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Dispute Settlement Body
26 September 2016

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 26 SEPTEMBER 2016

Chairman: Mr. Xavier Carim (South Africa)

Prior to the adoption of Agenda, the item concerning the adoption of the Panel Report in the dispute on: "Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union" (DS475) was removed from the proposed Agenda following the Russian Federation's decision to appeal the Report.

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1.1. The Chairman noted that there were three sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 required that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". 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 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.164)

1.2. The Chairman drew attention to document WT/DS184/15/Add.164, 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 15 September 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.139)

1.6. The Chairman drew attention to document WT/DS160/24/Add.139, 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 15 September 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 the EU 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 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.102)

1.10. The Chairman drew attention to document WT/DS291/37/Add.102, 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. As stated previously on many occasions, the EU wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings.

1.12. The representative of the United States said that his country thanked the EU for its status report and its statement at the present meeting. As the United States had noted repeatedly at past meetings of the DSB, 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, even after the EU's scientific body had completed exhaustive and time-consuming safety reviews. The unwarranted delays between the mid-2015 scientific assessments and the final EU approvals of three soy products illustrated the ongoing problems with the EU measures. Indeed, those delays had already caused adverse effects on trade in soybeans, and similar delays continued to affect corn exports. The United States encouraged the EU to ensure that products in the biotech approval pipeline moved forward in a timely manner as was required by EU regulations. For instance, many corn and soy products had now been under EFSA consideration for several years. The United States urged the EU to ensure that its biotech approval measures were consistent with its obligations under the SPS Agreement.

1.13. The representative of the European Union thanked the representative of the United States for his statement. The Commission was proceeding with the authorization of all genetically modified organisms that had received a favourable opinion from the European Food Safety Agency. Therefore, the EU considered that it was complying with its obligations.

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

[1] Bt11 × MIR162 × MIR604 × GA21.

2 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

2.1. 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.

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

2.3. The representative of Japan said that since the distributions under the CDSOA continued, Japan urged the United States to stop illegal distributions, once again, in order to resolve this long-standing dispute. As had been stated in 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.

2.4. The representative of Brazil said that his country, as an original party to this dispute, thanked the EU and Japan, once again, for keeping this item on the Agenda of the DSB. Brazil referred to its previous statements made on this matter. Brazil referred specifically to the continuation of illegal disbursements, which had continued even after the Byrd Amendment had been revoked in 2006, with effects starting in 2007. On the basis of the flawed argument that the disbursements referred to investigations initiated before that date, millions of dollars continued to be illegally disbursed to the original petitioners of the investigations. Once a measure had been declared by the DSB to be WTO-inconsistent, it could not continue to produce its illegal effects into the future. Brazil renewed its call on the United States to fully comply with the DSB's recommendations and rulings in this dispute. Until then, the United States was under an obligation to submit status reports, in accordance with Article 21.6 of the DSU.

2.5. The representative of Canada said his country thanked the EU and Japan for placing this matter on the Agenda of the DSB. Canada shared their view that the Byrd Amendment should remain under the surveillance of the DSB until the United States stopped applying it.

2.6. The representative of China said her country thanked the EU and Japan for placing this item on the Agenda of the DSB. China urged the United States to come into full compliance with the DSB's rulings and recommendations on this matter as soon as possible.

2.7. 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, nearly nine years ago. The United States therefore did not understand the purpose for which the EU and Japan had inscribed this item at the present meeting. With respect to comments regarding further status reports in this matter, as the United States 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.

2.8. The DSB took note of the statements.

3 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. Statement by the United States

3.1. 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.

3.2. The representative of the United States said that his county recalled that the DSB had adopted its recommendations and rulings in this dispute in August 2012, and that the reasonable period of time had expired in July 2013. In June, China had issued a regulation that appeared to set out a licensing application process for electronic payment service (EPS) suppliers to obtain authorization to do business in China. The United States expected that with these regulations, China would allow for the approval of foreign EPS suppliers without further delay, in accordance with China's WTO obligations. It continued to remain unclear whether China would, in fact, allow foreign EPS providers to operate in China. In the meantime, more than three years after the expiry of the RPT in this dispute, China's domestic supplier and national champion, China UnionPay, 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 in China.

3.3. 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 DSB meetings and emphasized that China had taken all necessary actions and had fully implemented the DSB's recommendations and rulings in this dispute. China wished to reiterate that the regulation referred to by the United States was not relevant to the implementation of the DSB recommendations and rulings in this dispute. Nor was the DSB meeting an appropriate forum to discuss China's domestic regulatory action, which was not relevant to this specific dispute.

3.4. The DSB took note of the statements.

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

A. Statement by India

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

4.2. The representative of India said that his country was, once again, forced to raise the issue of the United States' non-compliance and its failure to submit a status report, in accordance with Article 21.6 of the DSU, in this dispute. At the present meeting, India wished to highlight why it had, once again, raised this issue. This dispute involved certain countervailing duty investigations conducted by the US Authorities that had been found to be inconsistent with the WTO obligations of the United States. Further, the Appellate Body had found that Section 1677(G)(iii) of the Tariff Act of 1930 was inconsistent with the SCM Agreement since it required the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports when petitions to initiate countervailing duty investigations or anti-dumping duty investigations were filed on the same day and countervailing duty investigations or anti-dumping duty investigations were initiated by the investigating authority. Consequently, the Appellate Body had found Section 1677(7)(G)(iii) of the US Statute to be inconsistent "as such" with Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

4.3. The reasonable period of time to implement the rulings and recommendations of the DSB in this dispute had long expired. However, the United States had neither repealed this section nor modified it. The United States had explained, in the previous 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 US claimed that no further action was needed. This explanation was erroneous, legally unsustainable and indicated a lack of understanding of the rulings and recommendations of the DSB in this dispute. The Appellate Body had categorically found, after a detailed analysis of the provisions and the SCM Agreement, that Section 1677(7)(G)(iii) required 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 that it had discretion to initiate an investigation and that it would exercise this discretion consistently with its WTO obligations meant disregarding the DSB rulings and recommendations in this regard.

