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Dispute Settlement Body
22 November 2017

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 22 NOVEMBER 2017

Chairman: Mr. Junichi Ihara (Japan)

Table of Contents

1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB 2

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States 2

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States 3

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union 3

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

E. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States 4

2 UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB 5

A. Statement by the European Union 5

3 UNITED ARAB EMIRATES – MEASURES RELATING TO TRADE IN GOODS AND SERVICES, AND TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 6

A. Request for the establishment of a panel by Qatar 6

4 INDONESIA – MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS 9

A. Report of the Panel 9

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

A. Report of the Appellate Body and Report of the Panel 11

B. Report of the Appellate Body and Report of the Panel 11

6 PROPOSED NOMINATIONS FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS 16

7 APPELLATE BODY MATTERS 17

A. Statement by the Chairman.....17

B. Appellate Body appointments: Proposal by Argentina; Brazil; Chile; Colombia; Costa Rica; Ecuador; El Salvador; the European Union; Guatemala; Honduras; Hong Kong, China; Mexico; Nicaragua; Norway; Pakistan; Peru; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Uruguay and Viet Nam 17

8 DISPUTE SETTLEMENT WORKLOAD 24

A Statement by the Chairman.....24

1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan: Status Report by the United States (WT/DS184/15/Add.178)

B. United States – Section 110(5) of the US Copyright Act: Status Report by the United States (WT/DS160/24/Add.153)

C. European Communities – Measures Affecting the Approval and Marketing of Biotech Products: Status Report by the European Union (WT/DS291/37/Add.116)

D. Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu: Status Report by Canada (WT/DS482/7/Add.3)

E. United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea: Status Report by the United States (WT/DS464/17)

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

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.178)

1.2. The Chairman drew attention to document WT/DS184/15/Add.178, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

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

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

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.153)

1.6. The Chairman drew attention to document WT/DS160/24/Add.153, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

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

1.8. The representative of the European Union said that his delegation thanked the United States for its status report and its statement. The EU referred to its previous statements and said that it wished to resolve this dispute as soon as possible.

1.9. The representative of China said that his country thanked the United States for its status report. However, yet again, China had not seen any tangible progress in the implementation of the DSB's recommendations and rulings regarding DS160. Therefore the interests of copyright holders remained unprotected due to the United States' violation of the minimum standards of protection provided for in the TRIPS Agreement. China urged the United States to fulfil its obligations under the TRIPS Agreement.

1.10. 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.116)

1.11. The Chairman drew attention to document WT/DS291/37/Add.116 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.

1.12. The representative of the European Union said that his delegation referred to its statement made at the 23 October 2017 DSB meeting. The EU continued to be committed to acting in line with its WTO obligations. But more generally, and as it had stated many times before, the EU recalled that the EU biotech approval system was not covered by the DSB's recommendations and rulings.

1.13. The representative of the United States said that the United States thanked the EU for its status report and its statement at the present meeting. The United States noted with concern that the EU measures affecting the approval of biotech products involved prolonged, unpredictable, and unexplained delays at every stage of the approvals process. Furthermore, even when the EU finally approved a biotech product, the EU had facilitated the ability of individual EU member States to impose bans on the approved product. The United States urged the EU to ensure that its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were based on scientific evidence, and that decisions were taken without undue delay.

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

D. Canada – Anti-dumping measures on imports of certain carbon steel welded pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu: Status report by Canada (WT/DS482/7/Add.3)

1.15. The Chairman drew attention to document WT/DS482/7/Add.3 which contained the status report by Canada on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on imports of certain carbon steel welded pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

1.16. The representative of Canada said that his country referred to the detailed statement it had made at the DSB meeting on 23 October 2017. Canada had no new developments to report.

1.17. The representative of Chinese Taipei said that her delegation thanked Canada for its status report and statement. Chinese Taipei was examining the legislative amendments and the Canadian domestic review proceedings. It hoped to resolve this matter very soon.

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

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

1.19. The Chairman drew attention to document WT/DS464/17, 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 9 November 2017, in accordance with Article 21.6 of the DSU. The United States continued to consult with interested parties on options to address the recommendations of the DSB and would also be conferring with Korea in the near future on this and related issues.

1.21. The representative of Korea said that his country thanked the United States for its status report and its statement. Korea had been closely monitoring actions taken by the US Government regarding the implementation of the DSB's recommendations and rulings in this dispute. The reasonable period of time for implementation would expire on 26 December 2017. However, Korea was very concerned about whether the United States would bring the measures at issue into compliance. The United States had not provided any meaningful information regarding its implementation progress nor had Korea observed the United States taking any of the steps that would be necessary to implement the DSB's recommendations and rulings within the reasonable period of time. While Korea had continuously made inquiries to the United States about the status of, and its plans for, implementation, the United States had only responded with unclear messages like the present statement. There were procedures which, during the RPT arbitration in February 2017, the United States had presented as being essential for implementation under its domestic law – Section 123 and 129 of the Uruguay Round Agreements Act – such as the re-opening of the investigation at issue, receiving public comments, and holding consultations with the US Congress. Korea had not been provided with any information to indicate that any of the procedures mentioned above had begun. Against this backdrop, Korea considered the information contained in the status report circulated by the United States to be insufficient for Members to be aware of the United States' status and plans regarding implementation. Furthermore, with only about a month remaining before the reasonable period of time would expire, the US status report and the statement at the present meeting would leave Korea, and the rest of the Membership, less confident about the US intentions regarding implementation. The United States had indicated it intended to implement the DSB's recommendations and rulings at the 26 October 2017 DSB meeting. Korea had suffered from the United States' WTO-inconsistent measures for more than 13 months since the adoption of the DSB's recommendations and rulings. It strongly requested the United States to resolve the uncertainty surrounding the implementation matters without delay, and, eventually, to bring its measures into compliance within the reasonable period of time.

1.22. The representative of the United States said that the United States took note of Korea's statement and would convey it to capital. As mentioned, the United States and Korea would be

conferring on this matter in very near future. The United States would welcome discussing this matter with Korea on a bilateral basis. To be clear, however, it was incorrect to suggest that the United States had taken no action. As it had explained in the status report submitted to the DSB and circulated to Members ahead of the present meeting, the United States continued to consult with interested parties on options to address the recommendations of the DSB. That process was ongoing.

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

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

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

2.4. The representative of Canada said that his country thanked the EU for placing this item on the DSB's Agenda. Canada shared the EU's view that the Byrd Amendment remained under the DSB's surveillance until it was no longer applied.

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 had announced that it had implemented the DSB's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. And as the United States had noted many times in the past, the EU had demonstrated repeatedly that it shared this understanding, at least when it was the responding party in a dispute. Once again, for the present meeting the EU had provided no status report for disputes in which there was a disagreement between the parties on the EU's compliance.

2.6. The representative of the European Union said that his delegation had provided status reports on all disputes that the EU was required to do so (i.e. DS291).

2.7. The DSB took note of the statements.

3 UNITED ARAB EMIRATES – MEASURES RELATING TO TRADE IN GOODS AND SERVICES, AND TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

A. Request for the establishment of a panel by Qatar (WT/DS526/2)

3.1. The Chairman recalled that the DSB had considered this matter at its meeting on 23 October 2017 and had agreed to revert to it. He drew attention to the communication from Qatar contained in document WT/DS526/2 and invited the representative of Qatar to speak.

3.2. The representative of Qatar said that, at the outset, his country wished to state that efforts to find reconciliation to resolve to the dispute between Qatar and its nearest trading partners had failed due to the continued refusal by the responding parties to engage. Therefore, at the present meeting, Qatar was requesting the DSB to establish a panel, for a second time, to resolve the dispute between Qatar and the UAE. Qatar's request concerned violations of Qatar's rights to trade in goods under the GATT 1994, to trade in services under the GATS Agreement, and to benefit from the protection of intellectual property rights under the TRIPS Agreement. Qatar had previously requested a panel establishment on 23 October 2017. Therefore, Qatar would not repeat the comments it had made in its statement at that meeting, other than to reiterate that the actions of the UAE constituted unilateral actions in gross disregard for Qatar's and other WTO Members' rights. In addition, it was important to recall that the measures imposed clearly violated the cornerstone WTO rules. WTO rules for goods, services and intellectual property were based on principles of non-discriminatory treatment. Yet, these measures targeted Qatar alone, denying virtually all the benefits guaranteed by WTO Membership. WTO rules guaranteed freedom of transit. Yet, these measures denied freedom of transit to both Qatar as well as to third-country WTO Members seeking to ship to and receive goods from Qatar. WTO rules and commitments only allowed trade to be stopped in limited circumstances and yet, with a few exceptions that were commercially important for the countries concerned, almost all goods and services trade had been frustrated and Qatar's citizen's intellectual property rights had been violated. These WTO-illegal measures were fundamentally at odds with the multilateral system of rights and obligations that all WTO Members had accepted. Accordingly, it was appropriate for these measures to be resolved through the use of binding WTO dispute settlement mechanism. Qatar looked forward to prosecuting its rights before the WTO Panel that would now be established to resolve the dispute between Qatar and the UAE.

