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Dispute Settlement Body
19 April 2017

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 19 APRIL 2017

Chairman: Mr. Junichi Ihara (Japan)

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

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.171)

1.2. The Chairman drew attention to document WT/DS184/15/Add.171, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 6 April 2017, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for its statement and its status report. Japan called on the United States to fully implement the DSB's recommendations and rulings 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.146)

1.6. The Chairman drew attention to document WT/DS160/24/Add.146, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 6 April 2017, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union 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 said that it wished to resolve this dispute as soon as possible.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.109)

1.10. The Chairman drew attention to document WT/DS291/37/Add.109, which contained the status report by the EU on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.11. The representative of the European Union said that the draft authorisation decision for one type of genetically modified maize[1] (for food and feed uses) and the draft proposals for the authorisation of three types of maize[2] (for cultivation) had been submitted for vote at the Appeal Committee on 27 March 2017, with a "no opinion" result. It was now for the Commission to decide on these authorisations. The draft authorisation decision for one type of genetically modified maize[3] (for food and feed uses) and one type of genetically modified cotton[4] (for food and feed uses) had been submitted for a vote at the member States Committee on 27 March 2017, with a "no opinion" result. These measures would now be submitted for discussion, and possible opinion, to the Appeal Committee on 16 May 2017. The EU said that it continued to be committed to acting in line with its WTO obligations. More generally, and as it had stated previously on many occasions, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.12. The representative of the United States said that the United States thanked the EU for its status report and its statement made at the present meeting. The EU measures affecting the approval and marketing of biotech products continued to result in lengthy, unpredictable, and unexplained delays in approvals. The delays and uncertainty in approvals caused adverse effects on trade. The failure to approve biotech corn products was a source of particular concern to the United States. A number of corn products had received the approval of the EU's scientific authority, yet remained stalled at the level of the EU Appeals Committee or the EU Commission. The EU's scientific review process was also subject to increasingly long delays. Many corn and soybean products had now been under consideration by the EU's scientific authority for many years. Furthermore, the EU had recently proposed regulations that would create more, rather than less, uncertainty with regard to the information required for scientific evaluation of biotech products. The United States strongly encouraged the EU to ensure that it required only the scientific information relevant to the type of risk assessment being conducted. The United States encouraged the EU to ensure that, as required by EU regulations and WTO rules, decisions on biotech approvals were made without unnecessary or further delays.

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

2 RUSSIAN FEDERATION – MEASURES ON THE IMPORTATION OF LIVE PIGS, PORK AND OTHER PIG PRODUCTS FROM THE EUROPEAN UNION

A. Implementation of the recommendations of the DSB

2.1. The Chairman recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned should inform the DSB, within 30 days after the date of adoption of the Panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. He recalled that at its meeting on

[1] Maize Bt11 × 59122 × MIR604 × 1507 × GA21.
[2] Bt11, 1507 and MON810 (renewal).
[3] DAS 40278-9.
[4] GHB 119.

21 March 2017, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, pertaining to the dispute on: "Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union" (DS475). He then invited the representative of the Russian Federation to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2.2. The representative of the Russian Federation said that, at its meeting on 21 March 2017, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, in the dispute: "Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union" (DS475). According to Article 21.3 of the DSU, Russia informed the DSB that it intended to implement the recommendations and rulings of the DSB in accordance with its WTO obligations. Russia said that it needed a reasonable period of time for the implementation of the DSB's recommendations and rulings. It stood ready to discuss this matter with the EU in due course, in accordance with Article 21.3(b) of the DSU.

2.3. The representative of the European Union said that his delegation hoped that Russia would promptly and fully implement the Panel's findings and urged Russia to allow trade of safe products from the EU to take place without delay. The EU said that it was ready to discuss with Russia a reasonable period of time, but also wished to stress that, from the EU's point of view, no legislative change was required for Russia to bring itself into compliance. Against this backdrop, the EU would not accept an excessively long period of time for Russia's implementation.

2.4. The DSB took note of the statements, and of the information provided by the Russian Federation regarding its intentions in respect of implementation of the DSB's recommendations.

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

A. Statement by the European Union

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

3.2. The representative of the European Union said that his delegation, once again, requested the United States to stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with 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 status reports on implementation in this dispute. The EU would continue to place this matter on the DSB Agenda for as long as the United States had not implemented the WTO ruling.

