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Dispute Settlement Body
12 January 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 12 JANUARY 2018

Chairman: Mr. Junichi Ihara (Japan)

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1 UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA

A. Report of the Panel (WT/DS488/R and WT/DS488/R/Add.1)

1.1. The Chairman recalled that at its 25 March 2015 meeting, the DSB had established a Panel to examine the complaint by Korea pertaining to the dispute "US – OCTG (Korea)". The Report of the Panel, contained in documents WT/DS488/R and WT/DS488/R/Add.1, had been circulated on 14 November 2017, as unrestricted documents. He noted that the Panel Report was before the DSB for adoption at the request of Korea. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

1.2. The representative of Korea said that Korea wished to thank the members of the Panel and the Secretariat for their hard work in the dispute "US – OCTG (Korea)". His country considered this dispute to be an important case that clarified the obligations of investigating authorities under the Anti-Dumping Agreement, especially in using data from a global producer with no record of sales or production in the exporting country's home market for the calculation of constructed value (CV) and in defining the concept of the "same general category of products" under Article 2.2.2 of the Anti-Dumping Agreement. In its Report, the Panel had correctly found that an investigating authority's discretion in selecting a CV profit source was not without limits, and that investigating authorities must comport with the requirements of the Anti-Dumping Agreement when calculating CV profit. Specifically, the Panel had found that the chapeau of Article 2.2.2 required investigating authorities to use respondents' actual data for sales of the like product in the ordinary course of trade, and that low volumes of sales did not absolve an investigating authority from meeting this obligation.[1] Accordingly, the Panel had determined that the USDOC had acted inconsistently with the Article 2.2.2 chapeau in failing to use the Korean respondents' own sales data to calculate CV profit.[2] In addition, the Panel had found that the USDOC had applied an overly narrow definition of the "same general category of products", by defining this as more narrow than its definition of a "like product". Korea noted that, accordingly, the USDOC did not have a proper basis to conclude

[1] Panel Report, para. 7.47.
[2] Panel Report, para. 7.56.

that the methods under Article 2.2.2(i) could not have been used, and that it could not have calculated a profit cap in accordance with Article 2.2.2(iii).[3] In its Report, the Panel had also found that Article 2.2.2(iii) imposed a mandatory requirement for investigating authorities to calculate and apply a profit cap when determining CV profit, and accordingly, the USDOC's failure to calculate a profit cap had resulted in a violation of Article 2.2.2(iii) and Article 2.2.[4] Korea also noted that, with these findings, the Panel had confirmed that the Korean respondents, despite their full cooperation in the investigation, had been subject to dumping rates that had been unfair and that had been calculated based on erroneous legal standards. While Korea was satisfied with the Panel's important findings on the issue of CV profit, Korea did have some concerns with some of the Panel's other findings. In particular, Korea said that it registered its disappointment that the Panel had failed to properly assess the magnitude of the US political pressure that had persistently forced the US investigating authority to deviate from the legal standards set out in the Anti-Dumping Agreement throughout its investigation against targeted Korean producers. Korea was of the view that despite the USDOC's preliminary finding that the Korean OCTG producers had not engaged in unfair pricing practices, the USDOC, after having faced significant political pressure, has had to make a drastic change in its final determination where it had recalculated double digit and near double digit dumping margins on the Korean producers. For instance, the administrative record of the investigation contained evidence of dozens of *ex parte* communications between the USDOC, the US industry and Congressional representatives, including a letter that had been signed by over 50 US senators discussing specific issues in the case, such as cost of production and profit rates. Another similar letter had also been signed by over 150 members of the US House of Representatives. Korea noted that this was the evidence that the Panel had failed to take into account in assessing the impact of the political pressure on the outcome of the investigation. Moreover, the Panel had not fully recognized the legal significance of the USDOC's decision to accept the US petitioners' untimely submission of the financial statements of Tenaris, a global OCTG producer that had no record of sales or production in Korea. This had been done without notifying all interested parties, which, as a result, had caused serious prejudice to the Korean respondents. Even though the Panel's findings were not 100% satisfactory, Korea believed that the Panel's findings – if properly implemented by the United States – would significantly alleviate the prejudice suffered by the Korean OCTG producers in this investigation. Taking this into account, Korea closely consulted with the United States to examine the feasibility of not appealing, which in turn would also alleviate the current workload in the Appellate Body. Korea therefore requested the DSB to adopt the Report of the Panel in dispute DS488, and looked forward to working with the United States to achieve the prompt and proper implementation of the DSB's recommendations and rulings.

