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Dispute Settlement Body
26 October 2016

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 26 OCTOBER 2016

Chairman: Mr. Xavier Carim (South Africa)

Prior to the adoption of the Agenda, the Chairman informed delegations that Antigua and Barbuda had requested by letter, dated 24 October 2016, that the item entitled: "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Statement by Antigua and Barbuda" (DS285) be removed from the proposed Agenda and that it be added to the proposed Agenda of the 23 November DSB meeting.

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C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.103)

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". Under this Agenda item, 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.165)

1.2. The Chairman drew attention to document WT/DS184/15/Add.165, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that his country had provided a status report in this dispute on 13 October 2016, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said his country thanked the United States for its statement and its status report submitted on 15 September 2016. Japan referred to its previous statements that this issue should be resolved as soon as possible.

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.140)

1.6. The Chairman drew attention to document WT/DS160/24/Add.140, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that his country had provided a status report in this dispute on 13 October 2016, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union said that his delegation thanked the United States for its status report and its statement. The EU referred to its statements made under this Agenda item at previous DSB meetings. The EU 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.103)

1.10. The Chairman drew attention to document WT/DS291/37/Add.103, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.11. The representative of the European Union said that on 16 September 2016, the Commission had adopted an authorisation decision for one GM maize.[1] Two other GMOs had been voted on with a no opinion result in the Standing Committee on 8 July 2016 and in the Appeal Committee on 15 September 2016. In accordance with the applicable regulations, it was now for the Commission to decide on these authorisations. More generally, and as had been stated many times before, 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 thanked the European Union for its status report and its statement made at the present meeting. As the United States had noted at past DSB meetings, EU measures affecting the approval and marketing of biotech products remained of substantial concern to the United States. The EU measures were characterized by lengthy, unpredictable, and unexplained delays in approvals. The United States noted that the EU's scientific review process seemed to have slowed in recent years. For instance, many corn and soy products had now been under consideration by the EU's scientific authority for several years. Further, the United States was concerned that products that had received positive scientific evaluations continued to languish without approval by the relevant EU bodies. The delays in approvals caused adverse effects on trade, particularly with respect to soybeans and corn. The United States encouraged the EU to ensure that products in the biotech approval pipeline moved forward in a timely manner, as required by EU regulations and WTO rules. The United States urged

[1] Bt11 × MIR162 × MIR604 × GA21.

the EU to ensure that its biotech approval measures were consistent with its obligations under the SPS Agreement.

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

2 IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

A. United States – Anti-dumping and countervailing measures on large residential washers from Korea

B. Russia – Tariff treatment of certain agricultural and manufacturing products

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 had to 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. The Chairman proposed that the two sub-items, to which he had just referred, be considered separately.

A. United States – Anti-dumping and countervailing measures on large residential washers from Korea

2.2. The Chairman recalled that, at its meeting on 26 September 2016, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, pertaining to the dispute: "United States – Anti Dumping and Countervailing Measures on Large Residential Washers from Korea". He invited the representative of the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2.3. The representative of the United States said that on 26 September 2016, the DSB had adopted the Panel and Appellate Body Reports in the dispute: "United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea". At the present meeting, as provided in the first sentence of Article 21.3 of the DSU, the United States stated that it intended to implement the recommendations of the DSB in this dispute in a manner that respected US-WTO obligations. The United States said it would need a reasonable period of time for implementation. In accordance with Article 21.3(b) of the DSU, the United States would discuss this matter with Korea with a view to reaching agreement on the period of time.

2.4. The representative of Korea said that his country welcomed the statement by the United States that it intended to comply with the recommendations and rulings of the DSB in this dispute. As the DSU called for prompt compliance with the DSB's recommendations and rulings, Korea urged the United States to take necessary steps to immediately bring its measures into conformity with its obligations under the WTO Agreements. Korea said it believed that the appropriate and reasonable period of time for the United States to take necessary steps should be as prompt as possible, pursuant to Article 21.1 of the DSU. In this regard, Korea was prepared to enter into consultations with the United States, under Article 21.3(b) of the DSU, on the reasonable period of time necessary for prompt compliance. In the meantime, Korea reserved its rights under Articles 21 and 22 of the DSU.

2.5. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.

B. Russia – Tariff treatment of certain agricultural and manufacturing products

2.6. The Chairman recalled that, at its meeting on 26 September 2016, the DSB had adopted the Panel Report in the dispute: "Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products". He invited the representative of the Russian Federation to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2.7. The representative of the Russian Federation said that, at its meeting on 26 September 2016, the DSB had adopted the Panel Report in the dispute "Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products" (DS485). The Panel had recommended Russia to bring duties on certain goods in conformity with its WTO commitments. The Russian Federation informed the Membership that the overwhelming majority of the measures challenged by the EU had already been brought into compliance with the Russian Federation's WTO obligations prior to, and in the course of, the dispute settlement proceedings. With respect to the remaining measures, Russia informed the DSB that it intended to implement the recommendations and rulings of the DSB in accordance with Article 21.3 of the DSU. To this end, the Russian Federation stated that it needed a reasonable period of time for the implementation of the DSB recommendations and rulings in this dispute. The Russian Federation said it looked forward to discussing this matter with the EU in due course with a view to resolving it in accordance with the DSU provisions.

