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Dispute Settlement Body
26 April 2019

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 26 APRIL 2019

Chairman: H.E. Dr David Walker (New Zealand)

Prior to the adoption of the Agenda, the representative of the Bolivarian Republic of Venezuela said that his delegation wished to make a short statement for the record to the effect that Venezuela was not asking to modify the proposed Agenda of the present meeting to request an inclusion of an item. However, Venezuela wished to reserve its right to do so at any future DSB meeting. Subsequently, Japan said that it wished to include on the proposed Agenda an item under "Other Business" regarding its communication contained in Job/DSB/3. The Agenda was adopted as amended. Following the adoption of the Agenda, the representative of Peru, speaking on behalf of Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras, Panama and Paraguay said that the members of the Lima Group supported the functioning of the DSB at the present meeting. However, their Governments wished to indicate that they did not recognize the legitimacy of Nicolás Maduro's regime nor that of its representatives. The representative of Venezuela said that the DSB was not the appropriate forum to discuss this matter. The representative of the Russian Federation said that her country supported the legitimate government of Nicolás Maduro and underlined that the WTO was not the appropriate international forum vested with the authority to discuss issues raised by the members of the Lima Group.

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1 SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.194)

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WR/DS160/24/Add.169)

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.132)

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.16)

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.8)

F. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WR/DS484/18/Add.7)

G. United States – Anti-dumping measures on certain oil country tubular goods from Korea: Status report by the United States (WT/DS488/12/Add.7)

H. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.3 – WT/DS478/22/Add.3)

1.1. The Chairman noted that there were eight sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 requires 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, he invited delegations to provide up-to-date information about their compliance efforts. He 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". He then turned to the first status report under this Agenda item.

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.194)

1.2. The Chairman drew attention to document WT/DS184/15/Add.194, 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 15 April 2019, 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 DSB's recommendations and rulings 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 wished to thank the United States for its most recent 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 (WR/DS160/24/Add.169)

1.6. The Chairman drew attention to document WT/DS160/24/Add.169, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning 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 15 April 2019, 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 wished to thank the United States for its status report and its statement made at the present meeting. The EU wished to refer to its statements made at previous DSB meetings under this Agenda item. The EU said that it wished to resolve this case as soon as possible.

1.9. The representative of China said that his country noted that the United States had submitted its 170th status report in this dispute. Once again, this most recent report, as was the case for the status reports submitted by the United States ahead of previous DSB meetings, was not different from the very first report submitted in this dispute. Nearly two decades after the DSB had adopted the Panel Report in DS 160, this dispute remained unresolved. Section 110(5) of the US Copyright Act, which had been found to be inconsistent with the requirements of the Berne Convention and the WTO TRIPS Agreement, was still in effect. Without further implementation, the United States had continuously failed to provide the minimum standard of protection as required by the WTO TRIPS Agreement and had become the only WTO Member who failed to implement the DSB's recommendations and rulings under the TRIPS Agreement. Article 21.1 of the DSU stated that: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China, therefore, 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 without further delay.

1.10. The representative of the United States said that as the United States had noted at prior DSB meetings, by intervening under this item, China attempted to give the appearance of concern for intellectual property rights. Yet, China had been engaging in industrial policy which had resulted in the transfer and theft of intellectual property and technology to the detriment of the United States and its workers and businesses. In contrast, the intellectual property protection that the United States provided within its own territory equalled or surpassed that of any other Member. Indeed, none of the damaging technology transfer practices of China that had been 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, once again, the United States had tried to derail the discussion toward other irrelevant issues. Under this Agenda item, the relevant issue was whether the United States had fully implemented the DSB's recommendations and rulings in this dispute. Obviously, the answer was negative. In its statement under this Agenda item, the United States appeared to suggest the supremacy of its protection of intellectual property rights. Aside from the relevance of that assertion to the issue under this Agenda item, that assertion was in and of itself deeply flawed. The United States had deliberately delayed full compliance in this dispute for more than 14 years. It was the only WTO Member who failed to implement the DSB's rulings and recommendations under the TRIPS Agreement. Regarding US criticism about China's intellectual property protection, China wished to refer to its statements made at prior DSB meetings, including its statement made at the 28 May 2018 DSB meeting. His country took its commitments under the TRIPS Agreement seriously and continued its various efforts to ensure the protection of intellectual property rights holders. China welcomed and always stood ready to engage in good faith discussions with other Members regarding any intellectual property issue. Under this Agenda item, it was fair to say that the long overdue US implementation in this dispute was of great concern to many other Members, if not all, and to the multilateral trading system, since it severely undermined the effectiveness and functioning of the dispute settlement mechanism. China, therefore, urged the United States to faithfully honour its duty to implement the DSB's recommendations and rulings in this dispute. In addition, China invited the United States to include in its next status report the specific reasons as to why implementation of the DSB's recommendations and rulings in this dispute could not take place for so long in this dispute.

1.12. The representative of the United States said that the record showed that the United States had fully complied in the vast majority of its disputes. The best way for China to support fairness in the world trading system was to remedy the problems it had created. China should change its behaviour: stop distorting markets, stop forcing companies to transfer technology, and create a level playing field that would give all countries a better chance to succeed.

1.13. The representative of China said that his delegation had just heard the US claim regarding a "level playing field". China's understanding was that the baseline of the level playing field in this Organization was compliance with WTO rules. China, therefore, requested that the United States fully implement the DSB's recommendations and rulings in this dispute.

1.14. 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.132)

1.15. The Chairman drew attention to document WT/DS291/37/Add.132, 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.

1.16. The representative of the European Union said that his delegation continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and concluded that there were no safety concerns. In general, efforts to reduce delays at all stages of authorization procedures were constantly maintained at a high level. This had already resulted in a clear improvement of the situation. It should be noted that delays in risk assessment on some applications were mainly due to the amounts of time that applicants needed to respond to justified scientific questions. The EU wished to note that on 11 April 2019, two draft authorizations – one for a new genetically-modified (GM) soybean[1] and one for the renewal of the authorization for a GM maize[2] – had been presented for a vote in the Appeal Committee, with a "no opinion" result. It was now for the European Commission to decide on these authorizations. The EU continued to be committed to acting in line with its WTO obligations. More generally, and as the EU had stated many times at previous DSB meetings, the EU wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings in this dispute.

1.17. The representative of the United States thanked the European Union (EU) for its status report and its statement at the present meeting. The United States continued to be concerned with the EU's measures affecting the approval of biotech products. Delays persisted and affected dozens of applications that had been awaiting approval for months or years, or that had already received approval. As the United States had highlighted at prior DSB meetings, even when the EU finally approved a biotech product, EU member States continued to impose bans on the supposedly approved product. The EU maintained legislation, in the form of the amendment of EU Directive 2001/18 through EU Directive 2015/413, that permitted EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms (GMOs), even where the European Food Safety Authority (EFSA) had concluded that the product was safe. This legislation permitted EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State's territory from cultivation. At least 17 EU member States, as well as certain regions within EU member States, had submitted such requests with respect to MON-810 maize. This could not be squared with the EU's statement at a previous DSB meeting that no member State had taken action to ban the cultivation of such a product. The United States further highlighted a public statement issued by the EU's Group of Chief Scientific Advisors on 13 November 2018, in response to the 25 July 2018 European Court of Justice (ECJ) ruling that addressed the forms of mutagenesis that qualified for the exemption contained in EU Directive 2001/18/EC. As the United States had previously noted, the Directive had been a central issue in dispute in these WTO proceedings, and concerned the deliberate release into the environment of genetically modified organisms, or GMOs. Contrary to the EU's statement made at prior DSB meetings, this ECJ ruling related to previously authorized GMOs. The EU Group of Chief Scientific Advisors' statement spoke to the lack of scientific support for the regulatory framework under EU Directive 2001/18. Contrary to the EU's assertion made at a previous DSB meeting, the statement clearly did not reflect a mere reaction from a group of stakeholders. Rather, the statement reflected scientific advice provided to the European Commission in response to its request for such information. The message provided in the statement was clear: "in view of the Court's ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose". The statement

[1] Soybean MON 87751.
[2] Renewal of maize 1507xNK603.

further advised that current scientific knowledge called into question the definition of "GMOs" under the Directive and noted that mutagenesis, as well as transgenesis, occurred naturally. The United States urged the EU to act in a manner that would bring into compliance the measures at issue in this dispute. The United States further 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.

1.18. The representative of the European Union said that his delegation wished to remind Members that the opt-out Directive was not covered by the DSB's recommendations and rulings in this dispute. In addition, no EU member State had imposed any ban. Moreover, under the terms of the Directive, an EU member State could only adopt other measures restricting or prohibiting cultivation only if such measures were in line with EU law, reasoned, proportional and non-discriminatory and based on compelling grounds. In any event, the provisions of the opt-out Directive did not affect the free movement of seeds within the EU. He noted that in its statement at the present meeting, the United States had mentioned a product referred to as "MON 810". His delegation was not certain as to what this reference was meant to cover. The EU was not aware of the status of this product and whether it was causing any trouble to the right holder. The EU said that perhaps the United States would wish to explain the meaning of its reference to the MON 810 product at a subsequent DSB meeting. In July 2018, the Court of Justice of the European Union (CJEU) had provided important clarification on the scope of application of the GMO legislation in relation to organisms obtained by mutagenesis techniques. The CJEU had ruled that organisms obtained by means of new techniques/methods of mutagenesis, which had appeared or had been developed mostly after the adoption of Directive 2001/18, fell within the scope of this Directive. The CJEU's judgment had not extended the scope of the legislation but had clarified how it should be read. The European Commission was now working to ensure proper implementation of the CJEU's judgment together with EU member States. EU member States were responsible at the national level for the relevant control activities regarding the placing on the market of both products produced in the EU and imported products. To this effect, the Joint Research Centre was helping national laboratories to develop relevant detection methods. The EU wished to recall that the Group of Chief Scientific Advisors was an independent group of scientific experts that provided scientific advice to the European Commission. Its statement focused on the challenge related to products obtained by new mutagenesis techniques and not to the "conventional GMOs". Its statement did not suggest or imply that Directive 2001/18 would not be fit for purpose as far as conventional GMOs were concerned. There had been many reactions to the CJEU's judgment which had brought forward a wide range of different views. That statement fed into ongoing discussions on new mutagenesis techniques with all stakeholders. Many stakeholders agreed with this statement. However, many others considered that the current legislation was adequate to address the risks from new biotechnology developments. The EU confirmed the European Commission's strong interest in this debate, which should extend beyond the regulatory status of new technologies and focus on the way new products could help address societal challenges, such as climate change or reduction of use of pesticides, without negative consequences on health and environmental protection.

1.19. 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.16)

1.20. The Chairman drew attention to document WT/DS464/17/Add.16, 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.

1.21. The representative of the United States said that the United States provided a status report in this dispute on 15 April 2019, in accordance with Article 21.6 of the DSU. On 29 March 2019, the US International Trade Commission (USITC) had determined in the context of a five-year "sunset" review that revoking the existing anti-dumping and countervailing duty orders on imports of large residential washers from Korea would not be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. As a result of the USITC's negative determinations, the existing anti-dumping and countervailing duty orders on imports of large residential washers from Korea would be revoked. Revocation of the anti-dumping and countervailing duty orders was expected to take place shortly after the publication of the USITC's public report, which was scheduled to be released on 8 May 2019. By withdrawing the anti-dumping and countervailing duty orders on

imports of large residential washers from Korea, the United States would have completed implementation of the DSB's recommendations concerning the anti-dumping and countervailing duty investigations of large residential washers from Korea. The United States continued to consult with interested parties on options to address the DSB's recommendations relating to other anti-dumping measures challenged in this dispute.

1.22. The representative of the Republic of Korea said that his country wished to thank the United States for its status report and the statement made at the present meeting. Korea acknowledged and welcomed the recent steps taken by the United States to revoke the anti-dumping and countervailing duty orders on large residential washers. Korea regarded them as positive developments in this dispute. Korea was currently evaluating whether the revocation, in its effect, would achieve full compliance with the DSB's rulings and recommendations in terms of the "as applied" measures at issue in this dispute. At the same time, Korea noted that the United States had not taken any meaningful step to comply with the "as such" findings in this dispute. Therefore, Korea urged the United States to take appropriate steps to promptly implement the DSB's recommendations and rulings for the "as such" measure in order to fully comply with its obligations under the covered agreements.

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

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

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.8)

1.25. The Chairman drew attention to document WT/DS471/17/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 certain methodologies and their application to anti-dumping proceedings involving China.

1.26. The representative of the United States said that the United States had provided a status report in this dispute on 15 April 2019, 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 DSB's recommendations.

1.27. The representative of China said that on 11 May 2017, the Appellate Body had circulated its report in this dispute. On 22 May 2017, the DSB had adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report. The arbitration pursuant to Article 21.3(c) of the DSU had determined the reasonable period of time (RPT) to be 15 months. The RPT had expired on 22 August 2018. On 9 September 2018, China had requested authorization from the DSB to suspend concessions or other obligations and the matter had been referred to arbitration in line with Article 22.6 of the DSU. Thus far, the United States had submitted nine status reports with nearly identical contents. None of these status reports indicated any substantive implementation progress by the United States to address the DSB's recommendations in this dispute other than "consulting with the interested parties". Due to its consistent non-compliance, nearly two years after the DSB had adopted the Appellate Body report and the panel report in this dispute, and eight months after the expiry of the RPT, this dispute continued to be unresolved. Unfortunately, China was not the only victim of US disrespect of WTO dispute settlement. Under Item 1 of the Agenda of the present meeting, five out of eight disputes under the DSB's surveillance related to US non-compliance with the DSB's recommendations and rulings. Such behaviour seriously undermined the effectiveness and credibility of the WTO dispute settlement system, which ran against the interests of the entire Membership. With regard to the dispute at hand, China was very disappointed and deeply concerned with the progress of the United States in implementing the recommendations and rulings adopted by the DSB. The WTO-inconsistent measures taken by the United States had seriously infringed China's legitimate economic and trade interests, distorted the relevant international market as well as seriously damaged the rules-based multilateral trading system. Once

again, China urged the United States to take concrete actions, fully respect the WTO rules, and faithfully implement the DSB's recommendations and rulings in this dispute.

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

F. Indonesia – Measures concerning the importation of chicken meat and chicken products: Status report by Indonesia (WR/DS484/18/Add.7)

1.29. The Chairman drew attention to document WT/DS484/18/Add.7, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case on measures concerning the importation of chicken meat and chicken products.

1.30. The representative of Indonesia said that his country had submitted its status report in accordance with Article 21.6 of the DSU. On 22 November 2017, the DSB had adopted its recommendations and rulings in this dispute. At the 22 January 2018 DSB meeting, Indonesia had informed the DSB of its intention to implement the DSB's recommendations and rulings in this dispute. Indonesia and Brazil had also informed the DSB, on 15 March 2018, of their agreement on a reasonable period of time (RPT) for Indonesia to implement the DSB's recommendations and rulings in this dispute. The RPT had expired on 22 July 2018. He said that his country had undertaken necessary adjustments for the relevant measures. With regard to the alleged undue delay, the health certificate questionnaire submitted by Brazil would be processed without delay on a first-come-first-serve basis. Indonesia stood ready to continue communicating with Brazil, and to hold consultations as and when necessary, in relation to this matter.

1.31. The representative of Brazil said that his country wished to thank Indonesia for its status report. Brazil's concerns about Indonesia's implementation of the DSB's recommendations and rulings in this dispute remained unchanged. These concerns related to the "positive list requirement" which was still in force. Indonesia had chosen to maintain the list and include some of the HS codes of chicken meat and chicken products that had been the subject of Brazil's complaint. One HS code, however, still remained to be included in Indonesia's positive list. Brazil noted that Indonesia had eliminated the requirement of distribution reports with information regarding use or place of sale of imported chicken meat and chicken products. The requirement of distribution plans nonetheless still existed by force of Article 22(1)(l) of Ministry of Agriculture Regulation 34/2016. Regarding the possibility of making amendments to the terms of import licenses, to Brazil's knowledge, the amendments still subjected importers to several sanctions in case some requirements were not strictly observed. Finally, Brazil highlighted the unsatisfactory status of the analysis of Brazil's veterinary health certificate for the importation of chicken meat and chicken products. Brazil believed that undue delay continued with Indonesia's approval of the certificate. Brazil recalled that the reasonable period of time (RPT) for Indonesia to comply with the DSB's recommendations and rulings in this dispute had expired on 22 July 2018. Full implementation remained to be seen. Brazil thus urged Indonesia to fully comply with the DSB's recommendations and rulings in this dispute.

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

G. United States – Anti-dumping measures on certain oil country tubular goods from Korea: Status report by the United States (WT/DS488/12/Add.7)

1.33. The Chairman drew attention to document WT/DS488/12/Add.7, 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 measures on certain oil country tubular goods from Korea.

1.34. The representative of the United States said that on 11 January 2019, the United States and Korea had informed the DSB that the parties had mutually agreed to modify the previously notified reasonable period of time (RPT) for implementation of the DSB's recommendations and rulings in this dispute pursuant to Article 21.3(b) of the DSU. The RPT would now expire on 12 July 2019. The United States had provided a status report in this dispute on 15 April 2019, in accordance with Article 21.6 of the DSU. On 23 November 2018, the US Department of Commerce had provided notice in the US Federal Register that it had commenced a proceeding to gather information, analyse record evidence, and consider the determinations which would be necessary to bring the anti-dumping

investigation at issue in this dispute into conformity with the DSB's recommendations and rulings. The notice was available at 83 F.R. 59359. The United States would continue to consult with interested parties on options to address the DSB's recommendations.

1.35. The representative of the Republic of Korea said that his country wished to thank the United States for its status reports and its statement made at the present meeting. Considering that there had been no development reported since the most recent DSB meeting, Korea wished to refer to its statements made at previous DSB meetings and urged the United States to faithfully implement the DSB's recommendations and rulings in this dispute within the reasonable period of time which would expire on 12 July 2019.

