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Dispute Settlement Body
22 January 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 22 JANUARY 2018

Chairman: Mr. Junichi Ihara (Japan)

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1.1. The Chairman noted that there were six sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 of the DSU required that, "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". Under this Agenda item, he invited delegations to provide up-to-date information about compliance efforts and to focus on new developments, suggestions and ideas on progress towards the resolution of disputes. He also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings, "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.179)

1.2. The Chairman drew attention to document WT/DS184/15/Add.179, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Hot-Rolled Steel".

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 11 January 2018, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for the latest status report and the statement at the present meeting. Japan called, once again, on the United States to fully implement the DSB's recommendations and rulings so as to resolve this matter.

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.154)

1.6. The Chairman drew attention to document WT/DS160/24/Add.154, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Section 110(5) Copyright Act".

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 11 January 2018, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union said that his delegation thanked the United States for its status report and its statement made at the present meeting. The EU referred to its previous statements on this matter and reiterated that it would like to resolve this dispute as soon as possible.

1.9. The representative of China recalled that, in 2000, the Panel had found that Section 110(5) of the US Copyright Act had been inconsistent with the TRIPS Agreement. Specifically, the Panel had found that the US law at issue had failed to meet the requirements under Article 13 of the TRIPS Agreement and Articles 11bis (1)(iii) and 11(1)(ii) of the Berne Convention, which had been incorporated into Article 9.1 of the TRIPS Agreement. Nonetheless, the law in question was still in effect to the detriment of the interests of copyright holders of musical work. China referred to its previous statements made under this Agenda item, and urged the United States, once again, to fully implement the DSB's recommendations and rulings by amending or withdrawing the said law to fulfil its obligations under the TRIPS Agreement, which set out only the minimum standards of protection that WTO Members were required to provide to intellectual property right holders.

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

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.117)

1.12. The Chairman drew attention to document WT/DS291/37/Add.117, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case "EC – Approval and Marketing of Biotech Products".

1.13. The representative of the European Union said that on 22 December 2017, the Commission had adopted six decisions concerning the authorization for GM food and feed products, which included the authorization of four new GM soybeans[1], one new GM rapeseed[2] and the renewal of one GM maize[3]. The EU continued to be committed to act in line with its WTO obligations. As stated many times before, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.14. The representative of the United States thanked the European Union for its status report and its statement at the present meeting. The United States understood that before the close of 2017, the EU had approved a small number of the pending applications for biotech products. While this development was welcome, the United States nonetheless noted its continuing concerns that the EU measures affecting the approval of biotech products involved prolonged, unpredictable,

[1] Soybeans: DAS-44406-6, FG72 x A5547-127, 305423x40-3-2 and DAS-68416-4.
[2] Oilseed rape: MON88302 x Ms8 x Rf3.
[3] Renewal of maize: 1507.

and unexplained delays at every stage of the approval process. These delays had affected the recently approved products, as well as the great majority of applications that were still awaiting approval. Furthermore, even when the EU finally approved a biotech product, the EU had facilitated the ability of individual EU member States to impose bans on the approved product. The United States urged the EU to ensure that its measures affecting the approval of biotech products, including measures that had been adopted by individual EU member States, were based on scientific evidence, and that decisions were taken without undue delay.

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

D. Canada – Anti-dumping measures on imports of certain carbon steel welded pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu: Status report by Canada (WT/DS482/7/Add.4)

1.16. The Chairman drew attention to document WT/DS482/7/Add.4, which contained the status report by Canada on progress in the implementation of the DSB's recommendations in the case "Canada – Welded Pipe".

1.17. The representative of Canada said that, as agreed with the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in January 2017, the reasonable period of time in this dispute would expire on 25 March 2018. Canada was pleased to report that it had fully implemented the DSB's recommendations and rulings in this dispute well in advance of that date. As had been previously reported to the DSB, the Government of Canada had enacted, on 22 June 2017, amendments to the Special Import Measures Act in respect of exporters that had been found to have *de minimis* margins of dumping. In addition, and as also previously reported to the DSB, on 29 September 2017, the Canada Border Services Agency (CBSA) had amended the final determination of dumping of carbon steel welded pipe from Chinese Taipei in order to exclude two Chinese Taipei exporters that had had *de minimis* dumping margins. The CBSA had also revised the margins of dumping for "all other exporters" from Chinese Taipei. On 8 December 2017, the Canadian International Trade Tribunal had completed its review and had continued the original finding of threat of injury, excluding Chinese Taipei exporters with *de minimis* margins of dumping. These legislative amendments, together with the issuance of the amended final determination of dumping and the threat of injury finding brought Canada into compliance with the DSB's recommendations and rulings in this dispute. Canada stated that, therefore, this would be its final status report in this dispute.

1.18. The representative of Chinese Taipei said that her delegation thanked Canada for its status report and the statement made at the present meeting. Chinese Taipei also welcomed Canada's intention to implement the DSB's recommendations and rulings before the expiry of the agreed reasonable period of time. Chinese Taipei was in the process of reviewing the legislative amendments and the revised determination of dumping and injury finding. Chinese Taipei would continue its discussions with Canada with a view to resolving this matter shortly.

1.19. The DSB took note of the statements.

E. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.1)

1.20. The Chairman drew attention to document WT/DS464/17/Add.1, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case "US – Washing Machines".

1.21. The representative of the United States said that the United States had provided a status report in this dispute on 11 January 2018, in accordance with Article 21.6 of the DSU. On 15 December 2017, the US Trade Representative had requested that the US Department of Commerce make a determination under Section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce initiated a proceeding to make such determination. On 21 December 2017, the Department had issued to interested parties questionnaires soliciting additional information. The United States continued to

consult with interested parties on options to address the recommendations of the DSB relating to antidumping measures challenged in this dispute. The United States noted Korea's request pursuant to Article 22.2 of the DSU for authorization to suspend concessions and other obligations. The United States had explained to Korea the special challenges arising from the recommendations in this dispute. Particularly in this light, Korea's decision was disappointing, and not constructive. In any event, the United States had objected to the level of suspension proposed by Korea, by a US letter submitted on 19 January 2018, and the matter therefore had been referred to arbitration pursuant to Article 22.6 of the DSU.

1.22. The representative of Korea said that his country thanked the United States for its status report. Korea took note that the United States had initiated its implementation process with respect to the countervailing duty measures at issue. However, taking into account the significance of the present dispute, Korea called on the United States to step up its efforts to ensure prompt compliance with the DSB's rulings and recommendations with respect to the Anti-Dumping Agreement and the SCM Agreement.

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

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

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

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

1.26. The representative of China said that his country had provided a status report in this dispute on 11 January 2018, in accordance with Article 21.6 of the DSU. China intended to comply with the DSB's recommendations and rulings within the agreed RPT, which would expire on 22 April 2018. China had launched a re-investigation, which was under way, and interested parties had the possibility to submit their comments.

1.27. The representative of Canada noted that China had indicated to the DSB on 19 June 2017 that it had intended to implement the DSB's recommendations and rulings in this dispute. Canada thanked China for its status report of 11 January 2018, in respect of its implementation efforts. Canada looked forward to the completion of China's review of this matter as soon as possible and expected that a negative injury finding, prior to the expiry of the reasonable period of time on 22 April 2018, would resolve this dispute.

