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Dispute Settlement Body
29 June 2020

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 29 JUNE 2020

Chairman: H.E. Mr. Dacio Castillo (Honduras)

Prior to the adoption of the Agenda, the Chairman welcomed those delegations participating physically at the meeting as well as those delegations who were listening-in remotely. He recalled that, exceptionally for this meeting, he would not be offering the floor to delegations participating remotely. These arrangements would be reviewed as delegations gained more experience with this format. At this point, the Chairman also wished to thank all Members for their trust in electing him as the new Chairman of the DSB. He said that he would count on Members' support and cooperation during his mandate.

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1.1. The Chairman noted that there were seven sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 required that: "[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 proposed to turn 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.205)

1.2. The Chairman drew attention to document WT/DS184/15/Add.205, 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 18 June 2020, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the recommendations and rulings of the DSB that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country wished to thank the United States for its most recent status report and its statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings so as to resolve this matter.

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

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.180)

1.6. The Chairman drew attention to document WT/DS160/24/Add.180, 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 18 June 2020, 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 wished to thank the United States for its status report and its statement made at the present meeting. His delegation wished to refer to its statements made at previous DSB meetings under this Agenda item. The EU 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 provided 181 status reports in this dispute. However, those reports were not different from one another and none of them indicated any progress on implementation. China expressed regret that nearly two decades after the DSB had adopted the Panel Report, this dispute remained to be unresolved. In China's view, the United States continued to fail to accord the minimum standard of protection required by the 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 very clearly 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 urged the United States to adopt concrete implementation actions in this dispute so as to faithfully honour its commitments under the DSU and the TRIPS Agreement without further delay.

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

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.143)

1.11. The Chairman drew attention to document WT/DS291/37/Add.143, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that his delegation continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and had concluded that there were no safety concerns. The EU had a solid record on the authorization of GMO requests: in 2019, 18 decisions had been adopted to authorize 65 new GMOs for feed and food, six GMOs had been renewed and one GM cut flower had been authorized. As repeatedly explained by the EU and confirmed by the US delegation during the EU-US biannual consultations held on 12 June 2019, efforts to reduce delays in authorization procedures were constantly maintained at a high level at all stages of the authorization procedure. At previous DSB meetings, the United States had referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings did not cover that "opt-out Directive". The EU acted in line with its WTO obligations. Finally, the EU recalled that the EU approval system was not covered by the DSB's recommendations and rulings in this dispute.

1.13. The representative of the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. The United States continued to see persistent delays that affected dozens of applications that had been awaiting approval for an extended period. The EU had previously suggested that the fault was with the applicants. The United States disagreed; the US concerns related to delays at every stage of the approval process resulting from the actions or inactions of the EU and its member States. For example, the Standing Committee on Plants, Animals, Food and Feed (PAFF) section responsible for biotechnology had not held a meeting for biotech products this year. This was not a COVID-19 issue – the Commission continued to cancel scheduled biotech standing committee meetings, most recently the meeting scheduled for June 2020, even though meetings of six other standing committee sections had been held, such as the June 2020 meetings regarding pesticides and food safety. Currently, 13 applications were pending risk management decisions in the standing committee on biotech and two awaited final approval by the European Commission. Three of these applications had been going through the EU approval system for over 10 years. This absence of meetings further delayed new product approvals. The EU also had suggested that the United States "appears" to acknowledge that there was no ban on genetically engineered products in the EU. The EU was incorrect. It was, and had consistently been, the position of the United States that the EU had failed to lift all of the WTO-inconsistent member-State bans covered by the DSB recommendation. The DSB had adopted findings that, even where the EU had approved a particular product, in many instances EU member States had banned those products for certain uses without a scientific basis. This included not only the two member States subject to panel findings – Austria and Italy. There were seven additional member States that previously maintained bans on cultivation and had since opted out of cultivation under the EU's legislation: Bulgaria, France, Germany, Greece, Hungary, Luxembourg, and Poland. There were also eight member States that had not previously banned cultivation of MON-810 but had since opted out of cultivation under the EU's legislation: Croatia, Cyprus, Denmark, Latvia, Lithuania, Malta, the Netherlands, and Slovenia. Further, Austria and Italy appeared to maintain bans on other products subject to specific panel findings. The EU's only response, which it continued to repeat, was that the member States did not restrict marketing or free movement of MON-810 in the EU. As the United States had noted at the prior DSB meeting, this answer did nothing to address US concerns. The restrictions adopted by EU member States restricted international trade in these products and had no scientific justification. Indeed, this was why the DSB had adopted findings that such restrictions on MON-810 were in breach of the EU's WTO commitments. The United States 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.

1.14. The representative the European Union said that the WTO Agreements did not require full international harmonization and left some regulatory space or autonomy to individual WTO Members. The EU had different regulatory approaches to non-GMOs and GMOs but, in all cases, such regulations did not discriminate between imported and domestic like products. No EU member State had imposed any "ban". Under the terms of Directive 2001/18/EC, an EU member State could adopt measures restricting or prohibiting cultivation only when such measures were in line with EU law and were reasoned, proportional, non-discriminatory and based on compelling grounds. The free movement of seeds was embedded in Article 22 of Directive 2001/18/EC: "member States may not prohibit, restrict or impede the placing on the market of GMOs, as or in products, which comply with the requirements of this Directive". The EU also noted that according to the provisions of the opt-out Directive (Article 26b, point 8) the measures adopted under the Directive "shall not affect the free circulation of authorised GMOs" in the EU. Currently, the EU Common Catalogue of varieties of agricultural species included 150 varieties of maize MON-810, which were allowed to be marketed in the EU. As of the present meeting, the European Commission had never received any complaint from seed operators or other stakeholders concerning the restriction of marketing of MON-810 seeds in the EU. This confirmed the smooth functioning of the internal market of MON-810 seeds. The EU invited the United States to provide any evidence it might have at its disposal that would substantiate the disruption of the free movement of MON-810 seeds in the EU.

1.15. 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.27)

1.16. The Chairman drew attention to document WT/DS464/17/Add.27, 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.

1.17. The representative of the United States said that the United States had provided a status report in this dispute on 18 June 2020, in accordance with Article 21.6 of the DSU. On 6 May 2019, the US Department of Commerce had published a notice in the US Federal Register announcing the revocation of the anti-dumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (6 May 2019)). With this action, the United States had completed implementation of the DSB's recommendations concerning those anti-dumping and countervailing duty orders. The United States continued to consult with interested parties on options to address the recommendations of the DSB relating to other measures challenged in this dispute.

1.18. The representative of Korea said that his country thanked the United States for its status report. Once again, Korea urged the United States to take prompt and appropriate steps to implement the DSB's recommendations for the "as such" measure at issue in this dispute.

1.19. The representative of Canada said that the United States continued to fail to comply with the DSB's ruling, arising out of the Appellate Body report in this dispute, that the "differential pricing methodology" (DPM) was "as such" WTO-inconsistent. The United States had also ignored the DSB's recommendation that the United States bring itself into compliance with its obligations. Instead, the United States continued to apply the "as such" inconsistent differential pricing methodology in investigations with respect to foreign companies and continued to collect cash deposits from foreign exporters based on its inconsistent methodology. The reasonable period of time to implement the recommendations relating to the "as such" WTO-inconsistency of the DPM had expired more than two years ago. However, in its most recent status report, the United States stated that it continued to consult with interested parties. Moreover, the continued use by the United States of the DPM had forced Members to resort to several dispute settlement proceedings concerning this measure. This was an inefficient and unnecessary use of WTO dispute settlement resources. In particular, Canada had been forced to challenge the application of the "as such" WTO-inconsistent DPM to Canadian companies in the "US – Differential Pricing Methodology" dispute (DS534). The panel had found that the DPM violated US obligations under the Anti-dumping Agreement. However, it had also made certain findings that dramatically departed from prior Appellate Body findings relating to the DPM and zeroing. Canada had appealed these problematic panel findings, but that appeal could not be heard as the United States continued to block the Appellate Body appointments. Canada remained deeply concerned with the continued US failure to comply with the DSB's recommendations and rulings in the "US – Washing Machines" dispute (DS464). This failure seriously undermined the security and stability of the multilateral trading system.

1.20. The representative of the United States said that the premise of Canada's statement was flawed and indicative of what had led the DSB to the place it currently was. A panel did not depart from or follow the findings in prior reports. Were a panel to do so, that panel would have failed in its duty under the DSU. The role of a panel was to assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with the WTO agreements.[1] A panel made an objective assessment of the conformity of a measure with the covered agreements[2] by interpreting the text of the covered agreements using customary rules of interpretation of public international law.[3] Nothing in the DSU or customary rules of interpretation assigned precedential value to prior

[1] Article 7.1 of the DSU (setting out a panel's terms of reference: "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)").

[2] Article 11 of the DSU ("Function of Panels") ("[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements").

[3] Article 3.2 of the DSU ("[t]he Members recognize that it [the WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing

adopted reports, including Appellate Body reports. The United States had explained this issue at length in the DSB[4], and in the USTR *Report on the Appellate Body*.[5] Many WTO Members seemingly had accepted that a prior Appellate Body report was not "precedent", and that a panel did not follow or depart from such a report – but Canada had revealed at the present meeting that it did not share the conclusions of other Members and the then-DSB Chair's "Walker Principles". If there was a textual basis in the DSU for Canada's position, the United States would like to hear it. Canada had lost its dispute before the panel because Canada had failed to persuade the panel of the correctness of its proposed interpretations of the Anti-Dumping Agreement. And the United States had won before the panel because the United States had succeeded in persuading the panel that the interpretations proposed by the United States were correct. The panel of anti-dumping experts had rejected Canada's claim that zeroing was prohibited under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. But that was *not* the first time that a panel of anti-dumping experts had rejected a claim that the Anti-Dumping Agreement prohibited zeroing. In fact, it was the *fifth* time that a party had argued zeroing was prohibited, and a WTO panel had *rejected* that claim. The consistent view of the United States for nearly two decades had been repeatedly vindicated: nothing in the WTO agreements prohibited the use of zeroing. The United States asked at what point would Canada and other parties accept that their arguments were simply not persuasive to anti-dumping experts.

1.21. The representative of Canada said that his country disagreed with the position of the United States with respect to the "US – Differential Pricing Methodology" dispute (DS534). Canada had sought recourse to appeal as was its right under Article 17 of the DSU. Canada hoped that it would be able to have the Appellate Body hear this case so that DSB recommendations could be adopted.

1.22. 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.19)

1.23. The Chairman drew attention to document WT/DS471/17/Add.19, 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.

1.24. The representative of the United States said that the United States had provided a status report in this dispute on 18 June 2020, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the recommendations of the DSB.

1.25. The representative of China said that on 22 May 2017, the DSB had adopted the Appellate Body Report and the modified Panel Report in this dispute. Thus DSB had found that certain measures taken by the United States were inconsistent with requirements of the Anti-Dumping Agreement, which included: (i) the use of zeroing under the W-T methodology was as such incompatible with Article 2.4.2; (ii) the so-called single rate presumption as such violated Articles 6.10 and 9.2; and (iii) the adverse facts available was a norm of general and prospective application which could be subject to future as such challenges. On 19 June 2017, the United States had stated its intention to implement the DSB's recommendations and rulings in this dispute. The arbitration pursuant to Article 21.3(c) of the DSU had decided that the reasonable period of time (RPT) would be 15 months, expiring on 22 August 2018. However, the persistent non-compliance of the United States left China no choice other than to resort to arbitration under Article 22.6 of the DSU. On 1 November 2019, the arbitrator had determined that the level of nullification or impairment incurred by China was USD 3.579 billion, the third largest retaliation amount in the WTO history. Nearly two years after the expiry of the RPT, the United States continued to fail to indicate

provisions of those agreements in accordance with customary rules of interpretation of public international law").

[4] DSB, Minutes of the Meeting Held on 18 December 2018, WT/DSB/M/423, paras. 4.2-4.25.

[5] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf.

a single concrete implementation action in its status report other than to "consult with interested parties on options to address the recommendations of the DSB". As a result, China's legitimate interests provided for in the covered agreements and reaffirmed by the dispute settlement system continued to be impaired. In fact, China's experience in this dispute was no exception. Over the past decade, implementation of the DSB recommendations and rulings by the United States, especially in its trade remedy disputes, had increasingly become a systemic problem for the entire Membership. The US non-compliance severely undermined the authority and effectiveness of the dispute settlement system. Other Members were forced to relitigate issues already settled by panels and the Appellate Body which further strained the dispute settlement system. 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 urged the United States to faithfully honour its implementation obligation and take concrete actions to deliver full compliance in this dispute.

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

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.14 – WT/DS478/22/Add.14)

1.27. The Chairman drew attention to document WT/DS477/21/Add.14 – WT/DS478/22/Add.14, 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.

1.28. The representative of Indonesia said that his country had provided a status report pursuant to Article 21.6 of the DSU. As his country had stated at previous DSB meetings, and in order to further facilitate import procedures, Indonesia had issued Ministry of Agriculture (MoA) Regulation No. 2/2020, which amended MoA Regulation No. 39/2019 concerning Recommendations for Importation of Horticultural Products. Indonesia was in the process of amending Ministry of Trade (MoT) Regulation No. 44/2019 to be in line with the amended MoA Regulation. With respect to Measure 18, Indonesia wished to underline that a draft amendment of the relevant laws had been transmitted by the Government to Parliament. The Government was waiting for a joint discussion with Parliament. Indonesia would continue to engage with New Zealand and the United States regarding matters related to the DSB's recommendations and rulings in these disputes.

1.29. The representative of New Zealand said that his country acknowledged the steps that had been taken by Indonesia towards compliance to date, and Indonesia's commitment to comply fully with the DSB's recommendations and rulings in this dispute. Both of the compliance deadlines that had been agreed between the parties had expired. As stated at previous DSB meetings, New Zealand was seriously disappointed that full compliance had still not been reached in respect of a number of measures. New Zealand was very concerned that difficulties continued to be experienced in obtaining import recommendations and approvals. There was a significant delay in the issuing of import recommendations this year and to date, only a small fraction of the approvals applied for had been issued. If this issue was not resolved promptly, it could undermine the progress made towards compliance to date. New Zealand strongly encouraged Indonesia to take appropriate steps, swiftly, to achieve long-term, commercially meaningful, compliance with the DSB's recommendations and rulings in this dispute.

1.30. The representative of the United States said that Indonesia continued to fail to bring its measures into compliance with WTO rules. 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 understood that Indonesia claimed to have "completed its enactment process" of certain regulations, but the United States was still waiting to hear from Indonesia on whether and how such action would bring its measures into full compliance. It also remained unclear how Indonesia's proposed legislative amendments would address Measure 18 and when Indonesia would complete its process. The United States looked forward to receiving further detail from Indonesia

regarding the changes to its regulations and laws, especially with respect to Ministry of Agriculture Regulation 46/2019 on Strategic Horticultural Commodities.

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

G. China – Domestic support for agricultural producers: Status report by China (WT/DS511/15/Add.2)

1.32. The Chairman drew attention to document WT/DS511/15/Add.2, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning domestic support for agricultural producers.

1.33. The representative of China said that his country had provided a status report in accordance with Article 21.6 of the DSU. At its meeting on 26 April 2019, the DSB had adopted the Panel Report in this dispute. On 16 May 2019, China had informed the DSB of its intention to implement the DSB's recommendations and rulings. Subsequently, China had confirmed its intention at the DSB meeting. On 10 June 2019, China and the United States had informed the DSB that the reasonable period of time for China to implement the DSB's recommendations and rulings was set to expire on 31 March 2020. On 1 April 2020, China and the United States had agreed to extend the reasonable period of time to 30 June 2020 to allow the United States additional time to evaluate China's actions. The National Development and Reform Commission, the National Food and Strategic Reserves Administration, the Ministry of Finance, the Ministry of Agriculture and Rural Affairs and the Agricultural Development Bank of China had jointly promulgated: the Notice on Announcing the Minimum Procurement Price for Wheat for 2020 (Fa Gai Jia Ge [2019] No. 1617) and the Notice on Improving the Wheat Minimum Procurement Price Policy (Guo Liang Liang [2019] No. 284) on 12 October 2019; and the Notice on Announcing the Minimum Procurement Price for Rice for 2020 (Fa Gai Jia Ge [2020] No. 290) and the Notice on Improving the Rice Minimum Procurement Price Policy (Guo Liang Liang [2020] No. 41) on 28 February 2020. The Minimum Procurement Price (MPP) policies maintained under the Notice on Improving the Wheat Minimum Procurement Price Policy and the Notice on Improving the Rice Minimum Procurement Price Policy were fully consistent with the DSB's recommendations and rulings in this dispute and with the WTO covered agreements. As set forth in these two measures regarding the MPP policy for wheat and rice, starting from 2020, maximum procurement amounts under the MPP had to be set each year, and the amount of production that was eligible to receive the minimum procurement price had to be limited to the maximum procurement amount. The procurement progress was required to be monitored and published regularly, and in no event could the actual procurement amount exceed the maximum procurement amount set for each year. China was pleased to notify the DSB that through the above-mentioned measures, China had fully implemented the recommendations and rulings of the DSB in this dispute.

1.34. The representative of the United States noted that the parties had informed the DSB, on 1 April 2020, that the United States and China had agreed that the reasonable period of time for China to implement the DSB recommendations and rulings expired on 30 June 2020. The findings of the Panel in this dispute related to China's provision of domestic support for its agricultural producers. China had committed not to provide support in excess of its commitment level of "nil" set forth in China's Schedule. Therefore, while the United States noted certain changes in China's underlying legal instruments, the United States was interested in the manner in which those measures were applied in practice. China had informed the DSB, on 19 June 2020, that various agencies had jointly promulgated four notices, respectively announcing the 2020 minimum procurement prices ("MPP") and the minimum procurement price policy for wheat and rice. The United States had requested additional information from China on how it would implement these measures – for example, how any limitation on procurement would function. The United States looked forward to receiving further information from China. The United States noted that China's status report asserted that China had fully implemented the recommendations and rulings of the DSB in this matter. The United States was not in a position to agree with China's claim of compliance at this time. As set out in this statement, the United States looked forward to continuing engagement with China on the information requested and on China's administration of domestic support measures.

1.35. The DSB took note of the statements.

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 on 1 May 2020, the EU had adjusted the level of suspension to the nullification or impairment caused by the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) to the EU. The adjustment maintained unchanged the list of products subjected to retaliation while increasing the rate of additional duty to which those products were subjected to 0.012% in order to adjust to the level of retaliation. The letter informing of the adjustment, together with the Commission Delegated Regulation (EU) 2020/578 of 21 February 2020, had been notified to the DSB on 26 June 2020. The EU requested, once again, that the United States stop transferring anti-dumping and countervailing duties to the US industry. Even if the amounts had considerably decreased, the latest CDSOA report from December 2018 showed that amounts were still being disbursed in practice. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations and rulings in this dispute. As long as the United States did not fully stop transferring collected duties, this item was rightly under the DSB's surveillance. Due to the long-standing nature of this breach, the EU would continue to insist on placing this item on the Agenda of DSB meetings, as a matter of principle, and independently from the cost resulting from the application of such limited duties. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit implementation reports in this dispute. The EU would continue to place this item on the Agenda of DSB meetings as long as the United States had not fully implemented the DSB's recommendations and rulings and as long as disbursements had not ceased completely.

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 agreed with the EU that the Byrd Amendment should remain subject to the surveillance of the DSB until the United States ceased to administer it.

2.4. 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 14 years ago in February 2006. Accordingly, the United States had implemented 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 12 years ago. Even aside from this, the United States questioned the trade rationale for inscribing this item on the DSB's Agenda. On 26 June 2020, the EU had announced that it would apply an additional duty of 0.012% on certain imports of the United States, which, remarkably, reflected an *increase* in the additional duty of 0.001%. These minuscule tariffs vividly demonstrated what had been evident for years – it was not common sense that was driving the EU's approach to this Agenda item. The EU suggested that it had requested the DSB's consideration of this item "as a matter of principle", but the EU's principles shifted depending on whether it was the complaining or responding party. As the United States had explained repeatedly, there was no obligation under the DSU for a Member to provide further status reports on the progress of its implementation once that Member announced that it *has implemented* the DSB's recommendations. The widespread practice of Members – including the EU as a responding party – confirmed this understanding of Article 21.6 of the DSU. Indeed, at recent DSB meetings, two Members (Brazil and China) had informed the DSB that they had come into compliance with the DSB's recommendations in three disputes (DS472, DS497, and DS517), and the complaining parties had not accepted the claims of compliance. Those Members had not provided a status report for the present meeting, consistent with the understanding that there was no obligation for a Member to provide further status reports once that Member announced that it had implemented the DSB's recommendations. Accordingly, since the United States had informed the DSB that it had come into compliance in this dispute, there was nothing more for the United States to report in a status report.

2.5. 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 noted that once again the European Union had not provided Members with a status report concerning the "EC – Large Civil Aircraft" dispute (DS316). As the United States had noted at several recent DSB meetings, the EU had argued – under a different Agenda item – 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". Under this Agenda item, however, the EU argued that by submitting a compliance communication, the EU no longer needed to file a status report, even though the United States as the complaining party did *not* agree with the EU's assertion that it had complied. The EU's position appears to be premised on two unfounded assertions, neither of which was based on the text of the DSU. First, the EU had erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance". There was nothing in the DSU text to support that argument, and the EU provided no explanation for how it read DSU Article 21.6 to contain this limitation. Of course, this would be a convenient limitation on Article 21.6 for purposes of this dispute, as the DSB had authorized the United States to impose countermeasures of approximately US$ 7.5 billion annually due to the adverse effects on the United States from subsidies provided by the EU and four EU member States. But that limitation did not exist in the text of Article 21.6. Second, the EU once again relied on its incorrect assertion that the EU's initiation of compliance panel proceedings meant that the DSB was somehow deprived of its authority to "maintain surveillance of implementation of rulings and recommendations". Yet again, there was nothing in Article 2 of the DSU or elsewhere that limited the DSB's authority in this manner. It was another invention of the EU. The EU was not providing a status report because of its assertion that it had complied, demonstrating that the EU's principles varied depending on its status as complaining or responding party. Perhaps the EU chose not to report on the progress in its implementation because, rather than actually attempt to achieve compliance in this dispute, the EU had pursued a strategy of endless and meritless litigation. The report of the second compliance panel shows how misguided the EU's strategy was. The second compliance panel, like the prior one, had rejected the EU's claim of compliance. But despite yet another finding of non-compliance, the EU had chosen to appeal the panel report, seeking yet more litigation in this 15-year dispute. The representative of the United States asked the EU whether it would not be more productive for the EU and its member States to focus on resolving this dispute. Despite the countermeasures on EU imports that the United States had been compelled to impose, the United States still awaited a proposal from the EU on how it would withdraw *all the subsidies* that the DSB had found continued to cause adverse effects after the EU's implementation period had ended. In sum, the US position on status reports had been consistent and clear: under Article 21.6 of the DSU, once a responding Member announced to the DSB that it had complied, there was no further "progress" on which it could report, and therefore no further obligation to provide a status report. But as the EU allegedly disagreed with this position, it should for future meetings provide status reports in this "EC – Large Civil Aircraft" dispute (DS316). The EU could report on the progress in its implementation in this dispute in light of the five separate WTO reports having found that the EU and four member States had failed to comply with WTO subsidy rules.

