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Dispute Settlement Body
20 February 2017

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 20 FEBRUARY 2017

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 "Russia - Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy" (DS479) 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 the Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 required that: "Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". Under this Agenda item, the Chairman invited delegations to provide up-to-date information about compliance efforts and to focus on new developments, suggestions and ideas on progress towards the resolution of disputes. He also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "Representatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record". He then turned to the first status report under this Agenda item.

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.169)

1.2. The Chairman drew attention to document WT/DS184/15/Add.169, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 9 February 2017, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for its statement and its status report. Japan called on the United States to fully implement the DSB's recommendations and rulings in order 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.144)

1.6. The Chairman drew your attention to document WT/DS160/24/Add.144, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 9 February 2017, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union 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 and said that it would like 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.107)

1.10. The Chairman drew attention to document WT/DS291/37/Add.107, 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 the draft authorisation decision for one type of genetically modified maize[1] (for food and feed uses) had been submitted for a vote at the member States committee on 27 January 2017. The draft proposals for the authorisation of three types of maize[2] (for cultivation) had also been submitted for a vote at the member States committee on 27 January 2017. The EU said that it continued to be committed to acting in line with its WTO obligations. More generally, and as it had stated previously on many occasions, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.12. The representative of the United States said that the United States thanked the EU for its status report and its statement made at the present meeting. The EU measures affecting the approval and marketing of biotech products continued to be characterized by lengthy, unpredictable, and unexplained delays in approvals. For example, the EU's scientific review process had slowed in recent years. Many corn and soybean products had now been under consideration by the EU's scientific authority for several years. Furthermore, the EU had recently proposed regulations that created more, rather than less, uncertainty with regard to the information required for scientific evaluation of biotech products. The United States encouraged the EU to ensure that only the scientific information relevant to environmental risk assessments was required to be provided to the EU's scientific authority, and only by those applicants who sought authorization to conduct field trials or participate in cultivation of biotech products. The delays and uncertainty in approvals caused adverse effects on trade, particularly with respect to

[1] Maize Bt11 × 59122 × MIR604 × 1507 × GA21.
[2] Bt11, 1507 and MON810 (renewal).

soybeans and corn. The United States encouraged the EU to ensure that products in the biotech approval pipeline moved forward in a timely manner, as required by EU regulations and WTO rules.

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

2 CANADA – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN CARBON STEEL WELDED PIPE FROM THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

A. Implementation of the recommendations of the DSB

2.1. The Chairman recalled that, in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned had to inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. The Chairman recalled that, at its meeting on 25 January 2017, the DSB had adopted the Panel Report in the dispute on: "Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu". He then invited the representative of Canada to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

2.2. The representative of Canada recalled that the DSB had adopted the Panel Report in the "Canada – Welded Pipe" dispute (DS482) at the 25 January 2017 DSB meeting. Pursuant to Article 21.3 of the DSU, Canada wished to inform the DSB that it intended to implement the recommendations and rulings of the DSB in DS482 within a reasonable period of time. Canada also wished to inform the DSB that Canada and Chinese Taipei had reached an agreement, pursuant to Article 21.3(b) of the DSU, that the reasonable period of time in this dispute would be 14 months. Therefore, it would expire on 25 March 2018. That agreement had been circulated to Members in document WT/DS482/6. Canada thanked Chinese Taipei for the constructive dialogue that had taken place during the negotiations for determining the length of the reasonable period of time to comply.

2.3. The representative of Chinese Taipei said that his delegation confirmed the statement made by Canada regarding the agreement reached by the parties on a reasonable period of time of 14 months, and said that it stood ready to work closely with Canada towards a prompt settlement of this dispute.

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

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

A. Statement by the European Union

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

3.2. The representative of the European Union said that his delegation, once again, requested the United States to stop transferring anti-dumping and countervailing duties to the US industry. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports on implementation in this dispute. The EU would continue to place this matter on the DSB Agenda for as long as the United States had not implemented the WTO rulings.

3.3. The representative of Brazil said that his country thanked the EU for keeping this item on the Agenda of the DSB. As a party to the Byrd Amendment disputes, Brazil referred to its previous statements on this matter. In particular, Brazil wished to refer to its statements regarding the continuation of illegal disbursements, which should cease immediately. Brazil renewed its calls on the United States to fully comply with the DSB's recommendations and rulings in these disputes. Until then, the United States was under an obligation to submit status reports, pursuant to Article 21.6 of the DSU.

3.4. The representative of Canada said that his country thanked the EU for putting this item on the Agenda of the DSB. Canada shared their view that the Byrd Amendment should be kept under the surveillance of the DSB until the United States stopped applying it.

3.5. The representative of China said that her country thanked the EU for placing this item on the Agenda of the present meeting. China urged the United States to fully implement the DSB's recommendations and rulings on this matter as soon as possible.

3.6. 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, over nine years ago. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB recommendations and rulings, regardless of whether the complaining party disagreed about compliance. Indeed, the EU had demonstrated repeatedly that it shared this understanding, at least when it was the responding party in a dispute, such as in the "EC – Large Civil Aircraft" (DS316) dispute. The United States said that if the EU disagreed, it could demonstrate this different understanding by submitting a status report in DS316 for the DSB meeting on 21 March 2017.

3.7. The DSB took note of the statements.

4 CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. Statement by the United States

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

4.2. The representative of the United States said that the DSB had adopted its recommendations in this dispute in August 2012, and that the reasonable period of time had long since expired. China had issued a regulation several months before that purported to set out a licensing application process for foreign EPS suppliers. However, the only entity authorized to provide electronic payment services (EPS) in China remained a business set up by the People's Bank of China and other Chinese Government-related entities. The United States urged China to ensure that foreign EPS suppliers could apply for and receive permission to operate in China, in accordance with China's WTO obligations.

4.3. The representative of China said that her country regretted that the United States had, once again, brought this matter before the DSB. China referred to its statements made at previous meetings and emphasized that it had taken all necessary actions and had fully implemented the DSB's recommendations and rulings in this dispute.