2.8. The representative of the European Union said his delegation welcomed the statement made by the Russian Federation with regard to its intentions to comply. The EU was ready to discuss a reasonable period of time for compliance. The EU recalled that the Panel had confirmed that the customs duties that the Russian Federation had been required to apply, pursuant to the Common Customs Tariff of the Eurasian Economic Union, with respect to a number of products, exceeded Russia's bound rates and were inconsistent with Article II:1(b) of the GATT 1994. While the EU had taken note of modifications that had already occurred for certain tariff lines, it urged the Russian Federation to promptly take the necessary steps to ensure WTO-compatibility of the measures for which inconsistency remained. The EU hoped that the Russian Federation would fully respect the bindings that it had committed to in its Schedule.

2.9. 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. Statements by the European Union and Japan

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

3.2. The representative of the European Union said his delegation renewed its call on the United States to abide by its clear obligation, under Article 21.6 of the DSU, to submit implementation reports in this dispute. The EU requested, once again, that the United States stop transferring anti-dumping and countervailing duties to its industry. Every disbursement that still took place was clearly an act of non-compliance with the recommendations and rulings of the DSB.

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

3.4. The representative of Canada said his country thanked the EU and Japan for keeping this item on the Agenda of the DSB. Canada agreed with them that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

3.5. The representative of Brazil said that her country thanked the EU and Japan for keeping this item on the Agenda of the DSB and said that Brazil reiterated its previous statements on this matter.

3.6. The representative of China said her country thanked the EU and Japan for raising this item at the present DSB meeting. China urged the United States to come into full compliance with the DSB's rulings and recommendations on this matter, as soon as possible.

3.7. The representative of the United States said that, as his country had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU, Japan, and other Members had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, which was over nine years ago. The United States, therefore, did not understand the purpose for which the EU and Japan had inscribed this item on the Agenda of the present meeting. With respect to comments regarding further status reports in this matter, as it had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports which would repeat, again, that the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Indeed, as these very WTO Members had demonstrated repeatedly when they had been a responding party in a dispute, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented those DSB recommendations and rulings, regardless of whether the complaining party disagreed about compliance.

3.8. The DSB took note of the statements.

4 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. Statement by the United States

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

4.2. The representative of the United States said that the DSB had adopted its recommendations in this dispute more than four years ago, and the reasonable period of time had expired more than three years ago. To the present day, however, China's domestic supplier and national champion – a business set up by the People's Bank of China and other Chinese Government-related entities – remained the only entity authorized to provide electronic payment services (EPS) in China. China had issued a regulation a few months ago that appeared to set out a licensing application process for EPS suppliers to enter the domestic market. However, whether China would, in fact, allow foreign EPS suppliers to operate in the Chinese domestic market remained unclear. The United States urged China to ensure that the approval of foreign EPS suppliers occurred without delay, in accordance with China's WTO obligations.

4.3. The representative of China said her country regretted that the United States had, once again, brought this matter before the DSB. China referred to its statements made at previous meetings and emphasized that it had taken all necessary actions to fully implement the DSB's recommendations and rulings in this dispute. China reiterated that the regulation mentioned by the United States was not relevant to the implementation of the DSB's recommendations and rulings in this dispute. Nor was the DSB meeting an appropriate forum to discuss China's domestic regulatory action which was irrelevant to this specific dispute.

4.4. The DSB took note of the statements.

5 UNITED STATES - COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

A. Statement by India

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

5.2. The representative of India said that his country was, once again, forced to raise the issue of the US' non-compliance and its failure to submit a status report, in accordance with Article 21.6 of the DSU, in this dispute. India said it would like to highlight to the DSB why it had, once again, raised this issue at the present meeting. India said it was mindful of repetitive statements in the DSB, and had shortened its intervention considerably, in view of the Chairman's opening remarks.

He recalled that the United States had explained, at the 26 September 2016 DSB meeting, that, under US law, the US Department of Commerce "has discretion with respect to the timing of a self-initiated investigation. And, Commerce has confirmed its commitment to exercise its discretion in a manner that is consistent with the international obligations of the United States". Therefore, the United States had claimed that no further action was needed. This explanation was not legally tenable. The Appellate Body had categorically found, after a thorough analysis of the provisions of the measure and the SCM Agreement, that Section 1677(7)(G)(iii) "requires" cross-cumulation, which was, in fact prohibited under WTO law. The law, as it existed on the statute, was WTO-inconsistent. Therefore, for the United States to argue in the DSB that it had discretion to initiate an investigation, and that it would exercise this discretion consistently with its WTO obligations, disregarded the DSB's rulings and recommendations in this regard. The United States was attempting to re-adjudicate the issue where it could not be adjudicated. Merely stating that it would act in a WTO-consistent manner without either modifying or repealing the measure could not, *ipso facto*, result in compliance with WTO obligations.