3.3. The representative of the European Union said that, as during previous DSB meetings, the United States had again mentioned 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 United States had also referred to the EU's appeal filed against the report of the second compliance panel as an example of the EU pursuing "endless and meritless litigation … instead of attempting to achieve compliance". Both US assertions were without merit. As the EU had repeatedly explained at past DSB meetings, the crucial point for the defending party's obligation to provide status reports to the DSB was the stage of the dispute. In the "EC – Large Civil Aircraft" case (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 recalled that in that case the EU had notified a new set of compliance measures to the DSB. That new set of compliance measures were a clear demonstration that the EU – contrary to the United States in the parallel "US – Large Civil Aircraft (2nd complaint)"

case (DS353) – was serious about and committed to achieving compliance. That new set of compliance measures had been subject to an assessment by a compliance panel and that panel's report had been issued on 2 December 2019. As noted in the statement made by the EU at the 18 December 2019 DSB meeting, the EU believed that significant aspects of the compliance panel's report could not be regarded as legally correct and were very problematic from a systemic perspective when it came to assessing compliance with the subsidy disciplines of the WTO Agreements. It was in order to have these legal errors corrected, and not – as the United States asserted – to continue litigation for the sake of litigation, that the EU had filed an appeal against the compliance panel's report on 6 December 2019. The EU was concerned that with the current blockage of the two-step multilateral dispute settlement system, the EU was losing the possibility of a proper appellate review of the serious flaws contained in the panel report. While the blockage continued, the EU stood ready to discuss with the United States alternative ways to deal with this appeal. The EU was also committed to finding a balanced negotiated solution with the United States that would allow leaving both aircraft disputes behind. These considerations did not, however, alter the fact that the compliance proceeding in this dispute had not been concluded. Whether or not the matter was "resolved" in the sense of Article 21.6 of the DSU remained the very subject matter of this ongoing litigation. The EU asked how it could be said that the defending party should submit "status reports" to the DSB in such circumstances. The EU would be very concerned with a reading of Article 21.6 of the DSU that would require the defending 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 EU noted that its reading of the provision was supported by other WTO Members. The EU's view 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 INDIA – TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

A. Request for the establishment of a panel by the European Union (WT/DS582/9)

4.1. The Chairman recalled that the DSB had considered this matter at its meeting on 5 March 2020 and had agreed to revert to it, should a requesting Member wish to do so. He then drew attention to the communication from the European Union contained in document WT/DS582/9 and invited the representative of the European Union to speak.

4.2. The representative of the European Union said that his delegation had already raised this issue at the 5 March 2020 DSB meeting. The EU wished to recall that India, in the framework of the WTO, had taken the commitment not to apply import duties on information and communications technology (ICT) products. However, for several years, India had adopted measures to reintroduce and regularly increase import duties on those products, up to 20%, and this despite the tariffs of its WTO bound Schedule of concessions on those products. The EU had raised the issue of India's tariffs on ICT products a number of times bilaterally as well as in various WTO fora. Unfortunately, without solving the problem thus far. The value of EU annual exports of concerned goods to India amounted to around EUR 400 million. The consultations meeting of 21 May 2019 had only been useful in clarifying a certain number of points but had failed to solve the problem. The EU kept urging India to bring its tariffs on ICT products in line with its WTO obligations. To this end, at the 28 February 2020 DSB meeting (resumed on 5 March 2020), the EU had requested the establishment of a panel. India had opposed the EU's panel request at that meeting. At the present meeting, the EU requested for the second time the establishment of a panel in this case to assess fully India's measures. In addition, the EU requested the establishment of a single panel in this case and in two other cases which covered the same Indian measures and which had been initiated by Japan (DS584) and by Chinese Taipei (DS588). The panel requests in both cases were on the Agenda of the present meeting. All three cases were "related to the same matter" pursuant to Article 9.1 of the DSU, i.e., (i) they identified the same tariff treatment by India of mostly identical ICT products, which were specified in the form of tariff lines in their respective panel requests, and (ii) they provided the same legal basis of complaint, i.e., a violation of tariff concessions that India had committed to within the legal framework of the WTO on these ICT products, under Article II of the GATT 1994. The EU believed that the establishment of a single panel to examine the complaints in these three cases was feasible, as consultation meetings had already taken place in all three cases,

and as it would in no way impair India's rights under the DSU. Indeed, establishing a single panel would be desirable in these disputes as a way to organize the examination of this matter in an orderly and efficient manner, since this would save both time and human resources for India and each complainant. Such consideration was more pertinent than ever in the current circumstances that the COVID-19 pandemic had brought upon the world.

4.3. The representative of India said that his country was disappointed that the European Union had moved forward, for the second time, with its request for the establishment of a panel in this dispute. As India had explained in its statement made at the 28 February/5 March 2020 DSB meeting, the EU was essentially requesting India to implement a declaration by select Members, namely, the Declaration on the Expansion of Trade in Information Technology Products (ITA-2), to which India was not a party. This dispute was also seeking to take advantage of an inadvertent error in the transposition of HS2002 to HS2007, of a purely formal character, committed while transposing the tariff lines and the description of the products recommended by the World Customs Organization (WCO). India reiterated that the measures identified by the EU were consistent with India's WTO obligations. India understood that a panel would be established at the present meeting. India stood ready to defend its legitimate rights and interests in future proceedings. India noted that the EU had requested the establishment of a single panel to examine its claims along with certain other matters that were on the Agenda of the present meeting. India did not agree to this request as these matters could not be said to be related.

4.4. The representative of the United States said that as the United States had explained at the 28 February 2020 DSB meeting (resumed on 5 March 2020), the United States shared the European Union's serious concerns regarding the customs duties applied by India on imports of certain information and communications technology (ICT) products. The United States had raised these concerns bilaterally with India and in the WTO committees over the past several years. Once again, the United States called on India to provide duty-free access for the products for which India had a WTO commitment to do so. The United States would closely monitor the progress of this dispute, as well as the disputes initiated by Japan (DS584) and Chinese Taipei (DS588) also concerning India's tariff treatment of certain ICT products.

4.5. The representative of Japan said that his country shared the concerns of the European Union regarding the matter raised in its panel request and supported the establishment of a panel as requested by the EU. Japan had made its own panel request, which would be considered under Agenda item 6 of the present meeting. Japan would explain its position on the substance of the matter under that Agenda item. The EU requested the establishment of a single panel pursuant to Article 9.1 of the DSU to examine the same matter raised by the complainants in the disputes DS582, DS584 and DS588. Japan supported the establishment of a single panel for the reasons explained by the EU. Although India had refused the establishment of a single panel at the present meeting, Japan continued to hope that India would agree to the establishment of a single panel, in accordance with Article 9.1 of the DSU.

4.6. The representative of Chinese Taipei said that his delegation shared the EU's concerns regarding the matter raised in its panel request. Chinese Taipei supported the EU's panel request. Chinese Taipei had made its own panel request under Agenda item 7 of the present meeting. Chinese Taipei would elaborate its position under that Agenda item. Chinese Taipei also noted that the EU had requested the establishment of a single panel pursuant to Article 9.1 of the DSU to examine the same matter raised in the disputes DS582, DS584 and DS588. Chinese Taipei believed that it was appropriate for the same matter to be heard by a single panel.

4.7. 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.

4.8. The representatives of Brazil, Canada, China, Indonesia, Japan, Korea, Norway, Pakistan, Russia, Singapore, Chinese Taipei, Thailand, Turkey and the United States reserved their third-party rights to participate in the Panel's proceedings.

5 COLOMBIA – ANTI-DUMPING DUTIES ON FROZEN FRIES FROM BELGIUM, GERMANY AND THE NETHERLANDS

A. Request for the establishment of a panel by the European Union (WT/DS591/2)

5.1. The Chairman recalled that the DSB had considered this matter at its meeting on 5 March 2020 and had agreed to revert to it, should a requesting Member wish to do so. He drew attention to the communication from the European Union contained in document WT/DS591/2 and invited the representative of the European Union to speak.

5.2. The representative of the European Union said that his delegation had serious concerns about the investigation leading to the imposition by Colombia of anti-dumping duties on frozen fries from Belgium, the Netherlands and Germany. These related to almost all aspects of the investigation, from initiation, to the analyses on dumping, injury, causality as well as the respect of certain procedural rights. The EU did not wish to repeat the more systemic concerns to which it had drawn the attention of the other Members during the 5 March 2020 DSB meeting. The EU was, however, concerned that Colombia might extend these anti-dumping duties through an expiry review. The EU, therefore, asked Colombia whether it could confirm that the domestic industry had submitted an application for an expiry review of the measures. The EU urged Colombia not to extend and to bring its unwarranted anti-dumping duties imposed on frozen fries from Belgium, the Netherlands and Germany in line with its WTO obligations. To this end, the EU requested the establishment of a panel to assess the WTO-compatibility of these duties.

5.3. The representative of Colombia said that his country regretted the EU panel request at the present meeting. In fact, Colombia and the EU had maintained a permanent dialogue at various levels. They had held extensive consultations on this matter on 15-16 January 2020, and they had maintained their efforts to clarify any ambiguity and to resolve this dispute amicably. The anti-dumping measure at issue had been adopted as a result of a detailed investigation. Throughout the various stages of its investigation, the relevant authority had acted strictly in conformity with the rules set out in the Anti-Dumping Agreement. Colombia reiterated its willingness to continue working with the EU with a view to finding an amicable resolution to this dispute in spite of the EU's panel request at the present meeting.

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 Brazil, China, Honduras, India, Japan, Russia, Turkey and the United States reserved their third-party rights to participate in the Panel's proceedings.

6 INDIA – TARIFF TREATMENT ON CERTAIN GOODS

A. Request for the establishment of a panel by Japan (WT/DS584/9)

6.1. The Chairman drew attention to the communication from Japan contained in document WT/DS584/9 and invited the representative of Japan to speak.

6.2. The representative of Japan said that India had raised its customs duties on certain products in the information and communications technology (ICT) sector since 2014, in excess of the bound rates set forth in its Schedules of Concessions and Commitments annexed to the GATT 1994. Japan had been raising its concerns with India for years, hoping that India would take Japan's concerns seriously and rectify the WTO-inconsistency. However, no action had been taken by India. Regrettably, India had further raised its customs duties on certain products in the ICT sector in February 2020. As Japan explained in its panel request, India's measures were clearly inconsistent with India's obligations under the GATT 1994, specifically Article II. Japan had requested consultations on 10 May 2019 and had held consultations with India on 23 May 2019 with a view to reaching a mutually satisfactory solution. However, Japan and India were unable to reach a satisfactory adjustment of the matter through consultations. Therefore, Japan requested, pursuant to Article 6 of the DSU, that a panel be established to examine the matter as set out in its panel request with standard of terms of reference in accordance with Article 7.1 of the DSU. Japan also requested the establishment of a single panel pursuant to Article 9.1 of the DSU to examine the same matter raised in the DS582, DS584 and DS588 disputes. Japan considered that establishing a

single panel was the proper course of action to resolve these disputes. First, the requests for the establishment of a panel in these disputes would be all "related to the same matter" under Article 9.1 of the DSU. In particular, they identified the same specific measures, i.e., India's tariff treatment of mostly identical ICT products, which was specified in the form of tariff lines as set out in the complainants' respective panel requests. They also provided the same legal basis of complaint, i.e., a violation of tariff concessions that India had committed to within the legal framework of the WTO on those ICT products, under Article II of the GATT 1994. Second, Japan believed that establishing a single panel to examine these three complaints was feasible and would in, no way, impair India's rights under the DSU. Indeed, establishing a single panel would be desirable in these disputes as a way to organize the examination of this matter in an orderly and efficient manner, since this would save both time and human resources for India and each complaining party. Such consideration was more pertinent than ever under the current circumstances brought on by the pandemic. Accordingly, Japan requested that a single panel be established in accordance with Article 9.1 of the DSU to examine the same matter in these disputes.

6.3. The representative of India said that his country was disappointed that Japan proposed to establish a panel regarding India's measures concerning its tariff treatment on certain goods. India considered Japan as a close trading partner, as attested by the Comprehensive Economic Partnership Agreement between Japan and India. India noted that Japan's requests for consultations and the establishment of a panel avoided references to either ITA-1 or ITA-2 which were key to understanding the issues. India's original WTO Schedule had been subject to various amendments. India believed that the Ministerial Declaration on Trade in Information Technology Products (ITA-1) did not contain any obligation to eliminate customs duties (and other duties and charges of any kind) on the products mentioned by Japan in its requests. However, Japan essentially requested India to implement a declaration by select Members, namely, the Declaration on the Expansion of Trade in Information Technology Products (ITA-2), to which India was not a party. The issue was the result of an inadvertent error, of a purely formal character, committed while transposing the tariff lines and the product description recommended by the World Customs Organization at the time of transposing HS2002 to HS2007. India had attempted to rectify the error through WTO document G/MA/TAR/RS/572 dated 25 September 2018, on which objections had been raised by certain Members, including Japan, despite the fact that the rectification request was in accordance with "the procedures for modification and rectification of Schedules of tariff concessions" contained in the Decision of 26 March 1980 (BISD 27S/25). India, on signing the ITA-1 in 1997, had presented its schedule of commitments, which had subsequently been certified in document WT/LET/181. India wished to reiterate that it had not intended to commit, and would not commit to, any obligation beyond the scope of India's ITA-1 commitment as inscribed in that document. India maintained that the products arising out of technological progression could not be covered within ITA-1. Similarly, purported concessions solely emanating from incorrect HS transposition were not within the scope of substantive obligations arising from ITA-1. It was evident from WTO document G/MA/TAR/RS/24 dated 2 April 1997 that India had made it very clear at the time of taking commitments under the ITA-1 that India reserved its right to make technical changes to the schedule and to correct any errors, omissions or inaccuracies. India also noted that most of the products mentioned in Japan's requests for consultations and for the establishment of a panel were covered under the subsequent declaration of select countries which had led to ITA-2, to which India was not a party. India was deeply conscious of its responsibilities and had always implemented the decisions reached at the WTO, including decisions of the DSB. The issues raised in this dispute seriously undermined India's sovereignty, as the purported commitment went beyond the consent provided by India when it had agreed to implement ITA-1. India wished to recall the explanations provided during consultations and its offer for continuous bilateral engagement to resolve any issues in good faith. India invited Japan to reconsider having recourse to the establishment of a panel. For these reasons, India was not in a position to accept the establishment of a panel at the present meeting. India believed that open and bilateral discussions between the two parties in good faith remained the most constructive option and could lead to a satisfactory outcome. India wished to extend an invitation for bilateral discussions as a basis for resolving any concerns. India noted that Japan had requested the establishment of a single panel to examine its claims along with certain other matters that were on the Agenda of the present meeting. India did not agree to this request, as these matters could not be said to be related.

6.4. The representative of the European Union said that his delegation supported the proposal of establishing a single panel in the three cases filed by Japan (DS584), Chinese Taipei (DS588) and the EU (DS582) for the reasons already mentioned under Agenda item 4. Therefore, the EU regretted India's statement on this matter.

6.5. The representative of Chinese Taipei said that his delegation shared the concerns of Japan regarding the matter raised in its panel request. Chinese Taipei supported Japan's panel request. Chinese Taipei also noted that Japan requested the establishment of a single panel pursuant to Article 9.1 of the DSU to examine the same matter raised in the disputes DS582, DS584 and DS588. In this respect, Chinese Taipei believed that it was appropriate for the same matter to be heard by a single panel.

6.6. The representative of the United States said that as stated under Agenda item 4 of the present meeting, the United States had serious concerns regarding the customs duties applied by India on imports of certain ICT products. The United States would closely monitor the progress of this dispute, as well as the disputes initiated by the European Union (DS582) and Chinese Taipei (DS588) also concerning India's tariff treatment of certain ICT products.

6.7. The DSB took note of the statements and agreed to revert to this matter, should a requesting Member wish to do so.

7 INDIA – TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

A. Request for the establishment of a panel by The Separate Customs Territory Of Taiwan, Penghu, Kinmen and Matsu (WT/DS588/7)

7.1. The Chairman drew attention to the communication from Chinese Taipei contained in document WT/DS588/7 and invited the representative of Chinese Taipei to speak.

7.2. The representative of Chinese Taipei said that since 2014, India had increased the rate of customs duties imposed on imports of certain goods in the information and communications technology (ICT) sector. Some of these duties exceeded the bound rates set forth in India's Schedule of Concessions annexed to the GATT 1994 and were therefore inconsistent with India's obligations under Article II:1(a) and (b) of the GATT 1994. By exceeding its bound rates, India afforded certain ICT goods originating in Chinese Taipei treatment less favourable than that provided for in India's WTO Schedule. On 2 September 2019, Chinese Taipei had requested consultations with India pursuant to Article 4 of the DSU. The bilateral consultations had been held on 21 November 2019. These consultations, however, had failed to resolve the dispute. Therefore, pursuant to Article 7.1 of the DSU, Chinese Taipei requested that the DSB establish a panel with standards terms of reference to examine India's measures concerning certain ICT goods as described in its panel request. Chinese Taipei noted that the EU and Japan had also submitted their requests for the establishment of a single panel in the disputes DS582 and DS584 respectively. The requests of Chinese Taipei, the EU and Japan related to the same matter, as they all related to the tariff treatment by India of certain ICT products. To ensure the efficiency of the proceedings, Chinese Taipei further requested that in accordance with Article 9.1 of the DSU, a single panel be established to jointly examine the contents of the requests by Chinese Taipei, the EU and Japan.

7.3. The representative of India said that his country was disappointed that Chinese Taipei proposed to establish a panel on India's measures concerning the tariff treatment on certain goods in the information and communications technology sector. India believed that consultations held with Chinese Taipei had been constructive and that India had been able to address the concerns raised by Chinese Taipei by adequately explaining its measures concerning the tariff treatment on certain goods in the ICT sector. India noted that Chinese Taipei's requests for consultations and for the establishment of a panel avoided references to either ITA-1 or ITA-2 which were key to understand the issues. India's original WTO Schedule had been subjected to various amendments. India believed that the Ministerial Declaration on Trade in Information Technology Products (ITA-1) did not contain any obligation to eliminate customs duties (and other duties and charges of any kind) on the products mentioned by Chinese Taipei in its requests. However, Chinese Taipei essentially requested India to implement a declaration by select Members, namely, the Declaration on the Expansion of Trade in Information Technology Products (ITA-2), to which India was not a party. The issue was the result of an inadvertent error, of a purely formal character, committed while transposing the tariff lines and the description of the products recommended by the World Customs Organization (WCO) at the time of transposing HS2002 to HS2007. India had attempted to rectify the error through WTO document G/MA/TAR/RS/572 dated 25 September 2018 on which objections had been raised by certain Members despite the fact that the rectification request was in accordance with "the

procedures for modification and rectification of Schedules of tariff concessions" contained in the Decision of 26 March 1980 (BISD 27S/25). India, on signing the ITA-1 in 1997, had presented its schedule of commitments, which had subsequently been certified in document WT/LET/181. India wished to reiterate that it had not intended to commit, and would not commit to, any obligation beyond the scope of India's ITA-1 commitment as inscribed in that document. India maintained that the products arising out of technological progression could not be covered within ITA-1. Similarly, purported concessions solely emanating from incorrect HS transposition were not within the scope of substantive obligations arising from ITA-1. It was evident from WTO document G/MA/TAR/RS/24 dated 2 April 1997 that India had made it very clear at the time of taking commitments under the ITA-1 that India reserved its right to make technical changes to the schedule and to correct any errors, omissions or inaccuracies. India also noted that most of the products mentioned in Chinese Taipei's requests were covered under the subsequent declaration of select countries which had led to ITA-2, to which India was not a party. India was deeply conscious of its responsibility and had always implemented the decisions reached at the WTO, including decisions of the DSB. The issues raised in this dispute undermined India's sovereignty, as the purported commitment went beyond the consent provided by India when it had agreed to implement ITA-1. India asked Chinese Taipei to recall India's explanations of its measures and its offer for continuous bilateral engagement to resolve any issues in good faith, as well as to reconsider its recourse to the establishment of a panel. For these reasons, India was not in a position to accept the establishment of a panel at the present meeting. India reiterated its willingness to cooperate with Chinese Taipei to seek a mutually satisfactory solution at a bilateral level. India believed that open and bilateral discussions in good faith between the two parties would result in a more constructive and satisfactory outcome. India noted that Chinese Taipei had requested the establishment of a single panel to examine its claims along with certain other matters that were on the Agenda of the present meeting. India did not agree to this request, as these matters could not be said to be related.

7.4. The representative of Japan said that his country shared the concerns of Chinese Taipei regarding the matter raised in its panel request, and that it supported the establishment of a panel as requested. Japan would not reiterate its position on this matter and simply wished to refer to its previous statements made under Agenda items 4 and 6 at the present meeting.

7.5. The representative of the European Union said that his delegation wished to support the proposal of establishing a single panel in the three cases filed by Chinese Taipei, Japan and the EU for the reasons already mentioned under Agenda item 4 of the present meeting. Therefore, the EU regretted India's statement.