4.4. The DSB took note of the statements.

5 MOROCCO – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL FROM TURKEY

A. Request for the establishment of a panel by Turkey (WT/DS513/2)

5.1. The Chairman recalled that the DSB had considered this matter at its meeting on 25 January 2017 and had agreed to revert to it. He drew attention to the communication from Turkey contained in document WT/DS513/2, and invited the representative of Turkey to speak.

5.2. The representative of Turkey recalled that at the 25 January 2017 DSB meeting, Turkey had requested, for the first time, the establishment of a panel to examine the anti-dumping duties imposed by Morocco on imports of certain hot-rolled steel from Turkey. At the present meeting, Turkey was requesting the establishment of a panel for a second time. Turkey reiterated that Morocco's anti-dumping duties on imports of certain hot-rolled steel from Turkey were not in compliance with Morocco's WTO obligations, as had been explained in detail in Turkey's panel request. Furthermore, these duties had already had significant effects on Turkish exports of these products. Turkey said that it had hoped that this matter could have been resolved without the need to go to the panel stage. Unfortunately, this had not been the case and Turkey had to ensure that its rights under the Anti-Dumping Agreement were properly secured. Turkey was, therefore, requesting the DSB to establish a panel, with standard terms of reference, to address the matters set out in its panel request.

5.3. The representative of Morocco said that his country regretted that Turkey was requesting, for the second time, the establishment of a panel in this dispute. Morocco stressed that it had done what it could to resolve this dispute through consultations, and remained ready to pursue those consultations in order to reach a mutually acceptable solution. Indeed, Morocco had contacted Turkey after the 25 January 2017 DSB meeting in order to resume consultations in a constructive spirit and to seek a solution in the interest of both parties. However, Morocco had received no response to its request. Over the past few years, Morocco's steel plate industry had been seriously undermined by imports at abnormally low prices, leading the Moroccan authorities to conduct an objective and unbiased anti-dumping investigation, in accordance with the relevant regulations. Following that investigation, an anti-dumping duty had been adopted in conformity with Morocco's obligations under the Anti-Dumping Agreement. Notwithstanding these considerations, if, after the present meeting, a panel was established under Article 6.1 of the DSU, Morocco would provide the necessary explanations and to defend the conformity of its measure before that panel. Morocco believed that it had violated neither the provisions of the Anti-Dumping Agreement, nor those of the Agreement on Import Licensing Procedures.

5.4. 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.

5.5. The representatives of China, Egypt, the European Union, India, Japan, Kazakhstan, Korea, the Russian Federation, Singapore and the United States reserved their third-party rights to participate in the Panel's proceedings.

6 UNITED STATES – CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR

A. Request for the establishment of a panel by India (WT/DS510/2)

6.1. The Chairman drew attention to the communication from India contained in document WT/DS510/2, and invited the representative of India to speak.

6.2. The representative of India said that the United States maintained certain renewable energy programmes which promoted domestic content requirements (DCR) through incentives. India had, in the past, made sincere efforts to understand the nature of some of these programmes through clarificatory questions before the TRIMs and SCM Committees. These efforts had not yielded satisfactory responses. Subsequently, on 9 September 2016, India had requested consultations with the United States. These consultations had been held on 16-17 November 2016 and had, unfortunately, failed to resolve these issues. As a result, India was now requesting the establishment of a panel, in accordance with the provisions of the DSU, to resolve this dispute.

India said that it was mindful that climate change was a real threat and the global community had to take all necessary steps to protect the planet for future generations. In this regard, constructive efforts made thus far by the global community had been commendable. Past experience showed that, for the purpose of long-run energy security, there was need for in-house capacity development for manufacturing of equipment for generation of renewable energy. This was required, at least to some extent, to avoid an international crisis. Hence, India said that it believed that every country needed to have policy space to build such manufacturing capacity within its own territory. However, Members would also have to be mindful of their WTO obligations. India said that it believed that certain renewable energy programmes maintained by the United States, which were the subject matter of India's panel request, fell short of the same and were not consistent with WTO disciplines on non-discrimination and subsidies.

6.3. India had identified eleven Renewable Energy Programmes in its panel request. This formed the basis of the present dispute. A brief description of these programmes and the legal basis for India's claims formed part of the panel request. Each of these programmes offered certain subsidies to targeted recipients which appeared to be conditioned upon use of local content in the production process of the concerned goods. Members were aware that subsidies which were contingent on local content requirements had trade distortionary effects and were not only prohibited under the SCM Agreement, but were also inconsistent with Article III of the GATT 1994 as well as Article 2.1 of the TRIMs Agreement. Therefore, India said that it was concerned with the identified programmes which negated benefits to WTO Members. Since the consultations had not resolved this dispute, India was requesting that the DSB establish a panel, in accordance with Article 6 of the DSU, to examine the matter set out in India's panel request and make appropriate findings for the early resolution of the dispute.

6.4. The representative of the United States said that the United States was disappointed that India had sought the establishment of a panel in this matter. It appeared that India had launched this dispute for purely political reasons. Indeed, Indian government officials had been quoted as characterizing this dispute as motivated by the DSB's findings in the DS456 dispute that the domestic content requirements under India's National Solar Mission were contrary to WTO rules, a complaint brought by the United States. Article 3.10 of the DSU made clear that the "use of the dispute settlement" mechanism should be made "in good faith" and that "complaints and counter-complaints […] [in distinct matters] should not be linked". India did not export significant amounts of renewable energy equipment to the United States, and the state-level programs identified in India's request appeared to have virtually no effect on commerce. At a time when WTO dispute settlement resources were stretched thin, the United States said that it regretted that India would seek to use WTO resources on such a matter. For all these reasons, the United States did not agree to the establishment of a panel at the present meeting.

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

7 RUSSIA – MEASURES CONCERNING TRAFFIC IN TRANSIT

A. Request for the establishment of a panel by Ukraine (WT/DS512/3)

7.1. The Chairman drew attention to the communication from Ukraine contained in document WT/DS512/3, and invited the representative of Ukraine to speak.