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

H. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.3 – WT/DS478/22/Add.3)

1.37. The Chairman drew attention to document WT/DS477/21/Add.3 – WT/DS478/22/Add.3, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the case concerning importation of horticultural products, animals and animal products.

1.38. The representative of Indonesia said that his delegation had submitted its status report in accordance with Article 21.6 of the DSU. On 22 November 2017, the DSB had adopted the recommendations and rulings in this dispute. At the 28 February 2018 DSB meeting, Indonesia had informed the DSB that it intended to implement the DSB's recommendations and rulings in this dispute, but that it would need a reasonable period of time (RPT) to do so. Pursuant to Article 21.3 (b) of the DSU, Indonesia, the United States and New Zealand had mutually agreed on the RPT to implement the DSB's recommendations and rulings. That RPT had expired on 22 July 2018. Nevertheless, with regard to the DSB's recommendations and rulings concerning Measure 18, Indonesia, the United States and New Zealand had mutually agreed that Indonesia would have more time to make statutory changes to comply with the DSB's recommendations and rulings in this dispute. Accordingly, the United States and New Zealand would not initiate further proceedings concerning Measure 18 until at least 22 June 2019. Indonesia had noted continued concerns of New Zealand and the United States regarding Indonesia's progress in complying with the DSB's recommendations and rulings in this dispute. Against this backdrop, Indonesia wished to inform the DSB that bilateral engagement had taken place between Indonesia and New Zealand and the United States respectively. During this engagement, Indonesia had presented in great detail concrete steps that Indonesia had taken to adjust its regulations to be in line with the DSB's recommendations and rulings in this dispute, i.e., to improve its importation system with a view to achieving full compliance. Indonesia would continue the aforementioned process. With respect to Measure 18, Indonesia was convening consultations with all relevant stakeholders in view of the implementation of the DSB's recommendations and rulings in this dispute. Indonesia wished to thank New Zealand and the United States for their bilateral engagement. Indonesia would continue its effort and engagement towards resolving this dispute.

1.39. The representative of New Zealand said that his country wished to thank Indonesia for its status report and its statement made at the present meeting. New Zealand acknowledged the steps that had been taken by Indonesia to bring its regulations into compliance with the DSB's recommendations and rulings in this dispute. His country also welcomed Indonesia's commitment to comply fully with these recommendations and rulings. New Zealand did not consider, however, that full compliance had been reached in respect of a number of measures addressed in this dispute. Of particular concern was the continued enforcement by Indonesia of limited application windows and validity periods, harvest period import bans, import realization requirements, and restrictions placed on import volumes based on storage capacity. These were issues that continued to adversely impact New Zealand exporters. New Zealand welcomed Indonesia's commitment to engage intensively with New Zealand and the United States, which New Zealand intended to continue. New Zealand remained interested in progress on the further legislative change that was due to come into effect by June 2019. New Zealand would continue to work with Indonesia to achieve long-term, commercially meaningful compliance with the DSB's recommendations and rulings in this dispute.

1.40. The representative of the United States said that Indonesia continued to fail to bring its measures into compliance. The United States and New Zealand agreed that significant concerns remained with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms. The United States remained willing to work with Indonesia to fully and meaningfully resolve this dispute. The United States was still waiting to hear from Indonesia the concrete actions it would take to bring its measures into full compliance. The United States also looked forward to receiving from Indonesia information regarding the statutory changes Indonesia intended to make with respect to Measure 18.

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

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

A. Statement by the European Union

2.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union. He then invited the representative of the European Union 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 in this dispute. 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 DSB's recommendations and rulings in this dispute.

2.3. The representative of Canada said that his country wished to thank the European Union for placing this item on the Agenda of the present meeting. Canada shared the EU's view that this dispute shall remain under surveillance of the DSB until the United States ceased to apply the measures at issue in this dispute.

2.4. The representative of Brazil said that as an original party to this dispute, his country wished to thank the EU, once again, for placing this item on the Agenda of the DSB. Beyond the discussion about whether or not the concerned Member had an obligation to continue submitting status reports in this dispute, the reason that Members had to return to this Agenda item at every DSB meeting was that millions of dollars in anti-dumping and countervailing duties were still being illegally disbursed to US domestic petitioners. After more than 16 years since the adoption of the DSB's recommendations and rulings in this dispute, and more than 13 years after the date on which the Deficit Reduction Act that had repealed the Amendment, Brazil called on the United States to comply fully with the DSB's recommendations and rulings in this dispute.

2.5. The representative of the United States said that as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 11 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's recommendations and rulings, regardless of whether the complaining party disagreed about compliance. The practice of Members confirmed this widespread understanding of Article 21.6 of the DSU. Responding party Members did not continue submitting status reports where the responding Member had claimed compliance and the complaining Member disagreed, as Members would see under the next Agenda item concerning the "EC – Large Civil Aircraft" dispute (DS316). At recent DSB meetings, the European Union had argued that the situation in this dispute differed from the "EC – Large Civil Aircraft" dispute (DS316) because, here, "the dispute has been adjudicated and there are no further proceedings pending". With this statement, the EU suggested

that the issue of compliance had been adjudicated; in fact, it had not. The United States had repealed the measure after all of the proceedings in this dispute. Accordingly, since the United States had informed the DSB that it had taken all steps necessary for compliance, there was nothing more for the United States to provide in a status report.

2.6. 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 Chairman said that this item was on the Agenda of the present meeting at the request of the United States. He then invited the representative of the United States to speak.

3.2. The representative of the United States said that the United States noted that, once again, the EU had not provided Members with a status report concerning the "EC – Large Civil Aircraft" dispute (DS316). The United States had raised this same issue at recent past DSB meetings, where the EU had similarly chosen not to provide a status report. As the United States had noted at several recent DSB meetings, the EU had argued that Article 21.6 of the DSU required that: "the issue of implementation shall remain on the DSB's agenda until the issue is resolved". And the EU had argued that where the EU as a complaining party did not agree with another responding party Member's "assertion that it has implemented the DSB ruling", "the issue remains unresolved for the purposes of Article 21.6 DSU". The EU did not contest that the issue remained unresolved for purposes of Article 21.6 of the DSU. The EU's only attempt to reconcile its stated position with its lack of a status report in this dispute was to argue that there was some exception to providing a status report if there were ongoing proceedings. The only problem with this EU effort was that there was no such exception anywhere in the DSU. It was simply an invention by the EU to try to justify its acting in this dispute in a manner that was inconsistent with the legal position it had taken for other disputes. Under the EU's own view, the EU should be providing a status report. Yet it had failed to do so. The only difference that the United States could see was that, now that the EU was a responding party, the EU was choosing to contradict the reading of Article 21.6 of the DSU it had long erroneously promoted. Under Article 21.6 of the DSU, once a responding Member provided the DSB with a status report that announced compliance, there was no further "progress" on which it could report and, therefore, no further obligation to provide a report. And the conduct of every Member when acting as a responding party, including the EU, showed that WTO Members understood that a Member concerned had no obligation under Article 21.6 of the DSU 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 for future meetings provide status reports in this DS316 dispute.

3.3. The representative of the European Union said that as at previous DSB meetings, the United States had again implied that the EU was taking inconsistent positions under Article 21.6 of the DSU, depending on whether the EU was a complaining party or a defending party in a dispute. The US assertion remained without merit. As his delegation had repeatedly explained at previous DSB meetings, the crucial point for the responding party's obligation to provide status reports to the DSB was the stage of the dispute. In the case of the "EC – Large Civil Aircraft" dispute (DS316), the dispute was at a stage where the defending party did not have an obligation to submit status reports to the DSB. The EU wished to recall that in the "EC – Large Civil Aircraft" dispute (DS316), the EU had notified to the WTO a new set of measures in a compliance communication, submitted at the 28 May 2018 DSB meeting. The United States had responded that the measures included in that communication did not bring the EU in full compliance with the DSB's recommendations and rulings in that dispute. In light of the US position, on 29 May 2018, the EU had requested consultations with the United States pursuant to Articles 4 and 21.5 of the DSU. These consultations had failed to resolve the dispute. Consequently, the EU had then asked for the establishment of a compliance panel. The compliance panel had been established by the DSB on 27 August 2018. That compliance panel was currently reviewing "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. He repeated that there was a compliance proceeding still ongoing in this dispute. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU was the very subject matter of this ongoing litigation. He asked how it could be said that the defending party should submit "status reports" to the DSB under these

circumstances. The EU would be very concerned with a reading of Article 21.6 of the DSU that would require the responding party to notify the purported "status of its implementation efforts" through the submission of status reports to the DSB, while dispute settlement proceedings on that precise issue were ongoing. The view of the EU was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures: where, further to the disagreement between the parties on compliance, a matter was with the adjudicators, it was temporarily taken out of the DSB's surveillance.

3.4. The DSB took note of the statements.

4 INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

A. Communication from Indonesia (WT/DS490/14 – WT/DS496/15)

4.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Indonesia. He drew attention to the communication from Indonesia contained in document WT/DS490/14 and WT/DS496/15. He then invited the representative of Indonesia to speak.

4.2. The representative of Indonesia said that on 27 August 2018, the DSB had adopted its recommendations and rulings in the "Indonesia – Iron or Steel Products" dispute (DS490; DS496) with Chinese Taipei and Viet Nam respectively (WT/DS490/10 and WT/DS496/11). In a communication dated 16 September 2018, his country had informed the DSB of its intention to implement the DSB's recommendations and rulings in this dispute. Pursuant to Article 21.3(b) of the DSU, Indonesia had agreed on a reasonable period of time (RPT) with Chinese Taipei and Viet Nam respectively (WT/DS490/12 and WT/DS496/13). The RPT had expired on 27 March 2019. With respect to the DSB's recommendations and rulings, his country was pleased to inform the DSB that on 22 March 2019, Indonesia had adopted Minister of Finance (MoF) Regulation No. 26/PMK.010/2019 to amend MoF regulation No. 130/PMK/010/2017 concerning the Imposition of Safeguard Duty on Imports of Flat-Rolled Products of Iron or Non-Alloy Steel or "galvalume". The regulation was enacted and had entered into force on 22 March 2019. With the adoption of this regulation, the safeguard measure challenged by Chinese Taipei and Viet Nam had ceased to exist. Consequently, there would be no imposition of any additional safeguard duty (in the form of a specific duty) on import galvalume starting on 28 March 2019 (on a non-discriminatory basis). The adoption of this regulation ensured full implementation of the DSB's recommendations and rulings in these disputes.

4.3. The representative of Chinese Taipei said that his delegation wished to thank Indonesia for its statement regarding the adoption of a Ministerial regulation. His delegation also wished to thank Indonesia for its statement that the safeguard duty was no longer imposed and that the measure at issue in this dispute had been terminated. His delegation wished to thank Indonesia further for its efforts in complying with the DSB's recommendations and rulings in this dispute.

4.4. The representative of Viet Nam said that his country wished to take this opportunity to show appreciation to Indonesia for its efforts in implementing the DSB's recommendations and rulings in this dispute.

4.5. The representative of the European Union said that his delegation was a third party in this dispute and it would normally not make a statement under this Agenda item at the present meeting had it not been for the following. The EU had taken note of the Sequencing Agreements circulated in these disputes. These agreements were contained in documents WT/DS490/13 and WT/DS496/14. The EU took note that the disputing parties had agreed not to appeal a potential compliance panel report, if, on the date of its circulation, the Appellate Body was composed of fewer than three AB members available to serve on a division. The EU considered that it was the right of parties to WTO proceedings to forego their rights to appeal, if they so wished. However, the EU found it regrettable that the current crisis had resulted in such agreements being signed. The EU understood that the parties to the dispute had felt compelled to sign such agreement because of the uncertainty of whether, at the relevant point in time, an appeal would be available for the panel reports and the resulting uncertainty as to the status of such panel reports. For the EU, such solution to deal with the uncertainty resulting from the blockage of Appellate Body appointments was clearly suboptimal. The EU also wished to stress that this was but an illustration of a concrete impact that the blockage of Appellate Body appointments by one WTO Member had on pending disputes and on

the rights of other WTO Members. It could deprive WTO Members of their procedural right to an appeal before the Appellate Body that they otherwise should enjoy under the DSU. The existence of an appeal stage was an important part of the bargain struck in 1995. The EU, therefore, wished to strongly reiterate its call on all Members to constructively engage in the discussions on the proposals that had been made to resolve this crisis, so that the AB appointments could be made as soon as possible.

4.6. The representative of Canada said that the right of appeal provided to WTO Members under Article 17 of the DSU was a fundamental one. It was important in 1995, when the WTO was established, and it remained important. Canada deplored that the current impasse had led to certain Members contemplating the relinquishment of this right of appeal due to the possibility that it might not be available to them in the future. This called for action now. Canada wished to emphasize the importance of active engagement in the informal process led by the DSB Chairman as Facilitator and filling the vacancies at the Appellate Body.

4.7. The representative of Mexico said that her country wished to reiterate that Members had a responsibility to safeguard and preserve the dispute settlement system in general, and consequently, the Appellate Body. Members were currently failing to comply with Article 17.2 of the DSU. In this regard, Mexico wished to underscore that the agreements between the parties to these disputes not to appeal the Panel's decision were a clear example of the consequences of the failure by the 164 Members to comply with this obligation. These agreements were, however, a demonstration of the commitment and maturity of the parties to these disputes with regard to preserving the dispute settlement system. Her delegation welcomed these agreements. However, Mexico regretted that, for the first time in the 24 years since the establishment of the WTO, Members were finding it necessary to waive part of their right to due process in this Organization in response to the imminent threat faced by the Appellate Body, and that the outcome of the Uruguay Round was currently being undermined in this case in particular. The possibility to appeal the recommendations issued by a panel was a right of Members which had been agreed upon by each and every Member. This entitlement was an integral part of the dispute settlement system and, therefore, Members could not be pressured into foregoing it. Mexico thus expressed its concern that the relinquishing of this right was becoming a new trend among Members to prevent their disputes from being left in limbo. Mexico wished to reiterate its willingness to engage in the discussions on potential changes to the dispute settlement system, with the aim of addressing the concerns that had been expressed. Members had to reach an agreement immediately and as a matter of urgency that would end the impasse in the AB selection processes.

4.8. The representative of China said that his country took note of the Sequencing Agreement between Viet Nam and Indonesia in this dispute. It was China's understanding that the parties to this dispute had made such extraordinary arrangement in the context of the lingering selection deadlock of Appellate Body members. It showed, again, that when the Appellate Body were to halt its functioning, this would inevitably cause severe consequences to the entire WTO Membership, including the *de facto* forfeiture of the right of appeal. Special arrangements between Members could temporarily mitigate the adverse impacts of the Appellate Body paralysis to some extent, but they still fell short of replacing a well-functioning Appellate Body. China, therefore, called on all Members to continue their constructive and faithful participation in consultations, and to work together to break the AB selection impasse without further delay.

4.9. The representative of Brazil said that his country wished to thank the EU for having raised this matter. Brazil had stated many times at previous DSB meetings that the current deadlock in AB selection processes was already having an impact on the rights of WTO Members. The right of appeal to a standing and fully composed Appellate Body was a fundamental element of the understanding that Members had agreed to in the Uruguay Round. Brazil, therefore, wished to be associated with the EU's call on all Members to engage constructively in order to resolve the current impasse. Concrete proposals had been put forward and a solution-oriented process had been set up to achieve such an outcome. It was time for all Members to find a solution.

4.10. The representative of Guatemala said that his country understood that this was a topic covered by another Agenda item at the present meeting. However, his country did not wish to miss the opportunity to be associated with the delegations that had expressed concern about the fact that some delegations had felt obliged to renounce their right to due process. While Guatemala supported the spirit of cooperation that existed between the parties to these disputes, in the same way that other delegations had stated previously, Guatemala expressed regret that the current situation in

which the dispute settlement system found itself compelled Members to renounce their rights enshrined in the DSU.

4.11. The representative of Chinese Taipei said that his delegation wished to thank Members for their statements made under this Agenda item. Indeed, the non-appeal clause agreed by the three disputing parties in the sequencing agreements was aimed at dealing with the uncertainty in the Appellate Body. His delegation wished to reiterate its dedication to finding a solution to this impasse.

4.12. The DSB took note of the statements.

5 EUROPEAN UNION – ANTI-DUMPING MEASURES ON CERTAIN COLD-ROLLED FLAT STEEL PRODUCTS FROM RUSSIA

A. Request for the establishment of a panel by the Russian Federation (WT/DS521/2)

5.1. The Chairman recalled that the DSB had considered this matter at its meeting of 11 April 2019 and had agreed to revert to it. He drew attention to the communication from the Russian Federation contained in document WT/DS521/2 and invited the representative of the Russian Federation to speak.

5.2. The representative of the Russian Federation said that her country wished to refer to its statement made at the 11 April 2019 DSB meeting under this Agenda item. At the present meeting, Russia requested, for a second time, that the DSB establish a panel to examine the matter with standard terms of reference, as set forth in Article 7.1 of the DSU.

5.3. The representative of the European Union said that his delegation regretted that Russia had decided to request the establishment of a panel on anti-dumping measures imposed by the EU in 2016 on certain cold-rolled flat steel products from Russia. The EU believed that its measures at issue in this dispute were in conformity with the WTO Agreements.

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

5.5. The representatives of the China, India, Japan, Korea, Ukraine and the United States reserved their third-party rights to participate in the Panel's proceedings.

6 QATAR – CERTAIN MEASURES CONCERNING GOODS FROM THE UNITED ARAB EMIRATES

A. Request for the establishment of a panel by the United Arab Emirates (WT/DS576/2)

6.1. The Chairman drew attention to the communication from the United Arab Emirates contained in document WT/DS576/2 and invited the representative of the United Arab Emirates to speak.