7.6. The representative of the United States said that, as stated under Agenda items 4 and 6 of the present meeting, the United States had serious concerns regarding the customs duties applied by India on imports of certain ICT products. The United States would closely monitor the progress of this dispute, as well as the disputes initiated by the European Union (DS582) and Japan (DS584) also concerning India's tariff treatment of certain ICT products.

7.7. The representative of Chinese Taipei said that his delegation wished to express regret at India's rejection of its single panel request. Chinese Taipei had a preference for the establishment of a single panel under Article 9.1 of the DSU because the co-complainants' requests related to the same matter and it would be more efficient to consolidate those proceedings. Furthermore, India had failed to provide an adequate explanation as to why it would not be feasible or appropriate for the matter to be heard by a single panel.

7.8. The DSB took note of the statements and agreed to revert to this matter, should a requesting Member wish to do so.

8 JAPAN – MEASURES RELATED TO THE EXPORTATION OF PRODUCTS AND TECHNOLOGY TO KOREA

A. Request for establishment of a panel by the Republic of Korea (WT/DS590/4)

8.1. The Chairman drew attention to the communication from the Republic of Korea contained in document WT/DS590/4 and invited the representative of Korea to speak.

8.2. The representative of Korea said that his country requested the establishment of a panel to examine Japan's imposition of export restrictions on certain products and related technologies destined for Korea. On 1 July 2019, Japan had announced an amendment to its export licensing requirements on the export of fluorinated polyimide, resist polymers, and hydrogen fluoride, as well as their related technologies, when destined to Korea (Amended Export Licensing Requirements). The Amended Export Licensing Requirements imposed a WTO-inconsistent restriction on exportation, which had become effective on 4 July 2019. These requirements had been further amended on 20 December 2019. The products subject to Japan's trade restrictions were products primarily used in the production of smartphone displays, TV displays, and semi-conductors. These products were essential inputs in the electronics industry, a strategically important industry for Korea. As a result of the Amended Export Licensing Requirements, the export of the three previously mentioned products to Korea was subject to increased scrutiny, unnecessary delays, uncertainties, costs, and other serious restrictions. Japan's measure also restricted other forms of international trade, including investments, licensing or transfer of intellectual properties, and supply of certain services relating to the three previously mentioned products and their related technologies. Korea considered the imposition of such restrictions to be contrary to Japan's WTO commitments under the GATT 1994, the Agreement on Trade Facilitation, the Agreement on Trade-Related Investment Measures, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights. With a view to reaching a mutually satisfactory solution, Korea and Japan had held consultations on 11 October and 19 November 2019. In addition to these consultations, Korea and Japan had held bilateral negotiations between their trade officials in an effort to resolve the dispute. Unfortunately, these consultations had not resolved the dispute. For these reasons, and pursuant to Article 6 of the DSU, Korea requested that the DSB establish a panel to examine this matter with standard terms of reference as set out in Article 7.1 of the DSU.

8.3. The representative of Japan said that his country wished to express disappointment at Korea's decision to unilaterally disrupt the ongoing effort to explore the resolution of this issue through dialogue between the two export control authorities and to request the establishment of a panel. Korea was challenging Japan's export licensing requirements for exporting hydrogen fluoride, resists and fluorinated polyimide, all of which were internationally recognized as dual-use items, meaning that they had military applications. Korea wrongly described those requirements as "a politically-motivated, disguised restriction on trade". Japan wished to draw attention to three essential points regarding the measure.

8.4. First, Japan's export control system was no different from those of other countries. WTO rules, including such clauses as Article XXI of the GATT, fully recognized WTO Members' right to adopt an export control policy and implement an export control system in order to prevent unintended exports of goods and transfers of technologies that could be potentially diverted to weapons or military use. In addition, under international export control regimes, established independently from the WTO, the right of each participating State to decide on actual enforcement and implementation was fully recognized and respected, while States participating in these regimes shared common lists of controlled goods and technologies. In accordance with these established practices, Japan had implemented export licensing requirements solely with a view to exercising and enhancing appropriate export control over goods and technologies aimed at verifying whether such dual-use goods and technologies being exported or transferred from Japan posed a risk of being diverted to military use. In relation to the three items at issue, the export control undertaken by individual exporters tended to be managed in an inappropriate manner due to the tight delivery schedule requested by users. In fact, there had been actual instances of exports not being properly managed. As Japan supplied substantial quantities of the three items at issue, it bore significant responsibility to properly fulfil its export control obligation. As background to Japan's measure on the three items, there had been underlying concerns, including vulnerabilities in the organization of Korea's export control system and its operation, which remained the case. Korea's claims, if upheld, would compromise WTO Members' right to operate effective control over exports of goods and transfers of technologies. Japan was seriously concerned that Korea was challenging fundamental premises underlying the internationally established frameworks and efforts for non-proliferation of arms and sensitive military technologies, including weapons of mass destruction. This posed a serious risk of destabilizing international peace and security.

8.5. Second, the July 2019 update of Japan's export control *vis-à-vis* Korea in no way constituted an export ban, and Japan continued to allow for exports once civilian use was confirmed. Japan wished to underline that the export licensing requirements applicable to the three items at issue did not constitute a quantitative restriction, let alone an export ban. Once it was confirmed that the

goods and related technologies were exported for civilian use, Japan's competent authorities had granted, and would grant, export licenses in accordance with the specified procedure and published timeline. In fact, Japan had already granted export licenses for exports of all of the three items which were confirmed to be for civilian use. As a result, and as the Korean Government had itself stated at various occasions, no disruptions in the supply chains had been caused.

8.6. Third, a number of bilateral meetings had been held to build a relationship of trust before the sudden announcement by Korea that it would take the matter to WTO dispute settlement. Japan recognized that enhancing mutual understandings of export control systems and building a relationship of trust between export control authorities was the best and only way to resolve this matter. Such approach was also in accordance with the principles of the DSU.[6] Export control authorities of the two countries had been engaged in the Japan-Korea Export Control Policy Dialogue and other communications with a view to resolving the issue until the abrupt announcement by Korea that it would halt the process. Through Director-General level meetings lasting for more than 24 hours in total and a series of follow-up conversations at various levels, according to their joint press release, "both sides could mutually enhance understandings on export control systems each other".[7] Japan remained hopeful that Korea would return to the table of dialogue in the near future. For these reasons and due to the lack of any foundation to Korea's claims, Japan did not agree to the establishment of a panel.

8.7. The representative of the United States said that to the extent that Japan indicated that its measures were justified on the basis of Article XXI, the United States noted that issues of national security were political in nature and were not matters appropriate for adjudication in the WTO dispute settlement system. Every Member of the WTO retained the authority to determine for itself those matters that it considered necessary to the protection of its essential security interests, as was reflected in the text of GATT 1994 Article XXI.[8] Therefore, if Japan invoked the essential security exception in defence of the challenged measures, the United States considered that the panel would lack the authority to review that invocation and to make findings on the claims raised in the dispute. The United States recalled that under DSU Article 7.1, a panel was to examine the matter referred to the DSB by the complaining party and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". If Article XXI were invoked, there were no findings by the panel that could assist the DSB in making the recommendations provided for in DSU Article 19.1.[9] This was because the DSB might make no finding of WTO-inconsistency or recommendation to a Member to bring its measure into conformity with WTO obligations. Therefore, if a panel was established and if Japan invoked Article XXI, any findings should be limited to a recognition that Article XXI had been invoked. Under these circumstances, the United States considered that the parties should resolve the issues raised in this dispute outside the context of WTO dispute settlement. If the parties were unable to resolve the issue bilaterally, the United States encouraged the parties to request assistance from the Director-General through his good offices or from another person or WTO Member in which the parties had confidence. Further, if a panel was established, it should consult with the parties "to develop a mutually satisfactory solution".[10]

8.8. The representative of Korea said that Japan seemed to disagree with Korea's claim that the new requirements were not consistent with WTO law. Korea also took note of Japan's position that they were legitimate export control related requirements. It was because of this disagreement between their two countries that Korea was requesting the establishment of a panel. As the DSU clarified, seeking recourse to dispute settlement was not a contentious act but rather was aimed at securing a positive solution to a dispute. Pursuant to Article 23 of the DSU, requesting the establishment of a panel to undertake an objective assessment of the matter was in fact the required course of action for Korea. Korea would, therefore, not seek to respond to Japan's statement at the

[6] Article 3.7 of the DSU "... [a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred ...".

[7] Joint press release for the Seventh Japan-Korea Export Control Policy Dialogue (16 December 2019).

[8] Article XXI(b) of the GATT 1994: "[n]othing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (emphasis added).

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

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

present meeting, but would make the relevant legal arguments in support of its claim before the panel.

8.9. The DSB took note of the statements and agreed to revert to this matter, should a requesting Member wish to do so.

9 EUROPEAN UNION – CERTAIN MEASURES CONCERNING PALM OIL AND OIL PALM CROP-BASED BIOFUELS

A. Request for the establishment of a panel by Indonesia (WT/DS593/9)

9.1. The Chairman drew attention to the communication from Indonesia contained in document WT/DS593/9 and invited the representative of Indonesia to speak.

9.2. The representative of Indonesia said that on 9 December 2019, his country had requested consultations with the European Union regarding certain measures of the European Union and its member States affecting trade in palm oil and oil palm crop-based biofuels. Indonesia had noted that these measures appeared to be inconsistent with the obligations of the European Union and its member States under the GATT 1994, the TBT Agreement and the SCM Agreement. Consultations between the two parties had been held on 18 February 2020 but unfortunately, they had not resolved the dispute. On 18 March 2020, Indonesia had filed its request for the establishment of a panel. Indonesia requested the establishment of a panel at the present meeting to examine the matter identified in its panel request with standard terms of reference as set out in Article 7.1 of the DSU.

9.3. The representative of the European Union said that his delegation took note of Indonesia's decision to request a WTO panel to examine certain measures concerning palm oil and oil palm crop-based biofuels imposed by the European Union. The European Union recalled that it had held constructive consultations with Indonesia on 19 February 2020. The EU had expressed hope that the consultations had provided the necessary information and clarifications. Of course, Indonesia was entitled to bring this matter to WTO dispute settlement. However, the EU firmly believed that its measures were fully justified. For these reasons, the EU was confident that it would prevail in this dispute, and that its actions would be declared to be consistent with WTO law. At the present meeting, the EU was not ready to accept the establishment of a panel. The EU also stood ready to discuss with Indonesia reciprocal interim arrangements that would preserve the availability of appeal review in this and other disputes on the basis of Article 25 of the DSU either through the multi-party interim appeal arbitration arrangement or through similar *ad hoc* arrangements.

9.4. The representative of Malaysia said that her country wished to commend the successful organization of the present meeting, in spite of the challenges brought on by the devastating COVID-19 pandemic. The presence of delegates at the meeting was an indication of the human spirit's formidability in the face of adversity. Malaysia viewed the renewable energy measures introduced by the European Union with concern. The EU had asserted that these measures had been designed for the goal of environmental preservation. Unfortunately, the practical effect of implementing these measures would culminate in a barrier to trade that significantly distorted the palm oil market and pricing system which could create an arbitrary and disguised restriction on international trading of palm oil and its products. Malaysia wished to emphasise that palm oil producing countries, including Malaysia, had implemented various measures to ensure that the industry was being managed in a sustainable manner as well as in line with the United Nations Sustainable Development Goals (UN SDG) 2030. As the second largest producer of palm oil in the world, Malaysia wished to voice its firm support for Indonesia in this dispute and for its objection against the measures at issue. Malaysia considered that free and open trade was a hallmark of collective global prosperity and viewed the measures at issue as an impediment to the liberalization of global trade. The issues raised by Indonesia warranted an enquiry and deliberation by a panel, given the fact that the measures introduced by the EU could put the trade of palm oil, a key commodity among vegetable oils, at risk. Therefore, Malaysia urged the DSB to look deeply into this matter as this dispute had a strong and valid representation. Conducting an examination of the legal and technical issues raised by this dispute and providing a resolution to these issues also had the benefit of refining the corpus of existing WTO legal jurisprudence.

9.5. The DSB took note of the statements and agreed to revert to this matter, should a requesting Member wish to do so.

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

A. Report of the Appellate Body (WT/DS435/AB/R and WT/DS435/AB/R/Add.1) and Report of the Panel (WT/DS435/R and WT/DS435/R/Add.1 and WT/DS435/R/Suppl.1)

B. Report of the Appellate Body (WT/DS441/AB/R and WT/DS441/AB/R/Add.1) and Report of the Panel (WT/DS441/R and WT/DS441/R/Add.1 and WT/DS441/R/Suppl.1)

10.1. The Chairman said that, as Members were aware, Honduras had been a party to the dispute on: "Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging" and, for that reason, he had decided to recuse himself from chairing this Agenda item. He therefore invited Ambassador Harald Aspelund, the Chairman of the Trade Policy Review Body (TPRB), to preside over the proceedings of this Agenda item.

10.2. The Acting Chairman, Ambassador Harald Aspelund, proposed that the two sub-items under Agenda item 10 concerning the Appellate Body Reports and the Panel Reports in DS435 and DS441 respectively, be taken up together. He then drew attention to the communication from the Appellate Body contained in document WT/DS435/27-WT/DS441/28 transmitting the Appellate Body Reports in the disputes: "Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging", which had been circulated on 9 June 2020 in documents WT/DS435/AB/R and WT/DS435/AB/R/Add.1 and WT/DS441/AB/R and WT/DS441/AB/R/Add.1. He reminded delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

10.3. The representative of the Dominican Republic said that nearly 10 years ago, her country had initiated the WTO proceedings against Australia's tobacco plain packaging measures. It was beyond question that the Dominican Republic had fully shared Australia's objective of reducing smoking, and that it continued to do so. However, the Dominican Republic believed that plain packaging was not effective and could be replaced by other tobacco control policies that would successfully reduce smoking without depriving the Dominican Republic of trademarks that had helped it become the world's leading premium cigar producer and exporter. In the Report to be adopted at the present meeting, the Appellate Body had confirmed that the Dominican Republic had legitimate reasons to oppose plain packaging. The Appellate Body had reversed the Panel's finding that plain packaging reduced tobacco consumption. It had also agreed with the Dominican Republic that other tobacco control policies were available to Australia, that they were at least as effective as plain packaging in reducing smoking, and that they could do so without interfering with the Dominican Republic's trademarks. The Appellate Body had further agreed with the Dominican Republic that the Panel had failed to give the Dominican Republic a fair hearing in assessing plain packaging and thus depriving the Dominican Republic of the due process rights that were an essential feature of any system of fair and independent adjudication. In sum, despite not having received a fair hearing, the Dominican Republic had demonstrated that Australia could fully achieve its public health objectives by replacing plain packaging with other tobacco control policies, and that it could do so without prohibiting its trading partners from using their trademarks.

10.4. In the view of the Dominican Republic, this course of action would surely strike the proper balance between health and trade policy that all Members should strive to achieve, because the health and trade objectives could then each be achieved to their fullest. There was no need to sacrifice trademark protection in order to protect health. However, the Dominican Republic expressed regret at the Appellate Body having shied away from striking this balance and having made this sacrifice. According to the Appellate Body, Australia was free to choose to maintain plain packaging, even though it brought no additional health benefits compared to other policies, and even though it eviscerated the Dominican Republic's trademarks when other equally effective policies did not. In the view of the

Dominican Republic, this outcome made no sense. This was not the bargain that the Dominican Republic believed it had struck under the covered agreements. At the present meeting, the Dominican Republic would highlight two systemic concerns with the Appellate Body Report. Before doing so, the Dominican Republic wished to emphasize its strong belief in appellate review as part of the WTO dispute settlement system. The Appellate Body had made an important contribution to the WTO over the past 25 years. It was because the Dominican Republic cared about the institution that it would wish to share its concerns regarding the Report. The Dominican Republic invited the Membership to consider these concerns when thinking about how to revitalize the appellate review function in the WTO.

10.5. The Dominican Republic's first systemic concern related to the Appellate Body's treatment of the Dominican Republic's appeals under Article 11 of the DSU. The Dominican Republic's appellate proceedings had lasted nearly two years. During that time, the role of appeals based on Article 11 of the DSU had become an increasingly political issue. Indeed, even within the Appellate Body, Members had seen dissenting opinions on issues related to Article 11 of the DSU, including in this appeal.[11] Looking ahead, the Membership would continue to debate the role of Article 11 in dispute settlement. This dispute served as a reminder of the important role that Article 11 played in achieving the objectives of WTO dispute settlement. Any system of fair and independent adjudication depended on an objective assessment. In this appeal, the Appellate Body had failed to ensure that the Dominican Republic's case received the fair and objective assessment it deserved. The Dominican Republic was particularly concerned with the Appellate Body's treatment of its appeals regarding the Panel's lack of objectivity in assessing cigar-specific evidence. As many Members knew, cigars had a prominent place in the Dominican Republic's history, culture and economy. In bringing this dispute, the Dominican Republic had sought, above all, to safeguard the interests of its cigars. The Dominican Republic had appealed a number of issues that were specific to cigars. Remarkably, the Appellate Body had failed to address any of the Dominican Republic's cigar-related claims. The Report contained a half-sentence, which dismissed a complete series of claims on a wide range of issues, including cigar-related claims, because "it appears" that all of these appeals were supposedly "not focused on the objectivity of the Panel's assessment".[12]

10.6. It would be an understatement for the Dominican Republic to say that it was disappointed with the treatment of its cigar-related appeals. The Dominican Republic had a sovereign right to file its cigar-related appeals under Article 17 of the DSU. The Dominican Republic considered it neither appropriate nor respectful for the Appellate Body to dismiss its appeals on products of great importance with a half sentence. Furthermore, the Appellate Body's half-sentence was misguided. The Dominican Republic's cigar-related appeals had focused expressly on the Panel's lack of even-handedness, an issue which the Appellate Body had consistently stated was a requirement of objectivity, including in this case.[13] A half-sentence was inadequate to explain why a lack of even-handedness was "not focused on the objectivity of the Panel's assessment".[14] It was also striking that, in almost eight days of hearings, the Appellate Body had not taken the time to ask a single question to clarify its evident misunderstanding about the Dominican Republic's cigar-related appeals.

10.7. The Dominican Republic's serious concerns with the Appellate Body's findings did not end there. An important part of its appeal related to the Panel's failure to give the Dominican Republic a fair hearing. In the past, the WTO had had an excellent track record of resolving contentious and sensitive cases with impeccable neutrality. Over the years, the Appellate Body had been instrumental, under Article 11 of the DSU, in ensuring that panels applied high standards of impartiality. This was an important reason for the success of WTO dispute settlement. In this appeal, the Appellate Body had agreed with the Dominican Republic that the Panel had violated the Dominican Republic's due process rights.[15] The Dominican Republic cared deeply that the Panel had failed to give it a fair hearing. The Dominican Republic appreciated the Appellate Body's recognition that the Dominican Republic had not been granted a fair hearing. However, the Dominican Republic was shocked that the

[11] Appellate Body Report, paras. 6.523-6.543. See also Appellate Body Report, EU – PET (Pakistan), paras. 5.54-5.60.

[12] Appellate Body Report, para. 6.287, footnote 849.

[13] Appellate Body Report, para. 6.318. See also e.g., Appellate Body Report, Korea – Alcoholic Beverages, para. 163.

[14] Appellate Body Report, para. 6.287.

[15] Appellate Body Report, paras. 6.257 and 6.260.

Appellate Body had drawn no substantive consequences at all from the Panel's failure to give the Dominican Republic a fair hearing. The Appellate Body had not struck out a single substantive finding on the basis of the Panel's failure to afford due process to the Dominican Republic. The Appellate Body had admitted that the denial of due process had tainted two factors that had played "*an important role in the Panel's assessment of the evidence*".[16] These two factors, which the Panel had applied repeatedly in assessing the Dominican Republic's evidence, were the econometric concepts of multi-collinearity and non-stationarity.

10.8. To address these two factors, the Panel had created its own so-called "evidence"[17] – which was not part of the Panel record. It had then relied on its own "evidence" to dismiss the Dominican Republic's evidence, without giving the Dominican Republic any opportunity to be heard on any of these issues. The Appellate Body had found that the Panel had thereby denied the Dominican Republic its due process right to be heard. However, it had decided that the Panel's serious due process failings had no substantive consequences at all. To reach this result, the Appellate Body had reweighed Australia's evidence and had second-guessed how the Panel would have assessed Australia's evidence without the two factors. Of course, the Appellate Body had no mandate to reweigh Australia's evidence, much less to wish away the relevance of two factors that the Panel had considered "important", as the trier of fact, to its assessment of the evidence.[18] Even if it had been appropriate for the Appellate Body to reweigh the evidence without the two factors, it should have reweighed the evidence from each party. However, the Appellate Body had only reweighed Australia's evidence, and had not reweighed the complainants' evidence.[19] In that respect, the Dominican Republic had attempted to explain that the Panel's denial of due process had important substantive consequences, and that it would have made a difference if the Dominican Republic had received a fair chance to address the Panel's concerns about its evidence. However, even though the Appellate Body itself had reweighed the facts, it had dismissed the Dominican Republic's argument as "relitigating the facts".[20] The Appellate Body had conveniently forgotten its own finding that the Dominican Republic had been denied any chance to litigate these "facts" in the first place. The Dominican Republic was left with the distinct impression that the Appellate Body had adopted a result-driven reasoning to find in favour of Australia. In so doing, it had aggravated the Panel's denial of due process.