3.3. The representative of the United Arab Emirates said that the UAE regretted that Qatar was requesting, for a second time, the establishment of a panel to adjudicate a matter that fell outside the purview of the WTO and its dispute settlement system. As the UAE had explained at the DSB meeting on 23 October 2017, the measures that were the subject of the panel request had been announced on 5 June 2017 by the UAE Ministry of Foreign Affairs because of Qatar's refusal to cease supporting and funding terrorism. Eight other countries – seven of which were WTO Members – had taken similar measures against Qatar. This was clearly not a commercial dispute and there was not the slightest indication that the measures taken by the UAE sought to protect the interests of UAE producers, service providers or rights holders. Rather, the measures had been taken to protect the UAE's essential security interests and were in full conformity with the UAE's obligations under the GATT, GATS and TRIPS Agreement. At the DSB meeting on 23 October 2017, Qatar had conceded that WTO Members had a right to take bona fide measures to protect their security. Further, in refusing to respond to the charges of supporting and funding terrorism, Qatar had made the point that these issues did not belong "in this Forum". Yet, despite these acknowledgements, Qatar had persisted in pursuing this matter in WTO dispute settlement proceedings. Every nation had the right to take measures necessary to protect its essential security interests. This was a bedrock principle enshrined in international law and it was reflected in GATT Article XXI, GATS Article XIVbis, and TRIPS Article 73. The UAE said that Members should urge Qatar to act responsibly by addressing, in the appropriate fora, the underlying concerns over its compliance with its international counter-terrorism obligations. The UAE could not agree to the establishment of a panel. Furthermore, it wished to state, for the record, that it believed that Qatar was attempting to use the WTO dispute settlement system to distract from the real issues – namely Qatar's support for extremism and terrorist organizations. A WTO Member was sovereign to determine whether a measure was necessary for the protection of its essential security interests. As such, the WTO simply had no authority to second-guess such a determination.

3.4. The representative of the Kingdom of Bahrain said that his country fully endorsed the statement made by the UAE. Bahrain was disappointed that Qatar had decided to make a second

request to establish a panel in this matter. As it had stated at the 23 October 2017 DSB meeting, Bahrain, like the UAE and Saudi Arabia, amongst others, had adopted national security measures against Qatar. And, as Bahrain had stated previously, these measures were well within the rights granted to WTO Members under GATT Article XXI, GATS Article XIVbis, and TRIPS Article 73. Bahrain reiterated that the exceptions contained in the GATT Article XXI, the GATS Article XIVbis and TRIPS Article 73 were very clear. They provided that it was the invoking Member, and only the invoking Member, that carried the responsibility of assessing whether there was an "other emergency in international relations" and whether any security measures were "necessary". As such, Bahrain was of the view that a WTO dispute settlement panel could not judge the validity or motivation for the invocation of those exceptions, and simply did not have the mandate, nor the tools, to resolve the politically sensitive issues that Qatar was raising at the present meeting. Bahrain continued to be astounded by Qatar's inconsistent and contradictory accusations on this matter, the latest being that these clearly stated security measures could somehow achieve commercial objectives. In these circumstances, Bahrain believed that these claims, amongst the others that had been presented previously, were clearly misconceived and had no business at the WTO.

3.5. The representative of the Kingdom of Saudi Arabia said that his country wished to endorse the statement made by the UAE and also wished to second the statement made by Bahrain. As it had stated at the 23 October 2017 DSB meeting, Saudi Arabia regretted that the establishment of a panel had been requested by Qatar for a second time. Saudi Arabia took this opportunity to assure the DSB that the measures referenced in the request were maintained pursuant to the security exceptions set out in Article XXI of the GATT 1994, Article XIVbis of the GATS and Article 73 of the TRIPS Agreement. Furthermore Saudi Arabia believed that every Member retained the authority to determine for itself those matters that it considered necessary to protect its essential security interests, as was reflected in the text of these Articles, and as WTO Members had repeatedly recognized. Moreover, Saudi Arabia did not recognize the "jurisdiction of treaty" or "treaty power" of the WTO to establish a panel to adjudicate issues that were clearly, and fully, within the national security concerns of each Member. Saudi Arabia reserved its right to reconfirm its objection to the assertion of jurisdiction in this dispute. However if, above this objection, a panel was established, Saudi Arabia would reserve its third-party rights with a clear assertion of its objection recorded.

3.6. The representative of Yemen said that his country wished to express its regret to see this matter brought to the DSB's attention for a second time. Having followed up on the development of this issue, and related issues, Yemen sincerely believed that the subject matter did not belong to the DSB. Yemen supported the UAE's explanation and remained hopeful that this matter would be resolved.

3.7. The representative of Canada noted with disappointment that the dispute between Qatar and the UAE had progressed to this stage. It believed that a negotiated, political solution to this issue remained possible and it encouraged both parties to engage proactively and constructively with one another, before proceeding to the next phase of the dispute. Some delegations had suggested that the parties seek the assistance of the Director-General, through his good offices, in order to resolve the issue. Canada would support such an approach. It believed that a compromise solution was achievable, if there was goodwill between the parties.

3.8. The representative of Korea said that his country noted that this dispute, notwithstanding its significant impact on trade, did not seem to be driven by purely commercial considerations on the part of the responding Member, the UAE. In fact, there was no denying that this dispute was political in nature. On the other hand, it was in the interest of the WTO and all WTO Members to ensure a smooth flow of trade, minimizing the potential negative effects of this dispute on bilateral, regional and global trade and its systemic implications for the multilateral trading system. In Korea's view, the most effective and fastest path to resolving this dispute would also be a political one, which was not within the remit of the WTO. It was essential to find a bilateral political agreement among the relevant parties to resolve this dispute, and that in turn would make a WTO dispute procedure unnecessary. Nonetheless, the panel in this dispute between Qatar and the UAE would be established at the present meeting in accordance with Article 6.1 of the DSU, since Qatar had requested its establishment for the second time. However, Members needed to bear in mind that the Panel procedures for this dispute would require the dedication of a significant amount of resources of the WTO dispute settlement system at a time when the dispute settlement mechanism was already facing serious difficulties including workload issues. In this

regard, and considering the political nature of this dispute, Korea encouraged the relevant parties to make efforts in good faith to strengthen bilateral discussions with an aim of reaching a mutually acceptable resolution in an expeditious manner.

3.9. The representative of Egypt said that his country wished to support the statements made by the UAE, Bahrain and Saudi Arabia. Egypt recalled its statement made on this matter at the previous meeting. Egypt believed that these measures were undertaken by the UAE in a manner that was WTO-consistent. The determination of an action that was necessary for the protection of a Member's essential security interests and the determination of such Member's essential security interests were within the sole discretion of that Member.

3.10. The representative of the United States said that the UAE had again indicated that its measures were justified on the basis of national security, as it had done at the 23 October 2017 DSB meeting. As the United States had noted at the previous DSB meeting, issues of national security were political in nature and were not matters appropriate for adjudication in the WTO dispute settlement system. Every Member of the WTO retained the authority to determine for itself those matters that it considered necessary to the protection of its essential security interests, as was reflected in the text of the GATT 1994 Article XXI.[1] Therefore, if the UAE formally invoked Article XXI in defence of the challenged measures, the United States considered that the panel would lack the authority to review that invocation and to make findings on the claims raised in the dispute. The United States recalled that under Article 7.1 of the DSU, a panel was to examine the matter referred to the DSB by the complaining party and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". If Article XXI was invoked, there were no findings by the panel that could assist the DSB in making the recommendations provided for in DSU Article 19.1.[2] This was because the DSB could make no finding of WTO-inconsistency or recommendation to a Member to bring its measure into conformity with WTO obligations. Therefore, if a panel was established and if the UAE invoked Article XXI, any findings should be limited to a recognition that Article XXI had been invoked. Under these circumstances, the United States considered that the parties should resolve the issues raised in this dispute outside the context of WTO dispute settlement. If the parties were unable to resolve the issue bilaterally, the United States encouraged the parties to request assistance from the Director-General through his good offices or from another person or WTO Member in which the parties had confidence. Further, if a panel was established, it should consult with the parties "to develop a mutually satisfactory solution".[3]

3.11. The representative of China said that his country took note of the panel request made by Qatar under the DSU to resolve its dispute with the UAE in connection with the measures relating to trade in goods and services, and trade-related aspects of intellectual property rights (DS526). China was following this dispute closely as it potentially involved the application of the security exception provisions. First, China acknowledged that, under WTO rules, WTO Members had legitimate rights to defend their trade interests through the dispute settlement mechanism. Such rights should be respected. Second, China also recognized that the security exceptions provided in the WTO Agreements were sensitive provisions relating to the sovereignty and security interests of Members. In a situation where the security exceptions had been invoked, Members should make a judgment as to whether the effective resolution of the dispute at issue could be achieved through the WTO, and restrain itself to submit such dispute to the WTO. Third, at the same time, China believed that Members should faithfully fulfil their obligations and commitments under the WTO and had to use or invoke the security exception provisions on a bona fide basis.

3.12. The representative of Qatar said that his country was concerned that the UAE had opted to entertain the DSB with a series of provable fabrications and rhetoric that was not befitting the WTO. Qatar noted that, despite these measures, it continued to adhere to and respect its multilateral and bilateral commitments. This included supplying the UAE with energy products essential to its economy. The UAE's continued commercial practices belied all of its claims. Qatar

[1] The GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* …") (italics added).

[2] DSU Article 19.1: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement".

[3] DSU Article 11: "Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution".

noted that the UAE had asserted an absolute unilateral right to be absolved of all of its substantive and procedural WTO obligations vis-à-vis Qatar, based purely on its bald assertion that its coercive attempts to isolate Qatar reflected a security concern. Qatar did not dispute the right of countries to take bona fide measures to protect their security. But this defence could not be self-regulating as that would threaten the integrity of the entire rules-based system. It was clear that the nature of any defence under WTO law was subject to multilateral oversight. The legal tests agreed to by Members were objective and were not left to the whim of individual decision makers in Member governments. The delegation of the UAE was simply incorrect to the extent that it considered that its measures were immune from review.

3.13. The representative of the United Arab Emirates said that his country would not comment on the first part of Qatar's statement. Issues of national security were political matters, not susceptible to review or capable of resolution by the WTO dispute settlement mechanism. Every Member of the WTO retained the authority to determine for itself those matters that it considered necessary for the protection of its essential security interests. This was reflected in the text of the GATT 1994 Article XXI, the GATS Article XIVbis and TRIPS Article 73. Qatar had ignored the fundamental distinction between the text of these national security exceptions, which provided Members with a broad discretion to make judgments regarding essential security interests, and the other WTO exceptions.