4.4. It was inappropriate for the United States to dispute this fact at this stage and re-open the arguments about the consistency of the statute on which there had been a clear finding. The Appellate Body had completed its legal analysis and held that the relevant provision was inconsistent with the WTO obligations of the United States. The Appellate Body's findings indicated a stage of finality and required compliance. The US could not now disregard its obligations to comply with the Appellate Body's findings and the DSB recommendations by merely giving an oral commitment to act in a WTO-consistent manner. This was not sufficient to remove the WTO-inconsistency of the law.

4.5. The US approach undermined the integrity and effectiveness of the dispute settlement system. By 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. If that had been the case, it would have cast a serious doubt on the effectiveness of the system. The United States was therefore bound to remove the inconsistency, by either 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 DSB rulings and recommendations in this dispute and to provide a status reports as it was doing in other similar disputes.

4.6. The representative of the United States said that, as his delegation had explained at prior DSB meetings, the United States had completed implementation with respect to the DSB recommendations and rulings in this dispute. As the United States had also previously remarked, the US remained willing to discuss with India any questions it may have. India, however, had not contacted the United States to do so. As the United States had consistently explained to the DSB, and again today under Agenda item 2, 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. Based on its own decision not to provide a status report in the DS430 dispute, India would appear to share the US view, at least when it was India that was in the position of the responding party. Therefore, it was not clear on what basis India continued to press this erroneous point. With respect to the "as such" finding on Section 1677(7)(G)(i)(III) of the Tariff Act of 1930, the US had explained, both to India and to the DSB, that no further US action was needed. 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. And, to reiterate, Commerce had confirmed its commitment to exercise this discretion in a manner that was consistent with the international 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. India was incorrect that the US claim of compliance was based on the statute never having been applied. While it was true that the statutory provision at issue had never been applied, as had just been noted, that was not the reason a change to the statute was not necessary. Given that the United States had fully complied in this dispute, the United States was not required to submit further status reports in this matter.

4.7. The representative of India said his country thanked the United States for its statement. The issues pertaining to the DS430 dispute would be addressed by India under the next agenda item in line with India's principled view on status reports. The United States, however, could not absolve itself from its WTO obligations in this dispute and India would assist the United States with its obligations in the present dispute. As previously stated, there existed on the statute book a law that had been found to be WTO-inconsistent. Did that law exist at the present moment in the United States? The answer was a categorical yes. The US explanation that Commerce would act consistently with US WTO obligations, in spite of the law mandating cross-cumulation, flew in the face of logic. It did not remove or modify the WTO-inconsistent law from the statute book.

4.8. It was also pertinent to note that under Agenda item 1(a) and (b) of the present meeting, there were two disputes wherein provisions of a statute had been found to be inconsistent with the

WTO obligations of the United States. And the United States was, to date, still providing status reports since these provisions had remained on the statute book. Further, the statements in the DSB with regard to these two disputes was educative of the US's inconsistent stand in the present dispute. Under Agenda item 1(a), the United States explained: "With respect to the recommendations and rulings of the DSB that have yet to be addressed, the US Administration will work with the US Congress with respect to appropriate statutory measures that would resolve this matter". Under Agenda item 1(b) the United States explained that: "The US Administration will continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter". Therefore, in both these disputes, the US law continued to be WTO-inconsistent on the statute book, and the United States stated that it was working with the US Congress to bring in appropriate measures.

4.9. India noted that the United States continued to submit status reports which pertained to work on statutory amendments to domestic laws that had been found to be inconsistent with its WTO obligations and was 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. It was disappointing to note a different legal standard being pursued in the present dispute, which pertained to essentially the same issue – a law which was WTO-inconsistent. Though these were different disputes with different sets of facts and law, the legal question was the same. The United States, surprisingly, did not believe that it was necessary to provide a status report in this case. Neither did it believe that it needed to work on repealing or modifying the statute. A mere statement that it would exercise "discretion" in a WTO-consistent manner did not remedy the inconsistency or lack of compliance. While one standard recognized the inconsistency and continued to file status reports, the other absolved any responsibility. India therefore urged the United States to follow the standard it had set in other disputes and to fully comply with the rulings and recommendations of the DSB in this dispute. Until then, it had to file status reports as it did in other similar disputes.

4.10. The DSB took note of the statements.

5 INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

A. Statement by the United States

5.1. 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.

5.2. The representative of the United States said that Members would recall that this dispute had been discussed at three recent meetings of the DSB. India had objected to the level of suspension requested by the United States, referred the matter to arbitration, and that arbitration was currently in progress. Nonetheless, the United States remained open to working with India on a mutually agreed resolution to this dispute and had been engaging with India to this end. In late July, India had adopted a measure that revised certain aspects of the measure at issue in the dispute. Unfortunately, the revised measure had appeared to retain many of the features of India's prior measure that the DSB had already found to be inconsistent with India's obligations under the SPS Agreement. At the previous DSB meeting, the United States had provided several examples. On 22 September 2016, India had notified an amendment to the measure that it had notified in July. The United States was studying this amendment carefully. As the United States had had it for only one full business day prior to the present meeting, the United States was not prepared to comment on it.

5.3. With respect to India's claim in its communication of 22 September 2016 that its measures were now in compliance with the DSB's recommendations, the United States noted that India had now made three different claims of compliance to the DSB in this dispute. First, in India's status report of 10 June 2016, India had claimed that finalization of its draft measure "would bring India into full compliance".[2] Second, in India's communication of 19 July 2016, India had claimed that, due to the final measure it had published on 8 July 2016, which had been different from its draft measure, India had fully complied with the DSB recommendations and rulings.[3] Third, as noted,

[2] WT/DS430/15.
[3] WT/DS430/18.

India had now amended the measure that it notified on 19 July 2016 and made a third compliance claim. Given the number of measures India had pointed to, one wondered which of those compliance claims India considered to be correct. The United States would continue to preserve and enforce US rights under the DSU. Despite the fact that India had not engaged with the United States on the substance of any changes to its measure until after both the expiry of the reasonable period of time and the US submission of a request under Article 22.2 of the DSU, the United States was actively engaging with India to seek the resolution of this dispute. The United States hoped that India would come into compliance with its WTO obligations without need for further proceedings under the DSU.