10.9. The Appellate Body had found a second violation of Article 11 of the DSU. The Panel had rightly accepted the uncontroversial rule that smoking falls when taxes rise.[21] The Panel had applied this rule strictly to the complainants' evidence, but not to Australia's. The Appellate Body had agreed that the Panel had not applied this rule to Australia's evidence on tobacco consumption, which showed that consumption rose when taxes rose. The Appellate Body, therefore, had reversed the Panel's finding that plain packaging reduced tobacco consumption.[22] The Dominican Republic appreciated the Appellate Body's recognition that there was no reliable basis to conclude that plain packaging reduced tobacco consumption. Similar to its evidence on tobacco consumption, Australia's evidence on smoking prevalence had failed to show that smoking prevalence fell when taxes rose. Yet, the Appellate Body had not reversed the Panel's assessment of this evidence. The Dominican Republic asked why the Appellate Body would not do so. The Appellate Body had stated it was because "the Panel *did not explicitly indicate* that Australia's [prevalence] models *were* able to detect" the proper impact of taxation.[23] The Appellate Body's finding was, once more, shocking. The Panel's consideration of this factor had been critical to its assessment that the Dominican Republic's prevalence evidence was not reliable.[24] Yet, by omitting to mention that Australia's prevalence models were also unable to detect the impact of taxation, the

[16] Appellate Body Report, para. 6.246.
[17] Panel Report, Appendix C, para. 107 and footnote 119 to para. 107; Appendix D, footnote 143 to para. 109.
[18] Appellate Body Report, para. 6.246.
[19] Appellate Body Report, paras. 6.264-6.266. The footnotes to paragraphs 6.264 to 6.266 (i.e., footnotes 784-790) show that the Appellate Body's assessment addressed only the part of Appendix C that deals with Australia's evidence, i.e., repeated citations to Panel Report, Appendix C, paras. 120-122.
[20] Appellate Body Report, para. 6.188.
[21] Panel Report, Appendix C, paras. 103 and 117.
[22] Appellate Body Report, para. 6.262.
[23] Appellate Body Report, para. 6.134 (first emphasis added; second emphasis in the original); see also footnote 445.
[24] Appellate Body Report, para. 6.261.

Panel had somehow been entitled to ignore this factor in assessing Australia's evidence. In effect, the Appellate Body had blessed the Panel's application of double standards to the assessment of the evidence, because the Panel had not mentioned that it was applying double standards.

10.10. In these – and many other – respects, the Appellate Body had let the Dominican Republic down. More importantly, it had let the WTO dispute settlement system down. At a time when the Appellate Body was facing intense political pressure on appeals related to Article 11 of the DSU, it had turned a blind eye to the Panel's failure to act with fairness and objectivity. Members could all agree that a panel enjoyed discretion as the trier of fact. However, a panel did not enjoy discretion either to deny the parties their right to be heard, or to apply double standards to its factual assessment. As Members looked ahead to restoring an appellate review worthy of the 21st century, Members had to work towards a system that enabled panels to make decisions within their discretion and, at the same time, ensured that Members were not deprived of their right to an objective assessment.

10.11. The Dominican Republic's second systemic concern related to the TRIPS Agreement. As Members knew, developed countries had led the negotiation of this Agreement, despite the scepticism of developing countries. Ultimately, developing countries had embraced the TRIPS Agreement because they recognized that intellectual property, including trademarks, could serve the interests of developing countries. In the Dominican Republic, cigars were a good example of a development story that benefitted from trademark protection. Over the past 30 years, the Dominican Republic had become the world's leading producer and exporter of premium cigars, a high value-added product that relied on trademarks to single out the Dominican Republic's brands in foreign markets. Many developed Members had brought successful cases under the TRIPS Agreement. However, this was the first TRIPS case brought by a developing country – indeed, not by one but by four developing countries. It was with regret that these developing countries saw that, when the TRIPS Agreement was invoked to safeguard their development interests for the first time, the WTO had severely undermined trademark protection.

10.12. Most remarkably, the Appellate Body had stated that, under Article 20 of the TRIPS Agreement, there was, at least in this case, no need to consider whether a challenged measure could be replaced by an alternative that contributed at least equally to the challenged measure's objective without interfering with trademark use.[25] In other areas of WTO law, the Appellate Body had emphasized the need to consider alternatives. The Dominican Republic supported this "lesser harm" approach, which even the Panel had found relevant under Article 20 of the TRIPS Agreement, and which Australia had not challenged on appeal. When a Member could fulfil a non-trade objective to the same extent through a measure that interfered less with trade, it should take the "lesser harm" approach. In this way, such Member could fully promote its own non-trade objectives in a way that minimized harm to the trade interests of other Members.

10.13. The Dominican Republic considered how this "lesser harm" approach had been applied in this case. On the one hand, the Appellate Body had found that plain packaging imposed "*far-reaching*" prohibitions on the use of trademarks, while making only a "*rather modest*" contribution to Australia's objective.[26] The Appellate Body had agreed with the Dominican Republic that there was no reliable evidence that plain packaging reduced tobacco consumption. On the other hand, the Appellate Body had stated that Australia could achieve the same health outcome with alternative measures that did not interfere with trademarks. Indeed, it had been uncontested that the alternatives would immediately reduce *both* tobacco consumption and smoking prevalence, and that they would do so without interfering with trademarks. From the perspective of the "lesser harm" approach, the outcome was obvious. Yet, the Appellate Body had rejected the "lesser harm" approach in this case, even while admitting that the availability of effective alternatives "call[s] into question" the justifiability of the challenged measure.[27] For the Appellate Body, under Article 20 of the TRIPS Agreement*,* there was no need in this case to consider the inconvenient question that the alternatives raised. This left the Dominican Republic to wonder why its trademark interests were sacrificed to endorse plain packaging, when plain packaging brought no additional health benefits.

10.14. The Appellate Body's answer was wholly unsatisfying. The Appellate Body had argued that alternatives had to be assessed only when the treaty established a "necessity" test. Yet, the

[25] Appellate Body Report, paras. 6.654-6.655, 6.695-6.697.
[26] Appellate Body Report, paras. 6.493, 6.666, 6.674, 6.675, 6.678, 6.696, 6.697 (emphases added).
[27] Appellate Body Report, paras. 6.655, 6.695.

Appellate Body itself had applied the "lesser harm" approach when the text of a treaty did not provide for a "necessity" test. The text of Article XX(g) of the GATT 1994, on the conservation of natural resources, had no "necessity" test. Yet, the Appellate Body had stated that alternative measures had to be assessed.[28] The Dominican Republic asked where had the Appellate Body found the "lesser harm" approach under Article XX(g) of the GATT 1994. The Appellate Body had found it in the chapeau of Article XX: a measure was "arbitrary or unjustifiable" when it could be replaced with a less trade-restrictive alternative that made an equivalent contribution.[29] Thus, the Appellate Body had already found that the word "unjustifiable" – which was the very word used in Article 20 of the TRIPS Agreement – required the consideration of alternatives. Following the Appellate Body's own past reasoning, the Dominican Republic, therefore, was at a loss to see any principled basis for the Appellate Body's decision to abandon the "lesser harm" approach when considering the trademark interests of the Dominican Republic in this case. The Dominican Republic wished to underscore its deep disappointment and frustration with the Reports that would be adopted at the present meeting. WTO panels and the Appellate Body had to apply the rules in a fair and objective manner, irrespective of the type of products before them. The Dominican Republic hoped and believed that the system would be strong enough to live up to this fundamental principle in the future.

10.15. The representative of Honduras said that her country took note of Australia's request to adopt the Appellate Body Report in this dispute. The Appellate Body had generally upheld the Panel's findings that it had not been demonstrated that Australia's plain packaging legislation violated Australia's WTO obligations. Honduras was disappointed by these findings. Honduras wished to make a few comments on the Appellate Body's findings on its claims under Article 11 of the DSU, Article 2.2 of the TBT Agreement, and Articles 16 and 20 of the TRIPS Agreement, before highlighting a number of systemic procedural concerns. First, Honduras welcomed the Appellate Body's very important finding that the Panel had failed to respect the due process rights of Honduras concerning the examination of the econometric evidence on the alleged effect of the measure at issue on consumption and prevalence of tobacco products. Honduras agreed with the Appellate Body that due process was "an essential feature of a rules-based system of adjudication, such as that established under the DSU". It was thus all the more significant that the Appellate Body had expressly found that "in its examination of the post-implementation evidence of smoking prevalence and consumption, the Panel denied the parties their due process rights and thus acted inconsistently with its duty to conduct an objective assessment of the facts under Article 11 of the DSU".

10.16. In other words, the Appellate Body had found that the Panel's examination of the only two metrics for determining the effect of plain packaging on actual smoking behaviour had been the result of a process that had failed to respect an "essential feature" of a rules-based dispute settlement system – due process. This failure highlighted the lack of evidence that plain packaging was an effective tobacco control instrument. In fact, more recent official prevalence data of Australia confirmed that the plain packing legislation had not been effective in reducing smoking in Australia.[30] Even the Australian Institute of Health and Welfare had noted that "for the first time in over two decades, the daily smoking rate did not significantly decline over the most recent 3 year period (2013 to 2016)".[31] Moreover, in March 2018, the Australian Bureau of Statistics had released its accounts on national household expenditure on tobacco products – this was a data source on which the Panel had relied in its examination of tobacco sales and consumption.[32] This newly released data showed an increase in expenditure on tobacco products for the first time since 2004. These expenditures had increased by 2.6% in the final quarter of 2017 compared with the same period in 2016, suggesting, if anything, an increase rather than a decrease in total consumption.[33] This more recent evidence, of course, had not been before the Panel and could thus not be reviewed by the Appellate Body. The Panel and Appellate Body Reports should therefore be read keeping in mind that they were not based on current, up-to-date evidence. The more recent evidence was further

[28] Appellate Body Reports, US – Gasoline, pp. 26-29 and US – Shrimp, paras. 171-172 and 176; see also Panel Report, China – Rare Earths, para. 7.354 and footnote 549.

[29] Appellate Body Reports, US – Gasoline, pp. 26-29 and US – Shrimp, paras. 171-172 and 176.

[30] Results for the 2019 NDSHS were expected to be released in the third quarter of 2020.

[31] Australian Institute of Health and Welfare, National Drug Strategy Household Survey (NDSHS) 2016 key findings, http://www.aihw.gov.au/alcohol-and-other-drugs/data-sources/ndshs-2016/key-findings/.

[32] Panel Report, Appendix D, section 1.1.4.

[33] Australian Bureau of Statistics, Australian National Accounts: Household Expenditure on "Cigarettes and Tobacco" (December 2017), p. 44. www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/9355EEA037741EDFCA258248000BC099/$File/52060_dec%202017.pdf.

confirmation that, as demonstrated by Honduras during the legal proceedings, Australia's plain packaging legislation lacked effectiveness.

10.17. In sum, Honduras considered that the only logical conclusion to draw from the Appellate Body Report was that the Panel's factual findings that plain packaging had been effective in reducing smoking were not valid, because they were the result of a process that had failed to respect the due process rights of Honduras. The Appellate Body had gone thus far as to vitiate the Panel's finding on the alleged contribution to reducing tobacco consumption. This meant that the claim that plain packaging had worked to reduce the consumption of tobacco products was unsupported. Remarkably, however, the Appellate Body had re-constructed the Panel's overall contribution analysis to surgically remove the flawed aspects of the findings with a view to suggesting that, even absent these errors, the Panel's overall finding could still stand. This was entirely inappropriate. It was not known whether the Panel would have made these findings absent the all-important concerns over multicollinearity and non-stationarity that had never been tested with the parties and thus had given rise to a violation of Article 11 of the DSU. It was also not known whether the Panel would have perhaps finally questioned the logic of the causal chain model on which Australia had relied so heavily, given that, as the Panel itself had confirmed, there had been no evidence for the assertion that this causal chain model had actually been working. There had been no evidence of an increase in cognitive processing of the health warnings, no evidence of an increase in quitting intentions, no evidence of an increase in quitting attempts and, as confirmed by the Appellate Body, no evidence of any effect on reducing consumption of tobacco products. Honduras believed that the Appellate Body should have reversed the Panel's findings that had been tainted by the violation of due process rights. It should then have examined whether it had been asked to, and whether it had a sufficient factual basis to, complete the legal analysis. Unfortunately, the Appellate Body had failed to do that. It had thus concluded that a violation of due process, which the Appellate Body itself had described as an "essential feature" of a rules-based dispute settlement system, had had "no impact" on the Panel's ruling. This was striking, because the due process violation had impacted a finding about the only factors that indicated any actual effect of plain packaging on smoking behaviour. Put differently, the due process violation had vitiated the very core of the Panel's finding that plain packaging contributed to the reduction of smoking. And that finding had been, in turn, central to the Panel's overall conclusion and to the very outcome of the case. That was as remarkable as it was erroneous.

10.18. Second, Honduras welcomed the Appellate Body's key finding that "the Panel erred in finding that the complainants failed to demonstrate that each of the two alternative measures would be apt to make a contribution equivalent" to that of the plain packaging measures. This meant that the Panel had been wrong in rejecting the two alternatives that Honduras had proposed. The Appellate Body had found that these alternatives provided at least an equivalent contribution to the reduction of smoking. The Appellate Body had rightly rejected Australia's "suite of measures" argument that sought to shield the plain packaging measures from proper scrutiny because of the alleged synergies with other tobacco control measures. It had been confirmed that not one, but two, valid and effective alternatives existed that could have been pursued by Australia. This was what Honduras had been stating all along. Unfortunately, however, the Appellate Body had broken with decades of jurisprudence that focused on the structure, architecture, and design of a measure to determine its trade restrictiveness. Instead, the Appellate Body had focused on the trade effects of the measure as reflected in a reduction in the volume of sales. Thus, the Appellate Body had put the complainants in a "catch-22" situation in that every alternative measure that was equally effective in reducing sales would be rendered invalid because it was also as trade restrictive as plain packaging. This made it impossible for the complainants to ever come up with a valid alternative measure. That could not be correct and revealed a legal error that undermined the Panel's and the Appellate Body's approach to trade restrictiveness. Reducing sales through a predictable, transparent, and WTO-consistent tax measure, for example, was by design and structure less trade restrictive than intervening in the market in a way that affected the very essence of the way in which products competed in the market based on brands. The Australian plain packaging measure had thus created uncertainties in the market that went beyond any immediate impact on the volume of sales that alternative measures proposed by Honduras had. It was regrettable that the Appellate Body had refused to follow its own long-standing jurisprudence to this effect. Moreover, the Appellate Body had failed to even begin to offer the "cogent reasons" for doing so. Honduras was thus disappointed that the Appellate Body had rejected its claim under Article 2.2 of the TBT Agreement that plain packaging was more trade restrictive than necessary.

10.19. Third, Honduras was deeply concerned about the findings of the Appellate Body relating to the TRIPS Agreement. Honduras believed that the Appellate Body had deprived the protection guaranteed by the TRIPS Agreement to trademark owners of any practical meaning. In particular, the Appellate Body's finding that special requirements, including a prohibition on use, could be imposed as long as there was a "fair reason" or "reasonable explanation" for doing so, meant that Article 20 was a meaningless provision and that trademarks for any product could be taken away and prohibited without proper justification. This erroneous finding had implications for many sectors of the economy beyond tobacco and ignored the importance of trademarks for a well-functioning competitive economy. Honduras looked forward to Australia's reaction if another Member decided to impose plain packaging on alcoholic beverages and removed well known trademarks from bottles of beer, wine or spirits based on any "fair reason" for depriving trademark owners of their most valuable property. Honduras was thus disappointed to see that the WTO had failed to stand up for trade and intellectual property protection and had failed to acknowledge the negative systemic implications of symbolic but ineffective, unlawful and potentially counterproductive measures such as plain packaging. Honduras recalled that its WTO challenge had questioned neither the negative health effects of smoking nor a WTO Member's right to enact regulation in order to protect public health. Honduras supported the adoption of effective measures to reduce smoking that were consistent with international law, effective, and not disproportionate.

10.20. Honduras wished to raise a number of systemic procedural concerns. Honduras regretted the tone and manner in which the Appellate Body had addressed its claims under Article 11 of the DSU. This had been disconcerting and unjustified as Honduras was entitled to raise the lack of objective assessment of the Panel's treatment of the evidence before the Appellate Body, in the light of existing jurisprudence and established standards under Article 11 of the DSU. Nevertheless, the Appellate Body had seemed to have made up its mind from the outset that it would not entertain the appellants' claims under Article 11 of the DSU. This was evident from the fact that the Appellate Body had unilaterally changed the agreed dates for the second hearing, which was largely dedicated to the claims under Article 11 of the DSU. What a reader of the Appellate Body Report could not know was that when the previously set dates for that hearing had been modified in response to requests by other parties, Honduras had shown significant flexibility to accommodate those other parties. All that Honduras had requested was that the new dates be set in a way that would enable a key member of the delegation of Honduras to attend the hearing in person. However, when the new dates had been set, they had been set without any regard for the previously expressed constraints that the delegation of Honduras was facing. As a key member of its delegation had been unable to attend, Honduras had been "punished" for having been flexible and accommodating. It was regrettable that the Appellate Body Report did not even mention this procedural development.

10.21. In addition, the pre-determined nature of the Appellate Body's position with respect to claims based on Article 11 of the DSU had been expressly confirmed by the public speech given by one member of the Appellate Body, Mr Thomas Graham, on 5 March 2020. This was more than three weeks before he had signed the Report and had thus been in the middle of the Appellate Body's deliberations. In making suggestions for a future WTO appellate entity, Mr Graham had recommended "[t]o banish most Article 11 claims on appeal because panels' fact finding is outside the role of the Appellate Body". He had further observed that "in recent years appellate litigators almost routinely attacked fact-finding by panels as 'not objective'", and had blamed the Appellate Body for having too often "indulged them by spending many pages analyzing panels' fact-finding".[34] It thus appeared as if Mr Graham's legal views about the strength of the legal claims under Article 11 of the DSU as presented by Honduras had been pre-determined by a policy view that there was no place for claims under Article 11 of the DSU in the system. It had been entirely inappropriate to give a public speech on a key issue in the appeal pending before him at that time. To conclude, Honduras was deeply disappointed with the findings of the Reports that would be adopted at the present meeting. This dispute did not deserve this dark procedural cloud that commentators would point to. Honduras hope that in the future, the system would be able to stand up to the raison d'être of this Organization.

10.22. The representative of Australia said that her country welcomed the findings of the Appellate Body in these disputes, which overwhelmingly dismissed the appeals brought by Honduras and the Dominican Republic. Australia had been the first country in the world to introduce tobacco plain

[34] Speech of Thomas Graham (former Appellate Body Member) at the Georgetown Law International Trade Update, 5 March 2020, p. 13, available at https://worldtradelaw.typepad.com/files/t.graham.greenwaldlecture.final_.pdf.

packaging, as part of its multifaceted approach to reducing tobacco use and exposure. Australia had implemented tobacco plain packaging in 2012 to prevent the tobacco industry's well-documented exploitation of product and packaging design features to influence consumer behaviour, particularly the behaviour of young people. Australia had done so on the basis of three decades of expert evidence, and an explicit recommendation by the 180 parties to the World Health Organization Framework Convention on Tobacco Control. Tobacco plain packaging was a legitimate public health measure that fully respected Australia's WTO obligations. The findings of the original Panel, upheld by the Appellate Body, had confirmed this unequivocally.

10.23. In response to the statements delivered at the present meeting by Honduras and the Dominican Republic, Australia trusted Members to understand from their own review of the relevant reports the core findings of the Appellate Body and the correct legal basis of those findings. Australia wished to mention only briefly these key outcomes. Specifically, the Appellate Body had upheld the Panel's findings under Article 2.2 of the TBT Agreement and Articles 16.1 and 20 of the TRIPS Agreement. The Appellate Body had agreed with the Panel that Honduras and the Dominican Republic had failed to establish that Australia's tobacco plain packaging measures were inconsistent with WTO rules; and it had rejected the appellants' attempts to fundamentally rewrite those rules. In reaching this conclusion, the Appellate Body had also overwhelmingly rejected the appellants' unprecedented assault on the Panel's findings of fact. The Appellate Body had found that the appellants had failed to demonstrate that the Panel had erred in finding that the tobacco plain packaging measures, in combination with Australia's other tobacco-control measures, were apt to, and did in fact, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products. Australia welcomed the Appellate Body's rejection of the appellants' attempt to misuse Article 11 of the DSU to re-litigate the bulk of factual issues they had lost before the Panel; and its affirmation of the Panel's discretion as the trier of fact to decide which evidence it used in making its findings and the probative value of the evidence.

10.24. Australia was pleased that the Appellate Body's findings finally brought to an end the WTO challenges to Australia's legitimate public health measure. However, Australia was concerned that resolving this matter had taken over eight years of intensive litigation. This delay was especially concerning given that, at the outset of these dispute settlement proceedings, the complainants had actively discouraged other Members from adopting similar measures until the dispute had concluded. Australia was heartened by the number of Members that had resisted this pressure and were already contributing to improving the public health of their populations by banning the promotion and advertising of tobacco products through packaging. Australia was also concerned by the exceptional scale of this dispute. The panel proceedings alone had involved over 5,000 pages of submissions, over 1,700 exhibits, and over 80 expert reports that spanned complex issues of public health, behavioural theory, marketing, and econometrics. The enormity of this evidentiary record had been in large part the result of the litigation approach used to challenge Australia's measure, and it had risked transforming WTO dispute settlement into an endless and expensive "battle of the experts". This dispute clearly highlighted that Members needed to redouble their efforts to enhance the efficiency of their dispute settlement system – to ensure it fulfilled its objective of "prompt and effective" settlement of disputes. The significance of this dispute, given its implications for the legitimate policy space provided in the WTO covered agreements, had been well understood by Members. This had been reflected in the largest number of third parties of any WTO dispute to date. Australia wished to thank the third parties for their active engagement during all phases of these long-running proceedings. In welcoming the adoption of the Reports at the present meeting, Australia also wished to thank the Appellate Body and the panelists for their rigorous and comprehensive examination of the claims and arguments in these disputes, and the Secretariat for its hard work and dedication to this matter.

10.25. The representative of Norway said that his delegation wished to thank the Appellate Body, the Panels and the Secretariat for their tireless work in these disputes. Norway welcomed the adoption of the Panel and Appellate Body Reports at the present meeting. As repeatedly stressed in various fora, public health and tobacco control were topics of particular interest to Norway. Norway noted that the Appellate Body confirmed the Panels' findings that it was possible for Members to introduce standardized packaging of tobacco consistent with the WTO Agreement. Norway recalled that this type of measure was recommended to implement the WHO Framework Convention on Tobacco Control, and it was Norway's firm view that the Framework Convention and the relevant WTO Agreements were mutually supportive. Norway was very pleased to see the conclusion of these long-running disputes. Norway sincerely regretted that these would be the last Appellate Body Reports for the time being.