1.3. The representative of the United States said that the United States would like to begin by thanking the members of the Panel and the Secretariat assisting them for their work on this dispute. While the United States was disappointed with certain aspects of the Panel's findings, the United States acknowledged the Panel's thorough review of the legal arguments that had been put forward by the parties. Korea had raised a number of claims under a variety of provisions of the Anti-Dumping Agreement and the GATT 1994. The Panel had rightly rejected the majority of those claims. In particular, the United States welcomed the Panel's finding that Korea had not established that Article 2.2 of the Anti-Dumping Agreement required an authority, where home market sales were not viable, to evaluate third-country export sales before determining whether to construct normal value. No such requirement existed in the text of Article 2.2, and the Panel had been correct to decline Korea's invitation to read such an obligation into the Anti-Dumping Agreement. The United States also appreciated the Panel's rejection of Korea's arguments under Article 2.3 of the Anti-Dumping Agreement. The United States said that Korea's arguments had essentially asked the Panel to review US compliance with US law, not with the text of the Anti-Dumping Agreement. That was not an appropriate task for a WTO panel, and the Panel had been correct to reject Korea's claim.

1.4. The United States said, however, that it was disappointed with the Panel's findings that the US Department of Commerce's calculation of constructed value profit had not been consistent with certain obligations set out in the Anti-Dumping Agreement. The Panel had found that the United States had acted inconsistently with the chapeau of Article 2.2.2 because it had not determined profit for constructed value based on actual data pertaining to sales of the like product in the home market. It made little sense in light of the structure of the Anti-Dumping Agreement

[3] Panel Report, para. 7.75.
[4] Panel Report, paras. 7.108-7.109.

to suggest that, where an investigating authority determined under Article 2.2 that home market sales were inappropriate for "a proper comparison", the authority was nevertheless obligated to collect data regarding those sales under Article 2.2.2 when constructing normal value. The Panel's findings were potentially very burdensome for foreign respondents, who must gather and provide this additional, and potentially voluminous, data. The Panel had also found that the United States had acted inconsistently with Articles 2.2.2(i) and (iii) in relation to profit because the US Department of Commerce had supposedly relied on a narrow definition of the "same general category of products". But the Panel appeared not to have understood the Department's definition of the "same general category of products", which had included all OCTG products subject to the anti-dumping investigation. The United States noted that the Panel's mistake had been based in part on its reference to a separate anti-dumping determination submitted by Korea – evidence that had not formed part of the record before the Department of Commerce and upon which the Panel therefore should not have relied. The Panel otherwise had rejected, had found to be outside of its terms of reference, or had exercised judicial economy on other claims raised in this dispute.

1.5. The United States said that it appreciated the Panel's careful examination of the arguments presented by the parties and third parties to this dispute. The Panel had appropriately limited its findings only to those issues necessary to assist the DSB in making the recommendation provided for in the DSU, consistent with its terms of reference under DSU Article 7.1 and its role under DSU Article 11. Although the United States was disappointed with certain findings of the Panel, on balance, the United States had decided to permit the Report to be adopted at the present meeting. The United States said that it took this step in light of all the circumstances, including the overall quality of the Panel Report, and encouraged other Members similarly to consider the nature and number of appeals they filed. The United States said that it again thanked the Panel and the Secretariat assisting it for its work on this dispute, and it thanked Members for their attention to the US statement.

1.6. The DSB took note of the statements and adopted the Panel Report contained in WT/DS488/R and Add.1.

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

A. Recourse to Article 22.2 of the DSU by the United States (WT/DS456/18)

2.1. The Chairman drew attention to the communication from the United States contained in document WT/DS456/18, and invited the representative of the United States to speak.

2.2. The representative of the United States said that, on 19 December 2017, the United States had requested authorization from the DSB to suspend concessions or other obligations with respect to India due to its failure to comply with the recommendations and rulings of the DSB in this dispute.[5] On 3 January 2018, India had submitted a communication in which it objected to the US request.[6] The United States said that it had just used the term "objected", but it was necessary to be precise. Under Article 22.6 of the DSU, "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time" unless the United States joined a consensus to reject the request – which the United States did not – or unless India, and the United States further quoted, "objects to the level of suspension proposed" by the United States. India's communication made a bare reference to Article 22.6 of the DSU in a heading of the document. But India's communication nowhere stated that it "objects to the level of suspension proposed" by the United States. Therefore, the DSB needed absolute clarity from India. If India clarified at the present meeting that it "objects to the level of suspension proposed" by the United States, then the matter was referred to arbitration pursuant to Article 22.6 of the DSU. If India failed to clarify that it was making the objection provided for in Article 22.6 of the DSU, then the matter will not have been referred to arbitration, and the DSB shall grant the authorization requested by the United States.

2.3. In its communication, India asserted that the US request was supposedly "invalid" for a number of reasons. The United States said that none of those reasons had merit, as it would explain shortly. But, the United States said that two points bore emphasis at the outset. First, none of the reasons cited by India had any basis in Article 22.6 of the DSU and thus could not

[5] WT/DS456/18.
[6] WT/DS456/19.

prevent the DSB from granting the authorization requested by the United States. Second, nowhere in India's communication, nor in the "status report" that India had submitted on 14 December 2017 claiming compliance[7], did India identify even a single measure or action that it had taken to come into compliance. Therefore, India had provided no basis for its assertion of compliance. In that circumstance, and without any other bilateral explanation from India, the United States had no choice but to make the request for authorization to preserve its rights under the DSU – the same choice that many other WTO Members had made in other disputes.