6.2. The representative of the United Arab Emirates (UAE) said that his delegation respectfully requested that the DSB establish a panel, with standard terms of reference, to examine the matter referred to in document WT/DS576/2. The UAE had requested consultations in this matter on 28 January 2019 and these consultations had been held on 28 February 2019. Unfortunately, those consultations had failed to resolve the matter. This matter concerned Qatar's decision to take unilateral retaliatory action against the UAE by banning sales outlets from importing, stocking, distributing, marketing or selling goods, medicines and other products originating in or exported from the UAE, and by excluding UAE products and companies from infrastructure projects in Qatar. Qatar's actions violated core principles of the WTO. They violated fundamental market access and non-discrimination principles reflected in Articles I, III, and XI of the GATT 1994. Emirati products were being treated less favourably than products sold by Qatari companies or by most third-country companies. These Qatari actions targeted the UAE and the other countries – specifically the Kingdom of Bahrain, Egypt and the Kingdom of Saudi Arabia – that had been seeking to protect their essential security interests in the face of Qatar's continued support of terrorism and extremism, its propagation of hate speech, and its meddling in the internal affairs of its neighbours. The Qatari actions thus also directly contravened the prohibition of unilateral retaliatory action enshrined in Article 23 of the DSU. The prohibition on unilateral retaliatory action under Article 23 of the DSU was a basic cornerstone of a rules-based system and one of the greatest achievements of the

Uruguay Round. The DSU was clear that only the DSB could authorize retaliatory action. Such action could only be authorized after a WTO panel or the Appellate Body had confirmed that a Member had acted inconsistently with its WTO obligations, that the Member had failed to bring its measures into conformity with the covered agreements within a reasonable period of time, and that the procedures for retaliation in the DSU had been strictly followed. Qatar had chosen to brazenly defy these important rules. As other Members were aware, the DSB had established a panel on 22 November 2017, at the request of Qatar, to hear its complaint against actions taken by the UAE. This Panel was currently examining the matter and had yet to issue a decision. The UAE was firmly convinced that the Panel would find that the actions taken by the UAE on security grounds were permissible pursuant to the security exceptions under Article XXI of the GATT 1994, Article XIV *bis* of the GATS and Article 73 of the TRIPS Agreement. The recent Panel decision in the "Russia – Traffic in Transit" dispute (DS512) confirmed the importance of these exceptions in protecting each country's sovereign right to take such action as the country itself deemed necessary to protect its essential security interests. Having requested the establishment of the Panel, Qatar was required to wait until the Panel issued its ruling and was prohibited from taking unilateral retaliatory action. Yet, his country was unable to discern any credible purpose behind Qatar's ban on UAE goods other than to unilaterally retaliate against the UAE. In an effort to justify the ban on WTO grounds, Qatar had announced that its ban was necessary for consumer protection and the prevention of smuggling. These objectives, however, did not require discrimination against UAE products or those of two other countries. Moreover, it appeared to the UAE that if these were the true objectives of the ban, there were less trade-restrictive means of achieving them. The UAE, therefore, requested that the DSB establish a panel, with standard terms of reference, in this dispute.

6.3. The representative of Qatar said that his delegation was surprised that the United Arab Emirates (UAE) had abruptly terminated consultations in this dispute and had rushed to seek the establishment of a panel. The UAE's complaint in this dispute was surreal because Qatar did not limit access for UAE goods to Qatar's market. To the extent that UAE goods were unable to access Qatar's market, this was solely because of the UAE's own measures that prohibited the movement of goods between the UAE and Qatar. The UAE had imposed a scheme of coercive and unlawful measures against Qatar, which was the subject of another ongoing dispute: "United Arab Emirates – Goods, Services and IP rights" (DS526). Qatar was perplexed that the UAE continued to maintain those measures, and yet complained of an alleged lack of market access to Qatar. To the extent the UAE wished to facilitate the access of its goods to the Qatari market, its recourse lies in removing its own unlawful measures, not in complaining about non-existent Qatari measures. If UAE exporters were frustrated at not being able to access Qatar's market, they should look closer to home to find the cause. Qatar wished to note that the UAE had previously indicated that its own restrictive measures on exports to Qatar were necessary for national security purposes. With its panel request at the present meeting, Qatar understood that the UAE no longer considered restrictions on export of goods to Qatar necessary for protecting its security interests. That being the case, the UAE's own export restrictions had no legal justification. Therefore, Qatar called on the UAE to immediately withdraw those measures. Qatar also wished to take this opportunity to comment on the stark contrast between Qatar's conduct in this dispute and that of the UAE when Qatar had requested consultations concerning the UAE measures at issue in the "United Arab Emirates – Goods, Services and IP rights" dispute (DS526). Qatar recalled that the UAE had refused in that case to engage in consultations with Qatar. By contrast, in this dispute, and consistent with its obligations under the DSU, Qatar had participated in consultations in good faith when requested by the UAE to do so. Qatar was disappointed that the UAE continued to abuse the system by picking and choosing when to engage in consultations. Turning more specifically to this dispute, there was no factual basis for the complaint. Unlike the UAE, Qatar remained open for business with all WTO Members and continued to adhere to all its international obligations. If Qatar had intended to implement trade restrictions against the UAE, it would not continue to export more than US$ 750 million worth of Qatari gas each year to the UAE. Qatar continued to provide the UAE with more than 30% of its energy needs, despite the UAE's coercive measures against Qatar. All of the measures mentioned by the UAE in its panel request contained in document WT/DS576/2 either had never existed or had ceased to exist. Qatar had informed the UAE that certain documents, since then listed in the UAE's panel request, had been temporary. Qatar had issued these temporary documents to prevent illegal conduct and protect Qatari consumers. The relevant documents had been subsequently rescinded and the circulars rescinding the earlier documents had been provided to the UAE. The DSU admonished Members to refrain from manifestly futile litigation. The dispute that the UAE now sought to initiate, against non-existent Qatari measures, could not possibly be fruitful. Qatar did not consider it appropriate for the WTO to spend its limited resources on facilitating the litigation of a pointless dispute. Qatar, therefore, objected to the establishment of a panel at the present meeting.

6.4. The representative of the Kingdom of Bahrain said that his country supported the UEA's claims and their right to request the establishment of a panel on this matter, as Bahrain was one of the other WTO Members directly affected by the measures that had just been elaborated on by the UAE. His country regretted that consultations on this matter had not yielded a solution and was concerned that the respondent had yet to provide a justification for its actions.

6.5. The representative of Egypt said that his country supported the statement made at the present meeting by the UAE and its right to request the establishment of a panel on this matter. This dispute concerned Qatar's decision to ban its domestic sales and outlets from importing, stocking, distributing, marketing and selling goods, medicines and other products originating in or exported from the UAE. At the same time, this decision targeted other WTO Members, including Egypt. His country considered that Qatar's sales ban had been taken against the legitimate measures that these Members had adopted to protect their essential security interests in the light of Qatar's actions that had contributed to the destabilisation of the region. Egypt believed that Qatar's ban on sales of products originating from the above-mentioned WTO Members violated Article I:1, III:4 and XI:1 of the GATT 1994 and could not be justified under any exception of the GATT 1994, including Article XXI. In addition to its discriminatory effects, Qatar's sales ban restricted the importation of goods. Essentially, this measure discouraged business operators in Qatar from importing goods from affected Members, since goods originating from those Members could not be legally traded in Qatar. In addition, Qatar's failure to notify its ban on the sale of goods to the WTO was inconsistent with the 1982 GATT Decision concerning Article XXI, which had been incorporated into the GATT 1994. Finally, to the extent that the sales ban had not been published, Egypt considered that Qatar had acted inconsistently with Article X:1 of the GATT 1994. Pursuant to this provision, Members had to publish promptly their laws, regulations, judicial decisions and administrative rulings of general application affecting the sale of goods in such a manner as to enable governments and traders to become acquainted with them. Egypt regretted that the consultations on these issues had not yielded a solution. Egypt looked forward to the prompt resolution of this dispute and to restoring the trading conditions to which Qatar had agreed at the WTO.

6.6. The representative of Yemen said that his country had read the UAE's request for the establishment of a panel dated 11 April 2019 contained in document WT/DS576/2. His country had also listened to the statements made at the present meeting by Qatar and the UAE and noted Qatar's decision to block the UAE's request to establish a panel at the present meeting. His delegation supported the UAE's request to establish a panel, with standard terms of reference, to examine the matter set out by the UAE in its panel request as soon as possible.

6.7. The representative of the United Arab Emirates said that his delegation regretted that Qatar had decided to block the establishment of a panel on this matter. If Qatar believed that its measures were justified, it should allow a panel to examine them. This decision to block the establishment of a panel appeared to mean that Qatar did not have full confidence in the legality of its actions. There was no contradiction between the UAE's decision to bring its case and to terminate diplomatic and economic relations with Qatar. On the contrary, it was inconsistent for Qatar to first invoke WTO rules against the UAE, but then to violate these very same rules by adopting non-transparent, unilateral retaliatory measures before the WTO had had a chance to issue a ruling in respect of Qatar's initial complaint. The UAE's principal defence to Qatar's claims at the WTO was essential security, to which the WTO accorded a broad deference. Qatar's support for terrorism and extremism, its interference in its neighbours' affairs and its propagation of hate speech threatened the security of the UAE and the region more broadly. In contrast, Qatar had not indicated that its ban on the sale of UAE goods was to protect its essential security nor could it point to any legitimate reason for the very targeted trade action it had taken. In truth, Qatar had taken retaliatory action against the UAE. Having filed its WTO panel request, Qatar could not now take matters into its own hands and impose retaliation unilaterally without the WTO's approval. The UAE was pleased to hear that Qatar now acknowledged that its discriminatory measures were not justified. While Qatar had attempted to provide additional explanations, the vagueness and contradictory nature of those explanations confirmed that Qatar's discriminatory measures had never pursued legitimate objectives, but were retaliatory actions taken against the UAE. The UAE had not had sufficient opportunity to review Qatar's measures and to fully assess whether Qatar had in fact put an end to the discriminatory treatment of UAE goods. The public notice of this development had only appeared on 25 April 2019. The UAE intended to undertake a careful review of the alleged measures. At this point, the UAE noted Qatar's announcement that it had withdrawn the measures at issue in this dispute was inadequate for several reasons. First, it was unclear to the UAE whether Qatar had fully withdrawn all measures covered by the UAE's panel request. For instance, Qatar referred only to

two notices. It also did not address the discriminatory treatment of UAE goods and manufacturers in Ashgal's approved material lists. Nor did Qatar address its failure to comply with the GATT's publication requirements. Second, it did not address Qatar having taken retaliatory action not permitted by Article 23 of the DSU. Qatar had not withdrawn its improper unilateral decision finding that the UAE had violated WTO rules. Indeed, Qatar had continued to put forward misleading explanations for its measures, including claiming that they served to protect consumers. At the heart of the UAE's panel request was Qatar's violation of its obligation not to make such unilateral determinations or engage in unilateral retaliation. The public pronouncements from Qatar failed to address these issues. Therefore, the UAE intended to proceed with its panel request at the present meeting. The UAE, therefore, wished to reiterate its request that the DSB establish a panel, with standard terms of reference.

6.8. The representative of Qatar said that in light of the previous statement made by the UAE, his delegation wished to strongly condemn the fabricated accusations made by the UAE. The UAE had, once again, shown to the WTO Membership that it was abusing the key WTO principle of engaging in good faith. Qatar would not allow the UAE to entertain such a discussion in the WTO. This was not the appropriate forum to have such a discussion and even if it were, it was the subject of the ongoing dispute: "United Arab Emirates – Goods, Services and IP rights" (DS526). Had the UAE not abruptly terminated consultations with its panel request, the UAE would have received copies of the circulars that had rescinded Qatar's earlier measures within the framework of those consultations. Even after the UAE had abruptly terminated the consultations, Qatar, of its own initiative, had provided copies of these documents to the UAE. Qatar regretted that the UAE persisted with its futile request despite having been fully aware that the measures of which it complained did not exist. Therefore, Qatar objected to the establishment of a panel at the present meeting.

6.9. The representative of the United Arab Emirates said that there was no contradiction between the UAE's decision to bring its case and its termination of diplomatic and economic relations with Qatar. On the contrary, it was inappropriate for Qatar to first invoke WTO rules against the UAE but then to violate these very same rules by adopting non-transparent, unilateral retaliatory measures before the WTO had had a chance to issue a ruling in respect of Qatar's initial complaint. The UAE's principal defence to Qatar's claims at the WTO was essential security, to which the WTO accorded a broad deference. In contrast, Qatar had not indicated that its ban on the sale of UAE goods was to protect its essential security, nor could it point to any legitimate reason for the very targeted trade action it had taken. The UAE regretted that Qatar had decided to block the establishment of a panel and insisted that a panel be established at the present meeting.

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

7 CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

A. Report of the Panel (WT/DS511/R and WT/DS511/R/Add.1)

7.1. The Chairman recalled that at its meeting of 25 January 2017, the DSB had established a Panel to examine the complaint by the United States pertaining to this dispute. The Report of the Panel contained in document WT/DS511/R and WT/DS511/R/Add.1 had been circulated on 28 February 2019 as an unrestricted document. The Panel Report was before the DSB for adoption at the present meeting at the request of the United States. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report. The Chairman then invited the representative of the United States to speak.

7.2. The representative of the United States said that the United States thanked the Panel and the Secretariat staff that assisted it for their work in this dispute. The United States welcomed the findings of the Panel in this report, which confirmed that China had failed to comply with WTO rules by providing agricultural domestic support in excess of its commitments every year between 2012 and 2015. When China had joined the WTO, it committed not to provide support in favour of domestic producers, expressed in terms of China's Current Total Aggregate Measurement of Support (or Current Total AMS), in excess of its final bound commitment level of "nil". China had further agreed that its *de minimis* exemption for product-specific support would be equivalent to 8.5% of the total value of production of a basic agricultural product during the relevant year. For the years 2012, 2013, 2014, and 2015, the Panel had found that China had exceeded its final bound commitment level on the basis of each of China's market price support programmes for wheat, Indica rice, and

Japonica rice. China's support for each of these products had exceeded 8.5% of the total value of production for each product. The United States noted in particular the Panel's interpretation of the term "quantity of eligible production" in paragraph eight of Annex 3. China, and certain third parties, had argued that a panel must limit the quantity of eligible production to the amount of a product actually procured by the government, even where no such limitation existed in the domestic support measure in question. The Panel had disagreed with this interpretation, finding instead that, where the measure did not contain an express or implied limitation, the quantity of eligible production was the total volume of production of the product in the relevant territory. This interpretation accurately reflected the text of paragraph eight of Annex 3, as well as the actual economic effects of market price support programmes. The United States regretted that the Panel had declined to make additional findings with respect to corn. For corn too, China's market price support programme in the relevant years had also exceeded 8.5% of the total value of production of corn, including for the most recent year (2015) for which data were available, and therefore for which China's conformity with its WTO commitments could be assessed. The Panel's approach not to make findings for corn for 2015, without China's having clearly established the basis on which corn support had been provided in 2016, was flawed because it created a real risk that lack of transparency would enable a WTO Member to avoid WTO findings on its domestic support. However, the United States also recalled that the Panel had found that China had exceeded its Commitment Level through the support provided to each of the products in question. That was, a finding on any one of the products established that China had breached its overall domestic support commitments. Thus, the Panel's failure to make additional findings with respect to corn did not alter the ultimate outcome that China had exceeded its allowable domestic support commitments. In conclusion, the United States thanked the Panel for the work reflected in this report and looked forward to China's prompt implementation. The United States proposed that the DSB adopt the report contained in WT/DS511/R and WT/DS511/R/Add.1.

7.3. The representative of China said that his country wished to thank the Panel and the Secretariat for their hard work on this proceeding. Before making specific comments on findings of the Panel Report, China wished to take this opportunity to first share important background which would help Members to have a holistic view of this dispute. Agriculture was a basic industry for all WTO Members. It was very sensitive, and was related to national food security, as well as to the livelihood of hundreds of millions of farmers. This was especially true for China. China fed 20% of the world's population with 7% of the world's arable land. Meanwhile, China's rural population was as large as 500 million, which was 41 times the total amount of that in the United States and Europe. It could be said that China's agricultural industry was connected, at one end, to the food and clothing of 1.3 billion people; and at the other end, to the employment of 500 million farmers. This special situation determined that China would not have in place a farm economy in the style of the United States, which was characterized by large scale and export orientation. Rather, China had developed a sustainable agricultural industry that was small-scale and livelihood-oriented. Nevertheless, upon its accession to the WTO, China had overcome difficulties and had made tremendous contributions and sacrifices in the agriculture sector. As a newly-acceded developing Member, China had not only taken the unequal "Nil" Aggregate Measurement of Support (AMS) commitment that was applicable to all developing Members, but had also further committed to reduce its de minimis level to 8.5%. Therefore, the interpretation of China's Schedule of Concessions on agricultural products, including its supporting materials, had to be strictly based on the text and the negotiating history, and had to respect the negotiation outcomes as agreed between China and other WTO Members. These were the basis for the discussion of China's domestic support policy for agriculture. It was also the rule that served as the starting point for the WTO dispute settlement mechanism to correctly interpret the disputed provisions at issue. Back to the present case, on the basis of an objective review of China's new corn policy, the Panel had found that China's Temporary Purchase and Reserve Policy for corn had been terminated before the initiation of the dispute by the United States, and had ruled against the US claim regarding China's corn policy. Such finding demonstrated the Panel's respect for the facts. The Panel had also found that the base period for calculating China's domestic support shall be 1996 – 1998 as specified in supporting material Rev.3 (WT/ACC/CHN/38/Rev.3), instead of 1986 – 1988 as provided in Annex 3 of the Agreement on Agriculture, contrary to what was asserted by the United States. Such finding demonstrated the Panel's respect for the negotiation outcomes regarding China's accession and that of other newly-acceded Members. China, like other newly-acceded Members, had entered into rounds of negotiations to discuss supporting materials with other parties. The drafts had been revised several times before a consensus had finally been reached upon Rev.3, which had then been incorporated into China's Schedule. Rev.3 was, therefore, one of the terms of accession reached between China and other WTO Members. It formed part of the WTO Agreement and had to be given due legal effect. However, China regretted that the Panel

had not followed the correct interpretive methodology as mentioned previously and had thus failed to calculate China's domestic support by using the actual purchased amount as the "eligible production" in accordance with Rev.3. Although China was disappointed with certain parts of the Panel's findings, China chose to let the Panel Report to be adopted at the present meeting in order to settle this dispute. Undeniably, while ruling on the disputed matters, the Panel Report in this dispute, once again, highlighted the unfair treatment suffered by developing Members vis-a-vis WTO rules on agricultural subsidies. This was a fundamental problem that deserved reflection and active resolution by every Member.