5.4. The representative of India said that, on 19 June 2015, the DSB had adopted its recommendations and rulings in "India – Measures Concerning the Importation of Certain Agricultural Products" (DS430). At the following DSB meeting, India had informed the DSB of its intention to implement the DSB's recommendations and rulings in connection with this matter. On 8 December 2015, India and the United States had informed the DSB that they had agreed on a reasonable period of time, up to 19 June 2016, for India to implement the recommendations and rulings. On 8 July 2016, India had published, notification S.O. 2337(E) in its Official Gazette, which had superseded the previous notification S.O. 1663(E).[4] India had notified the DSB, on 18 July 2016 that it had adopted measures necessary to comply with the recommendations of the DSB.[5] Notification S.O. 2337(E) complied with the recommendations of the DSB in this dispute as it: (i) allowed import of poultry and poultry products into India in accordance with the relevant international standard, i.e. the OIE Terrestrial Animal Health Code ("Terrestrial Code"); (ii) recognized the concept of disease-free areas; and (iii) provided for a process to be followed for recognition of such disease-free areas, zones/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 the questionnaire for recognizing a part of a country, zone/compartment for the purpose of trade in poultry and poultry products.

5.5. 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 the same, India had further amended notification S.O. 2337(E) vide S.O. 2998(E) dated 19 September 2016.[6] The amendment notification had been notified to the SPS Committee.[7] It had also been notified to the DSB on 22 September 2016 and was found in WT/DS430/19. Notification S.O. 2337(E), dated 8 July 2016, and the amendment notification 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. In view of the above, India strongly considered that it had brought itself into conformity with its WTO obligations. It had complied with the recommendations of the DSB by rectifying the inconsistencies in S.O 1663(E) and by issuing notification S.O. 2337(E) and amendment notification S.O. 2998(E), as well as the guidelines and questionnaire.

5.6. India was disappointed that the United States had raised this issue at the DSB again despite the fact that India was engaged 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 a revised measure consisting of S.O. 2337(E) and S.O. 2998(E), as well as the guidelines and questionnaire, were in force. Unlike the previous dispute, where the United States had not taken any measure to remove the inconsistent statute and still claimed compliance, it was abundantly clear that India had "revised measures" in place in this dispute.

5.7. Finally, India drew attention to the fact that, despite requests from India, the United States had not entered into a sequencing agreement in this dispute which was a standard practice among the WTO Members. A sequencing agreement was entered into in order to ensure that, in the event of disagreement between the parties with respect to compliance with the DSB's rulings and recommendations, recourse under Article 21.5 of the DSU should be pursued as the first option.

[4] See http://egazette.nic.in/WriteReadData/2016/170589.pdf.
[5] Communication from India, WT/DS430/18 circulated on 19 July 2016.
[6] See http://egazette.nic.in/WriteReadData/2016/171799.pdf.
[7] See G/SPS/N/IND/160.

It brought about predictability and certainty to the dispute settlement process and had been consistently used by Members over time. It would be relevant to note in this context that in the dispute that the US had been a respondent, which was the subject matter of the previous Agenda item, India had entered into a sequencing agreement without any conditions. It would augur well for the system if the United States maintained a uniform practice when it was a complainant as well as a respondent, in the interests of the WTO dispute settlement system as a whole. Instead, on 7 July 2016, the United States had made a request pursuant to Article 22.2 of the DSU seeking authorization from the DSB to suspend concessions under the covered agreements in the amount of US$450 million in 2016, which would be updated annually. India had objected to this request.[8] To date, the United States had not agreed to suspend the arbitration proceedings under Article 22.6 of the DSU. In view of the fact that India had brought itself into conformity with its WTO obligations, India would urge the United States to terminate the Article 22.6 proceedings in this dispute.

5.8. 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 neither been 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 of 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 the DS430 dispute. Regarding India's point on sequencing agreements, there was nothing in the DSU that required Members to enter into a sequencing agreement. Members had found it appropriate to do so in many circumstances. But India had taken no steps to address the DSB's recommendations as of the time when the United States had taken procedural action to preserve its rights under Article 22. Members had often agreed, through sequencing agreements or otherwise, to conduct proceedings in such an order, but as Members were well aware, this is not required under the DSU.

5.9. The representative of India said that the United States had asserted that, at 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 of the DSB's recommendations and rulings, had been withdrawn or modified and that it had been necessary to preserve and enforce US rights under the DSU. It must be noted that India had repeatedly been pursuing the issue of the sequencing agreement, as was the practice, even during the reasonable period of time. Entering into a sequencing agreement at this stage would have continued to preserve and enforce US rights under the DSU. India had notified its revised measure on 8 July 2016, just a day after the United States had made a request under Article 22.2 of the DSU. Thereafter, India had requested the United States to suspend the arbitration request in light of India's revised measure. This too could have been accomplished with a simple sequencing agreement, which preserved the rights of both parties. The United States had not shown any willingness to do so; even after India's revised measure. Therefore, while India continued to take all good faith efforts to engage with the United States to resolve the dispute, it was disappointing that the United States raised this Agenda item again at the DSB. India continued to be ready to engage with the United States to resolve the issue.

5.10. The representative of the European Union said the EU referred to its statement made at the special DSB meeting on 19 July 2016. The EU continued to hope that India and the US would ensure that the DSU provisions, with regard to compliance and suspension of obligations in this dispute, were conducted efficiently and in the correct sequence. The EU would continue to follow the developments in this dispute.

5.11. The DSB took note of the statements.

[8] See its communication to the DSB dated 18 July 2016 and at the DSB meeting held on 19 July 2016.

6 COLOMBIA – MEASURES CONCERNING IMPORTED SPIRITS

A. Request for the establishment of a panel by the European Union (WT/DS502/6)

6.1. The Chairman recalled that the DSB had considered this matter at its meeting on 5 September 2016 and had agreed to revert to it. He drew attention to the communication from the EU contained in document WT/DS502/6, and invited the representative of the EU to speak.

6.2. The representative of the European Union recalled that, at the 5 September 2016 DSB meeting Colombia had objected to the EU request for a panel concerning Colombia's discriminatory treatment of imported spirits. Therefore, in accordance with the DSU, such a panel would be established at the present DSB meeting. The EU reiterated its support of the ongoing legislative process in Colombia and encouraged Colombia to continue its good efforts towards the long awaited reform of the spirits regime so that EU spirits would no longer be discriminated against in the Colombian market.

