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Dispute Settlement Body
27 August 2018

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 27 AUGUST 2018

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in "Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging" (DS441) was removed from the proposed Agenda following the Dominican Republic's decision to appeal the Report. Also, the item concerning the adoption of the Panel Report in the dispute: "United States – Countervailing Measures on Supercalendered Paper from Canada" (DS505) was removed from the proposed Agenda following the decision by the United States to appeal the Panel Report. Similarly, the item concerning the adoption of the Panel Report in the dispute: "Ukraine – Anti-Dumping Measures on Ammonium Nitrate" (DS493) was removed from the proposed Agenda following the decision by Ukraine to appeal the Panel Report. Finally, the item concerning the adoption of the Panel Report in the dispute: "Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof" (DS499) was removed from the proposed Agenda following the decision by Ukraine to appeal the Panel Report.

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1.1. The Chairperson noted that there were six sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. She recalled that Article 21.6 required that: "[u]nless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". Under this Agenda item, she invited delegations to provide up-to-date information about their compliance efforts. She also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "[r]epresentatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record".

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.186)

1.2. The Chairperson drew attention to document WT/DS184/15/Add.186, 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 16 August 2018, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for the latest status report and the statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings 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.161)

1.6. The Chairperson drew attention to document WT/DS160/24/Add.161, 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 16 August 2018, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

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

1.9. The representative of China said that the United States had submitted the 162nd status report in this dispute, and this report was not substantively different from the status reports presented by the United States at previous DSB meetings, including the first status report, which had been submitted in November 2004. The United States had not provided any further implementation updates at the present meeting. China was curious about the reasons for the US failure to implement the DSB's rulings and recommendations for more than ten years. As result of US non-compliance, Section 110(5) of the US Copyright Act, which the Panel had found to be inconsistent with the requirements of the Berne Convention and the TRIPS Agreement, was still in effect. The United States had failed to provide intellectual property right holders the minimum standards of protection as required by the TRIPS Agreement. The United States remained the only WTO Member who failed to implement the DSB's recommendations and rulings under the TRIPS Agreement, this long after the expiry of the reasonable period of time. Article II:2 of the Marrakesh Agreement Establishing the WTO provided that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 are binding on all Members". China, thus, urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute. China, once again, suggested that the United States could include, in its next status report, the specific reasons for its failure to implement the DSB's recommendations and rulings, for this long.

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

1.11. The representative of China said that the United States intervened again to shift Members' focus away from this Agenda item. The matter at issue under this Agenda item was whether the United States had implemented the DSB's recommendation and rulings in this dispute. The answer was negative. China, thus, continued to urge the United States to comply with the DSB's rulings.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.124)

1.13. The Chairperson drew attention to document WT/DS291/37/Add.124, which contained the status report by the European Union on progress in the implementation of the DSB's

recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.14. The representative of the European Union said that, on 3 August 2018, the European Commission had adopted five authorizations for genetically modified organisms for food and feed use, namely: two new genetically modified maize (corn)[1], the renewal of two genetically modified maize (corn)[2] and one genetically modified sugar beet[3]. The EU continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. The EU remained committed to act in line with its WTO obligations. As had been stated previously, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings.

1.15. The representative of the United States said that the United States thanked the European Union for its status report and its statement at the present meeting. The United States remained concerned with the EU's measures affecting the approval of biotech products. Delays in approvals continued to affect the dozens of applications that had been awaiting approval. Further, even when the EU finally approved a biotech product, EU member States continued to impose bans on the supposedly approved product. As the United States had discussed at prior meetings, the EU had adopted legislation that permitted EU member States to "opt out" of certain approvals, even where the European Food Safety Authority (EFSA) had concluded that the product was safe. At least 17 member States, as well as certain regions within EU member States, had submitted requests to opt out of EU approvals. The United States again urged the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were based on scientific principles, and that decisions were taken without undue delay.

1.16. The representative of the European Union said that concerning the US statement, his delegation wished to inform the DSB that no EU member State had imposed any ban. Moreover, the opt-out directive, as the United States had just called it, provided that an EU member State could adopt measures prohibiting or restricting cultivation only if such measures were in line with EU law, and if they were reasoned, proportional, non-discriminatory and based on compelling grounds. The EU also reminded the DSB that the opt-out directive was not covered by the DSB's recommendations and rulings.

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

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.8)

1.18. The Chairperson drew attention to document WT/DS464/17/Add.8, 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.

1.19. The representative of the United States said that the United States had provided a status report in this dispute on 16 August 2018, in accordance with Article 21.6 of the DSU. On 15 December 2017, the United States Trade Representative had requested that the US Department of Commerce make a determination under Section 129 of the Uruguay Round Agreements Act to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On 18 December 2017, the Department of Commerce had initiated a proceeding to make such determination. Following initiation, Commerce had issued initial and supplemental questionnaires seeking additional information. On 4 April 2018, Commerce had issued a preliminary determination revising certain aspects of its original determination. Following issuance of the preliminary determination, Commerce had provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination and rebuttal comments. Commerce had reviewed those comments and rebuttal comments and had taken them into account for purposes of preparing the final determination. On 4 June 2018, Commerce had issued a final determination, in which Commerce had revised certain aspects of its original

[1] MON 87427xMON89034xNK603 and 1507x59122xMON810xNK603.
[2] DAS-59122-7 and GA21.
[3] H7-1.

determination. Specifically, Commerce had revised the analysis underlying the CVD determination, as it pertained to certain tax credit programs, in accordance with findings adopted by the DSB. The United States continued to consult with interested parties on options to address the recommendations of the DSB relating to anti-dumping measures challenged in this dispute.

1.20. The representative of Korea said that his country thanked the United States for its status reports and statement made at the present meeting. Korea noted that although the United States had informed the DSB that the US Department of Commerce had issued a final determination to address the DSB's recommendations and rulings, Korea questioned whether the results of the final determination properly reflected the DSB's recommendations and rulings. At the same time, Korea wished to reiterate its serious concern about the lack of implementation efforts regarding the anti-dumping measures at issue, more than 23 months after the adoption of the Panel and Appellate Body Reports in this dispute. In this regard, Korea, once again, urged the United States to faithfully implement the DSB's recommendations and rulings in this dispute to fully comply with its obligations under the covered agreements.

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

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

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

E. European Union – Anti-dumping measures on biodiesel from Indonesia: Status report by the European Union (WT/DS480/8)

1.24. The Chairperson drew attention to document WT/DS480/8, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning anti-dumping measures on biodiesel from Indonesia.

1.25. The representative of the European Union said that his delegation wished to remind the DSB that the reasonable period of time within which the EU had to bring its measures into compliance with the DSB's recommendations and rulings would expire on 28 October 2018. The EU intended to comply with the DSB's recommendations and rulings in this dispute within the agreed reasonable period of time, i.e., no later than 28 October 2018. On 28 May 2018, the European Commission had reopened the anti-dumping investigation in this case by publishing a Notice in the Official Journal of the EU (OJ C 181, 28 May 2018, page 5). On 24 July 2018, the European Commission had disclosed the findings of this investigation to interested parties who had been given the opportunity to provide their comments. The relevant procedures based on the said Notice were ongoing and were expected to be finalized in the near future, and in any event before the expiry of the reasonable period of time.

1.26. The representative of Indonesia said that her country took note of the EU status report in this dispute. Indonesia would further discuss this matter with the EU.

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

F. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17)

1.28. The Chairperson drew attention to document WT/DS471/17, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning certain methodologies and their application to anti-dumping proceedings involving China.

1.29. The representative of the United States said that the United States had provided a status report in this dispute on 16 August 2018, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the recommendations of the DSB.

1.30. The representative of China said that his country thanked the United States for its status report and the statement made at the present meeting. China was, however, very disappointed with the status report and was deeply concerned that no apparent measure had been taken by the United States to implement the recommendations and rulings of the DSB in this dispute. Pursuant to the award of the DSU Article 21.3(c) arbitration, the reasonable period of time for implementing the DSB's recommendations and rulings had already expired on 22 August 2018. China recalled that in the DSU Article 21.3(c) proceedings, the United States had indicated its intention to undertake Section 123 and Section 129 proceedings to address the DSB's recommendations and rulings. Nevertheless, the status report submitted by the United States had indicated that neither Section 123, nor Section 129 proceedings had been officially initiated, and no concrete measure or action, other than "consulting with the interested parties", had been taken to address the DSB's recommendations and rulings. China emphasized that the DSB had adopted the recommendations and rulings in this dispute on 22 May 2017, and more than 15 months had passed since then. The United States was, however, still in the process of "consulting with interested parties on options to address the recommendations of the DSB", thus, no substantive effort and progress had been made by the United States to fulfil its implementation obligation. China, once again, urged the United States to faithfully implement the DSB's recommendations and rulings in this dispute to fully comply with its obligations under the covered agreements. China reserved its right to take further action in accordance with the WTO rules.

1.31. The representative of the United States said that the United States took note of China's statement and would convey it to capital. The United States was willing to discuss this matter with China on a bilateral basis. To be clear, however, it was incorrect to suggest that the United States had taken no action. As the United States had reported to the DSB, the United States continued to consult with interested parties on options to address the recommendations of the DSB. That internal process was ongoing.

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

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

A. Statement by the European Union

2.1. The Chairperson said that this item was on the Agenda of the present meeting at the request of the European Union, and invited the representative of the EU to speak.

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

2.3. The representative of Brazil said that her country thanked the EU for keeping this item on the Agenda of the DSB. As an original party to the Byrd Amendment dispute, Brazil referred to its previous statements made on this matter. Specifically, concerning the continuation of illegal

disbursements, which despite allegations to the contrary, continued to this day ten years after the repeal act; these should cease immediately. Brazil thus renewed its call on the United States to fully comply with the DSB's recommendations and rulings in this dispute. Until then, the United States was under the obligation to submit status report.

2.4. The representative of Chile said that his country thanked the EU for the statement made under this Agenda item, which it supported.

2.5. The representative of Canada said that her country thanked the EU for keeping this item on the Agenda of the DSB. Canada agreed with the EU that the Byrd Amendment remained subject to the surveillance of the DSB until the United States ceased to administer it.

2.6. The representative of the United States said that as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 10 years ago. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB recommendations and rulings, regardless of whether the complaining party disagreed about compliance. And as the United States had noted many times previously, the EU had demonstrated repeatedly it shared this understanding, at least when it was the responding party in a dispute.

2.7. Once again, this month the EU had provided no status report for disputes in which there was a disagreement between the parties on the EU's compliance. Once again, the EU had not submitted a status report this month in the "EU – Large Civil Aircraft" dispute (DS316), despite the fact that the DSB had recently adopted two further reports finding that the EU had not complied. The United States failed to see how the EU's behaviour was consistent with the alleged systemic view it had been espousing under this item for more than 10 years. As the EU was aware, the United States had announced in this dispute that it had implemented the DSB's recommendations and rulings. If the EU disagreed, there would simply appear to be a disagreement between the parties to the dispute about the situation of compliance. The United States took note of Canada's support for the EU's decision to place this item on the DSB Agenda this month. In light of Canada's position, the United States would expect Canada to object to the failure by a responding Member to place on the DSB Agenda any dispute where Canada considered that Member not to be in compliance. This situation could include "China – Cellulose Pulp" (DS483). Based on Canada's statement under this item, the United States observed that a decision by Canada not to place its dispute with China on the DSB Agenda, or object to that failure, could be understood as agreement with a WTO Member's claim of compliance. The United States asked if it should understand that to be the implication of Canada's statement at the present meeting.

2.8. The representative of the European Union said that the United States had just stated that the EU had failed to provide status reports on one or more disputes. The EU disagreed with that statement. The EU had provided status reports for all cases, in which it was involved. For the present meeting of the DSB, these were: the GMO case and the Biodiesel from Indonesia case. With regard to the US statement referring to the Airbus case, the EU would provide a more detailed response under the relevant Agenda item.

2.9. The representative of Canada said that her country, like the EU, disagreed with the US claim of compliance in this dispute. Therefore, Canada supported the EU's decision to raise the issue of implementation so that the it remained subject to the DSB's surveillance. The United States had taken the same course of action in disputes where it was the complaining party and it disagreed with the responding party's claim of compliance. For example, DS413 had been placed on the Agenda for many meetings because the United States had disagreed with the responding party's claim of compliance. Finally, Canada noted that its statement made no reference to the subject of status reports.

2.10. The representative of the United States said that the United States appreciated Canada's clarification that it was not making a suggestion with regard to providing status reports. A Member was certainly free to place an item on the agenda of the DSB, but the question was whether a Member was required to provide a status report in a dispute once it had claimed compliance, and the United States had made clear it was not.

2.11. The representative of Brazil said that his country was fortunately not mentioned by the United States in its rebuttal statement, but perhaps to go one step beyond the procedural discussion that Members were having, which was important, whether Members were or were not obliged to present a status report once they had claimed compliance. The motive by the original complainants for continuing to place the item on the Agenda, and this was a substantive issue, was that 10 years after the Repeal Act, as the United States had just mentioned, the United States continued to make disbursements to the petitioners of the anti-dumping countervailing investigations. This was the issue and it would be too easy if a country could simply claim, "I complied", while the core of the dispute still remained in the form of continuous and monthly disbursements in the millions of dollars. This was a reason to keep the item on the Agenda.

2.12. The DSB took note of the statements.

3 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. Statement by the United States

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

3.2. The representative of the United States said that at the two prior DSB meetings, the United States had noted that the European Union had not provided a status report concerning the dispute "EU – Large Civil Aircraft" (DS316). The EU had failed to provide such a report despite the recent adoption by the DSB of panel and appellate reports finding that the EU had failed to comply with the DSB's recommendations to bring its subsidies for Airbus into compliance with WTO rules. Members would recall that for many years, and again this month, the EU had taken the position that, under DSU Article 21.6, a responding party Member was required to provide a status report whenever a complaining party Member disagreed with the responding party's claim that it had complied. And yet, in this dispute (DS316), the United States disagreed with the EU's most recent claim that it had complied. The United States had therefore requested the WTO arbitrator to resume its work to determine the level of countermeasures in this dispute.[4]

3.3. Given the disagreement on compliance between the parties, the EU should, to be consistent with the view it had taken when it was a complaining party, now be providing status reports. Instead, now that the EU was a responding party, the EU was choosing to contradict the reading of DSU Article 21.6 it had long promoted. The EU's purported rationale was that it need not provide a status report because it was pursuing a second compliance panel under DSU Article 21.5. But as the United States had explained at past DBS meetings, there was nothing in DSU Article 21.6 to support this position. In short, the conduct of every Member when acting as a responding party, including the EU, showed that WTO Members understood that a responding party had no obligation under DSU Article 21.6 to continue supplying status reports once that Member announced that it had implemented the DSB's recommendations. As the EU allegedly disagreed with this position, it should welcome the opportunity the United States was affording it to update the DSB on the status of its lengthy implementation efforts.

3.4. The representative of the European Union said that as his delegation had indicated in previous meetings, there was a difference between the Airbus case and the Byrd Amendment case. In the Byrd Amendment case, the dispute had been adjudicated and there were no further compliance proceedings pending. Under Article 21.6 of the DSU, the issue of implementation should remain on the DSB's Agenda until the issue was resolved. In the Byrd Amendment case, the EU could not agree with the US' assertion that it had implemented the DSB's recommendations and rulings. Therefore,

[4] See WT/DS316/37.

the issue remained unresolved for the purposes of Article 21.6 of the DSU. As to the Airbus case, when the Appellate Body Report on compliance had been issued, the EU had notified to the WTO a new set of measures in a compliance communication, tabled at the DSB meeting of 28 May 2018.