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

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

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 the DSB's recommendations and rulings 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 shall 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 DSB's recommendations and rulings. He recalled that, at its meeting on 22 November 2017, the DSB had adopted the Appellate Body Reports and the Panel Reports, as modified by the Appellate Body Reports, pertaining to the disputes on: "Indonesia – Import Licensing Regimes"

(DS477/478). He further stated that the 30-day period pursuant to Article 21.3 of the DSU had expired on 21 December 2017, and prior to that date, Indonesia had submitted a communication under Article 21.3 of the DSU, contained in documents WT/DS477/16 and WT/DS478/16. He then invited Indonesia to inform the DSB of its intentions in respect of implementation of the DSB's recommendations and rulings.

2.2. The representative of Indonesia informed the DSB that Indonesia fully understood its obligation to implement the DSB's recommendations and rulings in these disputes. These disputes involved a broad and lengthy domestic process that raised many complexities and politically sensitive issues. Indonesia was in the process of carefully examining its options on how to implement the DSB's recommendations and rulings regarding the various measures at issue in these disputes. As had been communicated in documents WT/DS477/16 and WT/DS478/16, Indonesia asked for an extension of the customary 45-day period to reach a mutual agreement on the reasonable period of time with the complainants. Indonesia said that, at this stage, it was still discussing the reasonable period of time with New Zealand and the United States, and looked forward to reaching an agreement on the reasonable period of time in the near future.

2.3. The representative of the United States said that the United States had reviewed Indonesia's communication[4] and had listened carefully to its statement at the present meeting. Article 21.3 of the DSU was clear that Members must "inform the DSB" at a DSB meeting "of its intentions in respect of implementation of the recommendations and rulings of the DSB". Indonesia's written communication of 15 December 2017 stated that Indonesia needed a reasonable period of time for compliance, but the communication did not state Indonesia's intentions in respect of compliance. In Indonesia's statement at the present meeting, the United States had heard Indonesia say that it "understands fully its obligation to implement", but the United States had not heard Indonesia say that it intended to comply with the DSB's recommendations and rulings. The United States had discussed this deficiency bilaterally with Indonesia, so it was concerning that Indonesia had not been clear at the present meeting. The United States asked whether Indonesia would, in its statement at the present meeting, announce its intention to comply with the DSB recommendations in this dispute.

2.4. The representative of New Zealand said that, like the United States, her country sought clarification from Indonesia regarding its intervention. New Zealand noted that Indonesia had requested a reasonable period of time to comply with the DSB's recommendations and rulings in this dispute and stated, at the present meeting, that it understood its obligation to comply. However, New Zealand asked if Indonesia could also confirm that it intended to comply with the DSB's recommendations and rulings, in accordance with the obligation under Article 21.3 of the DSU.

2.5. The representative of Indonesia said that her delegation took note of the concerns raised by the United States and New Zealand and said that her capital had already been informed of these concerns. At this stage, her delegation was still waiting for a reply.

2.6. The representative of the United States said that this seemed like a simple question: did Indonesia intend to comply with the DSB's recommendations and rulings? It was troubling that Indonesia could not confirm so at the present meeting. Indonesia had said that it needed a reasonable period of time. But Indonesia had not said that Indonesia intended to comply. Moreover, Indonesia's failure to state that it intended to comply had consequences. Under Article 21.3 of the DSU, the right to a reasonable period of time for compliance existed only following a statement that the Member indeed intended to comply. Further, the Member that had brought the dispute would have immediate rights under Article 22 of the DSU. The United States said that it would therefore again ask Indonesia to confirm whether it intended to comply.

2.7. The Chairman asked Indonesia if it was in a position to provide further clarification to respond to the question raised by the United States.

2.8. The representative of Indonesia said that her delegation took note of the US question. Indonesia wished to reconfirm that the concerns had already been transmitted to capital. At the present meeting, her delegation had already made the statement in accordance with the instructions from capital.

[4] WT/DS478/16.

2.9. The representative of the United States said that the United States would like to express its understanding that Indonesia had not yet stated its intention to comply with the DSB's recommendations.

2.10. The DSB took note of the statements.

3 INDONESIA – MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS

A. Implementation of the recommendations of the DSB

3.1. The Chairman recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of the DSB's recommendations and rulings 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 shall 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 DSB's recommendations and rulings. He recalled that, at its meeting on 22 November 2017, the DSB had adopted the Panel Report pertaining to the dispute on: "Indonesia – Chicken" (DS484). He noted that the 30-day period pursuant to Article 21.3 of the DSU had expired on 21 December 2017, and prior to that date, Indonesia had submitted a communication under Article 21.3 of the DSU, contained in document WT/DS484/13. He then invited Indonesia to inform the DSB of its intentions in respect of implementation of the DSB's recommendations and rulings.

3.2. The representative of Indonesia said that her country wished to inform the DSB that it was impractical for Indonesia to comply immediately with the DSB's recommendations and rulings. As set out in document WT/DS484/13, Indonesia further wished to have a sufficient time to discuss a reasonable period of time (RPT) in order to fully comply with its WTO obligations. Indonesia was still discussing the reasonable period of time with Brazil and looked forward to reaching an agreement on the RPT in the near future.

3.3. The representative of Brazil said that Brazil took note of Indonesia's intentions in respect of implementation of the DSB's recommendations and rulings in DS484. Brazil hoped that both parties could reach a mutually agreed reasonable period of time as soon as possible. Brazil and Indonesia were engaged in discussions to define the RPT. Brazil invited Indonesia to abide by its WTO obligations. Brazil understood that Indonesia had already stated on 22 November 2017, when the Panel Report had been adopted, that it would comply with the DSB's recommendations and rulings. According to the Panel's decision in DS484, Indonesia's measures had breached the WTO covered agreements in several different aspects, namely, the requirements of a positive list of products, restrictions on the intended use of products, fixed license terms and undue delay in granting sanitary recognition for chicken meat and chicken products from Brazil. Brazil understood that Indonesia's measures, which the Panel had found to be inconsistent with Articles III:4 and XI:1 of the GATT 1994 and Article 8 and Annex C(1)(a) of the SPS Agreement, were regulations enacted by that government's Executive branch and could, thus, be more easily amended. Brazil said that it had also noticed that some legal instruments underlying Indonesia's measures had been revoked and replaced twice during the course of the DS484 Panel proceedings, which demonstrated that adjustments to these measures could be made reasonably fast. Concerning Brazil's sanitary recognition that it had requested for the first time in 2009, Brazil said that taking account of the time that had already lapsed since the beginning of the dispute, as well as taking account of the decision of the Panel that there was no justified reason for the delay, Brazil believed that such recognition was an administrative measure that should be granted immediately.

3.4. The DSB took note of the statements, and of the information provided by Indonesia regarding its intentions in respect of implementation of the DSB's recommendations and rulings.

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

A. Statement by the European Union

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

4.2. The representative of the European Union said that, once again, the EU requested that the United States stopped transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit implementation reports in this dispute. The EU would continue requesting the inclusion of this item on the Agenda as long as the United States did not implement the DSB's recommendations and rulings.

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

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

4.5. The representative of the United States said that, as the United States had noted at previous DSB meetings, the Deficit Reduction Act, which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000, had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than ten years ago. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. As the United States had noted many times previously, the EU had demonstrated repeatedly that it shared this understanding, at least when it was the responding party in a dispute. Once again, this month the EU had provided no status report for disputes, in which there was a disagreement between the parties on the EU's compliance.

4.6. The representative of the European Union said that the EU disagreed with the latest statement by the United States. The EU reminded the DSB that it had provided status reports on all cases in which it had been involved. Currently, this was only the dispute on "EC – Approval and Marketing of Biotech Products" (DS291).

4.7. The DSB took note of the statements.

5 UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

A. Recourse to Article 22.2 of the DSU by Korea (WT/DS464/18)

5.1. The Chairman drew attention to the communication from Korea contained in document WT/DS464/18, and invited the representative of Korea to speak.

