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Dispute Settlement Body
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MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 22 JUNE 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

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1.1. The Chairperson noted that there were four sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. She recalled that Article 21.6 required that, "[u]nless 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, she invited delegations to provide up-to-date information about their compliance efforts. She reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings, "[r]epresentatives 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".

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.184)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.184, 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 11 June 2018, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would

work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for the latest status report and the statement made at the present meeting. Japan, once again, 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.159)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.159, 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 11 June 2018, in accordance with Article 21.6 of the DSU. The US Administration would 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.

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

1.9. The representative of China said that the United States had submitted the 160th status report in this dispute, which was not significantly different from the reports submitted by the United States at previous DSB meetings. China recalled that the first status report had been submitted in November 2004. No further progress towards implementation was reported at the present meeting. China was interested in the reasons as to why the United States had failed to implement the DSB's recommendations and rulings for over a decade. As a result of the US non-compliance, Section 110(5) of the US Copyright Act, which the Panel had found to be inconsistent with the requirements of the Berne Convention and the TRIPS Agreement, was still in effect. The United States had failed to provide intellectual property right holders with the minimum standards of protection as required by the TRIPS Agreement. The United States remained the only WTO Member who failed to implement the DSB's recommendations and rulings long after the expiry of the reasonable period of time. Upon the establishment of the WTO, Members had agreed to abide by the WTO Agreement. Article 2.1 of the Marrakesh Agreement Establishing the WTO provided that the Agreements and legal instruments as contained in Annexes 1, 2 and 3 were binding on all Members. There was no exception to this rule and Members should not be exempt from such obligations, or deem to be above the law. China urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute. China also urged that the United States, in next its status report, should provide specific reasons as to why it had failed to implement the DSB's rulings, and why it had failed to do so for such a long time.

1.10. The representative of the United States said that, by intervening under this item, China attempted to give the appearance of concern for intellectual property rights. At last month's DSB meeting, the United States had discussed at some length some significant and trade distorting shortcomings in China's treatment of intellectual property. If China was interested in discussing the protection of intellectual property rights, the United States was certainly willing to cooperate by bringing that matter to the DSB's attention again. For now, the United States could say that, as the companies and innovators of China and other Members well knew, the intellectual property protection that the United States provided within its own territory equalled or surpassed that of any other Member. Indeed, as China also well knew, none of the damaging technology transfer practices of China that had been discussed last month were practices that Chinese companies or innovators faced in the United States.

1.11. The representative of China said that his country took note that the United States had intervened again to shift Members' focus under this Agenda item. The issue here was whether the United States had implemented the DSB's recommendations and rulings in DS160, and the answer was negative. As before, China continued to urge the United States to bring itself into compliance with the DSB's recommendations and rulings.

1.12. 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.122)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.122, 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.

1.14. The representative of the European Union said that the EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. The EU continued to be committed to acting in line with its WTO obligations. More generally, and as stated many times before, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.15. The representative of the United States said that the United States thanked the European Union for its status report and its statement made at the present meeting. As noted at the previous DSB meeting, the United States had ongoing concerns with the EU's approval of biotech products. The United States continued to see prolonged, unpredictable, and unexplained delays at every stage of the approval process. The delays had affected the products previously approved by the EU, and continued to affect the dozens of applications that had been awaiting approval for months or years. Even when the EU finally approved a biotech product, the EU had facilitated the ability of individual EU member States to impose bans on the supposedly approved product.

1.16. As the United States had noted at previous DSB meetings, the EU had adopted legislation that permitted EU member States to "opt-out" of certain approvals, even where the European Food Safety Authority had concluded that the product was safe. In its intervention at the May DSB meeting, the EU had once again asserted that this "opt-out" legislation[1] was not covered by the DSB's recommendations and rulings, and that no EU country had imposed a ban. As the United States had explained, the EU could not seriously maintain that measures serving to move a Member further out of compliance were not relevant to the DSB's surveillance of a Member's implementation. The United States further noted that the EU's opt-out legislation permitted EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories. And thus far, at least 17 member States, as well as certain regions within EU member States, had submitted requests to opt-out of EU approvals. The United States again urged the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were supported by scientific evidence, and that decisions were taken without undue delay.

1.17. The representative of the European Union said that the United States had referred to what the United States called the "opt-out directive". As the United States had just mentioned, the opt-out directive was indeed not covered by the DSB's rulings. Moreover, no EU member State had imposed any bans thus far. As the EU had stated before, under the terms of the directive, an EU member State could adopt measures restricting or prohibiting cultivation only if such measures were in line with EU law, and if they were reasoned, proportional and non-discriminatory and were based on compelling grounds. The opt-out directive, as well as national measures that EU member States adopted based on the said directive, were compatible with WTO rules and did not discriminate between imported and domestic like products.

[1] EU Directive 2015/412.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.6)

1.19. The Chairperson drew attention to document WT/DS464/17/Add.6, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping and countervailing measures on large residential washers from Korea.

1.20. The representative of the United States said that the United States had provided a status report in this dispute on 11 June 2018, in accordance with Article 21.6 of the DSU. On 15 December 2017, the United States Trade Representative had requested that the US Department of Commerce make a determination under Section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce had initiated a proceeding to make such determination. Following initiation, Commerce had issued initial and supplemental questionnaires seeking additional information. On 4 April 2018, Commerce had issued a preliminary determination revising certain aspects of its original determination. Following issuance of the preliminary determination, Commerce had provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination and rebuttal comments. Commerce had reviewed those comments and rebuttal comments and had taken them into account for purposes of preparing the final determination. On 4 June 2018, Commerce had issued a final determination, in which Commerce had revised certain aspects of its original determination. Specifically, Commerce had revised the analysis underlying the CVD determination, as it pertained to certain tax credit programs, in accordance with findings adopted by the DSB. The United States continued to consult with interested parties on options to address the recommendations of the DSB relating to anti-dumping measures challenged in this dispute.

1.21. The representative of Korea said that his country thanked the United States for its latest status report and statement made at the present meeting. Specifically, Korea took note that the United States had taken steps to revise its countervailing duty determination where the US Department of Commerce had issued a final determination on 4 June 2018. Korea was, nevertheless, of the view that it was questionable whether the results of the final determination properly reflected the DSB's recommendations and rulings. Korea would closely monitor the final implementing measures by the United States relating to its CVD measures. Korea also, once again, expressed its serious concern that there had been no development regarding the implementation efforts by the respondent regarding the anti-dumping measures at issue until the present day, namely, more than 21 months after the adoption of the Panel and Appellate Body Reports in this dispute. In this regard, Korea, once again, urged the United States to implement the DSB's recommendations and rulings in this dispute to fully comply with its obligations under the covered agreements.

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

1.23. The representative of the United States said that the United States had explained to Korea the special challenges arising from the recommendations in this dispute. Nevertheless, Korea had requested authorization pursuant to Article 22.2 of the DSU to suspend concessions and other obligations. Korea's decision to proceed in that regard was disappointing, and not constructive. As the United States had objected to the level of suspension proposed by Korea, the matter had been referred to arbitration pursuant to Article 22.6 of the DSU.

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

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

A. Statement by the European Union

2.1. The Chairperson 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.

2.2. The representative of the European Union said that, as in previous DSB meetings, the EU, 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 regarding US implementation in this dispute. The EU would continue putting this item on the Agenda, for as long as the United States had not implemented the WTO ruling.

2.3. The representative of Brazil said that, as an original party to the "Byrd Amendment" dispute, her country, once again, thanked the EU for keeping this item on the DSB Agenda. Despite that more than 15 years had passed since the DSB's recommendations in this dispute and more than 12 years had passed since the enactment of the Deficit Reduction Act that had repealed the Byrd Amendment, millions of dollars' worth of anti-dumping and countervailing duties applied to Brazilian and other WTO Members' exports were still illegally disbursed to US domestic petitioners. Brazil called on the United States to fully comply with the DSB's recommendations and rulings in this dispute.

2.4. The representative of Canada said that his country referred to its statement made on this matter at the previous DSB meeting. Canada's position remained unchanged.

2.5. The representative of the United States said that, as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 10 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. And as the United States had noted many times previously, the EU had demonstrated repeatedly it shared this understanding, at least when it was the responding party in a dispute.

2.6. Once again, this month the EU had provided no status report for disputes in which there was a disagreement between the parties on the EU's compliance. In fact, last month the DSB had adopted two further reports finding that the EU and four of its member States – France, Germany, Spain and the United Kingdom – had failed to comply in the "EU – Large Civil Aircraft" dispute (DS316). Despite those findings, and despite the US view that the EU had not complied in that dispute, the EU had not submitted a status report this month. The United States failed to see how the EU's behaviour was consistent with the alleged systemic view it had been espousing under this item for more than 10 years. The United States would comment further on the EU's double-standard – one for itself, the other for other WTO Members – in the US statement under "Other Business". As the EU was aware, the United States had announced in this dispute that it had implemented the DSB's recommendations and rulings. If the EU disagreed, there would simply appear to be a disagreement between the parties to the dispute about the situation of compliance.

2.7. The representative of the European Union said that the EU disagreed with the statements made by the United States. The EU had provided status reports in all cases, in which it was involved. For the present DSB meeting, there was only one case, namely, "EC – Approval and Marketing of Biotech Products" (DS291). The United States had also referred to the "EC and Certain Member States - Large Civil Aircraft" dispute (DS316). Given that the United States had announced that it would

make a statement in this regard under "Other Business", the EU would also provide its views on this matter under the same Agenda item.

2.8. The DSB took note of the statements.

3 UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

A. Statement by Antigua and Barbuda

3.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of Antigua and Barbuda. She then invited the representative of Antigua and Barbuda to speak.

3.2. The representative of Antigua and Barbuda said that, as far back as 2007, an Arbitrator that had been appointed by the DSB had determined that the level of impairments of benefits accruing to Antigua and Barbuda, as a consequence of actions of the United States, had been US$21 million annually. The damage to Antigua and Barbuda's small economy had begun in 2003. Using the Arbitrator's measure of impairment, in the 15 years that had elapsed, tiny Antigua and Barbuda – the size of whose economy was a mere US$1.4 billion – had lost US$315 million, or more than a quarter of its annual GDP. All delegations would recognize that the damage to Antigua and Barbuda had set back its economy and deprived its people of the ability to advance their social and economic development. This set-back was even more horrendous when two factors were taken into account. The first was the effect of global recession, which had begun because of failures in the banking system in the United States that had spread across the globe and had persisted for seven arduous years, since 2008. The second was repeated injury to Antigua and Barbuda, over those years, by incessant hurricanes that had increased in frequency and intensity as a consequence of climate change.

3.3. Antigua and Barbuda had been a victim of all the mentioned circumstances; it had in no way been a perpetrator. Antigua and Barbuda's small economy was among those nations that contributed the least to harmful greenhouse gas emissions at less than nought per cent. While the country had suffered from the global recession, it had played no part in its creation or its harmful results. Nor had Antigua and Barbuda been responsible for this situation with the United States that had hurt its economy and engaged the attention of the DSB for 15 years, since March 2003. It was the United States, not Antigua and Barbuda, that had failed to honour its commitment to grant full market access in gambling and betting services; and it had been the United States that had continued to maintain limitations on market access. Since 2004 to now – and through processes of three Panels and two Arbitrators, all of which had upheld the damage to Antigua and Barbuda – Antigua and Barbuda had sought to settle this matter with the United States in an amicable, fair and reasonable manner. All of Antigua and Barbuda's attempts, in good faith, had failed. The United States had repeatedly stated at the DSB that the United States had offered what had been described as "creative and generous settlement proposals in 2008, 2013 and 2015", and that Antigua and Barbuda had found them unacceptable.

3.4. The US proposals had been found unacceptable because none of them had added up to even one per cent of the damage done to the Antigua and Barbuda economy. Antigua and Barbuda noted that while it had not been compensated for its significant and injurious trade losses, it had not stopped trading with the United States which, over the period of this issue, had enjoyed a balance of trade surplus with Antigua and Barbuda of well over US$2 billion. Further, Antigua and Barbuda's tariffs on US goods were among the lowest in the world, and the United States was the principal beneficiary of Antigua and Barbuda's imports, representing almost 70 per cent of Antigua and Barbuda's source markets. So, the United States could have no quarrel whatsoever with Antigua and Barbuda in terms of trade. Notably, as a condition of export benefits enjoyed by some Caribbean countries in the United States market, the US Executive and Congress required these countries to be compliant with the WTO rules and rulings. Yet, incongruously, the United States was itself not WTO-compliant because of its recalcitrance in settling this matter with tiny Antigua and Barbuda.

3.5. Antigua and Barbuda noted that the trade losses of US$315 million, done to Antigua and Barbuda's small economy over the last 15 years, did not total 0.1 per cent of one year of the GDP of the United States. The economy of the United States was 20,000 times larger than Antigua and Barbuda's economy. The United States had repeatedly stated at DSB meetings that pursuant to

Article XXI of the GATS, the US had offered compensation for removing internet gambling from its schedule of commitments. It had stated that while other countries had accepted compensatory measures granted to them, Antigua and Barbuda had not done so, and, therefore, the United States was blocked from completing the process. Antigua and Barbuda gave the DSB the full assurance that the moment the United States would make full and fair compensation, Antigua and Barbuda would release the United States from its obligations, but until the United States would do so, Antigua and Barbuda had a duty of care to its people to continue to insist on their rights. Besides, Antigua and Barbuda recalled that the WTO dispute settlement system was established as a system where all Members, irrespective of their size, would have their rights protected. As a small country, Antigua and Barbuda relied on the credibility of the rules-based multilateral trading system and Antigua and Barbuda greatly feared – as should all nations – the global chaos that would result from abandoning it. For this reason, Antigua and Barbuda persisted with this matter in the DSB. Antigua and Barbuda had an obligation not only to itself, but to all other nations that upheld the WTO principles and rules and looked to it for justice. Antigua and Barbuda acted in the interest of all of them.