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

3.15. The representatives of Afghanistan, Australia, Kingdom of Bahrain, Canada, China, Egypt, the European Union, Guatemala, Honduras, Japan, Kazakhstan, Korea, Norway, the Philippines, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Chinese Taipei, Ukraine, the United States and Yemen reserved their third-party rights to participate in the Panel's proceedings.

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

A. Report of the Panel (WT/DS484/R and WT/DS484/R/Add.1)

4.1. The Chairman recalled that, at its meeting on 3 December 2015, the DSB had established a Panel to examine the complaint by Brazil pertaining to DS484. The Report of the Panel, contained in document WT/DS484/R and Add.1 had been circulated on 17 October 2017, as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Brazil and Indonesia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report. The Chairman invited the representatives of the parties to the dispute to present their views on the Panel Report.

4.2. The representative of Brazil said that, by means of a joint request, Brazil and Indonesia had included this item on the DSB Agenda of the present meeting. The item concerned the adoption of the Panel Report in DS484. Brazil was pleased with the findings and recommendations made by the Panel in its Report, circulated on 17 October 2017, which favoured Brazil's main concerns regarding Indonesia's trade barriers on imports of chicken meat and chicken products. According to the Panel, Indonesia had been in breach of the SPS Agreement by delaying, without plausible justification, the sanitary recognition process of Brazil and Brazilian exporting establishments. The panel could not identify any sanitary reason for the delay in these routine authorizations. The Panel had also found that the Indonesian import licensing regulations had created unjustified restrictions on trade in at least three aspects: (i) by establishing, through a "positive list requirement", a selective list of products subject to licensing, which had excluded some tariff lines for chicken meat and chicken products; (ii) by limiting the purposes of use or place of sale of imported products; and (iii) by not allowing under any circumstances the introduction of changes to the terms of the import licenses granted. After three years of dispute settlement proceedings, a final solution to this dispute would contribute to expanding the cooperation between Brazil and Indonesia, in the light of both countries mutual interests in intensifying their political and economic relationship. As of the adoption of the Panel Report at the present meeting, Brazil expected Indonesia to inform the DSB of its intentions regarding the implementation of the DSB's recommendations and rulings in this dispute, so as to ensure fair international market conditions for Brazilian products. Finally, Brazil considered that the successful outcome of the present case

reinforced the importance of having fully functional WTO dispute settlement rules and proceedings, so that trade disputes could continue to find their proper institutional track.

4.3. The representative of Indonesia said that Indonesia and Brazil had jointly placed this item, regarding the adoption of the Panel Report in DS484, on the DSB Agenda. By doing so, Indonesia and Brazil had agreed to not appeal the Report. In Indonesia's view, the joint agreement to not appeal reflected the mixed findings contained in the Panel Report. This dispute had raised fundamental issues as to how a Member could properly structure its laws and regulations to promote food safety and to ensure compliance with its religious requirements. Indonesia bore a heavy burden to ensure both that the food available to Muslim Indonesians conformed to halal requirements and, more generally, that Indonesia's food supply was safe. This dispute involved Brazil's challenge against two categories of Indonesian measures under the GATT 1994, the Agreement on Agriculture, the Import Licensing Agreement and the Agreement on Sanitary and Phytosanitary Measures. The challenges involved an alleged unwritten overarching import prohibition resulting from the combination of several different measures with a policy objective of self-sufficiency; and, six individual measures. The six individual measures were: (i) the positive-list requirement for chicken imports; (ii) a requirement that imports of chicken be sold in facilities with cold storage such as hotels and fast food restaurants; (iii) an alleged undue delay in the approval of veterinary health certificates for chicken from Brazil; (iv) certain aspects of Indonesia's import licensing regime; (v) the surveillance and implementation of Indonesia's halal slaughtering and labelling requirements; and (vi) alleged restrictions on transportation of imported products by requiring direct transportation from the country of origin to ports in Indonesia.

4.4. With respect to the first category, the Panel had found that Brazil had not demonstrated the existence of the alleged overarching prohibition. In particular, the Panel had found that Brazil had not demonstrated that there was a link between Indonesia's policy objective of self-sufficiency and the specific Indonesian trade measures. With respect to the second category, the six individual measures, the Panel had delivered mixed findings. The Panel had found that the positive list requirement was inconsistent with Article XI:1 and was not justified under Article XX(d) of the GATT 1994. The Panel had applied judicial economy to Brazil's claim under Article 4.2 of the Agreement on Agriculture. It had divided the intended use requirement into the substantive aspects and the enforcement aspects. It had found that, under the current import licensing regime, the substantive aspects of the cold storage requirements were not inconsistent with Article III:4 of the GATT 1994 as there was an equivalent domestic measure. It did, however, find that certain enforcement aspects were inconsistent with Article III:4 and were not justified under Article XX(d) of the GATT 1994. Concerning the third measure, the Panel had found that there was an undue delay in the approval of the veterinary health certificates while Indonesia was awaiting information related to halal-compliance assurances. The Panel had further found that certain aspects of the fourth measure, Indonesia's import licensing regime, such as the application windows and the validity periods, had expired in the course of the proceedings. On the new validity period enacted during the proceedings, the Panel had found that Brazil had failed to make a *prima facie* case that it was inconsistent with Article XI:1 of the GATT 1994, Article 4.2 of the Agreement on Agriculture and Article 3.2 of the Import Licensing Agreement. The Panel had also found that Indonesia’s fixed license terms were inconsistent with Article XI:1 of the GATT 1994 and were not justified under Article XX(d) of the GATT 1994. With respect to the fifth measure, the halal slaughtering and labelling requirements, the Panel had found that Brazil had not demonstrated that there was a violation of Article III:4. Finally, the Panel had found that Brazil had not demonstrated that the sixth measure, Indonesia's direct transportation requirements, were inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In sum, the majority of the Panel's adverse findings had related to measures that had already been amended or terminated, such as the application windows and the validity periods. In essence, there had only been two "new" measures that Brazil had challenged and that the Panel had found to be inconsistent with Indonesia's obligations under the applicable agreements. These "new" measures were the enforcement mechanism of the intended use requirement and the undue delay in the approval of veterinary health certificates. In closing, Indonesia acknowledged the limited adverse findings of the Panel. It further noted that it would need a reasonable period of time to bring these measures, found to be inconsistent, into conformity with its WTO obligations. Indonesia looked forward to continuing to work constructively with Brazil during these important next steps of the dispute.

4.5. The representative of the United States said that this dispute was of particular interest to the United States because it, along with New Zealand, had raised similar claims with respect to

Indonesia's import licensing regime. Indeed, the United States' claims had been upheld in the reports considered under the next Agenda item of the present meeting. In general, the United States was pleased that the Panel had found that many of Indonesia's measures with respect to the importation of animals and animal products were inconsistent with Article XI:1 of the GATT 1994 and were not justified under Article XX of the GATT 1994. At the present meeting, however, the United States would like to highlight a systemic concern with the Panel's approach regarding measures adopted after the DSB had established the Panel's terms of reference. As part of its defence, Indonesia had relied on the contention that it had amended or replaced certain legal instruments after the time of panel establishment. In fact, Indonesia contended that it had adopted two different sets of changes, and that one of those changes had occurred after the first panel meeting. As the United States had noted in its third-party submission to the Panel, such post-establishment activity should not have altered the scope of the measures considered by the Panel. Rather, pursuant to the Panel's terms of reference from the DSB under Article 7.1 of the DSU, and its task to make an objective assessment of "the matter" referred to the DSB under DSU Article 11, the measures were only those that had been set out in Brazil's panel request, as they had existed at the time of the Panel's establishment. The Panel, however, appeared to have considered all of the alleged amendments and replacements throughout the proceeding. The result was that instead of conducting a full and thorough examination of "the matter" within the Panel's terms of reference, including the specific measures at issue pursuant to Article 6.2 of the DSU, the proceeding became an exercise in trying to analyse a moving target. By covering instruments adopted after Panel establishment, the parties, the third parties, and the Panel had been impeded from conducting a thorough review. Indeed, it appeared that some of the instruments had been changed after the time that third parties had filed their written submissions. In these circumstances, third parties had been denied an opportunity to present their views on at least some of the measures covered by the Panel's findings. There was no basis under the DSU for a panel to make findings on new measures that were not within its terms of reference as set by the DSB.

4.6. The representative of Canada said that his country wished to respond to the United States' statement. In Canada's view, the suggestion that a panel lacked jurisdiction to examine and make findings about a measure that had been amended after the establishment of a panel was incorrect. A panel could examine and make findings about such a measure if that measure did not change the essence of the original measure that had been identified in the panel request. Otherwise, it would be very easy for a Member to avoid a panel's jurisdiction.

4.7. The DSB took note of the statements and adopted the Panel Report contained in WT/DS484/R and Add.1.

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

A. Report of the Appellate Body (WT/DS477/AB/R and WT/DS477/AB/R/Add.1) and Report of the Panel (WT/DS477/R, WT/DS477/R/Add.1 and WT/DS477/R/Corr.1)

B. Report of the Appellate Body (WT/DS478/ab/R and WT/DS478/ab/R/add.1) and Report of the Panel (WT/DS478/R, WT/DS478/R/Add.1 and WT/DS478/R/Corr.1)

5.1. The Chairman proposed that the two sub-items under Agenda item 5 be taken up together. He drew attention to the communication from the Appellate Body contained in documents WT/DS477/14 – WT/DS478/14 transmitting the Appellate Body Reports on: "Indonesia – Importation of Horticultural Products, Animals and Animal Products", which had been circulated on 9 November 2017 in documents WT/DS477/AB/R and Add.1 – WT/DS478/AB/R and Add.1. He reminded delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report". The Chairman invited the parties to the dispute to present their views on the Reports before the DSB.