5.2. The representative of Korea said that, on 26 September 2016, the DSB had adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, in this dispute. The DSB had ruled that the US measures at issue were inconsistent both "as such" and "as applied" with relevant provisions of the Anti-Dumping Agreement and the SCM Agreement, and accordingly, had recommended the United States to bring its measures into compliance with these Agreements. Upon Korea's request for arbitration under Article 21.3(c) of the DSU, the Arbitrator had determined a 15-month RPT, which had expired on 26 December 2017. Despite the lengthy reasonable period of time, the United States had not taken any substantial steps to bring the measures at issue into conformity with its WTO obligations within that period. Furthermore, the United States had not claimed that it had implemented the DSB's recommendations and rulings. In the absence of an agreement on sequencing or compensation, and to preserve its rights under Article 22.2 of the DSU, Korea requested the authorization from the DSB to suspend certain tariff concessions and related obligations under the GATT 1994 *vis-à-vis* the United States. Specifically, Korea requested DSB authorization to suspend concessions with respect to the United States' non-compliance with both "as applied" and "as such" DSB's recommendations and rulings in this dispute. Concerning the "as applied" violations, Korea requested an authorization to suspend concessions at an annual amount of USD 711 million. Korea said that it would modify this amount annually to reflect the growth rate of the washing machines market in the United States and that it would report accordingly to the DSB. Furthermore, Korea requested authorization to suspend concessions at an annual level, based on a formula commensurate with the trade effects that would be caused to exports from Korea, aside from washing machines, due to the US non-compliance with "as such" DSB's recommendations and rulings. Korea considered that pursuant to Article 22.4 of the DSU, the requested annual value with regard to both "as applied" and "as such" was equivalent to the annual level of nullification or impairment of benefits to Korea caused or to be caused by the US measures. Korea would provide the DSB with a list of goods and tariff levels that would be applied to those goods in due course.

5.3. As indicated in the US status report, Korea noted that the United States had initiated its implementation process, under Section 129 of the Uruguay Round Agreements Act, with respect to its countervailing measures at issue, close to the expiry of the reasonable period of time. Korea welcomed that the process had started. However, Korea noted that the United States had not yet initiated any implementation process with respect to the anti-dumping measures at issue. Taking into account the significance of this dispute, Korea called on the United States to step up its efforts in order to ensure prompt compliance with the DSB's rulings and recommendations *vis-à-vis* both the Anti-Dumping Agreement and the SCM Agreement. Korea understood that the suspension of concessions or other obligations should be taken as temporary measures, as prescribed by Article 22.1 of the DSU. Korea, thus, urged the United States to promptly and fully implement the DSB's recommendations and rulings. Korea would continue to discuss the necessary issues required for reaching a prompt and mutually satisfactory solution with the United States.

5.4. The representative of the United States said that, on 11 January 2018, Korea had requested that the DSB authorize Korea to suspend concessions and related obligations under the GATT 1994. By letter, dated 19 January 2018, the United States had objected to the level of suspension of concessions or other obligations proposed by Korea. Under the terms of Article 22.6 of the DSU, the filing of such an objection automatically resulted in the matter being referred to arbitration. Article 22.6 of the DSU did not refer to any decision by the DSB, and no decision was therefore required or possible. Consequently, because of the US objection under Article 22.6 of the DSU, the matter had already been referred to arbitration. Nevertheless, although unnecessary, the DSB may take note of that fact and confirm that it may not therefore consider Korea's request for authorization.

5.5. The representative of Canada said that his country had noted that Korea's request for authorization to suspend concessions with respect to the possible non-compliance by the United States with the DSB's "as such" recommendations and rulings did not contain a proposed level of suspension. However, Canada noted that, at the present meeting, it understood that Korea clarified that the level it had proposed in its request was in respect of both the "as such" and "as applied" recommendations and rulings. Canada noted that, in any event, for the reasons explained at the previous DSB meeting in the context of DS456, a request under DSU Article 22.2 should include either a proposed amount for the level of suspension or a description of a formula to determine that level.

5.6. The representative of Mexico said that although her country had not participated in this dispute as a third party, Mexico had an interest in the procedural aspects concerning this dispute. Mexico noted that, unless no compliance measure existed, it was past practice to first request the compliance procedure before requesting the suspension of concessions, in accordance with a sequencing agreement. However, in this dispute, Mexico noted that the United States had not taken a compliance measure as was evident from the US status report (WT/DS464/17/Add.1). Mexico called on Members to comply with the DSB's recommendations and rulings within the reasonable period of time to avoid similar situations.

5.7. The representative of Brazil said that Brazil wished to make two brief comments. First, Brazil supported Canada's statement and also noted that Korea had provided more specificity concerning its request, and thus, its request met the adequacy level of arbitration requirements and requests. Concerning the issue of automatic referral to arbitration, as had been mentioned by the United States, Brazil said that one reason to have such referrals done in DSB meetings was that it allowed the rest of the WTO Membership, which would otherwise not be able to participate as a third party in the arbitration proceedings, to comment with respect to the adequacy of the request or any other issue of systemic importance.

5.8. The representative of the European Union said that with respect to the last part of the statement by the United States, as well as the last part of the statement by Brazil, the EU noted that the conclusion that should be drawn from this discussion was that the DSB took note of the statements and that the DSB agreed that the matter had been referred to arbitration.

5.9. The representative of the United States said that the United States did not agree with the EU's last statement. There was no DSB decision to take at this moment. The DSB could take note of the statements made and that the matter had been referred to arbitration, but there was nothing for the DSB to "agree" to. On Brazil's last comment, Brazil suggested that a referral to arbitration should occur at a DSB meeting for the sake of transparency. The United States did not agree. Transparency was provided by the fact that a request for authorization to suspend concessions, as well as any objection to that request, would be circulated to WTO Members. If a Member wished to comment on either of these documents, they would be free to request an Agenda item and make a statement. The United States said that it did agree with Brazil's last statement that there were no third parties to a DSU Article 22.6 arbitration.

5.10. The representative of the European Union said that the EU disagreed with the last statement made by the United States and recalled that the language of the DSB agreeing that the matter had been referred to arbitration could be found in many minutes of past DSB meetings, including in the case DS217, to which the United States was also a party.

5.11. The representative of the United States pointed delegates to the minutes of the 3 January 2018 DSB meeting, concerning the EU's request to suspend concessions and the language that was used in that meeting regarding the matter referred to arbitration. No action by the DSB had been required for the matter to be referred to arbitration.

5.12. The representative of the European Union said that the EU had not yet seen the minutes of the 3 January DSB meeting.

5.13. The DSB took note of the statements and that the matter raised by the United States in document WT/DS464/19 has been referred to arbitration, as required by Article 22.6 of the DSU.

5.14. The representative of the European Union said that his delegation took note of the Chairman's statement, and the EU reminded delegations that the DSB agreed, at the present meeting, that the matter had been referred to arbitration.

5.15. The representative of the United States said that the United States had heard the Chairman's comments and the statement. The United States disagreed with the EU's characterization. There had been no statement that the DSB had "agreed" to refer the matter to arbitration. The matter had been automatically referred to arbitration under DSU Article 22.6 by virtue of the objection filed by the United States on 19 January 2018.

5.16. The representative of Brazil said that his country would like to come back to the point raised by the United States concerning transparency. Brazil noted that the latest exchange between the EU and the United States illustrated that it was important to have such matters referred to arbitration in open DSB meetings, which was the "modern agora" for discussion on dispute settlement matters. As the United States had said, interested Members had access to the documents and they could bear the burden of requesting that an item be placed on the Agenda if they wished to make comments. Brazil noted, however, that, in its view, it would make more sense to have the discussion and action on such an item in this forum.