3.5. With respect to the measures included in that communication, the United States had expressed a view that the EU had not yet fully complied with the DSB's recommendations and rulings. In response, the EU had requested, on 29 May 2018, consultations with the United States under Articles 4 and 21.5 of the DSU. These consultations had failed to resolve the disagreement, the EU was thus requesting the establishment of a compliance panel. Therefore, compliance proceedings in this dispute were still ongoing.

3.6. The DSB took note of the statements.

4 STATEMENT BY THE UNITED STATES CONCERNING ARTICLE 17.6 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES AND APPELLATE REVIEW OF PANEL FINDINGS OF FACT, INCLUDING DOMESTIC LAW

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

4.2. The representative of the United States said that the United States had requested this Agenda item to draw Members' attention to an important systemic issue with significant implications for the operation of the dispute settlement system: Article 17.6 of the DSU and appellate review of panel findings of fact, including domestic (or municipal) law. The DSU reflected Members' agreement on the functions assigned to panels and the Appellate Body. In DSU Article 11, WTO Members had agreed that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". In other words, "the matter" in a dispute consisted of the facts and the legal claims, and WTO panels were to make factual and legal findings. In Article 17.6 of the DSU, Members had agreed that the Appellate Body would have a significantly more limited role than panels. The DSU explicitly provided that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". Yet, despite this clear, unambiguous text of Article 17.6, the Appellate Body had consistently reviewed and even reversed panel fact-finding. It had done so under different legal standards that it had had to invent, and it had reached conclusions that were not based on panel factual findings or undisputed facts. Through this statement at the present meeting, the United States would discuss two particular issues of concern relating to the Appellate Body's review of panel findings of fact. First, the United States would review the relevant provisions of the DSU to explain the Appellate Body's lack of authority to review a panel's findings of facts. The invention of an authority to review panel fact-finding, contrary to the DSU, had added complexity, duplication, and delay to every WTO dispute. Second, the United States would explain that the Appellate Body had compounded the error by asserting that it could review panel findings concerning the meaning of a Member's municipal law, which was the key fact to be demonstrated in any dispute.

4.3. First, appellate review of facts was contrary to the Appellate Body's limited authority under the DSU. The concerns involving appellate review of municipal law were just one symptom of a broader departure by the Appellate Body from the terms agreed by Members in the DSU. The fundamental issue was that the DSU explicitly limited the scope of an appeal, and there was no basis in the DSU for the Appellate Body to review a panel's findings of facts. Members had agreed in the DSU to expressly limit the authority of the Appellate Body to legal findings by a panel, not factual ones. Indeed, it was difficult to see how Article 17.6 of the DSU could be any clearer: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". In fact, in an early report, the Appellate Body had conceded as much. It had stated that: "Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body".[5] However, the Appellate Body at the same time had

[5] "EC – Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS27/AB/R, para. 132.

asserted that there was a "standard of review" applicable for panels in respect of "the ascertainment of facts" under the relevant covered agreements.[6]

4.4. The Appellate Body's approach had skipped over the key threshold question: how, in light of the limitation of appeals in Article 17.6 of the DSU to "issues of law and legal interpretations" had the Appellate Body been authorized to "review" a panel's "ascertainment of facts"? This question needed to be addressed and resolved before moving on to determine what would be the "standard" for any such review. But the Appellate Body had not engaged on this threshold question. It had not explained the basis for its assumption that it could review a panel's findings of fact when the DSU expressly limited the Appellate Body's review to "issues of law and legal interpretations".[7] Then, even aside from the lack of any basis for the Appellate Body to review a panel's factual findings, there was a real question about what the Appellate Body considered to be the "standard of review" for a panel's factual findings. Not surprisingly, there was no provision in the DSU that referred to a "standard of review" for a panel's factual findings, since the DSU did not provide for the Appellate Body to conduct any such review.

4.5. Faced with this lack of any agreed "standard of review," the Appellate Body had asserted that Article 11 of the DSU provided such a standard. In so doing, however, the Appellate Body had again ignored the text of the DSU and had simply asserted that the DSU text had said something different from what Members had agreed. The language in Article 11 of the DSU that the Appellate Body had relied upon is: "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case". Key to this text was the word "should". Members were all familiar with the difference between "should" and "shall" and chose carefully whether to use "should" or "shall" in particular parts of the agreements they negotiated. In fact, Members had been known to spend weeks or even longer negotiating over exactly this point – whether to use "should" or "shall". And in the DSU, Members had chosen to use "should" in 21 instances, and to use the word "shall" in 259 instances. Yet, in describing the text of Article 11, the Appellate Body had not engaged on this important textual issue. Instead, the Appellate Body had simply referred to this "should make" language as a "mandate" and a "requirement" for panels. To the contrary, the decision of WTO Members to use the term "should" indicated that Members had not intended to create a legal obligation subject to review, a conclusion that was directly reinforced by the limitation on appeals to issues of law in Article 17.6. From its assertion that "should make" set out a "mandate" and a "requirement", the Appellate Body had proceeded to state: "Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review".[8] Over a year later, the Appellate Body had confirmed that it had failed to engage in a textual analysis of "should" in Article 11, when it had stated simply that: "The word 'should' has, for instance, previously been interpreted by us as expressing a 'duty' of panels in the context of Article 11 of the DSU".[9] But there had been no interpretation in the "EC – Hormones" report on the term "should make" or how it could be understood as expressing a "duty", or legal obligation.[10] The Appellate Body had not explained how asserting that, contrary to the plain text, the language in Article 11 was a "requirement" could transform this "requirement" into a "standard of review".

4.6. The Appellate Body had correctly explained just prior to this erroneous statement that: "The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question". The United States agreed. But it did not follow that a panel's assessment of the facts became a "legal question" just because a party to the dispute had disagreed with it. It would still be an issue of "facts" and "factual findings" and would not become an "issue of law or legal interpretation". The Appellate Body's decision to

[6] "EC – Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS27/AB/R, para. 116.

[7] "EC – Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS27/AB/R, para. 61 (Canada: claims relating to the panel's alleged failure to make an objective assessment of the facts were, in reality, claims alleging errors of fact and "factual findings are, pursuant to Article 17.6 of the DSU, beyond review by the Appellate Body"); id., para. 44 (United States: party "improperly requests" appellate review of panel fact-finding because "according to Article 17.6 of the DSU, factual findings are clearly beyond review by the Appellate Body").

[8] "EC – Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS27/AB/R, para. 132.

[9] "Canada – Measures Affecting the Export of Civilian Aircraft", WT/DS70/AB/R, para. 187.

[10] See "EC – Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS27/AB/R, paras. 131-133 (no interpretation of the term "should" or the phrase "should make").

undertake a review of panels' findings of fact therefore had no basis in the DSU. And the decision to review panel fact finding had had a number of adverse effects on the dispute settlement system. For instance, the Appellate Body had itself repeatedly complained about the increased workload due to appeals under Article 11 of the DSU.[11] The Appellate Body had complained that the number of Article 11 appeals had increased over time, and that Article 11 appeals had in turn increased the complexity of appeals, the length of submissions, and the need for the Appellate Body to devote time and resources to become familiar with the basis for a panel's factual findings.

4.7. The opportunity for Article 11 appeals of the facts had also meant that a party to a dispute may try to re-litigate the entire case it had presented to the panel. That is, it may challenge all the panel findings, or at least the key findings, under DSU Article 11, and then all the panel legal interpretations and legal conclusions under the relevant provisions of the covered agreements. These developments in turn were then cited as reasons explaining the difficulties of the Appellate Body to meet the 90-day deadline mandated under Article 17.5 of the DSU. But these difficulties were, as the United States had explained, significantly of the Appellate Body's own creation, and another source of serious concern with the functioning of the Appellate Body. Appellate Body review of facts also undermined the value of the interim review of panel reports and could make the panel process significantly less efficient. A party may consider that the availability of Appellate Body review of the facts meant that the party should refrain from providing corrections or clarifications of the factual section of a panel's interim report. The party could consider that it was better off reserving its criticisms of a panel's factual findings for an appeal since that could result in reversing the ultimate findings of the panel. This meant that a panel did not benefit from the party's comments, and the panel's final report did not present factual findings of as high quality as it otherwise could. The Appellate Body's approach to the standard of review under Article 11 had also been inconsistent. Initially, the Appellate Body had set a very high threshold and had explained that for an Article 11 appeal to succeed, the party needed to demonstrate that the panel had committed "egregious error that calls into question the good faith of the panel".[12] However, over time, the Appellate Body had altered its approach. For instance, more recently the Appellate Body had explained that "for a claim under Article 11 to succeed, we must be satisfied that the panel has exceeded its authority as the trier of facts". The Appellate Body had gone on to explain this meant that "a panel must provide a 'reasoned and adequate' explanation for its findings and coherent reasoning. It has to base its findings on a sufficient evidentiary basis on the record, may not apply a double standard of proof, and a panel's treatment of the evidence must not lack 'even-handedness'".[13] This would appear to be a much lower threshold that was significantly different from an "egregious error that calls into question the good faith of the panel". The shifting nature of the Appellate Body's approach under Article 11 would appear to be a result of the fact that Members had never agreed that the Appellate Body would review a panel's factual findings and therefore Members had never negotiated the basis or standard for such a review. Instead, the Appellate Body had struggled to formulate its own approach, without the benefit of guidance from Members.

4.8. Second, the meaning of a Member's municipal law was an issue of fact. Following its assertion that it had the authority to review and even reverse panel findings of fact, the Appellate Body had also asserted that it had the authority to review panel findings on the meaning of a WTO Member's challenged domestic law. This was another serious error. First, the United States would explain that the meaning of domestic law was an issue of fact while the issue of law in a WTO dispute was whether that fact was consistent or not with WTO obligations. Second, the United States would explain how the Appellate Body's justification for its review on appeal of a Member's domestic law had no basis in the DSU and was logically flawed. In the WTO system, as in any international law dispute settlement system, the meaning of municipal law was an issue of fact. In a WTO dispute, the interpretation of the WTO Agreement or relevant covered agreements was the issue of law for the WTO dispute settlement system. The relevant provisions of the DSU reflected this straightforward division between issues of fact and law. As Members knew, DSU Article 6.2 required a complaining party to set out "the matter" in its panel request comprised of "the specific measures at issue" – that is, the core issue of fact – and to "provide a brief summary of the legal basis of the complaint" – that is, the issue of law. DSU Article 11 similarly distinguished between the panel's "objective assessment of the facts of the case" and its assessment of "the applicability of and

[11] See, e.g., Appellate Body Report for 2013 (WT/AB/20), pp. 36 and 38, reproducing the 30 May 2018, communication from the Appellate Body to the DSB concerning the Workload of the Appellate Body.

[12] "EC – Measures Concerning Meat and Meat Products (Hormones)", WT/DS26/AB/R, WT/DS27/AB/R, para. 133.

[13] "European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft", WT/DS316/AB/R, para. 881.

conformity with the covered agreements" – that is, the issue of law. And DSU Article 12.7 made the same distinction in relation to the findings of fact and law in a panel's report. Thus, the DSU made clear that the measure at issue was the core fact to be established by a complaining party, and the WTO consistency of that measure was the issue of law.

4.9. This proposition – that municipal law was an issue of fact – was not unique to the WTO dispute settlement system. In fact, it was well-recognized in international law generally. For example, one of the standard treatises on international law (Brownlie) stated that "municipal laws are merely facts which express the will and constitute the activities of States".[14] Not surprisingly, WTO panels had routinely repeated this proposition in a number of reports. For example: "US – Section 301 Trade Act": "In this case, too, we have to examine aspects of municipal law, namely Sections 301-310 of the US Trade Act of 1974. Our mandate is to examine Sections 301- 310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in "India – Patents (US)", interpret US law "as such", the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301- 310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations".[15] "US – Section 129(c)(1) URAA": "As a preliminary matter, we note that an assessment of whether Section 129(c)(1) is inconsistent with any of the aforementioned WTO provisions will inevitably involve us in a close examination of the meaning and scope of that section. It should be recalled, in this regard, that panels are entitled (indeed, even obliged) to conduct a detailed examination of the domestic law of a Member, to the extent that doing so is necessary for the purposes of determining the WTO-conformity of that Member's domestic law. For the purposes of such an examination, the meaning and scope of relevant provisions of domestic law are questions of fact".[16] "Mexico – Olive Oil": "As noted above, we see the issue … as one of municipal law, which is a matter of fact".[17] [18] "Colombia – Ports of Entry": "WTO jurisprudence has established that municipal law is to be approached as a 'factual issue'".[19] "EC – Fasteners": "Thus, we consider that it falls upon us to clarify the scope/operation of Article 9(5) of the Basic AD Regulation as a factual matter before engaging in a substantive analysis of China's claims".[20] "US – Countervailing Measures on Certain EC Products": "[T]he Panel maintains that it was correct for it to examine the relevant aspects of the United States' law and to establish the meaning of the legislation as a factual element".[21]; "When analysing municipal law, a Panel should not interpret the law 'as such', but rather establish the meaning of the disputed legislation as a factual element and determine whether the factual element constitutes conduct by the respondent Member contrary to its WTO obligations".[22] "EC – Bed Linen" (Article 21.5 – India): "We note that questions of municipal law are treated as matters of fact".[23] "US – Zeroing (EC)": "WTO panels and

[14] Brownlie, Principles of Public International Law, at 39 (5th ed. 1998) (quoting "Certain German Interests in Polish Upper Silesia", PCIJ, Series A, No. 7, p. 19.).

[15] Panel Report, "United States – Sections 301-310 of the Trade Act of 1974", WT/DS152/R, adopted 27 January 2000, para. 7.18 (citations omitted). See also para. 7.19 ("It follows that in making factual findings concerning the meaning of Sections 301-310 we are not bound to accept the interpretation presented by the US.").

[16] Panel Report, "United States – Section 129(c)(1) of the Uruguay Round Agreements Act", WT/DS221/R, adopted 30 August 2002, para. 6.28 (citations omitted).

[17] Panel Report, "Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities", WT/DS341/R, adopted 21 October 2008, para. 7.29; id., para. 7.30 ("We therefore find, as a matter of fact, that under Mexican law, the procedural act by which an investigation is formally commenced in the Mexican system is the publication of the Initiation Resolution, which takes legal effect the following day.").

[18] Panel Report, "Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities", WT/DS341/R, adopted 21 October 2008, para. 7.30.

[19] Panel Report, "Colombia – Indicative Prices and Restrictions on Ports of Entry", WT/DS366/R and Corr. 1, adopted 20 May 2009, para. 7.93 (citing Appellate Body Report, "India – Patents (US)", para. 66, and referencing Panel Report on "US – Section 301 Trade Act", para. 7.18, and PCIJ, "Certain German Interests in Polish Upper Silesia", PCIJ, 1926, Rep., Series A, No. 7, p. 19.).

[20] Panel Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, para. 7.68.

[21] Panel Report, "United States – Countervailing Measures Concerning Certain Products from the European Communities", WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, para. 6.38.

[22] Panel Report, "United States – Countervailing Measures Concerning Certain Products from the European Communities", WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, para. 7.125.