10.26. The representative of the United States said that the United States wished to raise an important systemic concern under this Agenda item. The documents circulated as WT/DS435/AB/R and WT/DS435/AB/R/Add.1, and WT/DS441/AB/R and WT/DS441/AB/R/Add.1 contained discussion regarding so-called "due process" violations by the Panel under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). As the United States had explained, and Members knew well, Article 17.6 of the DSU limited an appeal "to issues of law covered in the panel report and legal interpretations developed by the panel". Attempts by appellants to re-litigate unfavourable *factual* determinations by panels were not encompassed by the right of appeal set out in Article 17.6.[35] Neither was appeal of unfavourable factual determinations supported by the text of Article 11 of the DSU. This provision did not impose an *obligation* on a panel. Rather, it recognized that the "function of panels" was that a panel "*should* make an objective assessment" of the matter before it. By describing this function using "should", rather than creating an obligation using "shall", WTO Members had further established in the DSU that an alleged failure to make an objective assessment would not be subject of an appeal. Furthermore, Article 11 of the DSU did not include the term "due process". Nevertheless, the complainants in this dispute had brought numerous claims of error, including for "due process" violations, under Article 11. Such erroneous and unfounded claims of error under Article 11 had resulted in significant expenditures of time and resources. The parties and third parties had met with the Division for two oral hearings in June and November 2019, spanning a total of eight days of hearings. The United States disagreed with the majority's decision in the appellate report to entertain these claims and, remarkably, even accept a claim of error. Even aside from there not having been a basis to appeal under DSU Article 11, the United States agreed with the separate opinion's conclusion that it was not "necessary to examine in detail the appellants' claims that the Panel erred" and that, in any event, the Panel had not acted inconsistently with the original, high standard an Appellate Body report had set out for Article 11 of the DSU.[36] This appeal had presented a missed opportunity to reconsider the scope of appellate review permitted under the DSU.

10.27. As the United States had explained in the USTR *Report on the Appellate Body*[37], the DSU lacked any textual basis for appellate review of factual findings, irrespective of the standard of review to be applied. The Appellate Body's decision to review the "objective assessment" of a panel had been seized by appellants to cover practically all factual determinations by a panel, as illustrated by this monstrous appeal. The extensive experience of the United States as a litigant showed that panels took seriously their task to make an objective assessment. In fact, many current or former WTO delegates served as panelists, and no doubt took their responsibilities very seriously. To the extent that mistakes could happen in the assessment of evidence, Article 15 of the DSU provided for an interim review stage to correct these errors. Remarkably, the complainants in this appeal had chosen *not* to avail themselves of that opportunity and work with the Panel to correct any factual errors. Instead, they had sought further costly and time-consuming litigation by raising on appeal questions of fact that were beyond the scope of appellate review. The WTO dispute settlement system was not operating as it had been intended, nor should it operate in this manner. This dispute underscored the need for real reform in order to restore the proper functioning of the dispute settlement system.

10.28. In addition to these substantive concerns, the United States considered that very serious issues were raised by the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU and the continued service on this appeal of all three members of the Division who had ceased to be a member of the Appellate Body during the appeal, including with respect to the status of such a report. As the document had not been issued by three Appellate Body members and had not been issued within 90 days, consistent with the requirements of Article 17 of the DSU, it was not an "Appellate Body report" under Article 17, and therefore it was not subject to the adoption procedures reflected in Article 17.14. The circumstances of this dispute were particularly remarkable: the document had not been issued by any Appellate Body member and it had been issued 691 days after a notice of appeal had been submitted in the DS435 dispute. For this item, the United States did not understand any party to oppose the adoption of the reports, nor had any

[35] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf; Dispute Settlement Body, Minutes of the Meeting Held on August 27, 2018, WT/DSB/M/417, paras. 4.2-4.17.

[36] Australia – Plain Packaging (AB), para. 6.524.

[37] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), Sec. II.C, at 37-47 (available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf).

other WTO Member raised an objection. The aim of the dispute settlement system was to find a positive solution to the dispute. As no party to the dispute had objected, the United States understood that the parties considered that adoption of the reports would assist them in finding a positive solution. The United States would seek to support the parties' interests on this issue. Therefore, there was a consensus to adopt the reports before the DSB at the present meeting.

10.29. The representative of New Zealand said that his country welcomed the Appellate Body Report, which finally resolved this very long running dispute. New Zealand wished to thank all those involved. New Zealand participated as a third party in this dispute and wished to briefly comment on the health policy implications of the Reports that would be adopted at the present meeting. Like Australia and many other Members, New Zealand had put in place its own tobacco plain packaging measures to help combat the significant health risks associated with tobacco use. The Appellate Body Report was a welcome confirmation of the WTO-consistency of such measures, and a timely affirmation of the right of Members to regulate for legitimate public health objectives. New Zealand noted with regret that this would be the final Appellate Body Report, for a period, until the Appellate Body had sufficient members to hear appeals.

10.30. The representative of Indonesia said that his country wished to express its appreciation to the Panel, the Appellate Body as well as the Secretariat for the hard work and proficiency on these long and most anticipated disputes. The world had been looking forward to the final outcome of this controversial dispute due to its implications for public health, intellectual property rights and trade restrictiveness. Indonesia wished to re-emphasize that it did not question the right of Australia to protect public health, including by reducing tobacco consumption. In fact, Indonesia had also introduced measures which also aimed at discouraging people for consuming tobacco products, e.g., the mandatory display of graphic images on tobacco packaging. Indonesia's participation in these disputes as third party had been due to its substantial interest as well as its grave concern over the impact of tobacco plain packaging measures. As a major producer and exporter of tobacco products, millions of people in Indonesia who were dependent on this industry for their livelihood would potentially be affected by such measures. Indonesia believed that tobacco plain packaging was more restrictive to trade than necessary to accomplish legitimate health objectives. Such legitimate objectives could be achieved by implementing other measures with less trade restrictive effects. Indonesia did not expect that the conclusions in these disputes would be the basis for other Members to implement similar measures to other perfectly legal and legitimate products.

10.31. The representative of Turkey said that as a third party to this very important dispute, his country wished to thank the Appellate Body and the WTO staff for their hard work and tireless efforts. Turkey believed that the outcome of this dispute was significant and would guide the entire Membership, especially with regards to the interpretation and application of Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement. From early on in this proceeding, Turkey had shared the understanding that measures taken for the control of consumption of tobacco products rested upon legitimate public health objectives within the WTO, and that trade measures could be balanced with public health objectives. In line with this approach and in order to reduce the attractiveness of tobacco products and to protect public health, Turkey had also introduced regulations of its own that included plain packaging requirements. In this respect, Turkey welcomed the Appellate Body Report, which had upheld almost all of the Panel's findings and had concluded that plain packaging regulations were WTO-consistent. Tobacco plain packaging measures had been found not to be more trade restrictive than necessary to achieve public health objectives, and they did not violate any international trademark obligations stipulated in the TRIPS Agreement, since public health objectives justified the relevant restrictions on trademarks. Turkey was also pleased that the Reports had confirmed that plain packaging contributed meaningfully to public health objectives and implementing Members enjoyed a certain degree of discretion in imposing encumbrances on the use of trademarks under Article 20 of the TRIPS Agreement, considering their public health objectives. Turkey, once again, thanked the parties, the panels and the Appellate Body for their contribution to this dispute. Turkey hoped that this would not be the last Appellate Body Report and that the Appellate Body would soon resume its functions to preserve the rights and obligations of Members.

10.32. The representative of the European Union said that his delegation welcomed this Appellate Body Report, which closed particularly long proceedings. The EU supported the adoption of the Report by the DSB. At the present meeting, the EU wished to make two specific comments. First, this Report definitely clarified that both trade and domestic policies following other objectives could co-exist. The WTO rules clarified in this case confirmed that public policies of its Members could be

perfectly compatible with WTO law even if they impose restrictions on trade or other interests protected in principle by the covered agreements. In the present case, the protection of trademarks in particular had been found as not prevailing over the protection of public health. Hence, this confirmed once more, in a high-stakes dispute, that trade and other public interests were not mutually exclusive. This Appellate Body Report was a milestone in the world of trade law. The Appellate Body Report recalled the balance between trade and other public interests and reinforced WTO rules in terms of their connection with other policy objectives. This could only strengthen the credibility of the WTO. Second, this Report would be the last Appellate Body report for some time, as no further such reports were expected in the short term. Based on this Report, the EU wished to underline and applaud the importance of the Appellate Body's contribution to the multilateral, rules-based WTO system. The Appellate Body had shown, once more, how valuable a two-level judicial system was. The EU reiterated its regret that the appointment of Appellate Body members was blocked by and remained ready to consider improvements to the Appellate Body in order to unblock the current situation. Once more, the EU called all Members to take the Appellate Body's added value into account and to find a solution to the current crisis. All Members needed a well-functioning appeal mechanism and the well-functioning WTO as well as a multilateral, rules-based, system.

10.33. The representative of the United Kingdom said that his country supported the right of WTO Members to implement important public health initiatives to protect their citizens. The United Kingdom welcomed the Appellate Body's findings that Australia's tobacco control measures were not more trade-restrictive than necessary. Many countries around the world had adopted tobacco plain packaging measures, including the United Kingdom as of 20 May 2016. Smoking was the leading cause of ill-health and early death and a major cause of inequalities in the United Kingdom. In England alone, smoking killed around 78,000 people each year and cost the National Health Service GBP 2.5 billion. In response, the United Kingdom had introduced a range of measures to discourage smoking. The United Kingdom had been the second country in the world to introduce tobacco plain packaging measures. Smoking rates had continued to fall since the measures had been implemented and were currently at their lowest level of 14.4% in England. The United Kingdom welcomed the finding that the tobacco plain packaging measures, in combination with other measures, contributed to the objective of reducing the use of and exposure to tobacco products, and that these measures were not more trade-restrictive than necessary. The United Kingdom also took note of the Appellate Body's conclusions on the standard of review to be applied to claims under Article 11 of the DSU and its reminder that Article 11 claims could not be used as a pretext to re-litigate the panel's factual determinations on appeal. Limiting Appellate Body appellate review to matters of law and legal interpretations as required by Article 17.6 of the DSU would reduce the scope and duration of appeals and promote procedural efficiency at the DSB.

10.34. The representative of Canada said that in this dispute involving Australia's tobacco control measures, Canada believed that the Appellate Body and Panel had correctly and appropriately preserved the critical balance between the protection of intellectual property rights and trade facilitation, and a Member's right to take legitimate public health measures under the TRIPS Agreement and the TBT Agreement. The findings of the Panel and Appellate Body would have important systemic consequences for all WTO Members. Canada welcomed the adoption of these Reports. These Reports provided an important and valuable contribution to the clarification of the Members' rights and obligations, in particular with respect to Articles 16.1 and 20 of the TRIPS Agreement. The Appellate Body had confirmed that Article 16.1 did not confer upon a trademark owner a positive right to use its trademark or a right to protect the distinctiveness of that trademark through use. In addition, the Appellate Body's findings with respect to Article 20 confirmed that the consideration of whether the use of a trademark had been "unjustifiably" encumbered should not be equated with the necessity test within the meaning of Article XX of the GATT or Article 2.2 of the TBT Agreement. Canada noted that the Appellate Body had applied the high threshold it had followed in previous cases for determining whether a panel had failed to conduct an objective assessment of the matter. Canada supported the Appellate Body's rejection of the appellants' arguments that had simply sought to litigate *de novo* the factual case before the Panel.

10.35. The representative of Singapore said that, like the previous speakers, his country welcomed the outcome of this Appellate Body Report and supported its adoption. This Report had brought this dispute to a close after eight long years of litigation, in which Singapore had participated as a third party. Singapore also wished to express its appreciation for the Panel and the Appellate Body members as well as the Secretariat staff.

10.36. The DSB took note of the statements and adopted the Appellate Body Reports contained in WT/DS435/AB/R and WT/DS435/AB/R/Add.1 and the Panel Report contained in WT/DS435/R and WT/DS435/R/Add.1 and WT/DS435/R/Suppl.1, as upheld by the Appellate Body Report; the DSB took note of the statements; and

10.37. The DSB took note of the statements and adopted the Appellate Body Report contained in in WT/DS441/AB/R and WT/DS441/AB/R/Add.1 and the Panel Report contained in WT/DS441/R and WT/DS441/R/Add.1 and WT/DS441/R/Suppl.1, as upheld by the Appellate Body Report.

11 THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

A. Statement by the Chairman on consultations with Thailand and the Philippines with regard to the Recourse to Article 22.2 of the DSU (WT/DS371/32)

B. Statement by the Philippines

C. Statement by Thailand

11.1. The Chairman said that under the first sub-item, he wished to make a statement under his own responsibility in order to report to delegations on his consultations with Thailand and the Philippines in the "Thailand – Cigarettes (Philippines)" dispute (DS371). His statement was without prejudice to the rights and obligations of the parties to this dispute or of any other Member. He recalled that these consultations had first been conducted by the previous Chair of the DSB, Amb. Walker, prior to the 5 March 2020 DSB meeting. At that meeting, the matter had been suspended in order to allow more time for consultations. Following his appointment as Chair of the DSB on 20 May 2020, the Chairman had been consulting with Thailand and the Philippines on this matter. He had held virtual intensive consultations with the parties in preparation for the present meeting. These consultations were ongoing and therefore it was not his intention to have a discussion on this matter at this stage. He hoped that this was agreeable to all Members.

11.2. The DSB took note of the statement.

11.3. The Chairman invited the representative of the Philippines to speak.

11.4. The representative of the Philippines said that, at the outset, he wished to take the opportunity to congratulate the Chairman on his election and to express his country's appreciation for the resumption of the DSB meeting. As a user and a firm believer in the WTO dispute settlement system, the Philippines was confident that the Chair's principled leadership would contribute to its strengthening and improvement. The Philippines thanked the Chairman for his report as well as for providing the Philippines with an opportunity to continue its dialogue with Thailand in a constructive spirit through consultations. The Philippines also wished to commend the Chairman for his continuing efforts to help Thailand and the Philippines resolve these important and urgent concerns that had systemic implications for the rights of Members under the DSU. At the 5 March 2020 DSB meeting, and during the Chair-guided consultations, the Chairman had suggested that both parties attempt to find a way forward. In this context and with reference to its previous statements contained in documents WT/DS371/35 and WT/DS371/37, the Philippines was pleased to inform Members that on 9 March 2020, in a letter addressed to the Chairman and Thailand, the Philippines had proposed that the parties commence discussions to arrive at a constructive solution in order to complete the two pending appeals under Article 21.5 of the DSU, including but not limited to proceedings under Article 25 of the DSU, Article 22.6 of the DSU, or other hybrid approaches acceptable to all parties, or through an agreed level of compensation. The Philippines maintained its good faith and openness to a time-bound and Chair-guided solution to this situation and awaited any ideas or suggestions from the Chairman and Thailand.

11.5. However, the Philippines wished to emphasize that while it remained open to a constructive solution, as shown by its 9 March 2020 letter, the Philippines maintained that it was fully within its rights to seek recourse to Article 22.2 of the DSU. The provisions of Article 22.6 of the DSU were clear: "[t]he DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request"; and "[i]f the Member concerned objects to the level of suspension

proposed, […] the matter shall be referred to arbitration". Therefore, there were only two options under the reverse-consensus rule of Article 22.6 of the DSU: (i) the DSB granting authorization to suspend concessions; or (ii) the DSB referring the matter to arbitration. At the present meeting, the Philippines did not insist that the DSB, through the Chairman, grant the authority that the Philippines sought, given the good-faith consultations currently being conducted between the Chairman and the parties. However, the Philippines' flexibility was finite, and dependent on reaching a prompt and constructive way forward. At some point, if no solution was reached, the Philippines expected the DSB to act in accordance with the rules.

11.6. The DSB took note of the statement made by the Philippines.

11.7. The Chairman invited the representative of Thailand to speak.

11.8. The representative of Thailand said that her country wished to thank the Chairman for his involvement in the consultations with the parties in the "Thailand – Cigarettes (Philippines)" dispute (DS371), and for the opportunity to make a statement at the present meeting. Thailand wished to refer to its previous statement made at the 5 March 2020 DSB meeting. For the purpose of the present meeting, Thailand wished to reiterate, once again, that any request for suspension of concessions under Article 22.2 of the DSU in this dispute would be improper as two compliance proceedings under Article 21.5 were not completed. The two reports issued by the panel in the proceedings under Article 21.5 of the DSU had not been adopted by the DSB. Moreover, the appeals of these reports by Thailand were still ongoing before the Appellate Body. The Sequencing Understanding signed by the parties in this dispute stated that the Philippines could request retaliation only after the completion of proceedings under Article 21.5, which included proceedings before the Appellate Body in the event of an appeal. Given that Thailand's appeals had not been completed, the Philippines could not, at this stage, request the suspension of concessions or other obligations under Article 22.2 of the DSU. Thailand also wished to reiterate that, should the Philippines, for whatever reason, take the position that the rules contained in the Sequencing Understanding were no longer applicable, this would release Thailand of its commitment to not object to the Philippines' request as being outside the 30-day deadline under Article 22.6 of the DSU. According to this provision, any request for suspension of concessions had to be authorized by the DSB "within 30 days of the expiry of the reasonable period of time". As the reasonable period of time in this dispute had expired on 15 May 2012, the deadline under Article 22.6 of the DSU for authorizing the suspension of concessions had expired on 15 June 2012.

11.9. Thailand noted that the Philippines had indicated that, according to the sequencing understanding, the parties were under an obligation to find a prompt solution regarding any "procedural aspect" that arose concerning the procedures established in that understanding. Thailand disagreed with the Philippines' position that the Appellate Body's suspension of its work in both appeals constituted a "procedural aspect" of the sequencing understanding. Rather, as the Philippines had previously acknowledged, for example in its communication contained in document WT/DS371/32 dated 12 February 2020, the Appellate Body had suspended its work due to "institutional constraints" as a result of an insufficient number of Appellate Body members. Thailand had supported, and continued to support, efforts to resolve these institutional constraints and encouraged all WTO Members, including the Philippines, to do likewise. As Members knew, the real issue was the Appellate Body crisis, not any individual dispute. The Appellate Body crisis had imposed significant challenges on the rules-based system, including with respect to all pending appeals. The Philippines' previous request for suspension of concessions underlined the urgency of resolving the problems affecting the Appellate Body as a matter of priority so as to avoid unilateral actions that were contrary to Article 23 of the DSU. As Thailand would discuss under Agenda item 15 of the present meeting, Thailand fully supported the Appellate Body process and urged Members to move ahead with the AB selection processes. As indicated during previous exchanges with the Philippines, Thailand remained open to a bilateral dialogue with the aim of identifying a possible solution to the substantive issues in this WTO dispute that was mutually acceptable to both parties.

11.10. The DSB took note of the statement made by Thailand.

11.11. The representative of the European Union said that this dispute illustrated the disruptive effects of the paralysis of the Appellate Body on the functioning of the WTO dispute settlement system and on the rights of parties in disputes. On the one hand, the Philippines was entitled, under the DSU, to a binding resolution of the dispute and it was also entitled to ultimately suspend concessions or other obligations if the inconsistency persisted. On the other hand, Thailand was

entitled, under the DSU, to an appeal review of the compliance panel report. In these extraordinary circumstances, the EU called on the parties to seek an agreed solution that would preserve the above rights for both parties in a balanced manner. The EU wished to point out that the parties could decide to submit the suspended appeal for completion under an appeal arbitration procedure pursuant to Article 25 of the DSU. Such an appeal arbitration procedure could replicate all substantive and procedural aspects of appellate review. The EU trusted that Chairman could assist the parties in reaching such a solution.

11.12. The DSB took note of the statement.

12 UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

A. Recourse to Article 22.2 of the DSU by Canada (WT/DS505/13)

12.1. The Chairman drew attention to the communication from Canada contained in document WT/DS505/13 and invited the representative of Canada to speak.

12.2. The representative of Canada said that further to the adoption of the Panel and Appellate Body reports in Canada's favour, Canada was requesting authorization under Article 22.2 of the DSU to suspend concessions in this dispute. Canada was making such a request in view of the US failure to inform the DSB of its intention in respect of the implementation of the recommendations and rulings of the DSB, or to propose a reasonable period of time to comply. Canada acknowledged that the United States objected to the level of suspension proposed by Canada and that the matter was, therefore, referred to arbitration under Article 22.6 of the DSU. Canada would welcome it if this arbitration were to be carried out by the original Panel, as provided for in Article 22.6 of the DSU.

12.3. The representative of the United States said that on 18 June 2020, Canada had filed a request that the DSB authorize Canada to suspend concessions because it considered that the United States had failed to comply with the recommendations of the DSB. The United States objected to the premise of Canada's request, which was that the DSB had adopted recommendations in this dispute on 5 March 2020. As the United States would explain again, the position of the United States was that no DSB recommendation had been or could be adopted because there had been no valid Appellate Body report, and there had been no consensus for the DSB to adopt the reports. The United States had also repeatedly expressed concern that Canada continued to pursue a dispute that had no real-world effect on Canadian exporters – a fact conceded by Canada in its recent request. Canada's request asked for authorization based on speculation – that is, related to an alleged nullification or impairment that occurred "*if* the 'ongoing conduct' continues to exist and [*if* it] applies to exports from Canada *in the future*". Canada was unable to even assert that it suffered from any nullification or impairment *today* because the alleged conduct was *not* applied to any Canadian good. Only one determination in this dispute had involved Canada – *Supercalendered Paper* – and that countervailing duty order had been revoked two years ago. Therefore, Canada suffered no nullification or impairment from the alleged measure, nor could it say that the alleged measure continued to exist, nor that Canada *will* suffer nullification or impairment in the future. Nevertheless – and without prejudice to the US position that no recommendations had been adopted by the DSB – by letter dated 26 June 2020, the United States had also objected to the level of suspension of concessions or other obligations proposed by Canada. Under Article 22.6 of the DSU, the filing of the objection by the United States automatically resulted in the matter being referred to arbitration. Article 22.6 did not refer to any decision by the DSB, and no decision was therefore required or possible. Consequently, because of the US objection under Article 22.6, the matter already had been referred to arbitration. Although unnecessary, the DSB could take note of that fact and confirm that it could not therefore consider Canada's request for authorization.