7.2. The representative of Ukraine said that his country was requesting the establishment of a panel, pursuant to Article 6 of the DSU, to examine the measures imposed by the Russian Federation on traffic in transit from Ukraine, through Russia, to third countries. Since 1 January 2016, Russia had imposed measures which required traffic in transit from Ukraine to Kazakhstan, through Russia, to be carried out exclusively from Belarus. Since 1 July 2016 the same applied to traffic in transit from Ukraine to the Kyrgyz Republic. In addition, traffic in transit from Ukraine had to comply with the application of identification means (seals) and the use of registration cards for drivers. Furthermore, as of 1 July 2016, Russia had imposed a ban on the transit of a substantial number of goods through its territory via the above-mentioned transit routes. Russia had also imposed other measures concerning traffic in transit, from Ukraine to third countries, through its territory. All these measures on traffic in transit had not only had detrimental economic consequences on Ukraine, they were also inconsistent with several provisions of the GATT 1994 and the WTO Protocol on the Accession of the Russian Federation.

Ukraine had requested consultations with Russia on 14 September 2016. These consultations had been held on 10 November 2016, but, unfortunately, had failed to settle the dispute. Since the measures remained in force and continued to violate several WTO obligations, Ukraine was requesting the establishment of a panel, with standard terms of reference.

7.3. The representative of the Russian Federation said her country wished to express its strong disappointment with Ukraine's decision to request the establishment of a panel in this dispute. Ukraine had filed its request for consultations on 14 September 2016, and these consultations had been held on 10 November 2016. In the course of the consultations Russia had responded to the relevant questions and provided necessary clarifications. Notably, Russia had affirmed its continuing respect for WTO rules and its accession commitments. As provided for in the DSU, before bringing a case, a Member had to exercise its judgment as to whether an action under these procedures would be fruitful. In Russia's view, actions by Ukraine did not meet these criteria. For this reason, Russia was not in a position to accept the establishment of a panel at the present meeting.

7.4. The representative of the European Union said that his delegation noted that the request for panel establishment related, *inter alia*, to traffic in transit from the territory of Ukraine through the territory of the Russian Federation to certain third countries. Due to its geographical location, the EU was a major user of transit routes addressed in the panel request. In particular, the EU was a major exporter to Kazakhstan and to the Kyrgyz Republic. Furthermore, the measures at issue, as characterized by Ukraine in its request, affected not only goods of Ukrainian origin, but also goods originating in third countries, including in the EU. The EU had already expressed its strong concerns about these measures in other WTO fora, such as the Council for Trade in Goods. The EU said that it regretted that the consultations between Russia and Ukraine had failed to settle this dispute and that the measures at issue still remained in place. The EU would continue to follow this dispute very closely and would reserve its third- party rights in the Panel's proceedings.

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

8 COLOMBIA – MEASURES RELATING TO THE IMPORTATION OF TEXTILES, APPAREL AND FOOTWEAR

A. Recourse to Article 22.2 of the DSU by Panama (WT/DS461/16)

8.1. The Chairman drew attention to the communication from Panama contained in document WT/DS461/16, and invited the representative of Panama to speak.

8.2. The representative of Panama recalled that on 25 September 2013 the DSB had established a panel, at the request of Panama, to examine the compound tariff imposed by Colombia on imports of textile, apparel and footwear products. In examining this matter, both the Panel and the Appellate Body had found that the measure violated the GATT 1994. On 22 June 2016, the DSB had adopted the Panel Report, as modified by the Appellate Body Report, recommending that Colombia bring the measure at issue into conformity with the GATT 1994. The arbitrator had subsequently determined that the "reasonable period of time" for Colombia to implement the DSB recommendations and rulings would expire on 22 January 2017. On 2 November 2016, Colombia had adopted two decrees that affected the tariff and customs regime for the importation of textiles, apparel and footwear. In Panama's view, however, these legislative acts, far from bringing the measure into conformity with Colombia's WTO obligations, perpetuated the nullification and impairment of benefits accruing to Panama directly or indirectly under the GATT 1994. Article 22 of the DSU provided that, in the event that the recommendations were not implemented within the "reasonable period of time", the parties to a dispute could attempt to negotiate mutually acceptable compensation, or the prevailing party could be authorized by the DSB to suspend concessions and obligations. Panama had requested a meeting to that end, which had taken place, but the parties had not reached an agreement on satisfactory compensation. Article 22.2 of the DSU provided that if no satisfactory compensation had been agreed within 20 days after the date of expiry of the "reasonable period of time", a prevailing party could request authorization from the DSB to suspend the application of concessions and obligations to the party that had failed to implement the DSB's recommendations and rulings.

8.3. Article 22.6 of the DSU required the DSB to grant such authorization within 30 days of the expiry of that period, unless there was consensus to reject the request. Colombia's failure to bring its measure into conformity with its WTO obligations by complying with the DSB recommendations and rulings in this matter had resulted in a loss for Panama of US$210 million worth of exports of textile, apparel and footwear products. In accordance with Article 22.2 of the DSU, Panama was requesting authorization from the DSB to suspend the application to Colombia of concessions or other obligations covering trade in the amount of US$210 million. In considering what concessions or other obligations to suspend, Panama had applied the principles and procedures set forth in Article 22.3 of the DSU, and had submitted its request pursuant to Article 22.3(c) of the DSU. The request was based on the fact that, for Panama, the suspension of concessions or other obligations with respect to the goods sector only would be problematic. In Panama's view, a measure of this kind would affect sensitive sectors of the Panamanian economy that needed Colombian imports, including the energy, agriculture, health and construction sectors, which accounted for a considerable share of Panama's gross domestic product. Considering that the circumstances were sufficiently serious, and that it was not practicable or effective to suspend concessions or other obligations with respect to the goods sector only, Panama was requesting authorization from the DSB to suspend concessions or other obligations under the Trade in Goods, Services and TRIPS. As required by Article 22.4 of the DSU, the level of suspension proposed was equivalent on an annual basis to the nullification or impairment of benefits accruing to Panama, resulting from Colombia's failure to comply with the DSB's recommendations and rulings.