[23] Panel Report, "European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India", WT/DS141/RW, adopted 24 April 2003, fn 213.

the Appellate Body have applied the principle, articulated by the Permanent Court of International Justice, that municipal laws are facts before international tribunals."; "The meaning of municipal law in a WTO dispute settlement proceeding is a fact to be established by relevant evidence." [24] "US – Poultry (China) ": "As explained by the panel in Colombia – Ports of Entry, municipal law is to be approached as a 'factual issue'".[25] "US – Countervailing and Anti-Dumping Measures (China)": "[W]hen ascertaining the meaning of United States law … practice [by an administering authority] would need to be given due weight in our factual analysis. This would be required to correctly establish the meaning of United States law as a matter of fact".[26]

4.10. Thus, the United States was aware of at least 10 times that WTO panels had disagreed with the Appellate Body, and instead had found that the meaning or operation of a WTO Member's domestic law was an issue of fact, and not an issue of WTO law. That so many WTO panels had come to this conclusion in light of the clear text of the DSU was not surprising. Nor was it surprising that numerous WTO Members had also come to the same conclusion in their disputes. For example: Canada in "China – Auto Parts": "Canada expressed a similar view at the oral hearing in this appeal, stating that a panel's interpretation of municipal law is a matter of fact and is subject to the standard of review to be accorded to factual findings".[27] China in "EC – Fasteners": "China submits that the issue of the 'meaning' or 'scope' of Article 9(5) of the Basic AD Regulation is an issue of fact. Therefore, it rejects the European Union's argument that the scope of Article 9(5) of the Basic AD Regulation is a legal issue and hence subject to appellate review pursuant to Article 17.6 of the DSU".[28] China in "US – Countervailing and Anti-Dumping Measures (China)": "The meaning of prior municipal law must be determined as a matter of fact, by reference to the laws themselves and the manner in which those laws have been interpreted by domestic courts".[29] Colombia in "Colombia – Ports of Entry": "Colombia recalls that from the standpoint of international law, "municipal laws are merely facts".[30] Dominican Republic in "Dominican Republic – Import and Sale of Cigarettes": "Honduras' claim thus focuses on the meaning of a municipal law of the Dominican Republic. In addressing the meaning of municipal law, panels must examine the [municipal] law as a matter of fact, taking into account the evidence as to the meaning of the law presented by the parties".[31]; "In this case, the Panel correctly treated the meaning of the Dominican Republic's municipal law as a fact whose meaning was to be proved by evidence".[32] EU in "US – Large Civil Aircraft" (21.5 – EU): "Because the meaning of domestic law, including of the US Constitution, is a question of fact for a WTO panel, the United States must rebut the EU's interpretation with actual evidence and argument regarding US law".[33] EU in "United States – Conditional Tax Incentives for Large Civil Aircraft": "The interpretation of Washington State law is a question of fact before this Panel that must be considered

[24] Panel Report, "United States – Laws, Regulations and Methodology for Calculating Dumping Margins" ("Zeroing"), WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, paras. 7.53, 7.64.

[25] Panel Report, "United States – Certain Measures Affecting Imports of Poultry from China", WT/DS392/R, adopted 25 October 2010, paras. 7.104 and 7.381.

[26] Panel Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, para. 7.163.

[27] Appellate Body Reports, "China – Measures Affecting Imports of Automobile Parts", WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB, adopted 12 January 2009, n. 306.

[28] Appellate Body Report, "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para. 74.

[29] Panel Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/R and Add.1, as modified by Appellate Body Report WT/DS449/AB/R, para. 7.142. See also para. 7.160 ("China argues that in evaluating whether Section 1 effected an advance in a rate of duty on imports under an established and uniform USDOC practice, the relevant baseline of comparison is the prior municipal law of the United States, properly determined as a question of fact. According to China, it is by reference to the relevant United States laws themselves and the manner in which those laws have been interpreted by United States courts that we should determine whether there has been an advance in a rate of duty.") and para. 7.228 ("China considers the relevant baseline to be prior municipal law of the importing Member, properly determined as a question of fact.").

[30] Panel Report, "Colombia – Indicative Prices and Restrictions on Ports of Entry", WT/DS366/R and Corr.1, adopted 20 May 2009, para. 4.145.

[31] Appellate Body Report, "Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes", WT/DS302/AB/R, adopted 19 May 2005, para. 45.

[32] Appellate Body Report, "Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes", WT/DS302/AB/R, adopted 19 May 2005, para. 46.

[33] Panel Report, "United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union", WT/DS353/RW and Add.1, at Annex B-4, para. 2.

objectively..."[34]. EU in "European Communities – Trademarks and Geographical Indications (Australia)": "[The European Communities] submits that the Panel must take due account of the fact that the Regulation is a measure of EC domestic law and establish its meaning as a factual element". "[I]n making an objective assessment of the facts, and in particular of the meaning of Regulation 2081/92, the Panel must take due account of the fact that Regulation 2081/92 is a measure of EC domestic law. It can therefore not "interpret" Regulation 2081/92, but rather must establish the meaning of its provisions as factual elements".[35] EU in "EU – Fatty Alcohols": "Many of the arguments, submitted by Indonesia, are matters of EU, rather than WTO law…. The EU law characterisation of a particular fact pattern as consistent or not with the Basic Regulation is a question of fact, while the consistency of the contested measure with Article 2.4 of the ADA is a question of both law and fact".[36] Guatemala in "Guatemala – Cement" (Panel): "This evidence is fatal to Mexico's claim because it is an accepted principle of international law that municipal law (and practice) is a fact which must be proven before an international dispute settlement body such as this Panel".[37] Hong Kong in "US – Shrimp": "With respect to the judgment of the CIT in the Turtle Island case, Hong Kong, China, notes that in the absence of a clear mandate given to international adjudicating bodies, they commonly interpret only international law and treat domestic law, whenever warranted, as a factual matter".[38] India in "India – Patents (US)": "India asserts that the Panel erred in its treatment of India's municipal law because municipal law is a fact that must be established before an international tribunal by the party relying on it".[39] Mexico in "US – Anti-Dumping Measures on Oil Country Tubular Goods": "The [] [panel's] findings relate to the meaning and scope of a Member's municipal law … [which] is a question of fact falling outside the scope of appellate review".[40] Peru in "EC – Sardines": "Peru thus contends that, like municipal law, the Codex standard must be treated by an international tribunal as a fact to be examined, not as law to be interpreted".[41] Philippines in "Thailand – Cigarettes": "The Philippines relies on the Appellate Body US – Carbon Steel decision to argue that the meaning of municipal law has to be determined by panels as a question of fact, taking into account not only the assertions of the regulating country, but also, necessarily, evidence provided as grounds for those assertions (typically including judicial rulings, opinions of legal experts, writings of recognized scholars)".[42] Thus, in at least 15 instances of which the United States was aware, other WTO Members too had disagreed with the Appellate Body's assertion that it had the authority to review a panel's factual findings on the meaning of a WTO Member's domestic law. Despite this repeated disagreement with its approach, over many years, however, the Appellate Body had not reconsidered its view. Nor, as the United States would explain, had it ever engaged with the DSU text that demonstrated that its approach was erroneous and contrary to that text. The Appellate Body had not treated panel findings concerning the meaning of municipal law as a factual issue. Instead, it had treated the meaning of municipal law as a matter of WTO law, to be decided by the Appellate Body de novo in an appeal under Article 17.6 of the DSU. The Appellate Body had given no interpretation of the text of the DSU for its statement that the meaning of domestic law was an issue of law in the WTO dispute settlement system. Despite its occasional citation to other international law authorities, the Appellate Body had

[34] See also Panel Report, "United States – Conditional Tax Incentives for Large Civil Aircraft", WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R, at Annex B-1, para. 45.

[35] Panel Report, "European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaint by the United States", WT/DS174/R, adopted 20 April 2005, para. 7.43; id., WT/DS174/Add.2, Annex B-4, p. B-121 (Replies by the European Communities to Questions posed by the Panel following the First Substantive Meeting), para. 3 ("However, the EC would like to underline that in making an objective assessment of the facts, and in particular of the meaning of Regulation 2081/92, the Panel must take due account of the fact that Regulation 2081/92 is a measure of EC domestic law. It can therefore not "interpret" Regulation 2081/92, but rather must establish the meaning of its provisions as factual elements".).

[36] Appellate Body Report, "European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia", WT/DS442/AB/R and Add.1, adopted 29 September 2017, at Annex B-3, para. 28.

[37] Panel Report, "Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico", WT/DS156/R, adopted 17 November 2000, para. 6.440.

[38] Appellate Body Report, "United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia", WT/DS58/AB/RW, adopted 21 November 2001, para. 62.

[39] Appellate Body Report, "India – Patents (US)", para. 64.

[40] Appellate Body Report, "United States – Anti-Dumping Measures on Oil – Country Tubular Goods (OCTG) from Mexico", WT/DS282/AB/R, para. 80.

[41] Appellate Body Report, "European Communities – Trade Description of Sardines", WT/DS231/AB/R, adopted 23 October 2002, para. 75.

[42] Panel Report, "Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines", WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, para. 6.155.

also failed to point to any other source that would explain its departure from the approach followed generally in international dispute settlement.

4.11. The only basis the Appellate Body had given for its proposition that the meaning of municipal law was an issue of law under Article 17.6 of the DSU was a citation to its own reports, most often the Appellate Body report in "India – Patents (US)".[43] The appellate report in that dispute, however, provided no meaningful explanation for this proposition. In that appeal, India had asserted that the panel had erred in its treatment of India's municipal law.[44] Ironically, the Appellate Body had begun its examination of this issue by citing the very same international law treatise quoted above. As noted, that treatise stated: "[M]unicipal laws are merely facts which express the will and constitute the activities of States". That is, the treatise stated that municipal law was an issue of fact for the purpose of international dispute settlement.[45] Ironically, then, the "India – Patents" appellate report cited a treatise that stood for the opposite of what the Appellate Body cited it for. In discussing the panel's examination of India's domestic law in that dispute, the Appellate Body had noted that "[p]revious GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations".[46] To be clear, this statement referred to a detailed examination of domestic law by panels. But from this reference to the detailed examination of domestic law by panels, the Appellate Body made the following leap: "And, just as it was necessary for the Panel in this case to seek a detailed understanding of the operation of the Patents Act as it relates to the "administrative instructions" in order to assess whether India had complied with Article 70.8(a), so, too, is it necessary for us in this appeal to review the Panel's examination of the same Indian domestic law".[47] In other words, the Appellate Body had reasoned that, because the panel had been required to undertake a detailed examination of the meaning of a domestic law (as a factual issue) to determine whether that domestic law had complied with the WTO Agreements (as a legal issue), the Appellate Body could also conduct a detailed examination of the meaning of that domestic law (the factual issue) in reviewing the legal conclusions of the panel. There was no coherent logic in that statement. The authority to review a panel's legal conclusion implied no authority to also review a panel's factual findings. Those factual findings could simply be taken as a given.

4.12. The Appellate Body in fact provided no explanation of how its "detailed examination" of domestic law was consistent with the limits of appellate review imposed by Members in Article 17.6 of the DSU. The stated rationale – that a "detailed understanding" was important – said nothing about the proper role of the Appellate Body in reviewing a panel's findings. Indeed, many factual issues in WTO dispute settlement required "detailed understanding." But that provided no basis for treating those factual issues as issues of law to be decided de novo by the Appellate Body on appeal. Unfortunately, in subsequent disputes, the Appellate Body had repeated and expanded on its flawed approach in "India – Patents (US)". For example, in US – Section 211 Appropriations Act, the Appellate Body had quoted from its report in India – Patents, and then had found that "[t]o address the legal issues raised in this appeal, we must, therefore, necessarily examine the Panel's interpretation of the meaning of Section 211 under United States law" and "[t]he meaning given by the Panel to Section 211 is, thus, clearly within the scope of our review as set out in Article 17.6 of the DSU".[48] Again, the Appellate Body had been saying that the meaning of a municipal law – a factual issue – was within the scope of its review, notwithstanding the express limitations imposed by Article 17.6 of the DSU. At the DSB meeting on 6 March 2002, when this report had been adopted – over 16 years ago – the United States had expressed its serious concerns with this approach as follows: "Under Article 17.6 of the DSU, the Appellate Body's review was limited to issues of law and legal interpretation, not issues of fact. In this dispute, the Appellate Body had blurred this distinction by concluding that an examination of the meaning of municipal law – in this case Section 211 – was within its mandate. The Appellate Body had reached this conclusion based on a logical misstep. In paragraph 105 of its Report, the Appellate Body had correctly noted that a panel's assessment of whether a municipal law was consistent with WTO obligations was a legal characterization that was within the scope of appellate review. However, from this it had incorrectly concluded in the following paragraph that the Panel's finding as to the meaning and operation of the municipal law was also within the scope of appellate review. This did not follow logically. It was one thing to determine what

[43] See, e.g., Appellate Body Report, "EU – Biodiesel", para. 6.155 (citing "India – Patents (US)").
[44] Appellate Body Report, "India – Patents (US)", para. 64.
[45] Appellate Body Report, "India – Patents (US)", para. 65 and n. 52.
[46] Appellate Body Report, "India – Patents (US)", paras. 66 and 67.
[47] Appellate Body Report, "India – Patents (US)", para. 68.
[48] Appellate Body Report, "United States – Section 211 Omnibus Appropriations Act of 1998", WT/DS176/AB/R, adopted 1 February 2002, para. 106.

a municipal law meant and how it operated. It was an entirely different matter to determine whether – given a particular meaning and operation – the municipal law was consistent with WTO obligations. The meaning and operation of municipal law fell within the panel's role as finder of fact, and was outside the scope of appellate review unless the finding was inconsistent with the obligation to make an objective assessment of the facts, in accordance with Article 11 of the DSU. Once the panel had made these factual findings, its legal findings as to whether the municipal law was consistent with a WTO agreement were subject to appellate review. In the US view, the Appellate Body Report had not sufficiently distinguished between these factual and legal findings of a panel and thus risked encroaching on a panel's fact-finding role".[49]

4.13. And, unfortunately, this same criticism remained valid today as the Appellate Body had continued to follow the same flawed approach in subsequent appeals. For example: "China – Auto Parts" (AB): "When a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU…".[50] "China – Publications and Audiovisual Products": "We recall that a panel's assessment of the meaning and content of a Member's municipal law is subject to appellate review in order to determine whether the panel erred in its finding regarding the consistency of the Member's municipal law with the WTO agreements".[51] "EC – Fasteners (China)": "Therefore, we conclude that the Panel's assessment of the meaning and scope of Article 9(5) of the Basic AD Regulation, which is based on the text of the provision, its context within the structure of the other relevant provisions of the Regulation, and its operation is not a "factual matter" and is not excluded from appellate review. Rather, the Panel examined Article 9(5) for the purpose of determining its consistency with a number of provisions of the Anti-Dumping Agreement and the GATT 1994, which, as a matter of legal characterization, is subject to appellate review according to Article 17.6 of the DSU".[52] "US – Countervailing and Anti-Dumping Measures (China)": "Although factual aspects may be involved in the individuation of the text and of some associated circumstances, an assessment of the meaning of a text of municipal law for purposes of determining whether it complies with a provision of the covered agreements is a legal characterization".[53] These examples had repeatedly exhibited the same flawed logic. In short, the Appellate Body reasoned that when a panel examined a municipal law to assess compliance with the WTO Agreements, examination of that municipal law became a legal question. This approach eliminated the lines explicitly drawn by Members in the DSU between factual and legal issues. As the United States had noted in the excerpt above, the fact that the

[49] WT/DSB/M/119, para. 27 (statement of the United States); see also id. ("A better approach, according to the United States, was that of the International Court of Justice (ICJ) which was cited by the Appellate Body in its earlier report in the "India – Mailbox" dispute (WT/DS50). The ICJ has noted that from the standpoint of international law "municipal laws are merely facts". The Appellate Body had a special role with respect to the interpretation of WTO Agreements, and Appellate Body proceedings – which were expedited and permitted only limited briefing and hearings – reflected this. In the US view, this special role did not extend to ascertaining the meaning and operation of municipal laws, and Appellate Body proceedings were ill-suited to such fact-finding".). The United States raised questions about this in March 2005 (TN/DS/W/74) and submitted proposed guidance that: "The question of whether a measure does x is a factual question because at that point it is not a question of the interpretation of a provision of a covered agreement or of whether a provision applies to the measure". (TN/DS/W/82/Add.2.)

[50] Appellate Body Reports, "China – Measures Affecting Imports of Automobile Parts", WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para. 225 (citations omitted).

[51] Appellate Body Report, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", WT/DS363/AB/R, adopted 19 January 2010, para. 117.