3.6. In 2013, pursuant to Article 22.7 of the DSU, the DSB authorized Antigua and Barbuda to suspend obligations to the United States in respect of intellectual property rights to recover US$21 million annually. Antigua and Barbuda had not acted on that authorization in the hope that the United States would agree to a fair and reasonable settlement. It had not done so because Antigua and Barbuda had continued to hope that a sense of justice and fairness would prevail. But, Antigua and Barbuda was now losing all hope. For, the United States had opted to ignore proposals that had been put forward by Antigua and Barbuda in 2016 and 2017 respectively that would be mutually beneficial. The US clung only to US propositions of 2008, 2013 and 2015 respectively – all of which had been politely declined, given the inadequacy of their content. Given these circumstances, and after a long period of exhausting attempts to engage the United States, Antigua and Barbuda was now contemplating, once again, to approach the WTO Director-General under the DSU provisions to seek a mediated solution that would bring the much needed relief after these arduous 15 years of damage to Antigua and Barbuda's economy. Antigua and Barbuda was of the view that this was the only way left to urge the United States to the table of reasonableness and fairness. Antigua and Barbuda would keep the DSB informed of any developments.

3.7. The representative of Barbados said that his country reiterated, as it had done previously under this Agenda item, that the WTO was a rules-based system and, thus, non-compliance on the part of any Member in fulfilling its obligations undermined and put into question the integrity of the entire system. This system was critical for all WTO Members and, particularly, for small and vulnerable WTO Members. Vulnerability was the exposure of an economy to misogynist shocks, which could dampen economic growth, similar to what had occurred to Antigua and Barbuda. As Members knew well, this could adversely affect the quality of life and the standard of living of its people. This was, thus, a factor that could not be overlooked and had to be considered when assessing this issue. Barbados, therefore, reiterated that it was important that WTO Members adhered to and respected the DSB's rulings so that both parties could arrive at a satisfactory settlement, which would bring this matter to a close.

3.8. The representative of Cuba said that her country was grateful for the update provided by Antigua and Barbuda. This was a blatant example of a non-compliance with the DSB's recommendations and rulings, which affected one of the smallest economies in the world. In this regard, Cuba also recalled the importance of maintaining balance and stability of the WTO dispute settlement system. Cuba therefore called on the parties to continue their bilateral consultations in order to implement the DSB's recommendations, as soon as possible, so that this small and vulnerable economy was not affected for much longer.

3.9. The representative of Jamaica said that his country supported the statement made by the representative of Antigua and Barbuda under this Agenda item. Jamaica underscored that this was a matter of particular concern to the member States of the Caribbean community. Jamaica was one of the countries that had consistently called for a timely conclusion to this protracted dispute, especially in light of the clear ruling in favour of Antigua and Barbuda by the DSB. Jamaica had therefore been hopeful that the renewed efforts to resolve this matter by both parties in recent years would have borne fruit and that the removal of this Agenda item would have been permanent. Instead, Jamaica had to unfortunately, once again, use this opportunity to reiterate its call on all WTO Members to comply fully with their obligations, including those arising from DSB rulings. It was particularly important for small and vulnerable economies to maintain the integrity of the WTO

dispute settlement mechanism, which was the vital component under the rules-based system regulating international trade. Jamaica took note of Antigua and Barbuda's commitment to continue bilateral consultations with the United States and urged both Governments to renew their efforts to implement the DSB's ruling, in line with the request made by Antigua and Barbuda at the present meeting. Jamaica underscored that a resolution in this matter was critical to safeguarding the legitimacy of the multilateral trading system.

3.10. The representative of the Bolivarian Republic of Venezuela said that his country supported the position of Antigua and Barbuda. It was important that the United States comply with the DSB's recommendations and rulings, which were crucial to the economic recovery of Antigua and Barbuda, a developing country.

3.11. The representative of the United States said that the United States did not understand why Antigua had chosen to place this matter on the Agenda of the present meeting. As the United States had explained at past meetings of the DSB, the United States had responded to the DSB findings in this dispute by invoking the multilateral procedure under Article XXI of the GATS for modifying the US schedule of concessions. Under GATS Article XXI, Members may make modifications in their schedules in a manner that maintained a balance of benefits among Members. In that process, the United States had offered to all interested Members a generous package of services concessions as compensation for removing internet gambling from the US schedule. With one exception, each and every Member that had expressed interest in this process had accepted the US offer. The one exception was Antigua. Instead of engaging in the Article XXI process, Antigua had made extreme demands, including requests for monetary payments. Such payments were not part of the GATS Article XXI process. Nor were they provided for under the DSU.

3.12. Despite Antigua's failure to engage in the Article XXI process, the United States had expended substantial efforts to resolve this matter with Antigua on a bilateral basis. For example, in 2008, the United States worked for months with Antigua on a settlement package. The United States understood that the parties had reached agreement. But Antigua subsequently had repudiated it. The United States also had offered Antigua a broad range of useful suggestions to settle this dispute in November 2013. Antigua had ignored the US offer for a long period of time, and then had sent very mixed signals for months as to whether the offer had been acceptable. Ultimately, Antigua again had chosen to walk away from a settlement offer that would have provided real benefits to the people of Antigua. Most recently, the current US Administration formally had communicated with Antigua that the United States had been prepared for further discussions. The United States had received no response. For these reasons, Antigua's decision to place this matter on the Agenda of the present meeting appeared to be a political statement, rather than an effort to engage on a resolution of this dispute. With respect to the suggestion that this matter be referred to mediation or good offices, the United States considered that a serious effort to re-engage in negotiations would be more productive than referring the matter to a third party.

3.13. The representative of Antigua and Barbuda said that his country found it curious that the United States did not understand why Antigua and Barbuda had brought this matter back to the DSB. Antigua and Barbuda had brought it back to the DSB because it was obliged to do so. Antigua and Barbuda was obliged to keep the DSB informed of the status of these proceedings. The United States had said that Antigua and Barbuda had not responded to a most recent US offer. The representative of Antigua and Barbuda noted, however, that such an offer would have been addressed to him and he had not received it. He, thus, had to assume that it did not exist. Antigua and Barbuda however assured the DSB that should the United States make an offer for serious negotiations, Antigua and Barbuda would accept it willingly.

3.14. However, as had been noted in the statement made earlier, the United States kept referring to offers made in 2008 and 2013 respectively, which Antigua and Barbuda had rejected because of the inadequacy of the offers. These offers did not add up to one per cent of the damage done to Antigua and Barbuda's economy as established by the Arbitrator. The offers were so derisory that they were hardly worth discussing. Antigua and Barbuda took note that the United States would not favour an intervention by the WTO Director-General, in appointing a mediator. However, as mentioned earlier, the US economy was 20.000 times larger than Antigua and Barbuda's economy and had far greater resources. Antigua and Barbuda could take this matter no further and was of the view that it was truly disadvantaged and found that nothing that it had done in the DSB over the past 15 years had advanced its case one iota. Antigua and Barbuda, thus, appeared to have no

other choice but to contemplate seeking the assistance of the Director-General in appointing a mediator. Antigua and Barbuda informed the DSB that this was under very serious consideration.

3.15. The representative of the United States said the statement by the representative of Antigua that a communication from the current US Administration did not exist was a serious accusation. The United States would respectfully suggest there appeared to be some misunderstanding or miscommunication. The US records showed that the United States had written to Antigua and had noted that the United States looked forward to further discussions. Antigua had not responded. Furthermore, the United States had a number of channels for less formal communication. Antigua also had not made use of those channels. In any event, the United States remained prepared to discuss this matter bilaterally.

3.16. The representative of Dominica, speaking on behalf of the member States of the Organization of Eastern Caribbean States (OECS), expressed their support to Antigua and Barbuda, a fellow OECS member State. It had been 18 months since this matter had been placed on the DSB Agenda, in November 2016. Dominica also recalled that between 2012 and 2014, Antigua and Barbuda had placed this matter on the Agenda approximately 12 times, with statements made by itself or on its behalf, to highlight the ongoing lack of US implementation of the DSB's recommendations and rulings. Dominica had been aware that, since 2016, Antigua and Barbuda had been again engaged in discussions with the United States. OECS member States had hoped that progress had been made towards a final resolution on this long-standing matter, and thus, regretted to see that Antigua and Barbuda had to place this matter once again on the Agenda. It was disappointing to hear from Antigua and Barbuda that the matter remained unresolved.

3.17. The OECS member States had previously made a number of statements on this matter, which they wished to hereby reiterate. In these statements, OECS member States had emphasized that a well-functioning rules-based multilateral trading system that was fair and equitable had to address the needs and concerns of all of its Members, particularly those of the smallest, weakest and most vulnerable. This was critical for the credibility and relevance of the WTO in the long term. A key element of the rules-based multilateral trading system was the WTO dispute settlement mechanism. The dispute settlement system had to function well. The rulings of the Panel and the Appellate Body, in favour of Antigua and Barbuda, had been seen as a clear demonstration that a tiny Member could win a case against a major Member, in the hope of resolving the situation that had led to the dispute. However, the inability to implement the DSB's rulings in this dispute and the failure to obtain a fair settlement of the case for Antigua and Barbuda to this day, posed a strain on the system. The OECS members States fully understood the frustration of Antigua and Barbuda and, thus, called on the DSB to take note of this. The OECS member States hoped that the engagement at present would bring this matter to a final resolution. The OECS member States, once again, called for a prompt resolution to bring this long-standing dispute to a resolution, in line with the DSB's recommendations, as well as the fundamental principles and objectives of the WTO.

3.18. The DSB took note of the statements.

4 RUSSIA - ANTI-DUMPING DUTIES ON LIGHT COMMERCIAL VEHICLES FROM GERMANY AND ITALY

A. Statement by the Russian Federation

4.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of the Russian Federation. She then invited the representative of the Russian Federation to speak.

4.2. The representative of the Russian Federation said that the DSB had adopted its recommendations and rulings in this dispute on 9 April 2018. In accordance with Article 21 of the DSU, the Russian Federation had informed the DSB on 27 April 2018 that it intended to comply with the DSB's recommendations and rulings. The reasonable period of time to comply had been set until 14 June 2018, when the measures at issue had expired. Following the expiry of the measures at issue, the Russian Federation had fully complied with the DSB's recommendations and rulings.

4.3. The representative of the European Union said that his delegation took note of the statement made by the Russian Federation that the measures at issue had expired on 14 June 2018. The EU understood that the Russian Federation did not intend to renew or replace these measures.

Therefore, the EU thanked the Russian Federation for its prompt compliance, namely, within less than two months from the adoption of the DSB's recommendations and rulings.

4.4. The DSB took note of the statements.

5 STATEMENT BY THE UNITED STATES CONCERNING ARTICLE 17.5 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

5.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of the United States. She then invited the representative of the United States to speak.

5.2. The representative of the United States said that the United States had requested this Agenda item to draw Members' attention to the repeated issuance of Appellate Body reports beyond the 90-day deadline mandated in the DSU. For too long, the Appellate Body had ignored the clear text of the DSU. The United States wanted Members to read that rule together and to decide: did the words in the WTO Agreement matter? Or was the Appellate Body free to disregard and effectively re-write those words whenever it thought that was necessary or appropriate? Similarly, for too long, WTO Members had failed to fulfil their responsibility, acting through the DSB, to apply and administer the relevant rules. Although some Members had spoken out, by failing to acknowledge and address this problem collectively, the Membership had worsened the problem, as the facts would show. Through this statement, the United States intended to re-start a discussion among Members on whether Members understood and respected the rules they had written. To facilitate that discussion, in this statement the United States would highlight five aspects of this issue for Members. First, the United States would highlight the text of Article 17.5 and the mandatory requirement to complete appeals in no more than 90 days, with no exceptions. Second, the United States would explain that the Appellate Body's pre-2011 practice had respected this rule and, when there had been deviations, it had been only with the agreement of the parties. Third, the United States would draw Members' attention to the inexplicable change in the Appellate Body's practice in 2011. Fourth, the United States would discuss the result of this change; namely, appeals were taking longer and longer. Finally, the United States would conclude by explaining the serious consequences for the WTO dispute settlement system of the Appellate Body's repeated, flagrant breach of Article 17.5.

5.3. First: The DSU was designed to promote prompt settlement of disputes and mandated that appeals be completed in no more than 90 days, with no exceptions. The prompt settlement of disputes was a cornerstone of WTO dispute settlement. In Article 3 of the DSU, Members had agreed that "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between rights and obligations". The principle of prompt settlement was enshrined in numerous provisions of the DSU, including Article 17.5 in particular.

5.4. Article 17.5, which concerned appellate proceedings, provided that: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report". It was worth pausing here. Appeals were not supposed to take 90 days. They were supposed to be completed in 60 days "as a general rule". But WTO Members had recognized that would not always be possible, and so they had provided for the possibility to extend the appeals period. The third sentence of Article 17.5 provides: "When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report". And then the final sentence of Article 17.5 provided: "In no case shall the proceedings exceed 90 days". This statement was categorical – it used the terms "in no case" and "shall" – and therefore set the outside limit of an extension of the appeals period at 90 days.

5.5. Article 17.5 therefore did not accord discretion to the Appellate Body to issue reports beyond the 90-day deadline. In the early days, the Appellate Body itself had recognized this. For example, when the Appellate Body had first issued its working procedures, it had explained to the DSB that

the timeframes for WTO Members' submissions had to be short as a "consequence of Article 17(5) of the DSU, which states that … in no case shall [the proceedings] go beyond 90 days".[2]

5.6. The Appellate Body's working procedures, at Rule 23bis, paragraph 3, also referred to "the requirement to circulate the appellate report within the time-period set out in Article 17.5". Thus, if any Member considered today that Article 17.5 did not mean exactly what it said, the United States would simply point out that, some 20 years ago, the Appellate Body had understood Article 17.5 to mean exactly what it said.

5.7. Second: The Appellate Body's past practice had respected the 90-day deadline in Article 17.5. An examination of the Appellate Body's pre-2011 practice demonstrated that it had made every effort to comply with the requirements of the DSU. From the first appeal in 1996, in "US – Gasoline", up to the appeal in "US – Tyres (China)" in 2011 – a span of 15 years, covering 101 appeals – the Appellate Body had either met the 90-day requirement or, in a limited number of appeals, had consulted and obtained the agreement of the parties to exceed the 90-day deadline. In fact, for 87 of those appeals, the Appellate Body had issued its report within the 90-day deadline, including in complex appeals, such as "EC – Bananas", "US – Steel Safeguards", "EC – Tariff Preferences", "US – Offset Act", "Japan – DRAMs", and others.