6.3. The representative of Colombia said that his country regretted the EU's request for the establishment of the panel in this matter. As indicated at the previous DSB meeting, Colombia was working hard to adopt a Reform Bill that would make extensive changes to its spirits regime. Colombia had been working with a wide range of stakeholders, including the exporters represented by the EU, to ensure the adoption of a comprehensive and effective reform package. Since the previous DSB meeting, Colombia had continued to make significant progress on the enactment of the bill. There had been continuing discussions of the bill with stakeholders, including those that represented diverse importer interests. This should be viewed in the context of a busy legislative agenda due to the peace agreement that would be signed on the day. As a result, Colombia's Congress would not be in session that week. Colombia expected Congress to resume work on the bill in the week beginning 3 October 2016, and, with the cooperation of all concerned, Colombia hoped that the process would be completed in the following weeks. As it had been consistently explained to the EU, Colombia was concerned that the establishment of a panel at the present meeting could have adverse effects on the legislative process in Colombia by undermining the political support for the bill. Colombia would therefore have preferred it if the EU had awaited the outcome of the legislative process before pursuing the WTO dispute settlement process any further. Colombia considered that it was more productive to look forward and to achieve effective reforms than to have to divert attention to looking back at whether there might have been WTO-inconsistencies in the previous system. Therefore, Colombia regretted the EU's premature decision to seek the establishment of a panel in this matter. Now that the EU had chosen to take this step, Colombia hoped the EU would take pause to allow and facilitate the conclusion of the reform process. Colombia's expectation was also that the EU would work cooperatively with Colombia concerning the next steps in this dispute.

6.4. The representative of the United States said his country had participated as a third party in the consultations in this dispute, in light of the US substantial trade interest in the matter. The United States had repeatedly expressed concerns to Colombia regarding the taxation of alcoholic beverages and certain practices of departmental level alcohol monopolies. The United States urged Colombia to address this matter expeditiously.

6.5. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

6.6. The representatives of Brazil, Canada, Chile, China, El Salvador, Guatemala, India, Kazakhstan, Korea, Mexico, Panama, the Russian Federation, Chinese Taipei and the United States reserved their third-party rights to participate in the Panel's proceedings.

7 RUSSIA – TARIFF TREATMENT OF CERTAIN AGRICULTURAL AND MANUFACTURING PRODUCTS

A. Report of the Panel (WT/DS485/R, WT/DS485/R/Add.1, WT/DS485/R/Corr.1 and WT/DS485/R/Corr.2)

7.1. The Chairman recalled that, at its meeting on 25 March 2015, the DSB had established a Panel to examine the complaint by the EU pertaining to this dispute. The Report of the Panel,

contained in document WT/DS485/R and Add.1 had been circulated on 12 August 2016 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of the EU. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

7.2. The representative of the European Union thanked the Panel and the Secretariat for their work in this dispute. The EU welcomed the findings of the Panel. The Panel had upheld EU claims with regard to eleven out of twelve measures challenged by the EU in this dispute. Thus, the Panel had confirmed that the customs duties that the Russian Federation was required to apply pursuant to the Common Customs Tariff of the Eurasian Economic Union, with respect to products such as paper and paperboard, palm oil, refrigerators and refrigerator-freezers, exceeded Russia's bound rates, and were inconsistent with Article II:1(b) of the GATT 1994. The EU believed that these clear findings also had an effect beyond the particular products at issue in this dispute. For example, the Panel had made it clear that the application of combined rates (for instance "x%, but not less than y EUR per unit of measurement") for products for which Russia's Schedule provides for simple *ad valorem* rates (for instance "x%") violated Article II:1(b) of the GATT 1994. In this context, the Panel had also made some systemically important findings. For example, the Panel had confirmed that such violation could be established on the basis of mathematical calculations showing that the binding was exceeded below a "break even" price, and that concrete evidence on specific transactions was not required. The Panel had also rejected Russia's defence based on paragraph 313 of the Working Party Report on the accession of the Russian Federation to the WTO. The EU noted that some of the measures challenged in the dispute had been modified in the course of the Panel proceedings. In the light of clear findings of the Panel, the EU hoped that the Russian Federation would promptly take the necessary steps to ensure WTO compatibility of the measures for which inconsistency remained, in full respect of the bindings that it had committed to in its Schedule.

7.3. The representative of the Russian Federation said that her country was pleased to see the Panel Report in this dispute on the DSB Agenda at the present meeting. In Russia's view, the Report clarified a number of systemic issues regarding the WTO jurisprudence. Russia thanked the panelists, and the Secretariat who had assisted the parties for their work and efforts in resolving this dispute. The Panel had recommended that Russia bring duties on certain goods into conformity with its WTO commitments. In fact, for certain measures, the Russian Federation had already amended its applied rates prior to, and in the course of, these proceedings. Before the first Panel meeting, the Eurasian Economic Commission had issued a decision in relation to duties on palm oil and certain types of paper (measures 6, 7 and 8). The measures challenged by the EU had lapsed on 1 September 2015 and the applied duties had been established in full accordance with Russia's tariff commitments. Before the first Panel meeting, the Eurasian Economic Commission had also issued a decision in relation to EU's claims on refrigerators (measures 10 and 11). Before the second meeting of the Panel, the applied tariffs had been amended in accordance with Russia's WTO commitments. As of 1 September 2016 the duty applied by Russia, in relation to the 9th measure at issue in this dispute, had also been brought into conformity with Russia's WTO tariff commitments.

7.4. Russia continued to communicate with the EU with a view to resolving this dispute before and throughout these proceedings. Despite the fact that this dispute had moved forward, the amendments to the Common Customs Tariff of the Eurasian Economic Union for the products concerned had been introduced due to the EU's requests, which Russia had received prior to these Panel proceedings. In this regard, the EU's course of action to resort to formal resolution of a dispute in this case raised certain concerns in light of the already overburdened dispute settlement system. Russia was grateful for the comprehensive examination provided for in the Panel's Report in relation to the 12th measure challenged by the EU that had aimed to cast an overarching shadow over the Common Customs Tariff of the Eurasian Economic Union. The rulings issued by the Panel on this matter had confirmed the very high threshold that had been established in the WTO jurisprudence for this type of blanket and overambitious challenge. Russia considered that the Panel had made the necessary findings so as to secure a positive solution to the dispute. Therefore, Russia had decided not to appeal the Report of the Panel and looked forward to working constructively with the EU to address the recommendations and rulings of the DSB in this dispute.