[52] Appellate Body Report, "European Communities – Definitive – Anti-Dumping Measures on Certain Iron or Steel Fasteners from China", WT/DS397/AB/R, adopted 28 July 2011, para. 297. See also para. 295 ("We begin by addressing China's preliminary objection that the Panel's finding concerning the meaning and scope of Article 9(5) of the Basic AD Regulation is a matter of fact that is not subject to appellate review pursuant to Article 17.6 of the DSU. We disagree with China and the Panel. On several occasions, the Appellate Body has clarified that municipal law may serve both as evidence of facts and evidence of a Member's compliance or non-compliance with its international obligations. In particular, in "US – Section 211 Appropriations Act", the Appellate Body stated that, when a panel examines the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its WTO obligations, that examination is a legal characterization by a panel and is therefore subject to appellate review under Article 17.6 of the DSU".).

[53] Appellate Body Report, "United States – Countervailing and Anti-Dumping Measures on Certain Products from China", WT/DS449/AB/R and Corr.1, adopted 22 July 2014, para. 4.101. See also para. 4.99 ("In "India – Patents (US)" and "US – Section 211 Appropriations Act", the Appellate Body stated that municipal law may constitute evidence of facts as well as evidence of compliance or non-compliance with international obligations, and that a panel's examination of the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel subject to appellate review under Article 17.6 of the DSU".).

question of whether a particular municipal law was consistent with the WTO Agreements was a legal question did not change the nature of the factual determination of the meaning and content of that municipal law.

4.14. For a more recent example, Members would recall that at the DSB meeting on 26 October 2016, the United States had explained how the Appellate Body's flawed approach had been highlighted by the appeal in "EU – Biodiesel (Argentina)". In that dispute, one of Argentina's claims had been that a provision of EU law, the Basic Regulation, had been inconsistent "as such" with the AD Agreement. On appeal, Argentina had claimed that the panel had erroneously construed that EU law. Argentina's argument had been based on the text of the EU provision, legislative history, a supposed EU practice in several other investigations, and certain EU court decisions. On appeal, Argentina had claimed both that the Panel's interpretation of EU law had been wrong as a matter of law (although under what provision of the AD Agreement or the DSU remained unclear) and that the Panel had failed to make an "objective assessment of the matter" under Article 11 of the DSU. At a minimum, in light of the Appellate Body's conception of a different and higher standard to review findings of fact (which the United States had discussed earlier), the panel's factual findings would be subject to review under that higher or more restrictive standard. The Appellate Body had examined the meaning of the EU law as a de novo legal issue, and had then proceeded to conduct a separate examination of whether the Panel had made an objective assessment.[54]

4.15. The lack of coherence in the Appellate Body's approach had been noted by other commentators. For example, an entry in The Oxford Handbook of International Trade Law stated: "[T]he logic of the Appellate Body's finding [that panel findings on municipal law are issues of law under DSU Article 17.6] is difficult to understand. Just because a panel assesses whether a domestic legal act – which represents a fact from the perspective of WTO law – is consistent or inconsistent with WTO law does not suddenly turn the meaning of the domestic legal act into a question of WTO law…. [T]here must… be a discernible line between issues of fact and issues of law. After all, the Appellate Body's jurisdiction is circumscribed precisely by this distinction".[55] Another set of commentators had similarly critiqued the Appellate Body's approach, noting that "maybe that limitation [of appellate review to the application of WTO law to the facts as found by the panel] was precisely what Article 17.6 DSU intended to impose on the Appellate Body. The arguments offered by the Appellate Body for a more expansive review authority are not very convincing, as the determination of the implications of a Member's municipal law are not more "legal interpretations" than is the determination of the implications of any other measure. It seems that the Appellate Body is simply keen to review a Panel's interpretation of the meaning of municipal law…".[56]

4.16. The Appellate Body's approach in conducting its own de novo review of the meaning of domestic law was inconsistent with the appropriate functioning of the dispute settlement system. It departed from the basic division of responsibilities where panels determined issues of fact and law, and the Appellate Body may be asked to review specific legal interpretations and legal conclusions. It also represented a serious waste of the limited resources of the WTO dispute settlement system, adding complexity and delay to the process. No purpose was served by having a panel engage in a detailed review of a factual record related to the meaning of a domestic measure, and then to have the Appellate Body engage in its own de novo review of the exact same factual issues, so that the parties had to argue all the same factual issues a second time.

4.17. Third, to conclude, the representative of the United States said that the United States had for many years been concerned with the Appellate Body's approach to review of findings of fact by WTO panels. In this statement, for the benefit of WTO Members' reflection, the United States had drawn together an analysis of the DSU text, a critique of the Appellate Body's erroneous rationale, and a review of panel and WTO Member statements. As the United States had noted in this statement,

[54] The United States explained to Members why this approach did not make sense, and departed from the Appellate Body's frequent admonition that a party should present an issue as an error of law or an error under Article 11, but not both types of claims with respect to the same issue. See, e.g., "EC – Fasteners (China)" (AB), para. 442; "Chile – Price Band System (Article 21.5 – Argentina)" (AB), para. 238. Furthermore, it raised the prospect that the Appellate Body might find that the Panel made an objective assessment of a complex factual record, and at the same time might find that precisely the same panel finding was incorrect simply because the Appellate Body made a different factual determination based on its own de novo review.

[55] Bohanes and Lockhart, "Standard of Review in WTO Law", The Oxford Handbook of International Trade Law (2009), at 42.

[56] Wauters and Vandenbussche, "China – Measures Affecting Imports of Automobile Parts", American Law Institute Project, at n. 60).

DSU Article 17.6 expressly limited appellate review to issues of law and legal interpretation covered in a panel's report. On its face, this would not include panel fact-finding. When the United States looked back to the appellate report in which the Appellate Body had asserted it could review panel fact-finding under the "duty" or "requirement" in DSU Article 11 to make an objective assessment of the facts, the United States found that there was no interpretation by the Appellate Body of the text of DSU Article 11, which stated that a panel "should make" an objective assessment. And because the DSU text did not support any appellate review of the facts, it also did not suggest any particular standard for that review. By recasting panel fact-finding as, instead, an issue of law subject to review, the Appellate Body had further asserted that it could review the meaning of a Member's domestic law on appeal. And it conducted that review *de novo* – that is, without any deference to the panel's findings on appeal. But the meaning of a Member's domestic law – what a measure meant or did – was simply the key fact in a dispute while the issue of law was whether that fact was consistent or inconsistent with WTO obligations. The Appellate Body's expansion of its review authority, contrary to the DSU text, had added complexity, duplication, and delay to almost every dispute, as a party to the dispute could now challenge on appeal every aspect of the panel's findings. The United States did not consider this a desirable outcome. But more importantly, it did not reflect the WTO dispute settlement system as agreed by Members in the text of the DSU. Therefore, whether or not a WTO Member considered appellate review of facts desirable, that review was neither legal nor legitimate under the agreed WTO rules.

4.18. The representative of Chile thanked the United States for its statement and its explanation concerning Article 17.6 of the DSU. Chile noted that several DSB meetings had taken place, at which statements had been made by the United States on specific issues related to the dispute settlement system without providing any solutions. A process therefore had to be set up that would lead to solutions. Chile was ready to work towards such solutions if all Members were onboard to do so in the same spirit. Finally, Chile wished to consult on the possible alternatives, which could be explored in light of the concerns raised in the DSB. Chile reiterated its availability to work on possible solutions.

4.19. The representative of Japan said that his country thanked the United States for its statement made at the present meeting. Japan wished to make an observation concerning one particular issue that had been raised by the United States, namely, the issue of appellate review of a panel's determination of the meaning of municipal law. The text of the DSU was clear and unequivocal that the Appellate Body's jurisdiction was limited to legal issues contained in a panel report and there was little scope for debate that municipal law itself was a matter of fact in WTO law. For example, in "India – Patents (US)", the Appellate Body had approvingly cited the PCIJ's observation that had been made several decades ago, which had stated: "municipal laws are mere facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures".[57] The Appellate Body had repeatedly stated that "a panel's examination of the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel subject to appellate review under Article 17.6 of the DSU".[58]

4.20. The Appellate Body had clarified "[t]his [appellate] review would include text and context, as well as the 'structure and logic', of a legal instrument".[59] The Appellate Body had continued with caution, however, that there might be instances in which a panel's assessment of municipal law would go beyond the text of an instrument on its face, in which case further examination might be required, and might involve factual elements. With respect to such elements, the Appellate Body would not lightly interfere with a panel's finding on appeal.[60] According to the Appellate Body, such

[57] Appellate Body Report, "India – Patents (US)", para. 65.

[58] Appellate Body Report, "US – Countervailing and Anti-Dumping Measures (China)", para. 4.99, citing Appellate Body Report, "US – Section 211 Appropriations Act", para. 105. See also Appellate Body Report, "China – Auto Parts", para. 225; Appellate Body Report, "China – Publications and Audiovisual products", para. 177; Appellate Body Report, "EC – Fasteners (China)", para. 295; Appellate Body Report, "EU – Biodiesel (Argentina)", para. 6.155.

[59] Appellate Body Report, "US – Countervailing and Anti-Dumping Measures (China)", para. 4.99 and footnote 467, citing Appellate Body Report, "China – Auto Parts", para. 238. See also Appellate Body Report, "China – Publications and Audiovisual products", para. 177; Appellate Body Report, "EC – Fasteners (China)", para. 296; Appellate Body Report, "EU – Biodiesel (Argentina)", para. 6.169.

[60] Appellate Body Report, "China – Auto Parts", para. 225. See also Appellate Body Report, "US - Countervailing and Anti-Dumping Measures (China)", para. 4.99; Appellate Body Report, "EC – Fasteners (China)", para. 296; Appellate Body Report, "China – Publications and Audiovisual products", para. 177.

"factual elements" might include "evidence of how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts", the examinations of which "are more likely to be factual in nature".[61] Appellate Body had also stated "an examination of whether the elements cited by the Appellate Body in "US – Carbon Steel" are legal characterizations, or involve also factual elements, depends on the circumstances of each case"[62] but "the examination of the legal interpretation given by a domestic court or by a domestic administrative agency as to the meaning of municipal law with respect to the measure being reviewed for consistency with the covered agreements may be a legal characterization".[63] Japan wished to make a couple of comments in this regard. First, Japan did not understand that the examination of municipal law could be a legal characterization simply because it involved "legal interpretation" of the municipal law. As the Appellate Body had stated in "China – Auto Parts", "[w]hen a panel examines the municipal law of a WTO Member for purpose of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and therefore subject to appellate review under Article 17.6 of the DSU".[64] Thus, for example, the review of municipal law to determine whether what the municipal law required would constitute an act prescribed by a covered agreement, or whether governmental actions taken under municipal law would fall within the scope of the measures as defined in, and thus covered by, a covered agreement was certainly a legal characterization of the municipal law at issue under WTO law. However, the Appellate Body had also warned that a legal characterization of municipal law "will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements". Thus, the examination of factual elements might be part of, not separate from, legal characterizations of municipal law under the WTO Agreement, and with respect to such factual elements, "the Appellate Body will not lightly interfere a panel's finding on appeal".[65]

4.21. Second, Japan acknowledged that there might be a situation where a panel could commit an egregious error in its determination of the meaning of the municipal law at issue, and that in such a situation, a factual matter could be addressed by appellate review under Article 11 of the DSU, which required that a panel made an objective assessment of the fact before it. The "deliberate disregard of, or refusal to consider, the evidence submitted to a panel" or the "wilful distortion or misrepresentation of the evidence put before a panel" were inconsistent with an objective assessment of the facts.[66] As only "an egregious error that calls into question the good faith of a panel"[67] could be subject to appellate review under Article 11 of the DSU. Also, for preserving the prompt, effective and efficient functioning of the WTO dispute settlement system, the Appellate Body should be encouraged to exercise extreme caution in addressing the determination by a panel of the meaning of the municipal law at issue, which would inevitably involve complex factual enquiries. Japan looked forward to further discussions with other WTO Members on this important systemic matter.

4.22. The representative of Australia said that her country noted the concerns raised by the United States at the present meeting regarding compliance with Article 17.6 of the DSU. Article 17.6 clearly delimited the scope of issues that might be properly put before the Appellate Body for its consideration to "issues of law covered in the panel report, and legal interpretations developed by the panel". While the Appellate Body had noted in "US – Upland Cotton" (Article 21.5 – Brazil), the distinction between issues of law and issues of fact could be "difficult to draw"[68], in Australia's view it was incumbent on the Appellate Body, and Members engaged in appellate proceedings, to maintain

[61] Appellate Body Report, "China – Publications and Audiovisual products", para. 177, citing Appellate Body Report, "US – Corrosion-Resistant Steel Sunset Review", para. 168. See also Appellate Body Report, "US - Countervailing and Anti-Dumping Measures (China)", paras. 4.100 – 4.101, citing Appellate Body Report, "US – Carbon Steel", para. 157; Appellate Body Report, "EC – Fasteners (China)", para. 296.

[62] Appellate Body Report, "US – Countervailing and Anti-Dumping Measures (China)", para. 4.101. See also "US – Countervailing and Anti-Dumping Measures (China)", para. 4.100 and footnote 469 quoting Appellate Body Report, "US – Carbon Steel", para. 157.

[63] Appellate Body Report, "US – Countervailing and Anti-Dumping Measures (China)", para. 4.101.

[64] Appellate Body Report, "China – Auto Parts", para. 225. Compare the statement of the Appellate Body quoted above with the similar but slightly reformulated statements in Appellate Body Report, "US – Countervailing and Anti-Dumping Measures (China)", para. 4.99 and Appellate Body Report, "EC – Fasteners (China)", para. 295.

[65] Appellate Body Report, "China – Auto Parts", para. 225. See also Appellate Body Report, "US – Countervailing and Anti-Dumping Measures (China)", para. 4.99; Appellate Body Report, "EC – Fasteners (China)", para. 296; Appellate Body Report, "China – Publications and Audiovisual products", para. 177.

[66] Appellate Body Report, "EC – Hormones", paras. 133.

[67] Appellate Body Report, "EC – Hormones", paras. 133.

[68] Appellate Body Report, "US – Upland Cotton" (Article 21.5 – Brazil), para. 385

this distinction and respect the limits placed on the scope of appellate review under the DSU. Australia observed that the Appellate Body in "EC – Hormones" had described the distinction, as follows: "the determination of whether or not a certain event did occur in time and space is typically a question of fact … the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue".[69] In this light, Australia acknowledged the specific concern raised by the United States as to how the Appellate Body had characterized and dealt with domestic law in the context of certain appeals. Australia shared the general view that domestic law and meaning of domestic law was a question of fact, to be determined by a panel on the basis of the evidence put before it by the parties to a dispute. As such, it was not within the mandate of the Appellate Body to undertake its own independent review of the meaning or interpretation of such laws. On the other hand, the question of the consistency of such laws with WTO obligations, which was a separate matter, might be an issue of law. Therefore, such matters might be properly put before the Appellate Body. As with other issues of concern regarding the operation of the WTO dispute settlement system, Australia was interested in other Members' views on this issue and remained willing to engage constructively in further productive discussions in these issues.

4.23. The representative of Canada said that his country thanked the United States for raising these issues with respect to the standard of review. Canada would review the issues carefully. While it was important to discuss these issues in the DSB, it was also incumbent on Members to discuss a method by which these concerns could be addressed. Canada remained willing and available to discuss these issues going forward.