12.4. The United States recalled that at the 5 March 2020 DSB meeting, the United States had not joined a consensus to adopt the reports put forward. There were multiple reasons why the appellate document was not a valid Appellate Body report under Article 17 of the DSU. First, the DSB had taken no action to permit two ex-AB members to continue to serve after their terms had expired; second, the report had not been issued within 90 days, as required by Article 17.5; and third, one person serving was affiliated with the Government of China, and therefore was not a valid member of the Appellate Body under Article 17.3.[38] Indeed, separate from this dispute, on 31 January 2020,

[38] See US Statement at the 5 March 2020, DSB Meeting (Agenda Item 8).

the United States had informed the WTO Director-General and the DSB Chair by letter of discovered information that disqualified a Chinese national, Ms Zhao, from the Appellate Body. At the 5 March 2020 DSB meeting, the United States had detailed for Members the evidence demonstrating that Ms Zhao was not "unaffiliated with any government". No information had been presented, either before, during, or after the 5 March 2020 DSB meeting that contradicted that evidence. Because of Ms Zhao's affiliation with the Government of China, the appellate document was not a valid Appellate Body report because it had not been provided and circulated on behalf of three Appellate Body members, as required under Article 17.1 of the DSU.

12.5. The United States said that at the 5 March 2020 DSB meeting, Canada had agreed that the allegations of Ms Zhao's lack of independence were serious and had stated that they deserved full and impartial consideration. Canada had asserted that the Rules of Conduct addressed such situations. The United States agreed with Canada's apparent concern that Ms Zhao's participation in the appeal could also be inconsistent with the Rules of Conduct. The procedures under the Rules of Conduct for the Appellate Body itself to conduct an inquiry were not available in current circumstances. However, this did not mean that no inquiry could be conducted. To the contrary, in general the Rules provided for the DSB Chair or the Director-General to conduct the relevant inquiry. The DSB Chair and Director-General would be natural leaders of such an inquiry given their roles in the WTO dispute settlement system and the trust Members reposed in them. The United States noted that the conduct at issue also would have constituted a breach of the obligation in Article 17.3 of the DSU to avoid a direct or indirect conflict of interest.[39] Ms Zhao was demonstrably connected with the Chinese Government, which had a direct interest in this appeal as the "ongoing conduct" complained of related almost exclusively to China.[40] This reinforced the importance of an alternative form of ethical inquiry. Therefore, given Canada's acknowledgement of serious issues of independence and impartiality, the United States would support an alternative inquiry under the Rules of Conduct. Even aside from the fact that Ms Zhao was not a valid Appellate Body member under Article 17.3 of the DSU, such an inquiry would confirm her disqualification from serving on the appeal.

12.6. The representative of Canada said that the DSB had adopted the panel report and the report of the Appellate Body in this dispute at its meeting on 5 March 2020. This fact was unquestionable and was reflected in the minutes of the DSB meeting for that date. This was consistent with Article 17.14 of the DSU, which provided that Appellate Body reports "shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report". The United States had argued that Canada's request for the suspension of concessions was not asking for a specific amount of concessions to be suspended: Canada's request for authorization to suspend concessions related to "ongoing conduct" by the United States that was not currently being applied to Canada, and would relate to future US investigations or administrative reviews of Canadian goods. Canada was therefore not asking for the suspension of concessions for a specific amount at this time. Canada's request sought the authorization to suspend concessions or other obligations at an annual level commensurate with the trade effects of any future countervailing duties on Canadian imports of any given goods that were attributable to the US "ongoing conduct" that had been found to be WTO-inconsistent "as such" in this dispute. Canada's request was based on a formula to ensure that retaliation could be exercised only if and when the United States applied its WTO-inconsistent ongoing conduct to imports from Canada in the future. This approach had been applied by the Arbitrator in the "US – Washing Machines" dispute (DS464), for a measure found to be "as such" inconsistent with WTO law.

12.7. Canada reiterated that the fact that an Appellate Body report had been circulated after 90 days did not modify its character as a valid Appellate Body report subject to the negative consensus rule for its adoption by the DSB. This was confirmed by previous DSB practice. In this particular dispute, Canada noted that the three Appellate Body members who had signed the report had done so within their term, on 10 December 2019. Without taking a position on the merits of the allegations concerning Appellate Body member Zhao, any concerns that the United States might have regarding her impartiality and independence could be raised by the United States through the

[39] See Article 17.3 of the DSU ("[t]hey [persons serving on the Appellate Body] shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest").

[40] See United States – Countervailing Measures on Supercalendered Paper from Canada (Panel), WT/DS505/R, para. 7.295 and Tables 1-4 (seven of nine proceedings involving China).

appropriate mechanism. That mechanism was provided for under the Rules of Conduct of the DSU, and it required that formal allegations be addressed by the Appellate Body.

12.8. The representative of China said that undoubtedly, the DSB had adopted the Appellate Body report in this dispute by negative consensus on 5 March 2020. To suggest otherwise was contrary to the facts and lacked any legal support from the DSU. As China had explained in detail at the 5 March 2020 DSB meeting, Dr Zhao Hong met all requirements, including independence, for being an Appellate Body member since day one of taking office. Dr Zhao had undergone a vigorous selection process with full disclosure of her employment history and had been appointed unanimously by the entire Membership in 2016. She was not affiliated with the Government of China and her continued involvement with the Chinese Academy of International Trade and Economic Cooperation (CAITEC) did not jeopardize the independence required for being an Appellate Body member. Regrettably, while Dr Zhao's situation remained the same, the interests of the United States varied. It was worth noting that prior to this dispute, no WTO Member including the United States had ever questioned her independence and impartiality. Moreover, at the 11 January 2019 DSB meeting, the United States had welcomed the adoption by the DSB of the Appellate Body report regarding compliance proceedings in the "US — Tuna II (Mexico)" dispute (DS381) which had ruled in the favour of the United States. The United States had not raised any concern over Dr Zhao who had sat in the division that had heard the appeal in that dispute. China was extremely disappointed with the continuing false US accusations against the independence of the last remaining Appellate Body member. Such reckless conduct lacked factual support and violated basic due process requirements. China strongly urged the United States to stop such dangerous behaviour. Members expected more positive contributions from the United States to safeguard and further strengthen the rules-based multilateral trading system.

12.9. The representative of the European Union said that his delegation wished to refer to its position expressed at the 5 March 2020 DSB meeting on this issue. In particular, the European Union wished to underline that there was not a shadow of a doubt that the report was a report of the Appellate Body and that it had been adopted in accordance with the rules applicable for the adoption of Appellate Body reports under Article 17.14 of the DSU, i.e., by negative consensus – just as had been the case for all other Appellate Body reports. The EU recalled that the rules and procedures of the DSU excluded the right of any particular WTO Member to block the adoption of panel or Appellate Body reports. This was a central feature of the DSU, and a major difference with the dispute settlement mechanism that had operated under the GATT 1947. Article 17.14 of the DSU was clear: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report […]". The EU also wished to point out, once again, that the Rules of Conduct provided for a procedure to be followed by the parties to disputes if they had evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which might impair the integrity, impartiality or confidentiality of the dispute settlement mechanism. If this occurred, the parties, at the earliest possible time and on a confidential basis, had to submit such evidence to the standing Appellate Body. It shall be for the standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard. The EU was not aware of whether such procedure had been followed in this instance. Therefore, under the applicable rules, the EU saw no reason to question the validity of the Appellate Body report for the purposes of the adoption procedure under Article 17.14 of the DSU. The EU wished to assert that in this dispute and in view of the request by the United States, the matter had then been referred to arbitration by the DSB pursuant to Article 22.6 DSU automatically or by operation of law (*ipso iure*).

12.10. The representative of Japan said that his country took note of the statement made by the United States regarding Article 17.3 of the DSU and other Members' responses. Japan took no specific position at this point. However, the United States had raised a systemic issue of an extremely serious nature which would call into question the very integrity and impartiality of the dispute settlement system and, as such, would require WTO Members' serious attention. Given the nature and magnitude of the issue raised, Japan would expect that, as a nominating Member, China would provide full explanations on such issues as the relationship between the Chinese government and Ms Zhao. Japan would closely monitor the situation and any development that would follow regarding this matter.

12.11. The representative of Australia said that her country wished to confirm its view that the Appellate Body report in this dispute had been adopted validly under the procedures provided in Article 17.14 of the DSU. Australia also wished to underscore, consistent with its long-standing position, the principle of binding adoption of reports by "negative consensus". Australia considered this principle as fundamental to the security and predictability provided by the WTO dispute settlement system.

12.12. The representative of Mexico said that her country wished to set out its position that during the resumed 5 March 2020 DSB meeting, both the panel and the Appellate Body reports in this dispute had been adopted in accordance with the rules applicable under Articles 16.4 and 17.14 of the DSU, that is, by negative consensus. Article 17.14 of the DSU clearly stated that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties unless the DSB decides by consensus not to adopt the Appellate Body report". During the resumed 5 March 2020 DSB meeting, the DSB had not decided by consensus to not adopt the reports. Therefore, it was clear that both the panel and Appellate body reports had been adopted in accordance with the DSU.

12.13. The representative of the United States said that Canada asserted that the appellate report had to have been adopted by negative consensus. But it was evident that not any document issued with the title "Report of the Appellate Body" was such a document. For example, if such a document were signed by three members of the Appellate Body Secretariat, no one would seriously argue the report had to be adopted by the DSB by negative consensus. That was because the alleged "Report" would not be consistent with DSU Article 17, which required an appeal to be decided by three Appellate Body members.[41] In this dispute, the facts had not been seriously contested. First, the DSB had taken no action to permit two ex AB members to continue to serve after their terms expired; this was evident from the fact that no such decision had ever been proposed to the DSB. Second, the report had not been issued within 90 days, as required by Article 17.5; this too had not been contested. Third, one Appellate Body member was affiliated with the Government of China; as the United States had pointed out, the evidence of affiliation brought forward by the United States had not been directly contested. Therefore, this affiliated person was not a valid member of the Appellate Body under Article 17.3. Given that there had been no valid Appellate Body report before the DSB, the document could not have been adopted by negative consensus under Article 17.14, as that rule did not attach to this document. Therefore, the DSB could only adopt the document by positive consensus. The United States had made clear at the 5 March 2020 DSB meeting that it objected to and did not join a consensus on adoption. As there had been no consensus for adoption, the DSB had not adopted any report in this dispute. Accordingly, there was no recommendation for the United States to bring a measure into conformity with a covered agreement.

12.14. Regarding Canada's comments concerning application of the Rules of Conduct, the United States noted that the Rules of Conduct had been agreed by Members in order to help preserve the integrity and impartiality of the WTO dispute settlement system. That did not mean that the Rules were all that was necessary to do so. Rather, first and foremost, it was for WTO Members, and all participants in the system, to take responsibility for safeguarding that system. When Canada said only the Appellate Body could apply the obligations of impartiality and independence to a person serving on an appeal, and therefore the Rules could not currently be applied, Canada would actually be using the Rules to undermine the integrity and impartiality of the WTO. If there were valid ethical concerns with the service by a person in an appeal, they should be investigated. It would be thoroughly inconsistent with US experience and its close relationship with Canada to see it defend the behaviour of the Chinese Government official in this dispute. And there was no question that Ms Zhao's professional connections with the Government of China raised serious concerns. For instance, given Ms Zhao's professional connections with the Government of China, her participation in the appeal was not consistent with the obligations to be "independent and impartial" and "avoid direct or indirect conflicts of interest", provided for in paragraph II:1 of the Rules of Conduct.[42] Therefore, the United States looked forward to further conversations with Canada to find a shared approach through which they could maintain the integrity and impartiality of WTO dispute settlement.

[41] Article 17.1 of the DSU ("[t]he Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case").

[42] Rules of Conduct, Section II ("Governing Principle"), para. 1 ("[e]ach person covered by these Rules … shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest ... so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved").

12.15. The United States noted that at the 5 March 2020 DSB meeting and again at the present meeting, China had responded to the evidence explained by the United States. Importantly, and revealingly, China had not denied the following: Ms Zhao served as Vice President of MOFCOM AITEC; Ms Zhao received or had received a salary for her position of Vice President; MOFCOM AITEC was an "affiliated" entity "subordinate" to MOFCOM; MOFCOM AITEC's budget was part of MOFCOM's budget, such that the salary for Ms. Zhao's Vice President position at MOFCOM-AITEC was funded by the Government of the People's Republic of China. The fact that China had not denied these statements or asserted that they were incorrect only confirmed that Ms Zhao was affiliated with the Government of China and was therefore not a valid member of the Appellate Body.

12.16. The representative of China said that his country was surprised that the United States had repeatedly raised this issue again and again. His delegation wished to avoid repeating all the points of China's statements made at the 5 March 2020 DSB meeting. However, China noted that it had refuted and rejected all points raised by the United States. Dr Zhao Hong was not affiliated with the Chinese government. And the Chinese Academy of International Trade and Economic Cooperation (CAITEC) was not part of MOFCOM (the Ministry of Commerce of China). It was an independent think tank. Therefore, Ms Zhao was not affiliated with the Chinese government. Again, China wished to emphasize that it could not accept the inquiries from the United States at the present meeting. China noted that some other Members had also pointed out that accusations from the United States had already violated various WTO rules, including the Rules of Conduct. Also, it was the United States who blocked the AB selection processes. Therefore, the United States should bear all liabilities of the current paralysis of the Appellate Body. China urged the United States to stop such behaviour and take steps to contribute to and safeguard the multilateral trading system.

12.17. The DSB took note of the statements and that the matter raised by the United States in document WT/DS505/14 has been referred to arbitration, as required by Article 22.6 of the DSU.

13 MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU (JOB/DSB/1/ADD.12)

A. Statements by the MPIA Participating Parties

13.1. The Chairman said that this item was on the Agenda of the present meeting at the joint request of: Australia; Brazil; Canada; Chile; China; Colombia; Costa Rica; Ecuador; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Singapore; Switzerland; Ukraine; and Uruguay. He then invited delegations who wished to make statements under this Agenda item to speak.

13.2. The representative of the European Union said that the EU would make a statement on behalf of the 21 Members referred to by the Chairman. The EU said that since December 2019, the Appellate Body had been unable to function, due to an insufficient number of its members. Against this backdrop, on 30 April 2020, a group of Members had communicated to the DSB the Multi-Party Interim Appeal Arbitration Arrangement, pursuant to Article 25 of the DSU (known as the MPIA). Thus far, 21 Members had endorsed this arrangement. With the communication of the MPIA on 30 April 2020, and with this statement, the Members participating in the MPIA wished to ensure maximum clarity and transparency towards the rest of the Membership as to how, in the very specific situation where the Appellate Body was unable to function, MPIA participating Members intended to deal with disputes among themselves. As its full name confirmed, the MPIA was an interim arrangement, designed to remain in place only until a lasting improvement to the Appellate Body situation was found. The MPIA was not meant to "reform" the dispute settlement process. This interim arrangement was intended to operate within the WTO framework, on the basis of Article 25 of the DSU. Article 25 of the DSU required parties envisaging "arbitration within the WTO" to "agree on the procedures to be followed". The MPIA was in essence a political commitment to conclude appeal arbitration agreements in accordance with Article 25 of the DSU in disputes among participating Members. The MPIA would be put into practice in specific disputes through individual arbitration agreements based on the model contained in the communication of 30 April 2020. Procedures under these agreements were based on those of appellate review, as agreed to by all WTO Members in Article 17 of the DSU. The intention was to preserve, in disputes among Members participating in the MPIA, a functioning and two-step dispute settlement process, as envisaged by the DSU. This ensured that a positive solution could be secured in such disputes in line with Article 3.7 of the DSU.

13.3. The EU noted that, consequently, the main features of the MPIA were as follows. The MPIA applied to all disputes between participating Members, except those where the interim panel report had already been issued by the date of the MPIA communication or by the date of its endorsement by a new participant. However, this did not preclude Members from resorting to the model arbitration agreement for more advanced disputes. Participants undertook to conclude an arbitration agreement and to notify it pursuant to Article 25.2 of the DSU within a specified time limit. Panel proceedings took place as usual. Towards the very end of the panel proceeding, any party could request the suspension of the panel proceedings, with a view to submitting the final panel report to appeal arbitration under Article 25 of the DSU. If neither party appealed under this appeal arbitration procedure, the panel report was circulated and adopted by the DSB in the usual way. In particular, the parties agreed not to appeal before the non-operational Appellate Body. Therefore, the MPIA also preserved the possibility of a binding resolution of disputes at the panel stage, if no party chose to appeal under the MPIA. If there was an appeal under Article 25 of the DSU, the task of appeal arbitrators would be to review issues of law raised by the parties concerning the panel report. Arbitrators could only address the issues necessary to resolve the dispute. Reflecting Article 3.2 of the DSU, and as reaffirmed in the MPIA, arbitration awards "cannot add to or diminish the rights and obligations provided in the covered agreements". Appeals covered by the MPIA would be dealt with by three arbitrators selected randomly from a pool of 10 standing arbitrators. The pool of arbitrators would be made up of persons of recognized authority and demonstrated expertise. The participating Members were currently in the process of establishing this pool, with a view to ensuring that it comprised only persons of the highest calibre. The arbitration award would be final and binding on the parties. In accordance with Article 25 of the DSU, Articles 21 and 22 of the DSU would apply to arbitration awards, which were to be notified to the DSB. Third parties, irrespective of whether they had endorsed the MPIA, would be able to participate in appellate proceedings under the MPIA to the same extent as they currently could. To a large extent, arbitration in cases covered by the MPIA were governed, with any necessary adjustment for context, by the provisions of the DSU and other rules and procedures applicable to appellate review under the DSU. The MPIA arbitration agreement kept the core features of appellate review, including independence and impartiality. At the same time, the model MPIA arbitration agreement contained some procedural innovations that were intended to enhance the procedural efficiency of the proceedings in the specific context of arbitration under Article 25 of the DSU.

13.4. The EU said that after this general introduction to the MPIA, the EU wished to reiterate that its clear priority was to find a lasting improvement to the WTO Appellate Body situation. The EU remained fully committed to working with the entire WTO Membership to achieve this. The EU believed that a properly functioning WTO dispute settlement system was of crucial importance for rules-based international trade, and that an impartial appeal stage had to continue to be one of its essential features. In the meantime, it was the wish of Participating Members, and also their obligation *vis-à-vis* their respective constituents, to preserve their WTO rights on an interim basis through such an arrangement. The MPIA intended to achieve no more and no less than this. It did not reduce the rights of, nor create new obligations for, non-participating Members. The MPIA allowed participating Members to preserve both their right to an appeal review of panel reports and their right to a binding positive solution to disputes through adjudication in accordance with the DSU. The very existence of the MPIA reinforced the stability of the rules-based trading system. As already mentioned, the MPIA was put into practice in specific disputes through arbitration agreements pursuant to Article 25 of the DSU. Proceedings under such agreements fell to be supported by the WTO Secretariat and financed from the WTO budget, as any other dispute settlement proceedings in accordance with the DSU were. It was for the WTO Director-General to decide how to organize support for arbitration procedures under Article 25 of the DSU. The Members participating in the MPIA envisaged in this regard a separation from the support provided to the work of panels in order to ensure impartiality and avoid potential conflicts of interest in individual appeal cases. Openness and inclusion were important aspects of the MPIA. It provided that any Member could join at any time, by notification to the DSB that it endorsed the MPIA communication. Even more importantly, the EU urged all Members to work together, with energy and commitment, to achieve an improvement to the Appellate Body system and to launch the AB selection processes as soon as possible, so that the contingency measure that was the MPIA would soon be no longer required.

13.5. The representative of China said that his country supported the statement made by the EU on behalf of all MPIA participating Members. China wished to make several additional points in order to further clarify the intent, nature and operation of the MPIA. First, China wished to clarify that the MPIA had been initiated by the EU. Twenty other WTO Members, including China, had shared the

EU's views, had joined the initiative, had participated in the negotiations and had endorsed the arrangement. Those WTO Members accepted, appreciated and supported the EU's leadership. Whether a Member participated in the MPIA or not, it should respect the EU's MPIA initiative. Any expression about the composition of the MPIA, which put any other Member's name side by side with the EU was not correct. Second, participants envisaged that the MPIA would promote consistency and coherence in the interpretation of the covered agreements so as to enhance public confidence in the dispute settlement system and to provide security and predictability to the multilateral trading system. However, this did not mean there was precedent in the MPIA. The MPIA could not add to nor diminish the rights and obligations provided for in the covered agreements. Third, Article 25.2 of the DSU granted Members broad discretion in deciding arbitration procedures for disputes among themselves. By establishing the MPIA procedures based on appellate procedures and practices, participants had exercised such discretion which only applied to disputes among themselves and would in no way impact any non-participant. The MPIA reflected a collective dedication to ensure a two-tier, independent and impartial dispute settlement system. China expected that the MPIA would serve its limited, but unique purpose during the unprecedented crisis of the Appellate Body. China welcomed more Members to join this mechanism.

13.6. The representative of Hong Kong, China said that his delegation fully endorsed the communication by MPIA participants contained in document JOB/DSB/1/Add.12 circulated on 30 April 2020 and the joint statement made by the EU on behalf of all MPIA participants under this Agenda item. The joint statement and the communication highlighted participating Members' commitment to preserving a functioning dispute settlement system in the WTO with binding decisions, as well as independent and impartial appellate reviews where necessary. The current crisis in the Appellate Body was a significant challenge that all WTO Members faced. While Hong Kong, China was committed to working with other Members to find a long-term solution as a matter of priority, an interim arrangement that was consistent with the provisions in the DSU was necessary to preserve the rights and obligations of WTO Members and to enable the continued operation of their rules-based multilateral trading system. The joint statement delivered by the EU had outlined the main features of the MPIA and had noted that the MPIA was developed on the basis of Article 25 of the DSU which provided for the use of arbitration within the WTO as an alternative means of dispute settlement. The MPIA itself was a contingency measure. It did not aim to replace the Appellate Body nor would it prejudice Members' positions in their future discussions to resolve the Appellate Body crisis. Hong Kong, China encouraged other WTO Members who endorsed the principles set out in the MPIA to consider joining this interim arrangement. The more participants joined the MPIA, the more useful this interim arrangement would be in preserving the dispute settlement pillar of the WTO, and in demonstrating the Member's commitment to ensuring certainty and stability in the rules-based multilateral trading system.