5.2. The representative of New Zealand said that her country welcomed the adoption of the Appellate Body and Panel Reports in "Indonesia – Importation of Horticultural Products, Animals and Animal Products". New Zealand thanked the Appellate Body, the Panel, the Secretariat, the parties and third parties for their hard work and constructive dialogue during the course of these proceedings. New Zealand particularly thanked Indonesia for the constructive and collegial approach it had taken to these WTO proceedings. The positive tone during the hearings reflected the long-standing and mutually respectful bilateral relationship between Indonesia and New Zealand, and the shared desire between the two countries to strengthen their important relationship. The findings of the Panel and Appellate Body had confirmed that Indonesia's import regimes for horticultural and animal products were inconsistent with key WTO obligations. All 18 of the challenged non-tariff barriers at issue had been found by the Panel and Appellate Body to be inconsistent with Indonesia's obligations under Article XI:1 of the GATT 1994. Following adoption of the reports at the present meeting, Indonesia would need to bring its measures into conformity with its WTO obligations. New Zealand looked forward to working, and partnering, with Indonesia towards achieving prompt, effective, durable and WTO-consistent compliance. This was in both countries' mutual interest. New Zealand welcomed the adoption of these Reports at the present meeting, and looked forward to resuming exports of high-quality New Zealand agricultural products to Indonesian consumers, including a range of beef imports and horticultural imports that had been affected by Indonesia’s restrictions and prohibitions.

5.3. The representative of the United States said that the United States thanked the Panel, the members of the Division, and the Secretariat staff assisting them for their work in this dispute. The United States also thanked its co-complainant, New Zealand, for the very close and fruitful collaboration throughout the dispute. The adoption of the reports in this dispute would bring to a close this stage of proceedings that had been ongoing since early 2013. For over four years, the United States had been trying to resolve with Indonesia the issue of its highly trade-restrictive and blatantly WTO-inconsistent import licensing regimes. With the adoption of these reports, the United States would again seek to work together with Indonesia to resolve this matter and bring its import licensing regimes into compliance with its WTO obligations. This dispute concerned 18 separate measures that Indonesia imposed – primarily through its import licensing regimes – on the importation of horticultural products and animals and animal products. These measures included: (i) a positive list, under which unlisted animal products were not permitted to be imported; (ii) limited application windows and validity periods, and fixed license terms that restricted imports of covered products during a given period to the types and quantities pre-approved by the Indonesian government; (iii) a domestic purchase requirement; (iv) seasonal restrictions on imports during the Indonesian harvest; (v) restrictions on the use for which products could be imported; and (vi) a requirement that imports were allowed only if domestic production was deemed insufficient. The Panel had found that each of the challenged measures was inconsistent with Article XI:1 of the GATT 1994 and was not justified under Article XX of the GATT 1994. Those findings of inconsistency had now been confirmed on appeal.

5.4. On appeal, Indonesia had claimed that Article 4.2 of the Agreement on Agriculture applied to agricultural products to the exclusion of Article XI:1 of the GATT 1994. In finding that each of the challenged measures was inconsistent with Article XI:1, the reports in this dispute soundly rejected Indonesia’s argument. To the contrary, the reports confirmed that Article 21.1 of the Agreement on Agriculture operated only to the extent of a conflict between the provisions of the Agreement on Agriculture and the provisions of another covered agreement. The reports also rejected Indonesia's argument that the principle of *lex specialis* was relevant in this context. Further, the reports confirmed that, in considering claims under different provisions of the covered agreements, a Panel could order its analysis as it saw fit unless the order would affect the substantive outcome under the provisions at issue. Overall, the United States was pleased with the outcome in this dispute, which it expected would contribute to achieving a solution to this matter. The United States was disappointed, however, that the Division's report addressed certain of Indonesia's claims even as it rejected those claims. The United States recognized that the report appeared more succinct than some others, but even so, the report reached issues that were not necessary to resolve the dispute because the claims had no capacity to alter the DSB recommendations.

5.5. Under Article 3.3 of the DSU, the aim of the WTO dispute settlement system was "to secure a positive solution to the dispute". Article 3.3 established that "[t]he prompt settlement of situations [of impairment of benefits] is essential" and Article 3.7 provided that "[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter". To

contribute to these goals, Articles 7.1, 11, and 19 of the DSU established the key function of panels and the Appellate Body. Their responsibility was to make such findings as would assist the DSB in making the recommendation to the responding Member to bring any WTO-inconsistent challenged measures into compliance with the relevant provisions of the covered agreements. On these bases, the Appellate Body had, in the past, refrained from interpreting provisions of the covered agreements where doing so was "unnecessary for the purposes of resolving [the] dispute".[4] This was the case where the responding Member's obligation regarding compliance would not change "irrespective of whether [the Appellate Body] were to uphold or reverse the panel's finding" on the issue.[5]

5.6. In such situations, the Appellate Body had "addressed" the issues raised by a claim, within the meaning of Article 17.6 of the DSU, by explaining that the claim could have no effect on the DSB recommendations and rulings and, on that basis, declining to make substantive findings on it. As the United States had explained in its submission and during the appellate hearing, and as several other Members had agreed, once the Division 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 was inconsistent with that provision, the Division could, and should, have refrained from substantively addressing the remainder of Indonesia's claims. None of Indonesia's other claims had had any potential to alter the DSB recommendations and rulings. Nothing in the report suggested that the Division had not agreed that this was the case. Indeed, with respect to Indonesia's claims under GATT 1994 Article XI:2(c) and Article XX, the report had acknowledged that substantively addressing the claims could have had no effect on the recommendations and rulings in the dispute.[6] And with respect to the burden of proof under Article 4.2, while the report suggested that the issue was "intertwined" with Indonesia's argument concerning the application of Article 21.1 of the Agreement on Agriculture[7], the report had already entirely rejected Indonesia's argument that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture could conflict before reaching the issue of the burden of proof.[8] Nevertheless, the report had substantively addressed all three claims. Indeed, even with respect to Indonesia's Article XX claim, where the report had expressly agreed with the US argument that addressing the claim was not necessary[9], the Division had nonetheless discussed the legal standard under Article XX at some length and then, without analysis or further explanation, declared the Panel's findings moot and of no legal effect.[10] The United States was concerned with the approach in this report. Substantive review of claims not necessary to resolve the dispute between the parties not only used the Appellate Body's scarce resources unnecessarily, but it was not consistent with the role of the dispute settlement system set out in the DSU. With respect to adoption of the reports, the United States raised again an important systemic concern regarding the service on appeals of an Appellate Body member whose term had expired. As the United States had explained at the September meeting of the DSB in the context of the "EU – Fatty Alcohol" dispute, Mr. Ricardo Ramírez Hernández's term had expired on 30 June 2017. The DSB had taken no action to permit him to continue to serve as an Appellate Body member, and, therefore, he was not an Appellate Body member on the date of circulation of this report. The United States therefore considered that the implications for this report were the same as in the "Fatty Alcohol" dispute, specifically, that the report had not been issued consistent with the requirements of Article 17 of the DSU and so could not be an "Appellate Body report" subject to the adoption procedures reflected in DSU Article 17.14.

5.7. The United States supported the adoption of the "reports" of the Panel and the Division in this dispute, and understood that the other parties to the dispute did also. Article 3.7 of the DSU made it clear that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Therefore, as the parties considered that adoption of these reports would help them achieve that aim, the United States invited other Members to join a consensus to adopt the reports proposed for adoption today, that was, the reports contained in WT/DS477/AB/R and WT/DS478/AB/R and the Panel Reports contained in WT/DS477/R and WT/DS478/R, as modified by the former reports.

[4] "US – Upland Cotton" (AB), paras. 510-511, 747; see also "India – Solar Cells" (AB), paras. 5.156-5.163.
[5] "US – Upland Cotton" (AB), para. 510.
[6] Appellate Report, paras. 5.63, 5.102-103.
[7] Appellate Report, para. 5.37.
[8] Appellate Report, paras. 5.13-5.18.
[9] Appellate Report, paras. 5.102-103.
[10] Appellate Report, paras. 5.91-101, 5.103.

5.8. The representative of Indonesia said that her country's appeal in this dispute, brought by New Zealand and the United States, had raised the following issues of fundamental importance with respect to the interpretation of the covered agreements: (i) whether there was a mandatory sequence of analysis between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture; (ii) which party bore the burden of proof with respect to the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture; (iii) the proper order of analysis for panels to follow when assessing defences under Article XX of the GATT 1994; and (iv) in Indonesia's ground of appeal made in the alternative, whether WTO Members could still have recourse to Article XI:2(c) of the GATT 1994 to carve out quantitative restrictions on agricultural products from the application of Article XI:1 of the GATT 1994. These were issues of critical importance not only to Indonesia, but also to many other WTO Members, especially developing countries. Indonesia had presented cogent legal arguments in support of its position before the Appellate Body. Unfortunately, and to Indonesia's regret, the Appellate Body had not accepted Indonesia's arguments in this dispute. Indonesia was, of course, disappointed with the Appellate Body's reasoning and findings. Nevertheless, Indonesia accepted the outcome of this Appellate Body Report. Despite the outcome, Indonesia nevertheless wished to state that it was pleased with the Appellate Body's thoughtful consideration and engagement with each of the arguments presented by Indonesia in its written submissions and in the course of the hearing. This consideration had been fully reflected in the Appellate Body's Reports circulated to all Members. Therefore, Indonesia supported the adoption of these Reports, by negative consensus, in accordance with Articles 16.4 and 17.14 of the DSU. Given that this dispute involved measures that were of profound importance to ordinary Indonesians in their daily lives, any changes to the challenged measures that had been found to be inconsistent by the Appellate Body, and the Panel where applicable, would take a great deal of effort and time for Indonesia to implement. In closing, Indonesia wished to state that it recognized its WTO obligations and looked forward to constructive discussions with New Zealand and the United States with respect to the next steps in this complex process.

5.9. The representative of New Zealand said that, regarding matters of procedure that had been raised, New Zealand agreed with Indonesia and considered that the Reports issued in DS477 and DS478 were Appellate Body Reports, and accordingly that the standard negative consensus adoption process set out in Article 17.14 of the DSU applied to their adoption. As New Zealand had stated on a number of occasions in the DSB, while it was willing to discuss the concerns raised regarding Rule 15 of the Working Procedures for Appellate Review, the outcome of any such discussions could only be applied on a prospective basis.