5.8. In the other 14 of those appeals, the Appellate Body had been concerned it would not be able to meet the 90-day requirement, and it therefore had consulted with the parties and had obtained their consent to go beyond that period. This had been done in a transparent manner, and had been reflected in the Appellate Body's report or a communication from the Appellate Body to the DSB. For example, in "European Communities – Export Subsidies on Sugar", the Appellate Body Report reflected the following agreement of the parties to the dispute (the European Communities, Australia, Brazil, and Thailand): "After consultation with the Appellate Body Secretariat, the European Communities and Australia, Brazil, and Thailand agreed, in letters filed on 19 January 2005, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time limit referred to in Article 17.5 of the DSU. The European Communities and Australia, Brazil, and Thailand accordingly confirmed that they would deem the Appellate Body Report in this proceeding, issued no later than 28 April 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU".[3]

5.9. The practice of Members' submitting so-called "deeming letters", which had been an explicit recognition that issuing a report outside of the 90-day period had not been consistent with Article 17.5 of the DSU, had been followed in at least 10 appeals.[4] During this time, Members also had cooperated in other ways to facilitate the ability of the Appellate Body to meet the 90-day deadline. At the request of the parties to the dispute, the DSB several times had agreed to take DSB decisions to extend the time period for adoption or appeal of panel reports so that the appeal could be considered at a time when the Appellate Body would be better placed to issue its report within

[2] See, e.g., Communication from the Appellate Body, "Working Procedures for Appellate Review" WT/AB/WP/W/1 (7 February 1996), pp. 2-3 ("You will notice that the time limits set out in the Working Procedures for Appellate Review are short. This is the inevitable consequence of Article 17(5) of the DSU, which states that as a general rule, the proceedings shall not exceed 60 days, and in no case shall go beyond 90 days, from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. It is our view that the timeframes we have established for the filing of submissions and an oral hearing with the parties are reasonable within the constraints imposed by the DSU and afford due process to all parties concerned while at the same time providing the Appellate Body with the time it requires for careful study, deliberation, decision-making, report-writing by the division and subsequent translation of the Appellate Report".).

[3] "EC – Export Subsidies on Sugar" (AB), para. 7.

[4] See, e.g., "US – Upland Cotton" (AB), WT/DS267/AB/R, para. 8; "EC – Export Subsidies on Sugar", WT/DS265/AB/R, para. 7; "Mexico – Anti-Dumping Measures on Rice", WT/DS295/AB/R, para. 7; "US – Upland Cotton" (Article 21.5 – Brazil) (AB), WT/DS267/AB/RW, para. 14; "US – Antidumping and Countervailing Duties" (China), WT/DS379/7; "EC – Fasteners" (China), WT/DSB/M/301, para. 11; "United States – Continued Suspension of Obligations in the EC – Hormones Dispute" (AB), WT/DS320/AB/R, and "Canada – Continued Suspension of Obligations in the EC – Hormones Dispute" (AB), WT/DS321/AB/R, para. 29 (adopted 14 November 2008) (letters by the European Communities, the United States, and Canada); Joint Communication from the United States and Mexico, "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products", WT/DS381/13 (19 April 2012); and Joint Communication from the United States and China, "China – Measures Related to the Exportation of Various Raw Materials", WT/DS394/14 (13 January 2012).

90 days.[5] For example, in the context of the "EC – Fasteners" dispute, the EU and China had sought a DSB decision extending the 60-day time period for negative consensus adoption of the panel report in Article 16.4 of the DSU.[6] At a meeting held on 25 January 2011, the DSB had agreed to the jointly-proposed decision.[7]

5.10. Third: In 2011, the Appellate Body had begun ignoring the 90-day requirement, and some WTO Members had expressed significant concerns. The Appellate Body's commitment to respecting the 90-day rule had been commendable, and surely had entailed significant efforts on the part of those AB members and the Secretariat staff then assisting them. However, later that year (2011), starting with the appeal in "US – Tyres (China)", the Appellate Body, without explanation, had departed from the long-established practice of consulting and obtaining the parties' consent where it had considered it could not meet the 90-day requirement. At the time of the adoption of the report in that dispute, the United States had informed the DSB of the approach taken by the Appellate Body in that appeal and had expressed its concern: "Pursuant to Article 17.5 of the DSU, the Appellate Body had notified the DSB through a letter circulated on 27 July that it would not be able to complete its Report within 60 days. While the notice had informed the DSB of the expected circulation date, it had not noted that this date was beyond the 90-day deadline. Moreover, contrary to past practice, the notification had made no mention of whether the parties had been consulted on this issue or whether each party had agreed. Neither did the Appellate Body Report mention these issues. And in fact, both parties had not agreed that the Report could be provided beyond the 90-day deadline specified in Article 17.5 of the DSU."[8]

5.11. That was the first time the Appellate Body had operated in such a manner. In sharing its concerns, the United States had expressed its view that the issuance of a report by the Appellate Body beyond the 90-day deadline in the DSU, without meaningful consultations with the parties, and even more importantly without the affirmative agreement of the parties, should not be repeated in the future.[9] At that same DSB meeting where the report had been considered for adoption, several other Members had similarly expressed concerns with the Appellate Body's approach, including Japan, Australia, Chile, Argentina, Costa Rica, and Guatemala.[10] Unfortunately, those statements had not changed the Appellate Body's new approach. Other reports had been issued beyond the 90-day deadline, without consultation with the parties, as the United States would review shortly. And the Appellate Body had done so despite the fact that at least 10 WTO Members had continued to express concerns in the DSB in relation to at least 10 reports issued beyond the time limit in Article 17.5.[11] Despite the Appellate Body's change in practice, at least for a period of time, Members

[5] See, e.g., "EC – Export Subsidies on Sugar", WT/DS265/24, WT/DS266/24, WT/DS283/5 (procedural agreements between the EC, Australia, Brazil, and Thailand to extend the 60-day time-period in Article 16.4 of the DSU); "US – Zeroing" (EC), WT/DS294/11; "Brazil – Retreated Tires", WT/DS332/8 (joint request by the European Communities and Brazil for a Decision by the DSB); "EC – Bananas III", WT/DS27/87 (procedural agreement between Ecuador and the European Communities regarding the time-period under Article 16.4 of the DSU); "Thailand Cigarettes", WT/DS371/7 (Joint Request by Thailand and the Philippines for a Decision by the DSB); and "EC Fasteners", WT/DS397/6.

[6] Joint Request by the European Union and China for a Decision by the DSB (WT/DS397/6).

[7] Minutes of the DSB Meeting on 25 January 2011 (WT/DSB/M/291), p. 15.

[8] Minutes of the DSB Meeting on 5 October 2011 (WT/DSB/B/304), para. 4.

[9] Minutes of the DSB Meeting on 5 October 2011 (WT/DSB/B/304), para. 6.

[10] Minutes of the DSB Meeting on 5 October 2011 (WT/DSB/304), paras. 4-7, 11-20.

[11] See, e.g., Minutes of the DSB Meeting on 22 February 2012 (WT/DSB/M/313) (adoption of report in "China – Raw Materials"; statements by the United States, Canada, Japan, Costa Rica, Norway, Australia, and Guatemala); Minutes of the DSB Meeting on 23 March 2012 (WT/DSB/M/313) (adoption of report in "US – Large Civil Aircraft"; statements by the United States and Japan); Minutes of the DSB Meeting on 13 June 2012 (WT/DSB/M/317) (adoption of report in "US – Tuna II"; statements by the United States, Japan and Mexico); Minutes of the DSB Meeting on 10 July 2012 (WT/DSB/M/319) (in relation to the appeal in "US – COOL"; statements by the United States, Canada, and Mexico); Minutes of the DSB Meeting on 23 July 2012 (WT/DSB/M/320) (adoption of report in "US – COOL"; statements by the United States, Costa Rica, Japan, Australia, Guatemala, and Turkey); Minutes of the DSB Meeting on 18 June 2014 (WT/DSB/M/346) (adoption of report in "EC – Seals"; statements by the United States, Guatemala, Norway, and Japan); Minutes of the DSB Meeting on 19 December 2014 (WT/DSB/M/354) (adoption of report in "US – Carbon Steel (India)": statement by the United States); Minutes of the DSB Meeting on 16 January 2015 (WT/DSB/M/355) (adoption of report in "US – CVD (China)"; statements by the United States, Australia, and Canada); Minutes of the DSB Meeting on 26 January 2015 (WT/DSB/M/356) (adoption of reports in "Argentina – Import Measures"; statements by the United States, Japan, Chinese Taipei, Australia, Canada, and Norway); Minutes of the DSB Meeting on 29 May 2015 (WT/DSB/M/362) (adoption of reports in "US – COOL 21.5", statements by Canada and the United States); and Minutes of the DSB Meeting on 19 June 2015 (WT/DSB/M/364) (adoption of the report in "India – Agricultural Products"; statements by the United States, Norway, and Japan).

had continued to cooperate to address the legal uncertainty raised by the Appellate Body's breach of Article 17.5. For example, in the context of the "China – Raw Materials" dispute, despite the failure of the Appellate Body to seek the consent of the parties, the United States and China had submitted a joint communication indicating they had agreed to extend the 90-day deadline for completion of the appeal, and would deem the report to be an Appellate Body report circulated pursuant to Article 17.5 of the DSU.

5.12. The text of the joint US-China deeming letter read as follows: "Prior to the initiation of the appeal in the above referenced dispute, the Appellate Body Secretariat requested to meet with the United States and China to discuss scheduling issues relating to a possible appeal. The Secretariat informed the parties that the Appellate Body considered that it would not be possible to circulate the Appellate Body Report in an appeal within the 90-day time limit referred to in Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In light of the complex appeal under consideration by the Appellate Body and the numerous issues likely to arise in an appeal in this dispute, the United States and China agreed to extend the 90-day deadline for completion of the Appellate Body Report. On 28 October 2011, the Appellate Body informed the DSB of its reasons for the delay in providing its report and stated that the report "will be circulated to Members no later than Tuesday, 31 January 2012". Consistent with past practice, the United States and China hereby confirm that they will each deem an Appellate Body Report in this proceeding, issued no later than 31 January 2012, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU".[12] Unfortunately, Members' cooperation had not continued as some Members had become unwilling to take action to address this problem. For instance, in the original appeal in the "US – COOL" disputes, Canada, Mexico, and the United States had jointly requested the DSB to adopt a decision to deem an appellate report in each dispute "circulated by the Appellate Body no later than 29 June 2012, to be an Appellate Body report circulated pursuant to Article 17.5 of the DSU".[13]

5.13. The parties had explained that consideration by the DSB of the draft decision and adoption of that decision would serve several useful purposes: "First, through circulation of the draft decision and consideration at a DSB meeting, the issue is given full transparency. Members of the DSB can give due consideration to the reasons cited by the Appellate Body in its communication for circulation outside the 90-day time limit as well as the reasons cited by the parties to the disputes for putting forward the draft decision. Through circulation of the draft decision, the parties to the disputes are informing other Members of their agreement to the circulation of the appellate reports outside the 90-day time limit. The parties consider that it would be desirable that the Appellate Body consult with the parties and have their agreement, and this draft decision informs other Members of the parties' agreement. Through the process of consideration of the draft decision, Members will therefore be fully apprised of the circumstances under which the reports may come before the DSB for adoption. Second, the parties consider it desirable that the DSB provide greater certainty on the adoption procedure that will apply to the reports. The reports will be put before the DSB for adoption by all Members. Any Member may observe that the 90-day deadline in Article 17.5 of the DSU has not been met. The parties to the disputes consider that in these circumstances it would be appropriate also for the DSB to agree to deem the reports to be Appellate Body reports pursuant to Article 17.5 of the DSU. Without prejudice to any Member's systemic views on the proper adoption procedure, the draft decision, if adopted by the DSB, would increase certainty with respect to the adoption process. Finally, the parties noted that the language of the draft decision had been drawn from the letters filed by a number of Members in numerous past appeals, through which the parties to those disputes had expressed their willingness to deem the reports in those appeals to be Appellate Body reports pursuant to Article 17.5 of the DSU".[14]

5.14. Unfortunately, some WTO Members had indicated informally that they would not support the proposed DSB decision. That choice had been, and was, regrettable. Those WTO Members had chosen to ignore a clear breach of the DSU. They had refused to recognize the role of WTO Members to administer the rules of the DSU. They had refused to support the parties to the dispute to address a serious procedural concern. And, as Members shall see, their refusal apparently had encouraged the Appellate Body to exceed the 90 days more frequently and by increasing amounts. It was also worth noting that the parties, in the communication for that proposed decision, had already identified

[12] Joint Communication from the United States and China (WT/DS394/14).
[13] WT/DS384/15 and WT/DS386/14.
[14] WT/DS384/15 and WT/DS386/14.

that there had been concerns related to the adoption procedure for reports circulated after the 90-day deadline in the DSU. This had been six years ago – this was not a new issue.

5.15. Fourth: Since 2011, the Appellate Body had frequently and increasingly breached its 90 days obligation. Prior to the appeal in "US – Tyres (China)" in 2011, excluding the EU and US large civil aircraft disputes, the average length of an appeal had been approximately 90 days. As noted, in those rare instances where the Appellate Body had exceeded 90 days, it had done so with the agreement of the parties to the dispute. However, since the Appellate Body's unexplained change of approach in 2011, the situation was very different. The average length of appeals since then, again excluding the EU and US large civil aircraft disputes, was approximately 149 days. That is, an appeal had taken, on average, 59 more days, which was an increase of 66 per cent (two-thirds). In fact, if one considered only the appeals since 2014, the problem was even more striking. Since May 2014, not a single appeal had been completed within the 90-day deadline. The average over that 4.5 year period was 163 days. What was clear from the data was that the length of appeals had continued to increase from the point at which the Appellate Body had stopped respecting the 90-day deadline established by Members in Article 17.5 of the DSU. That is, once the Appellate Body had asserted that it had had the authority to take whatever time it considered appropriate for individual appeals, it had also apparently decided that the appropriate time period would, almost always, be more than 90 days. It was also worth noting that the Appellate Body had also stopped observing the obligation in Article 17.5 of the DSU to provide the DSB with an estimate of the period within which it would submit its report. Recent communications from the Appellate Body simply informed Members that the Appellate Body would not meet the 90-day deadline, without providing any estimated date for when the Appellate Body would circulate a report. This problem may also relate to other systemic concerns Members had expressed. For example, an appeal would take longer where the Appellate Body spent valuable time addressing issues that were not necessary to resolve a dispute.