5.17. The representative of the United States said that, for the United States, it was not a question of what might be the "best" practice according to the views of certain Members. It was a question of what was provided for in the text of the DSU. The text of Article 22.6 of the DSU did not provide for the DSB to take any action with respect to a Member's objection, which referred the matter to arbitration.

5.18. The representative of the European Union informed the DSB that the EU had a different reading of the text of the DSU.

5.19. The DSB took note of the statements.

6 UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON CERTAIN COATED PAPER FROM INDONESIA

A. Report of the Panel (WT/DS491/R and WT/DS491/R/Add.1)

6.1. The Chairman recalled that, at its meeting on 28 September 2015, the DSB had established a Panel to examine the complaint by Indonesia pertaining to this dispute. The Panel Report, contained in documents WT/DS491/R and Add.1 had been circulated on 6 December 2017 as unrestricted documents. The Panel Report was before the DSB for adoption at the request of Indonesia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

6.2. The representative of Indonesia said that the dispute DS491 had raised a number of important issues. First, whether the USDOC reached a *per se* finding of price distortion in violation of Article 14(d) of the SCM Agreement. The Panel had fundamentally misunderstood the nature and purpose of Indonesia's forestry programs, which were in place to protect the forest rather than to provide benefits to industries. This had led to several wrong findings by the Panel. Second, whether the USDOC had acted inconsistently with Article 12.7 of the SCM Agreement by resorting to facts available and taking an adverse inference, despite Indonesia's full cooperation. Indonesia said that, unfortunately, the Panel had relied on an interpretation of Article 12.7 that no responding party could ever satisfy when an investigating authority made numerous unjustified requests for irrelevant information at the end of an investigation. Third, whether the USDOC could find the existence of a subsidy program, despite the lack of any written evidence for such a scheme, as required by Article 2.1(c) of the SCM Agreement. The Panel had incorrectly interpreted Article 2.1(c) to permit anything in writing to qualify as a subsidy program, even if there had been no evidence that it had operated in such manner. Fourth, whether the USITC had reached a threat of injury determination based on factors that had not been attributable to subject imports and based on conjecture and remote possibility in violation of Articles 3.5 and 3.7 of the Anti-Dumping Agreement and Articles 15.5 and 15.7 of the SCM Agreement. The Panel had failed to recognize that the USITC's threat analysis had improperly attributed injury from other factors to subject imports based on anecdotal statements of the domestic industry rather than what had actually happened during the investigation. Fifth, whether the United States tie vote provision violated Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement, as such. Even though this provision of US law always operated to the disadvantage of the exporters, the Panel had erred by finding this provision of law procedural rather than substantive. Although Indonesia was disappointed with the Panel's ruling, it thanked the Panel for its efforts and professionalism. In conclusion, although Indonesia was not pursuing an appeal of the Panel's decision, it would continue to strongly pursue its interests at the WTO and defend Indonesian producers targeted by anti-dumping and countervailing duty proceedings.

6.3. The representative of the United States said that the United States thanked the Panel, and the Secretariat staff assisting it, for their work in this dispute. The United States particularly appreciated the Panel's thorough review of the facts, legal claims, and arguments in this dispute, while at the same time having applied the appropriate standard of review in a dispute involving administrative determinations in a trade remedy proceeding. As a result of that review, the Panel had rejected all of Indonesia's claims. The United States was gratified by this outcome. The United States also welcomed Indonesia's decision not to further expend the resources of the parties and the WTO dispute settlement system on this dispute. Indonesia had brought numerous claims regarding the anti-dumping and countervailing duties on coated paper from Indonesia, as well as one "as such" challenge to a US statute. The United States said that, turning first to the challenges to the determinations in the coated paper investigation, the United States would draw Members' attention to certain Panel findings. First, in calculating the level of benefit provided by Indonesia's subsidies, the US Department of Commerce (USDOC) had conducted a thorough review of the record and had concluded that an out-of-country benchmark had been appropriate with respect to both the stumpage and log export ban programs. The Panel had properly rejected Indonesia's argument that the USDOC's choice of benchmark had been inconsistent with Article 14(d) of the SCM Agreement. Second, the USDOC had found that the sale of the producer's debt had not been an arm's length transaction but instead a debt buyback, which was a subsidy in the form of debt forgiveness. Because neither Indonesia nor the responding paper producer had provided necessary information during the investigation on the identity of the purchaser of the debt, the USDOC had resorted to the use of facts available. The Panel had carefully examined the record, and had properly rejected Indonesia's claim that the use of facts available had been inconsistent with Article 12.7 of the SCM Agreement. Third, the USDOC had found during the investigation that Indonesia had provided subsidies to its paper industry through various subsidy programs, and that these subsidies had been specific under Article 2.1(c) of the SCM Agreement. The Panel had properly rejected Indonesia's claims that USDOC's specificity analysis had not adequately identified the relevant subsidy programs. Fourth, also in connection with USDOC's specificity findings, the Panel had properly rejected Indonesia's argument that the USDOC had failed to specify either the identity or relevant jurisdiction of the granting authority under Article 2.1 of the SCM Agreement. Fifth, the US International Trade Commission (USITC) had conducted an extensive, thorough, and well-reasoned investigation, and had found that Indonesia's exports of coated paper had threatened injury to the US domestic industry. Indonesia's arguments with respect to injury had essentially amounted to a request that the Panel conduct a *de novo* review. The Panel had properly rejected Indonesia's approach and instead had found no error under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement in the analysis and reasoning of the USITC. The Panel had also rejected Indonesia's "as such" claim concerning the US statute governing USITC voting procedures. There had been no reason for Indonesia to bring this claim as the statutory provision had not even been applied in the coated paper investigation. But in any event, the Panel had properly rejected Indonesia's argument that the statute as used in threat of injury cases was inconsistent with the "special care" provisions of Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement. In so doing, the Panel had properly rejected the proposition that these special care provisions could serve as a means for intruding into the internal decision-making procedures of investigating authorities. In conclusion, the United States welcomed the Panel's Report and was pleased to support its adoption at the present meeting.

6.4. The DSB took note of the statements and adopted the Panel Report contained in WT/DS491/R and Add.1.

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

7.1. The Chairman drew attention to document WT/DSB/W/614, which contained additional names proposed by Brazil, Chile and Singapore for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. He then proposed that the DSB approved the names contained in document WT/DSB/W/614.