3.3. The representative of Brazil said that his country thanked the EU for keeping this item on the DSB Agenda. As one of the parties to the Byrd Amendment disputes, Brazil referred to its previous statements on this matter. In particular, Brazil wished to refer to its statements regarding the continuation of illegal disbursements, which should cease immediately. Brazil renewed its 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 an obligation to submit status reports, pursuant to Article 21.6 of the DSU.

3.4. The representative of Canada said that his country wished to refer to its previous statements made under this Agenda item. Canada's position on this matter had not changed.

3.5. 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, which was over nine years ago. With respect to the EU's request for status reports in this matter, as the United States had already explained at

previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB recommendations and rulings, regardless of whether the complaining party disagreed about compliance. Indeed, the EU had demonstrated repeatedly that it shared this understanding, at least when it was the responding party in a dispute. At the 21 March 2017 DSB meeting, the United States had pointed out that the EU was not providing status reports in the "EC - Large Civil Aircraft" (DS316) dispute, despite the fact that the United States did not agree that the EU had implemented the DSB's recommendations. The EU had asserted, during the same meeting, that the matter was subject to an Article 21.5 proceeding, but that only confirmed that there was no adopted DSB finding that the EU had come into compliance with WTO rules. At best, therefore, the EU could only assert that a disagreement between the parties currently existed. Once again, if the EU actually believed the position it was taking under this Agenda item, it could demonstrate this by submitting a status report in DS316 for next month's DSB meeting scheduled for 22 May 2017.

3.6. The representative of the European Union said that his delegation wished to refer to the EU statement made at the 21 March 2017 DSB meeting. The EU was of the opinion that DS217 was different from DS316, since in DS217 the dispute had been adjudicated and no further compliance proceedings were pending. Therefore, the two disputes could not be compared.

3.7. The DSB took note of the statements.

4 INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

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

4.1. The Chairman drew attention to the communication from India contained in document WT/DS430/21 and invited the representative of India to speak.

4.2. The representative of India said that his country was requesting the establishment of a panel, pursuant to Article 21.5 of the DSU pertaining to DS430. He recalled that on 19 June 2015, the DSB had adopted its recommendations and rulings in: "India – Measures Concerning the Importation of Certain Agricultural Products" (DS430). At the 20 July 2015 meeting, India had informed the DSB of its intention to implement the recommendations and rulings of the DSB with respect to this matter. In accordance with the recommendation of the SPS Committee and as part of India's efforts towards compliance, India had notified the draft amendment notification to the SPS Committee on 20 April 2016, allowing a 60-day time period for interested parties to provide comments. Pursuant to this, India had issued the final notification, S.O. 2337(E), which had superseded the previous notification S.O. 1663(E). Further, India had also issued the relevant Questionnaire and the Guidelines referred to in the notification S.O. 2337(E) for recognizing disease free areas and areas of low pest and disease prevalence for the purpose of trade in poultry and poultry products. On 18 July 2016, India had notified the DSB that it had adopted measures necessary to comply with the DSB's recommendations and rulings. Pursuant to the issuance of S.O. 2337(E), India had entered into bilateral negotiations with the United States so as to address the US concerns. Thereafter, in order to provide further clarity, India had amended notification S.O. 2337(E) with notification S.O. 2998(E) and notification S.O. 510(E). Further, in response to a request for information by the United States pursuant to Article 5.8 of the SPS Agreement, India had provided necessary information to further clarify the legal regime existing after the issuance of the compliance measures. Notification S.O. 2337(E) (dated 8 July 2016), amendment notifications S.O. 2998(E) (dated 19 September 2016), S.O. 510(E) (dated 17 February 2017), the revised guidelines and the questionnaire, together, formed the "revised avian influenza measures".

4.3. These notifications had been issued in exercise of the power conferred by Section 3(1) and Section 3A of the Livestock Act, 1898 and came into effect from the date of their publication in the Official Gazette. India strongly considered that the "revised avian influenza measures" complied with the recommendations of the DSB in DS430 as they: (i) allowed imports of poultry and poultry products into India in accordance with the relevant international standard, i.e. the OIE Terrestrial Animal Health Code ("Terrestrial Code"); (ii) recognized the concept of areas of low disease prevalence and disease-free areas; and (iii) provided for the process to be followed for recognition of such disease-free areas and areas of low disease prevalence, in accordance with the