5.16. Fifth: The Appellate Body created reasons for breaching the rule rather than changing its behaviour to ensure compliance with the rule. The Appellate Body had for many years apparently considered that it was not possible to issue reports within the 90-day deadline. The United States had two reactions to that notion: first, the United States did not see objective evidence to support it; and second, and more importantly, that it was not within the Appellate Body's authority to disregard or amend the DSU. On the first point, the Appellate Body seemed to assert that under Article 17.12, it must "address each of the issues raised" in the appeal – as if this meant that the report must write an interpretation and reach the merits on each issue. But Members knew this was not true because the Appellate Body itself had, over and over, exercised judicial economy on issues on appeal – which meant it did not address the merits of that claim.[15] And it was appropriate to exercise judicial economy because to "address" an issue did not mean to write an interpretation; it meant to think about and dispose of the issue appropriately, which could also mean not writing an interpretation.[16]

5.17. Appellate Body reports also provided compelling evidence that the Appellate Body was not making every effort to issue its reports within 90 days. How did Members know this? Because in multiple appeals, the Appellate Body had reached issues not necessary to resolve the appeal. In this regard, the United States recalled that the report in "Argentina – Measures Relating to Trade in Goods and Services" had been issued 167 days after the notice of appeal, but more than two-thirds of the Appellate Body's analysis – 46 pages – had been in the nature of *obiter dicta*. In that appeal, having resolved the first, threshold issue of "likeness", it would have been appropriate to stop the analysis at that point. Instead, the Appellate Body had gone on to consider issues on appeal that the Appellate Body itself had considered not necessary to resolve the dispute.[17]

[15] See, e.g., "US – Upland Cotton" (AB), paras. 510-511, 747, where the Appellate Body refrained from interpreting provisions of the covered agreements where doing so was "unnecessary for the purposes of resolving [the] dispute". See also "India – Solar Cells" (AB), paras. 5.156-5.163.

[16] Oxford Dictionary online: "Address" (third definition): "think about and begin to deal with (an issue or problem)".

[17] "Argentina – Measures Relating to Trade in Goods and Services" (AB), para. 6.83 ("Our reversal of these findings [on likeness] means that the Panel's findings on "treatment no less favourable" are moot because they were based on the Panel's findings that the relevant services and service suppliers are "like". Moreover, as a consequence of our reversal of the Panel's "likeness" findings, "there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel's analysis"...pursuant to Article XIV(c) of the GATS and...paragraph 2(a) of the GATS Annex on Financial Services".). But after clarifying that all of the Panel's findings other than "likeness" were rendered moot, the Appellate Body in paragraph 6.84 states that "[w]ith

5.18. Similarly, as the United States had explained with regard to the appeal in "Indonesia – Import Licensing Regimes" in 2017, once the Division in that appeal had found that Article XI:1 continued to apply to agricultural products and had upheld the Panel's findings that each of the challenged measures had been inconsistent with that provision, the Division could and should have refrained from substantively addressing the remainder of Indonesia's claims, none of which had any potential to alter the DSB recommendations and rulings.[18] Unfortunately, it had not so refrained, and the report had been issued 265 days after the date of appeal.

5.19. Similarly, at the DSB meeting in May 2018, the United States had explained that the appeal in "EU – Countervailing Measures on Certain PET from Pakistan" could and should have been resolved upon Pakistan's statement that it had sought no recommendation on the EU's withdrawn measure. In this regard, the United States had agreed with the EU's appeal that Pakistan's alleged "dispute" had been a purely advisory exercise. And as the United States had explained at the last DSB meeting, the United States had further agreed with the EU that the DSU did not grant WTO adjudicators the authority to issue advisory opinions regarding the interpretation of provisions of the covered agreements in the abstract, and outside the context of resolving a dispute.[19] And yet the report in that dispute had been issued 258 days after the notice of appeal. These reports and others therefore did not support the notion that it was not possible for the Appellate Body to comply with the 90-day rule in DSU Article 17.5. Second, and more importantly, it was simply not the Appellate Body's place to disregard or amend the DSU. In the absence of a DSU amendment, or other appropriate DSB action, Article 17.5 set out a rule. The 90-day deadline had been recently referred to as a "great rule"; whether it was, or was not, it was a "rule". Because WTO Members had not amended Article 17.5 to provide for an exception, it was the responsibility of the Appellate Body to follow that rule. When a rule was not followed, the Appellate Body diminished the rights of WTO Members, contrary to DSU Article 3.2, and undermined confidence in the WTO as a whole.

5.20. Sixth: It was past time for WTO Members to meet their responsibility to administer the WTO rules-based system according to the rules. WTO Members urgently needed to find solutions to this rule-breaking. Of course, WTO Members themselves may assist by focusing their appeals on issues that were material to the outcome of the dispute. And the Appellate Body could approach appeals by focusing on addressing only those issues necessary to resolve a dispute promptly. But most importantly, a rules-based system needed the adjudicators to follow the rules of the system. It was simply not tenable for the Appellate Body, in seeking to help ensure Members observe their obligations under the WTO agreements, to itself ignore the requirements of the DSU.

5.21. Members would recall that the WTO Membership had had discussions recently on the consequences of issuance of an appellate report that was not in conformity with Article 17 of the DSU. As this statement made clear, Article 17.5 and the 90-day deadline was a fundamental rule and critical piece of Article 17. The consequence of the Appellate Body choosing to breach DSU rules and issue a report after the 90-day deadline would be that this report no longer qualified as an Appellate Body report for purposes of the exceptional negative consensus adoption procedure of Article 17.14 of the DSU. No party should bear uncertainty as to the adoption of a report due to the adjudicator's unwillingness to follow the rules or obtain the DSB's agreement to deviate from those rules.

5.22. If Members failed to take responsibility for administering and maintaining the system, and did nothing to address this growing problem, Members could expect the length of appeals to continue to grow, as they had for the last seven years. Members could expect the dispute settlement system to move further way from the principle of prompt settlement reflected in DSU Article 3. Members could expect that the system would become even less effective for resolving disputes, diminishing WTO Members' desire and willingness to bring their disputes to the WTO. The consequence would be to further erode support for the dispute settlement system and for the WTO as a whole. If any Member disagreed with the US understanding of the plain text of Article 17.5, the United States looked forward to hearing how that Member read that obligation. For any other Member, the

these considerations in mind, we turn to address the issues raised in Panama's appeals". That is, after clarifying that Panama's appeals concern "moot" panel findings, the Appellate Body goes on to address those moot appeals. That approach does not reflect the role of dispute settlement as set out in the DSU and, as the report was issued after 90 days, is in breach of Article 17.5 of the DSU.

[18] See US statement at 22 November 2017, DSB Meeting at https://geneva.usmission.gov/wp-content/uploads/2017/11/Nov22.DSB_.pdf (item 5).

[19] See US statement at 28 May 2018, DSB Meeting at https://geneva.usmission.gov/wp-content/uploads/2018/05/May28.DSB_.Stmt_.as-deliv.fin_.public.pdf (item 10).

United States looked forward to engaging them to finally address this longstanding, and still urgent, problem.

5.23. The representative of the European Union said that his delegation had listened with interest to the statement made by the United States. The EU was of the view that there were two issues that had to be clearly distinguished. First, it was clear that WTO Members would prefer a prompt resolution of disputes and this was one of the guiding principles of the DSU set out in Article 3.3 of the DSU. This principle was reflected in the various time-frames stipulated in the DSU, including in Article 17.5 of the DSU. In addition to prompt settlement, Members also sought high-quality rulings. The system served, *inter alia*, to "preserve the rights and obligations of Members" under the covered agreements, and the EU would not wish to see this to be compromised as the expense of faster rulings, in cases where it was unreasonable to expect a ruling within 90 days, given the overall circumstances. The EU was open to discuss this issue and considered that this discussion should start with the question: What were the underlying causes for delays. The EU believed that the answer to this question could be found in the Appellate Body communications pursuant to Article 17.5 of the DSU. These were, to a large extent, systemic issues such as the workload and resources that Members would need to address if the situation had to be improved. In addition, the situation had of course worsened due to the current blockage of new Appellate Body appointments. It was striking to criticize the Appellate Body for delays, while at the same time not allowing new Appellate Body appointments.

5.24. Second, there was the legal issue regarding the procedure for the adoption of Appellate Body reports, which the United States had raised again at the present meeting. In this regard, the situation was very clear, pursuant to Article 17.14 of the DSU, "[a]n 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…". The DSU rule for the DSB to adopt the Appellate Body report by negative consensus was absolute. It was not conditional on any other paragraph of Article 17 or any other DSU provisions. In other words, it remained valid in the same way for a "late" Appellate Body report as for a "timely" Appellate Body report. There was nothing in the DSU that would suggest a different interpretation. In particular, Article 17.5 of the DSU did not attach any procedural consequence to the exceeding of the 90-day time-frame.

5.25. The EU noted that the United States had referred to "deeming letters" and had suggested that the parties to disputes should enter into such "deeming letters". The proposal that parties would need to agree to the circulation of a late report appeared to undermine the adoption procedure by negative consensus by adding the requirement for prior agreement by the parties. This was inconsistent with the clear wording of Article 17.14 of the DSU. The same applied to the proposal that the DSB would need to agree, by positive consensus, to the circulation of a late report. This would be inconsistent with Article 17.14 of the DSU. The EU recognized that the practice with regard to the so-called "deeming letters" had evolved over time. But this practice had not altered the basic principle that Appellate Body reports were adopted by negative consensus. In fact, there were numerous examples of Appellate Body reports circulated outside the 90-day timeframe, without the so-called "deeming letter" from the parties, which had been adopted by negative consensus. There were two such examples at the previous DSB meeting, namely, the Appellate Body Reports in the cases "EC and Certain Member States – Large Civil Aircraft" (DS316) and "EU – PET (Pakistan)" (DS486), both of which had been adopted with negative consensus. In concluding, the EU noted that it considered that the US intervention touched upon an important issue with regard to delays and the EU stood ready to engage on this matter in a constructive manner. However, pending a solution to this matter, there was no doubt about the validity of Appellate Body reports.

5.26. The representative of Brazil said that his country welcomed the discussion of procedural or substantive matters that could contribute to the improvement of the WTO dispute settlement system. All Members wanted a system that was independent, efficient, competent and able to provide high-quality reports. With regard to the issue of the 90-day period for the circulation of Appellate Body reports, it was important that Members approached it from the proper perspective. It could not go unnoticed that the current discussion was taking place at the same time as the Appellate Body was being prevented from having its full composition, which would, of course, allow it to operate more expeditiously.

5.27. Only two days ago, Brazil, and several others, were again participating in an Appellate Body hearing. Like in many other disputes, the whole factual and legal record of the case, at the Panel and appeal stage, had comprised thousands of pages in submissions, statements, answers to

questions and exhibits. Brazil noted that those who had the opportunity to participate, or was present, in an Appellate Body hearing would realize the scope and magnitude of the task imposed on the WTO dispute settlement system and the Appellate Body, and the rational and dialectic process that had been developed together by the parties and the adjudicators in search for the best solution to the most intractable legal issues.

5.28. In dealing with this Agenda item, a broader perspective was required. First, it was important to recall that the 90-day period had been defined in the early nineties and in light of the experience that had been accumulated in the past, the GATT times, especially in the eighties. An experience, needless to say, that had lacked an appeal stage, the duration of which had been defined according to other parameters. Members also knew that, with the establishment of the WTO, the level of complexity of disputes, the sheer number of cases and the evolution of legal argumentation had marked a substantial shift from the way things used to be done before. From this perspective, it would be reasonable to assume that the deadlines for new appeals were unrealistic. Needless to say, that the time-frames in the DSU were the shortest in the world for any state-to-state adjudicative body. Another fact to be taken into account, and which corroborated the previous point made, was that delays had become common also at the Panel level, for more or less the same reasons. If cases were taking much longer at the Panel level, it should be no surprise that no magic would happen at the appeal stage, even if this phase was restricted only to issues of law. Third, it should be noted that other deadlines in the DSU were also not observed, such as the 60-day period for arbitration awards under Article 22.6 of the DSU.

5.29. From this perspective, Brazil thus considered that the issue of the 90-day period and of time-frames in general, would be better addressed collectively by all Members to find ways to enable the Appellate Body and the WTO dispute settlement system to continue delivering high-quality reports, if possible, within the original time-frames of the DSU, bearing in mind that quality took time. He noted that Brazil had not heard from the United States any concrete suggestions on how to achieve this objective.

5.30. Since the transition from the GATT to the WTO, Members had learned to expect and require a certain level of legal density in every decision by panels and the Appellate Body. A thorough legal analysis was required both as a response to the intricacies of each dispute and each argument, as well as to the expectations of domestic constituencies that would hesitate to implement decisions that lacked proper legal analyses. However, with more legal density there would be a need for more time. It was not difficult to see what could happen if one side of the scale carried all these expectations and legal burden, while the other side carried only a very short time-frame for the task and limited resources. Something would have to give. If Members were to add too much weight to the work of the Appellate Body and simply requested "prompt compliance", but would not compensate it with either additional time, better institutional conditions or a change in the way Members themselves would conduct their cases, Members would find out that something would have to give. By not recognizing these factors, Members did not capture the dimension of the issue at stake.