5.3. As had been previously stated, there existed, on the statute book, a law that had been found to be WTO-inconsistent by the DSB. It was also pertinent to note Agenda item 1A and 1B of the present meeting. In both these disputes, United States' law continued to be WTO-inconsistent and the United States had stated that it was working with US Congress to bring in appropriate measures. The United States continued to submit status reports pertaining to work on statutory amendments to domestic laws that had been found to be inconsistent with US WTO obligations and were yet to be modified or repealed. Though compliance was less strict in the DSB, in terms of the time taken to comply, the approach of the United States in providing a status report was consistent with the DSU. India was disappointed to note that a different legal standard was being pursued in the present dispute, which pertained to essentially the same issue: a law which was WTO-inconsistent, than the disputes under Agenda items 1A and 1B. The United States neither believed that it was necessary to provide a status report in this case nor that it needed to work on repealing or modifying the statute. India said that the United States was bound to remove the inconsistency, either by deleting Section 1677(7)(G)(iii) entirely, or by amending it to ensure that USITC could not cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports. The United States could not absolve itself from this responsibility by stating that an illusory "discretion" would be exercised in a manner consistent with its international obligations. India thus urged the United States to fully comply with the rulings and recommendations of the DSB in this dispute and, until then, to file status reports as it did in other, similar disputes.

5.4. The representative of the United States said that, as his country had explained at prior DSB meetings, the United States had completed implementation with respect to the DSB recommendations in this dispute. The United States remained willing to discuss with India any questions it may have. India, however, had not contacted the United States to do so. Accordingly, the United States failed to understand what purpose was served by India's decision to place this item on the Agenda of the present meeting. As the United States had consistently explained to the DSB, and again at the present meeting under Agenda item 3, there was no obligation under the DSU to provide further status reports once a Member had announced that it had implemented those DSB recommendations, regardless of whether the complaining party disagreed about compliance.

5.5. With respect to the "as such" finding on Section 1677(7)(G)(i)(III) of the Tariff Act of 1930, the United States had explained, both to India and to the DSB, that no further US action was needed. The provision of US law at issue had not been applied in the underlying investigation, and therefore had no bearing on compliance with respect to the countervailing duty at issue in this dispute. Indeed, to the United States' knowledge, this provision of US law had never been used in any investigation. With respect to any future investigations, the statutory provision related to a decision by the administering authority to self-initiate a CVD investigation on the same day as an AD petition was filed by an industry, or vice versa. As the United States had explained before, under US law, the US Department of Commerce had discretion with respect to the timing of a self-initiated investigation. The discretion provided for under US law had not been the subject of any findings by the Appellate Body in its Report – not surprisingly, as this provision had not even been addressed by either of the Parties in the course of this dispute.

5.6. Nonetheless, the United States had previously confirmed that, having never been exercised in a WTO inconsistent manner before, it was not now the intention of the United States to exercise

this discretion differently. That is, the Department of Commerce had confirmed its commitment to exercise its discretion with respect to section 702(a) of the Tariff Act of 1930, pertaining to countervailing duty investigations, and section 732(a) of that Act, pertaining to antidumping duty investigations, in a manner that was consistent with the WTO obligations of the United States. Therefore, no further action was needed and India had no basis for its insistence that US law had to be changed in order for the United States to comply with the DSB recommendations in this dispute.

5.7. The DSB took note of the statements.

6 INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

A. Statement by the United States

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

6.2. The representative of the United States said that Members would recall that India continued to modify its measures related to avian influenza, even though the reasonable period of time for compliance had expired in June 2016. Most recently, India had announced a revised measure on 22 September 2016. The United States recalled that the Panel had found, and the Appellate Body had confirmed, that international standards issued by the OIE would meet India's level of protection. Under the September 2016 version of India's measure, however, the United States continued to have concerns that India's measure could be substantially more trade restrictive than a measure based on OIE recommendations. For example, the content of the veterinary certificates that India would require upon the importation of agricultural products was an essential element in understanding India's revised measure. India's Department of Animal Husbandry, however, had removed from its website the veterinary certificates that would be required for the products covered by this dispute.[2] The United States said it stood ready to work constructively with India to reach a resolution to this dispute. Regrettably, however, the United States had had no notice that the most recent revision to India's measure was forthcoming. As a practical matter, the parties could not work together if India failed to communicate with the United States on the revisions to the measures at issue in this dispute. Until its concerns were resolved, the United States would continue to preserve and enforce its rights under the DSU.

6.3. The representative of India said that, on 8 July 2016, India had published, in its Official Gazette, notification S.O. 2337(E), which had superseded the previous notification S.O. 1663(E).[3] India had notified the DSB on 18 July 2016 that it had adopted measures necessary to comply with the recommendations and rulings of the DSB.[4] Notification S.O. 2337(E) complied with the recommendations of the DSB in this dispute as it: (i) allowed imports of poultry and poultry products into India, in accordance with the relevant international standard, the OIE Terrestrial Animal Health Code ("Terrestrial Code"); (ii) recognized the concept of disease-free areas; and (iii) provided for a process to be followed for recognition of such disease-free areas, zones or compartments, in conformity with the Terrestrial Code and the SPS Agreement. In this respect, India had also issued the relevant guidelines referred to in notification S.O. 2337(E), as well as a questionnaire, for recognizing a part of a country, zone or compartment, for the purpose of trade in poultry and poultry products.