2.4. India's communication asserted three grounds on which the US request was supposedly "invalid", but India's complaints were unavailing. The United States said that it hesitated to take up the DSB's time unnecessarily, but because India had circulated its views to Members, the United States considered it useful to explain just why these three assertions were irrelevant, and would contradict and undermine the DSU as agreed by Members. The United States said that India was incorrect that the United States had not sufficiently indicated a level of nullification and impairment or why it considered that India had not complied, that there was an obligation on a complaining party to seek to negotiate compensation, or that no request under Article 22.2 could be made before procedures were completed under Article 21.5 of the DSU.

2.5. First, the text of the DSU contradicted India's contention that a Member must enter into negotiations on "mutually acceptable compensation" before requesting authorization to suspend concessions. Article 22.2 of the DSU provided that a responding Member was required to engage in negotiations for compensation only "if so requested…by the party that invoked the dispute settlement procedures" – in this case the United States. As the United States had made no such request, no such negotiations had been required under Article 22.2 of the DSU. Rather, DSU Article 22.2 provided in its second sentence that if no compensation had been agreed within 20 days of the expiry of the reasonable period of time, a complaining party could request DSB authorization. India simply misread the plain text of the DSU and sought to impose a new obligation on all WTO Members.

2.6. Second, India complained that the US request had not indicated why the United States considered that India had failed to comply with the DSB's recommendations and rulings. In this respect, the United States noted, first, that India had provided the United States with no advance notice that India had intended to claim compliance with the DSB's recommendations and rulings on 14 December 2017; and that, second, India's claim of compliance had been wholly unsubstantiated and limited to the mere assertion that "India has ceased to impose any measures as found inconsistent in the DSB's findings and recommendations". Therefore, the United States had had no opportunity to evaluate any concrete compliance steps taken by India because India had identified none. India was simply incorrect, moreover, in asserting that Article 22.2 required a complaining Member to include in its request for suspension an explanation of why it considered the responding Member to have failed to comply with the recommendations of the DSB. The second sentence of Article 22.2 set out that if no satisfactory compensation had been agreed, a complaining Member could request authorization from the DSB. The United States said, therefore, for a second time, India had simply misread the plain text of the DSU and sought to impose a new obligation on all WTO Members.

2.7. Third, India argued that the US request for authorization had failed to specify a proposed level of suspension. This too was simply incorrect. The US request stated the following: "the United States requests authorization from the DSB to suspend concessions or other obligations with respect to India at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States by the failure of India to comply with the recommendations and rulings of the DSB". The United States said that its request thus set out the "level of suspension proposed", in the terms of Article 22.6 of the DSU, in the form of a formula commensurate with the trade effects caused to the interests of the United States. The United States noted that Members' requests to suspend concessions under Article 22.2 of the DSU

[7] WT/DS456/17.

commonly expressed the proposed level of suspension in the form of a formula rather than a specific monetary amount.[8] And if India was dissatisfied with the level of suspension proposed by the United States, it may object to the proposed level pursuant to Article 22.6 of the DSU for a determination of the level equivalent to the level of nullification or impairment.

2.8. Finally, India argued that the US request for authorization was invalid because the United States had not previously established India's non-compliance through procedures under Article 21.5 of the DSU. As apparently all Members other than India recognized, nothing in the DSU supported the view that a Member must proceed with full DSU Article 21.5 proceedings before the Member may even request authorization to suspend concessions under DSU Article 22.2. The United States said that it was for this very reason that, in some circumstances, Members had entered into voluntary agreements on the sequencing of proceedings. In some disputes, an agreement provided for the completion of a DSU Article 21.5 compliance proceeding before a Member could request authorization to suspend concessions or other obligations. In others, the parties agreed that, once a Member requested authorization pursuant to DSU Article 22.2 and the responding Member objected, the arbitration could be suspended to permit DSU Article 21.5 proceedings to occur. Where no sequencing agreement had been reached between the parties, as was the case here, a complaining Member must request authorization to suspend concessions within the time-frame specified in Article 22.6 of the DSU or it risked prejudicing its rights to do so at a later date. The United States said that it could give numerous examples of Members acting to preserve their rights in this fashion. But Members, other than India, may recall that, in fact, just this month, in January 2018, the EU had acted in just this manner in relation to the "Russia – Pigs" (DS475) dispute.[9] The EU request pursuant to Article 22.2 of the DSU had been considered by the DSB within 30 days of the expiry of Russia's compliance period, and despite Russia's claim of compliance, without a DSU Article 21.5 proceeding having been completed, or even initiated. This action had been perfectly within the EU's rights under the DSU, and the United States said that it did not understand India to consider the request for authorization by the EU, or any other Member, to be "invalid". Therefore, India's objections to the US request were without any legal basis, and could not prevent the US request from being approved at the present meeting by the DSB.