4.24. The representative of Brazil said that his country thanked the United States for its statement made on an issue that was conceptually complex and defied simple categorizations. Unlike the previous statements about Rule 15 and the 90-day period for appeal reports, the present topic was, as some commentators put it, fraught with difficulties. The US statement raised several interesting questions that called for a thorough analysis. A proper debate would involve further opportunities to correctly understand and frame the issue. A set of initial questions, however, did emerge in light of some of the claims raised by the United States, and Brazil therefore wished to make some preliminary remarks, despite of not having read the US statement in advance. First, although the item placed on the Agenda made reference only to Article 17.6 of the DSU, the concerns expressed by the United States had to be considered by taking account of other legal provisions, such as Article 11 of the DSU and the objective assessment of facts by panels (which could be appealed), Article 17.6(ii) of the Anti-Dumping Agreement and its specific standard of review, Article 3.2 of the DSU and the explicit function of the dispute settlement system to clarify the provisions in accordance with customary rules of interpretation of public international law, which, in turn, led to Articles 31 and 32 of the VCLT. Also relevant, was Article XVI:4 of the Marrakesh Agreement Establishing the WTO, which stipulated that "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

4.25. First, concerning standard of review, the issue, which had been brought to the DSB by the United States, seemed to revolve around the concepts of standard of review and the characterization of domestic or municipal law. Standard of review was the term used to define the margin of appreciation – or deference – that panels and the Appellate Body left to national authorities when enacting and enforcing their obligations under the WTO Agreements. It could also be read in the context of the deference granted by the Appellate Body to panels in discharging their specific function in the DSU, especially as the triers of facts. As per the current doctrine and jurisprudence, it seemed that the standard of review in the dispute settlement system was neither a de novo review, nor one of total deference. Its scope would define "the degree to which a panel should second-guess a measure to determine whether it is WTO consistent or not" (Mattias Oesche, Standards of Review in WTO Dispute Resolution, p. 161) and in fact, "shapes the jurisdictional competence of the WTO's adjudicating bodies *vis-à-vis* WTO members" (Oesche, p. 14).

4.26. Brazil believed that no one was better placed to state the meaning of domestic legislation or practice than the national authorities, and panels and the Appellate Body should not lightly interfere in this characterization. On the other hand, in the exercise of its objective assessment of facts (Article 11 of the DSU), panels had to ascertain, on the basis of evidence and arguments brought by the parties, what the meaning of the domestic legislation was, its effects, its operation and, ultimately, its consistency with WTO provisions. A total deference could not reasonably be the

[69] Appellate Body Report, "EC – Hormones", para. 132.

standard, for it would confer on the national authority the role as the ultimate judge of its compatibility not with its own domestic legislation – which would be normal – but with WTO law. As one author put it, panels and the Appellate Body "cannot exclusively rely on the reading of domestic law as presented by the defending member, nor can they accept at face value the characterization that the Member attaches to its laws. An overly deferential approach would arguably leave domestic authorities too much scope to put forward only WTO-compatible interpretations" (Oesch, p. 20-21). In practice, however, several authors argued that the standard was not static, but depended on the circumstances of the case, the nature of the measure and the scope of the obligation. The debate about standard of review took on still a bigger proportion when referring to questions of law and questions of facts. The distinction between these two, however, was not always clear-cut. To start with, in the exercise of its functions, panels issued findings that were (i) purely legal; (ii) purely factual; and (iii) findings that reflected the application of the law to the facts (Ehlermann/Lockhart, Standard of Review in WTO Law, in JIEL 7(3) 491-521).

4.27. Second, concerning domestic law as a factual issue, the main issue in the statement made by the United States at the present meeting, however, seemed to be the assertion that it was well-recognized in international law that "municipal law is an issue of fact". Brazil believed that this assertion alone might not so quickly dispose of the issue, namely: Was municipal law always and only an issue of fact? Or, as the Appellate Body had already put it, did it also serve "as evidence of compliance or non-compliance with international obligations" (US-Omnibus Appropriation Act, para. 105; "India-Patents", para. 65)? In the same publication (Principles of Public International Law), Ian Brownlie, as quoted by the United States, added that "the general proposition that international tribunals take account of municipals only as facts, is, at most, a debatable proposition the validity and wisdom of which are subject, and call for, further discussion and review" (p. 38, 7th edition, 2008), "municipal law may be evidence of conduct in violation of a rule of treaty or customary law" (p. 38) and that, "in cases in which vital issues (whether classified as facts or otherwise) turn on investigation of municipal law, the International Court has duly examined such matters…"(p. 39).

4.28. Against this background, Brazil wished to put forward some ideas for Members to consider. It seemed clear that the "application by the panel of WTO Law to the facts is a legal question", that is, the application of the law to the facts was a legal question that was subject of appellate review. It involved "weighing and appreciation of the facts and their characterization in terms of the legal rules" (Ehlerman/Lockhart). This might require sometimes the Appellate Body to conduct a scrutiny of the Panel's factual findings in determining whether a panel correctly applied WTO law to the facts of the case (Voon/Yanovich, The Facts Aside: The Limitation of WTO Appeals to Issues of Law, JWT 40(2), 239-258). In sum, when a panel assessed the consistency of the domestic measure (in its factual and legal dimensions) with the specific WTO provisions, it constituted a legal interpretation developed by the panel, as mentioned in Article 17.6 of the DSU. However, to pursue the assessment, the panel had to have understood and interpreted the facts before it – and it might have gotten it right or not. In reviewing the matter before it, the Appellate Body would be confronted with legal issues and legal interpretations developed by the panel, which often contained a mix of facts and law, as construed and structured by the panel, and could thus not always be easily separated. Once the Appellate Body was called to review a panel's findings, it would revisit the legal reasonings adopted by it and verify whether there had been any legal error committed; but this legal exercise could not be done in a vacuum, it had to be done based on the panel's factual findings. Far from exercising a reassessment of the facts, the Appellate Body, in the exercise of its function, would have to delve into an analysis of the measure at issue, namely, the legal effect, which was attributed to a factual record, was considered a question of law, and this was not the equivalent of allowing the Appellate Body to decide on purely factual questions. As the Appellate Body had stated in the case EC-Hormones (para. 132), "[d]etermination of the credibility and weight properly to be ascribed (that is, the appreciation of) a given piece of evidence is part and parcel of the fact-finding process. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question". This compatibility exercise between domestic legislation and WTO provisions was a legal issue and could, as such, be reviewed by the Appellate Body. In fact, this was the *raison d'être* of the Appellate Body, to review the consistency of domestic legislation with WTO Agreements, knowing that the Appellate Body would not review the legislation "as such", but solely for the purposes of determining its consistency. Also on a purely preliminary basis, the following questions could be addressed to the United States:

4.29. Concerning the standard of review and factual and legal issues, what would be the role of the Appellate Body, and what would be its functions? If the meaning of domestic law were to be

considered strictly a factual question and not subject to appeal, what would be the relevance of the Appellate Body's review role as enshrined in the DSU? In a more practical example, what did the "meaning" of municipal law mean? What did it include? For example, could the specific municipal law, assessed by a panel, serve as evidence of contingency of the use of domestic over imported goods? Should this be treated as a factual or legal question? How should a panel (and the Appellate Body), in the US' view, perform the task of determining consistency of domestic law and WTO Agreements? Did it not have to scrutinize and compare both? What if the domestic interpretation of the legislation was misconstrued by the panel? Would the United States accept that this finding could not be appealed? Did the United States consider that identical terms might have different meanings in the domestic/municipal and international sphere, for example, "necessary" as in Article XX of the GATT 1994 or "determination" as in "injury determination"? How did the United States understand the standard of review in Article 11 of the DSU? Did the United States agree that claims that the panel had not performed an objective assessment of facts was a legal question and could be subject to review by the Appellate Body? When a panel assessed whether a domestic investigation authority had provided, for example, a reasoned and adequate explanation for a certain conclusion, was it making a factual or legal assessment? And how could the Appellate Body not be able to consider this, as it was connected to the essential legal question of application of the correct legal standard?

4.30. Finally, to conclude, Brazil noted that when Members considered the function of law in the multilateral trading system – the function of each trade agreement, of the DSU, of the rules of procedure – Members realized that it was not only about resolving disputes, as Brazil had already stated in the DSB meeting of November 2017, to quote Rosalyn Higgins, to "provide an operational system for securing values that we all desire". Brazil was of the view that most Members would agree that they more or less knew which values they wished to see reflected in the WTO's dispute settlement system and in the Appellate Body: independence, professional competence and efficiency, clarity and high-quality reports, both at panel and appeal levels. This meant that any proposal to change established rules of the DSU or the Working Procedures, although welcome in the perspective of attempting to improve the system and to adjust it to new developments in the WTO's legal and economic environment, should be tested and argued in light of the values they embodied or the new values Members might want it to embody. In essence, Members were discussing, under this Agenda item, the very nature of the WTO's dispute settlement system.

4.31. The representative of China said that his country took note of the statement made by the United States and the statements made by other delegations at the present meeting. Given the complexity of the issue, prior to any preliminary comments, China wished to reserve its rights to make further comments on this important issue in the future. First, according to Article 17.6 of the DSU, an appeal should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Hence, factual issues generally fell outside the scope of Appellate Body's jurisdiction.

4.32. Second, China believed that the major function and value of the Appellate Body was to conduct a secondary and independent review of a panel report. This was what the negotiators in the Uruguay Round had agreed based on their GATT dispute settlement experience. In fact, not all issues related to domestic law should be categorized as factual issues. In China's view, at least two sets of issues fell within the scope of appellate review: the first one was the legal characterization of domestic law under WTO rules; and the second, the review by the Appellate Body on whether a panel objectively assessed the meaning of domestic law as contemplated by Article 11 of the DSU. Under the latter in particular, some panels' assessments of domestic law were clearly erroneous and should be corrected by means of an appellate review. Third, in practice, issues of law and fact were usually mixed together, which created the difficulty to draw a clear distinction. China believed that a practical solution would be to conduct a case-by-case analysis for each specific dispute. China reiterated that its comments at the present meeting were without prejudice to its position on this matter. China was open to further discuss this systemic issue with Members on future occasions.

4.33. The representative of the Philippines said that his country wished to make some preliminary comments on this Agenda item. The Philippines thanked the United States for its statement made regarding DSU Article 17.6, which it would carefully review. For this, it would welcome a copy of the full statement. The Philippines also wished to thank Japan for its well-considered remarks and comments on this very serious issue. The US statement dealt with a very important principle of international law, namely, the distinction between questions of fact and questions of law, was fundamentally important, and the Appellate Body, as the ultimate reviewer of facts and law, was an important guardian of international law principles. The issue of whether it was purely a question of

domestic law or interpretation of the practice of the domestic law at issue, or whether it was a question of compliance by the domestic authorities with WTO obligations, had become quite complex.

4.34. The Philippines thus believed that the issue brought forward by the United States was aimed at preserving the important international law principle, creating a distinction between questions of fact and questions of law. The Appellate Body only had jurisdiction over issues of law. As pointed out in prior interventions, it could become quite complex when there was a mix of these very issues as to how the domestic law was interpreted by domestic authorities, how the domestic law was interpreted by the panel, and the tricky question was then, how could the Appellate Body review what the panel had done. The Philippines noted that under the recognized principles, errors of fact or errors of interpretation of findings of fact could not be reviewed by the Appellate Body. The Philippines thus welcomed this discussion, which could result in constructive guidance by the DSB for the Appellate Body.

4.35. Questions about the process had been raised by Chile, Canada and other delegations that had intervened. The questions included: "What process does the United States propose, assuming without agreeing or conceding that that there has been an error in certain Appellate Body reports regarding this important international law principle? What is the process by which the WTO system could then move further towards strengthening a rules-based system that the WTO Appellate Body and the WTO system has made great strides in?" It was on this basis that the Philippines welcomed the discussion, including on how to advance this process. Other questions included: "Is there a procedure for [the] correction of Appellate Body reports? Or, is there a [way] by which the [DSB] in adopting Appellate Body reports, even though [the Members] are aware of the reverse consensus rule, is there a procedure by which qualified adopting of the Appellate Body report can be made by the [DSB]? Or is there a process by which the [DSB] can adopt by consensus certain guiding principles or certain guidance for consideration by the Appellate Body?" These were open questions and the Philippines thanked the United States, once again, for raising such questions. While the issue of questions of fact and questions of law could become very complex as pointed out in prior interventions, it was the duty of the Appellate Body to preserve as much as possible of the distinction in order to promote and safeguard the achievements of the DSB and the Appellate Body in enhancing a rules-based WTO system that allowed for greater confidence in, and the promotion of, the international rule of law.

4.36. The representative of Mexico said that her country thanked the United States for its statement. Mexico would look, in detail, into the different elements that had been identified and the proposals that had been made. Mexico agreed with the statements made by other Members, namely, that facts and laws, which were addressed by these special procedures and the legal issues, which were raised by them, could sometimes be very complex. In light of this, Mexico understood that there were cases where domestic law could not only be considered a question of fact but could be considered in terms of its compliance and thus become an issue of law. In addition to the elements proposed by the United States, Mexico was open to other options and views on this matter.

4.37. The representative of the European Union said that Article 17.6 of the DSU provided that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". This provision reflected the idea that only the panels were the triers of facts and that the scope of appellate review should be limited to legal issues. This was further reflected in Article 17.12 of the DSU, which provided that "[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceedings". The EU did not wish to enter, at the present meeting, into a detailed discussion on particular Appellate Body reports mentioned by the United States in its statement. The EU recalled that these reports had been adopted by the DSB. As a general observation, the EU noted that, in its view, the Appellate Body had fully respected the relevant provisions of the DSU. In any event, the EU was open to discussions on possible improvements in the operation of the dispute settlement system.

4.38. The representative of the United States said that the United States thanked the delegations that had intervened for their comments and the United States looked forward to further discussing this issue with Members. With respect to Brazil's intervention, the statement would seem to overly complicate what was a relatively straightforward issue. The United States would again refer to its past DSB statement on this issue highlighting the straightforward distinction between issues of fact and issues of law: "It was one thing to determine what a municipal law meant and how it operated".[70]

[70] WT/DSB/M/119, para. 27 (statement of the United States).

That was the issue of fact. "It was an entirely different matter to determine whether – given a particular meaning and operation – the municipal law was consistent with WTO obligations".[71] That was the issue of law. And so, the United States would agree with Australia's statement that this was an important distinction to maintain, and it was a distinction Members had agreed to in the DSU. Second, the United States would appear to have a different understanding from Brazil and China with respect to the purpose of the Appellate Body. China's intervention had suggested that the purpose of the Appellate Body was to provide a second, independent review of panel reports. And Brazil had suggested the purpose was to review the consistency of domestic laws with the WTO Agreement. The United States disagreed. The limited role of the Appellate Body, as set out in Article 17.6 of the DSU, was to review issues of law and legal interpretations in panel reports.

4.39. The DSB took note of the statements.

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

A. Recourse to Article 21.5 of the DSU by the European Union and Certain member States: Request for the establishment of a panel (WT/DS316/39)

5.1. The Chairperson recalled that the DSB had considered this matter at its meeting on 15 August 2018 and had agreed to revert to it. She drew attention to the communication from the European Union and Certain member States contained in document WT/DS316/39, and invited the representative of the EU to speak.

5.2. The representative of the European Union said that the EU was requesting, for the second time, the establishment of a panel with respect to a set of additional measures taken by the EU to comply with the DSB's recommendations and rulings adopted on 28 May 2018 in the original compliance proceedings in "EC – Large Civil Aircraft" (DS316). This item had already appeared on the Agenda of the special DSB meeting held on 15 August 2018. At that time, the United States had not agreed to the establishment of a panel. Through the specific measures detailed in the EU's second compliance communication, notified to the DSB on 17 May 2018, the EU had informed the DSB that the EU had achieved full compliance with its WTO obligations. More specifically, the EU had withdrawn the remaining subsidies, and/or taken appropriate steps to remove their adverse effects.