8.4. The representative of Colombia said that his country regretted Panama's request for the DSB's authorization to suspend the application, to Colombia, of concessions or other obligations under the GATT 1994, the GATS, and the TRIPS Agreement. Colombia said that it considered that, from a systemic point of view, it was an extremely serious matter that Panama had requested this authorization, in spite of the fact that Colombia had already notified its compliance with the DSB's recommendations and rulings in document WT/DS461/15. Colombia had complied promptly and effectively within the reasonable period of time. Colombia had replaced the compound tariff with an *ad valorem* tariff that did not exceed Colombia's WTO bound tariff rates. Colombia had thus brought the measure subject to the DSB's recommendations and rulings into compliance with its WTO obligations. Any disagreement between Colombia and Panama as to the existence or consistency with a covered agreement of measures taken to comply with the DSB recommendations and rulings had to be resolved through Article 21.5 of the DSU, which provided that: "Where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including whenever possible resort to the original Panel".

8.5. As stated by the Appellate Body[3]: "On the one hand, the authorization to suspend concessions can be said to be the result of a previous act of seeking redress that involved initiating a dispute. On the other hand, the continued application of the suspension of concessions can be said to reflect a continuous act of seeking redress for a violation found by the DSB that has not yet been rectified. In any event, the suspension of concessions that has been duly authorized by the DSB will not constitute a violation of Article 23.1, as long as it is consistent with other rules of the DSU, including paragraphs 2 through 8 of Article 22, even if the continued application of the suspension of concessions is regarded as an action or part of a process of 'seeking the redress'. This is because, before obtaining the DSB's authorization to suspend concessions, a Member must initiate a dispute settlement process in which it challenges the consistency with the covered agreements of a measure taken by another Member. The Member initiating the process will only be authorized to suspend concessions when the measure is found by the panel (and the Appellate Body, if appealed) to be inconsistent with the covered agreements and the Member taking the measure fails to implement the panel's (or Appellate Body's) findings within a reasonable period of time or, if it takes a measure to comply, that measure is found by the panel (and the Appellate Body) in compliance proceedings not to have brought the Member concerned into compliance. In other words, the Member will only be able to suspend concessions pursuant to the DSB's authorization after having had extensive recourse to, and abided by, the rules and procedures of the DSU, consistent with the requirements of Article 23.1".

8.6. Panama's decision to have recourse to Article 22.2 of the DSU and to request the DSB's authorization to suspend concessions or other obligations, rather than requesting the

[3] Appellate Body Report in "US – Continued Suspension" (DS320), para. 374.

establishment of a panel under Article 21.5, in spite of the fact that Colombia had already notified its compliance with the recommendations and rulings of the DSB, was contrary to the principles governing dispute settlement procedures, which maintained the balance and ensured the proper functioning of the system. It was clear to Colombia that since it had fully complied with the DSB's recommendations and rulings there could not be any nullification or impairment, and Panama's request for authorization to suspend concessions was therefore unjustified. Consequently, pursuant to Article 22.3 and 22.6 of the DSU, Colombia challenged the level of suspension of concessions or other obligations proposed by Panama and contended that Panama's request did not follow the principles and procedures set forth in Article 22.3 of the DSU. Colombia was therefore requesting that the matter be referred to arbitration.

8.7. The representative of the European Union noted that Colombia had notified full compliance with the DSB's recommendations and rulings. The EU also noted that Panama did not agree that Colombia had brought its measures into compliance with the covered agreements. Therefore, it appeared that "there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU. The EU recalled that, pursuant to that provision, "such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible recourse to the original panel". In cases of disagreement on compliance, concessions could be only suspended once there was a multilateral determination of compliance by the DSB. The EU hoped that Panama and Colombia would ensure that the DSU procedures regarding compliance and suspension of concessions would be conducted efficiently in this dispute and that the correct and logical sequence would be respected.

8.8. The representative of Canada said that Panama's decision to seek authorization from the DSB to suspend concessions vis-à-vis Colombia, despite Colombia's claim of compliance, and in the absence of a DSB ruling on compliance, raised the sequencing issue for the DSB's consideration. First, for the benefit of Members that had questions about the sequencing issue, Canada recalled that it had circulated an annotated Sequencing Agreement under the Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, which had been established in July 2016. That document explained the sequencing issue (JOB/DSB/1/Add.6). The DSU did not clearly set out the sequence of compliance proceedings under Article 21.5 and requests for authorization from the DSB to suspend concessions under Article 22.2 of the DSU. For the most part, this uncertainty had been resolved through the well-established practice of disputing parties entering into "sequencing agreements". These agreements set out, for the purposes of a specific dispute, that the parties agree that compliance proceedings would, if invoked, precede the grant of authorization to suspend concessions and that the request for such authorization can be made after the 30-day time period set out in Article 22.6 of the DSU. Sequencing agreements thus overcame the uncertainty that the text of the DSU created and contributed to the effectiveness and predictability of the WTO dispute settlement system. Canada considered that Panama's request under Article 22.2 of the DSU departed from this practice. In Canada's view, given that Colombia asserted that it had taken a measure to comply with the recommendations and rulings of the DSB and because this was the first time that a disagreement regarding a compliance measure had arisen in this dispute, it would be appropriate for the parties to first go through compliance proceedings under Article 21.5 of the DSU. It was not too late for Panama and Colombia to enter into a sequencing agreement. Given that Colombia had objected to the level of suspension proposed by Panama, the matter would be referred to arbitration. The parties could agree to suspend that arbitration until the completion of the Article 21.5 proceedings.

8.9. Beyond the specifics of this dispute, Canada believed that Article 21.5 of the DSU should not be subject to abuse. Such abuse would arise where a responding party serially implemented multiple measures that it asserted achieved compliance, which would delay indefinitely the complaining party from having recourse to Article 22.2 of the DSU. In Canada's view, it would be appropriate for the complaining party to be able to exercise its rights under Article 22.2 of the DSU in all circumstances where the DSB had ruled that a measure taken to comply in fact did not comply. As a final point, Canada said that Colombia's recourse to Article 21.5 of the DSU clearly illustrated the relevance and appropriateness of the right of a responding party to initiate compliance proceedings under the DSU.