2.9. The United States again noted that while India's communication made reference to Article 22.6 of the DSU in a heading, India did not state that it "objects to the level of suspension proposed" by the United States, as specified in DSU Article 22.6. It was on that basis that the matter would be referred to arbitration under Article 22.6 of the DSU. Having failed to make such an objection, the matter would not have been referred to arbitration, and the DSB shall grant the US request for authorization at the present meeting pursuant to DSU Article 22.6. The United States said that, to the extent that India objected, at the present meeting, to the level of suspension proposed by the United States, the matter would be referred to arbitration, and there would remain no further action for the DSB to take with respect to this Agenda item. In that case, while it would not be an efficient use of the resources of the WTO and of Members, the United States said that it would not object if the DSB wished to take affirmative note of the fact that no action on its part was necessary with respect to the US request for authorization because the matter had been referred to arbitration by virtue of India's objection under Article 22.6 of the DSU.

2.10. The representative of India said that India had submitted its communication, dated 3 January 2018, to the DSB Chairman in response to the communication from the United States,

[8] See, e.g., "US – Clove Cigarettes: Recourse to Article 22.2 of the DSU by Indonesia" (WT/DS406/12) ("…the level of suspension proposed is equivalent on an annual basis to the nullification or impairment of benefits accruing to Indonesia…"); "EC – Approval and Marketing of Biotech Products: Recourse to Article 22.2 of the DSU by the United States" (WT/DS291/39) ("…the United States requests authorization from the Dispute Settlement Body ("DSB") to suspend concessions and other obligations with respect to the European Communities under the covered agreements at an annual level equivalent to the annual level of nullification or impairment of benefits accruing to the United States resulting from the European Communities' failure to bring measures of the European Communities and its member States concerning the approval and marketing of biotech products into compliance with the recommendations and rulings of the DSB…"); and, in "US – Offset Act (Byrd Amendment)" (DS217 and DS234), requests by the European Union (WT/DS217/22), Brazil (WT/DS217/20), Japan (WT/DS217/24), Korea (WT/DS217/25), Canada (WT/DS234/25), Mexico (WT/DS234/26), Chile (WT/DS217/21) and India (WT/DS217/23).

[9] "Russia – Pigs (EU): Recourse to Article 22.2 of the DSU by the European Union" (WT/DS475/17) ("…the European Union requests authorization from the Dispute Settlement Body ("DSB") to suspend concessions and other obligations with respect to the Russian Federation as a result of the Russian Federation's failure to bring its measures into compliance with the recommendations and rulings of the DSB…").

dated 19 December 2017. India wished to highlight the key issues regarding its 3 January 2018 communication. At the outset, India expressed its deep concerns regarding the events in this dispute (DS456). India had filed a report on its progress in the implementation of the DSB's recommendations and rulings, which dated 14 December 2017 (WT/DS456/17). Therein, it had informed the DSB that it had ceased to impose any measures that had been found inconsistent with the DSB's recommendations and rulings. India said that it was therefore surprised that the United States had filed its request for suspension of concessions or other obligations on 19 December 2017. If the United States had had any doubts or concerns regarding India's compliance, it should have sought discussions with India. India noted that instead there had been silence from the United States between the filing of India's report and the filing of the US request for suspension of concessions. The US request was silent on the fundamental prerequisites for initiating a request under Article 22.2 of the DSU. It was silent on why the United States believed that there was non-compliance by India with the DSB's recommendations and rulings. It was silent on any negotiations preceding the request and it was silent on the level of suspension or retaliation that the United States was seeking to obtain from the DSB.

2.11. India was severely prejudiced by the vagueness and opaqueness of the US request under Article 22.2 of the DSU, since the US request simply referred to Article 22.2 of the DSU in the abstract, without any indication as to why the United States considered that India did not comply with the DSB's recommendations and rulings, or what was the level of suspension that the United States considered to be equivalent to the purported level of nullification or impairment, if any. India further emphasized that if the United States had any disagreement with India as to whether there had been compliance, the fact of non-compliance must first be established in accordance with the procedures of Article 21.5 of the DSU. However, despite repeated requests, the United States had refused to sign a sequencing agreement with India. India said that this went against past practice of WTO Members acting in good faith. India noted that in a recent dispute against the United States, namely "US – Carbon Steel (India)" (DS436), India had acceded to the US request to sign a sequencing agreement. India emphasized that given the facts and circumstances of this matter, the determination of the consistency of measures implementing the DSB recommendations and rulings must take place under Article 21.5 of the DSU before the level of suspension of concessions or obligations could be assessed under Article 22.6 of the DSU. India said that it was confident that proceedings under Article 21.5 of the DSU would lay to rest any doubts concerning India's compliance with the DSB's recommendations and rulings, and would thereby nullify the need for any proceedings under Article 22.2 of the DSU in the first place. India strongly objected to the US request, dated 19 December 2017, seeking authorization from the DSB for the suspension of concessions or other obligations. India requested that its objection be placed on record.