7.2. The DSB so agreed.

8 APPELLATE BODY MATTERS

A. Statement by the Chairman

B. Appellate Body appointments: Proposal by Argentina; Australia; Brazil; Chile; China; Colombia; Costa Rica; Ecuador; El Salvador; the European Union; Guatemala; Honduras; Hong Kong, China; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam (WT/DSB/W/609/Rev.1)

8.1. The Chairman proposed that the two sub-items under this Agenda item be taken up together. He said that he would first make a report to update delegations regarding his consultations on Appellate Body matters. Subsequently, he would invite Mexico to introduce the proposal contained in document WT/DSB/W/609/Rev.1 and he would then open the floor to other delegations to speak. He hoped that this was agreeable to all delegations. The Chairman said that, as he had stated on several occasions at previous DSB meetings, in order to effectively address the issues on Appellate Body matters, the DSB needed concrete ideas, which could provide a viable solution to the matter at hand. In this respect, he referred to the previous regular DSB meeting, which took place in November 2017, at which he had taken note of informal and exploratory technical discussions that were taking place among experts of several delegations. As he had stated at the November meeting, he had tried to reach out to hear those delegations' views and ideas. At the same time, he had invited delegations to share their thoughts with him about how they wished to approach these issues in general. He said that, based on these contacts, he would now report back to the DSB. He recalled that Rule 15 of the Working Procedures for Appellate Review had been first raised by the United States at the DSB meeting in August 2017 in relation to the launch of selection processes of Appellate Body members. The US statement on this matter was reflected in the minutes of the August 2017 DSB meeting contained in document WT/DSB/M/400. He also recalled that the Appellate Body, in its communication JOB/AB/3 of 24 November 2017, explained how the Working Procedures for Appellate Review, including Rule 15, had been drafted and finalized as well as how this Rule had been applied in practice. He said that, through his recent informal consultations in January 2018, he had learned that there were different views on whether Rule 15 posed any legal questions, and, in turn, different views on the appropriate mode to address these questions. He added that it appeared, however, that there was a common understanding among many delegations about the need for a sort of transitional arrangement such as the one that had been provided for in Rule 15. At the same time, he said there also appeared to be broad recognition that Rule 15 could be updated and improved in light of the current circumstances surrounding the dispute settlement system. For example, some delegations were discussing the possibility of establishing objective criteria to allow a continued service of outgoing Appellate Body members. In this respect, he noted that several delegations considered the Appellate Body's explanation of the operation of Rule 15 and its practice set out in its communication of 24 November 2017 to be a useful clarification. He further said that a number of delegations had suggested that, independently of those generic questions about Rule 15, the continued service of Mr. Ramírez and Mr. Van den Bossche should be addressed by, for example, the DSB's endorsement of the transition arrangement made by the Appellate Body. Many delegations had emphasized that, while addressing matters related to Rule 15, the selection processes of Appellate Body members should be launched without any further delay. In this context, as part of an overall solution, some delegations had proposed to review the procedures for the Appellate Body selection and reappointment processes, suggesting an introduction of some sort of automaticity. He thanked all delegations who had participated in his consultations in early January 2017, and had come up with concrete ideas and had shared their thoughts on these matters. It was not his intention to enter into a detailed discussion of those issues at the present meeting. He said that he would continue his informal consultations with interested delegations and he encouraged those delegations who had been working on concrete ideas of a possible solution to continue their endeavours. He then turned to the proposal contained in document WT/DSB/W/609/Rev.1 and invited the representative of Mexico to introduce the proposal.

8.2. The representative of Mexico said that the delegations of Argentina; Australia; Brazil; Chile; China; Colombia; Costa Rica; Ecuador; El Salvador; the European Union; Guatemala; Honduras; Hong Kong, China; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam had agreed to submit a joint proposal to launch the selection processes for the vacancies of the Appellate Body members. At the present meeting, Mexico wished to speak on behalf of the 60 above-mentioned Members, as well as the delegations of Canada and the Dominican Republic who had also expressed their intention to co-sponsor this proposal. Mexico said that this joint proposal reflected the increasing concerns, of a considerable number of Members, about the present situation in the Appellate Body. This situation was seriously affecting the WTO's work and the overall functioning of the dispute settlement system and was against the best interest of WTO Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the selection processes for new Appellate Body members at the present meeting, as set out in the proposal that had been submitted to the DSB. This proposal sought to fill the current vacancies, which had increased to three since the last regular DSB meeting. The proposal sought to, first, start three selection processes, namely, one to replace Mr. Ricardo Ramírez, whose second term had expired on 30 June 2017; a second process to fill the vacancy that had arisen with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; and a third process to replace Mr. Peter Van den Bossche, whose second term had expired on 11 December 2017. Second, to establish a Selection Committee. Third, to set 22 February 2018, as the deadline, for the submission of candidacies. Fourth, to request that the Selection Committee circulate its recommendation as soon as possible. Mexico said that while the proponents were flexible with regard to the deadlines for the selection processes, these should, however, reflect the urgency of the situation. The co-sponsors of the proposal urged all Members to support this proposal in the interest of safeguarding the multilateral trading system and the dispute settlement system.

8.3. The representative of Pakistan said that his country thanked the Chairman for holding informal consultations to resolve this matter. Pakistan said that it used the dispute settlement mechanism very rarely. Nevertheless, Pakistan greatly valued this very important aspect of the WTO, and regarded it as the pivot around which the whole edifice of the multilateral system rested. Pakistan suggested that linking systemic concerns on the work of the Appellate Body with the selection processes to appoint new AB members was not advisable. Pakistan strongly supported the views expressed by Mexico, on behalf of the proponents, to urgently fill the Appellate Body vacancies. In light of the current trend in the global trade environment, wherein Members were taking actions in their national interest, the efficient functioning of the Dispute Settlement System was gaining added importance for the multilateral trading system. As already expressed at previous meetings where the Appellate Body selection processes had been discussed, Pakistan reiterated its concern that the DSB had been unable to fulfil its obligation contained in DSU Article 17.2 to appoint Appellate Body members as vacancies arise. Currently, there were three vacancies, which remained to be filled. Pakistan noted that the situation had come to such a pass, that it seemed that the above-mentioned selection processes could not be initiated unless and until the systemic concerns that had been raised would be addressed by the DSB. Pakistan was of the view that the problems that had been highlighted *vis-à-vis* the transitional arrangements were rooted in the succession of the retiring members of the Appellate Body. Appointment or reappointment rules were weak and unclear. There was no predictability or certainty in the time-lines for the appointment process. WTO was an organization which viewed predictability as one of its bedrock values. This had to be somehow reflected in the timelines for the appointment process. Pakistan, once again, urged all Members to discuss this matter with an open mind and not link it with the regular work and functioning of the WTO. In addition, Pakistan urged Members to show the utmost flexibility in order to ensure that the DSB surpassed this deadlock, for the benefit of the system. Pakistan supported the proposal put forward by Mexico with regard to filling the current vacancies in the Appellate Body.

8.4. The representative of China said that his country appreciated the Chairman's efforts and his hard work in holding consultations with Members. China also thanked the Chairman for his update on this matter. China had decided to join the co-sponsorship of the proposal on Appellate Body appointments, contained in document WT/DSB/W/609/Rev.1, along with Australia, Kazakhstan, New Zealand, Panama, Paraguay and Ukraine. The growing number of co-sponsors of the joint proposal demonstrated the increasing concern among the WTO Membership over the current situation. China noted that even though three vacancies had arisen in the Appellate Body, none of

them could be filled because of the concerns raised by the United States. With regard to Rule 15 of the Working Procedures for Appellate Review, China was open to engage in further discussions on this matter. China noted, however, that this was without prejudice to its position that China was not in agreement with the United States that Rule 15 gave rise to any concerns. As China had previously stated, a careful reading of the DSU suggested that the Appellate Body was acting within its mandate under the DSU by including Rule 15 in the Working Procedures for Appellate Review. First, Rule 15 applied only to "a person who ceases to be a member of the Appellate Body", it did not extend the terms of the Appellate Body members. Second, past DSB decision supported the inclusion of Rule 15 in the Working Procedures for Appellate Review. Paragraph 14 of the document "Establishment of the Appellate Body", contained in document WT/DSB/1, which had been adopted by the DSB in 1995, stated that "[m]atters such as guaranteeing the rotation required by the DSU […] should form part of the working procedures". By allowing Appellate Body members, whose terms had expired, to finish the cases to which they had been assigned prior to their term's expiry, Rule 15 guaranteed the rotation, which was required by the DSU, and should therefore be included in the Working Procedures of the Appellate Body.