5.31. Brazil noted references made to reverting to the practice of the Appellate Body sending "deeming letters" to the DSB, giving notice that the parties to the dispute deemed a report issued after 90 days to be a report issued according to Article 17.5 of the DSU. The problem with this practice was that it granted the parties to the dispute the authority not to accept reports of the Appellate Body issued after the 90-day period. An authority, therefore, that in practice reversed the negative consensus rule and that was not in the DSU, neither with respect to the parties, nor to third parties, nor to the WTO Membership as a whole. Article 17.14 of the DSU, which established negative consensus for the adoption of Appellate Body reports was clear. An interpretation of a provision dealing with timeframes that carried consequences of this kind of magnitude could not rest on an implicit conclusion, and the letters would seem to complicate the issue rather than solve it. The parties to a dispute, especially if they were the respondents, would be tempted not to accept the adoption of the report, or even worse, to use procedural tactics.

5.32. The United States seemed to be drawing its conclusions from its interpretation of a provision that simply established time-frames. These conclusions were vastly disproportionate to the issue at hand. Not unlike the consequences being drawn from the application of Rule 15. In both cases, there seemed to be a *non sequitur*, namely, non-observance of the 90-day rule did not necessarily result in the report not being a report under Article 17.5 of the DSU or that there should be a change in the consensus rule. Similarly, the application of Rule 15 to allow a member of the Appellate Body to

continue serving on an appeal did not necessarily result in the report being subject to positive consensus. One reason why Article 17.5 of the DSU did not stipulate the consequences of non-observance of the deadlines was, possibly, that the responsibility to comply with the set deadlines rested not only on the Appellate Body but also on the parties. No dispute settlement system could function well without the cooperation from the adjudicators and the parties to the dispute. According to Brazil's statistics, the average of days for the issuance of Appellate Body reports had varied, from 110 days in 2014 to 139 days in 2016. From 2013 to 2017, the average had been 136 days. If Members wished this average to go down, they would need to revisit the issue with these considerations in mind, so that the WTO could have the best possible dispute settlement system, where efficiency, quality and independence were safeguarded. WTO Members could start by filling the Appellate Body vacancies, an obligation contained in Article 17.2, which, like the provision that had been raised under this Agenda item by the United States, was also preceded by "shall" and was a clear obligation which all WTO Members should respect.

5.33. The representative of Australia said that her country took note of the concerns that had been raised by the United States at the present meeting regarding compliance with Article 17.5 of the DSU. Australia recalled the obligation contained in Article 17.5, that in relation to the proceedings of the Appellate Body, "in no case shall the proceedings exceed 90 days". While Australia was conscious of the resource pressures and other challenges facing both the Appellate Body and the Secretariat, Australia did see this as an important requirement. In this regard, Australia noted the overarching principle of the prompt settlement of disputes, required by Article 3.3 of the DSU. Importantly, the WTO Membership should guard against accepting appellate proceedings exceeding 90 days as "usual practice". Australia was willing to engage with others on potential solutions. Australia was of the view that this required Members to consider the broader question of why reports were taking longer than 90 days and how the WTO as a whole, namely, the WTO Membership, the Appellate Body and the Appellate Body Secretariat, could ensure the 90-day timeline was routinely met. Moreover, where the 90 days could not be met, options should be explored to ensure transparency and affirm the principle of adoption of reports by negative consensus.

5.34. The representative of New Zealand said that his country thanked the United States for the detailed explanation of its concerns. It was helpful to better understand the reasons behind the US position, and hopefully try to find a way forward. In New Zealand's view, adherence to the time-frames, set out in Article 17.5 of the DSU, was important for ensuring the prompt settlement of disputes. For this reason, Members had set the time-frames in the first place. New Zealand thus considered that these time-frames should only be exceeded in exceptional circumstances and not as a matter of course, although, in the current situation, the WTO Membership needed to bear in mind the resourcing difficulties facing the Appellate Body. However, while a failure to meet these time-frames was undesirable, it did not, in New Zealand's view, call into question the legitimacy of an Appellate Body report. New Zealand did not consider that a report issued outside the time-frames in Article 17.5 of the DSU ceased to be an Appellate Body report, or that this should affect the method of adoption. New Zealand had heard several points made at the present meeting about how the Appellate Body might function in particular cases, but more importantly, Australia had also heard the reminders that Members needed to be very careful in the way that they compiled the record on appeals before the Appellate Body so that these timeframes could be met. New Zealand stood ready to work constructively with other delegations to try and find solutions to this and other concerns that had been raised.

5.35. The representative of the Philippines said that his country took note of the statement made by the United States, including its proposal to start a discussion on five specific issues of concern. The Philippines would conduct its own internal review and study of these five issues of concern. These were serious issues and the Philippines hoped that the discussions could start in a constructive manner with interested delegations. The Philippines welcomed the opportunity to engage in such discussions to address all issues of concern with the aim of contributing to the strengthening and improvements of the rules-based multilateral trading system, while making sure Members kept in mind the mandate of promoting inclusive growth and development to better the welfare of all Members' citizens.

5.36. The representative of Japan said that his country appreciated the high quality of Appellate Body reports as well as the Appellate Body's efforts to seek excellence in the reports. Japan recalled that Article 3.3 of the DSU set out the general principle of "prompt settlement" for WTO disputes. The specific deadlines that applied to the various stages of the WTO dispute settlement process, as contained in the DSU, enshrined this general principle of "prompt settlement". Appellate review

proceedings were no exception. Indeed, the scope of appellate reviews was "limited to issues of law contained in the panel report and legal interpretations developed by the panel" and the discipline of the 90-day time limit in Article 17.5 of the DSU was written in a categorical manner, namely "[i]n no case shall the proceedings exceed 90 days". One might say that because of the limited mandate of the appellate reviews, the DSU required the strict observance of the general principle of "prompt settlement", as had been embodied in the 90-day rule in a categorical manner. The WTO was a rules-based multilateral trading system, its rules had to be upheld and its dispute settlement system "serves to preserve rights and obligations of Members" based on the rules that WTO Members had agreed upon.

5.37. If particular reasons forced the Appellate Body to exceed the 90-day time-frame, it would be the responsibility of WTO Members to address any such reasons to ensure that the 90-day rule would be strictly and faithfully observed. Any departure from the DSU, even where particular circumstances legitimately so required, had to remain an exception rather than a general rule. Japan recalled that, as the United States had explained, prior to 2011, when the 90-day time limit could not be met, the Appellate Body had consulted with the parties involved and had secured their agreement to exceed the 90-day time limit. This practice, which had been developed by the Appellate Body, had worked well. Japan was of the view that in the interest of legal certainty vis-à-vis the adoption procedures contained in Article 17.14 of the DSU, it was essential that the Appellate Body sought to secure the agreement by the parties to deem the report to be an Appellate Body report circulated pursuant to DSU Article 17.5, when the 90-day time-period unfortunately needed to be exceeded.

5.38. The representative of Canada said that his country shared some of the concerns that had been set out by the United States. One of the hallmarks of the WTO dispute resolution system was the speedy resolution of disputes. This was worth preserving. Canada would welcome more information from the Appellate Body in respect of its inability to meet the 90-day deadline that was set out in Article 17.5 of the DSU and considered that consultations with the disputing parties would be advisable when it was not possible to meet the deadline. It would also be useful to explore why, since 2011, the practice as set out in Article 17.5 had been seemingly abandoned by the Appellate Body. In 2011, Canada had called on the Appellate Body to continue its practice of consulting with the disputing parties when the deadline could not be met. At the same time, Canada had also recognized that judicial processes did not lend themselves to neat time-frames. Furthermore, Canada did not dispute the Appellate Body's position that the number and complexity of appeals had increased beyond what had been envisioned by the Uruguay Round negotiators. There were things that the Appellate Body could do to get the operations back in line with the timeframes originally envisaged, and there were things that WTO Members would have to do as well. As some delegations had already pointed out at the present meeting, one of those things would be to start the process to fill the Appellate Body vacancies.

5.39. Canada was open to discuss pragmatic solutions to this issue and encouraged those who had concerns to bring forward their ideas for solutions. Canada was of the view that such solution should not seek to reinforce the strict, hard deadline for the completion of Appellate Body proceedings. Instead, it would be preferable to have a reasonable, aspirational target taking into account the timing of procedural steps in an appeal, the need for translations and other issues, and to require that the Appellate Body initiated consultations with the disputing parties when it would be unable to meet the target.

5.40. In addition, consideration could be given to establishing a mechanism for dialogue between Members and the Appellate Body that encouraged communication regarding the resource needs of the Appellate Body and Members' concerns with the Appellate Body practice that might negatively affect the time-frames for the completion of appellate proceedings. Finally, Canada did not consider that an Appellate Body report that was issued outside of the 90-day timeframe that was set out in DSU Article 17.5 ceased to be an Appellate Body report for the purpose of the reverse-consensus adoption rule.

5.41. The representative of Norway said that, without prejudice to her country's position on the issues that had been raised in the statement by the United States, Norway would like to offer a few remarks on the circulation of Appellate Body reports after the 90-day timeframe set out in Article 17.5 of the DSU. In Norway's view, transparency was crucial where the Appellate Body was not in a position to circulate its report within the 90-day timeframe. Predictability and legal certainty were also key elements in this context. Norway also shared the view that exceeding the timeframe did not put into question the validity of the Appellate Body reports. From a systemic point of view,

it was Norway's opinion that the interest of preserving a functioning dispute settlement system had to be the common objective when discussing these matters. Norway was ready to join other Members in an effort to find a workable solution to this issue, as well as matters concerning scheduling and general workload. Norway thanked the Appellate Body for their comprehensive work on disputes in the WTO.

5.42. The representative of Mexico said that her country had noted the US statement and appreciated the concerns raised by the United States. However, Mexico did not share the US views due to formal and substantive reasons. Although the concerns were valid, Mexico believed that Members' efforts should focus on solving problems, which were at the root of the current paralysis of the WTO dispute settlement system, such as the functioning of the Appellate Body with four out of seven members. This was a fundamental problem, and one which required urgent and immediate attention. Moreover, the discussion of the 90-day rule needed to be comprehensive, covering the entire WTO dispute settlement process, including issues relating to panels and translation deadlines, which Mexico would discuss when addressing the formal and substantive issues.

5.43. The WTO Membership had to take a pragmatic approach to these problems and come up with solutions. However, those solutions had to be analysed comprehensively and had taken into account both, the formal and the substantive issues that affected the system as a whole. Otherwise, Members' solutions would simply be masking problems that affected the very roots of the system. With regard to formal reasons, the United States had noted that according to Article 17.5 of the DSU, "[i]n no case shall the proceedings exceed 90 days". Since the word "shall" was used, the United States contended that there was an obligation. The examination needed to be more detailed. In Spanish, the same provision stated that "[e]n ningún caso la duración del procedimiento excederá de 90 días". If the WTO Membership compared this with the equivalent provision for panels, Members would find that Article 12.9 of the DSU stipulated that "[i]n no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months", while the Spanish read: "[e]n ningún caso el periódo que transcurra entre el establecimiento del grupo especial y la distribucíon del informe a los Miembros deberá exceder de nueve meses".

5.44. With regard to provisions in English, the United States considered that there was a difference between the use of "shall" for the Appellate Body deadline and "should" for the panels. Moreover, with respect to the DSU text in English, the United States overlooked the fact that the Appellate Body had taken the view that certain uses of "should" were "shall", since "[a]lthough the word 'should' is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used to 'express a duty [or] obligation'". Thus, the Appellate Body had understood that "should" did imply an obligation in Article 11 of the DSU ("EC – Hormones", paragraph 133) and in Article 13.1 of the DSU ("Canada – Aircraft", paragraph 187). For these reasons, Mexico did not see that there was a difference between the Spanish and the English texts, in other words, the same obligation existed for the Appellate Body and for panels.

5.45. To make an "apples-to-apples comparison" between the verb "shall" in Article 17.5 and other uses of "shall", Mexico observed that Article 21.5 of the DSU provided that "[t]he panel shall circulate its report within 90 days". Mexico had not heard the same criticism from the United States or from any other Member, despite the fact that compliance reports were not issued within the period of 90 days, even though the verb "shall" was also used. The same problem arose with regard to the circulation of Appellate Body or panel reports, namely, circulation usually took place outside the time limit set in the DSU. In calculating the lapse of days between the establishment of the panel and the circulation of the final report, Mexico arrived at an average of 511 days, a significant difference – 241 days to be precise – if the period of nine months was considered to be equivalent to 270 days, as stipulated in Article 12.9 of the DSU.

5.46. Regarding the issuance of Appellate Body reports, Mexico found that there was a lapse of 112 days, on average, between the notice of appeal and the circulation of the Appellate Body report. Thus, only 22 days more than the 90 days stipulated in Article 17.5 of the DSU. In other words, the criticism of the Appellate Body was based on a delay of 22 days, while a delay of 241 days in the case of panels did not appear to be of relevance. The rate of non-observance of the time limit had been 93 per cent in the case panels, compared to 31 per cent in the case of the Appellate Body. These figures spoke for themselves. Flexibility had been shown with regard to panels, and Mexico therefore suggested that the same flexibility be accorded to the Appellate Body.

5.47. Concerning the formal reasons, the United States had also reiterated that the Appellate Body had followed a practice prior to 2011 whereby participants in appeal proceedings had been consulted about the issuance of the report outside the time limit and that, after that date, the Appellate Body had confined itself to informing the parties, by means of a letter, that it would not circulate its report on time. Other countries had supported the practice promoted by the United States.[20] The practice prior to 2011 had been divided into two parts: (i) the signing of deeming letters[21], and (ii) consultations with the parties to the dispute that agreed to extend the deadline and such agreement was reflected in the Appellate Body reports in question.[22] This pre-2011 practice did not resolve the problem of the issuance of reports outside the 90-day time limit, as it implied that the Appellate Body Secretariat should consult or request the consent of participants in appeal proceedings. This could create further problems, namely, what would happen if one of the participants, despite the reasons it was given, considered that a report had not been issued on time and was therefore invalid. This would create serious difficulties for the system. Mexico, therefore, underscored that knowing the reasons for the issuance of a report outside the 90-day time limit, either through a meeting or a letter, did not resolve the problem of late issuance.