5.10. The representative of Canada said that his country had taken note of the US statement and wished to briefly intervene in this respect. Canada disagreed with any suggestion that the service of Mr. Ramírez on this appeal undermined the reverse consensus rule in Article 17.14 of the DSU. Like Indonesia and New Zealand, Canada also considered that the reverse consensus rule applied in this case.

5.11. The representative of Australia said that as a third party to these disputes, her country welcomed the Appellate Body Reports and supported the adoption of the Panel and Appellate Body Reports by the Membership at the present meeting, in the usual way, by negative consensus. The measures at issue in these disputes included a suite of prohibitions and restrictions imposed by Indonesia on imports of animals, animal products and horticultural products, such as bans on imports when domestic products were "sufficient", or limited licence validity periods and application windows, preventing long-term contractual arrangements. Such measures clearly had a negative impact on trade. The Appellate Body had found unambiguously and comprehensively in favour of the co-complainants and had confirmed that Indonesia was in breach of its WTO obligations with respect to all 18 measures at issue. Accordingly, it was now time for Indonesia to bring those measures into compliance.

5.12. The representative of Brazil said that his country had participated as a third party in these disputes and welcomed the conclusions reached by the Panel and the Appellate Body. The Panel had found, and the Appellate Body had confirmed, that all 18 Indonesia's measures that had been raised by the co-complainants were prohibitions on importation or restrictions having a limiting effect on importation, and were thus inconsistent with Article XI:1 of the GATT 1994. Some of the measures also affected the exports of Brazilian products. The fact that New Zealand, the United States and Brazil, in a separate case (DS484), had had to bring disputes to challenge Indonesia's numerous trade restrictions was, in itself, a signal of how closed, and sometimes

impenetrable, the Indonesian market was. The self-sufficiency principle, argued in part by Indonesia, could not be taken as a blank cheque, used to isolate Indonesia's market from imports.

5.13. On the procedural issue raised by the United States, Brazil took note of the US views on this matter. Brazil believed that the participation of Mr. Ramírez in the current appeals strictly followed Rule 15 of the Working Procedures for Appellate Review, which had been in force since 1996, with no objection by WTO Members and continued to be in force. Moreover, at paragraph 1.17 of its Report, the Appellate Body had clarified that the participants and third participants had been informed that Mr. Ramírez was to be authorized to complete the disposition of the appeal, even though his term in office was due to expire before the completion of the appeal proceedings. Nothing in the record of the dispute showed that the United States had objected to this before the Appellate Body during the proceedings in these disputes. The fact that the Report had been circulated after the end of Mr. Ramírez's mandate was of no consequence, given the strict application of the existing rule. If Members were to decide to address the situation posed by the United States, and a consensual outcome was to be found, it would then only be applied prospectively. Brazil considered that to allow flawed legal interpretations to put into question the fundamental rule of negative consensus for the adoption of the Reports should put all Members on alert. Brazil thus understood that nothing in the present scenario allowed a departure from the "negative" consensus rule set out in Article 17.14 of the DSU, upon which the appeals in these disputes should be adopted.

5.14. The representative of Chinese Taipei said that, as a third party to these disputes, his delegation also welcomed the adoption of the Panel and the Appellate Body Reports. With regard to the issue raised by the United States, Chinese Taipei had some comments. First, to its knowledge as a third participant to the appeal, none of the parties or third parties had ever raised the Rule 15 issue during the course of the appeal. Mr. Ramírez's term had expired on 30 June 2017, the hearing had been held on 28-29 August 2017, and the Report had been issued later. In this regard, the parties that had wished to take issue with Mr. Ramírez's legal standing would have had ample opportunity to do so. In Chinese Taipei's view, the Appellate Body was in a much better position than the DSB to address this issue. The institutional structure of the Appellate Body allowed it to examine details of the legal arguments, if any. Furthermore, by raising this issue in the course of the appeal, the parties could well avoid the alleged violation altogether. The DSB, at the most, could offer only *ex post* solutions.

5.15. Second, Chinese Taipei understood that every Member had the right to express its views on an Appellate Body Report under Article 17.14 of the DSU. On the other hand, if Members asked the DSB for a decision on whether or not an Appellate Body Report was prepared in accordance with the relevant DSU rules, assuming for the sake of argument that the DSB indeed had the authority to make such decision, then, in accordance with Article 2.4 of the DSU, that decision should be taken by positive consensus. In addition, the requesting Member should follow the rules of procedure for DSB meetings, which would mean, for example, the need to inscribe an item on the DSB Agenda in due time. Finally, Chinese Taipei emphasized that the "negative consensus" rule was a critical element of the WTO dispute settlement mechanism. For many smaller and medium-sized Members, it was often the basis on which their confidence in the mechanism was built. Chinese Taipei therefore urged Members to exercise special prudence when choosing which course of action to take, and try to avoid any chance of shaking the foundations. It believed that a constructive proposal should, at least to somewhat extent, generate sympathies, not raise concerns.

5.16. The representative of China said that his country, as a third party in these disputes, welcomed the adoption of the Panel and Appellate Body Reports in "Indonesia – Importation of Horticultural Products". China noted the procedural issues that had been raised by the United States. Rule 15 of the Working Procedures for Appellate Review stated that: "a person who ceases to be a member of the Appellate Body may, with the authorisation of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a member of the Appellate Body". China believed that, as it had stated at the 23 October 2016 DSB meeting, Mr. Ramírez's service in this dispute was consistent with Rule 15 of the Working Procedures for Appellate Review.

5.17. The representative of the European Union said that his delegation noted that the DSU excluded the right of any WTO Member to block the adoption of panel or Appellate Body reports. This was a central feature of the DSU, and a major difference with the dispute settlement mechanism that operated under the GATT 1947. Article 17.14 of the DSU was clear: "[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 EU understood that there was no formal objection at the present meeting to the adoption of the Appellate Body Reports. But in any event, the EU wished to emphasise that both the Panel and Appellate Body Reports would in any event be "adopted by the DSB" within the meaning of Articles 16.4 and 17.14 of the DSU. The EU recalled that these provisions were without prejudice to the rights of Members to express their views on reports, and such views were being expressed at the present meeting. However, although there was a right to express a view, there was no right to veto and any theories underpinning such right to veto were without any merit.

5.18. The representative of Mexico said that the working procedures of the Appellate Body provided for the practice whereby a person whose term of office as an AB member ended may complete the disposition of any appeal to which he or she had been assigned while an AB member. This procedure was common in other jurisdictions where arbitrators had fixed terms of office (i.e. other international forums and Members' domestic procedures). In this regard, Article 17.9 of the DSU provided that working procedures shall be drawn up by the Appellate Body in consultation with the DG and the Chairman of the DSB, and communicated to Members. The rule contained the AB's working procedures had been put in place in accordance with this provision and the long-standing WTO practice. The AB members had completed work in 14 cases following the expiry of their terms. In conclusion, the AB's practice should not be considered irregular, new or unfounded. It had existed for more than 20 years, without opposition from any Member. Mexico therefore agreed with the view previously expressed by other delegations that the situation of Mr. Ramírez was in conformity with the WTO provisions and that these Reports should be considered the AB Reports and should be adopted by negative consensus. Mexico welcomed the adoption of the Reports.

5.19. The representative of Guatemala said that his country noted the views expressed by the United States, however, Guatemala was not ready to accept that a unilateral determination by a WTO Member on the status of an Appellate Body Report could bring about a change in the way in which Reports were adopted. The Appellate Body Reports under discussion should be adopted without any conditions of conformity, as had been put forward under Article 17.14 of the DSU.

5.20. The representative of Colombia said that his country noted the views expressed regarding these disputes. Colombia was not a third party to these disputes, but noted that the Panel Reports and Appellate Body Reports had been put forward in the same way as had been done in the past. In this regard, Colombia understood that the Appellate Body had not acted in an inappropriate way. It had acted in conformity with the DSU and Rule 15 of the Working Procedures for Appellate Review.

5.21. The representative of Turkey said that his country, like other Members, believed that the Appellate Body Reports, under Agenda item 5, should be adopted by negative consensus.

5.22. The DSB took note of the statements.

5.23. The DSB adopted the Appellate Body Report contained in WT/DS477/AB/R and Add.1, and the Panel Report contained in WT/DS477/R, Add.1 and Corr.1, as modified by the Appellate Body Report; and

5.24. The DSB adopted the Appellate Body Report contained in WT/DS478/AB/R and Add.1, and the Panel Report contained in WT/DS478/R, Add.1 and Corr.1, as modified by the Appellate Body Report.

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

6.1. The Chairman drew attention to document WT/DSB/W/608, which contained additional names proposed by Argentina for inclusion on the Indicative List of Governmental and

Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/608.

6.2. The DSB so agreed.

7 APPELLATE BODY MATTERS

A. Statement by the Chairman

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

7.1. The Chairman proposed that the two sub-items under this Agenda item be taken up together. First, he would make a short statement to update delegations about the ongoing informal consultations on AB matters. Subsequently, he would invite Mexico to introduce the proposal contained in document WT/DSB/W/609 and then he would open the floor to other delegations to speak.

7.2. With regard to the first sub-item regarding the Appellate Body matters, the Chairman said that as he had indicated at the 23 October 2017 DSB meeting, informal consultations had continued on AB matters in order to find a way forward through the current impasse. These consultations were being held at different levels, both political and technical. It seemed that a sense of mutual trust had yet to be forged among key Members. Also, as he had stated several times, Members needed concrete ideas which could provide a viable solution to the issues facing the DSB. In this respect, the Chairman took note of informal and exploratory technical discussions taking place on voluntary basis. He urged all Members to continue conversations in a positive spirit.