8.5. As Members had previously pointed out, the settlement of disputes was one of the major functions of the WTO. The Appellate Body was a crucial component to the WTO disputes settlement mechanism. Ensuring the integrity, independence and impartiality of the Appellate Body contributed immensely to the proper settlement of disputes between WTO Members, and ensured the stability of the application and predictability of WTO rules. Moreover, it was the responsibility and obligation of the DSB to launch the selection process because Article 17.2 of the DSU provided that "[v]acancies shall be filled as they arise". By linking the start of selection processes with the alleged systematic concerns, the United States failed to fulfil its obligation and was undermining the proper functioning of the dispute settlement system. The United States refused to put an end to such blockage. Moreover, the United States also refused to elaborate all of its concerns or provide any concrete proposals to resolve its concerns. In this regard, China urged the United States to lift its illegal and unreasonable blockage and requested the DSB to launch the selection processes immediately.

8.6. The representative of Australia said that his country was pleased to join the proposal to commence the three selection processes to fill current Appellate Body vacancies. Australia welcomed the broad support shown for this proposal, and looked forward to it receiving further support from the WTO Membership. In Australia's view, all Members had to give priority to reaching agreement on a process that would ensure the three outstanding vacancies on the Appellate Body were filled and guarantee the on-going effective functioning of the WTO dispute settlement system. Australia stood ready to engage in constructive discussions regarding the outstanding concerns raised by Members in the context of the selection processes. Australia also remained hopeful that other Members would similarly demonstrate their commitment to the dispute settlement system and exercise flexibility in finding a mutually acceptable way forward.

8.7. The representative of the United States said that the United States thanked the Chairman for his continued work on these issues. The United States was not in a position to support the proposed decision. As noted in the past, Mr. Ramírez continued to serve on an appeal, despite ceasing to be a member of the Appellate Body nearly seven months ago. Now, a new situation had arisen: Mr. Van den Bossche continued to serve on five appeals, despite ceasing to be a member of the Appellate Body in December of last year (2017). The latest decision by the Appellate Body to, in its words, "authorize" a person who was no longer a member of the Appellate Body to continue hearing appeals created a number of very serious concerns. First and foremost, as stated at past meetings, the Appellate Body simply did not have the authority to deem someone who was not an Appellate Body member to be a member. It was the DSB that had a responsibility under the DSU to decide whether a person whose term of appointment had expired should continue serving. The United States was resolute in its view that Members needed to resolve that issue first before moving on to the issue of replacing such a person. Second, consider that in one current appeal, only one member of the Division hearing that appeal continued to be a member of the Appellate Body pursuant to DSB appointment decisions. Third, the United States noted that, with the most recent Appellate Body "authorization", one person who was no longer a member of the Appellate Body was serving on more appeals – at least five – than anyone who was a member of the Appellate Body. And so, in addition to the US concern that all of this was contrary to the DSU and without any DSB authorization, the United States had to ask whether this was reasonable or appropriate. The United States had continued to convene meetings to discuss this issue informally with a number of delegations. This outreach had been productive in that the United States

believed it had heard a general recognition that it was the DSB that had the authority to set the term of an Appellate Body member under DSU Article 17.2; it followed that the DSB had a responsibility to decide whether a person should continue serving beyond that term. The United States had also heard agreement from several delegations that Rule 15 raised difficult legal questions that the DSB should address. In the course of its engagement, the United States had not heard delegations reject the importance of the issue that it had brought to the DSB's attention. To the contrary, the United States had heard a willingness of delegations to work together on this issue to find a way forward. The United States also recalled that the Appellate Body had provided Members with a Background Note on Rule 15. That communication appeared to raise more questions than it answered. The United States looked forward to discussing that communication with Members as well. The United States would therefore continue its efforts and its discussions with Members and with the Chairman to seek a solution on this important issue.

8.8. The representative of Canada said that his country thanked the Chairman for his report and efforts on this matter. Canada deeply regretted that the DSB had been unable to fulfil its legal obligation under DSU Article 17.2 to appoint Appellate Body members as vacancies arose. Canada agreed with other delegations that it was time to start a process or, if necessary, several processes to select new Appellate Body members for the three current vacancies. Canada joined the proposal submitted by more than 50 delegations and urged the DSB to adopt it without further delay. Like other Members, Canada was disappointed that the United States had linked the start of the Appellate Body selection processes to the resolution of certain procedural concerns that the United States had raised. However, Canada remained committed to work with other interested Members, including the United States, with a view to finding a way to address those concerns so as to allow the selection processes to start and be completed as soon as possible.

8.9. The representative of Colombia, speaking on behalf of the GRULAC countries, reiterated once again that the WTO was going through a delicate period at the moment due to the deadlock in the Appellate Body selection processes. Colombia recognized the Chairman's efforts to seek a solution to the current problem and thanked the Chairman for the opportunities that he had provided to Members to exchange views on this matter. Colombia underscored its deep concern about the present situation, which was hindering the proper functioning of a key WTO Body. If the problem persisted, the Appellate Body would be virtually paralyzed in the near future, which would jeopardize the entire WTO dispute settlement system. Colombia noted that with the continued delay in launching the selection processes, the number of vacancies had further increased to three. Members had failed to comply with an existing mandate, and, thus, breached their legal obligations under a covered agreement. This had serious systemic consequences and set a bad precedent for the WTO. It undermined the image and credibility of the WTO, particularly given the complex international environment that was adversely affecting the multilateral trading system. Concerns had been raised regarding the functioning of the dispute settlement system and some specific issues regarding the decision-making process. These concerns now prevented the launch of the selection processes. Colombia found it unacceptable that these concerns had been linked to the, present and forthcoming, Appellate Body vacancies, and, thus, hindered the WTO Membership to meet its legal obligation. The functioning of the system should not be undermined because the concerns of some Members had not been addressed. Colombia called on Members to reflect on the serious repercussions of a continued blockage. Colombia further stated that the selection processes should not be linked to systemic concerns but instead they should be addressed on the basis of their own merit. It was therefore urgent to find a rapid solution to ensure that the WTO Members complied with their legal obligations. Colombia requested the Chairman to continue his efforts in order to find a solution on this matter.

8.10. The representative of Brazil said that, at the present meeting, 60 Members had endorsed the proposal to immediately launch the selection processes to fill the vacancies in the Appellate Body. Brazil noted that both Members, those that were frequent users of the system and had concrete, tangible interests in the smooth functioning of the dispute settlement system, as well as Members that were less frequent users, recognized the systemic and fundamental importance of the Appellate Body for the WTO. As had already been stated at the present meeting, Brazil asked how the WTO rules-based system could prosper without the ultimate guarantor of those rules. Brazil said that it was clear that Members were not simply discussing the gradual dismantling of the Appellate Body, in a manner unparalleled in the history of international organizations, but also the inevitable repercussions for the WTO, which rested to a significant extent on the dispute settlement pillar. One year had passed and Members were still attempting to overcome this impasse. This impasse would stay in place until the WTO Membership would hear explicitly from

certain Members, in particular from the United States, what actual concerns they had and what they concretely proposed to address them. No discussion would be fruitful if the main parties did not state their views and indicate possible alternatives. Otherwise, the rest of the WTO Membership, mirroring Robert Frost's image, would be left to "[…] dance round in a ring and suppose, (while) the secret sits in the middle and knows".