5.48. In 2012, Mexico, the United States and Canada had worked on a draft DSB decision aimed at ensuring that a collective decision would resolve the problem, rather than a bilateral arrangement by means of deeming letters. On that occasion, the talk of a collective decision, which could implicitly affect the consensus rule in the adoption of reports had given rise to such tension that the three proponents had decided to withdraw the item from the Agenda.[23]

5.49. Since 2014, outgoing Appellate Body members had expressed their views on the 90-day timeline in their farewell statements. In 2014, Mr. David Unterhalter had commented that "[…] the workload of the Appellate Body is unpredictable. There are periods when there are more appeals to decide than capacity permits. In these circumstances, we need some rules as to the order of determining appeals. And we need a relaxation of the 90-day rule".[24] In 2015, Professor Seung Wha Chang had stated, "[…] the 90-day time limit for appellate proceedings and the part-time status of Appellate Body Members appear to be incompatible with the increased size and complexity of appeals brought to the Appellate Body".[25] In 2016, Ms Yuejiao Zhang had stated that "[…] the part time status of the AB members and 90 days' time pressure for completion of AB report is not sustainable, particularly in times of heavy work load, and given the complexity of legal issues raised in appeals".[26] In 2018, Mr Ramírez-Hernández had stated that "[t]he 90-day rule is a great rule. It was for a long time a unique feature of the AB process. Nevertheless, the growing complexity of WTO disputes, the high rate of appeal of panel reports and the number of issues appealed, the amount of jurisprudence, and the size of the submissions, among other things, turned out to make the 90-day deadline unrealistic. […] if the Membership wants to keep the 90-day rule, it may require some sacrifices".[27]

5.50. Although the WTO Membership had heard from the outgoing Appellate Body members, WTO Members had not acted or taken appropriate steps to resolve the issues that had been brought to their attention repeatedly. With regard to the substantive aspects, Mexico considered that Members were involved or shared the responsibility for the delays in issuing Appellate Body reports. The following were some of the reasons: (i) participants submitted multiple complaints. Given that the Appellate Body had to examine each of them in accordance with Article 17.12 of the DSU, the

[20] Paragraph 5.6 of the Minutes of the DSB meeting of 26 January 2015, document WT/DSB/M/356.

[21] "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products" (WT/DS381/13) (19 April 2012); "China – Measures Related to the Exportation of Various Raw Materials" (WT/DS394/14) (13 January 2012); "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China" (WT/DS379/7) (8 February 2011).

[22] "European Communities – Export Subsidies on Sugar" (AB) (WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R), para. 7 (adopted 19 May 2005) (letters by the European Communities, Australia, Brazil and Thailand) (WT/DS265/26, WT/DS266/26, WT/DS283/7); "United States – Continued Suspension of Obligations in the EC – Hormones Dispute" (AB) (WT/DS320/AB/R) and "Canada – Continued Suspension of Obligations in the EC – Hormones Dispute" (AB) (WT/DS321/AB/R), para. 29 (adopted 14 November 2008) (letters by the European Communities, the United States and Canada) (WT/DS320/14 and WT/DS321/14); "United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil" (AB) (WT/DS267/AB/RW), para. 14 (adopted 20 June 2008) (letters by Brazil and the United States); "United States – Subsidies on Upland Cotton" (AB) (WT/DS267/AB/R), para. 8 (adopted 21 March 2005) (letters by Brazil and the United States).

[23] Page 1 of the Minutes of the DSB meeting of 10 July 2012, document WT/DSB/M/319.

[24] https://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm

[25] https://www.wto.org/spanish/tratop_s/dispu_s/changfarwellspeech_s.htm

[26] https://www.wto.org/spanish/tratop_s/dispu_s/yuejiaozhangfarwellspeech_s.htm

[27] https://www.wto.org/spanish/tratop_s/dispu_s/ricardoramirezfarwellspeech_s.htm

result was that more time was needed to reach a solution; (ii) complaints were submitted under Article 11 of the DSU and this required more work, even though these complaints were rarely successful; (iii) given the continued practice of zero-growth budget, the Appellate Body Secretariat had not had sufficient staff to deal with cases, and this had meant that the Director-General had had to make adjustments within the WTO Secretariat in recent years; (iv) the current paralysis in proceedings due to the three Appellate Body vacancies had only further increased the workload and contributed to more delays; and (v) WTO Members had not done enough to keep the rules up to date and to ensure their adjustment to the realities and growing complexities of the cases. Members were thus forced to act in accordance with rules written more than 25 years ago, many of which had ceased to be close to reality.

5.51. In light of these circumstances, Members did not have to confine themselves to making statements or expressing opinions about a change in the consensus rule. The consensus rule was clear and allowed no exceptions. If the Uruguay Round negotiators had wanted the rule to change, they would have so agreed. Mexico was therefore open to discuss a possible amendment to Article 17.5 of the DSU but any such amendment had to be considered in light of all the above-mentioned issues that had to be addressed. Until then, the DSB had to continue to adopt the reports as in the past, without any change to the consensus rule, and the validity of the reports should not be called into question. Mexico reiterated its commitment to engage in any discussion aimed at improving the WTO dispute settlement system.

5.52. The representative of China said that his country had carefully listened to the statements made by the United States and the other delegations. With respect to these statements, China wished to make the following comments. First, Article 17.5 of the DSU provided that the Appellate Body should circulate its report within 90 days. This requirement had been negotiated based on Members' previous experience during the GATT-period. China also recognized that the Appellate Body had tried its best to fulfil this requirement in all the previous cases. However, as the WTO dispute settlement system had proved itself as one of the most efficient international judicial tribunals, an increasing number of disputes and appeals had been brought before the panels and the Appellate Body. The matters that were being appealed were becoming increasingly complex. This explained why appellate proceedings sometimes took longer than originally expected and this situation had to be taken into account.

5.53. Second, one of the most important functions of the appellate review was to help ensure the consistency and predictability of the DSB's recommendations and rulings and the interpretation of WTO rules. Ensuring the quality of Appellate Body reports should be a priority for the WTO Membership. Members could not ignore the number of cases and their complexity while asking for a hard deadline for the circulation of Appellate Body reports. Otherwise, Members risked compromising the quality of Appellate Body reports and undermining the overall effectiveness of the system.

5.54. Third, China recognized the value of prompt settlement of disputes. China was willing to engage constructively in the discussion to resolve the time limit issue. However, Article 17.2 of the DSU provided that "[v]acancies shall be filled as they arise", which was also a Members' obligation. China, thus, objected to the actions that had been taken by a specific Member to block the Appellate Body selection processes while at the same time criticizing the Appellate Body for not being able to deliver an Appellate Body report within the time limit set in the DSU. This was contradictory.

5.55. Fourth, China recognized that, in the past, the Appellate Body had informed the disputing parties when an Appellate Body report would have to be circulated beyond the 90-day timeline and provided the parties with an explanation for the delay. However, the Appellate Body had its inherent right to establish its working procedures and time-tables without the consent of the parties and, thus, the Appellate Body should not be required to obtain the parties' approval to do so. Otherwise the decision-making process of the appellate review risked being interfered by some parties and the independence and impartiality of the Appellate Body could be undermined.

5.56. Fifth, once an Appellate Body report was circulated, it should be adopted pursuant to Article 17.14 of the DSU, namely, it should be adopted by the DSB under the negative consensus rule. Parties should not be obliged to enter into bilateral agreements to deem Appellate Body reports circulated after 90 days, as Appellate Body reports circulated within 90 days as required by the DSU. Such practice would bring uncertainties to the adoption of Appellate Body reports and to the WTO dispute settlement mechanism, and would risk jeopardizing the impartiality and integrity of the Appellate Body. China also encouraged the WTO Secretariat to allocate more lawyers to the Appellate

Body Secretariat to provide sufficient human resources to accelerate the drafting process and to ensure the proper functioning of the system.

5.57. The representative of the Russian Federation said that her country shared certain views expressed by the EU, Brazil, Mexico and China. At the present meeting, the Russian Federation had heard that the United States drew Members' attention to yet another problem, namely, the non-issuance of Appellate Body reports within 90 days. Given the current situation where the Appellate Body was weakened by the continued blockage by the US *vis-à-vis* the Appellate Body members' selection processes, the Appellate Body would not be able to circulate its reports within the 90-day period. Currently, there were only four Appellate Body members with only one division instead of two, serving on all appeals. The present situation, thus, made it increasingly difficult, if not impossible, to meet the deadlines set in the DSU. Accordingly, while the United States was raising a specific issue, it also contributed to this issue through its own actions.

5.58. For the Russian Federation, the independence of the Appellate Body and the quality of its reports were of utmost importance. The Russian Federation was not ready to sacrifice these aspects to ensure compliance with deadlines. The Russian Federation also noted that delays with regard to certain deadlines as set in the DSU were a problem that was not specific to the Appellate Body. The Russian Federation was of the view that it was not enough to name the problem. It was a systemic complex issue, which required the collective involvement by all Members. The Russian Federation called on the United States to constructively engage in a meaningful discussion and offer possible ways to resolve the problem at issue. The Russian Federation also called on the entire WTO Membership to discuss potential solutions and to find tangible solutions that would strengthen the WTO dispute settlement system.

5.59. The representative of Uruguay said that his country co-sponsored the proposal, which would be once again presented by Mexico, on behalf of all co-sponsors, under Agenda item 9. Uruguay considered that the immediate start of the Appellate Body selection processes was absolutely essential. The Appellate Body was an important component of the rules-based multilateral trading system. Uruguay did not understand why exceeding the 90-day deadline would call into question the validity of Appellate Body reports. Uruguay fully appreciated the high quality of the reports and the efforts made by the Appellate Body to comply with the established deadlines. Uruguay nevertheless welcomed that this matter had been brought to the attention of Members for discussion. This discussion had to serve as proof for the WTO Membership's commitment to a rules-based multilateral trading system. Uruguay was ready to discuss this matter and any other matter, and work in a constructive manner with all Members to ensure a better implementation of the DSU. Uruguay stood ready to engage and was of the view that the WTO Membership had to work together to find ways, which would enable Members to have a more efficient functioning DSB. In concluding, Uruguay noted that if the rules could not be adhered to, the rules had to be changed, but, for as long as the rules were not changed, they had to be complied with.

5.60. The representative of Guatemala said that his country shared the objective of resolving disputes in a prompt manner. However, Guatemala noted that the United States, in its statement, focused on the last sentence of Article 17.5 of the DSU, namely, "in no case shall the proceedings exceed 90 days". Based on this sentence, the United States proposed certain consequences, including the need to adopt Appellate Body reports by positive consensus. This suggestion did not find any support in the DSU and the United States had not provided any support for this suggestion. The United States had not explained where in the DSU it found the proposed consequence when the Appellate Body did not meet the 90-day deadline. The United States had also not explained the reason as to why the word "shall", contained in the last sentence of Article 17.5 of the DSU should prevail over the "shall" in Article 17.14 of the DSU. Article 17.14 provided that "[a]n Appellate Body report shall be adopted by the DSB […] unless the DSB decides by consensus not to adopt the Appellate Body report". More importantly, the DSU did not contain any provision that would allow a Member to make a unilateral determination on whether an Appellate Body report should or should not be considered as an Appellate Body report, in the meaning of Article 17.14 of the DSU. In this regard, Guatemala agreed with the EU and others that this discussion should focus first on the underlying reasons for the delays.

5.61. Under the current circumstances, not meeting the 90-day time-frame might not necessarily be the sole responsibility of the Appellate Body. The WTO Members might be, in part, responsible for these delays, and the United States acknowledged this. Furthermore, Members' responsibility also included compliance with other WTO obligations, which in the words of the United States were

"mandatory requirements with no exceptions". For example, the mandatory requirement in Article 17.1 of the DSU that the Appellate Body "shall be composed of seven persons". Guatemala was open and ready to engage constructively in finding solutions to this and any other concerns. Guatemala reminded Members that if the DSB did not appoint new Appellate Body members any time soon, this discussion would lose all relevance in 2019, if and when the Appellate Body would cease to exist.

5.62. The representative of Thailand said that her country took note of the concerns expressed by the United States. It was clear from Article 17.5 of the DSU that in no case the Appellate Body proceedings "shall" exceed 90 days. While Thailand took account of the difficulties and challenges that Appellate Body members and the Appellate Body Secretariat were facing, exceeding this time-frame should not be considered standard practice. In this regard, Thailand would support the more transparent process that the disputing parties and the DSB would be informed of the reasons when the Appellate Body would be unable to meet the 90-day time-frame requirement. Thailand stood ready to discuss and engage with Members in a constructive manner to address this issue. However, as had been pointed out by several Members at the present meeting, Thailand would like to note that the concern regarding the delay should not call into question the legitimacy of Appellate Body reports, which "shall" be adopted by negative consensus pursuant to Article 17.14 of the DSU.

5.63. The DSB took note of the statements.

6 CANADA – MEASURES GOVERNING THE SALE OF WINE IN GROCERY STORES (SECOND COMPLAINT)

A. Request for the establishment of a panel by the United States (WT/DS531/7)

6.1. The Chairperson drew attention to the communication from the United States, contained in document WT/DS531/7. She then invited the representative of the United States to speak.

6.2. The representative of the United States said that, in 2017, the United States had requested consultations with Canada regarding regulations governing the sale of wine in grocery stores in the Canadian province of British Columbia (BC). Consultations had failed to resolve the dispute. As set out in the US request for the establishment of a panel, the BC regulations governing the sale of wine in grocery stores appeared to breach Canada's WTO obligations. Specifically, the measures at issue appeared to be inconsistent with Article III:4 of the GATT 1994 because they accorded less favourable treatment to imported products than to like products of national origin. The BC regulations excluded all imported wine from grocery store shelves, an important retail channel for wine sales in BC. It was obvious that such discriminatory measures limited sales opportunities for US wine producers and provided a substantial competitive advantage for BC wine. These regulations adversely affected US wine producers. Indeed, these measures disadvantaged all wine producers not from British Columbia. The United States urged Canada and all Canadian provinces, including BC, to adhere to WTO obligations. For these reasons, the United States requested the DSB to establish a panel to examine the matter set out in the US panel request.