7.5. The representative of Ukraine said that her country welcomed the conclusions of the Panel in this dispute and found the legal qualification and explanation provided by the Panel to be useful from a systemic point of view. This case had raised a number of complex questions of systemic importance, in particular for Ukraine. Her country welcomed the conclusions regarding the eleven challenged measures regarding the tariff treatment of certain goods that the Russian Federation Customs Authority had been required to apply in respect of individual tariff lines. Ukraine expected the Russian Federation to fully and timeously implement the recommendations of the Panel, and bring the measure at issue into conformity with its obligations under the GATT 1994, by revoking the measures.

7.6. The DSB took note of the statements and adopted the Panel Report contained in WT/DS485/R, Add.1, Corr.1 and Corr.2.

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

A. Report of the Appellate Body (WT/DS464/AB/R and WT/DS464/AB/R/Add.1) and Report of the Panel (WT/DS464/R and WT/DS464/R/Add.1)

8.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS464/11 transmitting the Appellate Body Report in the dispute: "United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea", which had been circulated on 7 September 2016 in document WT/DS464/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 required 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".

8.2. The representative of Korea said his country welcomed the adoption of the Panel and the Appellate Body Reports in this complicated dispute on: "United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea" (DS464). At the same time, Korea appreciated the diligent work done by the Panel, the Appellate Body, and the respective Secretariats during this dispute. Korea believed that the Appellate Body's findings on the issues in this dispute were very important to the interpretation and application of the core provisions of Anti-Dumping Agreement[9] and the SCM Agreement.[10]

8.3. First of all, Korea welcomed the Appellate Body's findings on the use of the zeroing methodology. As WTO Members were well aware, the zeroing methodology had been repeatedly found to be WTO-inconsistent by panels and the Appellate Body. In this regard, the Appellate Body's findings on the inconsistency of the use of zeroing, both under the normal comparison methods of the first sentence of Article 2.4.2 and under the exceptional comparison method of the second sentence of Article 2.4.2, were all important.

8.4. Second, Korea also welcomed the Appellate Body's guidance in interpreting and properly applying the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Through this dispute, the Members of the WTO had shown keen interest in the interpretation of the second sentence, and, thus, had actively participated in both the Panel and the Appellate Body discussions as third-party participants. Korea appreciated the active participation and contribution of the third-party Members in this dispute.

8.5. On the question of "systemic disregarding", however, Korea was of the view that the principle of "product as a whole" should be maintained in determining "dumping" and "margin of dumping", pursuant to the Appellate Body jurisprudence, by considering "non-pattern transactions" in the numerator without allowing "systemic disregarding". Additionally, Korea appreciated the Appellate Body's clarification of the obligations that applied under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 to the calculation of the countervailing duty rate.

[9] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
[10] Agreement on Subsidies and Countervailing Measures.

8.6. However, Korea was disappointed with the findings on regional specificity under Article 2.2 of the SCM Agreement. As Members were all aware, the WTO did not regulate every subsidy within the meaning of Article 1.1 of the SCM Agreement. The WTO regulated a subsidy under Part II, III, or V of the SCM Agreement, but only if the subsidy was specific. As such, the WTO allowed policy space for a Member to pursue its legitimate policy objectives. In this regard, Korea believed that the Panel and the Appellate Body had mechanically interpreted Article 2.2 of the SCM Agreement without accounting for adverse practical implications of such an interpretation. RSTA Article 26 subsidies were not regionally specific under a correct interpretation and application of Article 2.2. RSTA Article 26 subsidies sought to discourage investment in a small area in order to relieve over-congestion. They were broadly available to any company located in Korea that made investments in 98% of Korea's territory, and, thus, they were not trade-distorting. The exclusion of a small territory from the area in which a subsidy could be used for legitimate purposes, as in this case, should not constitute a regionally specific subsidy under Article 2.2 of the SCM Agreement.

8.7. Finally, Korea expected the United States to promptly implement the recommendations and rulings of the DSB, as set forth by the Panel and the Appellate Body in their reports. For the prompt settlement of this dispute pursuant to Article 3.3 of the DSU, Korea was ready to engage immediately with the United States, including on the reasonable period of time needed to implement the recommendations and rulings adopted by the DSB at the present meeting.

8.8. The representative of the United States said his country thanked the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute. The Reports covered numerous issues under the Anti-Dumping Agreement[11] and the SCM Agreement.[12] In this statement, the United States would draw Members' attention to certain aspects of the Appellate Body Report that were of serious concern. These issues related to the Appellate Body's approach to substantive claims under the Anti-Dumping Agreement and the SCM Agreement as well as the proper role of the Appellate Body reviewing claims by a party and findings by a panel.

8.9. Important aspects of the Appellate Body Report appeared to be at odds with the basic purpose of dispute settlement, as had been set out in the DSU and as had been understood by the Appellate Body in prior reports. As contemplated by Article 3.7 of the DSU, "[t]he aim of the dispute settlement system is to secure a positive solution to a dispute". Findings on claims or issues not raised by the parties to the dispute were, by necessity, not necessary to secure a positive solution to their dispute. Indeed, in "US – Wool Shirts and Blouses", the Appellate Body had stated that it "do[es] not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute".[13]

8.10. The Appellate Body Report here, however, went beyond the resolution of the issues raised by the disputing parties to prescribe particular methodological approaches to the application of the Anti-Dumping Agreement. The Appellate Body Report also adopted an interpretive approach that was not – as required under Articles 3.2, 11, and 19.2 of the DSU – based on the text of the covered agreements, but rather was focused on the application of language from prior Appellate Body reports addressing different legal issues. Regrettably, a majority of the Appellate Body Division hearing this appeal had effectively read the methodology in the second sentence of Article 2.4.2 out of the Anti-Dumping Agreement, a result which a dissenting Appellate Body member could not join.