8.11. Brazil noted that a few Members had identified Rule 15 of the Appellate Body's Working Procedures as a source of concern, and said that, as much as this, or other rules, could be improved or updated, Brazil was ready to engage in discussions regarding such improvements. For Brazil, as important as the first part of Article 17.2, which had been invoked by the United States to justify its concern, were the DSU provisions that established that "the Appellate Body shall be composed of seven persons" and that "vacancies shall be filled as they arise". It had also been implied that the concerns went beyond Rule 15, which made it even harder for Members to assess the real scope, purpose and consequences of any proposal or alternatives to procedural or substantive provisions. In any circumstance, any proposed solution could only have been envisaged within the boundaries of the DSU. It would not be admissible, for instance, that the DSB would be invested with competences that were attributed directly to the Appellate Body, such as those enshrined in Article 17.9 of the DSU. The present meeting demonstrated, once again, that most Members were willing to listen to concerns and to cooperate to find relevant solutions, even if most struggled to understand why Rule 15 was a problem in the first place. Brazil said that what seemed, however, beyond the scope of a collective endeavour to accommodate specific concerns was, first, the pre-emptive virtual paralysis of the appeal stage, which was already causing severe damage to the WTO in general and to parties in disputes in particular, and, second, the attempt, under the guise of a mere tweak in a secondary procedural rule, to change the very nature of the dispute settlement system, which, as Brazil had stressed at the November 2017 DSB meeting, "provides an operational system for securing values that we all desire", values such as independence, neutrality, professional competence, efficiency, clarity of reasoning and, as a result, high-quality reports, both at the panel and the appeal stage. In light of this, Brazil asked whether, under this Agenda item, Members had asked and addressed the wrong questions and issues rather than focusing on how the dispute settlement system could be made more effective and useful. There were certainly many aspects Members could discuss openly and in good faith with a view to achieving better efficiency in the system. Article 17.9 of the DSU itself could be construed as a space for a respectful institutional dialogue between the Appellate Body and Members, facilitated by the Chairman of the DSB. Nevertheless, it was difficult to see how any issue or concern, other than ensuring the full functioning of the Appellate Body, could be more urgent and pressing, and would receive more overwhelming support.

8.12. The representative of Uruguay said that his country thanked the Chairman for his efforts to solve this situation. Uruguay was part of the group of Members that had requested this item to be included on the DSB Agenda and fully supported the statement made by Mexico and the concerns that had been raised by other Members that this issue should be resolved on a priority basis. Uruguay called on the DSB to approve the four stages as contained in the joint proposal in order to initiate the selection processes to appoint three new Appellate Body members, without any further delay. Uruguay said that it had participated in the Chair's recent consultations. The resolution of the present crisis required Members not only to focus on launching the Appellate Body selection processes, but also to undertake a comprehensive review on how to safeguard the multilateral trading system, and as a cornerstone thereof, the dispute settlement system. The challenges that the WTO had experienced with respect to the appointments of Appellate Body members in 2017 had been raised in the context of the MC11 in Buenos Aires. Uruguay said that all this should be perceived as a warning, which, if heard in time, would allow Members to constructively improve the WTO. Uruguay believed that Members should have a forum to discuss the challenges that the WTO was facing. Uruguay supported the statement made by Colombia, on behalf of the GRULAC countries.

8.13. The representative of Norway said that her country was among the co-sponsors of the proposal. Norway thanked Mexico for its statement, with which it wished to be associated, and encouraged other Members to join the proposal. Norway continued to be deeply concerned about the situation in the DSB. Norway said that it was imperative to quickly and continuously fill the vacancies in the Appellate Body to ensure a well-functioning of WTO dispute settlement system. Norway disagreed that the process of filling vacancies should be dependent on finding solutions to procedural issues related to the practice of the Appellate Body. As had been stated on previous occasions, Norway remained open and willing to listen seriously and engage constructively with all

and any Member on their grievances with the system, including procedural issues relating to the Appellate Body. However, Norway was not willing to let the search for solutions put the system at risk. Norway again urged all Members to contribute to preventing a serious crisis in the dispute settlement pillar, and to agree, without any further delay, to launch the process of selecting new Appellate Body members.

8.14. The representative of Panama said that her country thanked the Chairman for his report and his efforts in holding consultations on this matter. Panama supported the statements made by other delegations and agreed, with others, that there were systemic implications due to the impasse in the DSB to select new Appellate Body members. The inability to complete this simple housekeeping task seriously affected the functioning and credibility of the WTO dispute settlement system. Panama believed that there were no reasons to further delay the start of the selection processes to fill the three vacancies. Panama therefore co-sponsored, with 60 other Members, the proposal presented by Mexico. Panama had carefully listened to the statements made by Members who had reservations concerning the functioning of the Appellate Body and the rules that governed the selection of Appellate Body members. Panama believed that Members could launch and complete the selection processes, while also initiating a process to address the concerns that had been raised. The earlier the WTO Membership found solutions to these concerns, the better for an improved WTO dispute settlement system. Panama called for more flexibility and pragmatism to complete this matter by consensus, as soon as possible.

8.15. The representative of Singapore said that his country reiterated its systemic concerns with regard to the delays in launching the Appellate Body selection processes. Singapore co-sponsored the joint proposal and welcomed the new co-sponsors. Singapore noted that another vacancy in the Appellate Body had emerged in December 2017. Given its workload and significance, a fully-staffed Appellate Body was vital for the effective functioning of the WTO dispute settlement system. It was, therefore, essential that the vacancies in the Appellate Body were filled expeditiously. Singapore noted that the systemic issues, which had been raised, could be discussed in a separate process. Singapore stood ready to engage and work constructively with other Members, as well as the Chairman, to help to resolve this impasse.

8.16. The representative of Switzerland said that his country thanked the Chairman for his on-going efforts and his update on this matter. Switzerland shared the concerns expressed in at least one statement at the MC11 plenary session, namely, that too many controversial issues were being brought to litigation rather than to resolution through dialogue and negotiations. Switzerland was of the view that the priority for dialogue and negotiations should also apply with regard to the rules and the functioning of the WTO's dispute settlement mechanism itself. Switzerland therefore reiterated its call on all interested Members, and particularly major ones, to engage in serious dialogue and discussions on issues, which had been raised concerning the Appellate Body, and, if applicable, to the DSU more broadly, with a view to reaching sustainable solutions. In the meantime, and as a general principle, Switzerland strongly believed that pending vacancies on the Appellate Body should be filled without delays. Accordingly, Switzerland was co-sponsoring the revised proposal submitted by Mexico at the present meeting. By not launching the pending selection processes swiftly, the current strain on the Appellate Body would increase, and the credibility of the dispute settlement mechanism, and the WTO as a whole, would continue to suffer.

8.17. The representative of New Zealand thanked the Chairman for his on-going efforts and his report, at the present meeting, concerning his consultations. New Zealand also thanked Mexico for introducing the proposal to launch the Appellate Body selection processes, which it co-sponsored, and encouraged other Members to join. New Zealand believed that it was important to launch and conclude these processes as soon as possible to ensure the smooth functioning of the Appellate Body, and the dispute settlement and multilaterally trading systems more generally. New Zealand was flexible on the precise modalities for launching the selection processes, and while it fully supported the proposal, it was willing to consider any other proposal that could gain consensus and encouraged Members to put forward concrete solutions and engage constructively to help address remaining concerns as soon as possible. While New Zealand recognized that some Members had broader concerns regarding the Appellate Body, on which New Zealand was willing to engage, it disagreed that these concerns should prevent the launch of the selection processes.