7.3. With regard to the second sub-item, the Chairman drew attention to the proposal contained in document WT/DSB/W/609 and invited the representative of Mexico to introduce the proposal submitted on behalf of all of the proponents.

7.4. The representative of Mexico said that Argentina; Brazil; Colombia; Chile; Guatemala; Mexico; Peru; the European Union; Costa Rica; Ecuador; El Salvador; Honduras; Hong Kong, China; Nicaragua; Norway; Pakistan; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Uruguay and Viet Nam had agreed to submit a joint proposal to launch the selection processes. Mexico also wished to announce that Korea had expressed its intention to co-sponsor the proposal. Mexico, speaking on behalf of the 52 proponents, said that the joint proposal reflected the increased concern of many Members with the current situation, that was seriously affecting the workings of the Appellate Body and of the dispute settlement system more generally, to the detriment of the WTO and against the best interests of its Members. It was the responsibility of WTO Members to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Members could not remain passive in the present circumstances. This was the seventh consecutive time that a draft proposal on the procedures to carry out the selection process for new Appellate Body members had been submitted to the DSB. This draft sought to fill the two vacancies as well as the vacancy that would arise within a few weeks. The proposal contained four elements: (i) to start three selection processes: one to replace Mr. Ricardo Ramírez-Hernández – whose second term had expired on 30 June 2017, another one to fill the vacancy which had arisen with the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017, and a third to replace Mr. Peter Van den Bossche – whose second term would expire on 11 December 2017; (ii) to establish a Selection Committee; (iii) to set 22 December 2017 as the deadline for the submission of candidacies; and (iv) to request that the Selection Committee issue its recommendations no later than by the regular DSB meeting in March 2018. The proponents were flexible in the determination of the deadlines for the selection process. Mexico urged all Members to support this proposal. If not, Members risked a crisis with far-reaching consequences in 2018.

7.5. The representative of the European Union said that his delegation referred to its statements made on this matter at previous DSB meetings, starting in February 2017. The EU strongly regretted the inability of the DSB for these past several months to launch the selection processes for new Appellate Body members. With each passing month, the gravity and urgency of the situation increased. In fact, the present meeting was the last regular DSB meeting before a third vacancy would arise on the Appellate Body when the second term of Mr. Peter Van den Bossche would expire on 11 December 2017. The next time, the DSB would meet, there would only be four Appellate Body members left. The WTO Members had a shared responsibility to resolve this issue as soon as possible. The EU referred to the proposal regarding the AB matters made by the EU and 22 other Members (WT/DSB/W/609). The EU thanked all Members that co-sponsored the proposal and invited all other Members to endorse the proposal so that the appointments could be made as soon as possible.

7.6. The representative of the United States said that the United States thanked the Chairman for his continued work on these issues. The United States was not in a position to support the proposed decision. Mr. Ramírez continued to serve on an appeal, despite having ceased to be a member of the Appellate Body nearly 5 months ago. In the US view, the United States could not consider a decision launching a selection process when a person to be replaced continued to serve and decide appeals after the expiry of their term. As had been noted in past DSB meetings, the DSB had a responsibility under the DSU to decide whether a person whose term of appointment had expired should continue serving. The United States considered that Members needed to discuss and resolve that issue first before moving on to the issue of replacing such a person. As it had also noted previously, the United States would welcome Mr. Ramírez's continued service on the remaining appeal to which he had been assigned prior to 30 June 2017. In fact, it did not understand any Member to object to his service on this appeal. In that circumstance, it should not be difficult for the DSB to take up its responsibility to adopt an appropriate decision. The United States had continued to convene meetings to discuss this issue informally with a number of delegations. This outreach had been productive in that the United States believed that it had heard a general recognition that the DSB had the authority to set the term of an Appellate Body member under DSU Article 17.2. It followed that the DSB had a responsibility to decide whether a person should continue serving beyond that term. The United States had also heard agreement from several delegations that Rule 15 of the Working Procedures for Appellate Review raised difficult legal questions that the DSB should address. In the course of its engagement, the United States had not heard delegations reject the importance of the issue it had brought to the DSB's attention. To the contrary, it had heard a willingness of delegations to work together on this issue to find a way forward. The United States therefore would continue its efforts and its discussions with Members and with the Chairman to seek a solution on this important issue.

7.7. The representative of Canada said that his country deeply regretted that the DSB had been unable to fulfil its legal obligation under DSU Article 17.2 to appoint Appellate Body members as vacancies arose. Canada agreed that it was time to start a process or processes to select new Appellate Body members for the two current vacancies and the third vacant position that would become available in December 2017. Canada considered that it was in every Member's interest to maintain and nurture the WTO's effective and impartial dispute resolution mechanism, of which the Appellate Body was a key component. That mechanism was a central element of the robust rules-based multilateral trading system, which had provided security and predictability since its creation. To remain robust, the system – and in particular the dispute resolution mechanism – needed the continued support of every Member. A less predictable system would not bring more prosperity to all Members, and there was no guarantee that a less predictable system would bring more prosperity to any Members. Like other Members, Canada was disappointed that the United States had linked the start of the Appellate Body selection processes to the resolution of certain procedural concerns it had shared with the DSB. However, Canada remained committed to working with other interested Members – including the United States – with a view to finding a way to address those concerns so as to allow the selection processes to start and be completed as soon as possible.

7.8. The representative of Norway said that her country was one of the co-sponsors of the proposal contained in WT/DSB/W/609 and wished to be associated with the statement made by Mexico. Norway's key priorities continued to be to ensure the well-functioning of the dispute settlement system and of the Appellate Body. Norway did not agree that procedural issues should be linked to the process of filling vacancies on the Appellate Body. Vacancies should be filled as they arose. Norway was open and willing to discuss systemic issues, but this discussion should be

kept separate from filling the vacancies on the Appellate Body. Once again, Norway urged all Members to exercise their flexibilities on this matter in order to overcome the deadlock faced by the DSB for the benefit of the multilateral trading system and all its Members so as to prevent a serious crisis in the dispute settlement pillar.

7.9. The representative of Korea said that his country wished to echo Mexico's statement made on behalf of the group of proponents. As had already been noted by Mexico, Korea had decided to support the joint proposal as a co-sponsor. On the issue raised by the United States regarding Rule 15 of the Working Procedures for Appellate Review, Korea stood ready to engage in the discussions in good faith. However, it emphasized that the selection process should be launched independently without being linked to the discussions on the Rule 15 issue. In this regard, Korea regretted that the DSB had failed to reach a consensus at the present meeting. However, Korea still hoped that consensus could be reached soon, on the basis of this proposal, so that the DSB could make a decision to immediately launch the selection process.

7.10. The representative of Chile said that his country was concerned about the current situation regarding the Appellate Body selection processes. Furthermore, the issue was linked to other matters, which should be dealt with on their own merits and should not stand in the way of launching the Appellate Body selection processes. Chile noted that it was a co-sponsor of the proposal that had been presented by Mexico.

7.11. The representative of Chile, speaking on behalf of the GRULAC countries, said that, first, the countries in question recognized the Chairman's efforts to seek a solution to the impasse in launching the Appellate Body selection process, including the Chair's consultations, which had allowed Members to express their views on this matter. Second, Chile voiced its deep concern about the present situation which stood in the way of the proper functioning of a central WTO body. If the problem were to persist, it could virtually paralyze the Appellate Body and stand in the way of solving disputes. With the delay in launching the selection process, there were now two vacant posts in the Appellate Body. Third, the present situation gave rise to major systemic concerns. It could undermine the credibility and image of the WTO, in particular considering the complex international state of affairs that would have a negative impact on the multilateral trading system. Fourth, Chile noted the concerns that had been raised regarding the functioning of the dispute settlement system and the decision-making process. The concerns that had been raised stood in the way of Members being able to fulfil their legal responsibilities to fill the existing and upcoming Appellate Body vacancies. Nothing should stand in the way of the operation of the dispute settlement system, including the concerns that had been raised by some Members. Fifth, Chile urged the Member opposing the initiation of the selection process to reconsider its position. The blockage was serious and should not be linked to a distinct, separate issue which had to be looked at on its own merits. Members needed to solve the situation as quickly as possible in order to comply with their legal obligations. Finally, Chile called on the Chairman to continue to seek a solution to the impasse so as to ensure that all necessary actions could be taken to resolve this matter.

7.12. The representative of Chinese Taipei said that his delegation joined other delegations in thanking both the Chairman and the Secretariat for all their efforts over the past few months. Chinese Taipei was deeply disappointed to see that Members were still unable to solve the prolonged deadlock. It emphasized that the credibility of the Appellate Body was fundamental to the impartiality, integrity and key values of the multilateral trading system. The Appellate Body stood as the final arbiter in disputes. It ensured a rules-based, rather than a power-based, system, in which every WTO Member could participate on an equal basis. This was particularly important for the smaller and medium-sized Members because such Members could bring their complaints before the adjudicating body if they believed their economic benefits were being improperly infringed. Compared with small Members, larger Members could easily "flex their muscle" if their benefits were infringed. In short, a malfunctioning dispute settlement system did not affect the interests of large Members as much as smaller Members. Moreover, at a time when the negotiating function of the WTO was having great difficulty in moving forward, the quasi-judicial arm of the WTO had assumed even greater importance. Chinese Taipei strongly supported a rules-based multilateral trading system. It agreed with the other Members that the protracted vacancies on the Appellate Body had already had an impact on the overall effectiveness of the system. In Chinese Taipei's view, every Member of the WTO had a systemic interest in ensuring the proper functioning of the Appellate Body. At the very least, Members had to fulfil their obligations under Article 17.2 of the DSU. Chinese Taipei therefore greatly appreciated the opportunity to contribute to the

system by supporting the proposal (WT/DSB/W/609). Chinese Taipei called on Members to launch the selection processes soon as possible. Given the urgency of the matter, it suggested that Members adopt a more solution-oriented approach. Members should be ever-mindful of the key values enshrined at the heart of the WTO system, instead of being distracted by minor procedural issues. The great need at present was to restore the credibility and effectiveness of the Appellate Body, and not to cast a shadow over it. Chinese Taipei urged all Members to engage, in a spirit of pragmatism, to ultimately reach a consensus in the interests of the entire WTO Membership.