5.3. At the DSB meeting of 28 May 2018, the United States had expressed the view that the EU had not yet fully complied with the recommendations and rulings of the DSB. The United States had also requested the re-initiation of arbitration proceedings, indicating that it disagreed that the measures in the EU's second compliance communication had achieved full compliance with the EU's WTO obligations. To address this disagreement, on 29 May 2018, the EU had requested consultations with the United States. Those consultations had been held in Geneva on 27 June 2018. Unfortunately, these consultations had failed to resolve the dispute. Accordingly, the EU was requesting, for the second time, the establishment of a panel pursuant to Article 21.5 of the DSU and Article 7.4 of the SCM Agreement, with standard terms of reference, as provided for in Article 7 of the DSU. Given that this was the second time that this item appeared on the Agenda, a panel would now have to be established according to Article 6.1 of the DSU.

5.4. The representative of the United States said that as the United States had explained earlier this month of August 2018 when the EU had first put this panel request on the Agenda, the EU's decision to move forward with a request for yet another compliance panel in this 14-year dispute did a disservice to the WTO and its dispute settlement system. The United States referred Members to its statement made at the 15 August 2018 DSB meeting, and would not repeat it at the present meeting. Suffice it to say that instead of bringing yet another compliance proceeding in the largest dispute in WTO history, the EU should make the decision to actually comply with its WTO subsidies obligations and seek to resolve this dispute with the United States. The EU's failure to do so raised serious questions about its willingness to tax the resources of the WTO and about its oft-professed devotion to the multilateral trading system.

[71] WT/DSB/M/119, para. 27 (statement of the United States).

5.5. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the European Union and Certain member States in document WT/DS316/39. The Panel would have standard terms of reference.

5.6. The representatives of Australia, Brazil, China, India, Japan and the Russian Federation reserved their third-party rights to participate in the Panel's proceedings.

6 CANADA – MEASURES GOVERNING THE SALE OF WINE

A. Request for the establishment of a panel by Australia (WT/DS537/8)

6.1. The Chairperson drew attention to the communication from Australia contained in document WT/DS537/8, and invited the representative of Australia to speak.

6.2. The representative of Australia said that on 12 January 2018, his country had requested consultations with Canada on a range of measures, which discriminated against Australian wine imports in a manner that Australia considered to be inconsistent with Canada's WTO obligations under the GATT 1994. Australia and Canada had held consultations on 1 March 2018. Unfortunately, these consultations, and subsequent informal technical discussions with Canada, had failed to resolve this matter. Australia greatly valued its strong bilateral relationship with Canada and remained open to further discussions, both at federal and provincial level, with a view to resolving the issues it had raised. However, as no concrete steps had been taken to date to respond to Australia's longstanding concerns, Australia was now requesting the establishment of a WTO panel to examine this matter with standard terms of reference. Australia noted that a panel was established by the DSB at the request of the United States in DS531 on 20 July 2018 related to the same matter, Australia thus expected that the procedures for multiple complainants set out in the DSU would be applicable.

6.3. The representative of Canada said that his country was deeply disappointed by Australia's decision to request the establishment of a panel at the present meeting with respect to Canadian measures governing the sale of wine. Canada first flagged the serious concerns it had about deficiencies in the consultations request filed in this matter, which Canada had previously expressed to Australia. The defective consultations request had adversely affected Canada's due process rights, by preventing Canada from knowing the case against it. Specifically, the request failed to sufficiently identify the "measures at issue", as required under DSU Article 4.4. Instead, the measures were defined in the request in broad and vague terms. For example, the second paragraph of the consultations request referred to "a range of distribution, licensing and sales measures such as product mark-ups, market access and listing policies, as well as duties and taxes on wine" at both the federal and provincial level, but failed to provide any information regarding the federal measures challenged other than simply listing two federal acts (i.e., the Federal Importation of Intoxicating Liquors Act and the Federal Excise Act, 2001).

6.4. With respect to provincial measures, several of the "legal and policy instruments and practices" listed in the consultation request simply identified "mark-ups, fees, and taxes" of a given provincial liquor board, without identifying any instrument. Additionally, measures 14, 15, 19, 20 and 24 listed "Regulations" under the corresponding provincial legislative instruments, appearing to encompass all regulations without distinction based on relevance for the purposes of Australia's challenge. Despite these concerns, Canada had engaged constructively with Australia during consultations in Geneva on 1 March 2018 in order to try to resolve the matter. Given the complexity of the measures at issue, and the fact that Australia's challenge implicated five Canadian jurisdictions, a resolution in this regard would not come overnight. Canada believed that the parties would benefit from further discussions and was therefore surprised to learn that Australia had nonetheless decided to proceed with a panel request. Canada considered that the panel request was premature. Furthermore, it appeared that the panel request actually replicated some of the defects in the consultations request. As a result, Canada believed it was unlikely that the panel request met the requirements of Article 6.2 of the DSU. Again, this resulted in Canada's due process rights being adversely affected by preventing Canada from knowing the case against it. For these reasons, Canada reserved its right to raise its concerns under DSU Article 4.4 and DSU Article 6.2 before a panel, should one eventually be established in this matter on the basis of the panel request before the DSB at the present meeting. Based on the foregoing, Canada was unable to agree to the establishment of a panel at the present meeting. Canada wished to underline the strength of its bilateral trade and overall relationship with

Australia and remained open to continue its discussions with Australia with a view to resolving this matter.

6.5. The representative of the United States said that the United States fully supported Australia's request for the establishment of a panel in this dispute. As the United States had explained previously when it had requested the establishment of a panel in "Canada – Measures Governing the Sale of Wine in Grocery Stores" (Second Complaint) (DS531), the United States had serious concerns that British Columbia (BC) regulations governing the sale of wine in grocery stores discriminated against imported wine. On 20 July 2018, the DSB had established a panel in DS531. To enhance efficiency of the dispute settlement process, the United States suggested that if and when a Panel was established to examine Australia's complaint contained in document WT/DS537/8, the matter should be referred to the panel established on 20 July 2018 to examine the complaint by the United States, contained in document WT/DS531/7.

6.6. The representative of Australia said that his country took note of the matters raised by Canada at the present meeting in response to Australia's request for the establishment of a panel. For the record, Australia disagreed with Canada's claims that Australia's consultation and panel requests did not meet the requirements of the DSU. The legal basis of Australia's concerns was set out properly, and simply reflected the breadth of concerns that Australian producers had been raising over a number of years in respect of a range of measures governing the sale of wine in Canada, and their WTO inconsistency.

6.7. The representative of Canada said that in response to the statement made by the United States, his country did not consider that it was the appropriate time to consider the issue of harmonization with the panel established in DS531.

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

7 UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS

A. Request for the establishment of a panel by Korea (WT/DS545/7)

7.1. The Chairperson drew attention to the communication from Korea contained in document WT/DS545/7, and invited the representative of Korea to speak.

7.2. The representative of Korea said that on 14 August 2018, Korea had submitted its request for the establishment of a panel regarding "United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products" (DS545). For the reasons indicated in the panel request, Korea was concerned that the conditions for the application of a safeguard measure had not been met by the United States, and that the safeguard measure was being applied in a manner that was inconsistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards. In particular, in addition to a number of procedural concerns identified in the panel request, Korea considered that there was no reasoned and adequate explanation of any of the essential circumstances and conditions that could justify the application of safeguard measures, i.e. the existence of unforeseen developments, a relevant increase in imports, "serious injury" to the relevant domestic industry and the existence of a causal link between the allegedly increased imports and serious injury. Furthermore, in respect of the application of the safeguard measure, the United States had failed to respect the obligation that such measures should be imposed only "to the extent necessary" to prevent or remedy serious injury. In sum, as described in more detail in Korea's panel request, Korea considered that the US safeguard measure at issue violated a number of US WTO obligations and nullified or impaired the benefits accruing to Korea directly or indirectly under the said WTO Agreements. Korea had requested formal consultations with the United States on this matter on 14 May 2018, in which it had engaged in good faith with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations had failed to resolve the dispute and Korea thus felt obliged to request the establishment of a panel, with standard terms of reference, to examine the matter set out in Korea's panel request with the aim of resolving this dispute.

7.3. The representative of the United States said that the WTO Agreement recognized the right of Members to temporarily suspend concessions and other obligations when a product was being imported into its territory in such increased quantities and under such conditions as to cause serious

injury or threat of serious injury to the Member's domestic industry. The United States had exercised this right with respect to imports of crystalline silicon photovoltaic products. An independent investigative authority, the US International Trade Commission, had determined that the domestic industry producing like or similar products had been seriously injured and that the cause of that injury had been increased imports of the products at issue. The US process had been open and transparent, and fully in accord with both domestic US safeguard laws and WTO obligations. In addition, the request to establish a panel improperly included a claim, which had not been included in Korea's request for consultations. For these reasons, the United States was not in a position to agree to the establishment of a panel at the present meeting.

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

8 UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LARGE RESIDENTIAL WASHERS

A. Request for the establishment of a panel by Korea (WT/DS546/4)

8.1. The Chairperson drew attention to the communication from Korea contained in document WT/DS546/4, and invited the representative of Korea to speak.

8.2. The representative of Korea said that on 14 August 2018, Korea had submitted its request for the establishment of a panel regarding the matter "United States – Safeguard Measure on Imports of Large Residential Washers" (DS546). For the reasons indicated in the panel request, Korea was concerned that the conditions for the application of a safeguard measure had not been met by the United States, and that the safeguard measure was being applied in a manner that was inconsistent with the obligations of the United States under the GATT 1994 and the Agreement on Safeguards. In particular, and in addition to a number of procedural concerns identified in the panel request, Korea considered that there was no reasoned and adequate explanation of any of the essential circumstances and conditions that could justify the application of safeguard measures, i.e. a relevant increase in imports, "serious injury" to the relevant domestic industry and the existence of a causal link between the allegedly increased imports and serious injury. Korea noted that the United States had not even begun to examine whether the alleged increase in imports was the result of any unforeseen developments and of the obligations incurred by the United States. Furthermore, in respect of the application of the safeguard measure, the United States had failed to respect the obligation that such measures should be imposed only "to the extent necessary" to prevent or remedy serious injury. In sum, as described in more detail in the panel request, Korea considered that the US safeguard measure identified in the panel request violated a number of US WTO obligations and nullified or impaired the benefits accruing to Korea directly or indirectly under the said WTO Agreements. Korea noted that it had requested formal consultations with the United States on this matter on 14 May 2018, in which it had engaged in good faith with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations had failed to resolve the dispute, and Korea thus felt obliged to request the establishment of a panel, with standard terms of reference, to examine the matter set out in its panel request to resolve this dispute.

8.3. The representative of the United States said that as the United States had noted with respect to the prior Agenda item, the WTO Agreement recognized the right of Members to temporarily suspend concessions and other obligations when a product was being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry. The United States had exercised this right with respect to imports of large residential washers. An independent investigative authority, the US International Trade Commission, had determined that the domestic industry producing like or similar products had been seriously injured and that the cause of that injury had been increased imports of the products at issue. The US process had been open and transparent, and fully in accord with both domestic US safeguard laws and WTO obligations. For these reasons, the United States was not in a position to agree to the establishment of a panel at the present meeting.

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

9 AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS, GEOGRAPHICAL INDICATIONS AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING

B. Report of the Panel (WT/DS458/R, WT/DS458/R/Add.1 and WT/DS458/R/Suppl.1)

C. Report of the Panel (WT/DS467/R, WT/DS467/R/Add.1 and WT/DS467/R/Suppl.1)

9.1. The Chairperson proposed that the two sub-items under Agenda item 9 concerning the Panel Reports in the disputes on: "Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging", in relation to the complaints by Cuba and Indonesia in DS458 and DS467 respectively, be considered together. She recalled that at the meeting on 25 April 2014, the DSB had established a Panel to examine the complaint by Cuba pertaining to this dispute. She also recalled that at the meeting on 26 March 2014, the DSB had established a Panel to examine the complaint by Indonesia. The Reports of the Panel had been circulated on 28 June 2018, as unrestricted documents. The Panel Reports were, at the present meeting, before the DSB for adoption at the request of Australia. The adoption procedure was without prejudice to the right of Members to express their views on the Panel Reports. She then invited the parties to the dispute to present views on the Reports before the DSB.

9.2. The representative of Australia said that her country thanked the panelists for their rigorous and comprehensive examination of the evidence and arguments submitted by the parties in these disputes. Australia also thanked the WTO Secretariat for its hard work and dedication in this dispute. In addition, Australia thanked the record number of third parties for their thoughtful and active engagement in these disputes, particularly in light of the global significance of the public policy issues under challenge. Australia welcomed the Panel Reports in DS458 and DS467, in particular the Panel's comprehensive:(i) rejection of all claims that Australia's tobacco plain packaging measure was inconsistent with WTO rules; (ii) confirmation that WTO rules did not inhibit the right of Members to implement legitimate, non-discriminatory public health measures; and (iii) confirmation that Australia's measure was making a meaningful contribution to improving public health in Australia. Australia had consistently maintained that tobacco plain packaging – a legitimate public health measure endorsed by leading public health experts and the World Health Organization – fully respected Australia's WTO obligations. Australia regretted that it had taken more than six years – from consultations to the circulation of the Panel Reports – to confirm comprehensively what Australia had always maintained. While Australia understood the complexity and volume of evidence and arguments contributed to the delay in the resolution of these disputes, Australia considered such delays an important systemic issue for the entire WTO Membership and remained keen to work with other Members and the Secretariat to agree concrete action that would reduce the time taken to resolve disputes. Australia was pleased that, despite the length of time it had taken to resolve these disputes, Members, including the UK, France, Ireland, New Zealand, Hungary and Slovenia, had already implemented their own tobacco plain packaging measures to protect the health of their nationals and that a number of other Members, including Canada, Uruguay, Singapore, Belgium and Chile, had also already taken steps to adopt such measures. Australia welcomed the decision by Cuba and Indonesia not to appeal the Panel findings in these disputes, and looked forward to the adoption of the respective reports in DS458 and DS467 by the DSB at the present meeting. Australia noted that Honduras and the Dominican Republic had appealed the related Panel Reports in DS435 and DS441. Australia remained firmly committed to defending its legitimate public health measure in those appellate proceedings.

9.3. The representative of Cuba said that her country welcomed the opportunity to make the following statement. The historical and cultural significance of tobacco cultivation for Cuba was beyond question a fact that explained Cuba's decision to submit a claim. Tobacco represented more than 9 per cent of the total value of Cuban exports[72] and this sector was linked to women, elderly people and rural workers on whom other family members depended economically. This was thus an essential economic pillar for various regions of Cuba, such as the province of Pinar del Río. The adoption of the plain packaging measures affected the legitimate interests of tobacco trademark owners and was not proportionate to the objective pursued, since the alleged health benefits for consumers had not been shown to be greater than the effects it generated. The evidence produced by Cuba and other complainants demonstrated that plain packaging did not contribute to any change

[72] According to official statistics from the National Statistics Office (ONEI).

in smoking behaviour. In fact, when it came to the relevant mechanisms by which plain packaging was supposed to help to curb smoking, the results confirmed Cuba's position that the measure had had no effect.

9.4. Cuba believed that the market data and studies on smoking behaviour in Australia revealed that the said measure had not contributed to a reduction in smoking. There was no empirical evidence that linked plain packaging with a drop in tobacco consumption. Although the declared purpose of the plain packaging measure might be health as a right that had to be protected by the state, being of general interest, the fact was that these measures contributed to the loss of attributes and functions of brands, thereby increasing the risk of confusion among consumers. The packaging of tobacco products was no less attractive following the implementation of plain packaging, since graphic health warnings had already taken up 75 per cent of the packaging. In fact, the consumer behaviour that Cuba recognized with plain packaging brought down trading rather than reducing consumption or the prevalence of smoking, which was the said objective pursued by Australia in implementing the measure in question. Cuba confirmed that the plain packaging measures could not "justify" the total "encumbrance" imposed on Cuban trademarks for the purposes of Article 20 of the TRIPS Agreement. Moreover, Australia had reduced the protection of geographical indications in violation of Article 24.3 of the TRIPS Agreement. The plain packaging measures were much more trade restrictive than necessary to fulfil Australia's objective to curb tobacco consumption, and therefore violated Article 2.2 of the TBT Agreement. Similarly, the measures violated Article IX:4 of the GATT 1994 in that they limited the use of trademarks for products. Cuba found the Panel Report extremely disappointing, not only because it rejected the claims of the complainants, but also because of the way in which it did so. The Panel's general approach and the numerous specific elements of the Report suggested that the Panel's analysis essentially consisted of arguments against smoking and was not based on any objective evaluation of the arguments and evidence before it. Instead, the Report gave the impression that the analysis had been drafted to justify a conclusion that had been reached in advance. In other words, this was a case of "reverse engineering". Plain packaging was too drastic a measure to meet the objective of protecting health; in fact, it could be counter-productive by making counterfeiting easier and cheaper, and by increasing tobacco consumption. Despite Cuba's serious concerns with the Panel Report, Cuba wished to notify officially that it would not appeal the Panel Report.