13.7. The representative of Guatemala said that his country was one of the participating Members in the MPIA, pursuant to Article 25 of the DSU. Guatemala wished to thank the EU for its statement made on behalf of the participating Members under this Agenda item. Guatemala considered it important to highlight various aspects of the MPIA. Guatemala said that the MPIA, with its advantages and its limitations, had the merit of being the result of the cooperation and pragmatism of its participating Members that valued and defended a rules-based multilateral trading system. The MPIA had been made possible thanks to the political will and flexibility of its negotiating parties. This was an excellent example of the Members' ability to conclude mutually beneficial agreements when they shared the same objective. Moreover, it was worth noting that the participating Members formed a very diverse group and included developing countries, developed countries, Members with varying legal traditions, Members that were frequent users of the dispute settlement system and also infrequent users and non-users thereof. Notwithstanding this diversity, it had been demonstrated that with political will and flexibility, it was possible to reach understandings and agreements in a very short period of time. Guatemala considered that with the same political will and flexibility, Members should be able to find a solution to the Appellate Body impasse very quickly. As had already been mentioned at the present meeting, the MPIA was open to all Members. Adhering to the MPIA was extremely simple. This instrument was not reserved only to the users of the dispute settlement system. On the contrary, the MPIA aimed at preserving the fundamental characteristics on which the multilateral rules-based system rested. Members had a shared responsibility in preserving these characteristics. It was also necessary to underline that the negotiation of, adherence to and the subsequent operationalization of the MPIA rested on good faith principles. Therefore, the decision to adhere to the MPIA should not be a tactical one nor should it take into consideration the existence of ongoing or potential disputes. Guatemala wished to reiterate its

ongoing commitment to finding solutions that would allow for the prompt re-establishment of the Appellate Body.

13.8. The representative of Japan said that his country took note of the statement made by the MPIA participating Members. Japan shared the sense of urgency towards an expeditious reform of the WTO dispute settlement system. Japan appreciated the effort made by the EU and other MPIA participating Members. Japan's priority remained to reform the WTO dispute settlement system in a manner that would serve to achieve a long-lasting solution to the Appellate Body matter. Japan recognized the need for a stopgap measure to secure a positive and prompt solution to pending disputes. The MPIA was relevant in that context. However, any attempt to adopt measures of a provisional nature had to serve the ultimate purpose of finding a long-lasting solution to the Appellate Body matter. Japan had not participated in the MPIA because it was not certain if this arrangement served that ultimate purpose. In this regard, Japan considered it necessary that Members pay close attention to the actual operation of the MPIA. As an arrangement within the multilateral system, the MPIA should be implemented in a fair and transparent manner and should be consistent with the relevant WTO rules, including financial regulations. Article 25 of the DSU, which the MPIA relied on, provides for *ad hoc* arbitration procedures as an alternative means of dispute settlement. It was Japan's position that it would observe, in this respect, whether the MPIA would entrust the Secretariat with the operational work within what Article 25 of the DSU intended in relation to the Secretariat. If necessary, Japan would present its views at an appropriate time within this Organization. Japan would request that the MPIA participants ensure full transparency, including regarding their use of WTO resources, toward the entire WTO Membership.

13.9. The representative of South Africa said that her delegation wished to thank the proponents for their statement explaining the communication contained in document JOB/DSB/1/Add.12. South Africa reiterated its support for a two-tier dispute settlement system administered by the DSB under the auspices of the DSU. The priority of the Membership had to be to overcome the impasse in the AB selection processes. The lack of an effective dispute settlement system had serious consequences for future rule-making efforts in the WTO, as the value of the negotiated outcomes depended on the ability of signatories to enforce them. Members had wide flexibility and discretion to settle disputes among themselves, including through arbitration under Article 25 of the DSU. However, Members should note the specific language used in Article 25 of the DSU. It allowed Members to facilitate the solution of certain disputes that concerned issues that were clearly defined by both parties. The use of the wording "certain disputes" should already alert Members that this mechanism was not suitable to solve every kind of dispute between Members. When this provision had been crafted, the intention of Members could not have been to authorize the dispute appeal function or the multilateral oversight function of the DSB to be supplanted by decisions of arbitrators. A clear indication of this thinking was the reference to Articles 21 and 22 of the DSU in sub-paragraph 4 of Article 25. A condition precedent for the operation of these provisions was the existence of the recommendations and rulings of the DSB. From this perspective, the notified MPIA did not provide for multilateral oversight by the DSB. A final and binding arbitral award was merely notified but not adopted by the DSB. South Africa asked the proponents whether they could indicate if this was consistent with the provisions of the DSU and whether it constituted an amendment to the DSU. South Africa maintained that any amendment to the DSU could only be initiated through Article X of the Marrakesh Agreement and required agreement from Members. The uneasiness of South Africa was that the MPIA might become the default system to deal with appeals in the absence of a functioning Appellate Body and might thus become permanent, contrary to its stated objective. While noting the commitment of the participating Members to resolving the Appellate Body impasse, South Africa remained concerned about whether the MPIA would not divert attention from the multilateral process to find a solution to the Appellate Body impasse. Fundamentally, South Africa was concerned about what this meant for the joint proposal contained in document WT/DSB/W/609/Rev.18, supported by the majority of WTO Members, which aimed at launching the AB selection processes as soon as possible to fill the vacancies that existed in the Appellate Body. South Africa believed that the MPIA was yet another plurilateral agreement, which would fragment and disrupt larger multilateral processes and consensus in this Organization.

13.10. South Africa also wished to ask the proponents of the MPIA how they envisaged the unadopted arbitral awards to be treated by WTO Members. Furthermore, it was with interest that South Africa read paragraph 7 of the MPIA communication in which proponents stated the following: "[t]he participating Members envisage that the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable regarding the substance of their work only to appeal arbitrators. The participating Members request the Director

General to ensure the availability of a support structure meeting these criteria". South Africa asked the MPIA proponents whether they could explain the basis for the separate support envisaged, its implications for the broader Membership, as well as indications of additional support not related to the normal budget allocated to dispute settlement. South Africa also found it interesting that the innovations of the MPIA text largely ignored developing-country issues that had been pursued under the DSB Special Session. South Africa asked the MPIA proponents whether they could explain why no provision had been made for special and differential treatment. In conclusion, South Africa was assessing the implications of the MPIA in relation to: (i) its impact on the dispute settlement system and the possible fragmentation of the system; (ii) the rights and obligations of Members under the DSU; (iii) what this meant for the long-standing concerns raised by the African Group in relation to representation, cost and accessibility; (iv) the impact of arbitral awards on the broader Membership in view of the lack of multilateral oversight; and (v) whether the MPIA did not inadvertently expose developing countries in particular to power dynamics in the resolution of trade disputes which could result in second-best outcomes, including unauthorized retaliation.

13.11. The representative of the United States said that the United States did not object to WTO Members utilizing Article 25 or other informal procedures to help resolve disputes. Indeed, the United States had had discussions with a number of Members regarding alternatives to the traditional WTO dispute settlement system. In agreeing to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), WTO Members had explicitly set out the purpose of WTO dispute settlement: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute".[43] If any Member considered that use of the arbitration provision in Article 25 might assist it in securing such a positive solution, the United States in principle supported such efforts. The United States objected, however, to any arrangement that would perpetuate the failings of the Appellate Body, which the United States had catalogued in detail.[44] The arrangement that Members were discussing under this Agenda item incorporated and exacerbated some of the worst aspects of the Appellate Body's practices. For example, the arrangement weakened the mandatory deadline for appellate reports; contemplated appellate review of panel findings of fact; and failed to reflect the limitation on appellate review to those findings that would assist the DSB in recommending to a Member to bring a WTO inconsistent measure into conformity with WTO rules. The arrangement also promoted the use of precedent by identifying "consistency" (regardless of correctness) as a guiding principle for decisions. The phrase "consistency and coherence in decision-making" did not appear anywhere in the DSU, but the arrangement made such "consistency and coherence" in decision making an explicit objective for different arbitrators in different disputes and then proposed procedures to facilitate this objective. Arbitrators were thus encouraged to create a body of law through litigation, rather than to focus on assisting the parties in securing a positive solution to a dispute. The numerous departures from the DSU highlighted that at least some Members preferred an appellate "court" with expansive powers, instead of the more narrow appellate review envisioned by Members in the DSU. In addition, through the selection process, the arrangement sought to imbue itself with WTO authority, which it did not have. The introduction of a comprehensive set of documents to deal with perhaps two or three disputes over the next few years suggested that the real goal of the arrangement for some participants was not to help the participants resolve disputes but to create an ersatz Appellate Body that would serve as a model for any future WTO Appellate Body.[45] In sum, rather than work towards meaningful reform, some Members had re directed the focus and energies of the Membership to pursue an arrangement that would, at best, perpetuate the failings of the Appellate Body. The United States did not support such an effort and did not view it as contributing to reform of the dispute settlement system so that it supported the WTO's critical negotiating and monitoring functions and did not undermine those functions by overreaching and gap filling.

13.12. The DSB took note of the statements.

[43] Article 3.7 of the DSU.

[44] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf; Statement by the United States Concerning Matters Related to the Functioning of the Appellate Body, Meeting of the General Council on December 9 2019, available at https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/; Statement by the United States Concerning Appellate Body Appointments, Meeting of the Dispute Settlement Body on June 24, 2019, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun24.DSB_.Stmt_.as-deliv.fin_.public.pdf.

[45] Since 2015, there have only been four appeals in disputes between participating Members.

14 SYSTEMIC ISSUE OF THE LACK OF REMEDY TO THE BREACH OF CONFIDENTIALITY IN WTO DISPUTE SETTLEMENT PROCEEDINGS

A. Communication from the Kingdom of Saudi Arabia (WT/DSB/COM/9)

14.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the Kingdom of Saudi Arabia. In this regard, he drew attention to document WT/DSB/COM/9 and invited the representative of the Kingdom of Saudi Arabia to speak.

14.2. The representative of the Kingdom of Saudi Arabia said that Saudi Arabia regretted that it had been necessary to place this item on the DSB's Agenda. However, Saudi Arabia believed that in the future, no other WTO Member should be left without a remedy to violations of clear rules in WTO dispute settlement proceedings, especially in a manner that could affect a Member's essential national security interests. Therefore, Saudi Arabia was obliged to bring this matter to the attention of the Membership. Saudi Arabia wished to confirm that it was *not* raising this item in connection with the "Saudi Arabia – Protection of IPR" dispute (DS567) in which the Panel had recently issued its report. In fact, Saudi Arabia was generally pleased with the outcome in that dispute. More particularly, Saudi Arabia welcomed the Panel's complete vindication of its security exception defence under Article 73 of the TRIPS Agreement. Regarding damage incurred by Saudi Arabia out of a breach of confidentiality rules and the lack of a remedy – that issue, unfortunately, amounted to water under the bridge, at least as far as the "Saudi Arabia – Protection of IPR" dispute (DS567) was concerned. However, Saudi Arabia reserved its rights with respect to bringing a separate WTO complaint regarding the violation of confidentiality rules. As context for this Agenda item, Saudi Arabia wished to provide background information on the real dispute between Saudi Arabia and Qatar.

14.3. For several years, a sensitive national security situation had existed between several WTO Members, including Saudi Arabia, and Qatar. Since June 2017, Saudi Arabia and other Members had severed all diplomatic and consular relations with Qatar in response to Qatar's continuing support for terrorism and extremism. In the "Saudi Arabia – Protection of IPR" dispute (DS567), the Panel had explicitly agreed with Saudi Arabia that a Member's severance of all relations with another Member could be regarded as "the ultimate State expression of the existence of an emergency in international relations".[46] For Saudi Arabia, as for other WTO Members, nothing mattered more than the safety and security of its territory and its people. Protecting Saudi Arabia's national security had been the main goal that had mattered in this dispute. Indeed, Saudi Arabia had stated on the first page of its first written submission to the Panel: "[t]he severance of relations between the two countries and the publicly-stated reasons for the measures of Saudi Arabia constitute the only relevant facts in this dispute".

14.4. In its Report, the Panel had ruled that: "Saudi Arabia's severance of all diplomatic, consular and economic ties with Qatar, viewed in the context of similar actions taken by several other nations and the relevant history recounted in this Report, falls into the category of cases in which such action can be characterized in terms of an exceptional and serious crisis in the relations between two or more States".[47] Qatar had continued to deny the seriousness of its support for terrorism and extremism. However, in this case, the Panel had rejected Qatar's attempts to down-play the seriousness of the situation, ruling that: "in the light of the reasons advanced by Saudi Arabia for its actions, the Panel does not accept Qatar's view that the events culminating in the severance of relations can be characterized as a 'mere political or economic' dispute".[48] Of direct relevance to the discussion under this Agenda item, the Panel had states, in paragraph 7.268 of its Report: "[t]he Panel has found, on the basis of the facts in this dispute, that an 'emergency in international relations' exists in this case". Based on the prevailing emergency in international relations, the Panel had found that Saudi Arabia's invocation of the security exception under Article 73 of the TRIPS Agreement in the dispute had been justified. Saudi Arabia noted that, should Members be interested in reading the full background to the real dispute, the Executive Summary of Saudi Arabia's submissions, attached to the Panel Report, was dedicated to the defence of its national security interests. Paragraphs 1 through 48 provided details of the national security situation that had been

[46] Panel Report, Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights, WT/DS/567/R (16 June 2020) ("Panel Report"), para. 7.259.
[47] Panel Report, para. 7.262.
[48] Panel Report, para. 7.263.

summarized at the present meeting, and paragraphs 49 through 93 provided information in response to questions from the Panel on Saudi Arabia's good faith invocation of the security exception.

14.5. Saudi Arabia wished to review, for purposes of this item, the points that were set out in document WT/DSB/COM/9 dated 16 June 2020. This communication had been circulated on the same date as the date on which the Panel Report in the "Saudi Arabia – Protection of IPR" dispute (DS567) had been circulated and had become public. In short, on 26 May 2020, confidential information regarding the Panel's uncirculated Report had been disclosed and published in violation of the WTO DSU, the Working Procedures of the Panel, and explicit instructions from the Panel that were set out in the cover letter that had accompanied the Report when transmitted to the parties. The breach had included both distorted information and patently false information that had no basis in the Panel Report. Although the published confidential information had falsely represented findings of the Panel, Saudi Arabia had been unable to rebut the false narrative without disclosing the actual findings of the Panel, which would have violated WTO confidentiality rules. The day after the breach of confidentiality had taken place, on 27 May 2020, Saudi Arabia had immediately brought this violation to the attention of the Panel and had requested that the Panel provide a limited exception to the confidentiality rules so as to allow Saudi Arabia to publicly correct the malicious misrepresentation of the Panel's findings. However, the Panel had refused. When the truth did come out with the circulation of the Panel Report on 16 June 2020, the goal of the disclosure had been achieved in the press: the damage had already been done and the news cycle had moved on, having left false first impressions of the ruling that were extremely difficult to correct. Therefore, on 16 June 2020, 21 days – and 21 news cycles – after the breach of confidentiality, Saudi Arabia's communication had been circulated and this issue had transitioned from being dispute-specific to being systemic.

14.6. As a systemic issue, and without reference to a particular case, Saudi Arabia wished to ground this discussion into a systemic context by setting out a factual hypothetical case for the Membership to consider: (i) a geopolitical dispute involving WTO security exceptions was pending, or the Final Report had been released to the parties, and remained subject to DSU confidentiality rules; (ii) confidential information concerning the panel ruling in the dispute had been released to the press in violation of WTO rules; (iii) the facts surrounding the confidentiality breach provided to the panel established that a party had been responsible for the breach based on the applicable evidentiary standard, with direct evidence or on the basis of "inferences and circumstantial evidence"[49]; (iv) hypothetical facts before the Panel could include: the press report at issue confirmed that a specific business association with a publicly-stated interest in the dispute had provided the confidential information; evidence on the record established that the business association's commercial partner was a State-owned enterprise ("SOE") of a Member that was a party to the dispute; the same SOE had attended meetings with the panel in the dispute as part of the official delegation of a Member and had access to confidential information; both the other party and its SOE representatives had made simultaneous false statements to the press that were similar to the false statements in the press report at issue regarding the Panel findings; and (v) unless remedied immediately, i.e., within 24 hours, the confidentiality breach would harm the other Member party to the dispute because of the "24-hour news cycle".

14.7. Saudi Arabia considered that respect for confidentiality was important in all cases but that it was especially crucial in cases concerning national security interests. Therefore, panels should take extra care and attention to review such urgent matters in a national security context. Panels should be encouraged to adopt special and expedited procedures in such cases. Saudi Arabia considered that in such cases panels should exercise their power over the proceedings to allow the injured party to disclose confidential information in order to correct a false narrative with accurate information. Unless such violations were corrected immediately, the news cycle would move on and the false impressions would remain in the public consciousness and would continue to cause injury. The failure to correct such a matter irrevocably prejudiced a Member's legal rights and sent a systemic signal that no remedy existed to a prejudicial breach of binding confidentiality provisions under the WTO Agreements by the WTO Secretariat or by a party to a WTO dispute, including in disputes centred on national security.

14.8. Saudi Arabia strongly believed that this interpretation and outcome was not acceptable to WTO Members. Based on the situation described above, in addition to the apparent lack of effective remedies to such violations, Saudi Arabia's concern about the integrity of the WTO dispute

[49] Panel Report, para. 7.39.

settlement system led it to suggest that a discussion should take place on the issue of confidentiality breaches in WTO dispute settlement. Such discussion should be aimed at encouraging the development of balanced solutions under which panels would allow affected Members to protect their national interests and WTO rights in a timely manner. Such discussion should also be aimed at encouraging panels to hold Members to their obligations and to discourage such violations in order to preserve Members' WTO rights. Saudi Arabia considered that this topic should be addressed in the context of reforming the WTO dispute settlement system. In particular, where responsibility for a confidentiality breach could be ascertained by direct evidence or on the basis of "inferences and circumstantial evidence", Members should confirm that panels had to allow the injured party to disclose limited, accurate information to correct inaccuracies arising from the violation.

14.9. Finally, Saudi Arabia wished to thank the Chairman for his attention to this very serious issue. In light of its severance of diplomatic and consular relations with Qatar, Saudi Arabia wished to refer to the following Panel finding in the "Saudi Arabia – Protection of IPR" dispute (DS567): "[t]he Panel notes that the severance of diplomatic or consular relations has been characterized as 'a unilateral and discretionary act usually decided upon only as a last resort when a severe crisis occurs in the relations between' a sending state and a receiving state. The severance of such relations typically brings about 'the termination of all direct official communication between' the two states". Given "the termination of all direct official communication between" the Kingdom of Saudi Arabia and Qatar, Saudi Arabia had refused to engage directly with Qatar or to respond to its arguments or evidence throughout this dispute. Saudi Arabia would not acknowledge or respond to that country at the present meeting or in any other setting. Although this approach limited Saudi Arabia's ability to defend against Qatar's false claims, Saudi Arabia was unwilling to compromise its national security interests by engaging with such a country under the circumstances. Saudi Arabia remained engaged in bilateral discussions about this important issue and welcomed any idea or collaboration that did not entail Qatar's presence or participation.

14.10. The representative of Qatar said that Saudi Arabia's communication contained in document WT/DSB/COM/9 and its statement made at the present meeting criticized a procedural ruling by the Panel in the "Saudi Arabia – Protection of IPR" dispute (DS567). It also repeated unfounded allegations that Qatar had been the source of information regarding the Panel Report, aspects of which, regrettably, had apparently been disclosed to a UK newspaper before the circulation of the Report. Qatar had responded to these points in a communication circulated as document WT/DS567/6 and dated 26 June 2020. As Qatar had explained in its communication, Saudi Arabia's allegations were unfounded and were not supported by any evidence whatsoever. Once again, Qatar rejected these unfounded allegations. Saudi Arabia had made this same allegation before the Panel. At the present meeting, Saudi Arabia complained that the Panel had provided no remedy in response to its complaint and suggested that the Panel's approach was an example of a "systemic issue". However, the reason that Saudi Arabia had not received a remedy from the Panel had been because it had provided "no information" to the Panel regarding the source of the alleged leak, other than denying that the leak had emanated from Saudi Arabia's own delegation. The Panel had not endorsed Saudi Arabia's unfounded allegation that Qatar had been behind the apparent confidentiality breach. There had simply been no factual basis for the Panel to do otherwise.

14.11. Turning to the systemic issues involved, the starting point of any discussion on this topic was Article 3.10 of the DSU, which envisaged that "all Members will engage in these procedures in good faith in an effort to resolve the dispute". This core principle of WTO dispute settlement covered all stages of a dispute, beginning with the consultations, and lasting all the way up to compliance. WTO panels had the power to ensure the orderly conduct of proceedings before them, which allowed them to grant certain remedies when litigants did not engage in the proceedings in good faith. However, the most important safeguard against Members departing from that obligation was the Members' shared interest in preserving the multilateral dispute settlement system, and the reputational costs for a Member that would depart from those obligations. Qatar was heavily invested in the multilateral trade rules and had always conducted itself in strict adherence to the requirements of the DSU, the procedural rules, and the broader obligations of good faith. The opposite of confidentiality of panel proceedings was transparency of panel reports once circulated. Qatar believed that the obligation of a party to engage in dispute settlement proceedings in good faith, in an effort to resolve a dispute, extended to the manner in which a party characterized a panel report in its public statements. Parties should avoid conduct that could obscure the meaning of a published panel report or that was otherwise misleading. At the very least, parties had to refrain from wilfully making public statements that were manifestly incorrect as to the contents of a panel report.