8.11. This was the first dispute involving a Member's application of the alternative comparison methodology that was set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, the so-called "targeted dumping" provision. The Appellate Body's finding had little basis in the plain text of Article 2.4.2, and essentially rewrote the provision by prescribing a wholly new methodology for addressing "targeted dumping". The methodology created by the Appellate Body had never been contemplated at the time the Anti-Dumping Agreement had been negotiated and adopted. That methodology had never, to US knowledge, been used by any Member at any time in the 20-plus years since. And no party in the dispute had advocated the methodology ultimately prescribed by the Appellate Body.

[11] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
[12] Agreement on Subsidies and Countervailing Measures.
[13] "US – Wool Shirts and Blouses" (AB), p. 19.

8.12. Before discussing US concerns with specific Appellate Body findings, the United States noted that it appreciated that the Appellate Body rejected Korea's most extreme legal theories. In particular, Korea had argued for an interpretation of Article 2.4.2 that would have resulted in the alternative, average-to-transaction comparison methodology yielding precisely the same result as the normal, average-to-average comparison methodology in all cases. The Appellate Body had correctly recognized the exceptional nature of the second sentence of Article 2.4.2, and had acknowledged that it had to be possible for Members, in some way, to use that provision to address "targeted dumping".

8.13. However, in elaborating its vision of the "targeted dumping" methodology provided for under the second sentence of Article 2.4.2, the Appellate Body had found that the Anti-Dumping Agreement prohibited the combined application of the average-to-transaction and average-to-average comparison methodologies.[14] Nothing in the text of the second sentence of Article 2.4.2, nor elsewhere in the Anti-Dumping Agreement, addressed such a combined application. The parties and third parties had never disputed that a combined application could be necessary and appropriate in certain situations.

8.14. The Appellate Body's finding that a combined application was not permitted, together with its finding that the second sentence of Article 2.4.2 required that the alternative comparison methodology be applied only to a subset of transactions – the so-called "pattern transactions" – also conflicted with the Appellate Body's prior finding, in at least three reports, that margins of dumping had to be determined for the "product as a whole", and the failure to "take into account the entirety of the prices of some export transactions" was inconsistent with the Anti-Dumping Agreement.[15]

8.15. To be sure, if the Appellate Body Report had acknowledged this tension and had gone on to state that its prior findings related to determining dumping margins only for a "product as a whole" had been incorrect, this would have been a positive development.[16] But to the contrary, elsewhere in this very same Report, the Appellate Body majority continued to rely on the flawed "product as a whole" theory to find that "zeroing" was impermissible with respect to targeted sales. The result was that the Appellate Body's view of the proper interpretation of the Anti-Dumping Agreement was internally inconsistent; what was consistent was that a flawed interpretation had once again led to findings against the use of trade remedies.

8.16. The Appellate Body had found that the combined application of the average-to-transaction and average-to-average comparison methodologies was inconsistent with the Anti-Dumping Agreement even though Korea had never advanced any claim against the use of such a combined application. Indeed, neither of the disputing parties had appealed the Panel Report's brief reference to this issue. The Panel "assume[d] that the combined application of methodologies [was] not excluded", noting, appropriately, that "Korea ha[d] not advanced any claim" against such a combined application, and thus "there [had been] no need for [the panel] to rule on [the] matter".[17] In contrast to the Panel's restrained, and correct, approach of not making findings on an issue not raised by the complaining party, the Appellate Body had announced a prohibition on the use of a combined application, even though it had not even been asked to consider the issue on appeal.

8.17. In rewriting the second sentence of Article 2.4.2, the Appellate Body majority had also incorrectly expanded its prior findings against the use of "zeroing". In particular, the majority had found that the use of "zeroing", in connection with the application of the average-to-transaction comparison methodology to so-called "pattern transactions",[18] was inconsistent with the

[14] Appellate Body Report, para. 5.120.

[15] "US – Softwood Lumber V" (AB), para. 101 (emphasis in original). See also, e.g., "EC – Bed Linen" (AB), para. 53, "US – Softwood Lumber V" (AB), paras. 97-102; "US – Zeroing" (EC) (AB), para. 132.

[16] In previous communications to the DSB, the United States has explained in detail its concerns about the Appellate Body's findings related to "zeroing" and the Appellate Body's elaboration of its concept of "product as a whole". See "United States – Laws, Regulations and Methodology For Calculating Dumping Margins (Zeroing)", Communication from the United States, WT/DS294/16 (17 May 2006), "United States – Laws, Regulations and Methodology For Calculating Dumping Margins (Zeroing)", Communication from the United States, WT/DS294/18 (19 June 2006), "United States – Measures Relating to Zeroing and Sunset Reviews", Communication from the United States, WT/DS322/16 (26 February 2007).

[17] Panel Report, para. 7.161.

[18] Appellate Body Report, paras. 5.141-5.171.

Anti-Dumping Agreement. As one Appellate Body member had explained in dissent, this finding could not be supported under the rules of interpretation provided for under the DSU. Given the importance of this issue, the United States called the DSB's attention to the cogent explanation in the dissenting opinion: "the majority's interpretation would permit investigating authorities to deal with 'targeted dumping' only partially, and possibly ineffectively. Within the 'pattern', prices above normal value will cancel out – or 're-mask' – partly or completely, the 'targeted dumping' that results from prices below normal value. … [S]uch an incomplete approach is not required by the text of the second sentence read in the context of the entire Article 2.4.2 and in light of the object and purpose of the Anti-Dumping Agreement, and it unduly restricts the regulatory leeway that should be accorded to investigating authorities to deal with 'targeted dumping'".[19] The dissenting Appellate Body member had further reasoned that "allowing an investigating authority to zero within the 'pattern' under the second sentence of Article 2.4.2 not only is a permissible interpretation within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement, but … it is a more defensible interpretation within the meaning of the first sentence of that provision".[20]

8.18. The majority's prescribed approach for addressing "targeted dumping" simply was not the average-to-transaction comparison to which Members agreed in Article 2.4.2. The United States had definitively established that applying the average-to-transaction comparison methodology (without zeroing) would, as a mathematical certainty, always yield the same result as applying the average-to-average comparison methodology (without zeroing). This was true whether these comparison methodologies were applied to all export sales or to a subset of export sales. The Appellate Body majority itself had acknowledged as a "fact" that "the application of the [average-to-transaction] comparison methodology to [a] pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern".[21] Yet, the Appellate Body majority had ignored this key "fact".[22] In doing so, it had effectively rewritten the second sentence of Article 2.4.2, changing it from permitting Members to apply an average-to-transaction comparison methodology under certain circumstances to permitting Members to apply the average-to-average comparison methodology to a subset of transactions under certain circumstances. Ultimately, the majority had read the specific reference to the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement altogether, which was contrary to the customary rules of interpretation of public international law.