SPS Agreement and the OIE Terrestrial Code. These also addressed all the concerns raised by the United States during bilateral discussions. However, in spite of the efforts made by India to resolve the dispute bilaterally by providing to the United States the relevant information and clarifications, the United States had not yet agreed to enter into a sequencing agreement in this dispute. A sequencing agreement would have provided the United States with an option to request a compliance panel, in case the United States was not satisfied that India had fully complied with the recommendations of the DSB. This was also the standard practice amongst Members. Moreover, despite India's sincere efforts to resolve this issue bilaterally, the United States had not accepted India's request to suspend the Article 22.6 proceeding in this dispute. In light of these facts, and in order to safeguard its interests, India had no option but to request the establishment of a compliance panel, pursuant to Article 21.5 of the DSU, to determine whether India had complied with the DSB's recommendations and rulings. Nevertheless, India was still open to discuss with the United States their concerns, if any, on the extent of India's compliance with respect to the DSB recommendations. Therefore, India requested that a panel be established pursuant to Article 21.5 of the DSU, with standard terms of reference, as set out in Article 7.1 of the DSU. India requested that the DSB refer the matter to the original Panel, if possible.

4.4. The representative of the United States said that the United States was confident that India had no basis for asserting compliance with the DSB recommendations in this dispute. To recall, the DSB had found that India's measures blocking the importation of US poultry and other agricultural products were not based on science and breached several of India's obligations under the SPS Agreement. The DSB had adopted these rulings in June 2015, nearly two years ago. Despite that, India continued to maintain a complete ban on US poultry and other agricultural products. The United States said that it could see no valid legal basis for India's assertion of compliance. To the contrary, India's failure to take account of the DSB's findings meant that the inconsistencies found by the DSB continued to this day. In addition, a compliance panel proceeding at this time would not contribute to a prompt resolution of the dispute. While the United States had reserved its rights to move forward on the pending arbitration under Article 22.6 of the DSU, on the level of nullification and impairment resulting from India's ban, the United States had sought, and continued to seek, to work cooperatively with India toward the goal of lifting the current ban on US poultry products.

4.5. The United States had made concrete proposals to India and had yet to receive any reply from India to those proposals. Accordingly, the United States suggested that India focus on actually achieving compliance in this dispute. For these reasons, the United States was not in a position to agree to the establishment of a panel at the present meeting. With respect to India's reference to sequencing agreements, the United States found it puzzling that so much of India's panel request was dedicated to the issue of a sequencing agreement rather than explicating how India was ensuring its trading partners had access consistent with India's WTO obligations. In any event, the DSU did not require Members to enter into a sequencing agreement. Members had found it appropriate to do so in many circumstances. But, India had taken no steps to address the DSB's recommendations as of the time when the United States had taken procedural action to preserve its rights under Article 22 of the DSU.

4.6. The representative of Brazil said that this was another case that put the spotlight on the sequencing issue between Articles 21.5 and 22 of the DSU and the procedural issue of parallel proceedings. Beyond the concrete facts of the present dispute, the issue of "sequencing" had, over the years, reached a certain degree of accommodation by means of the so-called "sequencing agreements". More recently, regrettably, some Members had decided to take a more complicated route, having recourse to Article 22.2 of the DSU even in face of claims that measures had been taken to comply. Members were now witnessing the consequences of overturning the correct procedural order between these Articles. To be clear, direct recourse to Article 22.2 of the DSU should only be acceptable if no measure had been taken to comply with the DSB's recommendations and rulings. This situation, albeit rare, had indeed occurred in some disputes. Whenever, however, there was disagreement about the existence or consistency of measures taken for compliance with the DSB recommendations, the logical procedural order could only be the one set out in the DSU. Brazil said that Members supporting direct recourse to Article 22.2 of the DSU, in any circumstance, irrespective of the textual evidence of Article 21.5, should answer the following question: was it reasonable to believe, or prudent to accept, that the drafters of the DSU, back in the early 90s, envisaged the current situation? This included the following possibilities: (i) the establishment of parallel panel proceedings under Article 21.5 and Article 22.6 of the DSU; (ii) a retaliation panel under Article 22.6 of the DSU would start, and finish – possibly

with a finding of non-compliance – before a compliance panel had concluded its analysis (compliance procedures took longer, with the possibility of appeal); (iii) a Member could win the right to retaliate – and in practice apply that retaliation – before a multilateral confirmation of the lack of implementation; (iv) sometime later, a compliance panel could find that the measures taken by the other party had, in fact, brought that party into full or partial compliance with the DSB recommendations; and (v) the retaliation, that had been unjustifiably applied, would then, somehow, have to be "undone" or made good again, or at least recalculated. The question Members had to answer was simple: was this what the DSU text entailed? Was this what the drafters really intended? Brazil questioned whether Members were forcing an interpretation that was clearly problematic. There could be some problems with the phase of implementation and reality sometimes fell short of Members' expectations. But, certainly, there were other ways of tackling the sequencing issue without making things worse. What Brazil believed could not be done was to transform Article 22.6 of the DSU into a "mini-implementation dispute". Doing so could risk curtailing the due process guarantees safeguarded by the procedure under Article 21.5 of the DSU, which was the mechanism for resolving disagreements regarding implementation of adopted decisions.