9.5. The representative of Indonesia said that her country wished to recognize the thorough assessment by the Panel of Indonesia's claims in DS467. Indonesia also welcomed the participation of numerous other WTO Members who had expressed their interest in this matter, which would have far-reaching implications and create precedent for other product labelling/packaging regulations. Indonesia recognized that this dispute raised serious questions about the integrity of the multilateral trading system and the ability of WTO Members to safeguard public health. The Panel's decision was certainly not what Indonesia had expected. While Indonesia understood and respected Australia's desire to protect public health and reduce the consumption of tobacco products within its borders, Indonesia remained concerned that its plain packaging requirements were more restrictive of trade than necessary to accomplish legitimate health objectives. Indonesia was and had been a major producer and exporter of tobacco products. Millions of Indonesians depended on the local tobacco industry for employment and support. Nevertheless, Indonesia was not against all efforts to address the harmful effects of tobacco products. In fact, Indonesia had adopted measures designed to discourage people from consuming tobacco products. The latest measure adopted by Indonesia was the mandatory display of graphics on tobacco packaging that illustrated health risks caused by smoking. Indonesia believed that the decision of the Panel in DS467 was not just about the regulation of tobacco products and packaging, but that the Panel Report in this dispute would harm trade of other perfectly legal and legitimate products such as certain foods and drinks. There had been calls to introduce measures similar to tobacco plain packaging to high-fat and high-sugar products in order to combat obesity and diabetes. As a result of the Panel's decision, plain packaging requirements might now be applied to alcoholic beverages for religious or moral reasons. In short, Indonesia feared that the ruling in DS467, and its companion disputes, signalled the beginning of a slippery slope to fundamental disruption of global consumer markets. Indonesia would continue defending the interests of its key industries and sectors against measures that were inconsistent with international law.

9.6. The representative of Canada said that his country appreciated the opportunity to make a statement on the adoption of the Panels' findings in these disputes. These disputes were significant and consequential given their public health dimension. Canada had participated as a third party in these disputes because it had a systemic interest in preserving an interpretation of the

WTO Agreements that reflected the careful balance struck between rights and obligations to facilitate trade and a Member's right to take legitimate public health measures, such as tobacco plain packaging. Further, as WTO Members might be aware, Canada was currently moving forward on its own commitment to introduce plain packaging measures for tobacco products. Canada believed that the Panel had been correct to conclude that Australia's plain packaging measures were consistent with the provisions under the WTO Agreement that had been at issue in these disputes. Canada wished to thank the Panel and the Secretariat for their time and dedication in these important disputes.

9.7. The representative of New Zealand said that his country welcomed the Panel Reports in the disputes brought by the Dominican Republic, Cuba and Indonesia on Australia's plain packaging regime. The decisions had fully upheld Australia's right to regulate for public health purposes by means of tobacco plain packaging. New Zealand supported the adoption of the Reports by the WTO Membership in the usual way. The Panel had ultimately found that Australia's plain packaging measures had not violated the WTO Agreements, nor undermined the protection afforded to trademarks and geographical indications under the TRIPS Agreement. New Zealand had actively supported Australia's defence of its plain packaging regime as a third party to these disputes and New Zealand would continue to participate as a third party in the appeal's proceedings, in support of the Panel's confirmation of the fundamental right of Members to implement measures necessary to protect public health.

9.8. The representative of Uruguay said that her country had participated as a third party in this dispute, which was an issue of great interest to her country. Uruguay fully supported he statement made by Australia. In particular, Uruguay welcomed the conclusions of the Panel and supported the adoption of the Reports at the present meeting.

9.9. The representative of Norway said that, as had been repeatedly stressed in various fora, public health and tobacco control were topics of particular interest to Norway. In Norway's view, it was within the rights of each WTO Member to adopt measures, which were necessary to protect public health, as long as the measures chosen were consistent with the WTO Agreements. Plain packaging of tobacco products was a recommended measure under the WHO Framework Convention on Tobacco Control. It was Norway's firm view that the Framework Convention and the relevant WTO Agreements were mutually supportive, and that it was possible to implement measures intended to regulate the packaging of tobacco products in line with both sets of binding obligations. Norway was therefore pleased to note the Panel's acknowledgement of Australia's right to introduce this type of measures, in consistency with its WTO obligations, to fulfil its obligations under the Framework Convention in order to protect public health.

9.10. The representative of European Union said that his delegation thanked the Panel for its work on the complex issues raised in these cases. The EU welcomed the clarifications brought by these Reports on the balance between health and other interests in domestic measures, under the prism of three WTO Agreements, namely the TRIPS Agreement, the TBT Agreement and the GATT 1994.

9.11. The DSB took note of the statements and adopted the Panel Reports contained in WT/DS458/R, Add.1 and Suppl.1 and WT/DS467/R, Add.1 and Suppl.1.

10 INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

A. Report of the Appellate Body (WT/DS490/AB/R and WT/DS490/AB/R/Add.1) and Report of the Panel (WT/DS490/R and WT/DS490/R/Add.1)

B. Report of the Appellate Body (WT/DS496/AB/R and WT/DS496/AB/R/Add.1) and Report of the Panel (WT/DS496/R and WT/DS496/R/Add.1)

10.1. The Chairperson proposed that the two sub-items under Agenda item 13 concerning the Appellate Body Reports and the Panel Reports in DS490 and DS496 respectively were taken up together. She drew attention to the communication from the Appellate Body contained in documents WT/DS490/9 – WT/DS496/10 transmitting the Appellate Body Reports on: "Indonesia – Safeguard on Certain Iron or Steel Products", which had been circulated on 15 August 2018 in documents WT/DS490/AB/R and Add.1, and in WT/DS496/AB/R and Add.1. She 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: "[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 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".

10.2. The representative of Chinese Taipei said that his delegation thanked the Appellate Body, the Panel and the Secretariat for their hard work on these disputes. Chinese Taipei also thanked the parties and all third participants for their constructive participation during the course of these proceedings. Chinese Taipei was pleased that the Appellate Body had confirmed that the Panel requests had properly raised a claim under Article I:1 of the GATT 1994 against the Indonesian specific duty as a stand-alone measure, and thus, upheld the Panel's finding that the application of the specific duty was inconsistent with Indonesia's MFN obligation under Article I:1 of the GATT 1994. Chinese Taipei was, however, disappointed that the Panel and the Appellate Body had not accepted the parties' arguments regarding characterization of the disputed measure. According to the Panel and the Appellate Body, to constitute a safeguard measure within the meaning of Article XIX of the GATT 1994 and Article 1 of the Agreement on Safeguards, a measure had to result in the suspension of a GATT obligation or the withdrawal or modification of a tariff concession, and such suspension, withdrawal or modification had to be designed to prevent or remedy the serious injury. As Chinese Taipei had demonstrated throughout the course of proceedings, it did not think that the language of Article XIX of the GATT 1994 required such "constituent features". Chinese Taipei was concerned that the finding of the Panel and the Appellate Body might add a degree of uncertainty to the multilateral safeguard mechanism. Specifically, Members now had to conduct their own independent assessment of whether a purported safeguard measure possessed these so-called "constituent features" before they could decide to exercise their rights under the Agreement on Safeguards, for example, to request for consultations under Article 12 or to pursue retaliatory actions under Article 8. Chinese Taipei also recalled that one of the purposes of the Agreement on Safeguards was "to re-establish multilateral control over safeguards and eliminate measures that escape such control". In the event that a Member was willing to subject its measure to stricter scrutiny under the Agreement on Safeguards, as in this dispute, Chinese Taipei did not see why the multilateral trading system should refuse it. Despite the above-mentioned concerns, Chinese Taipei was overall pleased with the outcome in this dispute and welcomed the adoption of the Appellate Body and the Panel Reports. Chinese Taipei looked forward to working with its co-complainant and Indonesia to achieve prompt, effective and WTO-consistent compliance.

10.3. The representative of Viet Nam said that her country echoed the statement made by Chinese Taipei in thanking the Appellate Body, the Panel and the Secretariat for their hard work on these disputes. Viet Nam also thanked the parties and third participants for their constructive participation during these proceedings. Viet Nam welcomed the adoption of the Appellate Body and Panel Reports in these disputes. In Viet Nam's view, the measure at issue was clearly inconsistent with the WTO Agreement. However, it had taken almost three years of proceedings to obtain a positive ruling. The panel process had been beset with delays because of human resource constraints in the WTO Rules Division. Viet Nam's panel had been established on 28 October 2015 to examine a measure that was supposed to expire on 21 July 2017. However, the Panel had taken almost 22 months to complete its work. If the Panel had done its work in accordance with the DSU time-frame, or even within a year from its establishment or composition, the Report would have been circulated almost a year in advance of the extension of the original measure. Thus, it would have been unnecessary to debate on appeal whether the extension had been within the terms of reference of this dispute. Furthermore, Viet Nam was also concerned about the findings of the Panel and the Appellate Body that Indonesia's specific duty was not a safeguard measure under Article XIX of the GATT 1994 and the Agreement on Safeguards. Viet Nam was afraid that Members that were requested to conduct a safeguard investigation could now skip their relevant obligations under the Agreement on Safeguards, including notification, consultations and gradual liberalization requirements, if they decided not to impose measures that exceeded their tariff binding or impose quantitative restrictions. Nonetheless, if a Member wished its measure to be a "WTO safeguard" (for example, because of regional commitments that only allow the imposition of WTO safeguards against regional partners), it had to impose a more trade-restrictive measure, such as higher duties above the bound rates or quotas in the case of unbound items. Only in this manner could a Member apply a "safeguard measure" for purposes of Article XIX of the GATT 1994. The Appellate Body had not considered that the exclusion of developing country imports from a safeguard measure was a relevant suspension under Article XIX. Viet Nam recalled that the exclusion of developing country imports was part of the requirement to apply a measure "only to the extent necessary". However,

the Appellate Body had regarded the "necessity" requirement as unrelated to the legal characterization of a measure as a safeguard. Viet Nam was not convinced about this point. For example, for an item bound at the level of 50 per cent *ad valorem*, the choice of imposing a measure "only to the extent necessary" at levels above or below 50 per cent would be determinative of whether the measure was a safeguard. If it was set at above 50 per cent, it would be so. If not, the measure would not be a safeguard. Thus, in establishing the extent necessary of a measure, a Member might or might not have suspended the GATT 1994 obligation, and affected the legal characterization of the measure as a safeguard, contrary to what the Appellate Body had stated in its Report. Viet Nam was looking forward to the implementation of these Reports. Viet Nam hoped that Indonesia would decide to comply with the rulings and recommendations immediately.

10.4. The representative of Indonesia said that on the 15 August 2018, Indonesia had received the Appellate Body Report concerning "Indonesia – Safeguard on Certain Iron on Steel Products". Although Indonesia, Chinese Taipei and Viet Nam had appealed that the measure at issue was, in fact, a safeguard measure, the Appellate Body, however, upheld the Panel's finding to rule otherwise, and had, therefore, rejected all claims submitted by Chinese Taipei, Viet Nam and Indonesia relating to Article XIX of the GATT 1994 or the Agreement on Safeguards. In accordance with the Appellate Body Report, the measure at issue had only been found to be inconsistent with Article I:1 of the GATT 1994. This was due to the fact that during its implementation there had been certain WTO developing countries, which had been exempted from the said measure. Although Indonesia had appealed that this so-called stand-alone claim had not been clearly identified in the Panel request, Indonesia, nevertheless, respected the result of Appellate Body ruling, which was the highest adjudicative body in the WTO dispute settlement system. Indonesia appreciated the Panel's and Appellate Body's decision to reject Chinese Taipei's request for a recommendation that the only way for Indonesia to implement the Panel's and Appellate Body's ruling was to immediately withdraw the measure at issue and to grant Indonesia discretion on how to implement the ruling. Indonesia took note that the Panel and the Appellate Body also clarified that commitments under FTAs were not part of WTO covered agreements and therefore could not be raised in a WTO dispute settlement proceeding. Indonesia respected the Panel's and Appellate Body's ruling that would be adopted at the present DSB meeting and noted that Indonesia would endeavour to implement the adopted Report within a reasonable period of time.

10.5. The representative of European Union said that his delegation thanked the Panel, the Appellate Body and the Secretariat for their work in these disputes. The EU wished to highlight several of the Appellate Body's clarifications. The EU welcomed the clarification that Article XIX:1(a) of the GATT 1994 did not expressly define the scope of the measures that fell within the WTO safeguard disciplines, nor did it list the GATT 1994 obligations that might be suspended, for a measure to qualify as a safeguard measure (paragraphs 5.57 and 5.58 of the Appellate Body Report). Instead, whether a measure constituted a safeguard measure could be determined only on a case-by-case basis. The Appellate Body had cautioned that in carrying out the analysis, a distinction had to be made between the features that characterized a safeguard measure and the conditions for the measure to be consistent with the Safeguards Agreement and the GATT 1994, "[p]ut differently, it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the applicability of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the WTO-consistency of a safeguard measure" (paragraph 5.57 of the Appellate Body Report). For example, the specifications in Articles 5.1 and 7.1 of the Agreement on Safeguards that safeguard measures should be applied "only to the extent" and "only for such period of time" as might be "necessary to prevent or remedy serious injury and to facilitate adjustment" were not relevant for the legal characterization of a measure as a safeguard measure, for purposes of determining the applicability of WTO safeguard disciplines. In contrast, they related to the WTO-conformity of a safeguard measure (paragraph 5.59 of the Appellate Body Report). On the question which measure could be considered a safeguard measure under Article XIX of the GATT 1994, the Appellate Body had further clarified that it had to present certain constituent features, absent of which it could not be considered a safeguard measure. Such constituent features included, "[f]irst, that measure must suspend, in whole or in part, a GATT 1994 obligation or withdraw or modify a GATT 1994 concession. Second, the suspension, withdrawal or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the product" (paragraph 5.60 of the Appellate Body Report). The Appellate Body had further developed in paragraph 5.60 of its Report that "[i]n order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must identify all

the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and thereby, properly determine the disciplines to which the measure is subject". However, the Appellate Body had pointed out that "no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards" (paragraph 5.60 of the Appellate Body Report).

10.6. The representative of Australia said that her country welcomed the Appellate Body's findings in this dispute. Australia particularly welcomed the Appellate Body's clarification of two fundamental legal issues, namely (i) the constituent elements of a safeguard; and (ii) the obligations that could relevantly be suspended for the purpose of Article XIX:1(a) of the GATT 1994. In Australia's view, these appellate proceedings had underscored the importance of third party participation in the adjudication of WTO disputes since all the participants had adopted identical positions with respect to a number of fundamental legal issues, the input of third participants had been essential for raising a broader spectrum of interpretative perspectives. In this regard, Australia noted that it had advocated the approach ultimately taken by the Appellate Body in this case, which had confirmed that a safeguard measure had to have a particular content (the suspension of a GATT 1994 obligation, or withdrawal or modification of a concession) and a particular objective (preventing or remedying serious injury to the Member's domestic industry); and importantly, the content and objective of a safeguard measure were linked – namely that in order to constitute a safeguard measure under Article XIX:1(a), the suspension of the obligation (or withdrawal or modification of the concession) had to have the aim of preventing or remedying serious injury to the Member's domestic industry. As Australia had argued during the appellate proceedings, giving proper effect to these constituent elements of a safeguard measure preserved the balance of rights and obligations of Members by ensuring that measures that did not involve any suspension of a GATT 1994 obligation – and which Members were therefore free to impose – were not subject to additional disciplines; and measures that purported to "suspend" a GATT 1994 obligation but not for the purpose provided in Article XIX:1(a) constituted a breach of the relevant obligation and were actionable as such by another Member.