8.19. As the Appellate Body had explained in prior reports, "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness".[23] "One of the corollaries of 'the general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[24] It was troubling that a majority of the Appellate Body Division hearing this appeal had chosen not to abide by established customary rules of interpretation that the Appellate Body had recognized previously; though the United States appreciated that one dissenting Appellate Body member had decided not to join the majority in doing so.

8.20. Turning to the CVD issues in this dispute, the United States agreed with certain findings of the Appellate Body. In particular, the United States found persuasive the rejection of Korea's assertion that subsidies limited to a designated geographical region somehow were not regionally specific under the SCM Agreement.[25] The Appellate Body had found, among other things, that the size of a designated region was irrelevant to the specificity inquiry.[26]

8.21. The United States also agreed with aspects of the Appellate Body's findings regarding the calculation of subsidy margins. The United States agreed that the SCM Agreement did not dictate any particular methodology for calculating subsidy ratios, leaving the investigating authority with

[19] Appellate Body Report, paras. 5.195-5.196.
[20] Appellate Body Report, para. 5.202.
[21] Appellate Body Report, para. 5.165.
[22] Appellate Body Report, para. 5.165.
[23] "Japan – Alcoholic Beverages II" (AB), p. 12.
[24] "US – Gasoline" (AB), p. 23 (emphasis added).
[25] Appellate Body Report, paras. 5.204-5.246.
[26] Appellate Body Report, para. 5.236.

discretion to choose the most appropriate methodology.[27] In particular, the SCM Agreement did not expressly set forth a method for determining whether a given subsidy was "tied" to a particular product.[28] As the Appellate Body had observed, any "tying" determination would depend on the specific circumstances of each case, focusing on the "design, structure, and operation of the measure granting the subsidy".[29]

8.22. The United States had concerns, however, with respect to the Appellate Body's findings that these principles had not been adequately addressed and applied in the subsidy determinations made by the US Department of Commerce. The United States thanked the DSB for its attention to the important issues covered in its statement at the meeting.

8.23. The representative of Canada said that his country, as a third party to this dispute, also wished to thank the Panel, the Appellate Body and their Secretariats for their work in these proceedings. Canada had participated in this dispute because of its substantial systemic interest in the interpretation and application of WTO rules on dumping. Canada took the opportunity to comment on an issue on which Canada had provided views throughout the proceedings, namely, the calculation of a margin of dumping pursuant to the weighted average-to-transaction comparison methodology described in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Canada welcomed the Panel's and the Appellate Body's interpretation according to which, in order to use that comparison methodology, a pattern of prices which differed significantly had to be identified among different purchasers, or among different regions, or among different time periods, and could not transcend these categories. Canada also welcomed the Appellate Body's clarification that, in assessing whether prices differed significantly, an investigating authority was required to assess whether the differences in prices were significant, both quantitatively and qualitatively, and that this could require consideration of objective market factors. Canada was also pleased by the Panel's and the Appellate Body's finding that zeroing was prohibited in the application of the weighted average-to-transaction comparison methodology. In particular, Canada appreciated the Appellate Body's explicit indication that all transactions that fell within the relevant pattern had to be aggregated, irrespective of whether those transactions occurred above or below normal value. Canada likewise welcomed the Panel's and the Appellate Body's corollary finding that the use of zeroing in the weighted average-to-transaction comparison methodology was "as such" inconsistent with the "fair comparison" requirement under Article 2.4 of the Anti-Dumping Agreement.

8.24. The representative of China said her country was grateful for the work done in relation to this dispute by the Appellate Body, the Panel, and the Secretariat teams assisting them. This dispute was important from the systemic point of view. It spoke to a number of issues that had similarly been raised in China's complaint regarding methodologies used by the US investigating authority in "United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China" (DS471). China looked forward to faithful implementation by the United States of the result in the DS464 dispute.

8.25. The representative of Brazil said that the use of the "zeroing" methodology in anti-dumping proceedings had mobilized WTO Members and its dispute settlement mechanism for more than 15 years. From 2000 until now, this practice had been challenged and found to be WTO-inconsistent many times. The list of cases was long and Brazil would not recall them at the present meeting. The result of this intense litigation had been a consistent and coherent line of decisions, which had found "zeroing" to be "as such" and "as applied", in original investigations and in reviews, in any of the three methods of comparison, inconsistent with the GATT 1994 and the Anti-Dumping Agreement. Despite this vast jurisprudence, "zeroing" had still been used in "targeted dumping" situations, foreseen in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. This was due to the fact that the W-T method of comparison in "targeted dumping" had never been analysed in the dispute settlement mechanism. Precisely because it had been the "last frontier" for the possibility of zeroing, the task of the Appellate Body had not been easy. It had had to reconcile, on the one hand, the concern shared by many Members with pricing behaviour targeted to a purchaser, region or time period, and, on the other hand, the established principle that "dumping" and "margins of dumping" had to be calculated for

[27] Appellate Body Report, para. 5.269.
[28] Appellate Body Report, para. 5.269.
[29] Appellate Body Report, para. 5.270.

the product under investigation "as a whole"; any methodology that had disregarded or zeroed export transactions had already been found to be inherently unfair.

8.26. In Brazil's view, the Appellate Body's decision in the DS464 dispute - in addition to being concise, direct and clear – had been a balanced one. The Appellate Body had imposed strict obligations on the investigating authorities, who were admonished not to lightly determine the existence of a "targeted dumping" scenario. In this context, it had ruled that not all differences in prices constituted a "pattern" for the purpose of the second sentence of Article 2.4.2, and that the investigating authority had to convincingly explain why both of the symmetrical methods could not adequately take these differences into account. Under these stringent obligations, methods that had too easily, almost automatically, found a "pattern of export prices which differ significantly" were no longer permitted. Likewise, in line with past jurisprudence, the Appellate Body had maintained that all export transactions falling within the "pattern" had to be considered when calculating the margin of dumping. "zeroing" within that "pattern" was, therefore, WTO-inconsistent.