2.12. The representative of the European Union said that the United States had stated that the DSB must authorize, at the present meeting, the United States to suspend concessions because India had not objected to the US request. First, the EU wished to recall its well-established position that the referral to arbitration of an Article 22.2 DSU request to suspend concessions was done by the DSB. The EU referred, for instance, to its communications contained in documents WT/DS386/38 and WT/DS386/40, in the context of the "US-COOL" (DS386) dispute. The EU noted that in India's communication of 3 January 2018 (WT/DS456/19), India had "strongly object[ed] to the US request, dated 19 December 2017, seeking authorization from the DSB for suspension of concessions or other obligations and request[ed] that this objection may be considered in the special meeting of the DSB scheduled for 12 January 2018". In light of these circumstances, the EU considered that, at the present meeting, the DSB could not authorize the United States to suspend concessions and that the DSB would refer the matter to arbitration in accordance with Article 22.6 of the DSU.

2.13. The representative of Canada said that Canada wished to express concern at the absence of a proposed level of suspension of concessions from the DSU Article 22.2 request of the United States for authorization from the DSB. Canada was of the view that a DSU Article 22.2 request should include either a proposed amount for the level of suspension or a description of the proposed formula to determine that level. Canada also said that other provisions of Article 22 of the DSU confirmed that the level of suspension was a crucial element of a DSU Article 22.2 request. Specifically, Article 22.4 of the DSU provided that "the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment". Canada further noted that Article 22.6 of the DSU accorded the responding Member the right to object to "the level of suspension proposed", in which case the

matter shall be referred to arbitration. A responding Member should know the proposed amount or formula so that it could make an informed decision as to whether or not to avail itself of its right under DSU Article 22.6 to object to the proposed level of suspension. In the absence of an amount or formula, a responding Member would be compelled to object so as to trigger arbitration. Pursuant to Article 22.6 of the DSU, a responding Member had the right to object to the level of suspension proposed. Therefore, the failure to include a proposed level of suspension in an Article 22.2 request adversely affected the right accorded by Article 22.6 of the DSU to the responding Member. Canada noted that most past DSU Article 22.2 requests included such an amount or description of a formula. Finally, Canada urged complaining Members to avoid calling on the DSB to authorize an unspecified level of suspension out of concerns for a lack of transparency.

2.14. The representative of Brazil said that with respect to the US request to suspend concessions under Article 22.2 of the DSU, Brazil wished to comment on the minimum requirements necessary to ensure due process in arbitration procedures. Since there was no third-party participation in Article 22.6 arbitrations, Brazil took this opportunity to present the following comments. A request for suspension of concessions or other obligations must give appropriate notice to the other party and be apt to enable the DSB to properly authorize the suspension, or define the terms of reference of the Arbitrator, if the matter was referred to arbitration. For that purpose, a request for suspension of concessions or other obligations must first set out, pursuant to Article 22.4 of the DSU, a specific level of suspension, i.e., a level considered to be equivalent to the nullification and impairment caused by the WTO-inconsistent measure and, second, pursuant to Article 22.3 of the DSU, must specify the agreements and sectors under which concessions or other obligations would be suspended. Brazil said that it seemed that the US request had not met the first requirement. Brazil further stated that the United States had not indicated the level of suspension of concessions or other obligations, as it had not indicated an amount or, at least, specified a method or formula to calculate it. Brazil said that this raised serious concerns. First, the other party had not received proper notice of the level of suspensions, thus hindering its ability to defend itself. Therefore, the other party had to object to an unknown level of suspension. Second, the suspension of concessions or other obligations was a measure of last resort, which was not to be taken unilaterally, but rather authorized by the DSB. According to Article 22.4 of the DSU, the DSB could only authorize the suspension of concessions or other obligations at a level that was equivalent to the level of nullification or impairment. A request that did not indicate or explain the proposed level of suspension lacked a key procedural element and thus hampered the ability of the DSB to properly discharge its function at this stage of the dispute.

2.15. The representative of Japan said that Japan would like to make a few observations on the matters raised at the present meeting. First, Japan noted that Article 22.6 of the DSU stated "If the Member concerned objects to the level of suspension proposed, […] the matter shall be referred to arbitration". Japan said that the text was clear. Once the request for authorization was made and the objection was filed, the matter was automatically referred to arbitration. There was no need for the DSB to consider the objection. India claimed in its objection that the US request was invalid for several reasons. Japan noted that one of the reasons was that the United States had failed to initiate negotiations on compensation. However, Article 22.2 of the DSU stated that the implementing Member "shall, if so requested, […] enter into negotiations" with the complaining party, and "[i]f no satisfactory compensation has been agreed", then the complaining party was entitled to make a request for an authorization to suspend concessions or other obligations. Japan said that the complaining party was not obliged to initiate such negotiations, and as stated by India, "a necessary precondition to" a request for authorization was the lack of agreement about satisfactory compensation. Japan noted that it appeared that this condition was met. Japan also noted that India claimed that the US request was invalid and requested the DSB to consider its objection. Japan noted that it was not clear what India sought with this claim. Japan wondered whether India claimed that the DSB should decide whether the US request was valid or not, and if it was not valid, the DSB should decline the US request and that there was no legal basis for such claim. Japan reiterated that the text was clear: if the objection was filed, "the matter shall be referred to arbitration". The DSB was not in a position to make such judgement. For example, in the case of a panel establishment, irrespective of the responding party's view on the consistency of a panel request pursuant to Article 6.2 of the DSU, the DSB had to establish a panel pursuant to Article 6.2 of the DSU. The issue of consistency of a panel request with Article 6.2 of the DSU was decided by the panel, once such a panel was established. Japan said that the same logic applied in this case. Japan was of the view that if the deficiency of the request for authorization was of relevance, then the deficiency of the objection by the responding party was equally of relevance. Japan questioned what the consequence would be if the DSB decided that an objection was not