6.4. After the publication of S.O. 2337(E), India and the United States had entered into bilateral discussions to address additional concerns raised by the United States, and, pursuant to these discussions, India had further amended notification S.O. 2337(E) vide S.O. 2998(E) dated 19 September 2016.[5] The amendment notification had been notified to the SPS Committee.[6] It had also been notified to the DSB on 22 September 2016 and was available in document WT/DS430/19. Notification S.O. 2337(E), dated 8 July 2016; the amendment notification

[2] See http://www.dahd.nic.in/Trade/Sanitary-requirement-veterinary-health-certificate-import-various-livestock-products.
[3] See http://egazette.nic.in/WriteReadData/2016/170589.pdf.
[4] Communication from India, WT/DS430/18 circulated on 19 July 2016.
[5] See http://egazette.nic.in/WriteReadData/2016/171799.pdf.
[6] See G/SPS/N/IND/160.

S.O. 2998(E), dated 19 September 2016; the guidelines; and the questionnaire, together, formed the "revised Avian Influenza measures". The notifications had been issued in exercise of the power conferred by sub-section (1) of Section 3 and Section 3A of the Livestock Act, 1898 (9 of 1898) and had come into effect from the date of their publication in the Official Gazette.

6.5. In view of the above, India said it strongly considered that it had brought itself into conformity with its WTO obligations. It had complied with the recommendations and rulings of the DSB by rectifying the inconsistencies in S.O. 1663(E), issuing notification S.O. 2337(E), issuing amendment notification S.O. 2998(E), and issuing the guidelines and questionnaire. India was disappointed that the United States had raised this issue at the DSB again; despite the fact that India was engaging in good faith efforts to discuss and resolve the issue with the United States. The measure that had been found to be inconsistent by the DSB was no longer in force. It had been superseded and revised measures – consisting of S.O. 2337(E), S.O. 2998(E), the guidelines and the questionnaire – were in force. In view of the fact that India had brought itself into conformity with its WTO obligations, India urged the United States to terminate the Article 22.6 proceedings in this dispute.

6.6. The representative of the United States said that, under Article 22.6 of the DSU, the negative consensus rule applied within 30 days of the end of the period for compliance. By submitting the Article 22.2 request, the United States had preserved its negative consensus rights. Taking this step had been neither surprising nor unusual. Similar actions had been taken in other disputes. The United States noted that, as of the end of the reasonable period of time, and indeed as of the time of the US request under Article 22.2 of the DSU, India had not even claimed that the measures that were the subject to the DSB's recommendations and rulings had been withdrawn or modified. As the United States had noted, it remained prepared to engage with the Government of India to facilitate its coming into compliance with the DSB's recommendations and rulings in this dispute.

6.7. The representative of the European Union referred to his delegation's statement made at the special DSB meeting on 19 July 2016. The EU continued to trust that India and the United States would ensure that the DSU procedures with regard to compliance and suspension of obligations in this dispute, could be conducted efficiently and in the correct sequence. The EU would continue to follow the developments in this dispute.

6.8. The DSB took note of the statements.

7 CHINA - EXPORT DUTIES ON CERTAIN RAW MATERIALS

A. Request for the establishment of a panel by the United States (WT/DS508/6)

7.1. The Chairman drew attention to the communication from the United States contained in document WT/DS508/6 and invited the representative of the United States to speak.

7.2. The representative of the United States said his country recalled that, in two prior disputes, the DSB had found that China's export restrictions on various raw materials had been inconsistent with WTO rules. Unfortunately, those raw materials were not the only ones on which China had imposed export restraints. China continued to maintain export restrictions on other raw materials. The US panel request reflected US concerns with China's restraints on the exportation of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum, and tin. These materials were critical inputs to a wide range of industrial sectors in the United States and in other Members. China's export restraints provided an advantage to its domestic industries purchasing these raw materials, at the expense of industries elsewhere. As had been described in more detail in the US panel request, the export restraints at issue included export quotas, export duties, and restrictions on the rights of enterprises seeking to export. These restraints appeared to be inconsistent with provisions of the GATT 1994 and China's Protocol of Accession. China's persistence in maintaining such export restrictions, notwithstanding the United States' efforts to engage with China on this issue, and WTO findings in the two previous disputes, was troubling. The United States had attempted to resolve these issues through dialogue with China on a bilateral or multilateral basis. China had not taken any action to resolve the United States' concerns. The United States had then requested and held formal WTO consultations with China on 8-9 September 2016. These efforts had also, unfortunately, failed to resolve the dispute.

Accordingly, the United States was requesting that the DSB establish a panel to examine the matter set out in its panel request with standard terms of reference.

7.3. The representative of China said her delegation wished to express its strong disappointment with the United States' decision to request the establishment of a panel to examine this dispute. The United States had filed a request for consultations, and supplementary request for consultations, with China on 13 July and 19 July 2016 respectively. China had held sincere consultations with the United States in early September and had positively responded to the questions. China said it had reiterated its steadfast stance on respecting WTO rules and abiding by its accession commitments.