7.4. The representative of Canada said that the WTO Agreement on Agriculture (AoA) disciplined the amount of agricultural support (i.e., subsidies) that a Member was permitted to provide to its domestic producers. Canada had participated as a third party in this dispute because of a systemic interest in the appropriate application of the rules in the AoA concerning the methodology to calculate a Member's market price support. More specifically, under the AoA, market price support was determined by using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. His country was pleased that the Panel had now clarified this important rule. In particular, it had clarified that in the absence of any limitations on the production eligible for the applied administered price, it was the total quantity of all production of the agricultural commodity in question that should be used in the calculation of market price support, even if the amount of actual purchases by the government might be small or even nil. In this case, applying the correct approach demonstrated that China had been exceeding its domestic support limit for wheat and rice. The findings of the Panel provided clarity on the application of the methodology to calculate market price support and Canada encouraged Members to reflect on their current practices in light of these findings.

7.5. The DSB took note of the statements and adopted the Panel Report contained in WT/DS511/R and Add.1.

8 RUSSIA – MEASURES CONCERNING TRAFFIC IN TRANSIT

A. Report of the Panel (WT/DS512/R and WT/DS512/R/Add.1)

8.1. The Chairman recalled that at its meeting of 21 March 2017, the DSB had established a Panel to examine the complaint by Ukraine pertaining to this dispute. The Report of the Panel contained in document WT/DS512/R and WT/DS512/R/Add.1 had been circulated on 5 April 2019 as an unrestricted document. The Panel Report was before the DSB for adoption at the present meeting at the request of Russia. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report. The Chairman then invited the representative of Russia to speak.

8.2. The representative of the Russian Federation said that her country wished to thank the Panel and the Secretariat team for their fundamental work in this dispute. This undoubtedly landmark case clarified for the first time highly sensitive and systemically important issues of national security and the interpretation of Article XXI of the GATT 1994. Russia was honoured to pay tribute to the outstanding professionalism and broad experience of the Panel Chairman, Mr. Abi-Saab and Panelists Mr. Araki and Mr. Saeed, as well as to underline their historic contribution. From the very beginning, Russia had consistently declared that its measures, challenged by Ukraine in this dispute, were in full conformity with the provisions of the WTO Agreements. Her country welcomed the Panel's conclusions confirming this understanding in its Report and making no recommendation to the DSB pursuant to Article 19.1 of the DSU. Russia found the outcome of the dispute to be well-balanced and of systemic importance. The conclusions of the Panel on GATT Article XXI(b) finally, for the first time in GATT/WTO history, provided guidance and clarity regarding the consequences of invoking this Article for dispute settlement purposes. The Panel had come to an important conclusion on the content of GATT Article XXI(b) regarding the objective conditions that justified application of measures pursuant to this Article, narrowing blanks in common understanding of the Membership on issues of national security that were within the ambit of the WTO. In particular, the Panel found that while the chapeau of Article XXI(b) was subjective, it "does not extend to the determination of the circumstances in each subparagraph" of that Article. Rather, for action to fall within the scope of Article XXI(b), it had to be objectively found to meet the requirements in one of the enumerated subparagraphs of that provision. This ruling, on the one hand, confirmed the discretion of Members to adopt any measures they considered necessary for protection of their essential security interests and, on the other hand, excluded the possibility of abusing provisions of Article XXI to justify

measures introduced for the purposes of mere economic protectionism. In conclusion, Russia welcomed Ukraine's decision not to appeal the Panel Report and the adoption of the Panel Report.

8.3. The representative of Ukraine said that her country was grateful to the Members of the Panel[3] for their work in this dispute and to the WTO Secretariat staff that had assisted them. The ruling in this dispute was important not only for the parties to the dispute, but for all WTO Members, observers and even the whole WTO dispute settlement system because of its great significance to the legal foundations of the WTO. Issues raised in this dispute were indeed of historic importance for future developments in multilateral trade relations and would have an important impact along the way. The adoption of this ruling would constitute the first WTO decision on the Members' right to take action to protect national security under Article XXI of the GATT 1994. Ukraine hoped that it would shed light on rights and obligations of WTO Members in this respect. The Panel had made a very important and welcome contribution by confirming that Article XXI of the GATT 1994 was within the Panel's terms of reference for the purposes of the DSU.[4] Most importantly, the Panel had found the existence of appropriate circumstances to be a crucial element for justification under Article XXI of the GATT 1994. Thus, this WTO ruling set a narrow definition of instances when the security clause could be invoked. Moreover, the Panel had clarified what exactly could be treated as an "emergency in international relations" and correctly found that: "… there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny".[5] Hence, this ruling provided greater clarity as to the legal boundaries of this provision, which should reduce the occurrence of protectionist and discriminatory trade measures that breached fundamental WTO principles being imposed and justified due to an "emergency in international relations". Ukraine maintained its position that the transit restrictions imposed by the Russian Federation could not be justified by any logic. At the same time, Ukraine wished to thank the Panel for referring in its Report to the resolution of the General Assembly of the United Nations which had condemned the "temporary occupation of part of the territory of Ukraine" by the Russian Federation and had recalled "the obligations of all States under Article 2 of the Charter of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and to settle their international disputes by peaceful means".[6]

8.4. However, Ukraine wished to emphasize the importance that all WTO Members understood the correct course of events in this dispute. Ukraine, therefore, wished to address a few particular aspects of the Panel Report which had inverted historical facts, as well as Ukraine's concerns in this dispute which Ukraine believed should be noted once again. First, Ukraine drew attention to the fact that the chronological order of the events as reflected in the Panel Report, in particular in Section 7.3 ("Factual background") thereof, was not quite accurate. In the course of the Panel proceedings, Ukraine had clearly explained that the true sequence of events was critical for an objective recognition of the events overall. However, the Panel had inverted the chronology in its factual background related to the trade aspect of this dispute, in particular by linking the measures at issue with the entering into force of the Deep and Comprehensive Free Trade Agreement instead of the "economic part of the EU-Ukraine Association Agreement".[7] Second, during the Panel proceedings

[3] The Panel comprised: the Chairman – Georges Abi-Saab (Egypt), former head of the Appellate Body, Ichiro Araki (Japan), Mohammed Saeed (Pakistan).

[4] Panel Report (WT/DS512/R), para. 7.56.

[5] Panel Report (WT/DS512/R), para. 7.100.

[6] Panel Report (WT/DS512/R), para. 7.8., quoting UN General Assembly Resolution No. 71/205 "Situation of Human Rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)", 19 December 2016, A/RES/71/205, (UN General Assembly Resolution No. 71/205, 19 December 2016), (Exhibit UKR-91). This Resolution received 70 votes in favour, 26 against (including Russia) and 77 abstentions. (UN General Assembly Official Records, A/71/PV.65, 19 December 2016, pp. 40-41.) and UN General Assembly Resolution No. 68/262, 27 March 2014, (Exhibit UKR-89), p. 1.

[7] Political and economic integration with the European Union had been and remained a constant priority in Ukraine's foreign policy. Thus, the negotiation of the EU-Ukraine Association Agreement had started in 2008 and the negotiation of the EU-Ukraine Association Agreement were initiated on 30 March 2012. Therefore, the decision to sign the EU-Ukraine Association Agreement had been made long before the change in government in early 2014. Accordingly, the EU-Ukraine Association Agreement had been concluded in 2014. The part relating to the Deep and Comprehensive Free Trade Agreement, which provided for the progressive formation of a free trade area and covered both goods and services, that was the "economic part of the EU-Ukraine Association Agreement" had been applied provisionally by both parties from 1 January 2016 onward until the full application of the entire agreement as of 1 September 2017. Ukraine had submitted repeatedly throughout the Panel proceedings that from 1 January 2016 onward, the Russian Federation had imposed a series of far-reaching trade

the Russian Federation had not contested any of the claims presented by Ukraine, which was noted in the Panel Report.[8] Neither did the Russian Federation elaborate, explain or provide any evidence in relation to its invocation of Article XXI(b)(iii) of the GATT 1994, particularly as to what was an "emergency in international relations". Therefore, the question of what were the "essential security interests" which the Russian Federation had been seeking to protect through measures challenged by Ukraine had remained unanswered. During the Panel proceedings, the Russian Federation had not acted in good faith with respect to its obligations as a respondent. Thus, the Panel had taken an approach that entailed bearing the burden of proof for the respondent. In doing so, the Panel had ignored well-known case law according to which when a party had not satisfied its burden of proof, it was not for a panel to make the case for that party by advancing the relevant information itself.[9] More specifically, the Panel, by doing all the work for the respondent, had failed to assess all "specific arguments"[10] presented by both parties with the same strictness and had failed to impose the correct burden of proof among them. Despite its disappointment with some parts of the Panel's ruling, Ukraine was not pursuing an appeal, as an analysis of the Panel Report had revealed more positive than negative developments for the WTO dispute settlement system as a whole. In conclusion, Ukraine was thankful for the Panel's efforts in this dispute and would continue to strongly pursue its interests at the WTO.

8.5. The representative of the Russian Federation said that with disappointment, her country had to note that the previous statement made by Ukraine, once again, confirmed the fact that Ukraine was not really interested in finding solutions to existing problems. Should Ukraine bother with reading the text of the Panel Report, it would have easily realized that the illusion Ukraine tried to create regarding Crimea was not supported by its text. The factual background and the relevant conclusions reflected in the Report had no correlation with Ukraine's wishful thinking. Therefore, the previous statement made by Ukraine presented a new, pathetic and politically-motivated instance of storytelling. Contrary to what Ukraine had stated, the Panel had not established any facts connected with Crimea. It was important that the Panel had wisely stayed away from political issues. Therefore, her country made this statement for the sake of clarity as well as to raise concerns with potentially malicious misinterpretations and speculations as to the outcomes of this dispute.

8.6. The representative of the European Union said that his delegation had participated in this dispute as third party and, while it had not taken a position on the facts of the case, it had put forward its interpretation of Article XXI of the GATT. As Members all knew, this dispute had a special systemic importance for WTO Members since this was the first time that a WTO panel had to interpret the WTO security exceptions and to apply them to a specific case. Therefore, the EU wished to make the following observations. The EU welcomed the Panel's interpretation that strictly followed the customary rules of interpretation of public international law, as in particular codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In particular, the EU commended the Panel's conclusion that Russia's invocation of Article XXI(b)(iii) was within the Panel's terms of reference for the purposes of the DSU (at para. 7.56) and that the Panel had jurisdiction to determine whether the requirements of that provision were satisfied. On this issue, the Panel had agreed with the position put forward by Ukraine and by most of the WTO Members having intervened as third parties in this dispute. The contrary proposition that Article XXI of the GATT 1994 was totally "self-judging" had simply no basis in the WTO Agreements. As the Panel had held, there was no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shielded a challenged measure from all scrutiny (at para. 7.100). In particular, the Panel had correctly found that for an action to fall within the scope of Article XXI(b), it had to be objectively found to meet the requirements of one of the enumerated subparagraphs of that provision, and that evaluation could not be left entirely to the invoking Member (at para. 7.82) The EU also welcomed the Panel's interpretation of the relevant conditions that had to be met for the invocation of Article XXI(b)(iii) of the GATT to succeed. The Panel's interpretation was consistent with the text, object and purpose of the relevant provisions. Article XXI of the GATT struck a balance between the legitimate latitude for WTO Members to invoke the security exceptions for genuine security measures and the need to curtail potential abuse. This balance was also reflected in the Panel's interpretation. On the one hand, Article XXI(b) could not be successfully invoked just in any situation; rather, such invocation was limited to situations enumerated in the subparagraphs of that provision. On the other hand,

restrictions with respect to Ukraine due to the entering into force of the "economic part of the EU-Ukraine Association Agreement".

[8] Panel Report, para. 7.23.

[9] See, for example, Appellate Body Reports in "Japan – Agricultural Products II", para. 129 and "US – Gambling", para. 282.

[10] Appellate Body Report, "Indonesia – Import Licensing Regimes", para. 5.28.

while it was in general left to every Member to define what it considered to be in its essential security interests, the obligation of good faith required that Members not use the exceptions under Article XXI as a means to circumvent their obligations under the GATT 1994. Therefore, in the event of an invocation of Article XXI(b)(iii), it was incumbent on the invoking Member to articulate the essential security interests said to arise from war or other emergency in international relations sufficiently enough to demonstrate their veracity. Furthermore, the measures at issue had to meet a minimum requirement of plausibility in relation to the proffered essential security interest, i.e., they could not be implausible as measures protective of such interests. As the Panel had explained in great detail, the negotiating history of Article XXI also confirmed that – while considering that the security matters reflected in Article XXI of the GATT had a different character from those reflected in Article XX, and that Members should have "some latitude" in respect of these matters – its drafters had also intended to curtail potential abuse of these security exceptions, *inter alia*, by subjecting them to the dispute settlement provisions. The EU fully recognized the special nature of security interests covered by the security exceptions, and the need for a margin of discretion for the Member invoking these exceptions. However, as the EU had explained in its third-party submission in this dispute, such discretion could not be unfettered, since that could give rise to abuse. As the Panel had illustrated, a glaring example of abuse would be where a Member would seek to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constituted the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as "essential security interests" falling outside the reach of that system (at para. 7.132). Regarding this particular dispute and the measures at issue, in its third-party submission the EU had expressed doubts as to whether Russia had met its burden of proof as the Member invoking the exception. The EU took note of the fact that the Panel had been satisfied that the situation between Ukraine and Russia since 2014 constituted an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994, that the measures at issue were taken "in time" of such emergency, and that Russia had satisfied the conditions of the chapeau of Article XXI(b) of the GATT. In that regard, the EU understood that the Panel had found the elements adduced by Russia, also in later stages of the Panel proceedings, as sufficient given "the particular circumstances of this dispute" (7.119) and also that the particular circumstances of this case explained that, "despite its allusiveness, Russia's articulation of its essentially security interests is minimally satisfactory", given in particular that nothing suggested that Russia had invoked Article XXI(b)(iii) simply as a means to circumvent its obligations under the GATT 1994. Despite the EU's role as third party, the EU was also compelled to make a remark relating to the Panel's factual findings, insofar as they also involved the EU. In the section on factual background and notably in paragraphs 7.6 and 7.7, the Panel Report recounted certain historical events in an excessively selective manner, with the result of a mistaken impression as to the true sequence of events. The Panel Report wrongly gave the impression that Ukraine had developed the intention of seeking economic integration with the EU only following the "Euromaidan events". However, intentions of economic integration through the creation of a free-trade area had been programmed and inscribed in an international treaty between Ukraine and the EU in the first half of the 1990s, as was incidentally the case between the EU and Russia. In line with these plans, the bilateral negotiations between the EU and Ukraine for the conclusion of an Association Agreement, including a deep and comprehensive free-trade area, had taken place between 2007 and 2011 and, thus, well ahead of the initiative relating to the Eurasian Economic Union. It should be clear that Article XXI did not allow trade restrictive measures against a trading partner solely because that trading partner had chosen to enter into a free-trade relationship with another WTO Member. In that regard, the EU welcomed the Panel's findings that political or economic differences between Members were not sufficient, in and of themselves, to constitute an emergency in international relations for purposes of Article XXI(b)(iii) (at para. 7.75). The EU trusted that this matter had been of no decisive importance for the Panel's legal findings. However, since the facts in question were historically important and they involved the EU, and since they had also been the subject of some political controversy, the EU considered it important to put its remarks on the record. These factual remarks notwithstanding, the EU wished to welcome, once again, the Panel's interpretation of Article XXI, and wished to thank the panellists and the WTO Secretariat for their work on this Report.

8.7. The representative of Canada said that his country welcomed the Panel's thoughtful and well-reasoned interpretive approach to Article XXI in this dispute. The Panel had confirmed Canada's view that where a responding party had invoked Article XXI as a defence, whether the measure at issue could be justified under Article XXI was a justiciable matter. Further, it had clarified that Article XXI combined subjective and objective legal elements, and that, as an exception to the primary obligations, Article XXI imposed a burden on the responding party to substantiate its claims of justification, even where the provision granted that party considerable discretion. Therefore,

Canada considered that this Panel Report was an important and valuable contribution to the clarification of the Members' rights and obligations under the GATT 1994.

8.8. The representative of China said that his country noted that the DSB was requested at the present meeting to adopt the Panel Report in this dispute. China understood that it was the first time, since the establishment of this Organization, that a Panel had interpreted the "Security Exception" provision in the relevant covered agreements and had made an objective assessment of the applicability of that provision. The Panel Report in this dispute had addressed certain systemic concerns of Members by confirming the jurisdiction of the Panel to examine the dispute in relation to the "Security Exception", and by rejecting the assertion that the "Security Exception" provision was entirely self-judging. The Panel Report had also found that Members could not use the exceptions under Article XXI to circumvent their obligations under the GATT 1994. China was grateful for the work undertaken in relation to this dispute by the Panelists and Secretariat staff for assisting them.