valid, as claimed by the United States. Japan reiterated its view that the DSB was not in a position to make such judgement. It was therefore reasonable to read Article 22.6 of the DSU to imply that if an objection was made, the matter shall be automatically referred to arbitration.

2.16. The representative of China said that his country shared the concerns expressed by some delegations. China believed that filing a request for authorization to suspend concessions or other obligations without specifying the anticipated level of suspension was not consistent with the requirements of the DSU. China recalled that Article 22.3 and 22.4 of the DSU established the principles and procedures that a complaining party had to follow when considering what concessions or obligations to suspend. China was of the view that in drafting the DSU, Members had assumed that the complaining party should make the initial proposal for the level of suspension when requesting authorization to suspend concessions or other obligations. China noted that it was also implicit in other paragraphs of Article 22 of the DSU that there must first be a level of suspension proposed by the complaining party. Article 22.6 of the DSU provided that "[I]f the Member concerned objects to the level of suspension proposed, […], the matter shall be referred to arbitration". Article 22.7 of the DSU stated that the Arbitrator must determine whether the level of such suspension was equivalent to the level of nullification or impairment and whether the proposed suspension of concessions or other obligations was permitted under the covered agreements. Therefore, prior to the Arbitrator taking a decision, there should have already been a proposed level for consideration. China did not understand the reason why the United States had failed to provide a level of suspension that it considered appropriate in its request. China urged the United States to abide by the DSU rules.

2.17. The representative of the United States said that the United States would address the comments made by a few delegations before reacting to India's statement. First, with reference to the EU assertion that DSB action was necessary to refer the matter to arbitration, the US position on this subject was well-known. No decision by the DSB was necessary to refer the matter to arbitration. Article 22.6 of the DSU did not refer to any action of the DSB, and the text was clear that once a Member objected to another Member's request, that matter was automatically referred to arbitration. The situation here was not unique. Members could recall that no DSB decision had been needed in this dispute to refer the matter to the Appellate Body upon India's appeal, nor had any DSB decision been needed in past disputes to refer the matter of the reasonable period of time to an Article 21.3(c) Arbitrator. As just one illustration of why the DSB was not deciding at the present meeting to refer these matters to arbitration, the United States noted that the DSB did not have before it any proposed decision to refer the matter to arbitration. The DSB rules would require such a decision to be submitted 10 days before the DSB meeting. Clearly, the DSB was not taking a decision at the present meeting, nor had it on any of the previous occasions when requests had been referred to arbitration. Indeed, arbitration had commenced in the past without the need for a DSB meeting.[10] The DSU text made clear that this was the correct reading of Article 22.6 of the DSU. Following a request by a Member under Article 22.2 of the DSU for authorization to suspend concessions or other obligations, the text of the second sentence of Article 22.6 stated plainly: "If the Member concerned objects to the level of suspension proposed…the matter shall be referred to arbitration".

2.18. Second, with regard to the comments that had been made at the present meeting by Canada, China and Brazil, the United States noted that, as an initial matter, the suggestion that the US request did not specify a proposed level of suspension was incorrect. The United States said that, as it had explained earlier, the US request had clearly stated that "the United States requests authorization from the DSB to suspend concessions or other obligations with respect to India at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States by the failure of India to comply with the recommendations and rulings of the DSB". The United States said that it was unclear whether these Members intended to suggest a request under Article 22.2 of the DSU should specify a monetary amount or include a detailed formula, but neither was required by the text of the DSU. The United States referred these delegations to prior requests made under Article 22.2 of the DSU. While some requests had

[10] See, e.g., Minutes of 4 June 2007 DSB Meeting, WT/DSB/M/233 (relating to DS268), paras. 3, 4, 5 (noting agreement of parties matter had already been referred to arbitration by filing of objection); Minutes of 21 January 2008 DSB Meeting, WT/DSB/M/245 (relating to DS322), p. 2 (first through fourth paragraphs) (noting agreement of parties matter had already been referred to arbitration by filing of objection; request for authorization withdrawn from DSB Agenda); Minutes of 13 May 2016 DSB Meeting, WT/DSB/M/376, (relating to DS381), paras. 7.9-7.11 (noting agreement of parties matter had already been referred to arbitration by filing of objection therefore need not remain on the DSB Agenda).