8.10. The representative of India said that his country would like to touch upon the issue of sequencing and the procedure followed by Panama at the present meeting. India said that it was not commenting on the merits of the dispute or on the issue of compliance. India had faced a

similar situation in an earlier dispute and its views were a reiteration of its views previously expressed. India said that it was concerned about the systematic implications of such an action by Panama. In India's view, as had also been mentioned by the EU, if there was a disagreement between the parties with respect to "the consistency with a covered agreement of measures taken to comply with the recommendations and rulings" the proper course of action was first to have recourse to Article 21.5 of the DSU. India said that considerable discussions that had been held on the 19 July 2016 DSB meeting, in the context of another dispute, were noteworthy. In that meeting, Japan had rightly brought out the issues involved. Japan had said that "Under the practice, 'where there is disagreement as to the existence or consistency with a covered agreement, of measures taken to comply with the recommendations and rulings', the parties committed themselves to have recourse to the compliance proceedings under Article 21.5 of the DSU prior to the arbitration under Article 22.6 of the DSU. These procedural arrangements would certainly have implications for the time-frame of dispute settlement proceedings, but it had been and would continue to provide a practical way forward by securing legal certainty at this very critical stage in a dispute, nonetheless. And this practical arrangement actually made sense for the following reasons: (i) reviewing fully, complex issues of compliance through adjudicative process and multilateral decision by the DSB; (ii) securing the parties' rights to appeal; and (iii) providing a basis for the work of the arbitrator under Article 22.6". India agreed with the above assessment.

8.11. If there was a disagreement between the parties on this matter, the proper course of action was first to have recourse to Article 21.5 of the DSU. This had been a consistent practice. Members had signed sequencing agreements to ensure that this proper order was respected. Not doing so disrupted the legal certainty of the DSU. India noted that there was no sequencing agreement in this dispute. Colombia claimed it had complied with the DSB's recommendations and rulings; Panama disagreed. The right course of action, in India's view, was the establishment of a compliance panel. Pursuance of Article 22.6 proceedings, in India's view, was premature and seriously undermined the balance that Members had found in the dispute settlement mechanism. India agreed with Canada that it was not too late for Colombia and Panama to resolve the issue of process in the larger interests of the dispute settlement mechanism.

8.12. The representative of Japan said that his country understood that Colombia had objected to the level of suspensions proposed and claimed that the principles and procedures set out in paragraph 22.3 of the DSU had not been followed. With this objection and claim, the matter had been automatically referred to arbitration. Japan noted that under item 9 of the Agenda, the establishment of a compliance panel would be considered. Japan said that it did not know if the panel was going to be established at the present meeting, but that eventually a panel would have to be established. This would mean that there would be two parallel proceedings: an arbitration proceeding under Article 22.6 of the DSU and a compliance proceeding under Article 21.5 of the DSU. As Canada had stated, Members had a well-established practice to resolve this kind of procedural issue, namely that the parties would agree on a sequencing arrangement. Japan encouraged the parties to work together and agree on a workable arrangement to promote the smooth functioning of the dispute settlement system. Otherwise, the parallel proceedings would create a series of difficult legal issues, including the issue of what would happen if the two proceedings resulted in different outcomes.

8.13. The representative of Argentina said that his delegation wished to make a statement due to its systemic interest in the issues under discussion. Argentina did not wish to comment on the substantive issues involved in dispute DS461. Argentina had a systemic interest in the sequencing issue under Articles 21.5 and 22.2 of the DSU. In the past, Argentina, together with the G7 countries, had tabled a proposal on the sequencing issue in the context of the DSU negotiations. With regard to DS461, Argentina noted that, in document WT/DS461/15, Colombia had informed the DSB that it had adopted a measure and had "complied with the DSB's recommendations and rulings". Argentina noted that in document WT/DS461/16 Panama had sought recourse to Article 22.2 of the DSU, requesting authorization from the DSB to suspend the application of concessions or other obligations to Colombia. In that document, Panama had stated that Colombia had "adopted two decrees that affect the tariff and customs regime for the importation of textiles and footwear". In that regard, Panama appeared to be aware of the existence of a measure adopted by Colombia. However, Panama stated that, in its view, "these legislative acts [had not brought] the measure into conformity with Colombia's WTO obligations". Argentina noted that at the present meeting, Panama had sought the DSB's authorization to suspend concessions or other obligations to Colombia without recourse to compliance proceedings under Article 21.5 of the DSU. In WT/DS461/17, Colombia had sought recourse to Article 21.5 of

the DSU "to resolve the disagreement as to compliance". In the light of these facts, and given that the sequencing issue was a matter of systemic interest that could have consequences beyond this dispute and affect the use of the DSU for the entire Membership, Argentina urged both parties to reflect on the steps taken and to try to reach a sequencing agreement.

8.14. The representative of Brazil said that his country wished to echo the concerns expressed by some of the previous speakers. In Brazil's view, the discussion at the present meeting demonstrated that one unresolved issue was being brought back to the DSB. After the "Bananas" disputes, the sequencing issue had been brought to the Ministerial Conference in Seattle. With the failure of the Conference, the issue was later managed by sequencing agreements, which, although providing only a frail balance, had served as a *modus vivendi* for a long time. However, recently the DSB was witnessing that delegations had had recourse to Article 22.2 of the DSU directly. Brazil called on Members to reflect on systemic consequences of such actions. Members should also reflect on the question of unilateral determination of compliance, based on unilateral criteria as opposed to the multilateral determination of compliance based on the use of Article 21.5 of the DSU. That Article referred to two elements: measures taken to comply by the defendant and a disagreement about those measures between the two parties. In the present situation, Panama recognized that Colombia had taken measures to comply, but disagreed with those measures. In Brazil's view to follow the logical sequence of first having recourse to Article 21.5 of the DSU and then to Article 22.2 of the DSU made sense and was in line with the principle of good faith. Some could argue that in some cases merely "cosmetic" measures were taken, and that it would be a burden to have to go through an Article 21.5 procedure. In Brazil's view, if the time-frames provided in Article 21.5 the DSU were respected, this would not be a problem, and it would imply a three-month panel process, plus three-month appeal process. Brazil believed that Members should reflect on the serious consequences resulting from a situation where a Member was honestly seeking to comply and was being faced with retaliation before any determination of non-compliance had been made under Article 21.5 of the DSU.