8.9. The representative of Turkey said that as a third party in this dispute, his country wished to thank the Panel and the Secretariat staff for their hard work and effort in this dispute. The findings of the Panel had confirmed several points that Turkey had raised as a third party in this dispute. Most importantly, the Panel had confirmed that panels had jurisdiction to review a WTO Member's invocation of Article XXI and to determine whether the requirements of Article XXI of the GATT 1994 were satisfied. With its recommendations, the Panel had drawn the boundaries of Article XXI and taken a stance against the improper invocation of security exceptions to justify WTO-inconsistent economic measures designed to have a trade distorting or protectionist impact. The Panel had acknowledged that a Member could not re-label its economic concerns and economic relief measures as national security concerns or national security measures, thereby shielding such measures from multilateral scrutiny. In particular, the poor state of economic health of a domestic industry did not qualify as an emergency in international relations. The national security exception had not been included in the multilateral trading system to enable WTO Members to evade their multilateral obligations under, for instance, trade remedy agreements or the rules for tariff re-negotiations under Article XXVIII. On the characterization of security in relation to tariffs, the Panel had also upheld Turkey's view as a third party in this dispute. As Turkey had argued in its third-party submission, Article XXI left to a very large extent the determination of measures necessary for the protection of its essential security interest to the judgement of the country concerned. However, Turkey also considered that the discretion of the Member that claimed to take action for the protection of its essential security interest was not limitless. As the Panel had correctly underlined, essential security interest was evidently a narrower concept than security interest. It had been designed specifically to prevent the abusive adoption of commercial measures under the guise of national security. This meant that while Members had a wide margin of discretion as to how they characterized their security interests, they were not free to elevate any concern to that of an essential security interest, and their discretion was limited by their obligation to interpret Article XXI of the GATT 1994 in good faith. In this respect, Turkey hoped that this Panel Report provided guidance to the entire WTO Membership on the proper use of the national security exception. There was no doubt that WTO Members could invoke the national security exception when warranted. At the same time, WTO Members had to continue to respect multilateral rules and live up to their commitments under the covered agreements.

8.10. The representative of Australia said that as a third party to this dispute, his country wished to thank the Panel and the WTO Secretariat for their work on this complex and significant dispute. Australia recognized that this dispute raised significant issues regarding the invocation of Article XXI of the GATT, the rights and obligations of WTO Members, and the proper function of dispute settlement panels under the DSU. Australia was still considering the Panel Report and the potential implications of the Panel's reasoning. However, Australia welcomed the Panel's finding that Russia's invocation of Article XXI was within the Panel's terms of reference and, therefore, that the Panel had jurisdiction to determine whether the requirements of Article XXI(b)(iii) were satisfied. Without commenting on the other substantive findings of the Panel, Australia wished to make some broad observations. First, in light of the balance of sensitive interests that Article XXI sought to accommodate, Australia submitted that each invocation of Article XXI had to be considered carefully, in light of the particular dispute before a panel. Second, while acknowledging the Panel's finding that it had jurisdiction to review and make findings in relation to Article XXI, Australia emphasized that – in exercising this jurisdiction – the Panel had to fully respect the significance of the matters dealt with by Article XXI. The deference to a Member's determination of what action "it considers

necessary" to protect its essential security interests was explicit in the text of this provision and had to be given proper effect. However, Members should be conscious that this deference however was not absolute. Australia recalled that Article XXI(b) was an exception to a Member's obligations under the GATT 1994, and its use was explicitly limited by the text of that provision and had to similarly be given proper effect. Finally, Australia recalled that, in over two decades of WTO jurisprudence, this was the first time a WTO panel had been called upon to consider a Member's invocation of Article XXI. Australia viewed the restraint demonstrated by Members positively and similarly recalled the responsibility of Members to guard against undue use of this exception.

8.11. The representative of the United States said that WTO Members had understood, from the very beginning of the international trading system, that each Member could judge for itself what actions it considered necessary to protect its essential security interests. This had been the position of the United States for over 70 years, since the negotiation of the GATT. That position had been shared by every WTO Member whose national security action had previously been the subject of complaint, including the European Union, Canada, Russia, and others. In its Report, the Panel had concluded that, despite the clear text of Article XXI, the Panel could review multiple aspects of a responding party's invocation of the essential security exception. The United States found the Panel's analysis unpersuasive. The United States was currently involved in litigation concerning these issues and, therefore, would not discuss the Panel's interpretation in detail at the present meeting. However, the United States called Members' attention to several issues with the Panel Report that the United States found problematic also for systemic reasons. First, in reviewing Russia's argument that Article XXI was "self-judging", the Panel failed to interpret the provision – Article XXI – as a whole. Instead, the Panel began by saying it would consider whether the phrase "it considers necessary" modified the three subparagraphs (i) through (iii). The Panel disposed of this inquiry a mere two sentences later in the very next paragraph (para. 7.65), hardly the objective examination the DSU called for. And later in the same section, the Panel said that it would be contrary to the GATT 1994 and WTO Agreements to interpret Article XXI as a "potestative" or subjective criterion.[11] But in this section, the Panel was *not* interpreting Article XXI and had *not* looked at all of the text of Article XXI. Instead, the Panel drew its premature conclusions on Article XXI merely on the basis of subparagraph (iii). This was not consistent with Article 3.2 of the DSU and customary rules of interpretation of public international law. Second, having determined that it could review an invocation of Article XXI, the Panel's assessment of the security issues should have ended there. This was because while Russia invoked the exception, consistent with its interpretation that the Panel lacked the authority to review it, Russia had not substantiated a defence. In finding that Russia's actions were justified on the basis of essential security, the Panel had made Russia's case for it, concluding that the situation between the parties constituted an emergency in international relations.[12] It was not the role of a WTO adjudicator to make the case for a party. The Panel's analysis of XXI(b) was purely advisory given that Russia had not presented arguments. Finally, having determined that the measures at issue were justified under Article XXI(b)(iii), the Panel's assessment of Ukraine's claims should have been at an end. Nevertheless, the Panel had proceeded to provide advisory opinions on most of Ukraine's underlying claims – extending over some 20 pages of the Panel Report.[13] The Panel suggested this was appropriate to "enable the Appellate Body to complete the legal analysis" in the event it disagreed with the Panel's findings on Article XXI, but for that purpose the Panel only needed to make the relevant *factual* findings – leaving to the Appellate Body the completion of any necessary *legal* analysis. The Panel had stated over and over that "*had* the measures *been taken* in normal times", Ukraine "*would have* made a *prima facie* case".[14] In other words, were the facts *different* than they were, the Panel was advising on what findings it would make. But the DSU did not provide for a WTO adjudicator to provide an advisory opinion. Under Article 7.1 of the DSU, the DSB had charged the Panel with making only those findings that would assist the DSB in making the recommendation to bring a WTO-inconsistent measure into conformity with the covered agreements. This Panel Report was, unfortunately, seriously flawed. Even aside from the errors in its interpretation of Article XXI, the Panel had failed to interpret the entire provision before drawing conclusions on Article XXI, the Panel had made out the case for a

[11] Panel Report, para. 7.79.
[12] Panel Report, para. 7.122.
[13] Panel Report, paras. 7.166-7.258.
[14] Panel Report, para. 7.154, 7.183, 7.196, 7.257.

party, and the Panel had issued extensive advisory opinions. This was all contrary to the Panel's terms of reference and the DSU.

8.12. The representative of Mexico said that her country had not been a third party to this dispute. However, Mexico recognized that this dispute addressed a matter of systemic importance for this Organization, that was, the interpretation of Article XXI of the GATT 1994 regarding national security. In this regard, her country wished to make the following comments. Mexico agreed with the notion that the Panel had jurisdiction to examine objective elements of Article XXI of the GATT 1994.[15] Mexico also agreed that it was "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity" and that "the less characteristic is the 'emergency in international relations' invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise".[16]

8.13. The DSB took note of the statements and adopted the Panel Report contained in WT/DS512/R and Add.1.

9 KOREA – IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES

A. Report of the Appellate Body (WT/DS495/AB/R and WT/DS495/AB/R/Add.1) and Report of the Panel (WT/DS495/R and WT/DS495/R/Add.1)

9.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS495/12 transmitting the Appellate Body Report in the dispute: "Korea – Import Bans, and Testing and Certification Requirements for Radionuclides", which had been circulated on 11 April 2019 in document WT/DS495/AB/R and WT/DS495/AB/R/Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[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".

9.2. The representative of the Republic of Korea said that his country wished to thank the Appellate Body and its Secretariat, as well as the Panel and Secretariat staff having assisted the Panel, for their hard work in these proceedings. Korea also wished to thank the third parties for their constructive participation during the course of the proceedings. Korea was pleased that the Appellate Body had reversed the Panel's erroneous findings that Korea's import bans and additional testing requirements were inconsistent with Korea's obligations under the SPS Agreement. In fact, Korea's import bans and additional testing requirements had been implemented in response to the tragic Fukushima Daiichi Nuclear Power Plant (FDNPP) accident in 2011, which resulted in releasing substantial amounts of harmful radionuclides into the marine environment and surrounding areas. In 2013, it had been belatedly disclosed that large amounts of contaminated water had continued to be released from the FDNPP since the accident. As a neighbouring country, Korea could not but take measures to protect its people's food safety. The measures were designed to respond to the present and potential food risks associated with the unique conditions prevailing in Japan, including the substantial deficiencies in the information available about those conditions. Korea welcomed the Appellate Body's findings and conclusions, which confirmed that the SPS Agreement preserved Members' right to take appropriate measures to protect the life and health of their peoples against potential health risks. Naturally, Korea supported the adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report. Among the Appellate Body's findings, Korea wished to highlight three points. First, this dispute was the first that involved the potential adverse effect of radionuclides which had unique SPS risks. Contaminants such as radionuclides, once released, became part of the environment and their incorporation into food products could not be controlled. This made it particularly important to examine environmental conditions prevailing in the source country and their potential impact on food safety. In this sense, radionuclides were different

[15] Panel Report, "Russia – Measures concerning Traffic in Transit", paras. 7.53-7.58.
[16] Ibid., paras. 7.134 and 7.135.

from, for example, pesticides or additives, of which humans could control the amounts present in food products. Considering the specific risks associated with radionuclides, the Panel's "product-only" testing, if it had been endorsed by the Appellate Body, would have had serious implications for international food safety. Therefore, Korea highly appreciated the Appellate Body's sound judgment in rejecting the "product-only" testing and accepting potential risk factors in evaluating the legitimacy of food safety regulations against radionuclides under the SPS Agreement. Second, the Appellate Body had also found that a regulating Member had the right to determine for itself its appropriate level of protection (ALOP) under Article 5.6 of the SPS Agreement, and that when a panel assessed the appropriateness of a SPS measure, it had to carefully consider the regulating Member's entire ALOP.[17] This was significant because the AB's findings on the Panel's obligation would contribute to preserving Members' right to decide its citizens' radiological exposure level, without being subject to undue external standards. Third, the Appellate Body decided that the Panel had overstepped its mandate in finding inconsistency under Article 5.7 of the SPS Agreement as neither of the parties had raised a claim under this provision. This meant that there was a clear distinction between provisions that were included as part of a claim on the one hand, and provisions that were proffered as contextual background in the interpretation of another provision, on the other. Korea considered that this finding had systemic value. Korea was pleased that the WTO dispute settlement system had reached the right and meaningful outcome in this dispute. Korea appreciated that the Appellate Body had undertaken its assessment with rigor and care and, in doing so, had faithfully adhered to its mandate. Therefore, Korea again supported the adoption of the Appellate Body Report and of the Panel Report, as modified by the Appellate Body Report in this dispute.

9.3. The representative of Japan said that on 11 April 2019, the Appellate Body had circulated its Report in the "Korea — Radionuclides (Japan)" dispute (DS495). Although the Appellate Body found that Korea had failed to meet the procedural requirements to publish its import bans and additional testing requirements ("measures") with sufficient information, it had reversed the Panel's substantive findings of these measures' WTO-inconsistency based on technical faults in the Panel's reasoning and explanations. Subsequently, the Appellate Body had failed to resolve the dispute, because it had not addressed whether Korea's discriminatory measures were WTO-inconsistent. His country was deeply concerned that the Appellate Body Report had dismissed the Panel's findings founded on solid scientific evidence. His country found it troubling that, while reversing the Panel's findings on account of insufficiency of the Panel's analysis, the Appellate Body Report neglected to express long-awaited views on the WTO-consistency of the measures at issue. In essence, the Appellate Body Report was not conducive to settlement of the dispute and contradicted the principle stated in the DSU that prompt settlement of disputes was essential to the effective functioning of the WTO. Japan questioned the attitude of the Appellate Body which shied away from delivering judgement on the WTO-consistency of the challenged measures. This unfortunate outcome also raised a systemic issue. Japan was keen to discuss, together with other WTO Members, this systemic issue collectively. Japan was convinced that such discussions were essential in order to maintain confidence in the WTO dispute settlement system. Apart from this systemic issue, Japan considered the rulings of the Appellate Body Report extremely regrettable because the Appellate Body Report could have significant repercussions for regions, and producers, devastated by the 2011 Great East Japan Earthquake. The impact could be felt especially acutely in the food export industry, notably those that exported fish products. Since the disaster, rebuilding these industries had been a key part of Japan's broader effort to rebuild the economy in the areas affected by the disaster. The Appellate Body's decision could have a negative impact on perceptions of the safety of Japanese foods and on those seeking to export their products to countries such as Korea. He wished to remind all WTO Members that the factual findings made by the Panel on the safety of Japanese food products were undisputed and would be adopted by the DSB at the present meeting. Import restrictions on food products whose safety was assured and confirmed multilaterally in adopted findings could not be justified. Japan would continue to call on the countries and territories which maintained import restriction measures on food products from Japan to expeditiously lift these measures. Japan would spare no effort to secure the removal of unjustified import restrictions on Japanese food products. Additionally, Japan would pursue reform of the WTO dispute settlement system. Japan would constructively engage in the ongoing discussion on the dispute settlement mechanism.

9.4. Subsequently, Japan's legal expert made the statement to explain Japan's legal position in detail. By way of introduction, he said that diplomacy constrained the words it could use to express its deep disappointment with the Appellate Body's approach and decision, which would have far reaching consequences. The Appellate Body had deprived Japan of a prompt, satisfactory and

[17] Appellate Body Report, para. 5.33.

effective resolution to its long-standing dispute with Korea, as required by Article 3 of the DSU. Indeed, the Appellate Body's failure to resolve the dispute called into question the very effectiveness of the WTO dispute settlement system. Beyond the four walls of the WTO, the livelihoods of Japan's producers and exporters continued to be jeopardised by Korea's measures. The Panel had found that Korea discriminated against Japanese food in an arbitrary manner that did not comport with the purported health objectives of its measures. The Panel had also found that Korea's severe restrictions on Japanese food were not necessary to achieve its SPS objectives. The Panel had also found that, when Japan had initiated this dispute in 2015, Korea had abandoned any pretence that it was reviewing the extensive scientific evidence available. With respect to that evidence, the Panel had found that Japanese food – like food from elsewhere – fully met Korea's food safety standards, which were stricter than international standards. Indeed, the Panel had found that contamination levels in Japanese food were significantly below Korea's maximum thresholds. The Panel's factual findings had followed closely the unanimous views of five scientific experts, who had been appointed by the Panel to answer more than one hundred detailed scientific questions about the safety of Japanese food. Korea had not appealed the Panel's findings that Japanese food had extremely low levels of contamination, well below its strict thresholds. The Panel's careful treatment of the scientific evidence was left untouched by the Appellate Body's findings. Instead, the Appellate Body had reversed the Panel's decision, in essence, because the Panel had not explained its findings sufficiently. After that reversal, the Appellate Body ended its reasoning, failing to make any findings that resolve this dispute. Japan regretted that, four years after this dispute had been initiated, the Appellate Body left Japan and its producers with no remedy to secure access to Korea's market for Japanese food products that standing factual findings demonstrated full compliance with Korea's strict standards. It was difficult for Japan and, in particular, its producers to understand how the WTO could fail to restore market access for Japanese products that had been shown to meet Korea's standards – again, in factual findings that had not been challenged or reversed on appeal, and that would be adopted by the DSB at the present meeting. The deep sense of injustice was exacerbated by several factors: Korea's measures were arbitrarily disconnected from their purported health objectives; Korea maintained its measures without reviewing the scientific evidence; Korea had failed to be transparent in adopting and maintaining its measures; and Korea's justification for its measures had shifted opportunistically during the Panel proceedings, in particular its description of its level of protection. It was within this context that Japan wished to address the following in its statement made at the present meeting: (i) the considerable scientific evidence on the Panel record showing that Japanese food met Korea's strict standards; (ii) the shortcomings in the Appellate Body's decision under Articles 2.3 and 5.6 of the SPS Agreement; and (iii) the systemic issues raised by the Appellate Body Report in this dispute.

9.5. With regard to the issue that Japanese food products met Korea's standards, Japan said that the Panel's factual findings had been based on the detailed scientific evidence before it, including reports from five Panel-appointed experts. The Panel had asked these experts over 100 questions to fully understand the relevant scientific evidence before it. The experts had unanimously considered that Japanese food met Korea's food safety standards by a considerable margin. In particular, the following scientific evidence had been before the Panel. Codex applied an intervention exemption level of 1mSv/year for additional radiation exposure from food contaminated due to accidental releases. To implement this level, Codex set a guideline maximum level of 1,000 Bq/kg for caesium in commonly consumed food. For rarely consumed food products, Codex set the maximum caesium level at 10,000 Bq/kg. Japan, since soon after the accident, had started decontamination notably of the crop land and had introduced food monitoring based on the maximum levels for radioactive caesium in food, notably 100 Bq/kg for food in general. The limits in food had been set to meet the same intervention exemption level of the Codex, 1mSv/year, in consideration of the released radionuclides and with highly conservative and hypothetical assumptions, including that 50% of the food intake would reach maximum level. As part of its response to the Fukushima Daiichi Nuclear Power Plant (FDNPP) accident, Korea had lowered its maximum threshold for radioactive caesium levels in food products from Japan from 370 Bq/kg to 100 Bq/kg. This had aligned Korea's maximum thresholds with those of Japan, which had been lowered to 100 Bq/kg on 1 April 2012. On 9 September 2013, Korea had extended its 100 Bq/kg level for radioactive caesium to all general food products regardless of the origin.[18] With regard to the relationship between caesium levels and of other Codex radionuclides, the Panel had found that, when caesium levels are under 100 Bq/kg, contamination of food with other Codex radionuclides, such as strontium and plutonium, would be properly controlled. This finding was based on evidence relating, in particular, to the type and amount of radionuclides released into the environment during

[18] Panel Report, para. 2.103.

the accident, as well as their respective absorption pathways into food products. It was also based on food measurements taken as part of Japan's extensive food monitoring programme. The Panel's experts had agreed that, given the levels of radionuclides released into the environment in the accident and the specific properties of the radionuclides in question, when caesium contamination was below 100 Bq/kg, other radionuclides would be at levels below Korea's thresholds.