10.7. The representative of Mexico said that her country had not participated as a third party in this dispute. Nevertheless, Mexico thanked the members of the Appellate Body for their dedication in the analysis of the nature of safeguard measures. The Report covered the key elements and characterizations of safeguard measures, and highlighted that, irrespective of the characterization of a measure by a Member (whether they were a complainant or a defendant), and the internal procedures through which such safeguard measures were adopted. These measures were subject to review by panels, which were required to carry out an evaluation of the application of the relevant covered agreements. Mexico also appreciated the guidance provided with respect to the two main issues addressed in the Report, namely, first, the distinction made by the Appellate Body between the elements that defined a safeguard measure and that determined the applicability of the relevant WTO Agreement, and the elements that related to the conformity of the measure with WTO provisions; and second, the possibility to suspend the MFN obligation when a specific objective was being pursued. Mexico welcomed the adoption of these Reports.

10.8. The representative of Canada said that his country was pleased that the Appellate Body had confirmed the legal standard for determining whether a measure qualified as a safeguard measure within the meaning of the Agreement on Safeguards and Article XIX of the GATT 1994. In particular, Canada noted that the Appellate Body had clarified that a panel was not constrained by how a responding Member characterized its measure. Rather, panels had to undertake an objective assessment of the design, structure and operation of the measure in determining whether it constituted a safeguard measure. Canada agreed with the Appellate Body that it was necessary for a panel to undertake such an objective assessment in determining whether an impugned measure constituted a safeguard measure.

10.9. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS490/AB/R and Add.1, and the Panel Report contained in WT/DS490/R and Add. 1, as modified by the Appellate Body Report; and the DSB adopted the Appellate Body Report contained in WT/DS496/AB/R and Add.1, and the Panel Report contained in WT/DS496/R and Add. 1, as modified by the Appellate Body Report.

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

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

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

11.3. The representative of the United States said that the United States thanked the Chairperson for the continued work on these issues. As the United States had explained in prior meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remain unaddressed. For example, at the DSB meeting in August 2017, the United States had made clear its concerns with the issuance of appellate reports by individuals who were no longer members of the Appellate Body. Yet, one year later, an individual who was not currently a member of the Appellate Body continued to decide appeals. As the United States had explained many times, it was for the DSB, not the Appellate Body, to decide whether a person who was no longer an Appellate Body member could continue to serve on an appeal.[73] The United States referred back to its statements at earlier DSB meetings for more elaboration on its concerns. The United States therefore would continue its efforts and its discussions with Members and with the Chairperson to seek a solution on these important issues.

11.4. The representative of Argentina said that in addition to co-sponsoring the proposal that had just been re-submitted, more than one year after it had been first submitted to the DSB, Argentina wished to express its commitment to the rules-based multilateral trading system. This commitment had been reflected in its decisions to host the MC-11 and to put forward an Argentine candidate to fill one of the vacancies in the WTO Appellate Body. In this context, Argentina wished to express its grave concern regarding the current situation of the multilateral trading system, and the "abnormal" functioning of the Appellate Body in particular. For over a year, the DSB had been unable to meet its obligation to initiate the selection processes to replace the Appellate Body members whose mandates had come to an end. Several Members had requested that measures be taken regarding both substantive and procedural matters relating to the dispute settlement system, before the Appellate Body selection processes could be launched. Members had also flagged the possible risks

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

that a delay in initiating the selection processes would pose for the dispute settlement system, and the impact that such a situation would have on the multilateral trading system if it was not resolved swiftly. The current deadlock regarding the selection processes could bring the system to a standstill, if it continued. To address the present situation, Argentina thus requested, as a matter of urgency, the initiation of a frank and pragmatic dialogue, which should include all stakeholders and focus on specific issues that were considered as obstacles to the launch of the selection processes. It appeared that several informal proposals had already been placed on the table. These proposals had been circulated in various forms by a number of Members, and aimed to address the concerns raised. Given the urgency of the situation, Members had to take action and quickly decide on an appropriate forum in which such technical discussions could be held, so that measures could be taken promptly to launch the selection processes. Argentina agreed that Members could first address the concerns that had been raised, which, given their procedural nature, could be addressed in the short term to unblock the selection processes. Then, Members could turn to the more substantive matters that required more time for discussion. Argentina was willing to contribute towards the clarification of the relevant rules of the Working Procedures for Appellate Review, and eventually those of the DSU, which were directly related to the issues that were preventing the launch of the selection processes, and to address the initiatives that would ensure the smooth and more effective functioning of the dispute settlement system.

11.5. The representative of Canada said that his country deeply regretted that the DSB had been unable to meet 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, if necessary, several processes to select new Appellate Body members for the three current vacancies. Canada was pleased to join the proposal and urged the DSB to adopt it without further delay. Like other Members, Canada was disappointed that the United States had linked the start of the Appellate Body selection processes to the resolution of certain procedural concerns it had shared with Members. Canada invited the United States to engage in discussions with interested Members with a view to expeditiously developing a solution to the concerns that it had raised. 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.

11.6. The representative of Brazil said that his country shared the disappointment expressed by other Members regarding the long and continued impasse concerning the selection processes of new Appellate Body members, and was ready to engage with all Members in a serious, concrete and substantive discussion to overcome the impasse. Any concerns that the United States might have regarding Rule 15, or any other issue, could not serve as a justification for violating other mandatory obligations, such as the one contained in Article 17.2 of the DSU. There was no need to elaborate on the consequences of accepting the proposition that any concerns raised by Members could block the functioning of WTO bodies.

11.7. The representative of Thailand said that her country wished to refer to its statements made in previous DSB meetings, and reiterated its support for launching the selection processes as soon as possible.

11.8. The representative of China said that his country wished to echo the statement made by Mexico, on behalf of 67 Members, and was disappointed that the selection processes could, once again, not be initiated. China referred to its previous statements made on this matter. China believed that when Members had different views on a specific issue, discussion and negotiation were the only way to move forward. However, the United States constantly refused to engage in meaningful discussions after raising its concerns with respect to the functioning of the Appellate Body. Again, China urged the United States to meet its commitments under the WTO Agreements and to interpret all WTO rules in good faith.

11.9. The representative of Australia said that her country referred to its previous statements made on this matter and reiterated its serious concerns regarding the DSB's longstanding inability to commence Appellate Body appointment processes. Australia remained committed to resolving this impasse as a priority, and was ready and willing to work with other Members on pragmatic solutions.

11.10. The representative of Norway said that her country referred to previous statements made in the DSB related to the same Agenda item. Norway continued to encourage all Members to support the proposal to launch the process of filling the vacancies in the Appellate Body without further delay, in order to surpass the deadlock that Members had been facing for over a year. Norway

continued to have the well-functioning of the dispute settlement system and the Appellate Body as a key priority. Although Norway did not agree that there was a link between filling the vacancies and resolving the procedural and systemic issues raised before the DSB, Norway reiterated its continued openness and willingness to engage constructively with all and any Member on their grievances with the system.

11.11. The representative of Switzerland said that her country referred to its statements made on this matter at previous DSB meetings. Once again, Switzerland reiterated its deep systemic concerns about this ongoing deadlock. This situation was worsening with detrimental consequences for the integrity of the multilateral trading system. Switzerland reiterated its call on all Members, and in particular major ones, to engage seriously in order to find a way forward and overcome this impasse without further delay.

11.12. The representative of Korea said that his country supported the statement made by Mexico, on behalf of the proponents of the joint proposal. Korea wished to refer to its previous statements made in the DSB, under this Agenda item.

11.13. The representative of Japan said that his country supported the joint proposal and referred to its previous statements made on this matter.

11.14. The representative of Singapore said that his country referred to its previous statements made on this matter, and reiterated its serious systemic concerns about the lengthy delays in launching the Appellate Body selection processes. Following the present meeting, there would be only one more regular DSB meeting, i.e. on 26 September 2018, before the term of another Appellate Body member would expire on 30 September 2018. Given the great urgency of the situation, Singapore welcomed the Chairperson's efforts with regard to the possible reappointment of that Appellate Body member and the filling the other Appellate Body vacancies. Systemic issues, which had been raised, could be discussed in a separate process. Singapore stood ready to engage constructively and work with other Members, as well as the Chairperson, to help resolve this impasse.

11.15. The representative of Chinese Taipei said that his delegation referred to its statements made in previous DSB meetings, and reiterated its support to initiate the selection processes as soon as possible.

11.16. The representative of Chile said that his country supported the statement made by Mexico under this Agenda item, and wished to reiterate its statement made under item 4 of the present meeting, namely, that Chile wished to work on finding solutions.

11.17. The representative of India said that her country referred to its previous statements made on this matter and emphasized India's willingness to engage constructively with Members that offered concrete proposals and solutions to address the concerns that they had raised about the functioning of the Appellate Body. India believed, however, that the Appellate Body selection processes should not be held hostage to this process.

11.18. The representative of Hong Kong, China said that his delegation referred to its statements made in previous DSB meetings on this matter. Hong Kong, China reiterated its deep concerns with the prolonged impasse over the selection process. While some procedural and systemic concerns about the dispute settlement system had been raised, Hong Kong, China did not see any linkage between those concerns and the launch of the AB selection processes. The WTO Membership's imminent task was to avoid a dysfunctional Appellate Body that would seriously affect the normal operation of the dispute settlement system. Hong Kong, China urged Members to show flexibility in resolving the deadlock as soon as possible.

11.19. The representative of New Zealand said that his country referred to its previous statements made on this issue. New Zealand associated itself with the statement made by Mexico in particular, and the comment made by Singapore. Obviously, this was an issue of great systemic importance and one that New Zealand wished to see resolved as soon as possible.

11.20. The representative of Mexico, speaking on behalf of the 67 co-sponsors of the proposal, said that the proponents regretted that, for the fifteenth time, the WTO Membership was unable to reach

consensus to start the Appellate Body vacancies selection processes and had, thus, failed to fulfil their duty as WTO Members. No discussion should prevent the Appellate Body from continuing to function fully and WTO Members should comply with their DSU obligation to fill the vacancies as they arose. By failing to act at the present meeting, the WTO Membership would maintain the current situation, which was seriously affecting the work of the Appellate Body against the best interest of its Members.

11.21. The representative of European Union said that his delegation wished to make brief comments for the record. The EU noted that with each passing month, the gravity and urgency of the situation increased. WTO Members had a shared responsibility to resolve this issue as soon as possible. The EU thanked all Members that co-sponsored the joint proposal, and referred to its statements made on this issue in previous DSB meetings, starting in February 2017.

11.22. The representative of Guatemala said that his country wished to join other delegations that had already expressed their concerns, and referred to its statements made on this matter at previous DSB meetings.

11.23. The representative of Costa Rica, speaking on behalf of the GRULAC, said that the WTO was undergoing a delicate situation due to the deadlock in replacing and appointing new Appellate Body members. First, the GRULAC wished to recognize the Chairperson's efforts towards finding a solution to this problem and appreciated the opportunities that the Chairperson had provided to Members to express their views on the situation. In this respect, the GRULAC wished to emphasize its deep concern about the current situation, which affected the functioning of one of the WTO's principal bodies. If this problem was not resolved, it would lead, in the short term, to the paralysis of the Appellate Body, putting the entire dispute settlement system at risk. The GRULAC noted that the delay in launching the selection processes, with three vacancies at present, meant that WTO Members were failing to comply with an existing mandate, and thus, amounted to a breach of a legal obligation under a covered agreement. This had serious systemic consequences and set a bad precedent for the WTO, causing damage and affecting the image and credibility of the WTO, in particular, in light of the complex international environment that adversely affected the multilateral trading system. The GRULAC had heard the concerns raised with regard to the functioning of the dispute settlement system, and the specific issues regarding decision-making processes, which prevented the launch of the AB selection processes. The GRULAC did not accept that the concerns raised should prevent Members to meet their legal obligation, or that these concerns were linked to the current or future selection processes. The functioning of the system could not be brought to a halt because the concerns of some Members had not been addressed. The GRULAC further noted that a proper interpretation of Article 17 and Article 2 of the DSU did not suggest the requirement for positive consensus to launch the selection processes to fill the vacancies in the Appellate Body. The GRULAC, therefore, failed to understand why these processes had not yet been initiated. The GRULAC called on Members to understand the serious repercussions of a continued blockage concerning the start of the selection processes. The GRULAC also believed that the selection processes should not be linked to a separate process, but should be addressed on their own merit. It was therefore urgent to find a solution swiftly to ensure compliance with the said legal obligation. Finally, the GRULAC asked the Chairperson to continue to actively seek a solution to this issue.

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

11.25. The DSB took note of the statements.

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

12.1. The Chairperson said that under this Agenda item, she wished to report back to delegations on the results of her informal consultations on the issue of possible reappointment of Mr. Shree Baboo Chekitan Servansing, whose first four-year term of office would expire on 30 September 2018. She recalled that starting in May 2018, following Mr. Servansing's indication of his interest to the DSB to be considered for reappointment as a member of the Appellate Body, she

had been consulting informally with delegations on this matter at the level of Ambassadors. In this regard, she had followed past practice established in the context of previous reappointment processes. As part of the process, she had made herself available to all interested delegations to hear their views on the issue of possible reappointment and the process to be followed. She had also encouraged delegations with views on this matter to contact her directly. She used the opportunity of the present meeting to thank all delegations for their participation in this informal process. Finally, she wished to report to delegations that, on the basis of these consultations, it was her understanding that there would be no consensus to support Mr. Servansing's reappointment. Given that this process of informal consultations on the issue of possible reappointment was now concluded, she wished to confer with all delegations on the way forward. Her door was also open for any suggestion.

12.2. The representative of the United States said that for more than 15 years, across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members. Through persistent overreaching, the WTO Appellate Body had been adding obligations that had never been agreed by the United States and other WTO Members. The President's 2018 Trade Policy Agenda had outlined several longstanding US concerns.[74] The United States had raised repeated concerns that appellate reports had gone far beyond the text setting out WTO rules in varied areas, such as subsidies, anti-dumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect US workers and businesses against unfair trading practices. On procedural, systemic issues, for example, the Appellate Body had issued advisory opinions on issues not necessary to resolve a dispute, had reviewed panel fact-finding despite appeals being limited to legal issues, had asserted that panels must follow its reports although there was no system of precedent in the WTO, and had continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules. And for the last year, the United States had been calling for WTO Members to correct the situation where the Appellate Body acted as if it had the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office – as set by the WTO Members – had expired. This so-called "Rule 15" was, on its face, another example of the Appellate Body's disregard for the WTO's rules. The US concerns had not been addressed. When the Appellate Body abused the authority it had been given within the dispute settlement system, it undermined the legitimacy of the system and damaged the interests of all WTO Members who cared about having the agreements respected as they had been negotiated and agreed. The United States would continue to insist that WTO rules be followed by the WTO dispute settlement system. In this circumstance, the United States had determined that it was not prepared to support the reappointment of Mr. Servansing to the Appellate Body. This position was no reflection on any one individual but reflected its principled concerns.

12.3. The DSB took note of the statements.

[74] Office of the US Trade Representative, 2018 President's Trade Policy Agenda, at 22-28.