8.15. The representative of Mexico said that his country had an interest in the procedural issue related to this dispute although it had not participated as a third party in the proceedings of this dispute. He said that it was the practice of Members to first follow the compliance procedures before requesting the suspension of concessions in line with a sequencing agreement. In that regard, Mexico urged the parties to seek a sequencing agreement in this dispute.

8.16. The representative of Colombia said that his country was prepared to reach a sequencing agreement with Panama. On 9 February 2017, a high-level meeting had been held between the two governments and Colombia had submitted a proposal on a sequencing agreement in this dispute. However, that proposal had not been accepted by Panama. Therefore, Colombia invited Panama, once again, to reach a sequencing agreement in order to resolve this dispute.

8.17. The representative of Panama said that, as had been stated by Canada, the DSU did not provide for the sequencing of procedures under Articles 21 and 22 of the DSU. However, it did clearly specify time-frames to be observed for requesting authorization to suspend concessions. Panama was aware of the "Bananas" dispute and of the reasons that prompted the sequencing agreement process as well as of its value. As demonstrated in the DSU negotiations, which had not yielded any agreement on this issue over many years, it was unclear whether all Members agreed on a single sequencing rule. The parties were unsuccessful in reaching a sequencing agreement in this dispute. Therefore, Panama had to ensure all its rights under the DSU. Panama said it was still open to a sequencing agreement and reserved its rights in this respect. Like others, Panama underlined that the matter would be referred to arbitration, as provided for in the DSU.

8.18. The representative of the United States said that the United States supported Panama's right to have recourse to Article 22.2 of the DSU. As an initial point, the United States noted that a few delegates had commented that the parties should have entered into a sequencing agreement. There was nothing in the DSU that required Members to enter into such an agreement. While some Members had found it appropriate to do so in certain circumstances, others may not consider it appropriate in their circumstances, such as where a responding party had not taken steps to address DSB recommendations at the time the complainant had to take procedural action to preserve its rights under Article 22. Further, the United States agreed with Japan's statement and considered that, upon Colombia's objection to that request, the matter had been automatically referred to arbitration under Article 22.6 of the DSU, as was provided for in the text of that provision. Article 22.2 of the DSU stated that if a Member fails to bring a challenged measure

found to be inconsistent with a covered agreement into compliance within the reasonable period of time determined under Article 21.3 of the DSU, then such Member shall, if requested, enter into negotiations with the complaining Member "with a view to developing mutually acceptable compensation". Panama indicated in its statement that such negotiations had been undertaken, but no agreement on compensation had been reached. If no such agreement was reached, DSU Article 22.2 stated that "any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements". Further, Article 23.2 of the DSU set out the actions to obtain redress for a breach of WTO rules and confirmed that a Member shall "follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time".[4] There was thus no support in the text of Article 22.2, or Article 23.2, for the suggestion that a Member would be required to first bring a separate compliance proceeding under Article 21.5 of the DSU.

8.19. The United States noted, however, that any level of suspension of concessions determined in the arbitration had to be equivalent to the current level of nullification and impairment. This was clear from the text of Article 22.4 of the DSU, which stated that the "level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment", thus referring to the present level at the time suspension was authorized by the DSB. Therefore, if Colombia had, in fact, brought its measure into compliance with WTO rules, as it had stated, then the current level of nullification and impairment was zero. Consequently, the issue of compliance had to be addressed as part of any award determining a level of suspension of concessions or other obligations. The United States noted that the next Agenda item concerned Article 21.5 of the DSU. The United States considered that the issue of whether Colombia's actions removed the WTO-inconsistency found by the DSB could be addressed in the context of the Article 22.6 proceeding or in a proceeding under Article 21.5 of the DSU.

8.20. The DSB took note of the statements and that the matter raised by Colombia in document WT/DS461/18 has been referred to arbitration, as required by Article 22.6 of the DSU.

9 COLOMBIA – MEASURES RELATING TO THE IMPORTATION OF TEXTILES, APPAREL AND FOOTWEAR

A. Recourse to Article 21.5 of the DSU by Colombia: Request for the establishment of a panel (WT/DS461/17)

9.1. The Chairman drew attention to the communication from Colombia contained in document WT/DS461/17, and invited the representative of Colombia to speak.

9.2. The representative of Colombia recalled that on 22 June 2016, the DSB had adopted the Panel Report, as modified by the Appellate Body, in the dispute "Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear". In that Report, the DSB had found that, for imports of products classified in Chapters 61, 62, 63 and 64 (except for heading 64.06 but including tariff line 6406.10.00.00) of Colombia's Customs Tariff, that in the instances identified in the Panel Report, the compound tariff had exceeded the bound tariff rate in Colombia's Schedule of Concessions, and was therefore inconsistent with Article II:1(a) and (b) of the GATT 1994. The DSB had also found that although the measure at issue was "designed" to protect public morals in Colombia, within the meaning of Article XX(a) of the GATT 1994, Colombia had failed to demonstrate that the compound tariff was a measure "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. Similarly, the DSB had found that although the measure at issue was "designed" to secure compliance with laws or regulations which were not inconsistent with the GATT 1994, namely, Article 323 of Colombia's Criminal Code, within the meaning of Article XX(d) of the GATT 1994, Colombia had not demonstrated that the compound tariff was a measure "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994, within the meaning of Article XX(d) of the GATT 1994. At the DSB meeting of 21 July 2016, Colombia had announced its intention to implement the recommendations and rulings of the DSB and had stated that it would require a reasonable period

[4] DSU Article 23.2(c).

of time to do so. That reasonable period of time had been determined by arbitration, and had expired on 22 January 2017.[5] On 2 November 2016, the Colombian Government had issued Decree 1744 of 2016 modifying the tariffs applicable to imports of products classified in Chapters 61, 62 and 63 of the Customs Tariff, and certain items in Chapter 64. By that decree, Colombia had replaced the inconsistent compound tariff with an *ad valorem* tariff that did not exceed its WTO bound tariff rate. In other words, Colombia had brought the measure subject to the DSB's recommendations and rulings into compliance with its WTO obligations. By doing so, Colombia had complied fully and timely with the DSB's recommendations and rulings, as had been notified to the WTO in document WT/DS461/15 of 15 December 2016.