14.12. In this regard, Qatar was troubled by Saudi Arabia's appropriation of the WTO's name and logo for use in its own publicity material concerning the Panel Report in the "Saudi Arabia — Protection of IPR" dispute (DS567). Qatar considered that the publicity material in question was itself misleading as to the contents of the Panel Report. More importantly, by using the WTO's name and logo at the top of its official communications, Saudi Arabia appeared to be passing off its own erroneous characterizations of the Panel Report as somehow being endorsed by the WTO. Qatar had been forced to raise this matter with the Secretariat, as reflected in the annexes to Qatar's communication of 26 June 2020. Qatar was also concerned with wider attempts by Saudi Arabia to spread misinformation about the Panel's findings. Qatar recalled that the "Saudi Arabia — Protection of IPR" dispute (DS567) had arisen against the backdrop of the worst case of broadcast piracy that the world had ever seen – the cynically-named "beoutQ" which had, for several years, stolen and rebroadcast copyright material owned or licensed to Qatari-based beIN Media Group, as well as from other right holders that included many of the most famous sports leagues and events from around the world. The Panel had found that "beoutQ was operated by individuals or entities subject to the criminal jurisdiction of Saudi Arabia".[50] The Panel had also found that "while taking no action to apply criminal procedures and penalties to beoutQ, Saudi authorities engaged in the *promotion* of public gatherings with screenings of beoutQ's unauthorized broadcasts of 2018 World Cup matches".[51]

14.13. Further to this, and in stark contrast to what had been seen in the public statements by Saudi Arabia – a Member that had imposed coercive and illegal trade measures on Qatar since 5 June 2017 – the Panel in the "Saudi Arabia — Protection of IPR" dispute (DS567) had made it clear in its Report, at paragraph 7.263, that it did not endorse any of the national security related allegations made by Saudi Arabia, stating that: "[t]he Panel expresses or implies no position concerning any of these allegations, and recalls that Qatar strongly denied the various accusations made by Saudi Arabia". Indeed, Qatar had made it very clear to the Panel that Saudi Arabia's allegations against Qatar were entirely baseless. Qatar was aware of reports that Saudi Arabia claimed that it had been "fully vindicated" by the Panel. As the Panel's findings made clear, such claims were inaccurate. The Panel's factual findings had led the Panel to conclude that Saudi Arabia had violated Article 61 of the TRIPS Agreement in a manner that could not be justified by Saudi Arabia's invoking of the "national security" defence. The Panel's rejection of Saudi Arabia's defence was set out at paragraphs 7.293 and 8.1(c)(ii) of the Panel Report. This was the very first time in the WTO's history and its predecessor the GATT that a Member had failed in invoking a national security defence. Saudi Arabia's campaign of unfounded accusations, as well as its mischaracterization of the Panel Report, should neither be welcomed nor entertained at the present meeting. Instead, Saudi Arabia should take full responsibility for the serious violations as highlighted in the Panel Report, adopt immediate remedial action, and, in the closing words of the Panel Report, "bring its measures into conformity with its obligations under the TRIPS Agreement".

14.14. The representative of Turkey said that his country considered confidentiality to be an important pillar of the dispute settlement mechanism and recognized that adherence to this principle was of paramount importance. In fact, confidentiality was one of the twelve issues under negotiations in the DSB Special Session in which there had been extensive discussions on transparency and confidentiality. As Turkey understood from the communication, this specific issue had already been elaborated by the Panel and discussed during the Panel proceedings among the parties. Turkey believed that Members could continue to discuss this item, along with its systemic implications, in the DSB Special Session along with other topics. With regard to the Panel report referred to by the parties, Turkey wished to make the following statement. Turkey found the Panel's ruling on this matter to be of great importance in terms of shedding light on the discussion about the justiciability of obligations raised under security exceptions. The findings of the Panel confirmed that measures brought forth with national security concerns were challengeable. The judgement of the invoking Member was not absolute and was dependent on the existence of certain conditions. Turkey welcomed the fact that the Panel had rightly taken guidance and had exercised its jurisdiction to determine whether the requirements of Article 73 of TRIPS Agreement had been satisfied in this case. Following its analysis, the Panel had arrived at certain conclusions and very important recommendations. This was in line with the spirit of the WTO rulebook which aimed at striking a fine balance between security concerns of Members and an appropriate level of action to address those

[50] DS567 Panel report, paragraph 7.155.
[51] DS567 Panel report, paragraph 7.219.

concerns. In this vein, WTO Members had to continue to respect the rules and to live up to their commitments under the covered agreements.

14.15. The DSB took note of the statements.

15 APPELLATE BODY APPOINTMENTS: PROPOSAL BY AFGHANISTAN; ANGOLA; ARGENTINA; AUSTRALIA; BANGLADESH; BENIN; PLURINATIONAL STATE OF BOLIVIA; BOTSWANA; BRAZIL; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CANADA; CENTRAL AFRICAN REPUBLIC; CHAD; CHILE; CHINA; COLOMBIA; CONGO; COSTA RICA; CÔTE D'IVOIRE; CUBA; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; ESWATINI; THE EUROPEAN UNION; GABON; THE GAMBIA; GHANA; GUATEMALA; GUINEA; GUINEA-BISSAU; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KENYA; REPUBLIC OF KOREA; LESOTHO; LIECHTENSTEIN; MADAGASCAR; MALAWI; MALAYSIA; MALDIVES; MALI; MAURITANIA; MAURITIUS; MEXICO; REPUBLIC OF MOLDOVA; MOROCCO; MOZAMBIQUE; NAMIBIA; NEPAL; NEW ZEALAND; NICARAGUA; NIGER; NIGERIA; NORTH MACEDONIA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; QATAR; RUSSIAN FEDERATION; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SINGAPORE; SOUTH AFRICA; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TANZANIA; THAILAND; TOGO; TUNISIA; TURKEY; UGANDA; UKRAINE; UNITED KINGDOM; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA; VIET NAM; ZAMBIA AND ZIMBABWE (WT/DSB/W/609/REV.18)

15.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of a number of delegations. He drew attention to the proposal contained in document WT/DSB/W/609/Rev.18 and invited the representative of Mexico to speak.

15.2. The representative of Mexico, speaking on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.18, said that the delegations in question had agreed to submit the joint proposal, dated 18 June 2020, to launch the AB selection processes. Mexico welcomed Bangladesh as a new co-sponsor of this proposal. Her delegation, on behalf of 121 Members, wished to make the following statement. The extensive number of Members submitting this joint proposal reflected a common concern with the current situation of the Appellate Body that was seriously affecting its workings and the overall dispute settlement system against the best interest of WTO Members. 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 without further delay, as set out in the joint proposal, which sought to: (i) start six selection processes: one process to replace Mr Ricardo Ramírez-Hernández, whose second term had expired on 30 June 2017; a second process to fill the vacancy that had occurred following 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 had expired on 11 December 2017; a fourth process to replace Mr Shree Baboo Chekitan Servansing, whose four-year term of office had expired on 30 September 2018; a fifth process to replace Mr Ujal Singh Bhatia, whose second term had expired on 10 December 2019; and a sixth process to replace Mr Thomas R. Graham whose second term had expired on 10 December 2019; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issue its recommendation within 60 days after the deadline for nominations of candidates. The proponents were flexible regarding the deadlines for the AB selection processes. However, they believed that Members should consider the urgency of the situation. They continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

15.3. The representative of South Africa said that her country supported the statement made by Mexico. South Africa supported the premise of this proposal and joined other co-sponsors in calling for the launch of the AB selection processes. The reactivation of the Appellate Body was the best guarantee for a two-tier dispute settlement system based on legal certainty and predictability. Therefore, South Africa called on all Members to ensure that they discharged their collective duty to select and appoint Appellate Body members as soon as possible.

15.4. The representative of Thailand said that as a co-sponsor, Thailand supported Mexico's proposal to launch the AB selection processes. Thailand believed that the two-tier binding WTO dispute settlement system was one of the core elements of the WTO. The current inability of the

Appellate Body to function affected the ability of Members to secure a positive solution to their disputes. This would in turn undermine the security and predictability of the multilateral trading system. As one of the Members with pending appeals, Thailand's rights had been impaired as a result of the impasse. Thailand believed that a fully functioning dispute settlement system was imperative to guarantee and preserve the rights and obligations of Members. Moreover, it would also assist Members in resolving their disputes effectively. Thailand strongly encouraged all Members to continue to find a long-term solution to this problem.

15.5. 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, as well as to its statements made at the General Council meetings, including at the 9 December 2019 General Council meeting. Since 11 December 2019, the WTO no longer guaranteed access to a binding, two-tier, independent and impartial resolution of trade disputes. This was in clear breach of the WTO Agreements. As the EU had stated repeatedly, 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 thanked all Members that had co-sponsored the proposal to launch the AB selection processes. The EU invited all other Members to endorse this proposal.

15.6. The representative of the United Kingdom said that his country continued to support this proposal for the launch of the AB selection processes. The United Kingdom wished to refer to its statements made at previous DSB meetings under this Agenda item. The United Kingdom also supported the statement made by Mexico on behalf of all co-sponsors. The United Kingdom was a strong supporter of the WTO dispute settlement system, a central pillar of the rules-based multilateral trading system. An effective and binding dispute settlement mechanism ensured that the rules that Members had negotiated were enforceable, preserving the rights and obligations of all Members. The United Kingdom continued to be concerned that the Membership had not been able to launch the AB selection processes, with the result that the Appellate Body was unable to hear new appeals. The United Kingdom was seeing the concrete impairment of rights, which was arising from the situation. The United Kingdom also wished to reiterate its commitment to finding a resolution to the impasse with the Appellate Body, which carried the support of all Members. The United Kingdom understood the long-standing concerns that had been raised and recognized that in a consensus-based organization like the WTO, any dispute resolution mechanism had to carry the trust of all Members. The United Kingdom stood ready to play a full role in future discussions on dispute settlement reform. However, the United Kingdom also considered that finding a solution should not stand in the way of the continued functioning of the system and the launch of the AB selection processes. Therefore, the United Kingdom called on all Members to act to restore the system to its full functioning while they prioritized discussions on a long-term solution.

15.7. The representative of Japan said that his country wished to refer to its statements made at previous DSB meetings under this Agenda item. Japan supported this proposal. All Members recognized the urgent need for a reform of the WTO dispute settlement system so that it functioned properly in serving the ultimate goal of securing a positive solution to a dispute. Japan's priority had always been and continued to be to find a long-lasting solution to the Appellate Body matter. Simply replicating or duplicating the Appellate Body as Members knew it would be hardly conducive to this ultimate goal. If something believed to be infallible became fallible or indeed was falling apart, those who held such belief could be tempted to preserve such belief and maintain the status quo. This was understandable. However, Members had a choice and an opportunity with regard to this. Japan asked the following questions: When long-held, established and unshakable orthodoxy was shaken and discredited, was this the time for change, a time to be creative, a time to use one's imagination to create a better future unimagined in the past, rather than sticking to the past. Members had entered into a realm of uncertainty, which many Members might not like. However, such uncertainty would provide Members with an opportunity to experiment a variety of means to resolve disputes. This could in turn give Members a tool to rebuild something wonderful: a more viable, accountable and sustainable dispute settlement system that would work to the benefit of all Members in the 21st century. The MPIA that Members had discussed under a previous Agenda item could be considered as part of Members' experimentation should it operate in a forward-looking and transparent manner. Members had established the system, owned the system and administered the system. It was up to Members to bring about a brighter future. With imagination and creativity, Members could build or rebuild a better and more viable WTO dispute settlement system.

15.8. The representative of the United States said that as the United States had explained at prior DSB 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. The US view across multiple US Administrations had been clear and consistent: When the Appellate Body overreached and 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. Earlier in 2020, the Office of the US Trade Representative had published a *Report on the Appellate Body of the World Trade Organization*, detailing how the Appellate Body had failed to apply WTO rules as agreed by WTO Members, imposing new obligations and violating Members' rights.[52] The United States encouraged Members to review the Report. As the United States had explained repeatedly, the fundamental problem was that the Appellate Body had not respected the current, clear language of the DSU. Members could not find meaningful solutions to this problem without understanding how they had arrived at this point. Without an accurate diagnosis, Members could not assess the likely effectiveness of any potential solution. The United States had actively sought engagement from Members on these issues. Yet, some Members had remained unwilling to admit that there was even a problem, much less engage in a deeper discussion of the Appellate Body's failures. And rather than seeking to understand why the Appellate Body had departed from what Members had agreed, these Members and others had incorporated and exacerbated some of the worst aspects of the Appellate Body's practices, as discussed under Agenda Item 13. Nevertheless, the United States was determined to bring about real WTO reform, including to ensure that the WTO dispute settlement system reinforced the WTO's critical negotiating and monitoring functions, and did not undermine those functions by overreaching and gap filling. As discussions among Members continued, the dispute settlement system continued to function. The central objective of that system remained unchanged: to assist the parties to find a solution to their dispute. As before, Members had many methods to resolve a dispute, including through bilateral engagement, alternative dispute procedures, and third party adjudication. Consistent with the aim of the WTO dispute settlement system, the parties should make efforts to find a positive solution to their dispute, and this remained the US preference. And the United States would continue to insist that WTO rules be followed by the WTO dispute settlement system. The United States would continue its efforts and its discussions with Members and with the Chair to seek a solution on these important issues.

15.9. The representative of Korea said that his country wished to welcome Bangladesh as a new cosponsor and supported the statement made by Mexico based on the joint proposal. Korea urged all Members to engage constructively in the relevant discussions to resolve this issue as soon as possible.

15.10. The representative of Brazil said that his country thanked Mexico for its statement made on behalf of the co-sponsors. Brazil wished to be fully associated with that statement. As noted under a previous Agenda item, Brazil stood fully committed to finding a lasting improvement of the appellate stage in the WTO dispute settlement system. Brazil viewed this as a priority for the Organization. Brazil was prepared to engage with all Members in search for a long-lasting solution that could gain the support of the entire Membership.

15.11. The representative of Switzerland said that her country wished to refer to its statements made at previous DSB meetings on this matter. Once again, Switzerland urged all Members to engage constructively in order to solve this impasse without further delay. The restoration of the Appellate Body remained Switzerland's priority. Switzerland welcomed the MPIA, an appeal mechanism of an interim nature, which preserved the two-tier and binding nature of the WTO dispute settlement system. Switzerland believed that it was an important instrument in strengthening the security and predictability of the multilateral trading system in the current context.

15.12. The representative of Norway said that as mentioned under Agenda item 13 regarding the MPIA, some important work had been done in recent months. However, and sadly, the situation remained the same when it came to the appointment of new Appellate Body members. Thus, his country wished to refer to its statements made at previous DSB meetings on this matter and urged the United States to unblock the AB selection processes. One Member was blocking: this was the simple and accurate diagnosis of the problem Members were facing – a diagnosis that had previously

[52] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf.

been asked for at the present meeting. Until the AB selection processes were unblocked, Norway invited all other Members to co-sponsor this Agenda item.

15.13. The representative of New Zealand said that his country wished to reiterate its support for the co-sponsored proposal and to refer to its statements made at previous DSB meetings on this matter. New Zealand continued to urge all Members to engage constructively in seeking to find a resolution to the impasse.

15.14. The representative of Australia said that her country wished to refer to its statements made at previous DSB meetings on this matter. Australia remained strongly committed to working with the entire Membership to resolve the Appellate Body impasse. Australia continued to encourage all Members to engage actively, constructively, and pragmatically to further their collective interest in an efficient, functional, two-stage dispute settlement system.

15.15. The representative of China said that his country echoed the statement made by Mexico on behalf of the 121 co-sponsors of this proposal. The paralysis of the Appellate Body continued to be the most urgent matter for the WTO that needed to be addressed collectively as the top priority. Maintaining a two-tier, independent and predictable dispute settlement system was very important for the WTO. To show stronger political will on this important matter, China encouraged more Members to join this proposal which had already attracted more than 73% of the entire Membership. China expressed deep regret that the United States, once again, had decided to block the launch of the AB selection processes. Ensuring the functioning of the Appellate Body was not an option but a legal obligation. Article 17.2 of the DSU made it very clear: Members bore the legal obligation to fill vacancies of the Appellate Body as they arose. China firmly opposed using any pretext to disregard this obligation, which had been agreed by the entire Membership and written into the DSU. The Appellate Body could be further improved at various fronts. However, any potential improvement could be realized only if there was still a viable Appellate Body. Over the past two years, Members had made significant and sincere efforts in formulating converging reform proposals regarding the Appellate Body. Progress had been made but Members were still far from reaching a lasting solution to the crisis. The United States, which repeatedly raised various concerns over the functioning of the Appellate Body, had not showed any willingness to constructively engage in reform discussions. Without meaningful engagement of the United States, the viability of the already crippled dispute settlement system was in peril. While restoring a functioning Appellate Body remained China's priority, China believed that it was equally important to establish a timely stop-gap solution while the paralysis of the Appellate Body lasted. He recalled that on 30 April 2020, China and 20 other Members had notified the DSB of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). This interim mechanism was nearly fully operational. This open and inclusive mechanism could help maintain the binding nature of the dispute settlement system until a convergence on Appellate Body reform could be reached. China welcomed and encouraged more Members to seriously consider subscribing to the MPIA.

15.16. The representative of Turkey said that his country wished to thank Mexico for placing this item on the Agenda and welcomed Bangladesh as a new co-sponsor of the joint proposal. Turkey was pleased that there were 121 Members that endorsed the need to urgently launch the AB selection processes. As a co-sponsor of this proposal, Turkey reiterated its support to preserve the two-tier character and binding nature of the dispute settlement system. Turkey believed that discussions on current deficiencies of the system should continue but that they should not be an impediment to the launch of the AB selection processes, a situation which Turkey believed would benefit no one. Turkey was ready to work constructively with all Members to break the current impasse and engage in discussions with the Membership to launch the AB selection processes.

15.17. The representative of India said that his country wished to refer to its statements made at previous DSB meetings on this matter. India wished to reiterate its serious concerns regarding the DSB's inability to launch the AB selection processes, and to call on all Members to start the AB selection processes as a priority.

15.18. The representative of Hong Kong, China said that his delegation wished to thank Mexico for its statement made under this Agenda item on behalf of the co-sponsors. Hong Kong, China reiterated its concerns with the lack of progress in resolving the impasse, as well as the importance of the Appellate Body to the multilateral trading system, as referred to under Agenda item 13 of the present meeting. Hong Kong, China strongly believed that the AB selection processes should commence without delay in order to resume the normal functioning of the Appellate Body as soon

as possible. Hong Kong, China urged Members to continue with their efforts and constructive engagement until a solution was found.

15.19. The representative of Singapore said that his country wished to refer to its statements made at previous DSB meetings on this matter. Singapore reiterated its strong systemic interest in the maintenance of a two-tier and binding WTO dispute settlement mechanism that was underpinned by negative consensus. The unblocking of the AB selection processes had to remain the paramount priority for all Members. Singapore urged all Members, including the United States, to constructively engage in finding concrete solutions. Singapore also wished to welcome Bangladesh as a co-sponsor of this proposal.

15.20. The representative of Qatar said that his country wished to refer to its statements made at previous DSB meetings on this matter. Qatar wished to be associated with the statement made by Mexico on behalf of the co-sponsors. Qatar expressed regret that the DSB had failed to initiate the AB selection processes. Qatar recalled that Members had a shared obligation to promptly fill the vacancies in 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 unconditionally. To avoid unintentional consequences, Qatar called on all Members to act in a cooperative manner in order to break the impasse in the AB selection processes without further delay. Qatar also wished to emphasize that the discussion on improving the DSU should not be a reason to delay the AB selection processes. Qatar was ready to work on solutions with all Members while preserving the essence of the dispute settlement system.

15.21. The representative of the Russian Federation said that her country wished to thank Mexico for its statement made under this Agenda item and welcomed Bangladesh as a new co-sponsor. Russia also wished to refer to its statements made at previous DSB meetings and reiterated its support for the two-tier dispute settlement system provided for under the DSU.

15.22. The representative of Canada said that his country supported the statement made by Mexico under this Agenda item. Canada shared the concerns expressed by other Members at the present meeting. Canada welcomed Bangladesh as a new co-sponsor to this proposal and invited WTO Members that had not sponsored the proposal yet to consider joining the 121 Members calling for the launch of the AB selection processes. The critical mass of WTO Members behind this proposal was a clear testimony to the importance that all Members accorded to a fully functioning Appellate Body as an integral part of the dispute settlement system. Therefore, Canada called on the United States to act in accordance with Article 17.2 of the DSU and unblock the AB selection processes. The fact that the Appellate Body could not hear new appeals was of great concern. Canada reiterated that it was fully committed to discussions on matters related to the functioning of the Appellate Body. Canada's priority remained to find a long-lasting multilateral resolution to the impasse that covered all Members, including the United States. To that effect, Canada called on the United States to engage, constructively, in solution-oriented discussions. In the meantime, Canada would continue its work on the Multi-Party Interim Appeal-Arbitration Arrangement (MPIA) as a contingency measure. The MPIA was open to all WTO Members, and Canada invited all Members to seriously consider joining. The MPIA provided the opportunity for willing Members to safeguard their rights to binding, two-stage, dispute settlement in disputes amongst themselves. The MPIA would remain in place until a long-lasting multilateral solution was found.

15.23. The representative of Chinese Taipei said that as a co-sponsor his delegation supported Mexico's proposal. Chinese Taipei wished to refer to its statements made at previous DSB meetings on this matter. Chinese Taipei welcomed Bangladesh to join this proposal. Chinese Taipei encouraged Members to engage in constructive dialogue to overcome the current impasse.

15.24. The representative of Mexico, speaking on behalf of the 121 co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.18, regretted that for the thirty-third occasion, Members had still not been able to launch the AB selection processes and had thus continuously failed to fulfil 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 should not serve as a pretext to undermine and disrupt its work as well as the work of the dispute settlement system. There was no legal justification for the current blockage of the AB selection processes, which was causing concrete 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. Mexico noted with deep concern that due to the continued failure to act at the present meeting, the Appellate Body would continue to be unable to perform its functions, against the best interest of all Members.

15.25. The representative of Mexico said that her country considered that the joint proposal contained in document WT/DSB/W/609/Rev.18 demonstrated Members' desire to comply with their obligation to fill AB vacancies as they arose, in accordance with Article 17.2 of the DSU. Mexico expressed deep regret that Members were in an unprecedented situation whereby the Appellate Body was incomplete and non-operational. All ongoing disputes were being affected by the lack of a fully functioning dispute settlement system. This undermined the right of all Members to engage in appellate proceedings. As stated under Agenda item 13, Mexico supported an interim arrangement that provided for a two-tier dispute settlement system and ensured the adoption of panel reports. However, this arrangement did not detract from Mexico's main objective, namely, to have a functional Appellate Body. Mexico urged Members to join the list of co-sponsors of this proposal and not to become accustomed to this situation. Mexico reiterated its readiness to work toward a solution through concrete proposals aimed at reaching a concrete solution.

15.26. The Chairman thanked all delegations for their statements and said that, as in the past, the DSB would take note of the statements expressing the respective positions, which would be reflected in the minutes of the present meeting.

15.27. The DSB took note of the statements.