8.27. At the same time, Brazil understood that the present decision had also given due account to the concerns of Members with targeted behaviour and the corresponding need to address this behaviour in an effective way. In finding that the second sentence of Article 2.4.2 allowed an investigating authority to establish the existence of margin of dumping by focusing only on the transactions that constituted the "pattern", the Appellate Body delimitated with more precision the meaning of the "product as a whole" principle. This principle was now to be interpreted with reference to the specific universe of transactions to which the method of comparison applied. In the case of the W-T method in the second sentence of Article 2.4.2, the "product as a whole" meant the export transactions that fell within the pattern. Thus the Appellate Body had highlighted the importance of defining and using the correct "universe" of export transaction in each investigation. Some could argue that this solution still did not deal completely with "targeted dumping" situations, as, within the "pattern", prices above normal value would cancel out – or "re-mask" – partly or completely, the "targeted dumping". In Brazil's view, this decision seemed to be an adequate response to an intense intellectual debate. Now that the Appellate Body had spoken again on the issue, it was probably about time that this debate came to an end.

8.28. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS464/AB/R and Add.1 and the Panel Report contained in document WT/DS464/R and Add.1, as modified by the Appellate Body Report.

9 APPELLATE BODY MATTERS

9.1. The Chairman said that, under this Agenda item, he would make a short statement regarding the new selection process that had been agreed to by the DSB at its meeting on 21 July 2016. As Members were all aware, the names of seven candidates had been submitted by the agreed nomination deadline of 14 September for the vacancy left by the non-reappointment of one Appellate Body member. Pursuant to the 21 July DSB decision, Australia, China, Japan and Nepal had re-submitted their candidates for the new vacancy. Letters to this effect from the respective Missions had been circulated as addenda to the original Job documents containing the CVs of the candidates and were available online. In addition, new nominations had been submitted by Chinese Taipei and Korea. The CVs of these two candidates had been circulated as Job documents and were also available online. The Chairman recalled that, pursuant to the 21 July DSB decision, the re-nominated candidates from Australia, China, Japan and Nepal would not be interviewed for the second time by the Selection Committee. The interviews of the two new candidates would be held on Monday 17 October 2016 in the morning. On 1 and 2 November 2016, the Selection Committee would make itself available to hear views of delegations on the candidates. Delegations wishing to meet the Selection Committee were invited to contact the Secretariat – Council/TNC Division to make an appointment. A fax setting out the details would be circulated shortly after the present meeting. Alternatively, delegations could send comments in writing to the Chairman, as the Chair of the DSB, in care of the Council/TNC Division, by no later than 2 November, by close of business. Following the consultations with delegations, the Selection Committee would need to make its recommendation by no later than 10 November for consideration by the DSB at its regular meeting on 23 November. With regard to the previous selection process, he said that the Selection Committee would need to make a recommendation as soon as possible and by no later than 10 November so that the two new Appellate Body members could be approved by the DSB at its regular meeting in November.

9.2. The representative of Korea said that his delegation wished to take the opportunity to make a short statement to say a few words of gratitude in order to thank the outgoing Appellate Body member, Professor Seung Wha Chang. Korea would like to express heartfelt appreciation for Professor Chang's dedication and the excellent service he had rendered to the work of the Appellate Body during the past four years. Korea believed that he had done his best to remain faithful to the letter and spirit of the DSU in carrying out his responsibilities as an Appellate Body member and in safeguarding the WTO Members' rights provided for in the covered agreements. Professor Chang left a valuable legacy in the WTO dispute settlement system and Korea would like to wish him all the best in his future endeavours.

9.3. The DSB took note of the statement.

10 ANNOUCEMENT BY ARGENTINA REGARDING THE SESSION ENTITLED: "WTO DISPUTE SETTLEMENT SYSTEM FROM A LATIN AMERICAN PERSPECTIVE"

10.1. The representative of Argentina, speaking under "Other Business", said that his delegation wished to make a brief "save-the-date" announcement regarding the Public Forum, which would start on 27 September 2016 at the WTO. In this regard, he noted that Argentina, Brazil, Colombia, Guatemala and Mexico were organizing a session entitled: "WTO Dispute Settlement System from a Latin American Perspective". Argentina wished to invite all delegates to participate in this event, which would take place on 29 September 2016 at 9 am in Room W. Argentina said that seven highly talented colleagues who were very experienced with the operation of the dispute settlement system, would give their perspectives on this subject matter. In the context of this event, Argentina welcomed other Members to share their perspectives and points of view regarding the functioning of the system.

10.2. The DSB took note of the statement

11 DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

11.1. The Chairman, speaking under "Other Business", said that, as he had announced at the beginning of the meeting, he would now like to make a report to provide the DSB with information about the Appellate Body's workload, the number of disputes before panels and at the panel composition stage, and the ability of the Secretariat to meet expected demand over the coming period. The Appellate Body was currently dealing with two appeals.[30] In addition, the Panel Report in the extremely complex compliance proceedings in "EC and Certain Member States – Large Civil Aircraft" (Airbus) that had been circulated to Members on 22 September 2016, and two additional panel reports expected to be circulated in the following three months could also be appealed before the end of 2016.[31] 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. 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. The Chairman noted that he was counting multiple disputes that were being considered simultaneously by the same panel as one. As of 26 September 2016, there were four composed panels awaiting staff to assist them[32], and the DSB expected to have more clarity within the next 4-6 weeks as to when these panels could be staffed and their proceedings could commence. In addition, there were seven panels at the composition stage. Furthermore, two matters had been referred to arbitration under Article 22.6 of the DSU.

11.2. The DSB took note of the statement.

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[30] DS473 "EU – Biodiesel"; and DS475 "Russia – Pigs".

[31] DS471 "US – Anti-Dumping Methodologies" (China); and DS487 "US – Tax Incentives".

[32] DS480 "EU – Biodiesel" (Indonesia); DS427 "China – Broiler Products" (Article 21.5 – United States); DS504 "Korea – Pneumatic Valves" (Japan); and DS505 "US – Supercalendared Paper" (Canada).