9.3. Colombia noted that Panama had requested authorization to suspend concessions or other obligations, which implied that Panama considered that there was disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the DSB's recommendations and rulings. Colombia and Panama had held extensive consultations on this matter and on Decree 1744 in particular, without having been able to reach any mutual agreement on the implementation of the DSB's recommendations and rulings in this dispute. Since Panama had not requested the establishment of an Article 21.5 compliance panel, but rather, had directly requested the suspension of the application of concessions to Colombia, it was necessary for Colombia to resort to Article 21.5 of the DSU to request a compliance panel, including wherever possible to resort to the original panel, to determine whether Decree 1744 of 2016 had brought the measure found to be inconsistent into conformity with the DSB's recommendations and rulings. Colombia hoped that if a panel was established under Article 21.5 of the DSU and arbitrators were appointed under Article 22.6 of the DSU – and were composed of the same individuals – they would find a "reasonable way" to expedite the proceedings and settle all outstanding issues in this dispute in order to guarantee the proper functioning of the DSU provisions. In either case, prompt findings would assist the parties in securing a positive solution to this dispute, in accordance with Article 3.7 of the DSU.

9.4. The representative of Panama said that his delegation could not agree to the establishment of a panel at the present meeting and urged Colombia to withdraw its request, which was premature and improper. Article 21.5 of the DSU required that the request be made in conformity with the DSU provisions pertaining to the establishment of panels. Consultations prior to a panel request were a fundamental requirement of the DSU. To the extent that the preference expressed in the DSU of promoting and arriving at a mutually agreed arrangement among the parties was a core principle of the DSU, this requirement could not be disregarded. Colombia had not requested such consultations. Although Colombia's request referred to consultations, the meeting to which Panama understood that Colombia may be referring did not constitute consultations as required by Article 21.5 of the DSU. The meeting to which Colombia had referred was not requested by Colombia. Panama, which had requested the meeting, had done so strictly for the purposes of negotiating the compensation provided for under Article 22 of the DSU. If the meeting had been in relation to or understood as Article 21.5 consultations, the dynamics would have been very different. It would, for example, have also covered Decree 1745, which contained measures of the kind that Colombia announced during the arbitration that determined the reasonable period of time it had to observe in order to comply with the recommendations. Panama remained open to reaching an agreed solution, at any time, in order to end this dispute, which had already lasted for far too long. Therefore, Panama was still prepared to enter into consultations with Colombia. As things stood, preference had been given to dispute proceedings rather than to the primary principle of promoting a mutually agreed solution. Panama believed that Colombia should not insist on the establishment of a panel at the present meeting, but rather enter into consultations required under the DSU. The Chairman could hold an informal meeting with the parties to clarify

[5] Minutes of the DSB meeting held on 21 July 2016: "The representative of Colombia said that, in accordance with Article 21.3 of the DSU, his delegation wished to inform the DSB that Colombia intended to implement the DSB's recommendations and rulings resulting from the Appellate Body and Panel Reports in the dispute: "Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear" (DS461). Colombia would need a reasonable period of time in order to do so since a rigorous analysis and administrative coordination by the Colombian Government were necessary to bring the disputed measure into conformity with the covered agreements. It was important to bear in mind that, as had been demonstrated during the dispute settlement proceedings, the measure that had to be brought into conformity was essential for Colombia to achieve its objective of combating money laundering, on the grounds of Colombia's vital social interests. Currently, Colombia was engaging in discussions with Panama in order to reach an agreement on a reasonable period of time for the implementation of the DSB's recommendations and rulings in this dispute" (WT/DSB/M/383, para.2.2).

and facilitate this process. In the event that Colombia should insist at the present meeting on requesting the establishment of a panel, Panama could not agree and would object to a panel being established at the present meeting. Panama reiterated that Colombia's Article 21.5 request was premature and improper.

9.5. The representative of Colombia noted that Article 21.5 of the DSU did not refer to consultations. It simply stated that progress should be made with the issue under discussion concerning compliance, and that the dispute should be decided through recourse to the dispute settlement provisions and specifically, by resorting to the original Panel. In other words, consultations were included as part of a sequencing agreement which, as Colombia had explained, unfortunately, did not exist in this dispute. Consequently, Colombia had not had recourse to such consultations.

9.6. The representative of the European Union recalled that his delegation had participated as a third party in the panel and appeal proceedings in this dispute. Therefore, pursuant to Articles 10.1 to 10.3 of the DSU, the EU reserved its right to participate as a third party in proceedings with respect to any disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the DSB recommendations and rulings.

9.7. The representative of Brazil noted that Members were witnessing a historical moment, namely, the unravelling of the long-standing sequencing agreements. The procedure was acquiring new features, where the complainant could unilaterally – through a direct recourse to Article 22.2 of the DSU – determine whether there had been compliance. This situation inverted the logic of the right of defence and the principle of good faith. Therefore, Members should ask themselves if this was good for the system. Furthermore, given that the Article 22.6 procedure was shorter than the Article 21.5 procedure, which allowed for an appeal, this would create a procedural problem. In Brazil's view, it seemed that there was a textual discrepancy between both Articles – a sequencing problem – and the alleged automatic solution, namely direct recourse to Article 22.2 of the DSU. The solution to the matter at hand would be to codify the practice of sequencing and to amend the DSU.

9.8. The representative of Mexico said that in his country's view consultations on compliance were covered by Article 21.5 of the DSU since it provided that disagreements on compliance had to be decided through recourse to dispute settlement procedures. While Article 21.5 of the DSU did not expressly provide for consultations or appeals, compliance proceedings were subject to appeals and therefore they were also subject to consultations.