7.4. There was increasing pressure on the protection of exhaustible natural resources and the environment. Given this, China's policies concerning the products at issue were an integral part of the comprehensive measures taken to promote the scientific management of natural resources products and strengthen ecological environment protection, with the purpose of achieving sustainable development. In sum, China said it regretted the US decision to move this dispute into the panel phase. China said it was not in a position to accept the establishment of a panel at the present meeting. China stood ready to safeguard its rights under the DSU and the covered agreements.

7.5. The representative of the European Union said his delegation shared the United States' concerns regarding China's continued export restrictions on certain raw materials. The EU said that it was disappointed that China maintained such restrictions; despite two very clear rulings by the WTO (albeit on a different set of raw materials). On 19 July and on 19 August 2016, the EU had requested consultations with China with regard to its export restrictions on certain raw materials (DS509). As the consultations had failed to resolve the dispute, and the EU had not received any information from China that the export restrictions in question would be removed, the EU would later request the establishment of the panel in its own dispute to be considered by the DSB at its next meeting.

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

8 EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

A. Report of the Appellate Body (WT/DS473/AB/R and WT/DS473/AB/R/Add.1) and Report of the Panel (WT/DS473/R and WT/DS473/R/Add.1)

8.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS473/14 transmitting the Appellate Body Report in the dispute: "European Union – Anti-Dumping Measures on Biodiesel from Argentina", which had been circulated on 6 October 2016 in document WT/DS473/AB/R and Add.1. The Chairman reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU requires that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to members. This adoption procedure is without prejudice to the right of members to express their views on an Appellate Body report". The Chairman invited the parties of the dispute to present their views on the Reports before the DSB.

8.2. The representative of Argentina said his country welcomed the two highly important Reports – for Argentina and for the system – that would be adopted at the present meeting. First of all, Argentina wished to thank the Panel, the Appellate Body and both Secretariats for their work throughout the two year long dispute, as well as the staff who had, in one way or another, participated in the proceedings. It was significant that the Appellate Body had substantively upheld all Panel's conclusions and recommendations, in particular those relating to the interpretation of the obligations laid down in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. This highlighted the excellent work of the Panel in discerning the substantive aspects of the case, as well as their implications and importance. In this regard, Argentina noted that, in line with the proceedings conducted in the WTO, the General Court of the European Union had annulled Regulation No. 1193/2013, which had imposed anti-dumping duties on biodiesel from Argentina and Indonesia.

8.3. Argentina believed that, with the adoption of the Reports of the Panel and the Appellate Body in the dispute on "European Union – Anti-Dumping Measures on Biodiesel from Argentina" the entire WTO Membership would benefit from a sound, accurate and precise interpretation that would enhance the predictability of key provisions of the Anti-Dumping Agreement in respect of the construction of normal value. The Reports threw light on certain systemic aspects that had not been addressed before. First, Argentina noted that the Appellate Body had reaffirmed and upheld the fact that the object and purpose of the Anti-Dumping Agreement was to remedy practices resulting from the pricing behaviour of exporters or foreign producers under investigation. Its scope could not therefore be expanded in an attempt to cover measures that were not in keeping with the letter and spirit of the Agreement. Second, these Reports clearly showed that the purpose of anti-dumping proceedings was to determine the costs of production and sale of the product under consideration, produced by the producer under investigation, in the country of origin. The construction of normal value could not therefore be based on hypothetical costs that could have been incurred by the producer under investigation under different conditions or circumstances.

8.4. Third, Argentina emphasized that both the Panel and the Appellate Body had found that a particular government policy measure did not, as such, constitute a sufficient legal basis for concluding that the accounting records kept by the producers or exporters did not reasonably reflect the costs associated with the production and sale of the product under investigation. It was therefore highly relevant that both bodies had concluded that the first paragraph of Article 2.2.1.1 of the Anti-Dumping Agreement did not include a reasonableness test of the costs as such. Rather, it related to whether the accounting records of the exporter and/or producer under investigation suitably and sufficiently corresponded to or reproduced those costs incurred that had a genuine relationship with the production and sale of the specific product. Finally, with regard to Article 2.2 of the Anti-Dumping Agreement, Argentina noted that both bodies had made a finding that refuted the use of prices replacing the costs in the country of origin.

8.5. Fourth, with regards to Article 2.4 of the Anti-Dumping Agreement, Argentina noted that even though the Appellate Body did not overturn the Panel's findings on this claim, it had not shared the latter's interpretation. The Appellate Body did not agree that there existed a "general proposition" establishing that differences arising from the methodology applied for establishing the normal value could not, in principle, be challenged under this Article as "differences affecting price comparability". Fifth, Argentina underscored that, although it was aware of the difficulty of prevailing in an "as such" claim and regretted not having been able to assert its position, it was confident that in future cases initiated by other WTO Members, the second subparagraph of Article 2(5) of the European Basic Regulation would be found to be inconsistent by means of a holistic analysis that went beyond the analysis carried out in this dispute. Finally, Argentina said that it hoped that, pursuant to Article 21.3 of the DSU, the European Union would inform the DSB of the prompt implementation of the latter's conclusions and recommendations in this dispute. To conclude, Argentina once again thanked the Panel, the Appellate Body and both Secretariats for their work, as well as all the staff that had participated in the proceedings relating to this dispute.