6.3. The representative of Canada said that his country was disappointed that the United States had requested the establishment of a panel at the present meeting with respect to Canadian measures governing the sale of wine in grocery stores in British Columbia. Canada and the United States had held consultations on 25 October 2017. During those consultations, Canada had engaged constructively, had provided information on the operation of the measures and had responded to US questions. While Canada had not yet been able to resolve this matter through consultations, Canada thought that continuing the discussions towards a resolution was appropriate and warranted. Accordingly, Canada was not in a position to agree to the establishment of a panel at the present meeting.

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

7 UNITED STATES – ANTI-DUMPING MEASURES ON FISH FILLETS FROM VIET NAM

A. Request for the establishment of a panel by Viet Nam (WT/DS536/2)

7.1. The Chairperson drew attention to the communication from Viet Nam contained in document WT/DS536/2. She then invited the representative of Viet Nam to speak.

7.2. The representative of Viet Nam said that her country thanked the DSB for considering Viet Nam's request for the establishment of a panel in the case "United States – Anti-Dumping Measures on Fish Fillets from Viet Nam" (DS536). On 8 January 2018, Viet Nam had requested consultations with the United States. Consultations had been held in Geneva on 1 March 2018. At the consultations, Viet Nam had reviewed its various claims against the United States under the provisions of the WTO Agreement on Implementation of Article VI of the GATT 1994 and WTO jurisprudence. Viet Nam's principal point had been that each of the claims in Viet Nam's request for consultations had been subject to prior WTO dispute settlements and each case had been resolved in Viet Nam's favour.

7.3. With the exception of the issue of timeliness of the request for revocation of the anti-dumping duty order on fish fillets by Vinh Hoan, each of the issues had been resolved in Viet Nam's favour "as such" and "as applied" in the two prior cases, which Viet Nam had pursued against the United States, as well as in multiple cases that had been pursued by other Members against the United States in WTO dispute settlement proceedings. In this regard, Viet Nam drew the DSB's attention to DS404 and DS429, the two cases in which Viet Nam had been the complaining party. DS429 had resulted in the revocation of the anti-dumping duty order on certain frozen warm water shrimp from Viet Nam to the Minh Phu Group, on the grounds of demonstrating the absence of dumping in three consecutive reviews by the US Department of Commerce when a WTO-consistent methodology had been used in determining the margins of dumping.

7.4. The claims and circumstances with respect to Vinh Boan in DS536 were nearly identical to those in DS429. The only difference between Vinh Hoan's situation in DS536 and Minh Phu's in DS429 was that Vinh Hoan's request for a revocation had been made after the deadline set by the Department of Commerce regulations. However, based on jurisprudence addressing the Department of Commerce deadlines dating back to "United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan" (DS184), it was practically certain that a panel and the Appellate Body would consider the Department's deadlines in this case to have been unreasonable and WTO-inconsistent. Viet Nam had made this point very clear during the consultations with the United States. Viet Nam had also stated unmistakably that this had been a case that could be settled without going to a panel and had urged the United States to engage Viet Nam in settlement discussions. Despite multiple attempts to further engage the United States, Viet Nam had not been successful. Viet Nam was, thus, left with no choice, but to request the establishment of a panel in this dispute.

7.5. The representative of the United States said that the United States regretted that Viet Nam had sought the establishment of a panel in this matter. As the United States had explained to Viet Nam, the determinations identified in Viet Nam's request for panel establishment were fully consistent with WTO rules. Furthermore, Viet Nam sought to challenge certain items that were not measures and would not fall within the scope of a WTO dispute settlement proceeding. For these reasons, the United States did not agree to the establishment of a panel at the present meeting.

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

8 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/623)

8.1. The Chairperson drew attention to document WT/DSB/W/623, which contained an additional name proposed by the Kyrgyz Republic for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. She then proposed that the DSB approved the name contained in document WT/DSB/W/623.

8.2. The DSB so agreed.

9 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; THE PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; DOMINICAN REPUBLIC; ECUADOR; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KOREA; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TURKEY; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA AND VIET NAM (WT/DSB/W/609/Rev.4)

9.1. The Chairperson said that this item was placed on the Agenda of the present meeting at the request of Mexico on behalf of several delegations. In this regard, she drew attention to the proposal contained in document WT/DSB/W/609/Rev.4 and invited the representative of Mexico to speak.

9.2. The representative of Mexico said that the delegations referred to in document WT/DSB/W/609/Rev.4 had agreed to submit the joint proposal dated 17 May 2018 to launch the Appellate Body selection processes. Mexico, speaking on behalf of 67 Members, said that the considerable number of co-sponsors of this joint proposal reflected the concern about the current situation in the Appellate Body, which was seriously affecting the WTO's work and the functioning of the dispute settlement system and was against the best interest of its Members. Mexico noted that WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was their duty to launch the selection processes for new Appellate Body members, as set out in the proposal before the DSB at the present meeting. Mexico recalled that this proposal sought to: (i) start three selection processes, namely: to replace Mr. Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; to fill the vacancy that had arisen with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; and to replace Mr. Peter Van den Bossche, whose second term had expired on 11 December 2017; (ii) to establish a Selection Committee to carry out the processes; (iii) to set a deadline of 30 days for the nominations of candidates; and (iv) to request the Selection Committee to make its recommendations within 60 days from the deadline for nominations of candidates. While the proponents were flexible with regard to the deadlines for the selection processes, these should, however, take into account the urgency of the situation. The co-sponsors of the proposal continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

9.3. The representative of the United States said that the United States thanked the Chairperson for the continued work on these issues. As the United States had explained in prior meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. For example, concerns arose from the Appellate Body's decisions that purported to "deem" as an Appellate Body member someone whose term of office had expired and thus was no longer an Appellate Body member, pursuant to its Working Procedures for Appellate Review (Rule 15). The United States noted the respect that some Members had expressed at the last meeting the need for the DSB to observe its obligations under the DSU. In this regard, the United States recalled that it was the DSB, not the Appellate Body, that had the authority to appoint Appellate Body members and to decide when their term in office expired[28], and so it was up to the DSB, not the Appellate Body, to decide whether a person who was no longer an Appellate Body member could continue to serve on an appeal. This was an area of responsibility that the DSB needed to address, and the United States appreciated that Members had expressed a willingness to engage on this issue.

9.4. In past months, the United States had drawn attention to at least two aspects of the Appellate Body's unsolicited background note on Rule 15 that raised concerns. The United States had noted that the document had failed to provide a correct or complete presentation of the issue, including on past Member statements and other international tribunals. The United States had asked for clarification to be provided by the Appellate Body on those misstatements and continued to await an answer. The United States remained resolute in its view that Members needed to resolve that issue as a priority. A number of ideas had been mentioned in the context of informal discussions in which the United States had participated, representing a diversity of views on possible solutions. The

[28] Understanding on Rules and Procedures Governing the Settlement of Disputes, Arts. 17.1, 17.2 ("DSU").

United States therefore would continue its efforts and its discussions with Members and with the Chairperson to seek a solution on this important issue.

9.5. The representative of the European Union said that his delegation referred to the statements made in previous DSB meetings. Its position remained unchanged. The EU would, thus, not repeat its statements at the present meeting. The EU noted that with each passing month the gravity and urgency of the situation increased and that WTO Members had a shared responsibility to resolve this issue as soon as possible. The EU also thanked all Members that had co-sponsored the joint proposal.

9.6. The representative of Canada said that his country referred to the statement that Canada had made in respect of this matter at the previous DSB meeting. Canada's position had not changed. Canada urged the United States to allow for a process or, if necessary, several processes to select new Appellate Body members.

9.7. The representative of the Russian Federation said that her country referred to the statement made by the Russian Federation on this matter at the previous DSB meeting.

9.8. The representative of Norway said that her country continued to encourage all Members to support the proposal to launch the Appellate Body selection processes without further delay. It was imperative that all WTO Members worked together and showed flexibility and commitment to find solutions to surpass the ongoing deadlock. As stated on previous occasions, Norway did not agree that the process of filling vacancies should be dependent on finding solutions to procedural issues related to the practice of the Appellate Body. However, Norway reiterated its openness and willingness to listen seriously and to engage constructively with all Members on their grievances with the system.

9.9. The representative of Switzerland said that, as others, his country wished to refer to its previous statements made on this matter and wished to express its deep systemic concerns in this regard. Switzerland reiterated its call on all Members to engage constructively in discussions on any issues raised, and welcomed the substantive discussion on Article 17.5 DSU at the present meeting with the objective of moving beyond the present damaging impasse quickly and of ensuring a well-functioning of WTO dispute settlement mechanism that would be fit for the future.

9.10. The representative of Chinese Taipei said that, like others, his delegation simply wished to refer to its statements made at previous DSB meetings, regarding this matter. As one of the initial co-sponsors of the joint proposal, Chinese Taipei regretted to that no progress had been made on this issue for such a long period of time. Chinese Taipei called for a frank and constructive discussion among WTO Members, as it believed that this was the only way out of this impasse.

9.11. The representative of Pakistan said that his country wished to refer to its previous statements made on this matter. Pakistan expressed, once again, its concern with regard to the current impasse and called on Members to work together and show flexibility, so as to move forward in a direction that would benefit the multilateral trading system. Pakistan felt that Members were all willing to work towards a resolution of the current impasse, and, thus, encouraged Members to show the utmost flexibility for the proposed solution. Pakistan supported the joint proposal that had been presented by Mexico at the present meeting, for the appointment of new Appellate Body members. Pakistan was one of the co-sponsors and called on all Members to agree to the joint proposal.

9.12. The representative of Singapore said that his country reiterated its serious systemic concerns about the lengthy delays in launching the Appellate Body selection processes. The term of another Appellate Body member was due to expire in three months, on 30 September 2018, and if nothing was done by then, the Appellate Body would be down to just three AB members, which was the bare minimum to form a division for the hearing of a case. Singapore appreciated the Chairperson's efforts regarding the possible reappointment of the mentioned Appellate Body member and regarding the appointment of the other Appellate Body vacancies. Singapore welcomed any positive efforts in this regard. If vacancies were not filled as they arose, this would not only lead to the paralysis of the Appellate Body but also shake the foundation of the entire WTO dispute settlement mechanism, since panel reports that were appealed to a non-functioning Appellate Body could not be adopted by the DSB and would be rendered unenforceable. Singapore thus urged that all Appellate Body vacancies be filled immediately. Systemic issues, which had been raised, could be discussed in a

separate process. Singapore stood ready to engage constructively and work with other Members, as well as the Chairperson, to help resolve this impasse.

9.13. The representative of Thailand said that her country thanked Mexico and all co-sponsors of the joint proposal for their continued efforts to resolve the issue regarding the Appellate Body vacancies. Thailand supported the launch of the selection processes and regretted that, despite the overwhelming internationally raised concerns, the DSB had been unable to reach a decision on this matter to date. The Appellate Body crisis had undermined the proper functioning of the WTO dispute settlement mechanism, the impact of which acutely, and inevitably, affected every Member of this rule-based Organization. Without prejudice to Thailand's position regarding the linkage between the Appellate Body selection processes and the systemic concerns identified by the United States, Thailand reiterated its willingness to engage constructively with the WTO Membership in exploring options that could unblock the current impasse as soon as possible.

9.14. The representative of Colombia, speaking on behalf of the GRULAC, said that the countries in question wished to acknowledge the Chairperson's efforts to seek a solution to the problem related to the AB deadlock and thanked her for the opportunities to express views on this matter at the present meeting. The GRULAC reiterated its deep concern about the present situation, which affected the functioning of a very important WTO body. If this problem was not solved soon the Appellate Body would be paralysed in the near future. This would put the entire dispute settlement system at risk. With the continued delay in launching the selection processes, with three vacancies at present, the WTO Membership failed to comply with its legal obligations under the covered agreements. This had serious systemic consequences and set a bad precedent for the WTO. This situation caused damage and affected the image and credibility of the WTO, in particular, in light of the complex international environment that was adversely affecting the multilateral trading system. Concerns had been raised regarding the functioning of the dispute settlement system and some specific issues regarding the decision-making process. The GRULAC could not agree that these concerns blocked present and forthcoming Appellate Body selection processes and prevented Members from meeting their legal obligation. The GRULAC reiterated that the proper functioning of the system should not be undermined because the systemic concerns of some Members had not been addressed. The GRULAC further noted that a proper interpretation of Article 17.2 of the DSU, read together with Article 2 of the DSU, did not warrant the view that positive consensus was necessary to launch the selection processes. The GRULAC, thus, did not understand why these processes had not yet been initiated. The GRULAC called on WTO Members to understand the seriousness of a prolonged blockage of the AB selection processes, and believed that systemic concerns should be addressed on the basis of their own merit. In this regard, the GRULAC urged Members to find a solution to resolve this matter. The GRULAC requested the Chairperson to continue to seek a solution for this matter.

9.15. The representative of Guatemala said that his country found it regrettable that nothing had changed. Guatemala wished to refer to its previous statements made on this matter at previous meetings, which were part of the record.

9.16. The representative of Australia said that her country referred to its previous statements made on this matter and reiterated its serious concerns regarding the DSB's inability to commence an Appellate Body appointment process. This situation put at risk the enforceability of WTO rights that Members had all enjoyed for 23 years. Australia also acknowledged the concerns that had been raised regarding the functioning of the WTO dispute settlement system. Australia remained committed to resolving this impasse as a priority, and was ready and willing to work with others on pragmatic solutions.

9.17. The representative of Brazil said that her country found that the current impasse regarding the Appellate Body vacancies was already causing concrete nullification and impairment to the rights of Members under the DSU, especially those that trusted and used the system to solve disputes based on the rules that Members had agreed upon. Members and parties to disputes were facing legal uncertainties that were affecting their rights not only to have an appeal report, but also, potentially, to have a panel report in the future, pursuant to Article 16.4 of the DSU. Brazil wondered who would bear the costs of the very concrete and substantial damages that Members incurred, if they could no longer count on this system to settle their trade disputes. Brazil noted that any problems with, or concerns related to, Rule 15 of the Working Procedures for Appellate Review should be addressed and resolved separately and should not be used to serve another purpose. The

link between the application of Rule 15 and the Appellate Body selection processes, or the issue of negative consensus for the adoption of appellate reports, had no legal merit.