assigned a monetary value to the proposed level of suspension, others had not.[11] Several requests had been made for a level of suspension commensurate with the annual level of nullification and impairment.[12] While some such requests may have included an indicative monetary value for the first year, the request was nevertheless for an amount to be determined by formula as commensurate with the annual level of nullification and impairment.[13] The United States also noted India's request for authorization in the dispute "US – Offset Act" (Byrd Amendment) (WT/DS217). The United States found it interesting that India complained that the US request did not specify a monetary value for the proposed level of suspension, when India itself had not included such a value in the past.[14] In any event, the DSB did not need to debate at the present meeting what some Members considered "should" be included in an Article 22.2 request, as opposed to what the text of the DSU required. The US request did in fact specify the proposed level of suspension consistent with Article 22.2 of the DSU.

2.19. Finally, with regard to India's statement at the present meeting, the United States still had not heard from India an objection to the proposed level of suspension. As the United States had explained, the objections India had stated did not constitute legal bases for rejection of the US request. Article 22.6 of the DSU provided that the matter shall be referred to arbitration if the Member concerned objected to the level of nullification and impairment indicated in the request. This was the only basis upon which the request for suspension would not be granted by the DSB under Article 22.6 of the DSU. Absent an objection "to the level of suspension proposed", the US request for authorization was the item before the DSB, and "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request". The DSU did not provide for any other outcome under these circumstances. The United States said that it would therefore continue to insist that the DSB must grant the authorization as requested by the United States.

2.20. The representative of India said that India wished to emphasize that in both, its communication, dated 3 January 2018, as well as its statement made at the present meeting, India had clearly objected to the DSU Article 22.2 request of the United States on two grounds: (i) non-compliance with the procedures and principles of the DSU; and (ii) failure to specify the level of suspension that the United States was seeking an authorization for, which made it difficult for the responding party to decide whether or not to object under Article 22.6 of the DSU. India reiterated its strong objection to the Article 22.2 request of the United States in this dispute.

2.21. The representative of the European Union said that the previous speakers had referred to a number of issues on which the EU would like to provide its views. First, Japan and the United States had mentioned the issue of who referred the matter to arbitration, when the defending party had already objected to the request for suspension prior to the meeting of the DSB. The EU said that, as mentioned by the United States, this was not the first time this issue was raised. The EU recalled its well-established position that the referral to arbitration of a DSU Article 22.2 request to suspend concessions was done by the DSB. Given the substantial legal uncertainty persisting on this issue, the EU intended to continue the practice that had been used in

[11] See, e.g., "US – 1916 Act (Japan): Recourse by Japan to Article 22.2 of the DSU" (WT/DS162/18) ("Since the recommendations and rulings of the DSB were that the Anti-Dumping Act of 1916 as such violated the US obligations under the GATT 1994, the AD Agreement and the WTO Agreement, it is not practical to indicate the level of nullification or impairment in terms of monetary value.").

[12] See, e.g., "US – Clove Cigarettes: Recourse to Article 22.2 of the DSU by Indonesia" (WT/DS406/12) and "EC – Approval and Marketing of Biotech Products: Recourse to Article 22.2 of the DSU by the United States" (WT/DS291/39).

[13] See, e.g., "US – Large Civil Aircraft (2nd complaint): Recourse to Article 22.2 of the DSU, and Articles 4.10 and 7.9 of the SCM Agreement, by the European Union" (WT/DS353/17) ("Accordingly, pursuant to Article 22.2 of the DSU and Articles 4.10 and 7.9 of the SCM Agreement, the European Union requests the DSB to grant authorization to the European Union to take countermeasures that are appropriate, and commensurate with the degree and nature of the adverse effects determined to exist, respectively. Based on currently available data, countermeasures consistent with these standards total approximately US$ 12 billion annually. The European Union may update this amount annually using the most recently available data.").

[14] See "US – Offset Act (Byrd Amendment): Recourse by India to Article 22.2 of the DSU" (WT/DS217/23) ("Pursuant to Article 22.2 of the DSU, India requests the authorization of the DSB to suspend the application to the United States of tariff concessions and related obligations under the GATT 1994 in an amount that will be determined every year by the amount of offset payments made to affected domestic producers in the latest annual distribution of anti-dumping and countervailing duties under the CDSOA, as explained below.").

past cases. In particular, as a complaining party, the EU did not intend to incur the unnecessary legal risk of withdrawing an Article 22.2 request from the DSB Agenda following an objection raised by the defending party. The EU said that it preferred the legal certainty that resulted from the referral to arbitration taking place in the DSB meeting. The EU invited other Members to consider following the same approach.