8.6. The representative of the European Union said his delegation thanked the members of the Appellate Body, the Panelists and the Secretariat for their work on this case. The EU acknowledged the time and effort that had been dedicated to this dispute. The EU welcomed the Appellate Body's confirmation, of the Panel's finding, that the second subparagraph of Article 2(5) of the basic anti-dumping EU regulation was WTO-consistent. With regard to the EU regulation imposing anti-dumping duties on imports of biodiesel from Argentina, the EU was pleased that the Panel and the Appellate Body had rejected a number of claims of WTO inconsistency. Nevertheless, the Panel and the Appellate Body had made certain findings of WTO inconsistency with regard to the specific anti-dumping measures imposed on biodiesel from Argentina. The EU took note of the Appellate Body's clarification that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 did not preclude an investigating authority from using information on the cost of production "in the country of origin", from sources outside the country, as long as this information was apt or capable of yielding a cost of production in the country of origin. The EU also took note that the Panel and the Appellate Body had made certain findings of WTO-inconsistency with regard to the specific anti-dumping measures imposed on biodiesel from Argentina and was analysing the impact of these findings for the EU internal regulations and legislations.

8.7. The representative of Mexico said his country had been a third participant in this dispute and wished to comment on a systemic issue relating to open hearings, which had been settled by the Appellate Body in these proceedings. Thus far, Members had not reached agreement on open

hearings. This was one of the topics discussed in the DSU negotiations. The panels and the Appellate Body would agree to conduct open hearings, provided that the two parties to the dispute so agreed. In the absence of such agreement, requests for oral hearings open to the public or alternative methods such as video recordings were declined. In the appeal proceedings, the EU had requested the adoption of additional procedures concerning public observation of the oral hearing and recording of the latter by third participants. With respect to public observation of the oral hearing, the Appellate Body had explained that "the request to open the oral hearing in these proceedings was made by only one of the participants" and the other participant had expressed concerns about this request. The Appellate Body had accordingly denied the request for open hearings made by one of the participants. The request for video recording of the oral hearing had also been rejected. The same requests for open hearings or alternative methods had been settled differently in other ongoing proceedings. WTO Members hoped that similar situations were resolved in a similar way under the principle of "security and predictability" of the dispute settlement system provided for in Article 3.2 of the DSU. Mexico called upon the panels and the Arbitrators, as well as the Secretariat, to take this into account in their decisions.

8.8. The representative of the United States said that, before addressing a systemic issued raised in the Appellate Body Report, the US would first comment on the statement made by Mexico. The United States said that it was quite disappointing to hear Mexico express concerns with greater transparency in the WTO dispute settlement system. Mexico's position was surprising, given that it had agreed to open dispute meetings in other international fora and even in some of its own WTO disputes. The United States said it would be interested in understanding better why Mexico was opposed to greater transparency. In the United States' view, public hearings and greater transparency of the dispute settlement system promoted greater confidence in the system. It allowed other WTO Members and the public to observe the high-quality work of panels and the Appellate Body. The United States recalled that in "US – Continued Suspension", the Appellate Body had reasoned that pursuant to Article 18.2 of the DSU, each party had a right to disclose statements of its own position to the public and that such statements extended to oral statements and answers to questions at a hearing. Thus, a party had the ability to maintain the confidentiality of its own statements, but also the ability to request the confidentiality of the proceeding be lifted for its statements.[7]

8.9. The Reports of the Panel and Appellate Body in this dispute made findings on a number of matters regarding the interpretation and application of the Agreement on the Implementation of Article VI of the GATT 1994. The United States said it understood from those Reports that those findings turned on the facts and circumstances of the specific anti-dumping investigation at issue in this dispute. The United States would not comment on those facts and circumstances, and related findings, at the present meeting. The United States, however, said it would like to draw the DSB's attention to an important systemic issue which had implications for the operation of the dispute settlement system. The issue was how the Appellate Body should approach appeals from panel findings on the meaning of municipal law, as well as how the Appellate Body had approached Argentina's particular appeal in this dispute on the meaning of the EU law being challenged.

8.10. In the WTO system, or in any international law dispute settlement system, the meaning of municipal law was an issue of fact. In contrast, the interpretation of the WTO Agreement, or other relevant international law, was the issue of law for that system. This proposition was not controversial. For example, one of the standard treatises on international law (Brownlie) states that "municipal laws are merely facts which express the will and constitute the activities of States".[8] The Appellate Body, however, had treated panel findings on the meaning of municipal law as a matter of WTO law, to be decided by the Appellate Body de novo in an appeal under Article 17.6 of the DSU. The Appellate Body had given no rationale – based in the text of the DSU or in any other source – for this fundamental departure from the principle that the meaning of municipal law was an issue of fact in international dispute settlement.

8.11. In its Report in this dispute, the Appellate Body's explanation for the proposition that the meaning of municipal law was an issue of law under Article 17.6 of the DSU was a single sentence: "Just as it is necessary for the panel to seek a detailed understanding of the municipal law at issue, so too is it necessary for the Appellate Body to review the panel's examination of that

[7] "US – Continued Suspension" (AB), Annex IV, paragraph 4.
[8] Brownlie, Principles of Public International Law, at 39 (5th ed. 1998).

municipal law".[9] The only basis that had been given for this assertion was a citation to the Appellate Body's own Report in "India – Patents" (US). That Report, however, provided no meaningful explanation for this proposition. Ironically, "India – Patents" cited the very same international law treatise quoted above, which stated that municipal law was an issue of fact for the purpose of international dispute settlement.[10] That is, the "India – Patents" Report cited a treatise that stood for the opposite of what the Appellate Body cited it for.