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

4.8. The representative of Colombia said that his country did not wish to comment on the substance of DS430 but wished to share Members' concerns on the issue of sequencing. Colombia welcomed the fact that there was goodwill in the consultations regarding the implementation of the DSB's recommendations and rulings in this dispute. Colombia hoped that there would be a logical approach in the way that Members dealt with their concerns related to compliance in accordance with the spirit of the correct interpretation of the DSU.

4.9. The representative of Canada said that this was the third example in a recent series of cases that, together with DS381 and DS461, had raised important procedural issues for the DSB's consideration. For the most part, the uncertainty arising from the ambiguity in the DSU regarding the sequence of compliance proceedings and requests for authorization from the DSB to suspend concessions had been resolved through "sequencing agreements". These agreements set out that, for the purposes of a specific dispute, disagreements about the WTO-consistency of a compliance measure would be resolved through compliance proceedings before the grant of authorization to suspend concessions, and that the request for such authorization could be made after the expiry of the 30-day time period set out in Article 22.6 of the DSU. Sequencing agreements thus enable Members to overcome the uncertainty that the text of the DSU created and contributed to the effectiveness and predictability of the dispute settlement system. Canada invited the disputing parties to consider their procedural options with due regard both for systemic considerations and for their own interest in reciprocal treatment in future disputes. Canada also noted that this panel request had provided another example of the utility and appropriateness of the right of a responding party to initiate compliance proceedings. Finally, Canada said that in the absence of an agreement between the parties that consultations at the compliance phase of this dispute could be fruitful, Canada welcomed their decision to avoid delay and to focus their efforts on resolving the dispute as quickly as possible.

4.10. The representative of Australia said that, like others, her country would like to comment on some of the systemic issues raised in the current dispute. Australia said that it was mindful of the complex systemic issues and the potential for uncertainty arising as a result of possible parallel compliance and retaliation proceedings in the current dispute. In Australia's view, there was no legal basis for the DSB to require suspension of an Article 22.6 arbitration contingent on an

Article 21.5 panel finding. However, in principle, in the absence of agreement of the Membership on codification of appropriate procedures, Australia considered that an agreement between the parties on the sequencing of compliance and retaliation proceedings was the preferred mechanism to resolve any uncertainty about sequencing in a particular dispute. This was consistent with established practice, and, in Australia's view, had been effective in the past. Australia therefore, encouraged the Parties to cooperate with a view to finding a pragmatic solution that both protected the rights of each party and took into account the systemic interests of all Members.

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

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

A Report of the Panel (WT/DS492/R and WT/DS492/R/ADD.1)

5.1. The Chairman recalled that, at its meeting on 20 July 2015, the DSB had established a Panel to examine the complaint by China pertaining to this dispute. The Report of the Panel, contained in document WT/DS492/R and Add.1 had been circulated on 28 March 2017 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of China. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

5.2. The representative of China said that her country thanked the Panel, and the Secretariat assisting it, for their hard work throughout the course of this dispute. China had brought this dispute to address a situation that had arisen after certain SPS measures had been adopted by the EU in response to an outbreak of avian influenza in China. From January 2002 through July 2008, imports of poultry products from China into the EU had been prohibited pursuant to the SPS measures. It was worth noting that China did not challenge the WTO-consistency of the SPS measures themselves as part of this dispute. China's concern was that the EU had failed to take into account China's interests in the EU poultry market when it had renegotiated tariff concessions involving these products based on import data compiled while imports of these products from China were banned. In addition, the EU, based on the absence of imports from China due to the EU's import ban, had allocated the majority of the tariff-rate quotas (TRQs) opened as a result of the tariff renegotiation to Brazil and/or Thailand, because these two Members had accounted for the majority of EU imports. China considered that the approach to the tariff renegotiation and TRQ allocation adopted by the EU was inconsistent with the EU's obligations under Articles XXVIII, XIII, I and II of the GATT 1994. The Panel had found that the EU's allocation of two TRQ shares among supplying countries was inconsistent with the requirements of Article XIII:2. Specifically, the Panel had upheld China's claim that its increased ability to export poultry products to the EU, following the end of the SPS measures in July 2008, was a "special factor" that the EU had been required to take into account when determining which countries had a "substantial interest" in supplying the products concerned, or when determining the TRQ shares to be allocated to the category of "all other" countries that were not recognized as substantial suppliers (including China) pursuant to Article XIII. China was of course disappointed that the Panel had not found that the EU had violated its obligations with respect to the other claims in this dispute. Overall, however, China was pleased with the outcome and supported the DSB's adoption of this important Report. China appreciated the EU's decision to accept adoption of the Panel Report at the present meeting and looked forward to constructive engagement in respect of, inter alia, the EU's implementation of the recommendations of the DSB in the near future, so that the parties could resolve this dispute.