9.6. With regard to Japan's food monitoring, Japan said that soon after the accident, Japan had begun decontamination of the land affected by the accident. It had also introduced food monitoring based on its maximum levels for radioactive caesium in food. Japan conducted rigorous and extensive testing of food products, as well as monitoring of sea water and sediment around the FDNPP. The results of this testing were publicly available. The Panel and all five of its experts had considered that Japan's testing was sufficient to draw reliable conclusions about low contamination levels of Japanese food products.[19] The Panel's experts had confirmed that Japan's test data showed that caesium levels in Japanese food products were consistently well below Korea's threshold of 100 Bq/kg. The evidence also showed that contamination levels had fallen significantly over the years following the accident. The Panel and its experts had also found that, although Japanese food made up less than one percent of the Korean diet, a diet consisting entirely of Japanese food would lead to exposure levels that were a tiny fraction of 1 mSv/year.[20]

9.7. With regard to Japan's distribution restriction on food products, Japan said that in immediate response to the accident, it had imposed a variety of measures restricting the distribution and sale of certain products from the most affected regions. The response to the FDNPP accident had been coordinated horizontally amongst a variety of national government authorities. These included: the Nuclear Emergency Response Headquarters (NERH); the Ministry of Health, Labour and Welfare (MHLW); the Ministry of Agriculture, Forestry and Fisheries (MAFF); and the Ministry of the Environment (MOE). The national government had coordinated its activities with those of prefectural and local governments, as well as with the Tokyo Electric Power Company (TEPCO). Following the accident, Japan had imposed domestic restrictions on any food product with caesium levels in excess of 100 Bq/kg. These restrictions were maintained until caesium levels had fallen consistently below 100 Bq/kg. Over time, caesium levels had fallen, and Japan had been able to lift its domestic restrictions. This dispute concerned food products with caesium levels below 100 Bq/kg that were no longer subject to domestic restrictions. Given the strength of the scientific evidence and the food safety control system, Japan would continue to call on Korea, and other Members that maintained import restrictions on Japanese food products, to lift these measures expeditiously.

9.8. With regard to the Appellate Body's treatment of Article 2.3 of the SPS Agreement, Japan said that under the first sentence of Article 2.3, the Appellate Body had reversed both the Panel's interpretation and application of the relevant "conditions". The basis for these reversals was technical flaws in the Panel's reasoning. In both instances, the Appellate Body's approach raised serious questions.

9.9. With regard to the Appellate Body's findings on the interpretation of Article 2.3, Japan said that as an interpretative matter, the Panel had found that the relevant "conditions" should be informed by the regulatory objective of the measures in question.[21] The Panel had not limited the relevant considerations to any particular factors – it had concluded that any factor could be relevant to the extent that it was associated with the SPS objectives pursued. In its conclusion, the Panel had stated that nothing in the first sentence of Article 2.3 "would preclude it from considering the risks present in products in international trade as the relevant condition".[22] The Panel's use of the definite article "the", in this single sentence within a long section of the Panel Report, had formed the basis for the Appellate Body's reversal of the Panel's interpretation. The Appellate Body had reversed the Panel's interpretation, taking the view that the conditions always had to include consideration of a Member's territory and could never be limited to consideration of the SPS risks arising in food.[23] Unusually, in reversing the Panel's interpretation, the Appellate Body had failed to develop its own comprehensive interpretation of the relevant "conditions" following the usual rules of treaty interpretation. Indeed, while the Panel's interpretation had spanned five pages and had covered the ordinary meaning, context and object and purpose, the Appellate Body had spent a single paragraph on interpretation

[19] Panel Report, paras. 7.205-7.209.
[20] Panel Report, para. 7.236.
[21] Panel Report, para. 7.276.
[22] Panel Report, para. 7.276 (emphases added).
[23] Appellate Body Report, para. 5.64.

that did not follow conventional means of interpretation.[24] As noted, the Appellate Body had found that territorial conditions always had to be considered under Article 2.3, and the conditions could never be limited to consideration of the SPS risks arising in food.[25] Japan queried this position. During the Panel's proceedings, the Panel had asked Korea to explain the implications of its interpretation "for measures that address risks not related to the environment or agricultural conditions, such as the presence of additives".[26] In that case, the risk being regulated (that was, the risks associated with the presence of an additive) had no relation to a Member's territory. The Panel had recorded that Korea had been unable to answer this question.[27] The Panel's extensive interpretive reasoning had addressed this possibility. The Appellate Body's brief interpretation did not seem to account for such a scenario. Nor had the Appellate Body addressed the Panel's reasoning in this regard. In some respects, the Appellate Body's reversal of the Panel's interpretation seemed also to be at odds with its own reasoning. For example, the Appellate Body stated that "an Article 2.3 analysis includes consideration of other relevant conditions, such as territorial conditions, to the extent they have the potential to affect the products at issue".[28] This understanding of the relevant "conditions" closely mirrored the Panel's interpretive approach, which had nonetheless been reversed. Thus, as an interpretive matter, the Appellate Body had accepted that territorial (and other) conditions were relevant only if they had a bearing on the SPS risks in food being traded internationally. However, if territorial (and other) conditions had no bearing on those SPS risks, the Appellate Body's finding required that a Member's territory not provide the relevant "conditions" under Article 2.3. This was precisely what had been found by the Panel, for example, in the case of additives to food. Indeed, rather than applying the Vienna Convention on the Law of Treaties, the Appellate Body appeared to have a preconceived view that there always existed "relevant territorial conditions that may not yet have manifested in product"[29] in any SPS case. This was a policy judgement which played no role in treaty interpretation. Japan regretted the Appellate Body's failure to set out a detailed interpretation of the word "conditions" in Article 2.3. This failure marred the Appellate Body's approach to the Panel's findings on both the interpretation and application of Article 2.3 of the SPS Agreement.

9.10. With regard to the Appellate Body's findings on the application of Article 2.3 of the SPS Agreement, Japan said that the Appellate Body reversed the Panel's application of Article 2.3 to the facts on the basis that the Panel had failed to address adequately territorial conditions in Japan, and that it had failed to account for small differences in levels of contamination in food from Japan and elsewhere. With respect to territorial conditions, the Appellate Body did a disservice to the Panel, because the Panel had considered territorial conditions in Japan. In particular, the Panel had addressed the levels of environmental contamination, and had also explained why, given the transfer mechanisms to food, the environmental contamination levels did not imply risks for Japanese food.[30] In so doing, the Panel had accepted the views of its scientific experts. In finding that the Panel had not addressed Japan's territorial conditions, the Appellate Body gave the Panel no credit at all, under Article 2.3, for these aspects of its findings. Although the Panel had considered the relevance of environmental contamination to the contamination of food, the Panel had devoted more attention to the direct evidence of the risks arising in food. Korea's measures, after all, addressed the levels of contamination in food. The Panel's approach had reflected the unanimous views of the Panel's five scientific experts that, when it was possible to measure contamination levels in the food directly, the resulting data provided the best way to assess the SPS risks arising in food. Indeed, if there were any meaningful differences in territorial conditions, these would be discernible through food testing.[31] In finding that the Panel had not addressed Japan's territorial conditions, the Appellate Body, again, gave the Panel no credit at all, under Article 2.3, for this aspect of its findings. Indeed, the Appellate Body appeared to make factual findings that there were territorial differences that could relate to the different potentials for food contamination.[32] The Appellate Body's findings were based on a selective reading of the Panel's several statements which had been taken out of context. By doing so, the Appellate Body exceeded its mandate under the DSU. The Panel, and its five

[24] Panel Report, paras. 7.261-7.276; *cf* Appellate Body Report, para. 5.59.
[25] Appellate Body Report, para. 5.65.
[26] Panel Report, para. 7.268.
[27] Panel Report, para. 7.268.
[28] Appellate Body Report, footnote 280 to para. 5.89 (emphasis added). *See also ibid*. paras. 5.64 and 5.91.
[29] Appellate Body Report, para. 5.64.
[30] The Panel considered territorial conditions in the factual section of its Report at paras. 2.44-2.85. It considered them again in its application of Article 2.3, at paras. 7.289-7.298, 7.315-7.319.
[31] Panel Report, paras. 7.317. *See also ibid*. para. 7.92 and footnote 571 to para. 7.93.
[32] Appellate Body Report, e.g. paras.5.73 – 5.76.

scientific experts, had found that Japan's food monitoring provided reliable and robust data. In reaching this finding, the Panel and its experts had reviewed hundreds of thousands of food measurements taken over several years.[33] These data showed that contamination levels in Japanese food – like food from the rest of the world – were consistently well below Korea's regulatory thresholds. Second, the Appellate Body faulted the Panel for having failed to account for differences in levels of contamination in food from Japan and elsewhere. The Panel, however, had not failed to account for such differences. Rather, it had compared levels of contamination in food from Japan and elsewhere in light of the regulatory thresholds in Korea's measures. These thresholds permitted importation of food from all sources, except Japanese food products, if they had caesium levels below 100 Bq/kg. The Panel, therefore, had examined whether Japanese food and food from elsewhere presented similar risks of exceeding Korea's regulatory threshold. As the Panel had explained, caesium levels in food from all sources, including Japan, were well below Korea's threshold of 100 Bq/kg.[34] Further, as the Panel's experts had confirmed, even if Japanese food was exclusively consumed, that would result in radiation exposure far below Korea's 1 mSv/year limit.[35] As such, small differences in the absolute levels of contamination in food from Japan and elsewhere, at levels far below 100 Bq/kg, were not material in light of Korea's own SPS thresholds. It was surprising and disappointing that the Appellate Body failed to contend with the implications of Korea's regulatory thresholds, in faulting the Panel for its assessment of differences in levels of contamination in food from Japan and elsewhere.

9.11. With regard to the Appellate Body's treatment of Article 5.6 of the SPS Agreement, Japan said that under Article 5.6, the Appellate Body reversed the Panel's findings that Japan's alternative measure – testing for 100 Bq/kg of caesium – would achieve Korea's ALOP. Again, the Appellate Body's reversal was based on technical errors in the Panel's reasoning and explanation. Under Article 5.6, the Panel had found that the ALOP had three prongs: a quantitative exposure limit of 1 mSv/year and two qualitative elements, namely that exposure should be as low as reasonably achievable (ALARA) under 1 mSv/year, and should be limited to the exposure that resulted in the ordinary environment absent an accident.[36] Before the Panel proceedings, Korea had represented to Japan that its ALOP consisted of the first prong, namely, an exposure limit of 1 mSv/year.[37] The other two prongs had been added during the Panel proceedings, without supporting evidence, after Japan had shown that consumption of its food would lead to exposure far below 1 mSv/year. The Appellate Body found that the Panel had erred because it had focused its analysis on whether Korea's measures were necessary to ensure a 1 mSv/year exposure limit. The Appellate Body faulted the Panel for having failed to consider "explicitly" the qualitative elements of Korea's ALOP, including their relationship to the 1 mSv/year exposure limit.[38] In fact, the Panel had noted that ALARA was typically used by a government in setting its appropriate level for the 1 mSv/year exposure limit.[39] Indeed, the ICRP and Codex used ALARA in this way in setting an exposure limit of 1 mSv/year, which Korea followed.[40] The Panel had noted, therefore, that ALARA was a process for setting a level of protection, and was not a level in itself.[41] For the Appellate Body, this reasoning was not sufficiently "explicit" in addressing the relationship between ALARA and Korea's threshold of 1 mSv/year.[42] The Panel had also noted that its scientific experts were not familiar with Korea's notion that exposure to radiation in food should be limited to the human exposure that resulted generally in the ordinary environment.[43] The Panel had reasoned, though, that exposure in the ordinary environment was often in excess of 1 mSv/year and, on global average, 3 mSv/year, for example, due to the presence of background radiation, and another 1 mSv/year was "a minor addition to already experienced doses – or at the same level as that existing in the ordinary environment".[44] Although the Panel's finding had followed the unanimous view of its five scientific experts, for the Appellate Body, the Panel's reasoning had also not been sufficiently "explicit" in addressing the relationship between the ordinary environment and Korea's threshold of 1 mSv/year. Finally, the Appellate Body also exhorted panels to reject ALOPs, or elements of ALOPs, that were

[33] Panel Report, paras. 7.199-7.209.
[34] Panel Report, paras. 7.308-309.
[35] Panel Report, para. 7.244.
[36] Panel Report, paras. 7.171-7.172.
[37] Panel Report, para. 7.161.
[38] Appellate Body Report, para. 5.31.
[39] Panel Report, paras. 7.166-7.168.
[40] Panel Report, para. 7.171.
[41] Panel Report, para. 7.167.
[42] *See* Appellate Body Report, paras. 5.31-5.34.
[43] Panel Report, paras. 7.169-7.170.
[44] Panel Report, para. 7.170.

too vague or imprecise to serve as a benchmark "level", under Article 5.6, for assessing the necessity of an SPS measure.[45] The Appellate Body had recognized that the Panel's analyses indicated that ALARA and exposure in the ordinary environment would not "serve as a meaningful ALOP or as parts thereof".[46] However, the Appellate Body had faulted the Panel for it "did not explicitly examine" or had failed to "have explicitly determine" whether the two elements were part of Korea's ALOP. In other words, according to the Appellate Body, the Panel had erred because it had not examined the issue exactly in the way that the Appellate Body wanted the Panel to follow. This did not appear to be the proper standard for the review of panels' legal analyses.

9.12. With regard to the systemic concerns raised by the Appellate Body Report in this dispute, Japan said that the Appellate Body had reversed the Panel's findings under Articles 2.3 and 5.6 of the SPS Agreement based on technical faults in the Panel's reasoning and explanation, despite extensive and unappealed findings that Japanese food complied fully with Korea's food safety standards, which were stricter than international standards. Despite the fact that Japanese food met Korea's regulatory standards, Japan was left without resolution of its dispute, or access to Korea's market, four years after having initiated WTO dispute settlement proceedings. The Appellate Body's failure to resolve this dispute was contrary to its obligation under Article 3 of the DSU, which required the "prompt", "satisfactory", and "effective" settlement of disputes. Amongst others, these requirements reflected the prospective nature of WTO dispute settlement and the harm caused by WTO-inconsistent measures. The Appellate Body's failure to resolve this dispute was not the outcome envisaged by Article 3 of the DSU. It was also not the outcome that Members, like Japan, envisaged or deserved when they engaged in WTO dispute settlement. Indeed, the Appellate Body's decision raised questions regarding the Member's confidence in the WTO as a forum for resolving disputes between Members. It also raised questions about the ability of the WTO dispute settlement mechanism to fulfil the promise of "prompt", "satisfactory", and "effective" dispute settlement. It was simply not satisfactory for a Member to be left without resolution of claims regarding severe import restrictions facing its exports, no matter where that failure resulted from. The present situation highlighted acutely the limitations of the current WTO dispute settlement mechanism. When the Appellate Body had reversed a panel's findings and was unable, or unwilling, to make findings as to the consistency of a challenged measure, Members were left without the possibility of a satisfactory resolution of their complaint. This was the case even if a panel report was reversed because the panel had not adequately explained points that it could easily have explained. In such a situation, the dispute settlement system clearly failed to fulfil its function. Japan's concern extended beyond this dispute to the broader issue of the ability of WTO dispute settlement to serve the interests of WTO Members. The WTO dispute settlement system was at the heart of the multilateral trading system. When the effectiveness of the WTO dispute settlement mechanism was called into question, the whole system could be affected. Japan, therefore, urged Members to address this issue at future DSB meetings.

9.13. The representative of Canada said that his country noted that the Appellate Body had reversed the Panel's findings that the Korean measures were inconsistent with Articles 2.3 and 5.6 of the SPS Agreement. The Appellate Body had determined that the Panel had erred in its application of the relevant legal standard with respect to these Articles. However, after identifying the Panel's errors, the Appellate Body had not taken the next step of completing the analysis. In the absence of findings with respect to whether Korea's measures were inconsistent with Articles 2.3 and 5.6 of the SPS Agreement, the dispute had not been resolved. In Canada's view, any import ban had to be implemented based on scientific evidence. Canada urged Korea and Japan to come to a mutually agreeable solution to this dispute as soon as possible. More generally, the outcome of this appeal raised systemic concerns. In particular, Canada noted Article 3.4 of the DSU which stated that "recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this understanding and under the covered agreements". This had not happened in this instance. There had been a great deal of discussion in the past months on how the DSB might be improved and clarified. This decision animated that discussion. Canada further noted that simply "going back to what was agreed to in 1995" would not resolve the issue that was before Members at the present meeting. This particular case more specifically underscored that the DSU rules currently did not provide authority for the Appellate Body to direct the original panel to re-examine the question of whether there had been a violation of the SPS Agreement based on the correct application of the legal standard for Articles 2.3 and 5.6. Canada had been a strong advocate for the addition of a remand function for the Appellate

[45] Appellate Body Report, para. 5.34.
[46] Appellate Body Report, para.5.35.

Body in the DSU negotiations. Adding authority to the DSU for the Appellate Body to remand a matter back to the original panel would assist panels, the Appellate Body and ultimately the DSB in fulfilling their roles under the DSU to secure a prompt resolution of a dispute. Without that authority, WTO Members such as, in this dispute, Japan, had no recourse under the DSU to seek a determination that the challenged measures were inconsistent with WTO obligations under existing proceedings and, therefore, had to initiate a new dispute.