8.18. The representative of Japan said that his country thanked the Chairman for his statement and his efforts to reach out and listen to WTO Members' views on this matter. Japan was encouraged to learn from the Chairman's report that, although Members' views differed, the delegations, with whom the Chairman had met, engaged in substantive discussions. Japan considered this as an opportunity for the DSB to clarify and improve transitional arrangements, so as to assist the Appellate Body in functioning properly during a period of transition, and in particular, given the present circumstances faced by the dispute settlement system. Japan believed that building trust among WTO Members was the key to resolving this pressing matter. Japan supported the Chairman's continued effort to seek common ground to find a possible solution, and would continue to work with other interested delegations to assist the Chairman and the DSB in this common endeavour. Japan then turned to the joint proposal and thanked the proponents for the proposal. Japan supported the proposal and found it unfortunate that the DSB was not in a position to launch the selection processes at the present meeting. Appointing a member of the Appellate Body was one of the important functions entrusted to the DSB under the DSU. In this context, Japan emphasized that it was the responsibility of the WTO Membership, through the DSB, to ensure the proper functioning of the dispute settlement system, including the Appellate Body in transition, in a manner consistent with the DSU.

8.19. The representative of Chinese Taipei said that her delegation joined other delegations in thanking the Chairman for his efforts to consult with Members and for his report at the present meeting. Chinese Taipei welcomed the opportunity to contribute to the system by supporting the joint proposal but was also disappointed that the deadlock prevailed. Chinese Taipei underscored that the credibility and effectiveness of the Appellate Body was in the interest of the entire WTO Membership. Chinese Taipei, therefore, called on all Members to launch the selection processes for all vacancies without further delay.

8.20. The representative of Turkey said that, being a co-sponsor of the proposal, his country associated itself with the statement made by Mexico, on behalf of the proponents. Turkey referred to its statement delivered at the DSB meeting on 22 November 2017 and reiterated its belief that the concerns raised by the United States about the Working Procedures for Appellate Review should be dealt with separately, and should not block the immediate start of the selection processes for the three Appellate Body positions. Turkey shared the concerns of many Members who had intervened at the present meeting. In Turkey's view, the more the launch of the selection processes was delayed, the more the systemic and workload concerns regarding the Appellate Body and the overall system would increase. Therefore, the WTO Membership should launch the selection process immediately, without further delay.

8.21. The representative of Mexico, speaking on behalf of the 60 co-sponsors of the proposal, said that the proponents regretted that, for the eighth time, Members had not achieved consensus to start the selection processes for the vacancies of the Appellate Body and had, thus, had failed to fulfil their duty as WTO Members. As had been reiterated, Article 17.2 of the DSU contained an obligation for all Members stating that "[v]acancies shall be filled as they arise". Mexico said that no discussion should prevent the Appellate Body from continuing to operate fully. By failing to act at the present meeting, the DSB would sustain the current situation, which was seriously affecting the work of the Appellate Body against the best interest of its Members.

8.22. The representative of India said that his country thanked the Chairman for his efforts thus far, and his statement at the present meeting, to address the current crisis by initiating the selection processes for Appellate Body members. India also thanked the proponents for the revised proposal targeting to resolve the present stalemate in the Appellate Body selection processes for the three vacancies. India said that the revised proposal had achieved common ground enabling the launch of the selection processes to fill the three vacancies. India fully supported the proponents' suggestion to urgently commence the selection processes for the three vacancies. There was a degree of urgency with regard to filling the Appellate Body vacancies, not only because of the legal obligation contained in Article 17.2 of the DSU, which provided that vacancies "shall be filled as they arise", but also because of the number of appeals that had already been filed or were being filed. India disagreed to link any alleged systemic issues with the launch of the selection processes, and reiterated that it shared the view of many of the other Members that these two issues were not dependent and should be dealt with separately. India strongly believed that certainty and predictability in trade rules could only be ensured through the availability of an adequate dispute resolution instrument and the machinery to resolve such disputes. India was concerned about the significant delays in launching the Appellate Body selection processes, which

paralyzed the existing system and hindered the timely delivery of dispute settlement outcomes. It was vital for the effective functioning of the dispute settlement system that the Appellate Body had a full complement of seven members to hear appeals. The continued impasse could bear major consequences for the system, and any further delay in this regard would jeopardize the timely and qualitative delivery of judicial remedies. India strongly believed that systemic issues raised by any Member could be dealt with on a different track, and thus, should not become a stumbling block in the launch of the Appellate Body selection processes. India urged Members to show flexibility in working towards a consensus to launch the Appellate Body selection processes expeditiously.

8.23. The representative of the European Union said that his delegation took the floor to make three points. First, with each passing month, the gravity and urgency of the situation increased. Currently, there were only four out of seven Appellate Body members left. The WTO Members had a shared responsibility to resolve this issue as soon as possible. The EU thanked all Members that had co-sponsored the proposal, and invited all other Members to endorse the proposal. The EU's second point related to the Chairman's statement and to a part of the statement made by the United States. More specifically, the EU referred to the statement that it had made at the regular DSB meeting in November 2017, in which the EU clearly stated that it considered that Rule 15 was legitimate. The EU said that it was, nonetheless, ready to engage in discussions concerning Rule 15, if that helped to unblock the Appellate Body appointments. The EU said that it was still waiting for such engagement, on the part of the delegation that was blocking the three Appellate Body appointments. In the absence of such engagement, the EU considered that it was premature to talk about any solutions to the "Rule 15 issue". The EU's third point related to the United States' statement, which questioned the situation of Mr. Ramírez and Mr. Van den Bossche. Under the current rules, the Appellate Body had the full authority to apply Rule 15, as it had done for Mr. Ramírez and for Mr. Van den Bossche, which was particularly important in the present context with the Appellate Body not fully composed. As the Appellate Body had explained in its background note, this decision had to be taken in order to maintain the stability of the dispute settlement system to deal with the unprecedented workload of appeals and to preserve the rights of participants and third participants in pending appeals. The EU welcomed the decisions of the Appellate Body and, once again, thanked the Appellate Body and its staff for their continued work in this difficult context. Regarding the possibility of a DSB decision "endorsing" the decisions that had been taken by the Appellate Body, the EU reiterated that, under the existing rules, the Appellate Body had the full authority to apply Rule 15 as it had done for Mr. Van den Bossche and Mr. Ramírez. The EU was of the view that no DSB action was needed in that respect.

8.24. The representative of Egypt said that his country thanked the Chairman for his report and his continued efforts to solve this issue. Egypt also thanked the proponents of the proposal, which reflected the importance of having a well-functioned dispute settlement system. Egypt supported the proposal and the statements made by other Members that vacant positions of the Appellate Body should be filled immediately. Egypt looked forward to discuss other proposals related to the Working Procedures of the Appellate Body and concerns in this regard.

8.25. The DSB took note of the statements.

9 DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

9.1. The Chairman, speaking under "Other Business", said that, as he had announced at the beginning of the meeting, he would like to make a report to provide the DSB with information about the number of disputes before panels and at the panel composition stage, the Appellate Body's workload and the ability of the Secretariat to meet expected demand over the coming period. This information reflected the status of disputes up until the present DSB meeting on 22 January. Other developments in the course of that meeting would be reflected in the information posted on the Members' website. Currently, there were 11 active panels (including three panels under Article 21.5 of the DSU) that had not yet issued a final report to the parties. Multiple disputes 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 active or in the process of commencing proceedings. There were a further four 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, seven final panel reports that had been issued to the parties were currently being translated. The Appellate Body was presently dealing with seven appeals,

including the extremely complex compliance proceedings in "EC and Certain Member States – Large Civil Aircraft (Airbus)" and in "US – Large Civil Aircraft (Boeing)". Submissions had been filed by the participants and third participants in seven appeals. Divisions hearing these appeals had been composed and had started their work. However, three of these appeals could not be fully staffed at this point. Up to three additional appeals could be filed within the next three months. Finally, three matters had been referred to arbitration under Article 22.6 of the DSU.

9.2. The DSB took note of the statement.