5.3. The representative of the European Union said that his delegation wished to thank the Panel and the Secretariat for their work in this dispute. The EU welcomed the findings of the Panel. The Panel had rejected most claims made by China and had made some important systemic findings. In particular, the Panel had rejected all claims by China under Article XXVIII of the GATT 1994. This included the claim that an importing Member was under a legal obligation to reappraise which WTO Members held a principal or substantial supplying interest to reflect changes in import shares that had taken place following the initiation of the negotiations. This ensured legal certainty and predictability for WTO Members which followed the procedures under Article XXVIII of the GATT 1994. Moreover, in relation to claims under Article XIII of the GATT 1994, the Panel had rejected China's claim that the EU had acted inconsistently with Article XIII by failing to periodically (annually) update the initial TRQ allocations. Such a finding would have been of concern beyond the management of this particular tariff-rate quota as it would have imposed a

very burdensome obligation on all WTO Members managing TRQs to periodically update all initial TRQ allocations. Finally, the Panel had also rejected China's contention that the EU had acted inconsistently with Article XIII by determining which countries had a substantial interest in supplying the products concerned on the basis of their actual share of imports into the EU, rather than on the basis of an estimate of what import shares would have been in the absence of the SPS measures restricting poultry imports from China. The EU believed that these clear findings were of systemic importance and provided very useful guidance to Members in negotiating and managing TRQs.

5.4. The representative of Thailand said that his country welcomed the adoption of the Panel Report in DS492. The dispute in DS492 arose, in part, directly from measures taken by the EU to implement the DSB's recommendations and rulings in the 2005 dispute brought by Thailand and Brazil against the EU, namely, "European Communities – Customs Classification of Frozen Boneless Chicken Cuts" (DS269). Due to its economic and legal interest in this dispute, Thailand had requested (and had been granted) enhanced third-party rights in the panel proceedings, together with the other third-parties. This dispute concerned the modification of ten tariff lines[5] in the EU's Schedule of Concessions. These modifications had been negotiated with Thailand and Brazil, which had been determined by the EU to be Members with a principal supplying interest or a substantial supplying interest in the ten tariff lines. The EU had replaced the previously unlimited tariff concessions in these lines with tariff-rate quotas. The total amounts of the tariff-rate quotas and their allocation had been determined by the EU by agreement with Thailand and Brazil, as appropriate. In this dispute, the Panel had decided upon various complicated issues, including the procedures for the determination of Members with a principal supplying interest and a substantial supplying interest under negotiations pursuant to Article XXVIII of the GATT 1994, the rules for the allocation of tariff rate quotas under Article XIII of the GATT 1994, and the relationship between these two provisions. Many of these issues had never been examined before by a WTO panel. The EU's tariff-rate quotas at issue in this dispute covered poultry meat products, which were important exports for Thailand. Thailand said that it looked forward to actively following all future steps in these proceedings.

5.5. The representative of Brazil said that his country, as a third-party to this dispute, wished to make some comments on the implementation of the Panel's recommendations. Brazil said that it was confident that, in implementing the recommendations of the Panel, the parties would ensure full compliance with Article 3.5 of the DSU, pursuant to which decisions within the WTO dispute settlement system "shall not nullify or impair benefits accruing to any Member under the covered agreements, nor impede the attainment of any objective of those agreements". In particular, Brazil said that it expected that its rights, obtained by negotiations with the EU under Article XXVIII of the GATT 1994, would not be affected by the implementation of the Panel Report, both in terms of the overall size of the TRQ allocated to Brazil under those procedures and with regard to the administration regime of such quotas. At the same time, Brazil noted the Panel's reasoning with regard to changes of market share following initial TRQ allocations and other "special factors" for the purposes of Article XIII of the GATT 1994.