8.12. Further, the Appellate Body's stated rationale – that a "detailed understanding" was important – said nothing about the proper role of the Appellate Body in reviewing a Panel's findings. Indeed, many factual issues in WTO dispute settlement required "detailed understanding". But that provided no basis for treating those factual issues as issues of law to be decided de novo by the Appellate Body on appeal. The relevant provisions of the DSU reflected this straightforward division between issues of fact and law. As Members knew, Article 6.2 of the DSU required a complaining party to set out "the matter" in its panel request comprised of "the specific measures at issue" – that is, the core issue of fact – and to "provide a brief summary of the legal basis of the complaint" – that is, the issue of law. Article 11 of the DSU similarly distinguished between the panel's "objective assessment of the facts of the case" and its assessment of "the applicability of and conformity with the covered agreements" – that is, the issue of law. And Article 12.7 of the DSU made the same distinction in relation to the findings of fact and law in the Panel's Report. Thus, the DSU made clear that the measure at issue was the core fact to be established by a complaining party, and the WTO-consistency of that measure was the issue of law.

8.13. The lack of coherence in the Appellate Body's approach had been noted by other commentators. For example, an entry in The Oxford Handbook of International Trade Law stated: "[T[he logic of the Appellate Body's finding [that panel findings on municipal law are issues of law under DSU Article 17.6] is difficult to understand. Just because a panel assesses whether a domestic legal act – which represents a fact from the perspective of WTO law – is consistent or inconsistent with WTO law does not suddenly turn the meaning of the domestic legal act into a question of WTO law … [T]here must … be a discernible line between issues of fact and issues of law. After all, the Appellate Body's jurisdiction is circumscribed precisely by this distinction".[11]

8.14. The problems with the Appellate Body's approach were highlighted by this very appeal. One of Argentina's claims had been that a provision of EU law, the Basic Regulation, was inconsistent "as such" with the Anti-Dumping Agreement. On appeal, Argentina had claimed that the Panel had erroneously construed that EU law. Argentina's argument had been based on the text of the EU provision, legislative history, a supposed EU practice in several other investigations, and certain EU court decisions. On appeal, Argentina had claimed both that the Panel's interpretation of EU law was wrong as a matter of law (although under what provision of the Anti-Dumping Agreement or the DSU remained unclear) and that the Panel had failed to make an "objective assessment of the matter" under Article 11 of the DSU. Especially given the Panel's alleged error in examining all of the different types of evidence introduced by Argentina, the United States said that the Appellate Body could have, and should have, handled this matter as an appeal under Article 11 of the DSU. In an Article 11 appeal, of course, the Appellate Body would not have conducted a de novo review of EU law, but rather would have examined whether the panel had exceeded its "margin of appreciation" as the trier of fact. The Appellate Body, however, had examined the meaning of the EU law both as a de novo legal issue, and then proceeded to conduct a separate examination of whether the Panel had made an objective assessment. The United States said that, frankly, this approach did not make sense. It departed from the Appellate Body's frequent admonition that a party should present an issue as an error of law or an error under Article 11, but not both types of claims with respect to the same issue.[12] Furthermore, it raised the prospect that the Appellate Body might find that the Panel had made an objective assessment of a complex factual record, and at the same time might find that precisely the same panel finding had been incorrect simply because the Appellate Body had made a different factual determination based on its own *de novo* review.

[9] Appellate Body Report, "EU – Biodiesel", paragraph 6.155 (citing "India – Patents" (US)).
[10] Appellate Body Report, "India – Patents" (US), paragraphs 65 and footnote 52.
[11] Jan Bohanes and Nick Lockhart, "Standard of Review in WTO Law", The Oxford Handbook of International Trade Law (2009), at 42.
[12] See, e.g., "EC – Fasteners" (China) (AB), paragraph 442; "Chile – Price Band System" (Article 21.5 – Argentina) (AB), paragraph 238.

8.15. This type of outcome – which followed from the Appellate Body's finding that it could conduct its own de novo review of the meaning of domestic law – was inconsistent with the appropriate functioning of the dispute settlement system. It departed from the basic division of responsibilities where panels determined issues of fact and law, and the Appellate Body could be asked to review specific legal interpretations and legal conclusions. It also represented a serious waste of the limited resources of the WTO dispute settlement system, adding complexity and delay to the process. No purpose was served by having a panel engage in a detailed review of a factual record related to the meaning of a domestic measure, and then to have the Appellate Body engage in its own de novo review of the exact same factual issues, so that the parties had to argue all the same factual issues a second time. The United States said that it looked forward to discussing these important issues with other Members to enhance the effectiveness and efficiency of the dispute settlement system.

8.16. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS473/AB/R and Add.1 and the Panel Report contained in document WT/DS473/R and Add.1, as modified by the Appellate Body Report.