9.18. The representative of Hong Kong, China said that her delegation referred to its previous statement made on this matter at the previous DSB meeting. Hong Kong, China encouraged Members to support the joint proposal presented by Mexico and reiterated its deep concern with the prolonged impasse over the Appellate Body selection processes. Hong Kong, China noted that some procedural and systemic concerns had been raised by one Member. Hong Kong, China was prepared and committed to engage with all Members constructively in further discussion on a possible way forward that could address these concerns. In this regard, Hong Kong, China invited the concerned Member to submit a concrete proposal to facilitate a meaningful discussion.

9.19. The representative of Japan said that his country thanked Mexico for presenting the joint proposal, which Japan supported, and referred to its previous statements made on this matter.

9.20. The representative of the Bolivarian Republic of Venezuela said that his country supported the statements made by Mexico, on behalf of the co-sponsors, and Colombia, on behalf of the GRULAC. Venezuela also encouraged Members, including the Member that had objected the joint proposal contained in document WT/DSB/W/609/Rev.4, to support it in order to avoid any further delay in launching the Appellate Body selection processes.

9.21. The representative of India said that her country referred to its previous statements made on this matter and reiterated its serious concerns about the current impasse in filling the Appellate Body vacancies and its effect on the credibility of the WTO. India was one of the 67 co-sponsors of the joint proposal to fill these vacancies as a priority matter. India recognised that the WTO dispute settlement system was a central pillar in providing security and predictability in the rules-based trading system. With the resurgence of unilateral measures and protectionism, the role of an independent and effective guarantor of these rules became all the more important. With the term of another Appellate Body member set to expire in three months, and with no resolution in sight, the Appellate Body was moving even closer to an imminent paralysis. This was a grave situation that had already started to undermine the rights and obligations of WTO Members, not only in terms of longer delays, but also with regard to uncertainty regarding their right to have a second stage of review in the form of an appellate process, a right that had been negotiated and agreed by all WTO Members. The mismatch between the resources of the Appellate Body and the number, size and complexity of the appeals before it, had intensified with the ongoing impasse in filling the Appellate Body vacancies. India, thus, asked whether it was reasonable to expect a seriously understaffed Appellate Body to meet the time-frames stipulated in Article 17.5 of the DSU. India strongly believed that the process of filling Appellate Body vacancies should be delinked from the discussions about procedural issues and reforms related to the Appellate Body. India had repeatedly stated that it was willing to engage constructively with Members that offered concrete proposals and solutions to address the concerns that they had about the functioning of the Appellate Body. However, filling Appellate Body vacancies should not be linked to this process.

9.22. The representative of Korea said that his country supported the statement made by Mexico, on behalf of the proponents of the joint proposal, and Korea referred to its previous statements made on this matter.

9.23. The representative of China said that his country referred to its previous statements made on this matter. As China had previously stated, the United States had an obligation to adhere to all the rules to which it had previously agreed. The United States had an obligation to interpret these rules in good faith. China also believed that when Members had different views on a specific issue, discussion and negotiations were the best way to move forward. However, the United States had refused to engage in a meaningful discussion after it had raised its concerns with respect to the functioning of the Appellate Body and had taken actions that exacerbated the current situation. Thus, China, once again, urged the United States to meet its commitments under the WTO Agreements and to interpret all WTO rules in good faith.

9.24. The representative of Mexico, speaking on behalf of the 67 co-sponsors of the proposal, said that the proponents regretted that, for the twelfth time, WTO Members had not achieved consensus to start the Appellate Body selection processes and had, thus, failed to fulfil their duty as WTO Members. Discussions on systemic issues should not prevent the Appellate Body from continuing to

function fully and Members should comply with their DSU obligation to fill vacancies as they arose. By failing to act at the present meeting, the DSB would preserve the current situation, which was seriously affecting the work of the Appellate Body against the best interest of its Members.

9.25. The representative of New Zealand said that his country thanked Mexico for its leadership. While New Zealand did not agree with the linkages drawn, New Zealand, once again, confirmed its willingness to engage constructively with all Members and the Chairperson in order to address the concerns raised, so that the WTO Membership could move forward and exercise its collective responsibility in filling the Appellate Body vacancies as soon as possible.

9.26. The representative of Turkey said that his country also referred to its previous statements made on this matter and reiterated its profound disappointment with the current situation and the lack of progress registered, for more than a year.

9.27. The representative of South Africa, speaking on behalf of the African Group, reiterated its previous statement made in this regard. The African Group had already pointed out that recent developments could undermine the functioning of the dispute settlement system and pose unprecedented systemic risks to the multilateral trading system. The African Group remained concerned regarding the prolonged impasse in initiating the selection process to appoint new Appellate Body members to fill the three current vacancies. The African Group had also raised the matter of the reappointment of Ambassador Servansing and had called on Members, at the previous DSB meeting, to agree on a process to ensure that the issue of his reappointment should be resolved by September 2018. Recent practices, which had been adopted by the DSB in this regard, could be followed. The African Group had heard the concerns, which had been raised regarding the current functioning of the Appellate Body, and was of the view that, in an effort to address them, these concerns could be subject to engagement and discussions in good faith. The African Group was of the view that, all in all, some of the concerns appeared amenable for resolution in the short term, while some other concerns would require deeper discussion. Further clarification of some issues, which had been raised in this context, would need to be provided. The African Group would support an engagement on all the issues, which had been raised, with a degree of urgency. The African Group believed that the issue of appointment and reappointment of Appellate Body members might be conducted in parallel to a constructive debate regarding the concerns raised, with a view to improving the functioning of the Appellate Body.

9.28. The Chairperson thanked all delegations for their statements and said that it was regrettable that the DSB was, once again, not in a position, at the present meeting, to agree to launch the selection processes to fill the three vacancies in the Appellate Body. The Chairperson said that she understood that this matter required political engagement on the part of all Members, and noted that she was in the hands of Members, and her door remained open to any delegation wishing to share ideas or views on this matter. She therefore invited delegations with views on this matter to contact her directly.

9.29. The DSB took note of the statements.

10 STATEMENT BY THE CHAIRPERSON REGARDING THE POSSIBLE REAPPOINTMENT OF ONE APPELLATE BODY MEMBER

10.1. The Chairperson said that, under this Agenda item, she would like to make a short statement regarding the issue of possible reappointment of one Appellate Body member. She recalled that, at the May regular DSB meeting, she had informed delegations that on 15 May 2018 she had received a letter from Mr. Shree Baboo Chekitan Servansing, in which he had indicated that he would like to convey his interest to the DSB to be considered for reappointment as a member of the Appellate Body, pursuant to Article 17.2 of the DSU. She had also recalled that the first four-year term of office of Mr. Servansing would expire on 30 September 2018 and that, pursuant to Article 17.2 of the DSU, he was eligible for reappointment to a second and final term of office. In light of this, she had informed delegations of her intention to consult informally with delegations on the issue of possible reappointment of Mr. Servansing as well as on the process to be followed in this regard. She had also invited delegations with views on this matter to contact her directly. She said that, at the present meeting, she would like to report to Members that her consultations were ongoing and she invited, once again, any delegation with views on this matter to contact her directly. She would report back to delegations on the results of her consultations at the next regular DSB meeting.

10.2. The representative of South Africa, speaking on behalf of the African Group, thanked the Chairperson for her report on the consultations held on the reappointment of Mr. Servansing. South Africa believed that the consultations had to begin instantly to ensure that the DSB would be in a position to take a decision by September 2018.

10.3. The DSB took note of the statements.

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

A. Statement by Indonesia

11.1. The representative of Indonesia said that her country wished to inform the DSB that it had agreed with the United States and New Zealand that the reasonable period of time to implement the DSB's recommendations and rulings in this dispute would be eight months from 22 November 2017, i.e. the date the Reports in this dispute had been adopted, and would, thus, expire on 22 July 2018. For transparency reasons, Indonesia also wished to inform the DSB that, with regard to the DSB's recommendations and rulings concerning Measure 18, reflected in paragraphs 8.1(b)(iii), 8.1(c)(vi), 8.6 and 8.7 of the Panel Report (contained in WT/DS477/R and WT/DS478/R), Indonesia, the United States and New Zealand had mutually agreed that Indonesia would receive more time to undertake relevant changes to ensure compliance, namely, until at least 19 months from the date the Reports in this dispute had been adopted. Accordingly, the United States and New Zealand would not initiate further proceedings under Article 21.5 and/or Article 22.6 of the DSU with regard to Measure 18 until at least 22 June 2019. A joint communication to this effect had been circulated to the DSB on 19 June 2018 in documents WT/DS477/18, WT/DS477/19, WT/DS478/18 and WT/DS478/19.

11.2. The representative of the United States said that the United States was glad that the parties to the dispute had agreed that the reasonable period of time for Indonesia to comply with the DSB's recommendations and rulings shall be eight months. Accordingly, the United States looked forward to hearing from Indonesia regarding its compliance when the reasonable period of time expired on 22 July 2018. The United States noted that the parties had also agreed in a separate letter that Indonesia would have more time to make the statutory changes concerning Measure 18.

11.3. The representative of New Zealand said that, like Indonesia and the United States, his country was pleased to reach a mutual agreement between the co-complainants and Indonesia, regarding the reasonable period of time for implementation and looked forward to WTO-consistent compliance by Indonesia in accordance with the understandings that had been reached.

11.4. The DSB took note of the statements.

12 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT

A. Statement by the United States

12.1. The representative of the United States said that, under Rule 25 of the General Council Rules of Procedures, which the DSB also applied, "[d]iscussions on substantive issues...shall be avoided, and the [DSB] shall limit itself to taking note of the announcement by the sponsoring delegation" and any reaction by another delegation "directly concerned". The United States would therefore be brief in its statement under this item. The text of Article 21.6 of the DSU was clear: following adoption by the DSB of a recommendation to a Member to bring its WTO-inconsistent measure into compliance with the covered agreements, a Member was to provide status reports on "its progress in the implementation of the recommendations". Therefore, there was no obligation to provide a further status report in a given dispute, once a Member announced that it had implemented the DSB recommendations, regardless of whether the complaining party disagreed about compliance. The EU, however, had been equally clear that it considered Article 21.6 of the DSU to require status reports, so long as there was a disagreement between the parties about compliance.

12.2. For this reason, the United States was disappointed to see that the EU had not applied its own "systemic" position on status reports and had not filed a status report for the "EU – Large Civil

Aircraft" dispute, or even requested an Agenda item for this meeting. As had been made clear at the last DSB meeting, the United States considered the EU had failed to comply in this dispute, and this was a view that had been confirmed by two sets of conclusions. It was now nearly one month later, and yet the only information the United States had regarding the EU's supposed compliance with the recommendations and rulings of the DSB was a document circulated on 17 May 2018. This document did not reflect new developments that might somehow resolve this longstanding dispute. The document made various assertions that were so vague they indicated nothing about what, if anything, may have been done. The EU had been arguing for a decade that its financing of Airbus had reflected market benchmarks. Four sets of dispute reports had disagreed with that assertion. In this light, and without any concrete information from the EU, one could not give any credence to the EU's assertions regarding compliance.

12.3. Given the WTO's most recent non-compliance findings, and given that the EU had provided no basis for the United States to agree with its newest compliance claim, on what basis had the EU not provided a status report this month? Perhaps the EU considered that, despite the clear view the EU had expressed in countless meetings of the DSB, there was a caveat that excused the EU from submitting a status report in this dispute. In the past, the EU had suggested that the EU rule had not applied because compliance proceedings had been ongoing. Now that those proceedings had concluded (with a finding of EU non-compliance), perhaps the EU would say the rule still did not apply because it had requested new consultations based on the "mystery measures" that the EU had not been able to describe. Whatever the justification the EU provided, the United States would ask where Members could find the text for this EU rule in Article 21.6 or elsewhere in the DSU. That text was likely to be as elusive as the EU's compliance steps in this dispute. In fact, the rule the EU appeared to be applying was the same rule it had followed in every other dispute as a responding party. There was no obligation under the DSU to continue supplying status reports once a responding Member announced that it had implemented the DSB's recommendations.

12.4. The representative of the European Union said that the statement made by the United States had confused the EU delegation. At the outset, the EU thought that the United States appeared to agree with the EU on the interpretation of Article 21.6 of the DSU and that the United States had argued that the EU should have submitted a status report in the Airbus case. However, the last part of the US statement indicated that the United States actually did not consider that the EU should have submitted a status report in the Airbus case. This made this Agenda item moot. The EU asked that if the United States did not consider that the EU should have submitted a status report in the Airbus case, why had the United States requested the inclusion of this Agenda item. In any event, the EU considered that it did not have an obligation to submit a status report in the Airbus case. In contrast, the United States had the obligation to submit a status report in the "Byrd Amendment" case.

12.5. As the EU had mentioned in previous meetings, there was a difference between the Airbus case and the Byrd Amendment case. In the Byrd Amendment case, the dispute had been adjudicated and there were no further compliance proceedings pending. Under Article 21.6 of the DSU, the issue of implementation should remain on the DSB Agenda until the issue was resolved. In the Byrd Amendment case, the EU could not agree with the US assertion that it had implemented the DSB's ruling. Therefore, the issue remained unresolved for the purpose of Article 21.6 of the DSU and the United States had an obligation to submit status reports. In the Airbus case, when the Appellate Body Report had been issued, the EU had notified to the WTO a new set of measures in a compliance communication, as had been tabled at the DSB meeting of 28 May 2018. With respect to the measures included in that communication, the United States had expressed the view that the EU had not yet fully complied with the DSB's recommendations and rulings. In response, the EU had requested, on 29 May 2018, consultations with the United States, under Articles 4 and 21.5 of the DSU. Compliance proceedings in this dispute were still pending and the EU, therefore, did not have an obligation to submit status reports.

12.6. The DSB took note of the statements.