5.6. The DSB took note of the statements and adopted the Panel Report contained in WT/DS492/R and Add.1.

6 APPELLATE BODY APPOINTMENTS

A. Statement by the Chairman

6.1. The Chairman recalled that the second four-year term of Mr. Ricardo Ramírez Hernández would expire on 30 June 2017, and the second four-year term of Mr. Peter Van den Bossche would expire on 11 December 2017. Pursuant to Article 17.2 of the DSU they were not eligible for reappointment and the DSB would have to decide on the appointments of two new Appellate Body members to replace the incumbents. He also recalled that at the 25 January 2017 DSB meeting his predecessor, Ambassador Carim, had outlined two possible approaches to fill the upcoming vacancies in the Appellate Body. Following the 25 January 2017 DSB meeting, Ambassador Carim had consulted with Members on possible approaches and on the elements outlined with respect to

[5] These tariff lines are: 0210 9939, 1602 31, 1602 32 19, 1602 32 11, 1602 32 30, 1602 32 90, 1602 39 21, 1602 39 29, 1602 39 40, 1602 39 80. Tariff lines 1602 39 40 and 1602 39 80 were combined in 2012 to create a new tariff line: 1602 39 85. See Panel Report, p. 17.

the two vacant positons. In the course of his consultations several delegations had supported one single selection process. However, two delegations had expressed a preference for two independent processes. One delegation had suggested that the DSB could start one selection process to fill the vacancy that would expire in June 2017 and that more time could be given to address the second vacancy. It was his understanding however that those supporting one single selection process would agree to two independent processes only if the work on both could be completed before the summer break or if there was prior clarity on the process and timing of both. At the 20 February 2017 meeting Ambassador Carim had indicated his intention to consult with delegations with a view to submitting a proposal to the DSB in March on the procedural steps and the possible timetable for launching the process or processes. At the 21 March 2017 DSB meeting, he reported that he had consulted with several delegations on these matters but, unfortunately, it had not been possible to come to an agreement on the way forward. He indicated that the Chair's consultations would have to continue. Following the 21 March 2017 DSB meeting, after taking over the Chairmanship of the DSB, he had continued the process of consultations in order to find a way forward. As of the present meeting, the Chairman could only report that these consultations would continue with a view to finding a solution as soon as possible. He said that he was aware of the fact that the first position in the Appellate Body, currently held by Mr. Ramírez, would become vacant as of 1 July 2017. In view of the Appellate Body's increased workload, he believed that every avenue should be explored to ensure its good functioning. The Chairman therefore invited delegations with views on this matter to contact him directly or the Secretariat. On his part, he would continue to consult with delegations to be able to submit a proposal regarding the Appellate Body appointments as soon as possible.

6.2. The representative of Mexico, speaking on behalf of Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru, said that, pursuant to Article 2.1 of the DSU, it was up to the DSB to administer the dispute settlement provisions and, therefore, to maintain a proper functioning of the system, including the Appellate Body. Members, therefore, had to act responsibly and carry out the necessary work to enable its proper functioning. In this respect, the above-mentioned countries stressed their concern that, as of the present meeting, the selection process to fill the vacancy in the Appellate Body starting on 1 July 2017 – a vacancy traditionally maintained by the Latin American region – had not yet started. The mentioned countries were concerned that there was not even a proposal on procedures to carry out the selection process, given that Article 17.2 of the DSU and paragraph 4 of document WT/DSB/1 ("Establishment of the Appellate Body"), provided that "All vacancies shall be filled as they occur". In order to comply with this legal obligation, the selection process should have started at the beginning of 2017, which would have made it possible to comply with all the legal deadlines. In addition, Mexico said that, although the countries in question had received information about the lack of consensus to open the selection process, they did not know the reason as to why it was not possible to reach consensus. Mexico said that they would therefore appreciate being informed, as soon as possible, as to why there was no consensus. The delay in starting the selection procedure could create a negative precedent for future selection processes and should therefore be avoided. In addition, this situation created uncertainties for the conduct of the campaign of each candidate and could create obstacles for delegations to meet with the candidates. This was not appropriate in relation to such an important matter. Therefore, the countries in question urged the Chairman to submit a concrete proposal to initiate the selection process. They also urged other Members to act responsibly and to take a decision promptly, which would allow the DSB to overcome the delay and start the process. The countries in question were ready to work with the Chairman and, if necessary, they would submit a proposal for a decision by the DSB, with a view to initiating the selection process. Such a proposal could be submitted for consideration by the DSB at its meeting scheduled for 22 May 2017.