9.9. The representative of Japan said that his country had at least two concerns under this Agenda item. One concern was that the request for the establishment of a compliance panel had been made by the respondent, Colombia, not by the complainant, Panama. It was true that Article 21.5 of the DSU did not expressly prescribe which party should have recourse to this provision. But the DSB had a long-standing customary practice, with some exception, that it was the complainant who would initiate the compliance proceedings. This made sense because, as a jurisdictional matter, the complainant was in a better position to define and delimit the scope of disagreement between the parties under Article 21.5 of the DSU. The outcome of the panel requested by the respondent may not be satisfactory for the purpose of the resolution of the dispute. The second concern was that Panama had rejected the establishment of a compliance panel on procedural grounds at the present meeting. This would create a time lag between the Article 22.6 arbitration, which had just been initiated and was going forward, and the parallel compliance proceedings, which was yet to be established. This could lead to procedural complications. Once again, Japan encouraged the parties to the dispute to work together to manage the situation for the purpose of, and in the interest of, the smooth functioning of the dispute settlement system.

9.10. The representative of the United States said that, with regard to proceedings under Article 22.6 of the DSU, the United States referred to its statement made under Agenda item 8. The United States said that it would like to comment on Panama's statement that consultations had to be held prior to the establishment of a compliance panel under Article 21.5 of the DSU. This issue had come up before, and the United States did not agree with Panama's assertion. There was no requirement in the DSU to request consultations under Article 4 as a condition for requesting the establishment of a compliance panel pursuant to Article 21.5. And as it had noted before, the United States could not see how Article 4 of the DSU could apply to an instance in which it was the

Member concerned who was requesting a compliance panel to confirm that Member's compliance. The United States recognized that Panama had a right to object to the establishment of a panel at the present meeting. However, the United States considered that the panel should be established as soon as possible so that the individuals comprising the arbitrator and the compliance panel could consider how to organize their work as efficiently as possible.

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

10 PROPOSED NOMINATIONS FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/589)

10.1. The Chairman drew attention to document WT/DSB/W/589, which contained additional names proposed by Egypt and the European Union for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU, and proposed that the DSB approve the names contained in document WT/DSB/W/589.

10.2. The DSB so agreed.

11 APPELLATE BODY APPOINTMENTS

A. Statement by the Chairman

11.1. The Chairman recalled that at the 25 January 2017 DSB meeting he had reminded delegations that the second four-year term of Mr. Ricardo Ramírez Hernández would expire on 30 June 2017, and the second four-year term of Mr. Peter Van den Bossche would expire on 11 December 2017. Pursuant to Article 17.2 of the DSU they were not eligible for reappointment and the DSB would have to initiate work to appoint two new Appellate Body members. At the 25 January 2017 DSB meeting, the Chairman had also outlined two possible approaches to fill the upcoming vacancies. Following the 25 January 2017 DSB meeting, the Chairman had consulted with Members on the alternative approaches he had mentioned. Several delegations had supported one single selection process to fill both positions at the same time, and to complete the process by the end of June. In their view one selection process was more efficient and would take into account the fact that delegations would be deep in preparations for MC11 in the second half of 2017. However, two delegations had expressed a preference for undertaking two independent processes. One delegation had suggested that, at this point, the DSB could initiate a first selection process to fill the vacancy that would expire in June 2017 and that more time should be given to decide on when to launch a second process to fill the second vacancy. It was however the Chairman's understanding that those delegations supporting one single selection process would only agree to two independent processes if the work on both could be completed before the summer break. Since there was no agreement on this matter at this stage, it was the Chairman's intention to continue to consult with delegations. He said that he would aim to be in a position to submit a proposal that was agreeable to all Members on the procedural steps and timing for the Appellate Body appointments at the next regular DSB meeting in March.

11.2. The representative of Peru said that his country thanked the Chairman and the Secretariat for their consultations on the process of selecting two new Appellate Body members. As mentioned by Peru during the consultations, the best way of proceeding would be that the same Selection Committee carry out the selection process for both positions. This would save resources and would provide an overall balance for the composition of the Appellate Body. Nevertheless, if some Members wished to carry out a different process, Peru would be flexible. Otherwise, if there were to be two separate processes for each of the vacant positions, the selection process to replace Mr. Ricardo Ramírez Hernández should start as early as possible, given that his mandate would expire in June 2017. Peru wished to underline that it would be appropriate for the process of appointing two new Appellate Body members to end before the 30 June 2017 prior to the preparations for MC11 in Buenos Aires, which would take place in the second half of the year.

11.3. The representative of the European Union said that his delegation had expected that the DSB would be able to launch the selection process for Appellate Body appointments in 2017 at the present meeting. Based on past practice, the EU expected this to be one single process for both vacancies, as had been the case in 2009. In the EU's view, this was indeed the most efficient way of managing the selection processes for vacancies that were only a few months apart. The EU

encouraged the Chairman to continue engaging with Members so that the selection process could be launched without delay.

11.4. The representative of Brazil said that his country was flexible regarding the format of the procedures, but considered that the deadlines for the upcoming vacancies should be respected.

11.5. The representative of Argentina said that his country hoped the selection process would start without any delay.

11.6. The DSB took note of the statements.

12 DISPUTE SETTLEMENT WORKLOAD

A. Statement by the Chairman

12.1. The Chairman, speaking under "Other Business", said that he wished to provide the DSB with information about the Appellate Body's workload, the number of disputes before panels, and at the panel composition stage, and the ability of the Secretariat to meet expected demand over the coming period. With regard to panels, there were currently 17 active panels (including five panels under Article 21.5 of the DSU) that had not yet issued a final report to the parties. Multiple disputes that were being considered simultaneously by the same panel were being counted as one. As of the present meeting, all composed panels had been assigned staff to assist them and were either active or in the process of commencing proceedings. There were six panels at the composition stage, not counting panels for which there had been no composition activity in the last twelve months. In addition, four final panel reports that had been issued to the parties were currently being translated. Regarding appeals, the Appellate Body was currently dealing with seven appeals, including the extremely complex compliance proceedings in "EC and Certain Member States – Large Civil Aircraft" (Airbus). Three of these appeals could not be staffed at this point. Two additional appeals could be filed within the next two months. Regarding arbitrations, three matters had been referred to arbitration under Article 22.6 of the DSU and one had been referred to arbitration under Article 21.3(c) of the DSU.

12.2. The DSB took note of the statement.