7.13. The representative of New Zealand said that her country was concerned by the current impasse, and considered that launching selection processes should be a routine matter. New Zealand regretted the DSB's failure to do so at the present meeting. Delays in appointing Appellate Body members threatened the efficient and effective functioning of the dispute settlement system, and had the potential to undermine the broader multilateral trading system. New Zealand welcomed the fact that there was now a single proposal to launch the selection process to fill the three positions and thanked the delegations involved for their hard work. As it had stated previously, New Zealand was flexible on how these processes should be carried out and it could, of course, join any consensus on the new proposal. The key point was that Members launch the processes as soon as possible. New Zealand did not agree with the linkage that was being drawn between launching the selection process, and other procedural issues. However, it remained willing to engage in conversations on either topic. New Zealand again called on all Members to be flexible and pragmatic and to allow the launching of the selection processes for new Appellate Body members as soon as possible.

7.14. The representative of Australia said that her country welcomed the circulation of a single proposal by a group of Members to begin the selection processes to fill the current and upcoming Appellate Body vacancies. Australia thanked the proponents for their continued efforts in this regard. Like others, Australia would have been ready to join consensus at the present meeting to commence the selection processes on the basis of the joint proposal. It regretted that, once again, such consensus had eluded the DSB at the present meeting. Australia referred to its statements made in previous DSB meetings on this matter which it would not repeat. It remained open to constructive discussions regarding the outstanding concerns raised by Members in the context of the appointment process for Appellate Body candidates. It hoped that other Members would similarly demonstrate their commitment to Members' collective responsibility of the custodianship of the dispute settlement system and work together to find a mutually acceptable way forward.

7.15. The representative of Singapore reiterated his country's serious systemic concern regarding the lengthy delay in launching the Appellate Body selection process. At the 23 October 2017 DSB meeting, Singapore had expressed its flexibility in going along with either the proposal from the EU or the proposal from the group of Latin American Members, and had stated that it might be useful to work towards a single text so that the DSB could take a decision to launch the Appellate Body selection processes once the impasse had been resolved. Since the 23 October 2017 DSB meeting, both proposals had been integrated into a single text of which Singapore was a co-sponsor. Given its workload and significance, a fully-staffed Appellate Body was crucial for the proper functioning of the WTO dispute settlement system. To this end, it was essential that the vacancies on the Appellate Body were expeditiously filled while those systemic issues that 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 Chairman, to help resolve this impasse.

7.16. The representative of Switzerland said that his country thanked the Chairman for his update on this matter. Switzerland reiterated the deep concerns that had been expressed at previous DSB meetings about the difficulties that kept preventing the re-establishment of a fully staffed and fully functional Appellate Body – a key component of the multilateral trading system – and the detrimental consequences these difficulties increasingly had for this system. Switzerland welcomed the now joint proposal for the launch of selection processes for the three AB vacancies. It had therefore added its name to the list of co-sponsors, and had associated itself with the statement made by Mexico. Switzerland called on all Members, and especially key Members, to engage fully, with a sense of urgency, in substantive discussions on issues raised with a view to identifying a consensual way forward. Switzerland was ready to contribute to such a process.

7.17. The representative of Brazil said that this was the last regular DSB meeting in 2017. He recalled that the issue regarding the Appellate Body selection processes had been raised for the

first time in February 2017. This meant that Members had now been unable to comply with Article 17.2 of the DSU for almost a year. While Brazil was pleased to see that more than 50 Members were supporting the proposal to launch the AB processes to fill the three vacancies, the current deadlock also meant that Members were falling short of their collective responsibility to preserve the crucial pillar of the rules-based multilateral trading system. The function of law in the multilateral trading system was not only to resolve disputes but also to "provide an operational system for securing values that we all desire". Brazil believed that most Members would agree that the values reflected in the dispute settlement system, and in the Appellate Body, were: independence, professional competence, efficiency, and clear and high-quality reports at both panel and appeal's stage. Brazil believed that it was against this axiological benchmark that Members needed to assess the functioning of the dispute settlement system and the Appellate Body as well as any proposals for improvements or changes in this regard. Although little information had been conveyed by the Member interested in proposing changes to the Working Procedures for Appellate Review, Brazil was open to discuss new ideas and work on improvements that could be beneficial to all Members. However, any such changes must respect the crucial elements of independence and the proper functioning of the dispute settlement system. This meant that any proposal to change the DSU or the AB Working Procedures, albeit welcome in an effort to improve the system and adjust it to new developments in the WTO's legal and economic environment, should be tested and discussed against the values Brazil had just referred to. However, this was a challenge. Brazil wondered what value was discernible in the efforts to change Rule 15 of the Working Procedures for Appellate Review, if the result of such a change would be to block and paralyse the functioning of the Appellate Body. In a horizontal legal order such as in international trade law, the task of ascertaining purpose and values seemed complicated and work-intensive. However, Members could not start doing some editing work without a blueprint of the final framework and without knowing in advance what would be the vision and the final result. If Members were able to agree on the essentials, the rest would follow more easily. If Members could solidify their ideas, together sort them out and cement the good ideas they could perhaps make progress. There were certainly many aspects that could be discussed openly and in good faith, in this and other fora, in order to improve the system. Besides several ideas that had already been put forward, Members could be mindful of Article 17.9 of the DSU, which could be seen as a space for a respectful institutional dialogue between the Appellate Body and the Membership, through the Chairman of the DSB. The concerns raised could be discussed in the DSB in an expedited manner. Naturally, however, it was difficult to see how any of these issues or concerns could be more urgent or more pressing than the preservation of the full capability of the Appellate Body. In conclusion, Brazil hoped that Members would be able to restore the composition of the Appellate Body, as soon as possible. At the same time, Members could also work on other improvements to the system, as long as its independence and impartiality was preserved.

7.18. The representative of Indonesia said that her country wished to welcome and express its support for the Members' efforts to resolve the issue of the appointment of new Appellate Body members, as set out in document WT/DSB/W/609. Indonesia wished to express its views about the current situation regarding the vacancies on the Appellate Body. As Members were all aware, the WTO was currently facing a situation where Members had failed to reach consensus on how to select the successors of Appellate Body members whose mandates had expired or would soon expire. Indonesia had also taken note of a certain Member's concerns regarding the Reports that had been issued by former members of the Appellate Body. Indonesia believed that the DSB had been entrusted to resolve trade disputes between Members. It had also been widely believed to be the essential element to sustain the centrality of the WTO. However, Indonesia also believed that the present situation would put the DSB’s work into jeopardy and should be addressed in a serious manner. With regard to the selection processes, Indonesia was of the view that any systemic concern raised by a certain Member should not be linked to the decision to start the selection process to fill the vacancies on the Appellate Body which, according to Article 17 of the DSU, had to be filled as they arose. Hence, the selection process should be launched immediately in order to keep the DSB’s work moving forward.

7.19. The representative of the Philippines said that her country commended the European Union and the group of Latin American countries for their flexibility to make a joint proposal contained in WT/DSB/W/609. The Philippines noted that some other Members had co-sponsored this proposal. The Philippines placed great importance on the WTO's dispute settlement system, including the Appellate Body, which played a crucial role in providing security and predictability to the rules-based multilateral trading system. In this regard, the Philippines highlighted its systemic concerns about the lengthy delays in launching the Appellate Body selection process. There were

currently two vacancies on the Appellate Body, and a third vacancy would arise on 11 December 2017. The effective functioning of the dispute settlement system was hinged on the Appellate Body, which was meant to have a full complement of seven members to hear appeals from panel cases. To this end, the vacancies had to be filled expeditiously. The Philippines hoped that a consensus could be reached for a DSB decision to launch the Appellate Body selection process as soon as possible. The Philippines stood ready to engage constructively with other Members in order to resolve this deadlock.

7.20. The representative of China said that his country welcomed the current proposal that had been co-sponsored by Latin American Members, the EU and many other Members. With more than 50 Members co-sponsoring this proposal, and many previous speakers, China supported launching the Appellate Body selection processes without further delay. China had taken note of the so called "systemic concerns" of the United States with respect to Rule 15 of the Working Procedures for Appellate Review. While the issue could have been discussed separately, linking this issue with launching the selection processes would only undermine the proper functioning of the dispute settlement system and the credibility of the multilateral trading system, especially at a time of the increased DSB workload. China shared the concerns of previous speakers and urged the United States, once again, to demonstrate flexibility and fulfil its commitment to the multilateral trading system.

7.21. The representative of the Bolivarian Republic of Venezuela said that his country thanked the proponents for the proposal contained in WT/DSB/W/609. Venezuela supported the statement made by Chile on behalf of the GRULAC countries and reiterated its serious concern over the lengthy delay in starting the selection process for the remaining vacancies on the Appellate Body. In this regard, it considered that it was a priority for the Organization to begin the selection processes set out in the proposal without delay, in an independent fashion, and without a linkage to other matters under the DSB. Venezuela called upon Members to demonstrate the necessary flexibility to enable the DSB to overcome these difficulties.

7.22. The representative of Hong Kong, China said that her delegation thanked the Chairman for his update on this matter. Hong Kong, China was one of the co-sponsors of the proposal on the Appellate Body member selection process that had been introduced by Mexico. It associated itself with the statement made by Mexico on behalf of the group of co-sponsors. As it had repeatedly expressed at previous DSB meetings, Hong Kong, China was deeply concerned about the prolonged impasse in the launching of the Appellate Body selection process which would severely affect the proper functioning of the WTO dispute settlement system. It urged Members to exercise their flexibility and ensure that the Appellate Body selection process would be launched as soon as possible. On the other hand, Hong Kong, China was open to discussions with all Members on any proposals to address systemic concerns and further improve the operation of the WTO separately.