6.3. The representative of the European Union said that his delegation referred to its statement made at the 21 March 2017 DSB meeting. The EU said that it regretted that the selection process for the two vacancies arising in 2017 had not yet been launched. The EU encouraged the Chairman to continue to consult with Members so that the selection process could be launched without delay.

6.4. The representative of Canada said that his country was concerned and disappointed that lengthy consultations had not produced consensus on the manner in which to proceed to find successors to the members of the Appellate Body whose terms would end in 2017. As had been pointed out by Mexico, Article 17 of the DSU clearly required the DSB to fill vacancies on the Appellate Body as they arose. By failing to find a way forward after several months of consultations, Members were – collectively – failing to fulfil this responsibility. Canada said that it did not have strong views on whether it was preferable to have one selection process to fill both

vacancies arising in 2017 or to have a separate selection process for each vacancy. In the interest of achieving consensus, Canada said that it was prepared to proceed with either option. Canada did, however, consider that it was important to adhere to the limits regarding terms of Appellate Body members set out in Article 17.2 of the DSU. Thus, Canada strongly encouraged the DSB to launch a selection process or processes in a timely manner so that a successor for Mr. Ramírez Hernández could take office as soon as possible following the expiration of his term on 30 June 2017. The DSB would need to act quickly in order to make this possible. Indeed, given the timelines usually required for selection, it was likely that Members were already facing a period of time where the Appellate Body would not be at full strength. Canada was troubled by this given the demands on the Appellate Body. Canada, therefore, urged all Members to redouble efforts to achieve consensus on this matter.

6.5. Canada also drew attention to labels being attached to certain seats on the Appellate Body. The DSB had heard, on more than one occasion, the seat that would be vacated by Mr. Ramírez Hernández referred to as the "Latin seat". Similarly, Canada had heard both the seat that would be vacated by Mr. Van den Bossche referred to as the "EU seat" and that other seats on the Appellate Body "belonged" to other Members or geographic areas. Canada questioned the appropriateness of these labels. While Article 17.3 of the DSU provided that Appellate Body membership had to be broadly representative of the Membership of the WTO, there was no agreement among WTO Members that a particular Appellate Body seat should be attached to either a specific Member or that those seats should be limited to certain geographic regions that, in totality, excluded some areas of the world. Were this to occur, nationals of a considerable number of WTO Members would never have the opportunity to serve on the Appellate Body, and this would undoubtedly diminish the ability of the WTO Appellate Body to broadly represent the Membership of the WTO. To the extent that some Members considered there to be geographical limitations to the seat vacated by Mr. Ramírez Hernández, they should at least consider it to be the "Americas and Caribbean" seat. Moreover, in considering the selection of future members of the Appellate Body, Canada underlined the importance of considering a candidate on his or her merits in order to select the best individual to fulfil the responsibilities of this important office.

6.6. The representative of Australia recalled her country's statement made at the 21 March 2017 DSB meeting and register its disappointment that, once again, the DSB was not in a position to launch the process for the appointment of new Appellate Body members at the present meeting. Australia reiterated its view that the proper functioning of the Appellate Body was best served by the timely appointment of new members to fill vacancies as they arose. Further, Australia noted that a number of candidates had already been nominated by Members for consideration in anticipation of the commencement of a selection process. In light of this, it was increasingly critical that clarity on procedures and time-frames was forthcoming in order to ensure that any selection process was fair and transparent and that Members were afforded sufficient time to make informed choices. Consistent with past practice, Australia hoped that Members could work together to agree on an effective, transparent, and merits-based process to determine the appointment of the new Appellate Body members. Australia encouraged all Members to demonstrate pragmatism and flexibility to reach such an agreement and to ensure the timely appointment of members to the Appellate Body. Australia also wished to comment on the issue raised by Canada in its statement made at the present meeting, regarding the informal allocation of seats on the Appellate Body to particular Members or regions. For Australia's part, merit was, and would remain, the foremost criteria in its assessment of potential Appellate Body members. This was enshrined in the first sentence of Article 17.3 of the DSU. Further, nothing in the DSU entitled any WTO Member or region to automatic appointment of its nominated candidate to the Appellate Body.