2.22. Second, the United States had referred to the proper sequence between DSU Article 21.5 proceedings and DSU Article 22 procedures. The EU said that it took note of India's statement that India had brought the measures at issue into conformity with the DSB's recommendations and rulings. The EU also noted that the United States did not agree that India had brought its measures into compliance with the covered agreements. The EU noted that, therefore, it appeared that "there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU. The EU recalled that, pursuant to that provision, "such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible recourse to the original panel". In cases of disagreement about the existence or consistency with WTO rules of compliance measures, concessions or other obligations could be suspended under the DSU once there was a multilateral determination on the alleged compliance action. The EU said that it trusted that India and the United States would ensure that the DSU procedures with regard to compliance and suspension of obligations in this dispute, would be conducted efficiently and in the correct sequence.

2.23. Third, Canada, Brazil and China had made references to the "formula" mentioned in the US request for retaliation. The EU observed that requests for retaliation under Article 22.2 of the DSU served similar due process objectives as requests under Article 6.2 of the DSU. First, such requests gave notice to the other party and enabled it to respond to the request for retaliation. Second, a request under Article 22.2 of the DSU by a complaining party defined the jurisdiction of the DSB in authorizing suspension. Therefore, requests under DSU Article 22.2 must, *inter alia,* set out a specific level of suspension, i.e., a level equivalent to the nullification and impairment caused by the WTO-inconsistent measure, pursuant to Article 22.4 of the DSU. If the request did not indicate a specific number, that level must be otherwise specifically identifiable on the basis of the request. The EU agreed with the statement made by Japan that the question, as to whether or not the US request fulfilled these requirements, was a jurisdictional issue, which would need to be addressed by the Arbitrator in this dispute.

2.24. The representative of Japan said that his delegation wished to suggest a practical way forward. The US request for authorization stated that the United States requested authorization to suspend "at an annual level based on a formula commensurate with the trade effects caused to the interest of the United States by the failure of India to comply with the recommendations and rulings of the DSB". According to the United States, this described the proposed level of suspension. India, in turn, stated in its objection that it "strongly objects to the US request of 19 December 2017", which included the US description of the level of suspension. Thus, read together, Japan was of the view that India had objected to the indicated level of suspension contained in the authorization request, hence the requirement in Article 22.6 of the DSU had been met and the matter had already been referred to arbitration. Japan said that there was nothing further for the DSB to consider at the present meeting.

2.25. The representative of the United States said that, regarding the EU's statement, the United States continued to be surprised by a suggestion by any delegate that the US request was somehow deficient and did not specify the proposed level of suspension requested. The United States said that it did: "the United States requests authorization from the DSB to suspend concessions or other obligations with respect to India at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States by the failure of India to comply with the recommendations and rulings of the DSB". The United States asked Members to consider the EU's request under Article 22.2 of the DSU in "US — Large Civil Aircraft" (2nd complaint) (DS353). There, the European Union had "request[ed] the DSB to grant authorization to the European Union to take countermeasures that are appropriate, and commensurate with the degree and nature of the adverse effects determined to exist, respectively".[15] This statement was not unlike the framing of the US request. The United States also referred delegations to other requests, such as Indonesia's request in "US – Clove

[15] WT/DS353/17.

Cigarettes"(DS406), where Indonesia had not included a monetary value or a detailed formula.[16] That request was almost identical to the request that the United States had submitted in this dispute. Nonetheless, the issue of what "should" be included in a request under Article 22.2 of the DSU was not before the DSB at the present meeting. The issue was whether India had objected consistently with Article 22.6 of the DSU. The United States noted that the EU had stated that it understood India to have objected that "the principles and procedures of paragraph 3 have not been followed". The United States said that if that was India's position, India should confirm this. Alternatively, Japan had indicated that it understood India to be objecting to the level of suspension proposed. The United States said that if India were to confirm that it was, in fact, objecting to the level of suspension proposed, this would assist Members in this discussion. The United States said, however, that it had not heard India articulate such objections – not in India's "objection" submitted before the present meeting or in India's statement made at the present meeting. The United States further stated that the fact that India had not clarified the basis of their objection at the present meeting led the United States to understand that India was in fact not objecting to the level of suspension proposed by the United States, but rather to the sufficiency of the request, which was not a basis for referral to arbitration. Therefore, without clarification from India, the United States insisted that the DSB must authorize, at the present meeting, the suspension of concessions as requested.

2.26. The representative of India said that India reiterated its objection to the US request under Article 22.2 of the DSU, as stated in its communication dated 3 January 2018 and its statement made at the present DSB meeting. India objected to the purported level of suspension without prejudice to the question of whether or not the DSU Article 22.2 request of the United States contained such a level.

2.27. The DSB took note of the statements and that the matter raised by India in document WT/DS456/19 has been referred to arbitration, as required by Article 22.6 of the DSU.

2.28. The representative of the United States said that the United States did not consider India's "objection" notification of 3 January 2018, to have clearly objected to the level of suspension proposed by the United States. The United States said, however, that as India had now clarified that it was objecting to the US request on that basis, the United States understood that, upon India's objection, the matter had been referred to arbitration.

2.29. The DSB took note of this statement.

[16] WT/DS406/12.