9.14. The representative of Brazil said that in this dispute, the Appellate Body had reversed several legal findings that had been based on scientific evidence and factual findings made by the Panel. By way of example, in its analysis of Article 5.6 of the SPS Agreement, the Appellate Body had found the Panel's conclusion to be "in tension with" prior statements made in the analysis.[47] Brazil failed to see this "tension". In Brazil's opinion, the findings by the Panel regarding the alternative measure proposed by Japan and Korea's ALOP could be integrated to support the Panel's conclusion under Article 5.6. Brazil recalled that in situations where evidence showed that a less trade-restrictive measure achieved the relevant level of protection, the SPS measure was inconsistent with the SPS Agreement. Brazil believed that Appellate Body findings should achieve "a satisfactory settlement of the matter" as stated in Article 3.4 of the DSU. Brazil wished to clarify, however, that this did not call into question the broader work developed by the Appellate Body in this Report and its overall contribution to the dispute settlement system.

9.15. The representative of New Zealand said that his country shared the view that, as explained by other third parties including Canada, it was unfortunate that issues in this dispute remained unresolved as the Appellate Body had not made final determinations regarding the consistency of the measures at issue with the provisions of the SPS Agreement.

9.16. The representative of the United States said that the United States continued to review the reports in this highly technical dispute. Given that review, the United States considered it regrettable that the appellate report had reversed certain of the panel's findings, in particular as the panel had concluded (and the scientific experts consulted by the panel had agreed) that the Japanese exports satisfied Korea's level of protection for food safety. The United States recalled, however, that the appellate report had not concluded that imports of fish products from Japan were unsafe, and it would be improper to draw such a conclusion on the basis of a report that appeared to reverse certain panel findings on non-substantive grounds.

9.17. The representative of the European Union said that his delegation understood Japan's disappointment with the procedural situation in this dispute. Members – including the EU – were often in the situation where the Appellate Body, in the absence of undisputed facts on the record – could not complete the analysis after having had to reverse the findings of the Panel because of legal error. There were certain shortcomings inherent in the current system that had been the subject of discussions amongst Members, in particular as part of the DSU negotiations. However, the EU considered that the Appellate Body had fully and properly discharged its responsibilities within the system as it currently stood.

9.18. The representative of China said that his country noted the Report in the "Korea — Radionuclides (Japan)" dispute (DS495) to be adopted at the present meeting. Without prejudice to China's position on substantive issues addressed in the Report, his country wished to share some observations in this dispute. China noted that the Appellate Body's reversal was mainly based on the Panel's insufficient analysis and its failure to explain its legal findings on certain issues. However, the Appellate Body's hands were tied since the DSU only allowed it to review the method of a panel's fact finding rather than to redo the whole fact investigation by itself and complete the analysis thereafter. This dispute was another typical example that highlighted the importance of Article 11 of the DSU. A panel had to 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 agreement. A panel's role as the "trier of facts" did not grant it a monopoly over fact finding. In general, factual issues should not be addressed by the Appellate Body, but whether a panel had fulfilled its objective assessment obligation was an issue of law that was subject to appellate review. This was not a backdoor for the Appellate Body to review facts, but rather a delicate and important safety valve to correct potential egregious errors by a panel which would otherwise frustrate the positive resolution of a dispute. China believed that the Appellate Body was fully aware of its mandate and had taken a cautious approach to deal with Article 11 of the DSU appeals. There had

[47] Appellate Body Report, para. 5.30.

been only a limited number of appeals regarding Article 11 of the DSU and different findings had been made by the Appellate Body: two of them were confirmed inconsistent with Article 11 of the DSU because the panel had exceeded its mandate or had failed to sought evidence, and one had been subject to judicial economy. Given its important function, Members could further explore how to improve the practice under Article 11 of the DSU. However, any Appellate Body reform that aimed to remove Article 11 of the DSU from the Appellate Body's jurisdiction would undermine the Appellate Body's function in solving disputes.

9.19. The representative of Colombia said that his country wished to raise a general systemic concern regarding the proper use of SPS measures. His country was not a third party in this dispute and did not wish to comment on the substance of this case. Colombia wished to recall that its statement should by no means be construed as undermining the right of Members to defend legitimate objectives such as the protection of human life and health through appropriate SPS measures, when it was clear that those values were at stake in a specific situation. Colombia believed, however, that this dispute served as an important reminder that Members should bear in mind the necessity of taking good care not to restrict trade more than it was strictly necessary in a particular situation. Colombia was concerned that some Members were deviating from the Codex in adopting their SPS measures. This undermined international standards that had been developed with a view to enabling Members to take appropriate health measures in a transparent manner that did not improperly restrict international trade. Colombia also considered that SPS measures were justified only in the situations that were clearly provided for in the SPS Agreement. Finally, Colombia wished to recall the important role that transparency and due process played in imposing SPS measures. Members should not approach these requirements as a mere technical step in imposing measures that they considered necessary, without conducting "in extenso" a proper assessment of the safety of the products affected by a specific SPS measure that gave due consideration to the rights and livelihood of producers affected by such measures.

9.20. The representative of Ecuador said that his country had followed this dispute with great attention. Ecuador believed that it was in the interest of all Members that the WTO dispute settlement system was efficient, that its decisions were issued within the time-frames set out in the DSU, and that it produced results that led to positive resolutions of disputes between Members. From a systemic point of view, it was important that decisions of the Appellate Body resolved disputes. Otherwise, there would be no clarity for the disputing parties. Members had to ensure that the dispute settlement system continued to work and that its functioning was improved through amendments to be agreed by all Members.

9.21. The representative of Peru said that his country followed the SPS issues at the WTO with great interest. Members were aware of Peru's concerns raised in meetings of the SPS Committee. Members were also aware of Peru's interest in ensuring that the dispute settlement mechanism worked well. Peru noted that the WTO dispute settlement proceedings were lengthy and expensive for disputing parties and were of great political importance for Members to enable them to avoid trade tensions. Like other Members, Peru believed that the fundamental objective of the WTO dispute settlement mechanism was to determine clearly whether or not a challenged measure was inconsistent with the WTO Agreements. In addition, the WTO dispute settlement mechanism had to accomplish this task in an expeditious manner. Peru underlined that the expeditious resolution of disputes by the WTO dispute settlement mechanism was and had to be one of the fundamental objectives of the discussions held in the other WTO forum aimed at improving the rules for the proper functioning of the WTO dispute settlement mechanism. Peru reiterated its commitment to engage in these discussions, which would help to avoid similar situations like the one in which the WTO dispute settlement mechanism currently found itself.

9.22. The representative of the Kingdom of Saudi Arabia said that his country maintained its strong commitment to the rules-based multilateral trading system and to the work of the different WTO bodies and particularly the DSB. The WTO dispute settlement system and its Appellate Body had been key to the security and predictability of the multilateral trading system. Saudi Arabia wished to indicate that in cooperation with Japan, it had sent technical teams in 2018 to investigate on the safety of food products imported from Japan. The teams had recognized and confirmed the safety of such products and had recommended the removal of the ban. Based on this, Saudi Arabia had lifted its ban on imports of Japanese food products in 2018.

9.23. The representative of Pakistan said that his country had received with interest the Report of the Appellate Body in this dispute and had heard the statements of both disputing parties under this

Agenda item. Pakistan firmly believed that the WTO's dispute settlement mechanism was the most appropriate and effective way to resolve disagreements on the legality of measures. At the same time, Pakistan also believed that Members had a responsibility to implement the WTO Agreements in good faith while avoiding unnecessary restrictions in international trade. Pakistan also saw value in following scientific bases in designing food safety measures to the maximum extent. Pakistan had been a consistent supporter of upholding the integrity and independence of the Appellate Body. Pakistan recognized that a process was underway in the WTO where any concerns raised by Members about the dispute settlement system, including those on Appellate Body reports, were being discussed. Pakistan hoped that the process would be fruitful in addressing any concerns and that it would strengthen the dispute settlement mechanism for the benefit of the entire Membership.

9.24. The representative of Malaysia said that his delegation followed with great interest this issue and welcomed the Report of the Appellate Body contained in document WT/DS495/AB/R and WT/DS495/AB/R/Add.1. Malaysia wished to highlight a systemic concern regarding this issue. Malaysia wished to express that it was crucial for the Appellate Body to provide clarity in its findings so that disputes could be resolved effectively and positively with the limited resources that Members had.

9.25. The representative of the Republic of Korea said that at, the present meeting, Japan had provided extensive assessments of the Panel and Appellate Body rulings in this dispute. Korea disagreed with most of them. Korea wished to make two observations on Japan's views. First, regarding Japan's continuous reference to some of the Panel's findings, Korea understood that, by reversing virtually all rulings and recommendations rendered by the Panel, the Appellate Body had effectively declared that all relevant intermediate findings by the Panel, whether factual or legal, were of no legal effect. Therefore, Japan's assertion that some of the Panel's factual findings had somehow survived the Appellate Body's scrutiny was nothing more than "beating a dead horse". Moreover, the Appellate Body's findings were grounded on the premise that the ecological and environmental conditions in Japan had the "potential to affect" Japanese food products, and that Korea's measures were designed to address such potential risks. It was on that basis that the Appellate Body had rejected the Panel's rulings and recommendations. In fact, the Appellate Body had recognized the potential food risks associated with the prevailing conditions in Japan. Second, with regard to systemic concerns raised by Japan, Japan had asserted that the Appellate Body had failed to make findings necessary to assist the DSB in making the recommendations or in giving the rulings provided for under the covered agreements in this dispute. Korea disagreed. In Korea's view, contrary to Japan's assertion, the Appellate Body had positively and satisfactorily resolved this dispute. In the WTO dispute settlement system, a panel or the Appellate Body's mandate was to review and find whether or not a challenged measure was inconsistent with the covered agreements. Also, the burden of proving such inconsistency rested with the complaining party. In this dispute, the Appellate Body had properly found that Japan had failed to demonstrate that Korea's measures were inconsistent with the obligations enshrined in the SPS Agreement. As a well-established principle of public international law, a presumption of good faith implementation naturally attached to Korea's measures. Thus, with the Appellate Body's reversal of the Panel's finding of inconsistency, Korea's measures should be regarded as WTO-consistent. As such, the Appellate Body had adequately served its function to resolve this dispute. Furthermore, Korea noted that, in its appeal in this dispute, Japan had limited itself to arguing that the Panel's approach had been correct and that the Appellate Body should have upheld the Panel's findings. There had been no request by Japan for the Appellate Body to conduct further work, i.e., to complete the analysis, in the event that the Appellate Body would disagree with the Panel's approach. At the same time, WTO Members had been cautioning the Appellate Body to exercise restraint and to not go beyond what was strictly necessary to address the participants' appeals. It was regrettable that Japan now sought to blame the Appellate Body for failing to do something that Japan had never requested it to do. Korea also wished to stress one more point in this context. WTO Members including Japan had used the dispute settlement system for more than 20 years and all Members knew the system very well. Article 3.7 of DSU mandated that Members "exercise its judgement as to whether action under these procedures would be fruitful" before bringing a case. Korea believed that Japan had to have brought this case to the dispute settlement mechanism based on the best available knowledge of the current system. Triggered by and in accordance with Japan's panel request, disputing parties, panels, AB members and relevant Secretariats had exhausted all their efforts to secure a positive outcome to this dispute under the current system over about four years. Finally, disputing parties had a definitive outcome on the basis of which disputing parties could and should resolve this dispute. If Japan had any doubt about the proper functioning of the system in this dispute, it should have taken that consideration into account before bringing its case as mandated by Article 3.7 of the DSU. Korea, again, had to

express its strongest support for the Appellate Body Report in this dispute, keenly aware of the difficult situation that the Appellate Body was confronted with, in addition to its already onerous task of conducting a sophisticated legal review. Korea highly respected how the Appellate Body had nonetheless preserved its dignity and integrity as the highest judicial body of the WTO's dispute settlement mechanism.

9.26. The representative of Japan said that Korea had raised many points in its second intervention. Japan did not agree with any of them. However, as those points had been fully addressed in Japan's previous statement made under this Agenda item, Japan would not repeat its positions. With regard to systemic issues, Japan would continue to discuss those issues in the DSB.

9.27. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS495/AB/R and Add.1 and the Panel Report contained in WT/DS495/R and Add.1, as modified by the Appellate Body Report.

10 PROPOSED NOMINATIONS FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/640)

10.1. The Chairman drew attention to document WT/DSB/W/640, which contained new names proposed by Norway for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. He proposed that the DSB approve the names contained in document WT/DSB/W/640.

10.2. The DSB so agreed.

11 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; BENIN; THE PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CENTRAL AFRICAN REPUBLIC; CHILE; CHINA; COLOMBIA; COSTA RICA; CUBA; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KOREA; LIECHTENSTEIN; MEXICO; MOROCCO; NEW ZEALAND; NICARAGUA; NORTH MACEDONIA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; RWANDA; 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.10)

11.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of several delegations. He drew attention to the proposal contained in document WT/DSB/W/609/Rev.10 and invited the representative of Mexico to speak.

11.2. The representative of Mexico, speaking on behalf of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.10, said that the delegations in question had agreed to submit the joint proposal dated 15 April 2019 to launch the AB selection processes. Her country welcomed Morocco and the Central African Republic as new co-sponsors of the proposal. Mexico, speaking on behalf of these 75 Members, wished to state the following. The considerable number of Members submitting this joint proposal reflected a common concern with the current situation in the Appellate Body that was seriously affecting its functioning and the overall dispute settlement system against the best interest of its Members. WTO Members had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes, as set out in the joint proposal before the DSB at the present meeting. This proposal sought to: "(i) start four selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term expired on 30 June 2017; a second process to fill the vacancy that resulted from the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term expired on 11 December, 2017; and a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office expired on 30 September 2018; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidates; and (iv) to request that the Selection Committee issue its recommendations within 60 days after the deadline for nominations of candidates". The proponents were flexible with regard to the deadlines for the selection processes, but believed that Members should consider the urgency of the situation. Mexico 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 Chair for the continued work on these issues. As the United States had explained in prior meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. As the United States had explained at recent DSB meetings, for more than 15 years and 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 2018 US Trade Policy Agenda outlined several long-standing US concerns.[48] 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. And as the United States had explained at recent DSB meetings, the Appellate Body had issued advisory opinions on issues not necessary to resolve a dispute and had reviewed panel fact-finding despite appeals being limited to legal issues. Furthermore, the Appellate Body had asserted that panels must follow its reports although Members had not agreed to a 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 more than a 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. 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, and would continue its efforts and its discussions with Members and with the Chairman to seek a solution on these important issues.

11.4. The representative of the European Union said that his delegation wished to refer to its statements on this issue made at previous DSB meetings, starting in February 2017. WTO Members had a shared responsibility to resolve this issue as soon as possible, and to fill the outstanding vacancies as required by Article 17.2 of the DSU. The EU wished to thank all Members that had co-sponsored the proposal to launch the AB selection processes. The EU invited all other Members to endorse this proposal. The EU also wished to recall that concrete proposals had been submitted to the General Council with a view to unblocking the AB selection processes. The EU invited all Members to engage constructively in these discussions so that the vacancies could be filled as soon as possible. The EU wished to stress that the objective behind these proposals was to address – in a forward-looking manner – the concerns that had been raised in relation to the functioning of the Appellate Body. Contrary to what the United States had suggested at the 25 February 2019 DSB meeting, the intention behind these proposals was not to "permit what is now prohibited". If adopted, these changes in the DSU would have a concrete impact on the way in which the Appellate Body operated, in a direction that the EU understood was being sought by the United States. The EU also wished to make clear that the fact that the EU had made these proposals did not mean that the EU agreed with the concerns expressed by the United States. In particular, the EU disagreed with the general proposition that the "Appellate Body has felt free to depart from what WTO Members agreed to". At the 25 February 2019 DSB meeting, the United States had raised a number of specific questions. The EU believed that if Members wished to find a solution to the current impasse, Members should be having a forward-looking discussion and not continuously re-litigate their differences as to the reading of the current rules. And the EU was looking forward to continuing such forward-looking discussion in the informal General Council process. The EU wished to place the following brief observations on the record. With regard to Rule 15 of the Working Procedures for Appellate Review, this was a common-sense rule that had been adopted in 1996 under the Appellate Body's authority to draw up its working procedures pursuant to Article 17.9 of the DSU. The Appellate Body had done so after having consulted the DSB Chair who in turn had consulted with the WTO Membership. The United States had not expressed on the record any concerns with this rule being part of the Working Procedures for Appellate Review, neither at that time nor during the more than two decades of its application that had followed. With regard to Article 17.5 DSU and the

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

issue of 90 days, the EU had explained its position at the 22 June 2018 DSB meeting. The EU agreed that Article 17.5 of the DSU set out a clear obligation to comply with 90 days. However, the EU did not agree that the AB had "decided to ignore" that time-frame. There were objective reasons that explained why appeals took longer, such as the number of appeals, increasingly large and complex cases, resource issues and the number of serving Appellate Body members. At the same time, it was also clear that Article 17.5 of the DSU did not attach any procedural consequence to exceeding the 90-day time-frame. Consequently, late reports were subject to the same adoption procedure as timely reports. Finally, with regard to Article 17.6 DSU, the EU wished to refer to its statements made at the DSB meetings of 27 August and 26 September 2018. It was clear that only the panels were the triers of facts and that the scope of appellate review was and should be limited to legal issues. It was also clear that one possible legal issue that could arise on appeal was whether a panel had failed to discharge its responsibilities under the DSU, including its duty to conduct an objective assessment of the facts of the case, as specified in Article 11 of the DSU. These rules were clear and the EU believed that the Appellate Body had not exceeded its mandate as delimited in particular by Articles 17.6 and 17.12 of the DSU. At the same time, because the application of these rules could sometimes prove difficult in concrete cases, the EU and other Members had proposed to clarify, through a DSU amendment, that issues of law did not include panel findings with regard to the meaning of municipal measures. Of course, Members could have different views on particular Appellate Body reports. Article 17.14 of the DSU preserved Members' right to express these views at DSB meetings and the EU, as well as others, made use of this right whenever they disagreed. On a general note, it was not clear how any of the above issues explained the blockage of new Appellate Body appointments. It was also not clear to the EU how the blockage of appointments would result in the "Appellate Body […] follow[ing] the rules we agreed to in 1995", which was what the United States had said it sought. If the blockage continued, there would soon be no Appellate Body left to follow any rules. To conclude, the EU wished to reiterate once more its willingness to discuss these issues in the General Council process in a constructive and forward-looking manner so that the appointments could be made as soon as possible.