6.7. The representative of India said that, as his country had stated at the 21 March 2017 DSB meeting, India echoed the views of Members who had spoken expressing concern about the delay in the initiation of the Appellate Body selection process. Though the reasons for the disagreement were evident – a single or independent processes – India was not entirely clear on the underlying rationale for the impasse. This had not been evident from the responses of Members that were seeking a single process or independent processes. As a matter of clarification, India said that it would be of great value to the Membership to know past practices in similar situations, which could be of some guidance in resolving the impasse. How had the Membership resolved similar situations in the past? It would also be useful for the Membership to understand what the underlying concerns were in going ahead with independent processes or filling up the vacancies as they arose. In India's view, it would be prudent to go ahead with filling both vacancies, in the interest of efficiency of process, or at least the first vacancy. There were many candidates already under

consideration. A few of them were already canvassing, both in Geneva, and in capitals. It was very difficult to engage without a clear time-frame for the appointment process or clarity on next steps. India said that it would like to know what exactly the impediment was to going forward with filling the first vacancy arising out of Mr. Ramírez Hernández term coming to an end. India would request the Chairman to further elaborate his understanding of the reasons for the impasse as a result of his consultations. The DSB had had an impasse a few months before the present meeting, on the selection of Appellate Body members, but, now, the impasse seemed to be on the process of the appointment itself. India said that it hoped that Members found a way of expediting the process of appointments to the Appellate Body, without further delay.

6.8. The representative of New Zealand said that her delegation thanked the Chairman for his progress report and efforts to find consensus. New Zealand continued to express its disappointment with the situation and urged Members to agree on a process for the 2017 appointments as soon as possible. Another month had passed and it seemed the DSB was no closer to agreeing on a process, let alone on a consensus candidate, to fill the position. New Zealand said that time was running out and urged Members to be pragmatic and constructive so as to avoid the situation arising where there was a vacancy on the Appellate Body. Even with a full bench, the Appellate Body had workload and resource constraints and a queue of disputes to be heard. Members should do their utmost to avoid exacerbating this situation. New Zealand said that it was prepared to consider any constructive solution that expedited appointments. It was also prepared to engage in discussions on how to address other causes of delay in Appellate Body hearings. New Zealand said that it looked forward to working with other Members, and the Chairman, in this regard.

6.9. The representative of China said that, as her country had expressed at the 21 March 2017 DSB meeting, China would like to join other Members to reiterate its systemic concern about the delay in the Appellate Body selection process. As a major user of the WTO dispute settlement system, China said that it had a strong interest in ensuring the efficient and smooth operation of the Appellate Body, and therefore it wished to have the appointment process begin as soon as possible. China said that it believed this was the common wish of all WTO Members, especially given the increasing workload pressures faced by the Appellate Body. China called upon Members to engage with this issue flexibly and constructively and to join efforts to find a solution expeditiously.

6.10. The representative of the United States said that the United States appreciated the information the Chairman had provided and that it looked forward to consulting with the Chairman, and other Members, on the process to fill these important positions.

6.11. The representative of the Russian Federation said that, taking into account delays with previous appointments of Appellate Body members, and the consequences that such delays had caused, her country hoped that this time the situation would not be the same, and that it would not increase the strain on the Appellate Body workload. Russia strongly encouraged the launch of the Appellate Body appointment process, as soon as possible.

6.12. The Chairman thanked Members for their statements made at the present meeting. He said that he was very encouraged by the number of statements, which had highlighted the importance that the Members attached to resolving this issue. As he had indicated, he would continue to work with delegations in order to be able to submit a proposal regarding the Appellate Body appointments as soon as possible.

6.13. The DSB took note of the statements.

7 DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

7.1. The Chairman, speaking under "Other Business", said that he wished to make a report to provide the DSB with information about the Appellate Body's workload, the number of disputes before panels and at the panel composition stage, and the ability of the Secretariat to meet expected demand over the coming period. This information reflects the status of disputes up until the present meeting. Regarding panels, there were currently 17 active panels (including five

panels under Article 21.5 of the DSU) that had not yet issued a final report to the parties. Multiple disputes that were being considered simultaneously by the same panel were being counted as one. As of the present meeting, all composed panels had been assigned staff to assist them and were either active or in the process of commencing proceedings. There were a further ten panels at the composition stage. This did not count panels for which there had been no composition activity in the last twelve months. In addition, four final panel reports that had been issued to the parties were currently being translated. Regarding appeals, the Appellate Body was currently dealing with six appeals, including the extremely complex compliance proceedings in "EC and Certain Member States – Large Civil Aircraft (Airbus)". Two of these appeals could not be staffed at this point. Up to three additional appeals could be filed within the next three months, including an appeal in the extremely complex compliance proceedings in "US – Large Civil Aircraft (Boeing)". Regarding arbitrations, three matters had been referred to arbitration under Article 22.6 of the DSU.

7.2. The DSB took note of the statement.