member to be a member of the Appellate Body for the purposes of a particular appeal. Of those two Members, only one had put forward any argument for this position. The United States took this opportunity to comment on that argument. That Member asserted that the rotation required by the DSU provided the legal basis for Rule 15.

This argument exhibited a fundamental misunderstanding of the DSU. Article 17.1 provided, in relevant part, that the Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body". Rotation, as used in this provision, was concerned with ensuring variation among the individuals serving in different cases. The United States failed to see how this rotation had any relevance to the question raised by Rule 15, namely, the continued service on an appeal by an individual that had ceased to be an Appellate Body member. At the present meeting, the United States had also heard certain WTO Members express a willingness to engage on the important issues and concerns that the United States had raised. The United States looked forward to that engagement.

7.34. The Chairman said that it was regrettable that the DSB was not in a position at the present meeting to reach consensus to launch the selection processes. Obviously, the matter was becoming increasingly complex. The United States had initially questioned the Rule 15 "transition" procedure when it had objected to the launch of the Appellate Body selection processes. In response, he had conducted informal consultations with interested WTO Members to discuss Rule 15 and some related issues. There was a sense, however, that many WTO Members were not ready to further proceed without more clarity about the US position, namely, what were the actual issues that needed to be addressed and resolved. The Appellate Body was currently reviewing seven cases and more cases would be brought to the Appellate Body in the near future. If the vacancies on the Appellate Body were not filled quickly, it would be almost certain that further delay in the appellate proceedings would ensue. The sense of crisis and urgency, which many Members had expressed at the present meeting, should be shared by all Members and be translated into action. For that, political engagements by all WTO Members would be needed. While there was a need to address procedural issues, WTO Members also needed more conversations on broader questions, so that the WTO Membership could build necessary trust among itself. He noted that his time as DSB Chairman was drawing to a close, but that he would continue informal consultations on this matter until the next, and his last, regular DSB meeting in March 2018, with the objective to gather Members' views and facilitate conversation. He then urged those delegations that had any views on this matter to contact him directly.

7.35. The DSB took note of the statements.

8 INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

A. Statement by Indonesia

8.1. The representative of Indonesia, speaking under "Other Business", said that, at the meeting held on 22 November 2017, the DSB had adopted the Panel and the Appellate Body Reports in these disputes. At that meeting, Indonesia had emphasised that it would take a lot of effort and time for Indonesia to implement the DSB's recommendations and rulings because of the profound implications of these measures. In its communication to the Chairman, dated 15 December 2017, Indonesia had informed the DSB that "it is impracticable for Indonesia to comply immediately with the recommendations and rulings of the DSB and therefore it requires a reasonable period of time in which to do so". On 22 January 2018, at the first DSB meeting, which had been held after the adoption of the Panel and Appellate Body Reports, Indonesia had stated that it had fully understood its obligation, and that it was currently studying implementation options. Despite of this statement, New Zealand and the United States appeared to need more clarity as to whether Indonesia intended to implement the DSB's recommendations in these disputes. Indonesia, thus, wished to reiterate that it intended to implement the DSB's recommendations in these disputes.

8.2. The representative of the United States said that the United States welcomed Indonesia's clarification and confirmation at the present meeting that it intended to comply with the DSB's recommendations and rulings in this dispute. The United States recalled that the DSB had found that each of the 18 Indonesian measures at issue in this dispute were inconsistent with Indonesia's WTO obligations. Given the severely restrictive nature of Indonesia's measures on importation of horticultural products, animals, and animal products, and how long they had been in place, the United States expected that Indonesia would promptly remove all of these WTO-inconsistent barriers.

8.3. The representative of New Zealand said that her country thanked Indonesia for its confirmation that it intended to implement the DSB's recommendations and rulings in this dispute which had been adopted on 22 November 2017. New Zealand looked forward to working with Indonesia towards achieving prompt, effective, durable and WTO-consistent compliance in this matter. This was in both countries' mutual interests.

8.4. The DSB took note of the statements.