9 ADOPTION OF THE 2016 DRAFT ANNUAL REPORT OF THE DISPUTE SETTLEMENT BODY (WT/DSB/W/577)

9.1. The Chairman said he was submitting for adoption the draft text of the 2016 Annual Report of the DSB contained in document WT/DSB/W/577. He did so pursuant to the Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO, contained in document WT/L/105. This Report covered the work of the DSB since the previous Annual Report contained in document WT/DSB/67. In other words, it covered meetings of the DSB from 25 November 2015 through to 26 September 2016. The Report contained a factual summary of DSB meetings during the period under review. As in the past, following the adoption of the Annual Report at the present meeting, the Secretariat would update the Report, under its own responsibility, in order to include actions taken by the DSB both at its special meeting held on 14 October as well as at the present meeting. Subsequently, the updated Annual Report would be submitted for consideration by the General Council at its meeting scheduled for 7 and 8 December 2016. The Chairman proposed that the DSB adopt the draft Annual Report of the DSB contained in document WT/DSB/W/577 on the understanding that it would be further updated by the Secretariat.

9.2. The DSB took note of the statement and adopted the draft Annual Report of the DSB contained in WT/DSB/W/577 on the understanding that it would be further updated by the Secretariat.[13]

10 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/580)

10.1. The Chairman drew attention to document WT/DSB/W/580, which contained one additional name, proposed by Kenya, for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. The Chairman proposed that the DSB approve the name contained in document WT/DSB/W/580.

10.2. The DSB so agreed.

11 APPELLATE BODY MATTERS

11.1. The Chairman said he wished to make a short statement regarding the ongoing Appellate Body selection process, which had been initiated by the DSB at its meeting on 21 July 2016. As Members were all aware, by the deadline of 14 September for nominating candidates for the vacancy that had been left by the non-reappointment, seven candidates had been proposed. In this regard, and pursuant to the 21 July 2016 DSB decision, Australia, China, Japan and Nepal had re-submitted their candidates for the new vacancy and two new nominations had been submitted by Chinese Taipei and Korea. The interviews by the Selection Committee of the two new candidates that had been submitted by Chinese Taipei and Korea took place on 17 October 2016.

[13] Subsequently, the 2016 Annual Report of the DSB was circulated in document WT/DSB/71.

He recalled that the five re-nominated candidates from Australia, China, Japan and Nepal were not required to be interviewed for the second time by the Selection Committee. As part of the selection process, on 1 and 2 November 2016, the Selection Committee would make itself available to hear the views of delegations on the candidates proposed for the second vacancy left by the non-reappointment of one Appellate Body member. Delegations wishing to meet the Selection Committee were invited to contact the Secretariat – Council/TNC Division to make an appointment. He said that many delegations had already done so. Alternatively, delegations could send comments in writing to the Chair of the DSB, in care of the Council/TNC Division, by no later than 2 November c.o.b. After the consultations with delegations, the Selection Committee would need to make its recommendation as soon as possible but by no later than 10 November in order to be considered by the DSB at its regular meeting on 23 November. The Selection Committee would also need to make a recommendation with regard to the first selection process so that the two new Appellate Body members could be approved by the DSB at its regular meeting on 23 November 2016.

11.2. The representative of China said her country would like to use this opportunity to express its gratitude to Ms Yuejiao Zhang for her valuable contribution and service to the work of the Appellate Body over the past eight years. China wished her all the best and reminded delegations that, after the farewell ceremony there would be a farewell reception, which was sponsored by the Chinese Mission.

11.3. The DSB took note of the statements.

12 DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

12.1. The Chairman, speaking under "Other Business", said that as he wished 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. On appeals, the Appellate Body was currently dealing with two appeals[14], including the extremely complex compliance proceedings in "EC and Certain Member States – Large Civil Aircraft" (Airbus). In addition, five panel reports, expected to be circulated in the following three months, could also be appealed after their circulation.[15] Given the limited number of staff available in the Appellate Body Secretariat, there was soon likely to be a waiting period before appeals could be staffed and Appellate Body members could turn to dealing with them. On Panels/Arbitrations, currently, there were 17 active panels (including three panels under Article 21.5 of the DSU) that had not yet issued a final report to the parties. Please note that multiple disputes that were being considered simultaneously by the same panel were being counted as one. As of the present meeting, there were three composed panels that had been assigned staff to assist them and were in the process of commencing proceedings.[16] There were an additional six panels at the composition stage. In addition, one matter had been referred to arbitration under Article 21.3(c) of the DSU, and two matters had been referred to arbitration under Article 22.6 of the DSU.

12.2. The DSB took note of the statement.

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[14] DS316 "EC and Certain Member States – Large Civil Aircraft" (Article 21.5 – US); and DS475 "Russia-Pigs".

[15] DS442 "EU – Fatty Alcohols" (Indonesia); DS471 "US – Anti-Dumping Methodologies" (China); DS477/DS478 "Indonesia – Import Licensing Regimes"; DS479 "Russia – Commercial Vehicles"; and DS487 "US – Tax Incentives".

[16] DS480 "EU – Biodiesel" (Indonesia); DS505 "US – Supercalendared Paper"; and DS437 "US Countervailing Measures" (China) (Article 21.5 - China).