11.5. The representative of Canada said that his country supported the statement made by Mexico. It had been twenty-four months since the initiation of AB selection processes was first proposed. Canada deeply regretted that the DSB had not been able to comply with its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members to fill the vacancies. The text of the DSU was clear: "vacancies shall be filled as they arise". This requirement did not provide for exceptions or justifications not to replenish the Appellate Body. The inability to select and appoint new Appellate Body members could only increase the necessity of relying on Rule 15 of the Working Procedures for Appellate Review, and the challenges of meeting the 90-day time-period to issue AB reports. This situation was at odds with the concerns that the United States had expressed regarding that practice. Canada shared the disappointment expressed by several other Members regarding the US decision not to join the consensus to move forward with the proposal. Canada supported the informal process led by the Chairman under the auspices of the General Council to discuss the various proposals aimed at addressing US concerns. Canada noted that many proposals hade been made under that process in an attempt to address US concerns. Canada also took note of the US statement made under this Agenda item in which it had stated its readiness to engage with other Members to resolve the issues that it had raised. Canada called on the United States to meaningfully engage in constructive discussions that were aimed at fixing the problems it perceived with the system. Canada remained committed to working with other interested Members, including the United States, with a view to addressing those concerns and undertaking the AB selection processes expeditiously. Canada invited Members that had not yet sponsored the proposal, contained in document WT/DSB/W/609/Rev.10 to launch the AB selection processes, to give it the attention it deserved, and to support it. Canada welcomed Morocco and the Central African Republic to the group of co-sponsors of this proposal.

11.6. The representative of Hong Kong, China said that his delegation wished to refer to its statements made at previous DSB meetings and to reiterate its disappointment and concern that the impasse in the AB selection processes remained unresolved. His delegation appreciated the efforts made by various Members to address some Members' concerns with the Appellate Body in the informal process under the auspices of the General Council. Hong Kong, China was committed to engaging constructively to find a solution as soon as possible. Hong Kong, China urged all Members, in particular those that had raised systemic concerns, to do the same. Nevertheless, Hong Kong, China had to emphasize that the discussion on the improvement of the DSU should not be a reason to delay the launch of the AB selection processes. It was not justifiable to attach

preconditions to the launch of the AB selection processes. Hong Kong, China called on all Members to lift the blockage of the Appellate Body appointments without further delay.

11.7. The representative of Morocco said that his country was conscious of the magnitude of the imminent systemic risk faced by the multilateral trading system due to the blockage of the AB selection processes, and that it was convinced that this risk would have negative impacts on international trade and world stability. Accordingly, Morocco joined the list of the co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.10 and called on all WTO Members to engage with a constructive and solution-oriented attitude to preserve the credibility and to ensure the sustainability of the multilateral trading system. And this could only be achieved by separating the AB selection processes from the discussions on rules and procedures of the Appellate Body. Morocco also supported the efforts of the Chairman, as Facilitator, to address the disagreements related to the Appellate Body, in overcoming this impasse.

11.8. The representative of Chile said that as a co-sponsor of the proposal contained in document WT/DSB/W/609/Rev.10, his country wished to be associated with Mexico's statement, which reiterated the urgency of promptly launching the AB selection processes. Chile recalled that at the 19 April 2017 DSB meeting, i.e., more than two years ago, a group of Latin American delegations, including Chile, had made a joint statement in which they had sought, for the first time, to launch the AB selection processes. Now, two years later, it remained necessary and urgent to launch the AB selection processes.

11.9. The representative of New Zealand said that his country wished to reiterate its support for the co-sponsored proposal and emphasized the importance of commencing the AB selection processes as soon as possible. New Zealand also noted the concerns regarding the effects of the impasse expressed at the present meeting by various Members under Agenda item 4. New Zealand welcomed discussions on the current impasse through the informal process under the auspices of the General Council and was focused on the need to identify solutions to the issues raised.

11.10. The representative of Cuba said that his country, speaking on behalf of the members of the Latin American and Caribbean Group (GRULAC) that were also WTO Members, wished to underline, once again, their deepest concern with regard to the status of the AB selection processes. It was in no way positive or constructive that the search for a solution to a matter as significant as this one remained unresolved and that a political agenda undermined the bases of the multilateral trading system. The GRULAC welcomed the establishment of a forum at the highest level that could contribute to unblocking the prolonged paralysis of the AB selection processes. A number of proposals had been submitted, which were aimed at achieving this objective. Some of these proposals had been submitted by WTO Members from the GRULAC region. GRULAC WTO Members had frequently listened to concerns that had been voiced with respect to the functioning of the Appellate Body, which purportedly impeded the launch of the AB selection processes. However, Cuba wished to underline, once again, that under Article 17.2 of the DSU, vacancies shall be filled "as they arise". Compliance with this obligation had been violated repeatedly. GRULAC WTO Members had expressed their willingness to consider the proposals that could unblock the AB impasse. They were still eagerly awaiting proposals that aimed at unblocking the AB selection processes. The search for a solution to systemic concerns should not be an obstacle to the functioning of the dispute settlement system. All Members should demonstrate a willingness to find solutions. Cuba wished to reiterate the willingness of GRULAC WTO Members to contribute to finding a definitive and urgent solution to this problem, as well as supporting the Chairman's efforts to this end.

11.11. The representative of Australia said that her country wished to refer to its statements made at previous DSB meetings on this matter and to reiterate its serious concerns regarding the DSB's inability to commence the AB selection processes. To this end, Australia welcomed the leadership provided by the Chairman, as Facilitator of the General Council's informal process on Appellate Body matters. Australia wished to thank Members for their valuable contributions at the recent meetings of the General Council's informal process. Australia remained committed to this process and noted that there were many more points to discuss to narrow down the issues and build a package of solutions. Australia encouraged other Members with constructive contributions to come forward to help steer debate towards concrete proposals and solutions in the interest of all Members.

11.12. The representative of Chinese Taipei said that his delegation simply wished to refer to its statements made at previous DSB meetings. His delegation looked forward to effective engagement by all Members in order to resolve this impasse.

11.13. The representative of Japan said that his country supported the proposal contained in document WT/DSB/W/609/Rev.10. Japan also supported and, was actively contributing to, the informal process on Appellate Body matters under the auspices of the General Council, which was well underway. The active engagement of WTO Members was essential to the prompt and successful conclusion of the process which would and should lead to the normalization of the situation in the Appellate Body by filling its vacancies.

11.14. The representative of the Republic of Korea said that his country also shared a deep concern and a sense of urgency regarding filling of the vacancies in the Appellate Body. In this regard, Korea supported the statement made by Mexico based on the joint proposal contained in document WT/DSB/W/609/Rev.10. Korea was a co-sponsor of that proposal. Korea also appreciated the Chairman of the DSB and the Chair of the General Council's efforts in facilitating and organizing the informal process on Appellate Body matters and looked forward to making good progress as soon as possible.

11.15. The representative of Switzerland said that his country supported the statement made by Mexico and wished to refer to its statements made at previous DSB meetings on this matter. Switzerland regretted that the DSB continued to be unable to launch the AB selection processes towards filling the Appellate Body vacancies. Switzerland called on all Members to engage constructively, with a view to finding concrete solutions, in the discussions that were taking place in the context of the informal process on Appellate Body matters under the auspices of the General Council. Switzerland looked forward to continuing and deepening discussions in that process.

11.16. The representative of Brazil said that her country wished to refer to its statements made at previous DSB meetings regarding the urgency of launching the AB selection processes. As Members were well aware, if nothing was done, in December 2019, the Appellate Body would no longer be able to hear appeals and the dispute settlement system as a whole would be compromised. Brazil believed that Members' main goal should be to trace a clear path toward filling the vacancies. To this end, Brazil welcomed the progress achieved in the informal process on Appellate Body matters under the General Council. Brazil had demonstrated that it was ready to engage in pragmatic discussions to resolve these issues. Time was of the essence. Brazil urged the Membership to fulfil its obligation of filling the Appellate Body vacancies.

11.17. The representative of Uruguay said that his country supported the statements made by Mexico on behalf of the 75 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.10, as well as Cuba's statement made on behalf of members of the GRULAC that were also WTO Members. Uruguay highlighted that WTO Members were engaged in a constructive and positive discussions under the General Council. These discussions, in light of the proposals made by various Members, could only improve the functioning of the Appellate Body. As a result, it would be appropriate to launch the AB selection processes in order to ensure that this Organization could continue to count on a dispute settlement mechanism.

11.18. The representative of Norway said that his country wished to reiterate its statements made at previous DSB meetings on the same Agenda item. Norway, once again, underlined the serious concerns related to the current impasse in the dispute settlement system. Norway deeply regretted that the United States still could not join consensus on the proposal to launch the AB selection processes. Norway encouraged all Members to actively seek solutions and engage in the ongoing and important discussions on the Appellate Body issues, which – quite clearly – were still being addressed and were not being left unaddressed.

11.19. The representative of Singapore said that his delegation wished to refer to its statements made at previous DSB meetings and to reiterate its serious systemic concerns with the failure to launch the AB selection processes. In more than seven months, the Appellate Body would be down to just one member if vacancies remained unfilled. Given the strain that the Appellate Body was facing, Singapore called on Members to bear this in mind when considering the filing of appeals. Systemic issues which had been raised could be discussed in a separate process. In this regard, even as Members continued to engage in the informal process on Appellate Body matters led by the DSB Chairman as Facilitator, Singapore wished to emphasize that the AB selection processes should be allowed to proceed unconditionally. Singapore stood ready to engage constructively and collaboratively to help resolve this impasse.

11.20. The representative of Jamaica said that her country wished to refer to its statements made at previous DSB meetings on this matter. Jamaica firmly believed that the dispute settlement mechanism played a vital and indispensable role within the WTO and the multilateral trading system. Jamaica, therefore, joined other Members in expressing concern and underscoring the need for Members to accord priority to the prompt filling of vacancies within the Appellate Body. While Jamaica welcomed the ongoing efforts being undertaken under the Chairman's able leadership to resolve the existing impasse, Jamaica however wished to reiterate the need to pursue a two-track process in resolving this impasse. The first track would place greater focus on resolving the impasse over the appointment of Appellate Body members in order to avert paralysis to the Appellate Body come December 2019, while the second track would pursue a more general reform package for the dispute settlement mechanism. Importantly as well, this approach would not prevent the two processes from being pursued concurrently. Jamaica wished to reiterate its strong commitment to continue its constructive engagement and collaboration on these initiatives which were geared toward the strengthening of the WTO and the execution of its mandate.

11.21. The representative of Mexico said that her country regretted that, despite the multiple attempts by different delegations, Members continued to have only three out of the seven members in the Appellate Body. Mexico had serious concerns, which were becoming increasingly pressing, and, once again, called on Members to address, in a responsible manner, the current situation in which Members had been unable, for nearly two years, to launch the AB selection processes. In failing to do so, Members were clearly disregarding the obligation, established in Article 17.2 of the DSU, to fill such vacancies as soon as they arose. This situation was unacceptable and would have a serious systemic impact on the Organization, a first example of which Members had seen under previous Agenda items at the present meeting. The Appellate Body had recently found itself faced with a growing accumulation of pending appeals, and this would continue to escalate, as it was only the same three remaining members that considered all the appeals submitted since October 2018. Consequently, this undermined the principle of collegiality in the Appellate Body. There were currently over ten proposals submitted by 19 Members before the General Council, which sought to address the concerns that had been raised. This alone should be sufficient reason for the AB selection processes to be initiated by Members at the present meeting in compliance with the DSU, so that the vacancies could be filled as quickly as possible. In this regard, Mexico strongly urged all Members, including the one that has raised concerns, to take part actively and constructively in this process.

11.22. The representative of Mexico, speaking on behalf of the 75 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.10, expressed regret that for the twenty-second occasion, Members still had not been able to start the AB selection processes and had thus continuously failed to fulfill their duty as Members of this Organization. The fact that a Member might have concerns about certain aspects of the functioning of the Appellate Body could not serve as pretext to impair and disrupt the work of this body. There was no legal justification for the current blocking of the AB selection processes, which resulted in nullification and impairment for many Members. As Article 17.2 of the DSU clearly stated: "[v]acancies shall be filled as they arise". No discussion should prevent the Appellate Body from continuing to operate fully and Members had to comply with their obligation under the DSU to fill the AB vacancies. By failing to act at the present meeting, Members would maintain the current situation, which was seriously affecting the work of the Appellate Body against the best interest of all WTO Members.

11.23. The representative of China said that his country welcomed the fact that Morocco and the Central African Republic joined the group of co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.10. China wished to echo the statement made by Mexico on behalf of 75 Members, and deeply regretted that the collective efforts by these Members had been, once again, frustrated by a particular Member's illegitimate blockage which simply exacerbated the current Appellate Body crisis. China recalled that Members had a shared responsibility to promptly fill the vacancies of the Appellate Body as required by Article 17.2 of the DSU. The clear text of that provision indicated that such responsibility had to be fulfilled without any precondition. Nevertheless, with a view to breaking the deadlock in AB selection processes, Members had made and were continuing to make earnest efforts to address concerns raised by a particular Member. Various concrete proposals, including the joint proposals co-sponsored by the EU, China and other Members, had been tabled and discussed in informal meetings under the auspices of the General Council. Regrettably, Members had yet to see constructive engagement from the Member concerned. If all Members supported the rules-based multilateral trading system, it was time for Members to show their seriousness and sincerity by meaningfully participating in relevant discussions on Appellate

Body reform. If the blockage continued, it would inevitably lead to the dismantlement of the Appellate Body which would cause severe damage to the effectiveness and credibility of the WTO dispute settlement system. To avoid unintended consequences, China called on all Members to constructively participate in informal meetings and strive to solve the deadlock in the AB selection processes at the earliest date.

11.24. The representative of Philippines said that his country attached great importance to the WTO dispute settlement system, including the Appellate Body, which played a crucial role in providing security and predictability to the rules-based multilateral trading system. To this end, the Philippines appreciated the proposal on Appellate Body appointments put forward by a large group of WTO Members and contained in document WT/DSB/W/609/Rev.10. Similarly, the Philippines took good note of other constructive steps being taken by Members, including the most recent paper circulated by Japan and Australia and contained in document WT/GC/W/768, as well as the discussions held in the parallel informal process on Appellate Body matters under the auspices of the General Council, which were aimed at a comprehensive resolution of the Appellate Body's current situation. The Philippines stood ready to collaborate and engage in all potential approaches in order to address all areas of concern, with the aim of contributing to the strengthening and improvement of the WTO rules-based system.

11.25. The representative of Colombia said that his country supported the statements made by Mexico and Cuba. Colombia recalled that, two years ago, a group of six Latin American countries, including Colombia, had initiated this process, which was now supported by 75 Members. Colombia wished to reiterate that it was important that Members continued to engage in constructive dialogue to move forward with the necessary agreements so as to resolve the impasse, to the extent possible, before December 2019.

11.26. The representative of Guatemala said that his country shared the concerns of other Members in relation to the US opposition to launching the AB selection processes. At the present meeting, once again, the United States had alleged that its concerns remained unaddressed. Guatemala also noted that the United States had offered, once again, to participate constructively in the search for solutions. However, in light of the important number of proposals made and of the meetings that had taken place under the guidance of the Chairman with a view to addressing these concerns, to date Guatemala had not heard from the United States its view as to whether any of these proposals addressed its concerns or how these concerns might be addressed. Guatemala remained available to contribute positively to the search for solutions to the current crisis and hoped that the United States could participate more actively in the discussions that were being carried out to this end.

11.27. The Chairman thanked all delegations for their statements. He said that, as in the past, the DSB would take note of the statements expressing the respective positions, which would be duly reflected in the minutes of this meeting. As a number of delegations had stated, this matter required a political engagement on the part of all WTO Members. As a number of delegations had referenced, under the auspices of the General Council, he had agreed to assist the Chair of the General Council, in his personal capacity as Facilitator, in an informal process of focused discussions on matters related to the functioning of the Appellate Body. These discussions were on-going and it was his intention to make a progress report on this matter to the General Council at its meeting on 7 May 2019.

11.28. The DSB took note of the statements.

12 COMMUNICATION BY JAPAN: "TOWARDS THE PROPER FUNCTIONING OF THE DISPUTE SETTLEMENT MECHANISM"(JOB/DSB/3).

12.1. The representative of Japan, speaking under "Other Business", said that Japan wished to refer to its communication contained in document JOB/DSB/3, which had been circulated on 18 April 2019. As stated in that communication, the effective functioning of the WTO dispute settlement system was fundamental to the rules-based multilateral trading system under this Organization. He recalled that the aim of the system was to secure a positive solution to a dispute.[49] Japan was particularly concerned that, under the current dispute settlement mechanism, should the Appellate Body fail to make findings necessary to assist the DSB in making recommendations or in giving rulings provided

[49] Article 3.7 of the DSU.

for in the covered agreements[50] in a particular dispute, the dispute would be left unresolved and, as a result, the dispute settlement system would fail to fulfil its function to secure a positive solution to that dispute. Such consequence was wholly unsatisfactory and unacceptable to any WTO Member. Japan emphasized that "[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of" the dispute".[51] Japan urged Members to further discuss this matter in the DSB.

12.2. The DSB took note of the statement.

[50] Article 11 of the DSU.
[51] Article 3.4 of the DSU.