7.23. The representative of Guatemala said that his country thanked Mexico for its statement on behalf of the co-sponsors of the proposal contained in WT/DSB/W/609. Guatemala also thanked Chile for its statement made on behalf of the GRULAC countries. Guatemala reiterated its concern about the present situation and its willingness to work constructively to seek a solution that would be acceptable to all Members.

7.24. The representative of Uruguay said that her country was a co-sponsor of the proposal contained in WT/DSB/W/609. In this regard, Uruguay regretted the lack of consensus to move forward with this proposal and reiterated its concern with the lengthy delay in the launching of the Appellate Body selection process. Uruguay supported the statement made by Chile on behalf of the GRULAC countries.

7.25. The representative of Japan said that his country thanked the Chairman for his statement. Japan also thanked the proponents for their proposal regarding the Appellate Body selection processes. Japan could support this proposal. It was extremely unfortunate that the DSB was not in a position to launch the selection processes at the present meeting. This was so especially because appointing a member of the Appellate Body was an important function entrusted to the DSB under the DSU. Japan turned to the so-called "Rule 15 issue" that had been raised by the United States. This issue involved the institutional question as to which WTO body was responsible for ensuring the legal status of a person serving on the Appellate Body during a transition. This was an important question, which had to be addressed by the DSB as the sole WTO body established to administer the DSU. In considering this question, WTO Members could also examine

how best the transitional rule should operate under the current circumstances facing the dispute settlement system. More generally, it was the responsibility of the DSB to ensure the proper functioning of the dispute settlement system, including the Appellate Body in transition, in a manner consistent with the DSU. All Members had to exercise flexibility and act in a constructive manner so that the DSB could properly discharge its responsibility.

7.26. The representative of Nigeria, speaking on behalf of the African Group, said that the DSU provided a fair system in which every Member could bring a complaint and obtain a ruling on the compatibility of a measure or practice with the WTO agreements. The DSB was intended to provide every Member equal opportunity before the law, thereby leading to fairer and more equitable opportunities in the system, where Members might influence the results. In this context Nigeria was concerned with the impasse in the Appellate Body selection processes. Nigeria was aware of the efforts by the DSB Chairman, the initiatives of Members and the consultations that had been ongoing in order to resolve this dispute. Nigeria therefore asked the Chairman to continue with his efforts to resolve the matter and expressed its willingness to engage in a constructive manner towards resolving this issue.

7.27. The representative of Honduras said that her country supported the statement made by Mexico on behalf of the co-sponsors and by Chile on behalf of the GRULAC countries. Honduras thanked the Chairman for his efforts in trying to resolve this matter. It regretted and was deeply concerned about the lengthy delays in launching the selection process. The dispute settlement mechanism was one of the most important aspects of the WTO and Honduras was an active user of the system and had systemic concerns. The situation represented a serious stalemate in the work of the DSB and the dispute settlement mechanism generally. The selection process was of great importance and the impasse was compromising the entire multilateral trading system. In this regard, Honduras urged Members to exercise flexibility and will to try to find a way out of the impasse as quickly as possible. This was in the interest of all Members.

7.28. The representative of Costa Rica said that his country thanked the Chairman for his update on the consultations. Costa Rica also thanked all of those Members that had, once again, expressed their concern with the current situation. Costa Rica especially thanked Chile for the statement it had made on behalf of the GRULAC countries and Mexico for the statement made on behalf of the co-sponsors of document WT/DSB/W/609. Costa Rica was also a co-sponsor of WT/DSB/W/609. As Mexico had stated in the joint statement, it was the responsibility of all Members to ensure the appropriate functioning of the Appellate Body. Article 17.2 of the DSU stated that vacancies had to be filled as they arose. As it had already stated in the past, Costa Rica was ready to find a solution to this impasse with the United States and to hear any other proposals which could help the DSB to improve its functioning. This should not in any way delay the launch of the selection process to fill the vacant posts on the Appellate Body. The selection process should be started as soon as possible and without delay as was set out in the draft decision co-sponsored by more than 50 Members.

7.29. The representative of Turkey said that, being a co-sponsor of the proposal contained in document WT/DSB/W/609, his country associated itself with the statement made by Mexico on behalf of the proponents. Turkey referred to its statements delivered at the DSB meetings on 29 September 2017 and 23 October 2017 and reiterated its belief that the concerns raised about the Working Procedures for Appellate Review should be dealt with separately, and should not block the immediate start of the selection process for the three positions on the Appellate Body. Turkey saw that the more the launch of the selection process was delayed, the more the systemic and workload concerns about the Appellate Body and the overall system increased. Therefore, the Membership should launch the selection process immediately, without further delay.

7.30. The representative of the European Union said that his delegation had noted the concerns expressed by the United States. The EU understood that, in fact, the "United States would welcome Mr. Ramírez's continued service on the appeals to which he was assigned prior to June 30". The EU agreed on this latter point, and it too welcomed the continued service of Mr. Ramírez. Aside from ensuring a proper transition, the continued service of Mr. Ramírez on all appeals assigned to him prior to 30 June 2017 was especially important in the current circumstances where the Appellate Body was incomplete and where it was clear that the next appointments would not take effect for at least some time. The same considerations applied with respect of Mr. Van den Bossche. With regard to the systemic concerns relating to Rule 15 of the Working Procedures for Appellate Review, the EU noted that Rule 15 had been in the Working

Procedures since 1996 and had since then been applied systematically by the Appellate Body in many appeals, without this being contested. The EU believed that Rule 15 was legitimate – it contributed to a smooth transition and to a prompt resolution of disputes. In fact, similar rules existed in other international jurisdictions. Moreover, the EU saw no link between the issue of Rule 15 and the issue of appointments. The discussion on Rule 15 could very well take place without delaying the decision on appointments any further. The EU saw no rationale in blocking the launch of the mere selection process. It took note of the position that had been repeatedly taken by the United States, that, in its view: "Members need to discuss and resolve that issue first before moving on to the issue of replacing such a person". Given the urgency and gravity of the matter, and the responsibility to ensure the proper operation of the dispute settlement system, the EU was ready to engage in such discussions, with a view to unblocking the issue of appointments. In these discussions, the EU would be guided, as always, by the concern to preserve the independence of the Appellate Body that was central to the proper functioning of the multilateral rules based system. But it also believed that – if the concerns on Rule 15 were guided by a legitimate desire to improve the proper administration of transition and if WTO Members engaged in such discussions in good faith – an appropriate solution could be reached. Finally, while WTO Members were working on a solution with a view to unblocking the appointments, the EU wished to once again express its thanks to the Appellate Body and its staff for their continued work in this difficult context. It wanted to send a strong message that the Appellate Body should continue its important work and operate unaffected by discussions amongst Members on Rule 15 of the Working Procedures for Appellate Review.

7.31. The representative of Mexico, speaking on behalf of the 52 co-sponsors of the proposal, said that his country regretted that, for the seventh time, the Members had not achieved consensus to start the selection processes and had not been able to fulfil their duty as Members of the WTO. As had been reiterated, Article 17.2 of the DSU contained an obligation for all Members stating that "[v]acancies shall be filled as they arise". It was therefore the duty of Members to fill all the vacancies on the Appellate Body. In fact, this should have already been done as a routine action by the DSB. The Appellate Body should continue to operate fully and be in a position to comply with its obligations under the WTO Agreements. By failing to act at the present meeting, the DSB would maintain the current situation, which was seriously affecting the work of the Appellate Body, to the detriment of the WTO and against the best interests of its Members.

7.32. The Chairman regretted that the DSB was not able to agree, at the present meeting, on a way forward regarding these matters. On his part, he would continue to consult further with Members and, at the same time, he called upon delegations to have more conversations and discussions on the Appellate Body matters among themselves. He was fully aware that, without political will, Members would not be able to achieve any solution to these matters. He believed, however, that conversations among Members at different levels would help build the necessary confidence and would enable delegations to come up with concrete ideas in order to address these matters. In this regard, and as he had mentioned in his statement at the beginning of this Agenda item, the Chairman understood that informal and exploratory technical discussions were taking place on voluntary basis. Between the present meeting and the next regular meeting in January, he would try to reach out to different delegations to hear their views and ideas on the Appellate Body matters. He also invited delegations to share their thoughts with him in order to see how they wished to approach these issues. Based on those contacts with delegations, he would report back to the DSB at its regular meeting to be held on 22 January 2018.

7.33. The DSB took note of the statements.

8 DISPUTE SETTLEMENT WORKLOAD

A Statement by the Chairman

8.1. The Chairman, speaking under "Other Business", said that, as he had announced at the beginning of the meeting, he would now like to make a report to provide the DSB with information about the number of disputes before panels and at the panel composition stage, the Appellate Body's workload and the ability of the Secretariat to meet expected demand over the coming period. This information reflected the status of disputes up until this DSB meeting on 22 November 2017. Other developments in the course of this meeting would be reflected in the information posted on the Members' website. Currently, there were 16 active panels (including four panels under Article 21.5 of the DSU) that had not yet issued a final report to the parties.

Multiple disputes being considered simultaneously by the same panel were being counted as one. As of the present meeting, all composed panels had been assigned staff to assist them and were active or in the process of commencing proceedings. There were a further four panels at the composition stage. This did not count panels for which there had been no composition activity in the last twelve months. In addition, five final panel reports that had been issued to the parties were currently being translated. The Appellate Body was currently dealing with six appeals, including the extremely complex compliance proceedings in "EC and Certain Member States – Large Civil Aircraft (Airbus)" and in "US – Large Civil Aircraft (Boeing)". All submissions had been filed by the participants and third participants in all six of these appeals. Divisions hearing these appeals had been composed and had started their work. However, two of these appeals could not yet be fully staffed at this point. Up to three additional appeals could be filed by the end of the year. Finally, two matters had been referred to arbitration under Article 22.6 of the DSU and one had been referred to arbitration under Article 21.3(c) of the DSU.

8.2. The DSB took note of the statement.